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EDITORIAL

THE USE OF ARTIFICIAL INTELLIGENCE IN JUDICIAL SYSTEMS: ETHICS AND EFFICIENCY

Filippo Donati[*]

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1. Introduction

The subject "Artificial Intelligence (AI) and justice" can be addressed from two different perspectives: AI as the object of judicial proceedings, from one side, and AI as a tool supporting judges in the exercise of jurisdiction, from the other side.

It is not difficult to foresee that, in the future, an increasing number of disputes will regard the use of AI systems. This is the case, for instance, of claims for damages caused by driverless cars, drones or automated disease diagnosis and treatment systems. In such cases, the main issue is whether, and to what extent, consolidated legal principles on the law of evidence, on damages quantification and on liability, which traditionally refer to human behaviours, can be extended to robotic behaviours.

The use of AI systems may also trigger a different set of issues, when used to assist judicial authorities in exercising jurisdiction. Nowadays, new automated tools for due diligence exercises, for drafting documents and for technical assessments, including calculation of maintenance allowances for spouse or children or damages in the event of personal injury, are available

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on the market. Law firms and insurance companies increasingly use predictive AI systems to determine the possible outcome of a current or potential legal dispute. Why not using the same tools, then, to increase the efficiency of the judicial system? As a matter of fact, the use of AI systems may help to increase the quality and efficiency of justice. At the same time, however, the use of AI in the judicial field raises a set of new and open questions.

Below, I will address this second perspective. I will try to bring some thoughts on the opportunities and risks deriving from the use of AI in the justice domain.

2. The ongoing development of AI applications in the field of justice

In Italy and in most Member States of the European Union, the digitalisation of justice is completed or is nearing completion. The digitalisation regarding communication, filing and exchange of documents has resulted in great simplification for users and a strong contribution to greater efficiency of judicial offices. Furthermore, the possibility of holding online hearings allowed trials to be carried out in oral form even when the pandemic prevented physical access to the courtrooms. Digitalization has also allowed the creation of large digital databases that collect judicial decisions, an indispensable prerequisite for the development of AI systems.

Despite trials underway in some countries, including Estonia, China, the United States, Canada and the United Kingdom, justice systems in most countries still make little use of AI systems. In fact, the features of AI systems appear to be not compatible with a set of fundamental principles to be applied in the field of justice, including transparency and justification of judicial measures, right of defence and cross-examination. Furthermore, it has been established that AI systems can be biased and produce errors and discrimination, resulting in infringement of human rights. The case of COMPAS, an AI program designed to assess potential recidivism risk, is well known. Such program, used by certain US Courts, was found to be discriminatory because it tends to attribute a greater risk of recidivism to certain people in relation to the colour of their skin and the social environment of reference.

However, AI could contribute to solving the problems and inefficiencies that afflict justice today, especially in terms of the

excessive length of trials, which undermines the right to a fair trial. Also, the lack in many countries of a sufficient uniformity and predictability of judicial decisions, undermines legal certainty. AI could speed up the delivery of judgments and ensure more predictable trial outcomes.

The application of AI, in substance, entails at the same time risks and advantages. AI must be considered not only as a threat, but also as a tool to improve people's lives and their enjoyment of fundamental rights. Also, AI systems are developing at increasingly rapid speed. It is therefore not excluded that, over time, problems such as those regarding the opacity of AI systems (the black box effect) could be mitigated or overcome thanks to technological progress. The choice on whether to allow the use of AI systems in the judicial sector, therefore, must not reflect an alternative between ethics and efficiency. On the contrary, a human-rights perspective on the development and use of AI is possible and desirable.

The Ethical Charter on the use of AI in judicial systems, adopted in 2018 by the European Commission for the Efficiency of Justice (CEPEJ), has identified the core ethical principles to be respected in the field of AI and justice: respect of fundamental rights, non-discrimination, quality and security of data processing, transparency, impartiality and fairness, human control. The Ethics Charter is based on the idea that AI, if used as a tool not to replace, but to assist judges, can promote the efficiency and quality of justice. Judges' autonomy must be increased and not restricted by AI tools and services.

The European Union, in its policy on AI, has followed the same approach. The European Commission's proposal for a regulation laying down harmonised rules on artificial intelligence (AI Act), whose final approval is expected by the end of 2023, clearly states that AI should not substitute human autonomy or limit individual freedom. Also, the AI Act aims at introducing safeguards to ensure the development and use of ethically embedded artificial intelligence that respects Union values and human rights.

3. The forthcoming AI Act

The AI Act follows a risk-based approach that, in order to introduce a proportionate and effective set of binding rules for AI

systems, tailors the type and content of such rules to the intensity and scope of the risks that AI systems can generate.

It therefore prohibits AI systems which pose unacceptable risks for fundamental public interests as recognised and protected by Union law, including fundamental rights, democracy, the rule or law or the environment. The prohibition covers practices that have a significant potential to manipulate persons through subliminal techniques beyond their consciousness, or exploit vulnerabilities of specific vulnerable groups, such as children or persons with disabilities, in order to materially distort their behaviour in a manner that is likely to cause psychological or physical harm. AI-based social scoring for general purposes done by public authorities is also prohibited, as well as the use of 'real time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement.

For systems entailing limited risk, such as chatbots, the AI Act requires transparency obligations aimed at making users aware that they are interacting with a machine. Free use is permitted for minimal-risk AI systems, such as AI-enabled video games or spam filters.

High-risk AI systems, the ones that may create a high risk to human rights, are subject to a strict regulation, requiring conformity assessment, certifications, registration obligations and ex post controls. The classification of an AI system as high-risk is based on its intended purpose. The AI Act classifies as high risk those systems that are "intended to be used by a judicial authority or administrative body or on their behalf to assist a judicial authority or administrative body in researching and interpreting facts and the law and in applying the law to a concrete set of facts or used in a similar way in alternative dispute resolution".

Therefore, AI systems at the service of justice shall comply with the strict regulation imposed by the AI Act.

4. The use of AI tools in legal analysis and decision-making by judges

It is worth noting that, as underlined in recital 41 of the AI act, the fact that an AI system is classified as a high risk AI system does not indicate that the use of the system is necessarily lawful or unlawful under other acts of Union law or under national law compatible with Union law, such as on the protection of personal

data. Any such use is permitted to the extent it complies with the "applicable requirements resulting from the Charter and from the applicable acts of secondary Union law and national law".

Several fundamental principles enshrined in national constitutions, the ECHR and in the CFREU prevent AI systems to replace human judges. As a matter of fact, a robot judge would affect the constitutional guarantees relating to jurisdiction, such as the right to a fair trial, the parties' right of defence, the obligation for judicial rulings to state the reasons on which they are founded.

Although AI cannot fully "replace" a human judge at present, it may still be useful in the courtroom in many ways. AI systems could provide more powerful search engines to improve the research for court decisions and other legal text. Also, AI tools may help judges in technical evaluations, such as calculation of indemnity against unfair dismissal, maintenance allowance in case of divorce etc. AI can be used to analyse evidence, translate languages, assess factual data as well as for preparing draft measures or for dealing with simple, serial, repetitive, entirely documentary cases. Finally, AI systems can be used in alternative dispute resolution procedures, in particular those involving small claims that would hardly be asserted before a judge. In such cases, effective legal protection of fundamental rights requires the provision of online platforms which, through AI systems, can offer inexpensive, rapid, and reliable forms of dispute resolution, not excluding recourse to judicial protection.

It is therefore no coincidence that the use of algorithms in the judicial field is spreading in many countries, in particular the USA, China, Canada, and the United Kingdom.

However, many scholars still today seem highly sceptical about the use of AI tools by judges. The problem lies in the risk of the so called "*effet moutonnier*" (sheep effect), which may lead the judge to avoid the responsibility not to follow the algorithm's advice. As a matter of fact, the risk of the judge being a captured by the algorithm cannot be underestimated. The AI support may relieve the decision maker from the burden of motivation and may help to qualify the decision with the chrism of "scientificity" and "neutrality" which today surrounds algorithmic evaluation and gives it a peculiar - yet unfounded - authority. The risk is that the advice provided by the AI system will be followed by the judge, without a further autonomous assessment of the peculiarities of the case and of the applicable law.

Such risks should be avoided. The autonomy of the judge, who is solely responsible for the interpretation of the applicable law and the evaluation of the peculiarity of the case in question, cannot be limited. It is therefore essential that, as the Wisconsin Supreme Court ruled in the Loomis case, the judge maintains full autonomy of judgment and does not base his decision exclusively on the indications coming from the AI.

It is therefore worth noting that, pursuant to the AI Act, high risk systems, such as the ones that may be used to support judicial authorities, must be designed and developed in such a way that natural persons can oversee their functioning. Human oversight shall aim at preventing or minimising the risks to fundamental rights that may emerge in the use of such systems.

5. Concluding remarks

The use of AI at the service of justice is possible and desirable, provided it is made in compliance with the applicable ethical and legal principles.

A fundamental role for the success of the AI Act will be played by the authorities entrusted with the power to enforce its provisions. High-risk systems will be permitted subject to an ex-ante conformity assessment carried out by conformity assessment bodies designated and monitored by national authorities. An ex-post supervision on the function of such systems by competent authorities will follow. To this end, the AI Act sets up a dedicated governance system at Union and national level. At Union level, a European Artificial Intelligence Board., composed of representatives from the Member States and the Commission will be established. At national level, Member States will have to designate one or more national competent authorities and, among them, the national supervisory authority, for the purpose of ensuring the application and implementation of the AI Act. Such national competent authorities "shall have a sufficient number of personnel permanently available whose competences and expertise shall include an in-depth understanding of artificial intelligence technologies, data and data computing, fundamental rights, health and safety risks and knowledge of existing standards and legal requirements" (Art. 59(4) AI Act).

In this respect, the difference between the high-risk systems listed in Annex III of the AI Act cannot be underestimated. The

requirements of AI systems intended to be used for recruitment or selection of natural persons, for example, may not be identical to those intended to assist judges in the exercise of jurisdiction. In addition, independence of the judiciary from undue external interference is a prerequisite of the rule of law, which is one of the founding values of the European Union (Article 2 TEU).

In the justice domain, a sound technical knowledge of ethical and legal principles applicable to jurisdiction, along with the need to avoid undue interferences by economic or political power, are therefore necessary. This means that the judiciary should be involved and have a voice in the assessment and monitoring procedures over those AI systems intended to be used in support of jurisdiction.

The judiciary cannot miss the opportunity to make use of the new technologies available today and in the future. AI may help to promote the quality and efficiency of justice. When using AI systems, however, human control remains necessary. Judges' autonomy cannot be restricted by AI systems. In addition, the issues regarding opacity, complexity, bias, unpredictability, and partially autonomous behaviour of certain AI systems must be duly addressed, in order to ensure their compatibility with fundamental rights.

The judiciary may well contribute to the assessment and monitoring of IA systems to be used in support of jurisdiction. AI, therefore, is a great opportunity and, at the same time, a great responsibility for the judiciary.

ARTICLES

TRANSPARENCY WITHIN THE *ARTIFICIAL ADMINISTRATION* PRINCIPLES, PATHS, PERSPECTIVES AND PROBLEMS *

Enrico Carloni **

Abstract

The attempt to regulate the use of artificial intelligence within the public administration (which marks a new phase of public digitization, that of *artificial administration*) passes through the "resource" of administrative transparency. The essay analyses how the issue has been dealt with by Italian jurisprudence and legislation, also paying attention to the European framework being defined. Transparency is called upon to adapt to the new context, but the technological phenomenon also calls for a rethinking and reshaping of citizens' levels of legal protection. The challenge, on which the essay reflects, is to maintain adequate levels of guarantee and protection, in a scenario where the old rules risk, however, not being able to govern the phenomenon. The new principles, of jurisprudential formation, now codified by the new Italian "contract code", propose possible paths of solution, but also challenges and risks of retreat in the protection of rights. The work therefore questions what transparency is necessary and what transparency is possible.

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1. Premise

1.1. The centrality of transparency and the artificial administration

More than thirty years have passed since Jacques Chevallier[1], in reflecting on the "myth of administrative transparency", found how this had «become not only one of the fundamental values which the administration must inspire, but also a privileged axis of administrative reforms»: after some time, and as a result of a pro-

[1] J. Chevallier, *Le Mithe de la Transparence Administrative*, in *Information et transparence administratives* 239 (1988) 239.

cess in which transparency has undergone an extraordinary evolution, transparency shows that it has now become a more overall keystone in the relationship between administrations and citizens, and does not fail to continue to receive new requests.

Following this discussion, the consideration that Han Byung-Chul[2] proposes to us in general (and indeed critical) terms return: «No other buzzword dominates public discourse today as much as the term *transparency*».[3] But transparency often promises more than it delivers[4], and this is even more true in the new technological scenario.

At the same time, no other principle seems better able to allow us to accompany and manage the new, formidable challenges facing society and, last but not least, contemporary administration.[5] Which applies in a particular, but problematic way, to the entry of artificial intelligence into public action.

This new phase of public digitalization, which follows the phases of computerization, that of eGovernment, that of digital administration, can be defined as the phase of *artificial administration* (an expression that sums up, precisely, the use of artificial intelligence for automated public decision-making).[6] And it is a phase that arises, unlike the others, in problematic (and ambivalent) terms with respect to the challenge of transparency.

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[2] H. Byung-Chul, *Transparenzgesellschaft*, 3 (2012).

[3] In general terms, on the evolution of the principle of transparency and its tools, see already F. Merloni et al (eds.), *La trasparenza amministrativa* (2008); C. Hood e D. Heald (eds.), *Transparency: Key to Better Governance?,* 211 ff. (2006); E. Carloni, *Il paradigma trasparenza* (2012).

[4] See e.g. M. Fenster, *The Opacity of Transparency*, 91 Iowa Law Review 888 (2006).

[5] For a reconstruction of the various transparency tools and their "digital" perspective, see e.g. S. Rossa, *Trasparenza e accesso all'epoca dell'amministrazione digitale*, in R. Cavallo Perin, D.-U. Galetta (eds.), *Il diritto dell'amministrazione pubblica digitale*, cit. at. 247 ff.; see also, in general terms, A. Cerrillo Martinez, *Accountability delle decisioni algoritmiche*, in R. Cavallo Perin (eds.), *L'amministrazione pubblica con i big data*, 61 ff. (2021); F. Di Porto, *Opacità tecnologica e trasparenza delle decisioni amministrative*, in R. Cavallo Perin (eds.), *L'amministrazione pubblica con i big data*, cit. at. 69 ff.

[6] According to the classifications proposed here, this is a phase that is anticipated by the emergence of the discourse on algorithmic administration, F. Conte, *La trasformazione digitale della pubblica amministrazione: il processo di transizione verso l'amministrazione algoritmica*, 11 *Federalismi.it*, 54 (2023); J.-P. Schneider, F. Enderlein, *Automated Decision-Making Systems in German Administrative Law*, 1 *CERIDAP* 95 ff. (2023); D.-U. Galetta, G. Pinotti, *Automation and Algorithmic Decision-Making Systems in the Italian Public Administration*, 1 CERIDAP 13 ff. (2023).

1.2. Transparency functions

In its essential core, as a paradigm of public law[7], transparency responds first and foremost to the function of guaranteeing the citizen in his relationship with power. It is the so-called "external transparency", which is defined in its characteristics through a series of guarantee rules that give substance to this paradigm of administrative law: power must be exercised by an authority that is knowable and is responsible for it, based on predetermined and knowable rules, following a decision-making process that must be explained, the decision must be taken "in the light of the sun" in the relationship with the interested party, it must be motivated.

The knowability and comprehensibility of the decision allow its control in the proceeding and any case in the judgment, and this is supported by the documents that form the proceeding, which can be made known with the access of the interested party (and now also exposed to possible democratic control of the citizen based on the Freedom of Information rules[8]) and reviewable by a judge.

Ultimately, it is the reversal of the Kafkaesque nightmare of an anonymous, unknowable power, not so much "secret" (to mean what is legitimately removed from knowledge due to specific needs of public or private interest), but structurally mysterious, occult. An important part of the history of public law and administrative law is given precisely by this path of "illumination" of power in its exercise in front of the citizen, no longer "naked", but armed with the power that gives knowledge.[9]

1.3. Technological change and transparency adaptability

Technological evolution impacts this path in a way that is not yet fully felt, proposing new challenges to transparency, and pushing it to show, again and more than before, its ability to adapt. In particular, new questions and new problems, new challenges, arise precisely in the prism of that technological evolution which has also been among the factors of evolution and expansion of the forms of knowability. Technological evolution exerts an ambivalent action,

[7] N. Bobbio, *La democrazia e il potere invisibile*, 2 Rivista Italiana di Scienza Politica 181 ff. (1980); see at lenght E. Carloni, *Il paradigma trasparenza*, cit. at 3.

[8] See e.g. T. Altì, M.C. Barbieri, *La trasparenza amministrativa come strumento di potere e di democrazia*, 2 Rivista trimestrale di diritto pubblico 809 ff. (2023)

[9] The reference is to Madison's well-known passage. In the relationship with power «people […] must arm themselves with the power which knowledge gives» (J. Madison, *Letter to W.T. Barry,* August 8, 1822).

on the one hand destructive of old constructs (including normative ones), on the other creating a new order which is the right to govern: technology is therefore in particular a determinant of many administrative innovations[10], places transparency at the center of administrative discourse in renewed terms.[11]

Transparency, in the face of the stresses resulting from technological transformations, shows, as we will see, its centrality, which is linked in no small way to the elasticity of the principle and its ability to renew itself to adapt to a changing world. In general terms, it is the specific character of transparency as Donati already highlighted: in its articulation and/or action, transparency must necessarily change due to the evolution of the subject itself and the changing conditions of the context in which it moves".[12] It is precisely in this ability to adapt and re-modulate itself one of the main strengths of transparency, which thus becomes a principle capable of presenting itself in new forms as scenarios change.

The question with which we will try to deal is how, today, transparency appears to be a solution capable of ensuring, again and again, those guarantees of the individual in the relationship with power which are its essential core.

Transparency, which has matured in the prism of legislation which for over a decade has placed it at the center, is called to re-explore its potential and its ability to adapt: the challenge to this is precisely the evolution of technology, and in particular now the emergence of decision dynamics governed by algorithms and artificial intelligence (AI).

2. Algorithms and artificial intelligence

2.1. Law and new challenges

Law (and in particular administrative law) is therefore confronted with new phenomena, and only a part of these can be classified in the old categories. In fact, automation not only produces a capacity for mechanical repetition and error-free application of predetermined criteria but also translates into new forms in which de-

[10] See e.g. A. Natalini, *Il tempo delle riforme amministrative* (2006).
[11] See e.g. B. Ponti (ed.), *Transparency in tension: between accountability and legitimacy*, 2 Etica pubblica 9 ff (2022).
[12] See in a similar sense D. Donati, *Il principio di trasparenza in Costituzione*, in F. Merloni et al. (eds.), *La trasparenza amministrativa* (2008).

cisions are the result of choices made by machines based on probabilistic approaches and self-learning paths, to the point of prefiguring choices resulting from artificial intelligence that replace individuals, following their decision-making strategies, in the exercise of decision-making spaces (also) in the public sphere.

The question, also from a legal perspective, is linked first of all to the nature of the phenomenon: in the AI approach, we are witnessing the transition from deductive logic to statistical-probabilistic logic. The artificial system learns, starting from the data, and in doing so it improves its predictive capacity, according to dynamics in which the "recipe" (the algorithm) does not always operate in a predictable and deterministic way, but evolves its decision-making strategies by experience. This is all clearer when the discussion moves to the concept of "artificial intelligence".

2.2. Artificial Administration as a necessary challenge

The prospect of artificial intelligence on the one hand may appear alarming and certainly requires to be accompanied by precautions and rules, but it is an unavoidable challenge for public administrations as it is for private organizations.[13] The technological context marks an extraordinary evolution in the ability to govern complexity[14], but it also produces a complexity that becomes ungovernable except through the strengthening of cognitive, analytical, and decision-making capacity: administrations cannot, in a nutshell, remain blind and deaf-faced with a transformation that qualifies economic and social dynamics.

Administration is a necessary power, a power useful for satisfying the needs and rights of citizens. Indeed, it is a power-duty, in which the function of service is increasingly evident rather than that of the exercise of authority. In a society in which needs are increasingly complex, resources are always limited compared to needs, and the risk of retreating in the guarantee of rights or any case of

[13] See E. Chiti, B. Marchetti, N. Rangone, *L'impiego di sistemi di intelligenza artificiale nelle pubbliche amministrazioni italiane: prove generali*, 2 BioLaw Journal - *Rivista di BioDiritto* 489 ff. (2022).

[14] See es. J.-B. Auby, *La digitalizzazione come motore dell'evoluzione dell'organizzazione della pubblica amministrazione*, 2 Istituzioni del federalismo 389 ff. (2023); J.B. Auby, *Il diritto amministrativo di fronte alle sfide digitali*, 3 *Istituzioni del federalismo* 619 ff. (2019); I. Martin Delgado, *El impacto de la reforma de la Administración electrónica sobre los derechos de los ciudadanos y el funcionamento de las Administraciones Publicas*, in M. Almeida Cerreda, L. Miguez Macho (eds.*), La actualizacion de la Administracion electronica* (2018).

non-correspondence with social needs and requests is evident, the challenge of seeking a greater administrative capacity (and, more broadly, a greater capacity to govern complexity) inevitably depends on the opportunities offered by technological evolution.[15] It can be said, emphatically, that the administration of the future is digital administration in its full potential, and is therefore artificial administration.

The concept of *artificial administration* (which is the formula with which we summarize the use of AI for public decisions) refers to a new level of evolution of the administration in its relationship with technologies: it is a level that implies that of full digitalization.[16] This is a perspective in which digital power unfolds but is at the same time regulated by law. It is a new step after the computerization of public administration, e-government, and digital administration.

This is a transformation that must be accepted but guided and understood. This is because, as the perspective of transparency shows us well, this evolution brings with it not only opportunities but also risks.

2.3. The favor for automation, and precautions

As Kate Crawford[17] highlights, AIs are not peacefully neither "intelligent" nor "artificial". The complexity reduction strategy they propose does not necessarily (and it would be wrong to say a priori that) produce the "best" solution; and, again, it is not certain

[15] In this sense, for example, the proposed European regulation (AI Act: see e.g. Recital 3, «by improving forecasting, optimizing operations and resource allocation, and personalizing the digital solutions available for individuals and organizations, the use of artificial intelligence can provide critical competitive advantages to businesses and support socially and environmentally beneficial outcomes») and President Biden's Executive Order on the Safe, Secure, and Reliable Development and Use of artificial intelligence, dated October 30, 2023 (see section 1: «the responsible use of AI has the potential to help solve urgent challenges by making our world more prosperous, productive, innovative and safe»).

[16] On this subject see already, in a general perspective, E. Carloni, *Tendenze recenti e nuovi principi della digitalizzazione pubblica*, 2 Giornale di diritto amministrativo 148 ff. (2015); with reference to public procurement, see already G.M. Racca, *La digitalizzazione necessaria dei contratti pubblici: per un'Amazon pubblica*, 4 DPCE online 4669 ff. (2020); is a process that develops both in a general way and through sectoral strategies: see e.g. D. Donati, *La digitalizzazione del patrimonio culturale. Caratteri strutturali e valore dei beni, tra disciplina amministrativa e tutela opere d'ingegno*, 2 P.A. Persona e Amministrazione 323 ff. (2019).

[17] K. Crawford, *Né intelligente né artificiale. Il lato oscuro dell'IA* (2022).

that what appears to be the result of neutral and impersonal mechanisms is (and therefore the outcome is not actually "impartial")[18], because algorithmic decisions often transmit biases that are specific to the social environment (of the programmer, in a deterministic model; of the social context, in a predictive statistician; perhaps of both).

It is a power, the exercise of which is useful and necessary, but concerning which we need "auxiliary precautions".

Precisely these limits, highlighted by Crawford, underline the importance of transparency as a condition of control over mechanized but not, therefore, optimal decisions (and this even in the absence of malfunctions of the systems): the problem, however, is that transparency is compared in terms not peaceful with machine learning, deep learning and data mining technologies, especially in a context in which large masses of data (big data) are available.

2.4. Possible risks, necessary guarantees

The importance of using new technologies to improve government capacity and the quality of services is evident in Biden's recent executive order, which signals the importance of these tools but also highlights their risks: «AI can help government deliver better results for the […] people. It can expand agencies' capacity to regulate, govern, and disburse benefits, and it can cut costs and enhance the security of government systems. However, the use of AI can pose risks, such as discrimination and unsafe decisions».[19]

On the other hand, the same European perspective is to encourage and allow the use of AI in the public sector[20] precisely because of their potential in terms of improving the quality of services, always with a "risk-based thinking" approach.

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[18] Which is one of the basic arguments in support of the use of AI and complex algorithms; as highlighted for example by C. Napoli, *Algoritmi, Intelligenza Artificiale e formazione della volontà pubblica: la decisione amministrativa e quella giudiziaria*, 3 Rivista AIC 1 ff. (2020) among the reasons in support of new technologies there is «the profile of objectivity or neutrality, given that, by making use of impersonal mathematical operations for the solution of questions of daily individual interest, the algorithm and the electronic tool at its service should be able to avoid those flaws typical of human cognitive processes that do not they rarely lead to outcomes that escape the parameters of reasonableness and impartiality».

[19] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 30 october 2023.

[20] See for example, Recital 3: «artificial intelligence consists of a family of rapidly evolving technologies that can contribute to the achievement of a wide range of

In this scenario, AI systems can identify correlations between information, even hidden ones, and build more sophisticated predictive models, and perhaps even more "precise", than "human" ones, with much shorter times.

In short, the algorithmic decision is more efficient (and hence the favor towards these tools, especially, but not only, for the execution of repetitive interventions)[21], on average perhaps even "better": but we are sure that it is true also in any specific case? How can we be sure that we are not faced with a system error, a "hallucination" of the machines? And in what terms can we evaluate the goodness of choices that are not fully reverifiable?

The challenge of transparency returns as an issue that concerns the guarantee of the individual in the relationship with power.[22]

The paradigm shift suggests, in any case, caution: this shift, therefore, poses new challenges for the law[23], while new regulation

economic benefits and social across the entire spectrum of industrial and social activities».

[21] As highlighted for example by C. Napoli, *Algoritmi, Intelligenza Artificiale e formazione della volontà pubblica*, cit. at. 2 «in this sense, first of all, the efficiency profile is taken into consideration, given that the transformation of an input into an output from part of a machine through a finite sequence of elementary operations, the merit of being able to neutralize and thus overcome that irreducible quantum of inefficiency that characterizes human action is recognized, in particular with regard to the execution of repetitive interventions».

[22] See e.g. M. Macchia, *Pubblica amministrazione e tecniche algoritmiche*, in 1 DPCE online 311 ff. (2022); S. Del Gatto, *Potere algoritmico, "digital welfare state" e garanzie per gli amministrati. I nodi ancora da sciogliere*, in 6 Rivista Italiana di Diritto Pubblico Comunitario 829 ff. (2020); S. Ranise, *Fiducia nell'algoritmizzazione della Pubblica Amministrazione: chimera o realtà?*, 1 *Ciberspazio e Diritto* 9 ff. (2020); I. Martín Delgado, *Automazione, intelligenza artificiale e pubblica amministrazione: vecchie categorie concettuali per nuovi problemi?*, in 3 Istituzioni del Federalismo 643 ff. (2019).

[23] See, in addition to the references above, in general terms A. Simoncini, S. Suweis, *Il cambio di paradigma nell'intelligenza artificiale e il suo impatto sul diritto costituzionale*, in 1 Rivista di filosofia del diritto 92 (2019); A. Simoncini, *Amministrazione digitale algoritmica. Il quadro costituzionale*, in R. Cavallo Perin, D.-U. Galetta, *Il diritto dell'amministrazione pubblica digitale*, cit. at. 1.

needs are accompanied by the affirmation of this power (in the "algorithmic society"[24], in the era of hyper-connection[25]), and the problems that arise when these solutions are proposed and implemented in the public sector are felt.[26]

3. The crux of technological opacity

3.1. A gradualist approach

Change poses a primarily definitional challenge.[27]

Not every use of automation poses the same problems: the mechanization of repetitive decisions, the use of deterministic algorithms, and the use of artificial intelligence are completely different things. The distinction between different phenomena, however, is neither simple nor immediate, and the speed of technological change imposes continuous updates and new interpretations of the phenomena by the law; forcing new taxonomies.

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[24] In this sense M. Bassini, L. Liguori, O. Pollicino, *Sistemi di Intelligenza Artificiale, responsabilità e accountability. Verso nuovi paradigmi?*, in F. Pizzetti (ed.), *Intelligenza artificiale, protezione dei dati personali e regolazione* 333 (2018); A. Pajno et al., *AI: profili giuridici. Intelligenza Artificiale: criticità emergenti e sfide per il giurista*, 3 BioLaw Journal – Rivista di BioDiritto 206-207 (2019).

[25] See already P. Dominici, *Comunicazione, sfera pubblica e produzione sociale di conoscenza: nuovi scenari per le organizzazioni complesse*, in 3 *Rivista trimestrale di scienza dell'amministrazione* 97 ff. (2013); see also L. Floridi (ed.), *The Onlife Manifesto. Being Human in a Hyperconnected Era* (2015).

[26] G. Sartor, F. Lagioia, *Le decisioni algoritmiche tra etica e diritto*, in U. Ruffolo (ed.), *Intelligenza artificiale. Il diritto, i diritti, l'etica* 65 (2020); cfr. M. Zanichelli, *Ecosistemi, opacità, autonomia: le sfide dell'intelligenza artificiale in alcune proposte recenti della Commissione Europea*, and A. Simoncini, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in A. D'Aloia (ed.), *Intelligenza artificiale e diritto. Come regolare un mondo nuovo* 21-22, 111-114 (2020); see also Y.N. Harari, *Homo Deus. Breve storia del futuro* 375 ff. (2018); see also B. Boschetti, *Transizione digitale e amministrazione (eco)sistemica*, 209 Studi parlamentari e di politica costituzionale 53 ff. (2021).

[27] See on the point eg. R. Cavallo Perin, I. Alberti, *Atti e procedimenti amministrativi digitali*, in R. Cavallo Perin, D.-U. Galetta (eds.), *Il diritto dell'amministrazione pubblica digitale*, cit. at 139 ff.; on the need for dialogue between technology and law, and in particular on that of a "technologically oriented" reading of law, see R. Cavallo Perin, *Ragionando come se la digitalizzazione fosse data*, 2 Diritto amministrativo 305 (2020).

In the proposed regulation on AI, to avoid interpretative problems, the Commission intended to propose a broad notion of artificial intelligence[28], capable of including both "strong" artificial intelligence, intended to duplicate the mind in computers (to create computers capable of understanding and possess cognitive states), and "weak" artificial intelligence intended to create computer systems capable of performances normally attributed to human intelligence, without assuming any analogy between minds and computer systems. Biden's executive order also proposes a definition of "AI" with a similar approach.[29]

In this context, the Italian Council of State itself suggests a "gradualistic approach", when it also frames the topic in terms of a "replacement" of the individual by machines, first and foremost due to the complexity of the algorithm. A perspective that allows us to better break down the phenomenon. These are issues that the Italian administrative judge tends to bring back to a broad notion of "artificial intelligence": «In this case, the algorithm contemplates machine learning mechanisms and creates a system that is not limited only to applying the software rules and parameters preset (as the "traditional" algorithm does) but, on the contrary, it constantly elaborates new inference criteria between data and makes efficient decisions based on these elaborations, according to a process of automatic learning».[30]

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[28] In the framework of the Proposal for a European regulation (3.1) "artificial intelligence system" (AI system) «means software developed with an or more than the techniques and approaches listed in Annex I, which can, for one certain set of human-defined objectives, generate outputs such as content, predictions, recommendations or decisions that influence the environments with which they interact».

[29] Biden Executive Order, Section 3, (b): «a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action». La definizione riprende, ma specifica, quella già proposta nel US Code (Title 15- Commerce and trade; Chapter 119 - National Artificial Intelligence Initiative; 9401 – Definitions (3).

[30] In this sense see Council State, sec. III, 25 November 2021, n. 7891; yes see already (especially for the notion of a "simple" algorithm then taken up by the judge of the second instance) in the first instance of the Regional Administrative Court of Lombardy, Milano, section. II, 31 March 2021, n. 843.

3.2. Transparency as a challenge

From this point of view, there are, to conclude, simple algorithms and artificial intelligence, of course, but also, between these first two phenomena, "variously complex" algorithms, which precisely because of their complexity (and therefore predictability, reverifiable, non-deterministic but statistical-probabilistic) move in the (truly wide) space between simple algorithms and "true" AI. With the risk, however, of lumping together new technological phenomena by placing at the center of the discussion the presence or absence of the (human) civil servant in the decision-making process and therefore the issue of automation: this is the perspective followed by the recent Italian regulation of the contract code public (decree no. 36 of 2023). In short, the phenomenon shows a different physiognomy depending on whether it is observed from the point of view of the presence of man in the decision-making process, or from that of transparency: from this second point of observation (which is ours), we grasp well how the key is that of algorithmic opacity which is typical of both complex algorithms and real AI. Both share the challenge of explainability.

Transparency, from this point of view, is certainly the solution, but it is above all a challenge.

This is certainly the answer to making new decision-making dynamics through algorithms compatible with the unavoidable need to guarantee rights.[31] Transparency, however, is an objective that is not so simple to pursue in the face of automated processes that are becoming increasingly structurally and technologically opaque. The decision-making processes implemented through machine learning solutions, and, above all, deep learning, pose numerous problems in terms of the ability, given a certain result produced by AI, to understand the ways and reasons behind it, also taking into account the inputs received.[32] This is all the more true as the mechanization and automation of processes make the individual official marginal in the decision-making process.[33]

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[31] In this sense see G. Lo Sapio, *La trasparenza sul banco di prova dei modelli algoritmici*, 11 Federalismi.it 239 (2021).

[32] M. Ebers, *Regulating AI and Robotics: Ethical and Legal Challenges*, in M. Ebers, S. Navas (eds.), *Algorithms and Law* 48 ff. (2020); Y. Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 2 Harvard Journal of Law & Technology 901 (2018).

[33] On the topic of the necessary "humanity" of decision-making processes, see B. Marchetti, *La garanzia dello "human in the loop" alla prova della decisione amministrativa algoritmica*, 2 BioLaw Journal – Rivista di BioDiritto 367 ff. (2021); see formerly

Also in the Italian case, the administrative judge seems to prefer a "broad" notion of artificial intelligence, which can be useful for delimiting this downwards compared to less complex algorithms but leaves unresolved on closer inspection the interpretative issue (which instead promises to be truly challenging) of what to mean by AI and whether and how to distinguish this phenomenon from that of the use of complex algorithms.

The ridge of transparency allows us to distinguish two very different phenomena, thus excluding from the problematic field automated but not opaque decisions, the result of «a finite sequence of instructions, well defined and unambiguous, so that they can be executed mechanically and such as to produce a certain result»[34], neither the machine learning processes nor, overall, the so-called "AI".

3.3. The black box problem

It is the black box problem[35]: AI systems suffer from an opacity that depends on some characteristics of the phenomenon. The first, linked to data which, especially in the logic of big data[36], are processed in ways that (due to volume, variety, and speed) make the decision-making process impossible to repeat; the second, linked to the machine (deep) learning algorithm, which is removed from deterministic logics and disconnected from the dynamics of a priori predictability but also, in its most advanced forms, from those of a posteriori re-verification.

Precisely this fundamental difference allows, at the moment, with a first approximation, to place the discussion on transparency on the definitional ridge suggested by the Italian administrative judge, understood however as a distinction between "simple/deterministic" algorithms and "complex/predictive" algorithms (with reservation, therefore, to better clarify if and when we can talk about artificial intelligence, which is a concept that should not be trivialized). An issue whose relevance grows with the growth of the

S. Civitarese Matteucci, "*Umano troppo umano*". *Decisioni amministrative automatizzate e principio di legalità*, 1 Diritto Pubblico 5 ff. (2019).

[34] Council of State, III, 25 Nov. 2021, n. 7891.

[35] F. Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information* (2015).

[36] See M. Falcone, "*Big data*" *e pubbliche amministrazioni: nuove prospettive per la funzione conoscitiva pubblica*, in 3 Rivista trimestrale di diritto pubblico 601 ff. (2017).

phenomenon of the use of these technologies, in the perspective of a government through algorithms that involve both the level of political choice and that (which first poses questions to the judge and, therefore, to the interpreters in non-abstract terms) of the administrative choice.

In any case, it is clear that transparency, in this context and the face of these processes, is a challenge, even before a necessary solution. The challenge of algorithmic knowability challenges the ability of transparency to truly operate as a principle, as such on the one hand exceeding the mechanisms that constitute its main form of realization, but on the other capable of changing to adapt to the transformations it encounters in the dynamics social and technological issues with which it deals. This is because, as confirmed precisely by its decline in the new algorithmic dimension, «in its articulation and/or action, transparency must necessarily change due to the evolution of the subject itself and the changing conditions of the context in which it moves».[37]

4. The "desired" transparency of algorithmic power

4.1. The premises and the first elaborations

It is no coincidence that the theme of necessary transparency accompanies the evolution of reflection on the governance of new technological phenomena.

It is no coincidence that the theme of necessary transparency accompanies the evolution of reflection on the governance of new technological phenomena.

It is already with the Asilomar conference that, in outlining the need to guide the use of artificial intelligence, principles are proposed that can accompany the development of these technologies, guiding their application and mitigating their risks. Without being able to retrace here the main documents that accompany, in a rapid crescendo, the evolution of the strategy for regulating artificial intelligence, it is no coincidence that, in the EU proposal for a regulation[38] of AI, transparency returns as a principle that, through several declinations, is called upon to play a central role in the matter.

[37] See D. Donati, *Il principio di trasparenza in Costituzione*, cit. at. 85.

[38] European Commission, E*thics guidelines for trustworthy AI. Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission*, Brussels, April 8, 2019; Consultative Committee of The Convention for the Protection

transparency returns as a principle that, through more declinations, is called to play a central role in the matter.

The relevance of the principle of transparency is confirmed both at a regulatory and strategic level by the numerous initiatives[39] that tend to enhance this principle, at a national, European, and international level, concerning the use of advanced algorithmic solutions and AI. All the main documents reiterate how the transparency of these artificial systems constitutes one of the unavoidable bases for the creation of solutions capable of creating trust and producing a real social benefit. [40]

It is precisely in the face of technological opacity (which risks slipping into the unknowability of the occult), that transparency shows its importance for its ability to modulate itself to respond to new problems and new challenges: this, in particular, in the interpretation that the administrative judge gives of it, in the Italian experience.[41]

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of Individuals with Regard to Automating Processing of Personal Data (Convention 108), *Guidelines on Artificial Intelligence and Data Protection*, Strasburgo, 25 gennaio 2019, 1 ff.; OECD, *Recommendation of the Council on Artificial Intelligence*, Paris, OECD, 2019; Science and Technology Committee (House Of Commons), *Algorithms in decision-making*, May 15, 2018, 3 ff.; Council of Europe (CoE), *Recommendation CM/REC (2020)1 of the Committee of Ministers to member State on the human rights impact of algorithmic systems*, April 8, 2020.

[39] In a scenario of European ferment on the subject, confirmed by further resolutions, and reports, in the context of the European Strategy for Artificial Intelligence, the European Commission therefore published on 21 April 2021, the proposal for a regulation on the European approach to Artificial Intelligence Artificial, proposing the first European legal framework on AI (European Commission Brussels, 21 April 2021, COM(2021) 206 final 2021/0106 (COD) *Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence act) and amending certain union legislative acts* {SEC(2021) 167 final} – {SWD(2021) 84 final} – {SWD(2021) 85 final}). On this proposal, see e.g. C. Casonato, B. Marchetti, *Prime osservazioni sulla proposta di regolamento della Commissione Ue in materia di intelligenza artificiale*, 3 BioLaw Journal – Rivista di BioDiritto 415 ff. (2021); G. Marchianò, *Proposta di regolamento della Commissione europea del 21 aprile 2021 sull'intelligenza artificiale con particolare riferimento alle IA ad alto rischio*, 2 Ambientediritto.it 616 ff. (2021); see A. Masucci, *L'algoritmizzazione delle decisioni amministrative tra Regolamento europeo e leggi degli Stati membri*, 3 Diritto Pubblico 943 ff. (2020).

[40] Si v. es. High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, cit. at 1 ff.; L. Floridi et al., *AI4People – An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations*, 28 *Minds and Machines* 689 ff. (2018).

[41] At length, on this point, among others, see E. Carloni, *I principi della legalità algoritmica. Le decisioni automatizzate di fronte al giudice amministrativo*, 1 Diritto

4.2. The multiple forms of algorithmic transparency

Artificial administration transparency is on the one hand a general requirement, on the other hand an objective that is achieved in parts, sometimes piecemeal, and is only partially fulfilled through the combination of a plurality of mechanisms and declinations.

Only through plural forms can transparency seek to guarantee the indispensable requirements of knowledge that are in turn, from the perspective of administrative law, essential conditions for the protection of the rights and interests involved in the various administrative events. This is a consideration that, however, also immediately confronts us with the limits of the construction of algorithmic legality. Algorithmic transparency is not able to place itself in the fully satisfactory terms of the full knowability of the algorithmic decision, and therefore fails to fully realise the needs of guarantee of rights satisfied by traditional "analogical" dynamics.

This poses obvious problems from the point of view of the introduction of new technologies, especially when applied to administrative action. The issue that scientific reflection and jurisprudence itself are addressing is that of the perceived need to avoid setbacks in the protection of the citizen, who runs the risk of finding himself disarmed in the face of a technological opacity that renders public decision-making paths incomprehensible.

4.3. The transparency necessary for "due process"

Faced with this challenge, the first natural reaction is to consider irreversible, and not revisable, the legal achievements codified in the laws and principles on due process, which provide for full knowledge on the part of the interested party and full traceability of the decision-making process in court.[42] From this perspective,

amministrativo 273 ff. (2020); E. Carloni., *IA, algoritmos y administración pública en Italia*, 30 IDP. Revista de Internet, Derecho y Política 1 ff. (2020); P. Otranto, *Riflessioni in tema di decisione amministrativa, intelligenza artificiale e legalità*, 7 Federalismi.it 187 ff. (2021).

[42] On the traditional features and trends of due process principles in Europe, see, from different angles, e.g. G. della Cananea, *Il nucleo comune dei diritti amministrativi in Europa. Un'introduzione* (2019); A. Ferrari Zumbini, *La creazione giurisprudenziale tra fine ottocento e primo novecento dei principi del giusto procedimento nel diritto amministrativo austriaco*, 3 Diritto processuale amministrativo 1029 ff. (2018).

transparency is seen as a necessary condition for the exercise of algorithmic power to be considered permissible.

Thus clearly in the first jurisprudence on these issues of the Italian administrative judge, for whom transparency is at the heart of the fair algorithmic procedure[43], constituting «direct specific application of the art. 42 of the European Charter of Fundamental Rights [...] where it states that when the Public Administration intends to adopt a decision that may have adverse effects on a person, it must listen to him before acting, to allow him access to its archives and documents, and, finally, he must give the reasons for his decision».[44]

In this sense, following the indications of the administrative judge, a transparency that we can define as "strong" must be ensured: the «knowability of the algorithm must be ensured in all aspects: from its authors to the procedure used for its development, to the mechanism of the decision, including the priorities assigned in the evaluation and decision-making procedure of the data selected as relevant». Otherwise, following this approach, the algorithmic rule underlying the decision must be considered unlawful[45]: this, in particular, when, for example, it is not «given to understand why the legitimate expectations of subjects [...] were disappointed». In fact, «the impossibility of understanding the methods [...] constitutes in itself a flaw capable of invalidating the procedure».[46]

The administration is ultimately required to demonstrate the presence of this algorithmic transparency, as it cannot simply limit itself to "affirming" the coincidence between legality and algorithmic operations: a coincidence «which must instead always be proven and illustrated on a technical level, at least clarifying the

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[43] G. Botto, *Intelligenza artificiale e canone del giusto procedimento: linee di tendenza della più recente giurisprudenza*, 9 *GiustAmm.it* 10 ff. (2021); see L. Floridi et al., *AI4People – An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations*, cit. at 699 ff.

[44] Council of State, sec. VI, n. 8472/2019. On this declination of the principle of transparency, see G. Orsoni, E. D'Orlando, *Nuove prospettive dell'amministrazione digitale: Open Data e algoritmi*, 3 Istituzioni del federalismo 593 ff. (2019).

[45] As well stated in the aforementioned sentence no. 8472 of the Council of State, these needs are particularly strong and are not satisfied by (solely) «rigid and mechanical application of all the minute procedural rules of the law. n. 241 of 1990»: Council of State, sec. VI, sentence. n. 8472 of 2019.

[46] Again Council of State, section. VI, sentence n. 2270 of 2019.

circumstances mentioned above, i.e. the instructions given and the operating methods of the IT operations».[47]

Robotic procedures must therefore be balanced by «a strengthened declination of the principle of transparency, which also implies that of the full knowability of a rule», even if expressed in computer language.[48]

4.4. Transparency as reviewability (and judicial control)

A principle according to which the citizen must always be assured of understanding the rule that guides the decision, even when this is expressed «in a language different from the legal one»[49] and its traceability must be guaranteed.[50]

The algorithmic decision, and therefore the algorithm that leads to the decision, must be knowable to the citizen[51], but also capable of being placed under the full knowledge of the judge[52], and in particular of the administrative judge who must be able to evaluate its reasonableness, proportionality, logic.[53] In the face of new challenges, we can conclude, in conclusion, with the key role of transparency, in its various forms, as a catalyst for new rights.[54]

The problem, however, is, again, the fact that in technological dynamics full access to information and decision-making mechanisms is not always technically possible: the ability to explain the reasons that led to a specific final choice is not intrinsic in these processes, nor often possible. In this context, it is necessary to operate

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[47] Council of State, sec. VI, sentence. 13 December 2019, n. 8472.

[48] Thus Council of State, section. VI, n. 2270/2019.

[49] So Council of State, sec. VI, n. 2270/2019.

[50] D.-U. Galetta, J.G. Corvalán, *Intelligenza Artificiale per una Pubblica Amministrazione 4.0? Potenzialità, rischi e sfide della rivoluzione tecnologica in atto*, 3 Federalismi.it (2019); F. Patroni Griffi, *La decisione robotica e il giudice amministrativo*, *www.giustizia-amministrativa.it*, August 28, 2019.

[51] See C. Benetazzo, *Intelligenza artificiale e nuove forme di interazione tra cittadino e pubblica amministrazione*, 16 Federalismi.it 4 ff. (2020)

[52] Question on which see P. Piras, *Il processo amministrativo e l'innovazione tecnologica. Diritto al giusto processo versus intelligenza artificiale*?, 3 Diritto processuale amministrativo 473 ff. (2021).

[53] S. Sassi, *Gli algoritmi nelle decisioni pubbliche tra trasparenza e responsabilità*, in 1 *Analisi giuridica dell'economia* 109 ff. (2019); G.M. Esposito, *Al confine tra algoritmo e discrezionalità. Il pilota automatico tra procedimento e processo*, 1 Diritto e processo amministrativo 39 ff. (2019).

[54] See V. Brigante, *Evolving pathways of administrative decisions. Cognitive activity and data, measures and algorithms in the changing administration* 165 (2019): «Transparency seems to be the key to resolution».

proactively to mitigate the effects of the so-called. black box[55], without giving up to the court the advantages that the use of the most advanced learning and decision-making techniques determines.

4.5. Explainability: Transparency and motivation of algorithmic decisions

A corollary of "strong" algorithmic transparency is certainly that of the ability to motivate the decision taken in a mechanized way or any case based on a "relevant" contribution of algorithms and AI. It is what in the literature on the topic is defined as decision explainability[56], as the effective ability to explain and motivate the decision-making processes of the algorithms and therefore the decisions taken on this basis.

A problem that arises in different contexts, in which technological opacity is confronted with the necessary "explainability" of its processes and therefore with the challenge of transparency.[57]

A transparency that is articulated, in the face of administrative decisions, first of all specifically in the form of the necessary justification. This need for transparency and knowability, which can be traced back in essential terms «to the principle of motivation and/or justification of the decision» (and therefore can be placed in the line well traced by the law on the procedure with the duty to motivate administrative acts) takes on an importance in this case. not formal but substantial, as well stated in the aforementioned sentence. n. 8472 of the Council of State, and is not exhausted, and does not find a substitute, in the «rigid and mechanical application of all the minute procedural rules of the law. n. 241 of 1990» (such as the communication of initiation of the procedure or the formal appointment of a person responsible for the procedure).[58]

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[55] In this regard, see G. Lo Sapio, *La "black box": l'esplicabilità delle scelte algoritmiche quale garanzia di buona amministrazione*, 16 Federalismi.it 136 ff. (2021).

[56] The importance of explainability in relation to AI systems is recognized, for example, in European Commission, High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, cit., 18; yes see also OECD, *Recommendation of the Council on Artificial Intelligence*, cit., par. 1.3; Council of Europe, *Recommendation CM/REC (2020)1 of the Committee of Ministers to member State on the human rights impact of algorithmic systems*, 8 April 2020, para. 4.1.

[57] See, for exemple, G. Lo Sapio, *La "black box": l'esplicabilità delle scelte algoritmiche quale garanzia di buona amministrazione*, cit. at 136 ff.

[58] Council of State, sec. VI, sentence. n. 8472/2019. See e.g. G. Pinotti, *Amministrazione digitale algoritmica e garanzie procedimentali*, 1 Labour & Law Issues 77 ff. (2021).

4.6. The (problematic) aspiration for "strong" transparency

Following this approach, the knowability of the algorithm "must be guaranteed in all aspects: from its authors to the procedure used for its development, to the decision mechanism, including the priorities assigned in the evaluation and decision-making procedure and the data selected as relevant" . Here in this sense is the Italian jurisprudence which, in the absence of legislative discipline, formulates the principles of algorithmic legality and requires «full knowledge of the algorithm and the criteria applied for its functioning», to be guaranteed on all aspects of the decision.[59]

This, as we will try to see, is however complex, so much so that a request for "full transparency" as total traceability and intelligibility of the processes is not only difficult but sometimes technologically impossible in the scenario of advanced algorithms and artificial intelligence. Against which the transposability of the "technical rule" that guides and governs the decision (or the cognitive process that determines it) into a "legal rule" is controversial.[60]

The path of algorithmic transparency is not, therefore, just that of a principle that must be affirmed, preaching its necessity, but rather that of a principle that must be placed in the context, and adapted to the different challenges. This places us in front of a problematic and multifaceted picture: transparency must be expressed in perhaps less satisfying but more plausible terms multifaceted transparency, which cannot be "strong" but through a plurality of "faces" can, if not exposed in broad daylight, at least remove the decision-making paths and choices of the algorithmic administration from the area where the shadow is thickest.

5. Possible transparencies and "sufficient" explainability

5.1. Organizational transparency and accountability

[59] In this sense, finally, see e.g. Council of State, sec. V, February 4, 2020, n. 881: «This knowability of the algorithm must be guaranteed in all aspects: from its authors to the procedure used for its development, to the decision mechanism, including the priorities assigned in the evaluation and decision-making procedure and the data selected as relevant».

[60] On this need, see again e.g. Council of State no. 881/2020, on which see widely G. Gallone, A.G. Orofino, *L'intelligenza artificiale al servizio delle funzioni amministrative: profili problematici e spunti di riflessione. Nota a sent. Cons. Stato sez. VI 4 febbraio 2020 n. 881*, 7 Giurisprudenza italiana 1738 ff. (2020). See also L. Torchia, *Lo Stato digitale* (2023).

In the proposed European regulation, transparency, which also occurs in multiple forms (the document refers to the concept and principle twenty-seven times) is expressed in a perspective that is first and foremost organizational and related to the "model" rather than to the specific decision.

It is a risk-oriented approach, which orients the challenge of transparency more in the sense of the responsibility of the systems and organizations that use them, rather than in terms of a justification/explanation of the individual decision. The approach focuses on activities with different levels of risk[61], which certainly include a large part of the activities of public administrations. [62] The draft European regulation (for which I refer extensively to the specific in-depth analysis), in focusing on a distinction by type of activity and related "risk", places transparency as a specific burden for carrying out high-risk activities (among which include many administrative activities and the provision of public services), but what is required is the transparency of a primarily planning and organizational nature, and in any case not complete but "sufficient" (art. 13 speaks of «functioning [...] *sufficiently* transparency of AI systems»): a "sufficiency" understood not as full comprehensibility of decisions, but as the ability for users to «interpret the output of the system» and «use it appropriately».

5.2. The transparency of the "algorithm": the right of access to the software

The principle was initially expressed in the form of the right of access to the algorithm as an "electronic administrative act" (and as such susceptible to falling within the scope of Art. 22 of law 241 of 1990).

The right of access to the algorithm is the first form of transparency, and its importance is evident: even in the face of the maturation of forms of transparency capable of allowing a less complex

[61] The regulatory framework defines 4 levels of risk in AI: unacceptable risk, high risk, limited risk, minimal or no risk.

[62] According to the proposed regulation, AI systems identified as high risk include AI technology used in: critical infrastructure; vocational education or training, which can determine access to education and the professional course of someone's life; product safety components; employment, worker management and access to self-employment; essential private and public services; law enforcement that may interfere with people's fundamental rights; management of migration, asylum, and border control; administration of justice and democratic processes.

comprehensibility of algorithmic action, this form of access maintains its role. The description/transparency may not be sufficient to reconstruct the relationship between the inputs and the outputs obtained in terms understandable for individuals[63], and even for expert users.[64]

In Italy this right to know the algorithm takes the form of a particular exercise of the right of access to documents provided for by the law on proceedings: the algorithm is therefore interpreted as an electronically processed administrative act". From this "assimilation" the judge derives the duty for the administrations «to provide not only all the instructions relating to the functioning of the algorithm, ensuring that the functioning of the software is comprehensible even to the common citizen, but also the source computer language (so-called "source code") of the algorithmic system».[65]

This perspective raises an important question regarding the possibility of using, in the public sector, proprietary technological solutions, covered by industrial property rights. The need for transparency, both in the form of testing the algorithm and its «democratic" accountability and in the form of ex-post reviewability by the interested party, requires transparent algorithms at least in the form of the "non-secrecy of the algorithm».

5.3. Transparency as "algorithm documentation"

Partially connected to this approach is the one that requires administrations (but more overall, in the perspective of the future European regulation, the "owners" of the algorithm) to support its use with adequate documentation that allows its operating logic to be fully understood. This is a transparency that is a "precondition" for the use of algorithmic power, which precedes its use in the concrete case but is a condition of the actual ability to understand the algorithmic activity.

The manifestation of this multiple and multifaceted transparencies is required by paragraph 2 of Art. 30 of the future European regulation, and is an "organizational precondition": the administra-

[63] See V. Dignum, *Responsible Artificial Intelligence. How to Develop and Use AI in a Responsible Way* (2019)

[64] Cfr. S. Quattrocolo, *Equo processo penale e sfide della società algoritmica*, in A. D'Aloia (ed.), *Intelligenza artificiale e diritto. Come regolare un mondo nuovo* (2020)

[65] S. Sassi, *Gli algoritmi nelle decisioni pubbliche tra trasparenza e responsabilità*, cit. at. 109 ff.

tions are required to ensure (in the purchase or development of automation solutions) «the availability of the source code, the related documentation, as well as any other element useful for understanding the operating logic». This precondition, which must be ensured first and foremost in the relationship with the supplier of digitalization services, is a prerequisite for the use of automated solutions but is also a necessary prerequisite for effective control (of the administrations themselves and citizens) over the forms of operation of algorithmic power.[66]

The recent Italian legislation moves in a similar direction (often using the same textual expressions): in regulating and encouraging automated administrative activity (the administrations «to improve efficiency [...] take steps, where possible, to automate their activities using technological solutions, including artificial intelligence»[67]): in this context, administrations are required to ensure («in the purchase or development of automation solutions») «the availability of the source code, the related documentation, as well as any other element useful for understanding the logic of operation».[68] This precondition, which must be ensured first and foremost in the relationship with the supplier of digitalization services, is a prerequisite for the use of automated solutions but is also a necessary prerequisite for effective control (of the administrations themselves and citizens) over the forms of operation of algorithmic power.

5.4. ***Transparency as knowability of the algorithmic decision***

It is, in fact, first and foremost "knowability" of the exercise of algorithmic power. A principle that we already derive from the GDPR and which is expressed in organizational terms and as an administrative duty, but also expressly in terms of a right «to know the existence of automated decision-making processes that concern him». It must be said that this principle-right of "knowability of the algorithm" (now codified in Italy by the code of the public contract)

[66] On the new public power deriving from the application of algorithms to the public function, see widely M. Falcone, *Ripensare il potere conoscitivo pubblico tra algoritmi e big data* (2023).

[67] Art. 30, c. 1, legislative decree n. 36 of 2023, the new "Public Contracts Code" (which dedicates an important part to the digitalization of administrative activity).

[68] Art. 30, c. 2, legislative decree n. 36 of 2023.

was derived starting from the privacy legislation[69], where the right to know «the existence of an automated decision-making». This principle becomes a rule for administrative action, in Italy first through administrative jurisprudence and now explicitly with Legislative Decree no. 36 of 2023. The right to knowledge belongs, we can say, to the interested party (i.e. to those who are directly involved in the exercise of this power), but the legislation also proposes it as a right of anyone, as a form of widespread control over an automated power which, to be exercised, must be subjected to public scrutiny concerning the cases in which it is used (according to paragraph 5 of the same art. 30[70] of Legislative Decree no. 36).[71] The question is interesting because it concerns a discussion on transparency which is not only an instrument of guarantee for the interested party, but also a condition of democratic control over power, and therefore now over the new algorithmic power.

5.5. Transparency as comprehensibility of algorithmic "logic"

This therefore translates into new forms, in the face of an algorithmic decision, and, where the overall ability to illustrate the different steps and data used, materializes first and foremost in the right to decipher the logic of the algorithm. The citizen has, in other words, the right to know «the logical process based on which the act itself [was] issued using automated procedures as to its dispositive content».

In this sense, the reference to the GDPR is relevant, as in the reasoning of the administrative judge: which states that «the interested party should therefore have the right to know and obtain communications in particular about the purpose for which the personal data are processed [as well as] to the *logic* to which any automated data processing responds and, at least when it is based on

[69] On the systemic value of personal data protection regulation and its specificities in the public sector, see widely B. Ponti, *Attività amministrativa e trattamento dei dati personali* (2023). Sul rilievo di fonti europee nella disciplina dell'attività amministrativa, cfr. L. Muzi, *European Union rules governing administrative procedures*, 2 Italian Journal of Public Law 254 ff. (2023).

[70] Art. 30, c. 5, «the public administrations publish on the institutional website, in the «Transparent Administration» section, the list of technological solutions referred to in paragraph 1 used for the purposes of carrying out their activities».

[71] See on the matter D.-U. Galetta, *Digitalizzazione, Intelligenza artificiale e Pubbliche Amministrazioni: il nuovo Codice dei contratti pubblici e le sfide che ci attendono*, 12 Federalismi.it (2023).

profiling, to the possible consequences of such processing»; and that the interested party is provided with information on the «existence of an automated decision-making process, including profiling [...], and, at least in such cases, significant information on the logic used, as well as the importance and expected consequences of such processing».[72]

This is demonstrated well by the French legislation, where legislation centered on a complex system of transparency guarantees has been prepared to rebalance the dynamics of digitalization. This legislation[73] provides that when an individual decision based on the algorithmic processing of personal data is adopted, the interested party must be informed not only of the use of an algorithm but also of the right to know the essential elements of its functioning («les principals caractéristiques de sa mise en œuvre») of the algorithm used.

In the Italian experience, this perspective is now codified by the new contract code, which provides, in line with the GDPR, that in the presence of automated processing, the interested party has the right to the "understandability" of the algorithm, to be understood as the right «to receive significant information on the logic used». The GDPR also provides for a similar right (and the same expression is used there too: «significant information on the logic used») which however perhaps has a broader scope because it is also linked to the right to know «the importance and expected consequences» as a result of automated data processing.

One can reflect on whether within the broader principle of transparency, there is, in essence, a duty that refers to a principle of "loyalty" to the algorithm concerning the logic that guides it and which must be knowable and understandable.[74]

6. As a conclusion: "strong" transparency through the human in the loop

These plural declinations of transparency perhaps illuminate the algorithm weakly, not allowing a "deep" (full, complete) understanding of the decision-making process, but counteract the opacity of the algorithm.

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[72] Thus in the art. 13, paragraph 2, letter. f).

[73] So, art. L.311-3-1, Code des relations entre le public et l'administration (CRPA).

[74] D. Cardon, *Le pouvoir des algorithmes*, 164 Pouvoirs 65-66 (2018); G. Orsoni, E. D'Orlando, *Nuove prospettive dell'amministrazione digitale*, cit. at. 614-615.

However, the construction of the other conditions/principles of algorithmic legality (which in Italy is mentioned in Art. 30 of the new code of public contracts, but which we can already derive by analogy from the GDPR) once again calls transparency into question.

An "internal" transparency (to the advantage of the official as it can control, validate, or deny the automated decision) whose presence is necessary to allow the official to intervene with knowledge (and not with subordination) and does not appear to be exhaustible within the terms of the weak transparency we talked about.

Affirming the "non-exclusivity of the algorithmic decision", e.g. recognizing that «in any case there is a human contribution in the decision-making process capable of controlling, validating or denying the automated decision», means affirming the need that at least internally the algorithm is understandable in deeper terms than those of the possibility of examining its "logic" alone. It means the necessary presence of a person responsible for the algorithm, a natural person who becomes an unavoidable interface for interested parties for a broader, deeper, and more substantial understanding of the decision-making process followed by the machines. This is because if the civil servant is unable to secure this deeper understanding, it is inevitable to admit his subordination to an automated decision that he cannot fully understand and therefore cannot reasonably deny or review.

Transparency passes, in these terms, through the capacity of the administration. The civil servant himself becomes a necessary mediator[75], and therefore responsible not only for internal supervision but also for external comprehensibility, and thus transparency in the relationship with the citizen. The challenge of "strong" transparency (as in full comprehensibility) is thus linked to the resilience of another principle of algorithmic legality, which is in turn challenged (in terms of the individual's substantial capacity to operate a syndicate on the decisions made by artificial intelligence) by the knot of technological opacity. The risk of a substantial subordination of humans is reflected in the capacity of the artificial administration to propose itself in terms (also) of full transparency.

[75] From a different perspective, on the importance of "mediators" in transparency processes, see for example B. Ponti, *La mediazione informativa nel regime giuridico della trasparenza: spunti ricostruttivi*, 2 Il Diritto dell'informazione e dell'informatica 388 ff. (2019).

Responses, in this sense, pass in the first place through the capacity of the administration: a quality public administration, endowed with adequate skills, can reduce the gap that arises (however inevitably) between its officials and artificial intelligence systems, consequently reducing the gap between the citizen's cognitive needs and the effective capacity to understand in the new technological environment.

METHOD IN CONSTITUTIONAL THEORY
BETWEEN NATURE AND ARTEFACT

*Laura Buffoni**

Abstract

The aim of the work is to provide an analysis of the problem of method in constitutionalist theory, in order to demonstrate advantages for a systemic reconstruction and the risks of a view that makes any coordinated reading pathological.

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1. The problem of Method

It was said that one should not talk about Method in public law because it is practice and operation, art before science, technique before dogma[1]. That may be. But the fact that Method is experience does not exclude that it is as thinkable, intelligible, and sayable as the latter. Nor can one get rid of the problem of Method by not mentioning it. Only who moves from the idea of a 'nature of things', of law as a natural given, rationale of and in things - nature of facts, hence, empirical as an entity - can argue that «sciences that deal with their methodologies are sick sciences»[2]. This conclusion is unacceptable, however, if law is not natural or, at least, not

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[1] V. E. ORLANDO, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico. Contributo alla storia del diritto pubblico italiano nell'ultimo quarantennio (1885-1925)* (1925), 20.

[2] G. RADBRUCH, *Introduzione alla scienza del diritto* (1961), 360.

natural in its determinism and necessity. And that is not the law posited by a Written Constitution, which is the legislative deliberation, intentional and conscious, of a constituent power, representative of the people. Which is constructivism, artefact and beginning of what was not there before: rule of law and not instance of law. But if one does not presuppose the existence of a perfect order in nature - an order of the Is, according to the categories of scholasticism, making things and intellect adequate, where things hold measure and ordering in themselves - every attempt at knowing the Is, putting order in the disorder, should hypothesise the distinction - which does not necessarily mean separation - between fact and value, between the Is of a phenomenon and the Ought of a rule. The possibility of an order should be the methodological premise of the rational solution of a problem. On the opposite side, Method is useless for those who, *à la* Feyerabend, are not afraid of absolute chaos. But the jurist cannot afford anarchy: law is, at least, something different from anarchy and chaos, because it moves in a linear direction, aiming towards an order, an ordering, and its science cannot be disordered, unless annihilating its subject, which is a compulsion, transcendent or immanent, towards order.

Excluding that it would be pointless, to talk about Method in law, to do method-o-logy is, however, difficult, because it implies self-reflection, a reflection on one's own action. It helps self-reflecting that the discourse on Method in law is timeless because Method, in the Cartesian sense, does not teach what truth is, but, etymologically, what the 'way', *hodòs*, is, to be followed to reach the goal, the orientation instrument to be used in the search for, and in the knowledge of, the reality of law. And the method of human knowing is universal as it discovers how «all things that can be the subject of human knowledge follow each other in the same way»[3] .

In turn, the idea of a universal *mathesis* in the things for which a certain order or measure is predictable - universal in the sense of a common epistemological methodology to the various branches of knowledge, proceeding by schemes and categories in the search for truth - opens up the idea that the discourse on the Method of law is peculiar compared with method in sciences, but is not a closed, original and self-sufficient discourse: the rules of law are made, constructed, by humans for humans and are knowable and

[3] DESCARTES, *Discorso sul metodo* (2022), 123.

recognisable by them. Law is not a technique or not only a social technique. Law springs from humans, and has its 'source' in human reality, which is both individual and social. Every idea of law, therefore, presupposes a vision of humankind, made of biological and social stratifications, of which we must say something that (does not coincide but) is compatible with what we know. This does not mean that the jurist - and the constitutionalist in particular - is an anthropologist, because there is no symmetry between anthropology and law. It is true that humans are the subject and object of positive law: thus, that the irenicism of the law of trust is founded on the vision of the good, prudent man, holding an innate sense of truth and justice, and who doesn't need the whole of it; or, on the contrary, that the person who is honest in himself is the anarchic man, who doesn't need the law, because he can live honestly without or outside it; or, again, that the heteronomy and coercion of the law are founded on the pessimistic anthropology of the evil man, who is deprived of an intrinsic morality or possesses a negative morality. As Schmitt wrote, «there is [...] no anthropology that is not politically relevant»[4] . But this is too little, too general and too descriptive for a jurist of positive law, such as a constitutionalist, who, because of that, must investigate what person the Constitution establishes and regulates and derive normative consequences from it. Nor does this mean to prescribe, in the name of a common belonging to the world of humans, the integration, accumulation, hybridisation or, even less so, the interdisciplinarity[5] and comparison of 'disciplines', law and the other social sciences, such as - to limit ourselves to the closest ones to constitutional law - political science, history, sociology, anthropology, praxis and so on; or even the hard sciences, in search of a synthetic and non-analytical knowledge. One may also speak of a dialogue between constitutional law and other sciences, but dia-logue presupposes a pre-existing separation.

With the aim to avoid meaningless generalities and, at the same time, messy details, fragmentation into ever smaller pieces with the loss of any direction in research, rather means to identify the matrix, the structure, that conditions law as a constructed

[4] C. SCHMITT, *Il concetto di 'politico'. Testo del 1932 con una premessa e tre corollari*, in ID., *Le categorie del 'politico'. Saggi di teoria politica*, edited by G. MIGLIO-P. SCHIERA (1972), 144.

[5] On which the objections raised by N. BOBBIO, *Diritto e scienze sociali,* in ID., *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto* (2007), 44 ff.

reality, as an artefact where constructivism is allied to materialism. It means to identify the invariants, the intrinsic structural laws, of humans and the social facts pertaining to them, such as law and in particular public law, and the forms of their knowledge, which - for their common subject, the human world - should present affinities, analogies.

Law is a human reality, but humans are of body and spirit. There dwell the two elements, domains, primary qualities of reality, from which everything moves, the threads for a knowing subject not to get lost in the labyrinths of knowledge: *res extensa* and *res cogitans*, which can be rewritten in the great division between phenomenon and noumenon, sensible experience and intellect, known thing and knowing subject, objectivism and subjectivism, senses and reason, nature and culture, materialism and idealism, realism and normativism, facts and values, and, ultimately, in the dualism of 'Is' and 'Ought'. In the beginning, that was the Christian opposition, first Pauline and then Augustinian, between the law of the flesh, of the body, and the law of the mind, of the spirit.

At the bottom of it all, in search of elementary concepts, insusceptible of further analysis, this is the binary matrix to access the knowledge of law, which is produced by humans for humans. But if person is made of body and spirit, his unity postulates some form of relationship, be it the pineal gland or a more articulated capacity of the neurobiological structure to condition emotions, feelings, thoughts, and language or, in the opposite direction, the priority of the spirit, understood as substance in its own right, over the body. And, if law is a human construction, its outcome is the overcoming of dualism between reality and thought, *res extensa* and *res cogitans*. The problem is to determine the direction of the relationship.

This is not surprising. In every *Methodenstreit*, starting by the historical debate on Method in social sciences and any other that followed, the struggle has always been played between the dualist opposition - body/mind, matter/spirit, history/form, nature/culture, fact/norm and so on - and their unity. That is, the struggle over methodological issues is a consequence of different interpretations of the world and the human, the source of law. The dispute is over the nature of subjects.

2. Method and subject

The problem is gnoseological because it is ontological.

The discourse on the Method of law is not the same as on its subject: one is a discourse on law, a meta-discourse, a discourse on the how, the other is on the what, a bit like the relationship between meta-language and language-object. They are distinct, but not separate. There is disagreement on the method, on the way to knowledge of law, because there is no shared 'concept' of law[6], although there could be disagreement on the method even if there was agreement on the concept of law. Disagreeing on what law is increases the chances of disagreeing on its method. But without an ontology there is no gnoseology, although with an ontology there can be more than one gnoseology. From which follows that the epistemological discourse on Method does not coincide with the ontological discourse on what law is, which pertains to the theoretical subject, but conditions it. Thus, the eternal opposition, which runs through law, between body and spirit, materialism and idealism, Is and Ought, mortgages its method.

More precisely, in the general theory of law, the position and solution of the epistemological problems in the interpretation and application of law, in the practical, judicial reasoning, and so on, depend on the way the ontological status *of* law is posed and questioned, on what makes a rule law, hence, on the dispute over the subject, divided between Is and Ought, fact and value, the sensible experience and its form/norm. After which, the positive jurist should verify which solution is compatible with the parameters of the current law, in order for the method to be true and valid. That is, in the specifics of positive constitutional law, how the subject, the existing constitutional 'document', conditions the form of its knowledge, understanding, interpretation, application and so on.

[6] On the disagreement on the method and on the concept of law in constitutionalist doctrine, after AA.VV., *Il metodo nella scienza del diritto costituzionale* (1996), recently see monografich works by G. ZAGREBELSKY, *Tempi difficili per la Costituzione. Gli smarrimenti dei costituzionalisti* (2023) and M. LUCIANI, *Ogni cosa al suo posto. Certezza del diritto e separazione dei poteri nella riflessione costituzionalistica* (2023), as well as *La Lettera*, 06/2023, *Sul ruolo dell'AIC*, in *AIC* (2023).

3. On dualism

At the root of the struggle over the Method of law there is the conceptual polarisation between Is and Ought: the two poles, debated and fought over, around which everything has always revolved, against the contingencies. It is an elementary, archetypal, and symbolic polarity, which constantly marks the whole humankind and each individual man.

Net of all the reorientations, hybridisations, and conversions of the dualism between mind and body, spirit and matter, heaven and earth, «the Scylla and Charybdis of the theory of law»[7] remain normativism and realism, the normative and factual nature of law, its validity and effectiveness, the artefact and the life, the juridical ought-to-be and the natural being. We do not mean that all theories of the concept of law stay, in a Manichean way, on the one or the other side: many are cut across by tensions and relations between thought and life, normativity and nature. What we mean, instead, is that, roughly speaking, in the 'concepts' of law, drawing on archaeology, on the science of foundations, of typical ideal schemes, either pole always prevails as the 'climate', the Is and the Ought. Thus law either stays on the side of thought, of ideas created by the spirit, that is of the *norms,* or on the side of the reality of matter, a phenomenon produced by the body, that is on the side of *facts.* We will not reconstruct the individual theories, but will take advantage of them, as parasites do, to define the general terms of the question of Method and to show that normativity is natural and the body conscientises itself, it gets normed.

All the theories of law that revolve around the norm/form, the law 'posited' and its 'system', the jurisprudence of concepts, dogmas, and so on, tend towards the Ought. The Method is the formal logic, the analytical knowledge, which draws concepts, constructions, principles from the norms of positive law to interpret it and the phenomenon of reality. Thus, it builds abstract, logically and intrinsically coherent, systems, excluding individual and social life from the form/norm, the Is from the Ought. A certain circularity is evident: the system is made to derive from certain axioms, whose validity is proven by the system. The way reason is given in legal reasoning is the Aristotelian syllogism. Life, being, substance, remain outside. But to the very extent it does not depend on the Is, on the reality, the Ought, which is idealism and

[7] H.L.A. HART, *Il concetto di diritto* (2002), 173.

formalism, makes law all-powerful: if it is empty of being, if it is nothing, if it is founded on emptiness, it can do everything. It is prescription, artefact, constructivism, and government. Not accommodation of (nor adaptation to) reality: it is the basis of the hyperbole of law that modifies everything.

The most accomplished, closed, independent, self-sufficient, empty and, therefore, powerful system, is the one constructed by the Pure Theory of Law, which, after all, with our categories, combining normativism and transcendentalism, is a secularised spirit. It is the normativity of the norm[8], from which the concepts that serve legal science are derived by generalisation and abstraction. Its subject is positive law, known - against the imperativist theories of law - as norm, which tells an Ought and not an Is. The method of legal science is cognitive, logical-formal, it is thought made of legal provisions that enunciate, from an external point of view, the prescription of what ought-to-be and make the legal norm known as norm, as ought-to-be without effective reality. The *pure* theory of *positive* law is, therefore, a method of normative knowledge of the 'reality' of law, whose specific form of existence is its validity, a category of thought and not a being, but a reality of nature. This separates clearly, purely, law from natural and social facts, which are always natural facts, the rule of law from the fact of law, the noumenon, which is only interesting for science, from the phenomenon, which is 'experiential' but on which no value judgement can be made. The same fact can be understood sociologically *or* legally: the sociological point of view of social relations says nothing to law and vice versa. Social reality and law are independent spheres, that is normality, which is a-juridical sociality, is mute to normativity and vice versa: they are external to one another. There is no normativity in normality, there is no Ought in the Is, and Ought has therefore no Is[9].

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[8] We take up the nomological normativity thesis of S.L. PAULSON, *A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz*, in M. KLATT (ed.), *Institutionalised Reason. The Jurisprudence of Robert Alexy* (2012), 61 ff.

[9] The is–ought problem, sometimes referred to as Hume's law or Hume's Guillotine, is a philosophical problem closely related to the fact-value distinction in epistemology. The passage is summed up in the slogan 'No-Ought-From-I'. According to the Hume's law, there is a significant difference between positive (or descriptive) statements (about what is) and prescriptive or normative statements (about what ought to be). It was articulated by the Scottish philosopher and historian David Hume in Book III, Part I, Section I of his work,

It is true that in Kelsen there are concessions to *Wirklichkeit*: the effectiveness of the system 'in its broad outlines' is, in fact, a condition for the validity of the norm, which can only be preached of something that exists, that is posited, applied and in force. Force, that is, is a condition of validity, of the value of the fact; or, at least, the norm, the Ought, has some relation to its realisation, its effectiveness. But it is left that law is norm in the precise sense that it is not perceivable by the senses; for the purposes of the validity of a norm it does not matter that it is observed, but that it needs (ought) to. Human conduct is not of interest in itself, in its Is, in its present, past or future reality, but in its Ought, in its having to happen, by virtue of a norm that prescribes the ought to be of the law (and not the being 'something' due). In short, what matters for Kelsen is the ought-to-be of the norm, the form of the Ought and not, as in the philosophy of values, the being of the ought-to-be, the translation from this to that. Even more, he privileges the normativity of the norm up to the point of eliminating the ontological, existential question of what law is.

More precisely, he converts the epistemological function of the 'categories' into an ontological function, constitutive of the normativity of law. There are prerequisites, or *a priori*, logical-transcendental, concepts that epistemologically ground law, because they constitute it by ordering it, attributing the objective sense of what ought to be to the act concretely willed by humans. But there is no essence (political, moral, etc.) of law: what matters is only the how, the mode of knowing what law is and it is precisely because of the epistemological function of the *a priori* category. Legal science, with its provisions, describes, ascertains, records, but does not create, the posited law, or rather the 'fact' of the posited law in effective reality, which depends on political authority. However, it produces, (neo)kantianly, validity: hence, the legal provision determines the juridicity of the law, because what it knows, by producing it, is the Ought of the law. In fact, like for the Neo-Kantian gnoseology, knowledge constitutes, ontologically, its own subject, so that the conditions of the norm are the conditions for its knowledge: in this case, the juridical provision, although referring to a posited norm, to the fact of a given norm, in a certain sense precedes the norm, because it determines it as norm and,

A Treatise of Human Nature (1739). A similar view is defended by G.E. Moore's naturalistic fallacy.

therefore, as the subject of its own knowledge. If that is the case, the Pure Theory is indeed knowledge of law, but, for this very reason, it is ontology of law: Method is the set of pure logical categories, deprived of empirical content, that make law possible because they experience the legal norm as a form of Ought. Therefore, law is its method in the most proper sense: the *hodòs,* the way, the procedure, which determines the goal.

Analytical doctrines take us close to the point. There too, law is its concept, its construction made by jurists. In a similar way to positivism and normativism, what matters is *how* law is and not *what* it is, meaning this in the sense of ontologism with an essentialist flavour, as a supposed and, thus, metaphysical nature or substance of law. For the same reason, the marginalisation of the ontological question conditions the method of knowledge of law as a discourse. Analytical philosophy of law studies it as language, as its linguistic use. If law is a posited norm, linguistic statement, the knowledge of that law is purification or critique of language and, thus, knowledge of its production; it is theory of sources that precedes the theory of interpretation. Again, if law is the position of a linguistic statement, Ought without Is, the textualist option or, at any rate, the dominance of norm over fact, is methodologically coherent. But since it cultivates the claim of objectively analysing the ideologies and interpretative methods (all of them) employed by jurists and judges, it does not need its own Method, because what it says is always verifiable in terms of correspondence to its empirical object. It reduces the discourse *on* law to a, more or less life-sized, map of it, thus eliminating both the ontological and epistemological questions.

But «there are no closed systems, and there never have been. The illusion that logic is a closed system has been encouraged by writing», which a sense of cognitive closure belongs to[10]. And so, the opening up of law, the escape from itself, from the juridicity of law, has followed, simplifying, two paths, upwards and downwards. Both lead in an opposite direction to the self-referentiality of law: they superimpose or juxtapose to the given of positive law a theoretical model, drawn from ideas or realities that are separate from, at least, positive law, on which they impose their own normative constructions. They do not logically describe the concepts built by legal norms but build the concepts to interpret the

[10] Thus W.J. ONG, *Oralità e scrittura. Le tecnologie della parola* (2014), 232.

law in force, drawing them at times from above, at times from below[11]. In the first direction, the transcendental Ought returns transcendent, after its emancipation in the modern; in the second direction it stays, to varying degrees and gradations, as Is, the fact. Consequently, the Method of law yields to abstract thought or to concrete life, depending on the direction of the opening.

The upward opening is an aspiration to the infinite, to perfection, to transcendence (not to transcendental logic), to the theological-political discourse, to the system-as-crystal, with an «open door to transcendence», as opposed to the «system of needs»[12], which is the lower part, closed, empirically and materialistically immanent, of that order. But the method of political theology, or «the methodological connection of the theological and political prerequisites of thought»[13], cannot be the method of the law made and knowable by people. Theology does not speak of people but of God: it follows that in political theology there is always something unexplained and inexplicable, because there is neither a speculative nor a scientific-experimental explanation of God, who is unknowable. But the scientist, whether natural or social, cannot say that something is unknowable, cannot resort to the abyss, which is unfathomable, elusive, and therefore explains nothing.

Conversely, it is a secularisation of theological transcendence the opening of law to the 'substances', the exemplary universals, the universal (and sometimes innate) ideas of good, justice, truth, to the world of values and to models of virtue and wisdom in social and political coexistence. These are typical theses of legal moralism, the interpretivist or interpretive theories, in the background of which lies, variously articulated, the connection between law and morality. They still belong to the order of prescriptive discourse, but here the Ought is moral, whereas in positivism and normativism it is juridical. Indeed, here, in its extreme version, it is juridical because it is moral, while there it is juridical because it is not moral. Their essence is a certain methodological absoluteness because they imply, at bottom, moral and political absolutes, even when declined in the pluralist sense of 'open' societies. Their cipher is the principle of the One-Good.

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[11] They are, however, at least incomplete theories where they do not understand the form and choice underlying positive law.

[12] C. SCHMITT, *Il concetto di 'politico'*, cit. at 4, 150-1.

[13] *Ibid*, 149.

On the opposite side, on the edge of Fact against Idea, the openness of the closed system is downwards, it is referred to immanence, to the life of people in flesh and blood, to the «carnality of existence»[14], to situation, to the vital flow of experience, to the 'living whole', *Lebens Ganzes*, to the concreteness, contingency and historicity of reality proper to the world of people, made of reason but also of senses; to the individual case, concrete and unrepeatable with respect to the general, abstract and regular norm/form. Forgiving the simplification, this is somehow a discourse that combines pragmatism as juridical philosophy of creative action, with radical empiricism, juridical realism, jurisprudence of interests, jus-liberalism, and the casuistic, synthetic, phenomenological, and hermeneutic law. These are hardly ever forms of superficially and reductionistically materialist or sensist realism. Rather, they are doctrines that reject the idea of law as a product of pure reason, of an *a priori* independent and separate from the being, with further sub-distinctions or nuances in the openness of law to the becoming of life, to human nature, which the biological given pertains to; but also to culture and living in society, depending on whether we prefer body or spirit, the physical needs and biological data as foundations of our mental capacities, or the operations of conscience, at times individual, at times social, and with them, the human ideas of justice, constant and recurrent throughout history, as supreme criterion of thinking and acting. Though with all these distinctions, in disclosing law to the facts of the world of people, hence to people, to their experience of reality, which brings with it its own Ought, its own deontology, a conceptualisation of doing, a normativity of the real, the Method that is left is topical-problematic thinking[15]. Compared with logical-systematic thinking, this is dominated by the concrete case, by the inventory, common sense, equity, justice as proportion, measure, and reciprocity, by induction from particular facts against deduction from general principles, by the controversial logic of the probable, reasonable and preferable, by teleological argumentation

[14] P. GROSSI, *La Costituzione italiana quale espressione di un tempo giuridico post-moderno*, 3 Riv. trim. dir. pubbl. 621 (2013).

[15] On the origin of the topical method in (seventeenth-century) English legal science H.J. BERMAN, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition* (2003), 204 ff.

against the self-referentiality of law and formal logic, and so on[16] . If systemic law *is*, ontologically, its provisions and theory of sources, problematic law *is* norms and theory of interpretation. With hermeneutics, in fact, law is the norm in the making of the concrete case, it occurs, is produced in its application, it is its own realisation. From which it follows that knowledge of law is inseparable from the study of how it is applied, it is the theory of interpretation and judicial praxis/practice, of the experience of living law. Simplifying, the rule emerges from the encounter between *quaestio iuris* and *quaestio facti*, where the fact, which is not the mere case of the norm, holds qualities that 'problematise' the norm. In hermeneutics, the scientific validity of law does not derive from its conformity to an *a priori*, but depends on the moment of application, on the *performances* of interpretative hypotheses. The truthfulness of a norm is not an attribute of it, an uncontroversial property already given, but is made, created in the becoming of the case. Thus, it is confirmed that the ontological question of what law is, (be it, analytically, a 'concept'' or hermeneutically, a 'practice'), determines the epistemological question, related to how law is understood. If law *is* - in the ontological, but not metaphysical sense - its own becoming a norm, if it *is* the application of norms to concrete cases, if it *is* the point of incidence and co-determination of fact and norm, where the norm is determined with the fact, then the re-evaluation of practical action logically follows. And, with it, of the jurisprudence that makes (and does not say) the law, i.e., of the judicial creation of law against the phonographic theory of the judicial function, as well as the prioritisation of application over understanding, of application as constitutive of understanding. Unlike analytical thinking, however, the hermeneutic one needs a method, because law is not an already given subject, which can be described and known from the outside, but is, in fact, constructed by the interpreter: therefore, the method builds the law-subject and, to that extent, makes legal rules defectible. In turn, to continue with polar oppositions, it is a less powerful law than the one that stays on the side of the idea, of the norm: it is a law linked to the fact, to the existing, somehow latent, contained and conditioned in it. It is close to the spontaneous order of things, with a prevalence of the

[16] These are the methodological consequences that S. NICCOLAI, *Principi del diritto, principi della convivenza. Uno studio sulle* regulae iuris (2022), *passim*, rigorously draws from the openness of law to human life, more precisely from the individual, moral, concrete foundation of the reality of law.

descriptive moment over the prescriptive one. Therefore, it cannot do everything: it is a somehow misoneistic law, which recognises but does not govern the reality that pre-exists it and, taking it to an extreme, preserves everything.

Law that contaminates itself with existence, that is, ontologically, on the side of being, is less powerful than the artefact, than 'productive' law, but is more real. This is proven by its rendering in exception and necessity, out of the normality of the norm. It goes without saying that we are talking about Schmitt and Romano's institutionalism, where the relationship, constitutive of law, between the 'Is' and the 'Ought' is not, for different reasons, dualism. Both, in different ways, differentiate *Sein* and *Sollen,* but do not separate them. In both, openness to life, to fact, enters into law and precedes the rule or, in any case, the law is not independent of social reality. Methodologically, it follows that the meaning of rule requires knowledge of the concrete fact.

In Schmitt, the norm is not factual, it is not the undecidability between life and law, the point where fact is law and law is fact; but the norm is derived from its application to concrete circumstances, to an event, to the situation. It is the law of the situation. It reintroduces substance, fact, hence exception, which means subjective freedom of decision[17]. For Schmitt, being is the pre- and immanent condition of normativity. In fact, in a state of exception, the suspension of the effectiveness of a norm does not reveal force, violence or arbitrariness, but that every norm «presupposes a normal situation»[18]. In contrast with Kelsen's Is-Ought dichotomy, he means that «the normality of concrete situation», the Is, is not «merely an external presupposition», but «an essential, internal, juridical character of the validity of a norm», of the Ought. Therefore, he refers it to law, up to the point of saying that it is «a normative definition of the norm itself» and that, on the contrary, «a pure norm, unrelated to a situation or a type, would be something legally non-existent»[19] .

[17] And the transition in Schmitt from the decisionism to the institutionalism and, in particular, to the concrete order thinking is not to be considered as a rupture, but as a continuity. In fact, even in this context, the decision-making process continues to appear as the only way to produce spatial and juridical order.
[18] C. SCHMITT, *Il concetto di 'politico',* cit. at 4, 130.
[19] C. SCHMITT, *I tre tipi di pensiero giuridico*, in ID., *Le categorie del 'politico'*, cit. at 4, 260.

From this follows that the Schmittian state of exception is not the formless life that suspends law, but a state of law. The decision is not normative but belongs to the juridical: it does not produce a norm, but «a normal structuring of life relations» to which the norm applies[20]. Thus, social normality in Schmitt is juridical, but it is pre-normative in the sense that normativity is not possible without an 'ordered' normality, created by the decision. In the end, normality founds normativity, and the decision is the foundation of validity of the norm. Then, if one looks at the conservative state of exception, the needed actions for the re-establishment of the legal order «will always have to be de facto measures [...]». Nor could it be otherwise, if one considers that the state of exception follows the logic of 'circumstances', which «calls for finding the appropriate means to obtain a concrete result in the concrete case»[21]. Law pertains to existence, emerges from the event, and rules, because it follows, the concrete situation that has arisen, and adheres to it.

Santi Romano's is also a thought of necessity and exception because hazard, circumstances, social life, empirics, and history count. Precisely because, in the search for the 'essence' of law, Romano's direction, contrary to Kelsen's, is «to ascend from the sphere of Ought to that of Is»[22]: institutionalism can deal with the real, hence with the a-nomaly. Necessity and effectiveness hold together. The immanence of law in the being makes it adaptable to the «condition of things that [...] cannot be regulated by previously established norms»[23]. Here we must recall Romano's sense of necessity that becomes law and *ex facto oritur ius*, to clarify the relationship between fact and law that lives in his institutionalism, in an institution that is concrete order, law, and mortgages its method.

In his anti-voluntarism, Santi Romano looks to society, to the sociality of law, to the legal system as form of society, to the social reality that spontaneously produces normativity, but always staying on the side of law, within law: it is not the law that is

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[20] C. SCHMITT, *Teologia politica: Quattro capitoli sulla dottrina della sovranità*, in ID., *Le categorie del 'politico'*, cit. at 4, 34 and 39.

[21] C. SCHMITT, *La dittatura. Dalle origini dell'idea moderna di sovranità alla lotta di classe proletaria* (1975), 213; similar argument articulated in ID., *Dottrina della costituzione* (1984), 156-7.

[22] S. ROMANO, *Diritto e morale,* in ID., *Frammenti di un dizionario giuridico* (1947), 70.

[23] S. ROMANO, *Sui decreti-legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria*, 1 Riv. Dir. cost. e amm. 260 (1909).

reduced to fact, fact of law, legitimation of the existing, or exercise of power - therefore, to a vacuum of law - but fact is law, the fact exists for the law, it is 'legal reality'[24], where the law is real, not fake, but it is not fact. It may be that in Romano's interweaving the gap of normativity and factuality is not well understood, nor is how one goes from 'Is' to 'Ought', how the fact becomes law, norm, how the normativity of the fact or the factuality of the norm are produced. Romano writes that the State «exists because it exists, and is a legal entity because it exists and from the moment it has life. Its origin is not a process regulated by legal norms: it is [...] a fact»[25].

Unlike decisionism, the social power, the normality of the power relationships, which produces the legal order, is meta-legal. But that fact for Romano is social ordering, which is not an antecedent, but is the identity of law: «there is because there is and when there is but as already law»[26]. For sure Romano is not a sociologist, he does not confuse the conditions of existence and thinkability: law is the pattern of thinkability, and transformation, of the social practices that lie beneath the rule. It almost seems as if the law, retrospectively, legalises the fact as its own foundation, which is therefore never, in and of itself, the origin of and for the law; this, on the contrary, in a certain sense, self-founds its own juridicity because constitutes that fact as its own foundation, hence as law.

However, he does not resort, with a flight forward, to the retrospective logic of the anterior future, whereby the origin is the goal, life becomes law, that is, the organisation that is institution/order/law, materially exceeds the norm, but is not formless, is not natural life, pure matter, bare life, being: indeed it is already formed, structured, limited, where the form of life, without violating Hume's law, is already moulded of normativity, of immanent ought to social practice and the form is full of life.

The Method of a doctrine that opens to the meta-normative, but does not reduce validity to effectiveness, comes by itself. The openness of juridical normativity to the flow of life, to events, to a certain spontaneity of the nature of things, to normality, implies in Romano a devaluation of written law, of the intentional

[24] According to the self-qualification of its realism contained in S. ROMANO, *Realtà giuridica*, in ID., *Frammenti di un dizionario giuridico*, cit. at 22, 204 ff.
[25] S. ROMANO, *L'ordinamento giuridico* (2018), 55-6.
[26] S. ROMANO, *Diritto e morale,* cit. at 22, 69.

deliberation of the legislator as «the beginning of law»[27]; in favour of the customary, oral, involuntary, unconscious law, which does not constitute the norm *ex nihilo,* but establishes it by recognising, discovering, 'inventing', a reality that pre-exists it. At the same time, however, the juridical point of view from which he looks at reality, which is always a bit of artefact, Ought, 'second nature'[28], does not lead Romano to hermeneutics, or to an anti-formalist theory of interpretation as art of continuous, anarchic experimentation that dissolves the theory of sources, or to a casuistic jurisprudence with a synthetic method against the conceptual jurisprudence with an analytical method, but to their coexistence in the jurisprudence of physics and metaphysics[29]. Thus, to a cognitive theory of interpretation that must limit itself to the «simple cognition of the law in force», which is reflected in the intellect of those who want to know it as in a mirror[30], and is anti-normativist in the sense we have said: it admits an evolutionary interpretation of the whole legal system, but, with regard to the individual rule considered separately from the legal system as a whole, considers the (written) law as «matter, not soul»[31]. He is on the side of the letter and not of the spirit[32].

What is demonstrated is that the dispute over Method is always a dispute over the subject, law as fact or norm, as 'Is' or 'Ought', and over the forms of the relationship, or unrelation, between the two.

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[27] S. ROMANO, *L'ordinamento giuridico,* cit. at 25, 79. This is also true, against all appearances, for constitutional law, so much so as to say that the constitutional charter, 'except in the very special case that it represents the epilogue of a revolutionary conclusion, can only have the task proper to all laws, of collecting and declaring the law as it has slowly and spontaneously come into being'.

[28] In the sense in which R. ESPOSITO discusses it, *Vitam instituere. Genealogia dell'istituzione* (2023), 130 ss.

[29] S. ROMANO, *Diritto (funzione del)*, in ID., *Frammenti,* cit. at 22, 86.

[30] S. ROMANO, *Interpretazione evolutiva*, in ID., *Frammenti*, cit. at 22, 119-20.

[31] *Ibid*, 123.

[32] An exception, however, is the concession that Santi Romano made to the spirit and, with it, to a 'second degree' interpretation in public law, against the permanent favour for the letter in private law, in ID., *L'interpretazione delle leggi di diritto pubblico,* Filangieri 241 ff. (1899), now in ID., *Scritti minori* (1950), *passim.*

4. Natural normativity and impossible law

The cards are reshuffled if one poses the ontological question differently and abandons the archetypal Is-Ought polarity. There is distinction, but no separation. The solution is natural normativity, which bridges the rift between nature and culture.

We do not mean to strike the right balance between concept and life, nor to follow the trail, always ready to be beaten, of equidistance of a constitutional theory that avoids an excess of realism and descriptiveness, dissolving itself in the political-sociological science, and an excess of normativism and prescriptiveness that, though allowing the cultivation of methodological purity, leads it to unreality. Here we aim at elaborating on the idea of the end of any dualistic perspective of the matter.

The source of law as a social fact is the person. But the 'nature' of human nature is problematic. It has always been split between biological and cultural profile, biological data, and mental faculties, Is and Ought, leading to a dissolution of the very idea of human nature. In short, in human nature, the dissociation between body and mind, which underlies all the dualisms that have mortgaged modernity, is reopened in an infinite number of regressions. In the first direction, law is determined by the reality of matter, produced by unmodifiable biological-natural data, by the 'physical'. It is a manifestation of naturalistic materialism. There are no metaphysical ideas of justice, there is no good person, individual as moral agent, with a conscience, but human strength, naked life, the biological invariant as an innate pattern. In the other direction, law is in the individual conscience, that is, in a kind of soul separate from the body, in the irreducible mind to body, and is determined by the universal regularities of human subjectivity. It presupposes ideas of good, true, just, which constitute the invariants, the universal constants of what is law, which is law because of an innate dutifulness, because of an internal morality embedded in the conscience of people or socially, culturally, and historically acquired, in the declination of the historicist idealism. In any case, there is contiguity between law and morality, because law is a substance - not an arbitrary and conventional construct - of which a person is originally capable, by culture, as a moral subject. The consequence is the moral reading of the law.

We can, however, deconstruct the dualist opposition between body and spirit, nature and culture, physics and metaphysics, the

biological and the mental, because there is no dualism between brain and mind. From neurosciences and cognitive sciences, filtered through the philosophy of mind, we gather that there is a biological-physical explanation of the innate mental capacities and a natural history of human morality - and, with it, of the typical freedom of an individual. Mental operations can be distinguished from the natural world under a logical point of view, not an ontological one: reducing the matter to the bone, what happens, inside the body, is the evolution of the psychical from the inside of the physical through the neural network[33]. Thus the foundation of the mind and of all the mental, emotional, conscientious, logical and linguistic faculties of the people lie in their unmodifiable biological data: in the inner workings of the body, in the activity of the brain, neither in a separate entity, be it the soul of metaphysics or the I think of transcendental idealism, nor in historical-cultural variables, which dissolve human nature into contingent cultural, historical and social products of marked plasticity. This discourse leads us to say that at the source of law, as a conscious and intentional act, there are the natural needs of people, their bodies, sensations, and passions, which, however, are always intermingled, polemically, with the reason, which for a person is as natural. There are sensations, such as the feeling of body, pain and pleasure, which are facts, but, through the nervous system, reach the consciousness and intellect and become emotions, feelings and ideas, feelings of feelings, and then, by abstraction, embody the idea of pain or pleasure. Thus, in the regulation of the body, in the search for homeostatic balance, one moves from ontology to deontology, from the 'Is' to 'Ought' of an action aimed at procuring pleasure or avoiding pain. The next step transforms, evolutionarily, the 'feeling' of pain or pleasure in an individual's body into good or bad, right or wrong, in the individual's spirit, in the mind that 'conscientises' the body. Without the innate elements of pleasure and pain and their conscientization, one cannot access the next level of the construction of the concepts of good and evil, or at «the cultural and reasoned construction of what *is to* be considered good or evil, in relation to the good and evil that derives from it»[34]. In this sense, normativity is natural. A person is not a legal body, but is the

[33] One benefits from the neuroscience studies of A. DAMASIO, *Looking for Spinoza. Joy, Sorrow and the Feeling Brain* (2023) and ID., *Self Comes to Mind. Constructing the Conscious Brain* (2010), *passim*.

[34] A. DAMASIO, *Looking for Spinoza,* cit. at 33, 178.

unity of body and mind, biology and thought, nature and norm. The leap occurs in the transition from individual to society, to the idea of pain and pleasure (or good and evil) of the many rather than the single. But law and public, community ethics always move from flesh and blood people, thus in a certain way they can also be reconnected to innate elementary structures, to biological data. They were born from these, just as the community grows from a set of individuals, of natural bodies: as an intentional moment of a natural unintentional evolution. It is, then, reasonable that biological imperatives and neurobiological dispositions are common to all the people and have contributed to causing and structuring the social situation and cultural instruments. A natural history of the human social contract and an evolutionary explanation of interdependence and cooperation, of which morality and law are 'specific' forms, in the biologically proper sense, can be hypothesised at the bottom of the most basic cognitive strategy of community organisation. But since a community of people is not macro-anthropic, to understand the social conduct of people in complex communities, and the ontology and social deontology that follows the natural, corporeal one, it is necessary to add the artefact to natural evolution, the 'reason' of the rules set out and accepted by those same people to establish what is good and bad for all. To the homeostatic regulation aimed at the balance of the individual body, we add mechanisms and devices protecting the homeostatic balance of the body of the community, i.e., the legal universals that support and substantiate the forms of social and political coexistence. In this sense, normativity is artificial. The body of the community is a legal organisation.

This is neither reductionism to the feeling of the body nor transcendentality, even less transcendence. Imputation has a background of natural causality. Law, like morality, is determined, at least in part, biologically: the biological substratum limits the possible options, which are many but finite. Thus, not all rights are possible, but only those that correspond to a deontology, which is not given without ontology, to the good and evil felt, perceived, qualified, by the person, unitarily considered as body and spirit[35].

[35] Clues on 'impossible law', starting from Reinach's 'essential connections', in F. DE VECCHI, *Strutture a priori e leggi essenziali dell'ontologia sociale e giuridica di Adolf Reinach*, in ID. (ed.), *Eidetica del diritto e ontologia sociale. Il realismo di Adolph Reinach* (2012), 125, because "we cannot invent social and legal entities 'at will'. In fact, there are laws founding social and juridical reality that impose inescapable limits

At the root of law there is something pre-linguistic, pre-verbal, biological, but the individual always has a choice in the spectrum of what is determined for the human species: it is always a bit of spirit. It is always repetition and difference. The oxymoronic concept of 'natural history' pertains to human nature[36]: human nature, invariant, implies variability of experience, but contingent phenomena are revealing icons of the biological invariance of human species, and the variable is a sign of the invariant, like the social of the biological. A purely neurobiological explanation of the origin of law is therefore not conceivable, because law is not a first reality, a 'natural reality', a corporeal one, but normativity never loses its natural basis. It is a 'second nature', a set of artificial, variable forms, translating invariable impulses, coming from the biological constitution of individuals; where the form breaks the world of the immediate and natural determination of living matter. Thus, the idea of natural normativity subtracts law, on the one hand, from the anti-scientificity and metaphysics of innate ideas, which, as such, have no foundation, and, at the same time, from the arbitrariness of infinite conventions, according to the intuition of naturalistic-evolutionist theories; and on the other hand, from naturalistic determinism, according to the contribution of critical thought and hermeneutics. Translated, the rule is not the fact, brute matter, but is not separable from it to the point of becoming abstract thought.

It is somehow the same movement that runs through linguistics, which, split between the body of language, «biological invariant»[37] and conventionality, idea, artefact, between the biological and the cultural, has discovered the impossible languages, against the behaviourist and culturalist conception of language. This is not surprising, because law is language and language is normative. But here one does not evoke linguistics in an analytical sense, that knowledge of law is analysis of language, logical analysis. We evoke it because there too, the idea of self-

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and conditions on our actions: these are a priori laws, that is, laws that have not been created by us, on the basis of our free will, but exist independently of our will'.

[36] In the conceptualisation elaborated by P. VIRNO, *Quando il verbo si fa carne. Linguaggio e natura umana* (2003), 143 ff.

[37] On whose side stood, as is well known, the cognitive science of Noam Chomsky: here suffice the historical, 'missed', dialogue with Foucault's critical thought in N. CHOMSKY, M. FOUCAULT, *Della natura umana. Invariante biologico e potere politico* (2008).

sufficiency, self-referentiality and originality of linguistics, of languages as infinite, arbitrary, cultural and conventional combinations, artificially constructed systems, is opposed by the idea that impossible languages exist[38]. We still do not know how much and how the structure of language is determined by the architecture and neurobiological functioning of the brain. What, however, seems to be established is that natural languages are not the result of intentionality, of arbitrary conventions or historical and cultural contexts, but have a natural, biological explanation. Artefact and convention determine the meaning and combinations of sounds/words and attributed meanings, but not the structure, the body, of a language. «The 'boundaries of Babel' exist and are traced in our flesh, in the neurophysiological and neuroanatomical structure of our brain»[39] . This calls into question the thesis that reality is only known through the linguistic filter and that different languages correspond to different visions of reality. Methodologically, it follows that linguistics is not pure, self-sufficient, and original, because it depends on neurosciences, just as language depends on the brain and neurobiological structure.

The existence of a biological sub-structure of language, which is the first institutional fact, is consistent with the social ontology that founds - without exhausting - all institutional facts, such as law, the social practice of law, on a material, physical or biological, substratum, that is not socially constructed as a form of *status* function, on which collective intentionality acts[40]. More precisely, the social ontology is the translation of the individual's natural normativity into the communitarian dimension. It thinks of law differently from the way both analytics and continentals think of it: law is neither just a concept, into which the former group converts it, because it has an ontological consistency; nor is it just its practice, or concretisation, as the latter group re-ontologises it. Law is not only matter/body or only idea/spirit. Law is qualification, collective assignment of quality, to a fact, to a matter that 'counts as' in a context. It is an institutional fact, the subject of a collective

[38] The idea is argued and demonstrated by A. MORO, *Le lingue impossibili* (2017); ID., *I confini di Babele. Il cervello e il mistero delle lingue impossibili* (2015).
[39] A. MORO, *Breve storia del verbo essere* (2010), 267.
[40] Against the underivability of *res cogitans* from *res extensa*, of spirit from matter, according to the biological naturalism of J.R. SEARLE's philosophy of mind, *The Construction of Social Reality* (1995); ID., *The Mystery of Consciousness* (1997); ID., *Mind. A Brief Introduction* (2004).

practice of recognition, that qualifies, attributes quality, value and, therefore, normativity to brute facts. Thus, the legislative fact is not a natural fact, which exists in itself, but an institutional fact, constituted *by* and *for* the law: a text, a document, has 'value' of law by virtue of a juridical title, of a qualification, a function, such that the existence of law depends on the rule that, by regulating it, constitutes it. In the limited sense of 'disguising' facts, law is a fiction[41]. It is artificial, because it is a thought matter, but is not false, imagined, invented, or arbitrary. Law qualifies and constitutes institutions and social facts, abstracts them from their singularities, makes anything count as something, and transfigures the Is in the perspective of the Ought, without making them unreal. Artificialism is not an enemy of social ontology: to the material basis, to the brute fact the socially created normative component is added, and stratified. But the qualification is always quality, *nomen*, of something that pre-exists in the real world. Ought is distinct and different from Is, but - Kelsen would disagree - there is no Ought without Is. Law is never a *fiat*, an original theological creation from nil, but is always derived from something existing, from a being, from life, from the concrete matter of human things. *Something*, some physical, material, documentary entity, must always exist for a function to be imposed upon it. The world of institutions is part of the physical world and there are no institutional facts without brute, pre-interpretative facts. In ontological terms, against the dualism between mind and body or the idealistic and, on the opposite side, materialistic monism, the mind is always already a body and the physical and neurobiological element is the causal substratum of the mental one. The flesh is itself *lógos*. The brain 'causes' the mind and the mental representation exists, the ideal is real. Without going as far as radical empiricism *à la* James, where thoughts are made of the same substance things are made of, there is no «metaphysical abyss» between them[42].

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[41] M. SPANÒ-M. VALLERANI, *Come se. Le politiche della finzione giuridica*, in Y. THOMAS, Fictio legis (2015), 95.

[42] J.R. SEARLE, *Mind,* cit. at 40, 105. Schmitt is horrified: to the individualist objection that «before anything else can be spoken of there must be a concrete, flesh-and-blood man», he opposes «the irreconcilability of the abstract and the concrete», «the logical error of letting empirical «assumptions» decide on value», «the error of the crudest materialism, for which the brain is «more important» than thought, since without the brain there is no thought» (C. SCHMITT, *Il valore dello Stato e il significato dell'individuo* (2013), 92, with emphasis added).

As a result, the relationship between fact and norm must be of distinction, not of separation. The norm is the qualification of a fact, with that bit of abstraction, symbolism, and dematerialisation that it implies. But for law, things of real life, whether natural or social, do not disappear, nor become pure human artefacts. In the world of law, events, facts, things, exist as material substrate, but do not (pre)exist legally unless they are named, codified, translated, and qualified. Things exist juridically, in and for law, by virtue of a name, of a qualification that establishes them: here constructivism is allied with materialism, not with idealism, in the sense that matter exists for law through a form, but that form presupposes that the 'thing in itself' exists, is not an 'eternal phantom'[43] and produces powerful real effects.

For law, however, there is no form *and* reality, because form is real and not fake, and the reality of law is the shaping of life, its organisation, qualification, and classification[44]. Law is real because it is never fact: if it were, it would not be given as law. It is neither pure idea nor pure matter, neither perfect, accomplished form or formless life, neither pure nor practical reason. On the first side stand, in different ways, positivism, normativism and political theology, on the second the realism, hermeneutics, the organicism of *Volksgeist*, institutionalism, and so on[45]. But there is no choice between substance and form: in people and in the facts of people there is no separation between the physical order and the mental order because the former is known by and for the latter, but the latter is conditioned, if not mortgaged, by the former. There is no opposition between formalism and realism. This is why we never know whether Kelsen or others were formalists and/or realists: because law is always the quality of a fact. The life of law, its reality, is a constructed, qualified, and codified matter.

Let us draw the consequences of Method in law.

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[43] Reconverting B. CROCE, *Teoria e storia della storiografia* (1947), 44-5.

[44] R. BIN, *Orlando* reloaded*?*, in F. CORTESE, C. CARUSO, S. ROSSI (eds.), *Alla ricerca del metodo nel diritto pubblico* (2020), 396 ff.

[45] It is always complicated to draw up lists and taxonomies. There are overlaps. Thus positivism, from a certain point of view, is realist, as is legal dogmatics and historicism, in the sense of *positum*. Thus, again, the Pure Theory of Law has been drawn now on the side of being, of reality, of empiricism, of efficacy, now on the side of what ought to be, of form, of idea, of validity: there could be a reconciliation because what 'ought' is the 'is' of law, its reality or nature, and the Pure Theory knows positive law and not ideal law. There remains roughly the opposition between form and life.

If law is a 'thing' in the sense of social ontology, then it is body *and* mind, fact *and* value, despite their binary, immune, dualistic opposition. Thus, understanding law means knowing 'something' and not just a concept. It implies - against the closure and abstraction of pure doctrine - that at the origin of law - and origin is a matter that pertains to law - there are always people and concrete human facts, with their unity of body and thought. It also implies that the norms themselves are willed and placed by people for the needs of people, that law is not independent of natural and social reality but 'emerges' from it through the artefact of rules laid down and accepted by flesh and blood people living in societies, the attribution of which may be different but not unrelated to natural causality. It implies - against the transcendent openness of political theology - that a real people exists, whose reality, however, is not transcendent but is the same of the law that establishes how those people decide as a single unit, as a community, attributing to a fact the representative value of the collectivity that binds them all. It implies - against the materialistic and reductionist openness of law to factuality - that law is the quality, the *status*, the value of a social fact, its 'form' and thus it is the thought of freedom, of the possibility and, therefore, of the dutifulness of human behaviours and not of their naturalistic determination.

This does not translate into the prescription of a syncretic method, into the contamination of knowings, which confuses and mixes empirical-experimental forms of knowledge, such as natural sciences, sociology, political science, history, etc., with the logical-idealistic knowledge of law, into a method that confuses factuality and ideality of law. Instead, it prescribes a method that 'knows' that subject, in the very sense of being the means of that knowledge and, therefore, accesses the idea of law as a sustained (and permitted) form by the material, real structure of the person, by the sensations of the individual body that reach the conscience and reason and determine the elaboration of intelligent norms of social conduct.

From an epistemological point of view this means, to make it clear, that the neurosciences, evolutionary theories, philosophy of mind, linguistic studies and so on, are not parallel studies to law, but means of knowledge: they run through it, they complement it. It is consistent with the theory of knowledge that originates from two fundamental sources: the receptivity of representations, the intuitions, and the knowledge gained by means of those representations, the concepts. Without sentience, no object would

be given to us, and without intellect, no object would be thought. Thoughts without content are empty, intuitions without concepts are blind, vulgarising the *Critique of Pure Reason* somewhat. It is equally necessary to make one's concepts sensible and one's intuitions intelligible. The intellect can intuit nothing, and the senses can think nothing. Only from their union can knowledge arise. And union is the relationship between body and spirit, brain and mind; it is the unity of the person. For this very reason, it is a particular instance of the idea of a universal *mathesis*, of a universal structure of knowledge of the facts concerning people - and law is a fact of people, thought but real - whose unique substance is a *continuum* between the constant neuro-biological structure and the ideal component, constructed, amendable, conventional and somewhat arbitrary; between being and ought-to-be.

5. The Constitutional Law method of a representative and popular government

The discourse on the Method of Constitutional Law in a positive system is, however, compared to the general theory of law and to constitutional theory. It is more concrete, sensitive, 'experimentable' and verifiable: it does not concern a concept of law and Constitution, although it presupposes them, and its science is knowledge of the law in force, posited, and of the dogmatic discourse on that law.

From this follows that the method of positive dogmatics is different and poses different questions from the method of general theory or, *a fortiori*, of the philosophy of law, whether this holds that its subject is the concept of law, derived from the use of the term in the discourses of jurists, or it ontologises its subject in the interpretation and application of law, in the judicial practice of the concrete case. It is not a question of taking the stance, in constitutional theory, arbitrarily and partisanly of Ought versus Is, of idea against empirical reality, of legislative as opposed to jurisprudential or sapiential enunciation, of provision as distinct from norm, of grounds instead of propositions of law according to Dworkin, or *vice versa*. It is not about dealing with Method speculatively, deducing it from a philosophical system or model of science rather than another. In fact, seen from the point of view of the positive jurist, the method of constitutional law, while not

neutral, is not free, because it is mortgaged by the decision that grounds positive law.

In short, the Method of Constitutional Law does not depend on a concept (or, within a concept, on a conception) of law. But means depend on content and, if content is positive law, the foundation of validity of posited law indicates the direction of the relationship between method and subject: the subject is not (in this case may not be, unless compromising the foundation of validity of posited law) produced by the thought, by the method, in Neo-Kantian sense, nor decided by the knowing subject in hermeneutic sense, but the former conditions the latter or, in any case, the Method is not indifferent to the subject[46] .

The subject determines the Method, which must not only be true, but valid and true. And if it is not valid, it is not even true. The legitimation of the method of positive law can, in fact, only derive from the principle of validity of positive law, not from the truthfulness of the arguments of this or that general theory. Put differently, to avoid its ungroundedness in the system laid down, the method of knowledge and understanding of law must be conditioned by the principle of validity of the written, self-founding Constitution, deliberated intentionally by a representative assembly and amendable only with a predetermined form (and not by life, individual or social conscience, or the spirit of times) as well as by the legislative acts derived from that Constitution.

Of course, the relationship between subject and method is always somewhat bi-directional, like the relationship between body and spirit, brain and mind: the cognitive process is never the analysis of an initial datum, but of the transition from a (more or less) indeterminate subject to a (more or less) determinate one, through a process of synthesis that never reaches completion. And it may be that juridical dogmatics, as a socially recognised and accepted juridical culture, has constituted its subject to some extent, which is therefore not exactly such. But in any case, Method in the knowledge of positive law pertains to something that has an

[46] This conclusion is compatible, in the general theory of law, with Bobbio's methodological positivism: as for the positivist method, «the discourse is very brief. Since science is either a-valutative or it is not science, the positivist method is purely and simply the scientific method, and therefore it is necessary to accept it if one wants to do legal science or theory of law: if one does not accept it, one does not do science, but philosophy or ideology of law»: N. BOBBIO, *Il positivismo giuridico* (1996), 245 ff.

existence of its own. Thus, who knows the positive constitutional law, whether paltry or opulent, and not the ideal one, should not autonomously be either normativist, or formalist, or realist, or interpretivist *à la* Dworkin, or casuist, or sceptic or else: they should be what the law to be known prescribes, otherwise they would not validly participate in that community of discourse.

Constitutional law is not unrelated to the Method in private law. The former arose from the latter, like a community from a set of individuals, flesh and blood people, so the two are not co-originated. Public law has different rules, because humans, with their will and judgement, with their unity of body and mind, exist in nature, while collectivities, more precisely human organisations, such as the State, are artificial, constituted by law. Public law is symbolic, representative, always refers to something that transcends the particular, the individual, just as the *ideal,* normative, general will transcends the *existing* particular wills. But it makes sense that the former cannot be given without the latter and that the method of knowing them is, roughly, the same.

More specifically, it is the Method of law of a representative and popular government. Here, the Constitution is also (if not exclusively) a form of law: it is constructivist and constituent power of a representative assembly of the people, hence it is Ought, beginning, and not Is, execution. It is a constitutive form. The legislation derived from it is, likewise, deliberated by the elected representatives of sovereign people: it is an extension within the order of the original constitutive form. It follows from Articles 1, 70 and 101 of the Italian Constitution that the 'value' of the legal rules, the representative form, in a popular government is the Subject and act of enforcement and execution, standing in a position of 'subjection', of what bears the law. The Constitution is not anarchic, it does not 'experiment': in Constitutional Law, unlike the general theory of law, statements must be distinguished according to their authors, where the statement which the jurisdictional act consists in says (does not make) the law and depends on the statement that makes (does not say) the law.

This implies that in the theory of constitutional law one does not 'decide', in theoretical terms, to do legal science in the Kelsenian sense, namely that the law theory, to be scientific, must be descriptive, ensuring the correspondence between the descriptive statement and what it describes, instead of prescriptive, constructive, and interpretative. One cannot stay, a *priori*, on the

side of a descriptive against a normative constitutional theory, precisely because the tension between law as it is and law as it should be concerns the concept or the conception of law and the general theories of it, but not positive law. And the science of law, if it must be about *that* law, should pertain to the necessary and sufficient conditions of truthfulness for a law provision, which, with respect to the law laid down by the legislator, can only be cognitive and not constitutive of the validity of provisions. Positive constitutional law prescribes that the discourse of the jurist be *on* law, cognitive, and not *of* law, normative or interpretative[47]. This is not, however, to legitimise the existing; rather, to introduce a further meta-linguistic level, a new meta-language that holds as subject the legislative and jurisprudential discourse *of* and *in* law, ordering and criticising it with respect to the positive parameter and to that extent, which is inherent to the neo-Kantian productivity of thought, somehow produces its own subject, while keeping a firm distinction between descriptive and prescriptive statements.

This is why the Method of constitutional law lays neither on the side of the analytics nor of the hermeneutics: not of the former, because positive law indicates which method is valid and which is not, and does not reduce the discourse on law to a, more or less life-sized, map of it; not of the latter, whose method is not admissible when positive law separates prescriptive from descriptive language depending on its author (legislator or judge) and places a discontinuity between the activity of describing and the subject to be described, that is, deliberated law. Against the analytics, the juridical science of positive constitutional law - without becoming politics of law[48] - is not only realisation and ascertainment of what legal practitioners do, but judgement, evaluation, whether what they do - in particular, what the legislator deliberates and what judges decide - is right or wrong, correct or incorrect, with respect to valid law, or positive constitutional law. Against the hermeneutics, constitutional science can criticise the law with

[47] I reject the hermeneutic thesis of G. ZACCARIA, *Comprensione del diritto, e non sul diritto*, 1 Riv. fil. dir. 125-6 (2015), which, however, preordained as it is to avoid the abstractionism of those who apply general conceptions from the outside to a specific field of human experience, pertains to general theory and not to historically and positively deliberated knowledge of the law.

[48] And it becomes the politics of law if criticism enters the space of legal indifference under positive law.

respect to the constitutional parameter and the solution of the concrete case, whereas in hermeneutic environments an external control on the correctness of interpretation is unthinkable, given that just law is its interpretation and application, the correspondence between the Ought of the rule and the Is of decided case.

It is not a valid argument against cognitive science of positive law the realistic observation that, when describing, an evaluation of the description is unavoidable and, therefore, describing how the law is always implies prescribing how the law should be, constructing it. It may be that the descriptive/prescriptive separation does not factually hold and that the theorist who knows law always formulates an interpretive theory, in the sense of normative[49]. But that fact says nothing about the tension to what ought to be.

Combining general theory and positive constitutional law, the methodological conclusion is as follows: we know law as a qualified fact, as *forma rei*, as matter and idea, as body and mind, as fact and value, as something that 'counts as' and we know it as positive, deliberated law of a representative and popular government. Law opens and leaves self-referentiality without flowing back into transcendence; at the same time, being opened on the side of immanence, of human nature and social facts, it emerges from the alternative between realism and normativism in solving the problems of constitutional law. That alternative pertains to the concepts of the general theory of law. If the Written Constitution as positive and enforced law bases its validity on a form/norm, that alternative is dissolved. But that is not a neurotic form, a nihilistic power, unrelated to matter and to the people, in flesh and blood, who have deliberated and accepted it: it is, indeed, a form of natural normativity.

6. The social ontology of the Written Constitution

The relation between life and norm gets more precise in the constitutional *document*, in the *writing* of Constitution[50]. It is word made flesh, in a certain sense.

[49] In this regard, see V. VILLA, *La metagiurisprudenza analitica e la dicotomia descrittivo/prescrittivo*, in AA.VV., *Studi in memoria di Giovanni Tarello* (1990), 617 ff.

[50] In defence of the *written Constitution* against the *unwritten Constitution*, of *constitutional textualism* against the *supplemental doctrine* and against

It is the written fixation of Constitution that leads to consider it as a law[51], in the specific sense of an act intentionally and deliberately posited by a legislative authority against the tradition and conservation, which is orality. The written Constitution is intentional, not 'evolved' or revealed. It is not law of nature, because it does not follow the 'nature of things': it does not arrange what a thing already is, what is realised and accomplished, but deliberately makes the thing subsist. It is Ought, destination, prescription and not Is, execution, realisation. It is law before being observed: indeed, it *is* law because it ought to be it. And the «written record of law» is necessary precisely «where, following a sudden change in power relations, there is no secure tradition and the articulation of power advocated by the legislator is called into question»[52] .

Surely, the humanist studies on the ancient world, notably Hebrew and Greek, have shown that the writing of law in its origin is conservative[53]. It is material support physically unaltered. But those same studies have proven how the written law overcame the ideology of immutability that it bore in-written and took the practical direction of innovation. They have revealed that writing is the cause (or the concomitant cause) of the conscious change of laws and that, in itself, the gesture of writing always evokes a crisis, a movement in progress; therefore, something new, with respect to what exists, to what is not written: otherwise, there would be no need for the 'making' of writing. What is more, writing is separate and distanced from the living experience, it is de-contextualised in the precise sense of being less immersed in the existential flux than the spoken word, which is present and immediate. But this distancing allows the written form to make logic, conceptualise, objectivise and order reality. And precisely because it is autonomous with respect to what exists, writing allows reality to change.

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compromising attempts to dissolve the former in the latter, T.C. GREY, *The Constitution as Scripture*, 37/1 *Stan. L. Rev.*, 1 ff. (1984).

[51] This is proven by the fact that, in constitutionalist doctrine, the criticism of the 'reduction' of the Constitution to law is at one with the devaluation of the writing of the text placed.

[52] H. HELLER, *Dottrina dello Stato* (1988), 415.

[53] G. CAMASSA, *Scrittura e mutamento delle leggi nel mondo antico. Dal Vicino Oriente alla Grecia di età arcaica e classica* (2011), *passim*.

Coherently, after the Revolutions of the 18th century, the 'making' of a law or Constitution, the act of writing a document that is law, has been the properly revolutionary act of a political community that, in representative form, freely decides its own destiny according to a conscious project. The written deliberation of a Constitution by the people gathered in assembly is, therefore, construction, normativity, abstraction, performativity and change; not immobility, recognition, nature, tradition, ascertainment, concreteness, repetition and preservation. The sequence that sums it all up is as follows: the established law, deliberated by the people who constitute a given political community, is writing and writing is artefact and change. It lies on the side of what ought to be.

But since there is no Ought without Is, it does not logically imply a devaluation of life, experience, and application, and, therefore, the sclerosis of the written Constitution. With a bit of approximation: if writing is reflexive and distancing, if it is not fixity, the Constitution will not only be the written one but, precisely because it is written, also the living Constitution, because/provided it is included in the written one. The life of the Constitution is precisely its writing. Unless the 'natural' purpose of *written Constitution*, and, with it, of the origin is to prevent change and fix its contents at the time of the Beginning, according to Justice Scalia's argument[54], the juridicity of the written constitutional document does not exclude *per se* that of the living, 'lived', Constitution.

It does not, however, prescribe the obliteration of the constitutional *charter* in the name of life and experience, or of the pretext, extra-text, and context. Paper, precisely because it is written, engraved, is integrated with its support, with the material entity, with the document that bears it and that comes before what is said about it, before the practices and interpretations. Paper is more fragile, more precarious, than stone or the skin of parchment, which could be engraved, erased and rewritten, but still has its own hardness, its own consistency.

This implies that the living Constitution, compatible with the written one and that recognises its vigour and validity, is the one that stays and must stay linked, intertwined, with the text[55]. Were

[54] According to the *new textualism* of A. SCALIA, *Common law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ID., A *Matter of Interpretation. Federal Courts and the Law* (1997), 25.

[55] L. PALADIN, *Le fonti del diritto italiano* (1986), 143, justifies the validity of the

this not the case, it would lead to the prevalence of Is over Ought, of efficacy over validity. Borrowing from structuralist semiotics, albeit far from the neurobiological conditioning of language, one could say, with Roland Barthes, that textuality, the «pleasure of the text», holds its own *reality*.

Here is, then, the *writing* of the Constitution as an argument in favour of the letter and not of the spirit, evangelically and naturalistically the word that became flesh, the written thing and the visible text as a sign, not of the signified thought, of the provision and not of the norm. But the ontology of the written document, with the solidity of the inscription, of the material trace, is, more properly, a form of ontology of social facts[56] than a materialistic ontology; or, put differently, its materiality is of the order of the institution, it is institutional. Document derives from *doceo*, meaning that what it shows or represents is a fact. And a document is properly a 'thing' and not an 'object' because things do not exhaust themselves in the objective and materialistic dimension of objectivity: they are physical objects, connotated by their relationship with a subject and by irreducible properties to those of natural objects, such as amendability; but above all they necessarily presuppose conceptual schemes, because social objects exist only to the extent that some people think they do[57]. And, contrary to the distinction between sensibility and thought, intuitions and concepts, the real thing, which in the otherness of its datitude stands in front of us, 'against' us, only exists in the world of humans, who let it 'be' as such and, encountering it, experience

norms of only the living Constitution in solidarity with (and not separated from) the written Constitution, since «physiologically understood, the interpretive and applicative activity, in its very varied forms, cannot generate a Constitution squared, opposed and superimposed on the written Constitution».

[56] According to the theoretical proposal, indebted to Searle, of M. FERRARIS, *Documentalità. Perché è necessario lasciar tracce* (2010), *passim* and ID., *Manifesto del nuovo realismo* (2014), *passim*, whose enemies are numerous and well-equipped: Platonism, Kantian transcendentalism, Hegelian idealism, postmodern constructivist philosophies and hermeneutic scepticism.

[57] Shares the linguistic distinction drawn by Ferraris F. GALGANO, *Le insidie del linguaggio giuridico. Saggio sulle metafore nel diritto* (2010), 17, footnote 21. He shares it in substance, even though he discusses material, physical objects as things independent of our beliefs and "non-material things", "social things endowed with meaning", which - like language and law - have a material substratum but exist by virtue of shared beliefs, readings, and the meanings of material signs that are, therefore, other than matter, M. JORI, *Esistenze. Appunti di Metafisica giuridica* (2022), 38 ff.

themselves, as subjects[58]. Thus, things are social facts and, when referred to law, institutional facts. At the same time, documentality, or disposition as a thing, shuns hermeneutics, the Manichaeism of spirit, the collapse of ontology, of the sphere of being, of reality, onto epistemology, the sphere of knowing. The truthfulness of the thing, its dose of selfhood, is, in fact, a powerful antidote against the constitutiveness of the subject. In short, in the theory of social ontology, considering the disposition to be applied as a thing refers to a weak or moderate textualism, which relates interpretation to a text, an inscription, or to a letter, but opens the partiality of interpretation[59] without slipping into the sceptical drift of the spirit, of the living law.

«The life of things»[60], however, has the theoretical force to ground and justify a more decided ontology of the constitutional document. Surely this is not given in the separation of object and subject, neither as a mere presence nor as a pure symbol, because social and natural relations are interwoven in it. Things do not exist in nature but belong to the world of value. But the meanings that things enjoy, their surpluses of sense, «do not form an improper and extrinsic addition»[61]. In the language of the intentionality of the thing, there are no subjects that are «detached from the world» and added «a posteriori to the object»[62]. Things, precisely because they are not objects, are neither manipulable nor dominatable nor can they be instrumentalised by subjects who are such in relation only to objects but not to things. Rather, the thing «compels thought to inquire in a certain direction»[63], refers to contents that unfold and 'emerge' from the thing, which indicates how to make it speak for itself. It is the self-movement, the automatic development, of the thing, in which one must 'get lost' to express its essence, which can be summed up in the conclusion that «in grasping the thing, in

[58] On the question of the thing, in the sense of the compound word *Gegen-stand*, in Heidegger's critique of Kant, V. VITIELLO, *Immanuel Kant. L'architetto della Neuzeit. Dall'abisso della ragione il fondamento della morale e della religione* (2021), 360 ff.

[59] M. FERRARIS, *Documentalità,* cit. at 56, 236 ff.

[60] As reconstructed in the history of philosophy by R. BODEI, *La vita delle co*se (2014).

[61] *Ibid*, 13.

[62] *Ibid,* 37.

[63] *Ibid*, 15.

going beyond the mute object, thought lends voice to the «substance», to what it feeds on in understanding»[64].

In the theory of the interpretation of the Constitution/law, the ontological, 'concrete' objectivity of documentality serves as a theoretical bridge and an ideal model against the arbitrary subjectivity deprived of constraints of dependence on reality, on the thing. Santi Romano wrote that (written) law «is matter, not soul». The law is not its interpretation; the book, with Jabès, is not its commentary. The provision, the thing, the writing, do not collapse on the norm, the thought/idea, the voice. The written thing privileges the ontology of a text against the epistemology of a subject. Against De Maistre, what is essential is what is written. Just as, realistically, epistemology derives from ontology because there can be no knowledge without being, so the interpretation and application of the law comes after - logically and chronologically - the provision of law, the production of the thing, of the written sign that grounds and mortgages the norm, the thought, after the deliberation of what *matters as* a legislative fact. Returning to natural ontology, the mind is distinct from the brain, but first it is body, its biological substratum. And this theory of mind in utterance interpretation is not materialist or physicalist reductionism, because the thing is thought matter, therefore, there is interaction and hybridization between brain and mind. It is not ontological dualism, because there is no text and, detached, its meaning is signified as if it was something else[65]. The signifier, the thing, the fact, determines its own meaning, the thought, the norm, because it carries it within itself, it expresses it, it brings it out. The reality of law is the provision, which is constitutive of thought. Meaning is not a result created by the interpreter but is already contained in the objectified beginning of the text, it is - going back to the philosophy of mind - an 'emergent property' of it. It is not impressed with a theological movement, from above to below, but, on the contrary, it ascends from things. In naturalistic-evolutionary language, it is a form of 'emergentism'. In legal language, the provision is always already the norm.

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[64] *Ibid*, 17.

[65] Against ontological dualism between provision and norm, legislative enunciation and jurisprudential or sapiential enunciation, see M. LUCIANI, *Interpretazione conforme a Costituzione*, IX Enc. dir. 413 (2016).

THE NEW PUBLIC PROCUREMENT CODE: A WAY TO SIMPLIFY?

Marco Macchia *

Abstract
Each Code is a creation of its time, responding to the most pressing needs of the historical moment in which it was adopted. Unlike the previous codifications, the input of the Third Public Procurement Code does not stem from the need to transpose European directives into national law, but rather from the need to adapt the procurement system to the reforms imposed by the EU's Next Generation Plan. The Code is a step towards fulfilling one of the commitments of the NRP, which is to simplify and speed up procurement procedures. This article will focus on these issues to examine how they cut across and inspire the new Code in different ways. Before doing so, it is important to pay attention to what has been presented as the most important innovation of this codification, namely the definition of twelve general principles which are intended to introduce the subject matter and define the foundations of the codification choice at the outset.

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1. The different stages of codification

Codification is not simply a matter of bringing together several laws in a single book in order to unify provisions that were adopted at different times. Codification means creating a stable

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system by organizing the rules into a coherent whole[1]. And a coherent system is essential to achieve the objective of legal certainty. Thus, compared with a single text, codification makes it easier to interpret a rule of conduct because the rules are bound together by a single vision. This phenomenon is part of what is known as the logic of "codification by constant law", which has given rise to a large number of specific administrative codes. These micro-legislations (codes on the environment, cultural heritage, code of expropriation for public utility, digital governance, public procurement, transparency, and so on) stand at the antithesis of the conventional idea of law-making. They are, in fact, a modern response to forms of decodification[2].

In the field of public procurement, it is easy to see that the need to "tidy things up" is all too frequent, to the point where the construction of a stable system seems a chimera, given that in little more than fifteen years there have been as many as three different codes. And this is certainly not well-matched with the objective of legal certainty that the codification programme seeks to achieve.

The creation of three different codes to regulate the phenomenon of public procurement contracts is a sign of excessive regulatory fibrillation, which has a profoundly unstable effect on the activities of contracting authorities and economic operators. But it is also a signal of the importance of this regulation, which moves a significant amount of economic resources, roughly equivalent to more than a tenth of GDP.

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[1] According to G. Tarello, *Codice (teoria generale)*, *Enc. giur.*, *ad vocem*, 1, a code is "a book of legal rules organized according to a system (an order) and characterized by the unity of subject matter corresponding to a sector of the legal organisation, in force for the entire geographical extension of the area of political unity (for the entire state), addressed to all subjects or subjects of the state political authority, desired and published by this authority, abrogating all previous law and not supplementing it with pre-existing material, as well as intended for long duration". On the subject, S. Cassese, *Codices and Codifications: Italia e Francia a confronto*, *Giorn. dir. amm.* 95 (2005); B.G. Mattarella, *Codificazione*, in S. Cassese (ed), *Dizionario di diritto pubblico* (2006), II, 937.

[2] N. Irti, *L'età della decodificazione* (1999). On the subject of codification, particularly in the field of public contracts, B. Marchetti, *I contratti pubblici in Europa: tra uniformità e differenziazione*, in G. Falcon (ed), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione* (2009), 291 ff.; M. Fromont, *L'evolution du droit des contracts de l'administration. Differences theoriques et convergences de fait*, in R. Nougellou, U. Stelkens (eds.), *Droit comparé des Contrats Publics. Comparative Law on Public Contracts* (2010), Part. I, 63 ff.

Indeed, public procurement is one of the main drivers of economic growth, job creation and innovation. And it plays a crucial role in the construction, energy, telecommunications and services sectors[3].

It would be a mistake to think that the three codes are basically the same, because the key words are different and the rules applied are therefore dissimilar. Each code is a creation of its time, responding to the most pressing needs of the historical moment in which it was adopted. For example, European legislation has introduced the philosophy that the application of internal market principles to procurement will ensure a better allocation of economic resources and a more rational use of public funds, and will enable public bodies to obtain products and services of the best available quality at the most advantageous price through tighter conditions of competition. While the periods of harmonization through EU legislation have been inspired by the need to effectively open up the internal market, to frustrate the preference given to national suppliers, to open up competition in certain key industries and to reduce administrative costs, national legislation has also extended regulation to other objectives[4].

The 2006 Code (Legislative Decree No. 163/2006) tried to apply the principle of competition between economic operators in its purest form. The subdivision into lots touches a crucial element

[3] P. Cerqueira Gomes, *EU Public Procurement and Innovation: The Innovation Partnership Procedure and Harmonization Challenges* (2021), highlights as the innovation partnership is the newest procedure added to the EU legislative package for procurement in 2014. This procedure is intended, among other things, to provide more flexibility and, consequently, to facilitate the creation of innovative products, services or works to satisfy a specific public need. Starting from the position that the EU public procurement regime has its legal basis internal market provisions, Cerqueira Gomes shows that the internal market must be seen as a market of values. Translating this into public procurement, he points out that a more balanced approach between economic and non-economic factors is needed and holds that promoting innovation can play a crucial role in "increasing the competitiveness of the European economy in an atmosphere of sustainable, smart and inclusive growth". He concludes that innovation procurement is a key tool in the EU's wider innovation policy.

[4] According to A. Sanchez-Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*, 22 *European Public Law* 377-394, (2016), public procurement reform and best practice could make significant contributions in terms of reducing administrative red tape, supporting innovation and green policies and, more generally, in boosting the competitiveness of EU businesses (particularly, SMEs), which are paramount goals of the Europe 2020 strategy.

in the dynamics of public procurement management, i.e. the delicate balance between the need for cost-effectiveness (pursued through aggregated forms) and the protection of competition and SMEs (pursued instead through fractional forms). The 2006 Code established the rule of the unitary nature of public contracts, while the subdivision into lots was permitted only exceptionally, in the case of special needs, on condition that an administrative advantage was guaranteed, provided that the lots were endowed with an autonomous functionality and in any case after thorough study and precise justification. It is only in 2011 that the perspective is reversed[5]: administrations must, where this is possible and economically advantageous, subdivide contracts into functional lots in order to facilitate access for small and medium-sized enterprises, and the contracting authority must state in the award decision the reasons for not subdividing the contract into lots. It is currently considered that the subdivision of a tender procedure into lots favours the opening up of the market to competition and enables small and medium-sized enterprises (so-called SMEs) to submit tenders, since it allows the contracting authority to require participation conditions which, since they are parameterized to individual lots, are necessarily less burdensome than those which, in terms of economic and performance capacity, would be required for participation in the entire tender procedure, the latter being requirements which only large enterprises have[6].

The 2016 Code[7], on the other hand, is built around other keywords. The idea of giving preference to the most efficient companies in the market, while respecting the rule of equal treatment, remains, but the principle of transparency and the

[5] By Article 44 of Law Decree No. 201 of 6 December 2011. On many aspects of the EU regulatory framework for public contracts, R. Caranta, G. Edelstam, M. Trybus (eds), *EU Public Contract Law: Public Procurement and Beyond* (2013).

[6] The contracting authority may derogate from the rule of division into lots for justified reasons, which must be punctually expressed in the contract notice or in the letter of invitation, as an expression of discretionary choice (see Consiglio di Stato, Sec. V, 16 March 2016, no. 1081), the concrete exercise of which must be functionally consistent with the balanced complex of public and private interests involved in the tender procedure; the power itself remains delimited not only by specific provisions of the Contracts Code, but also by the principles of proportionality and reasonableness (see Consiglio di Stato, IV, 19 June 2023, no. 5992). On this topic, S. Panagopoulos, *Strategic EU public procurement and small and medium size enterprises*, in C. Bovis (ed), *Research Handbook on EU Public Procurement Law* (2016), 268.

[7] Legislative Decree No. 50/2016.

reduction of the risk of fraud and corruption gain in importance. We are entering a new season with the fight against corruption and the risk of potentially corrupting phenomena in public procurement becoming the banner under which many of the contractual rules pass. We are thinking of the strengthening of the ANAC directives, of the activity of guidance and regulation, which is manifested in the adoption of types of notices, specifications, contracts and other tools known as "flexible regulation", with the aim of promoting efficiency, developing quality and supporting the action of the public contracting authorities.

The third code of 2023 arises again in a different context[8]. Contrary to the previous codifications, the input does not stem from the need to transpose European directives into national law, but rather from the need to adapt the contracting system to the reforms imposed by the EU's Next Generation plan. In this respect, the Code is a step towards fulfilling one of the commitments of the NRP, which is to simplify and speed up tendering procedures. The underlying idea is that tenders and concessions can act as an important lever for the country's economic development to achieve the standards of the plan agreed with the European Commission[9]. Simplifying them and

[8] In implementation of Delegated Law No. 78 of 21 June 2022, Legislative Decree No. 36 of 31 March 2023 was adopted, containing the new 'Public Contracts Code' for works, services and supplies.

[9] For an interventionist approach and instrumental utilization of procurement for the promotion of horizontal policies, S. Arrowsmith, P. Kunzlik (eds), *Public Procurement and Horizontal Policies in EC Law: General Principles*, in *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (2009), 9. See also S. Arrowsmith, *Horizontal Policies in Public Procurement: A Taxonomy*, 10 *J. Pub. Procure*. 149 (2010). Conversely, «it must be stressed that public procurement can only make such a contribution to economic development, including socially responsible and sustainable growth, by promoting the maximum degree of competition and being open to market-led innovation, instead of trying to mandate or 'drive' such innovation, social orientation, or 'greening' of procurement», S.L. Schooner, *Commercial Purchasing: The Chasm between the United States Government's Evolving Policy and Practice*, in *Public Procurement: The Continuing Revolution* (2003), 137. «The 'strategic' use of public procurement as a regulatory tool can well create barriers to the internal market, diminish incentives for business participation, and reduce the overall effectiveness of this essential mechanism for the proper functioning of the public sector. Consequently, only by avoiding distortions of market dynamics can procurement contribute to economic growth. Other policy goals are best left to specific regulatory regimes of general application, such as

making them more up-to-date is therefore an essential means of achieving this objective..

With regard to its genesis, it should be noted that the draft Code was drawn up by a special commission set up by the Consiglio di Stato. This commission included not only members of the Consiglio di Stato and administrative judges, but also economists, lawyers, university professors, statisticians and an "*Accademia della Crusca*" scholar, in order to bring the linguistic style into line with the best practices for drafting regulatory acts[10].

The main consequence of the adoption of this regulatory drafting technique can be seen in the fact that the codified text incorporates many jurisprudential orientations, thereby transforming rules of jurisprudential origin into primary sources. Just think of the distinction between automatic and non-automatic grounds for exclusion, or the discipline of special procedure for remedying formal deficiencies in tender bids in a comprehensive key as it was formed in the case-law of administrative judges. The translation of the choices into technical-regulatory terms can also be seen in the accompanying report, which has been drafted in a timely and precise manner, to the point of taking on the outlines of a real operating manual, which - as the Commission itself states - has a "guiding function", at the same level as the non-binding ANAC guidelines for the previous code.

Before examining the most controversial themes that run through the provisions of the Third Code, it is worth mentioning the qualification of the text as "self-applicable". At first sight, it is not clear what exactly is meant by this expression. It is obvious that correct implementation by contracting authorities and economic operators will always be crucial to the success of the reform. Once this uncertainty has been removed, a "self-implementing" code must be understood as being immediately valid, i.e. requiring no further regulatory intervention, no implementing rules.

The reference is directly to the ANAC Guidelines, which in the Code no. 50/2016, were the implementing acts containing the operational indications for the application of the text of the Code. In the current system, the seventeen guidelines and fifteen

standardization, labour, environmental or tax legislation», A. Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2015), 101.

[10] L. Carbone, *La genesi del nuovo Codice*, in C. Contessa, P. Del Vecchio (eds), *Codice dei contratti pubblici* (2023), 9 ff.

regulations adopted during the years in which the Code was in force have been replaced by thirty-five annexes included in the Code, which favours the unitary nature of the text. The annexes are of a modifiable nature, or rather of a "yielding" force: in their state, they are primary rules with the same status as the legal document in which they are incorporated, but, being more susceptible to change, they can be amended using the procedure provided for government regulations[11]. The procedure for amending the annexes involves changing their legal nature, from laws to executive regulations, but at the same time does not entail losing their status as "annexes" to the Code. The text reiterates that the regulation replacing the annex, adopted by decree of the President of the Council of Ministers, "replaces it in its entirety, also as an annex to the Code".

To sum up the main lines of Code No. 36/2023 correspond to three new key words. These are: the reduction of the number of contracting entities, simplification and digitalisation. This article intends to focus on these themes in order to examine how they cut across the new Code in various ways and inspire it in several parts. Before doing so, however, it is important to pay attention to what has been presented as the most important innovation of this codification, namely the definition of twelve general principles with which it is intended to introduce the subject matter and define the foundations of the codification choice at the outset.

2. General principles as a form of regulation in the new Code: objectives and functions

General principles are "those statements which express a normative content with a strong core of values, capable of going far beyond the mere, albeit constant, reiteration of the specific normative framework resulting from the summary formulation which is, instead, proper to the general rule. They are also capable of redirecting the application of the rule itself when, according to the applicable criteria of interpretation, it no longer appears adequate to the changed economic and social context, and, in any case, of programmatically directing it towards new objectives" [12]. In contrast to general rules, which are rules whose content is

[11] Article 17 of Law No. 400/1988.
[12] Tar Sardegna, sec. I, 9 May 2018, No. 410.

supported by uniform requirements, principles are rules which, although supported by uniform requirements, do not exhaust their operability in themselves. Instead, unlike the former, they are the basis for other more or less numerous rules[13].

A principle is not simply a very general rule, but a different mode of regulation, which requires different practical attitudes on the part of practitioners. Three different functions can be deduced from this technique: to fill gaps, to provide a guiding parameter to the interpreter, and to regulate the dynamics of the organisation of the community, given the pluralistic or composite nature of the system.

The new Code devotes considerable space to codifying the general principles of public procurement. This is a cultural signal. By not being circumstantial, the principles are stated without hierarchy or precedence. The inclusion of a value content makes it clear how they can conflict with each other. To what extent can sustainable development procurement restrict market access? Under what conditions can subcontracting conflict with trade security? For these reasons, the principles need to be weighed up in their concrete application, with assessments typical of a rationality test, according to a balanced composition of the interests at stake.

The fact that the legislator of the Public Procurement Code has codified the regulatory principles of the system is by no means a novelty. However, Code No. 50 of 2016, in line with previous codifications, only mentioned the "classical" principles identified by the jurisprudence on the subject and derived from the consolidated European rules. These are rules that have grown over time and that have always governed the procurement procedures of public administrations, namely the principles of economy, efficiency, timeliness and fairness for the award and execution phases of works, service, supply and concession contracts; free competition, non-discrimination, transparency, proportionality; and publicity for the award phase only.

On the contrary, the new Code opens with the declination of new principles in the sector, incorporating a value content which is intended to focus on the "overall vision" that must inspire the text of the Code, according to an organic model[14]. Attempting to

[13] Constitutional Court, 15 July 2005, No. 279.

[14] As argued by G. Napolitano, *Il nuovo Codice dei contratti pubblici: i principi generali*, *Giorn. dir. amm.* 287 (2023), legislative decree No. 36/2023 decided to

identify some differences and dissimilarities between the traditional principles and the new ones, the former appear to be the fruit of tradition, derived from jurisprudence, unsubstantiated, with a high degree of generality and affirmed in an absolute manner. The new Code, on the other hand, opens up new frontiers since the principles it codifies generally have the opposite characteristics to the traditional ones. That is to say, they are novel and contain formulations that were previously only occasionally known from case law; they are circumstantial and not general, i.e. accompanied by detailed rules; and they are reaffirmed in a relative manner, indicating the limit beyond which the guarantee ceases or is subject to an exception.

As mentioned above, the new Code contains many new principles that influence the body of law[15]. In the past, the

open the new Code with the affirmation of principles that cover the entire subject matter of public contracts in keeping with the natural vocation of a code to construct an organic regulatory system. In this way, the principles aim to express the overall 'vision' of the regulation of the subject matter which, as such, guides the interpretation and application of the individual provisions. It may thus well be said that principles express a sort of legal 'surplus value' with respect to individual rules. Recourse to the principles, moreover, fulfils a function of completing the legal system (even though the Code identifies two different sets of rules of reference to fill in the gaps) and of guidance/guarantee for the public and private interests at stake.

[15] According to A. Sanchez-Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*, cit. at 4, 380, «despite the clear intent to reconcile competition and economic efficiency with environmental and social considerations as part of the move towards a social market economy, and even bearing in mind the instrumental importance of procurement in the delivery of the Europe 2020 strategy, such general approach to the design of a pro-competitive procurement setting as a tool to boost efficient public expenditure was also followed in the preparation of the new public procurement rules. The European Commission clearly stressed that 'to increase the efficiency of public spending, it is vital to generate the strongest possible competition for public contracts awarded in the internal market'. Not surprisingly, the resulting Directive 2014/24 24 included competition as one of the general principles of the redesigned EU public procurement system. Following these cues, this article takes the view that the principle of competition is the main tool in the post-2014 procurement toolkit and the moderating factor in the implementation of any horizontal (green, social, innovation) policies under the new rules – that is, that competition remains the main consideration in public procurement and that the pursuit of any horizontal policies, including those aimed at delivering the Europe 2020 strategy, need to respect the requirements of undistorted competitive tendering. To substantiate that claim, the article focuses on the

principles were considered in their own right and were stated in relation to the phases of the award and/or the performance of the contract. Now, on the contrary, the classical principles are cited to explain the 'new' principles or to indicate how they should be implemented. Whereas in the past, the text was limited to stating the principles, the current text is more extensive. It devotes (or almost devotes) a specific article to each principle, made up of several subparagraphs, and declines to explain them. In other words, they are configured as "explained principles" or "preceptive principles".

These novelties deserve to be highlighted because, in the light of them, it is clear how, when placed in parallel with the traditional principles, the new principles appear to be the fruit of a very different vision, to the point of being configured in an unprecedented legal framework.

The first twelve articles of Legislative Decree No. 36 of 31 March 2023 are devoted to as many general canons. They express values and evaluation criteria that are immanent to the legal order and integrate "the legal foundation of the discipline in question". They complete the legal order and protect interests that would otherwise not be adequately taken into account in the individual rules. Compared to the specific rules, they seem to be characterized – even according to the Special Commission that drew them up – by a "preponderance of deontological content", and from this point of view they can be assimilated to duties for the operators in the sector, to moral rules of conduct relating to "what it should be"[16].

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interpretation of Article 18(1) of Directive 2014/24, which consolidates the principle of competition, and proposes a strict proportionality test applicable to the promotion of horizontal procurement policies where such 'strategic' or 'smart' use of public procurement can generate market distortions».

[16] According to the Report of the Consiglio di Stato to the *Final Draft of the Public Contracts Code in implementation of Article 1 of Law no. 78 of 21 June* 2022, *concerning "Delegation to the Government in the matter of public contracts"*, 7 December 2022, "the general principles of a sector express, in fact, values and evaluation criteria immanent to the legal order, which have a "memory of the whole" that the single and specific provisions cannot have, even though they are referable to it. The principles are, moreover, characterized by a prevalence of deontological content in comparison with the individual rules, even reconstructed in their system, with the consequence that they, as evaluation criteria that constitute the legal foundation of the discipline considered, also have a genetic ("nomogenetic") function with respect to the individual rules".

It may be that their number is not a coincidence. The assonance with the equal number of fundamental principles of the Constitution, which represent the ideological and political premises that the Constituents transcribed, shows in part how the Special Commission of the Consiglio di Stato, entrusted by the government with the writing of the Code, got a little carried away on this occasion[17]. There is also another assonance that should be emphasised. These principles are not linked to each other, as are the twelve fundamental principles of the Constitution, but are placed next to each other, sometimes against each other, in the knowledge that these values are meant to be balanced and to coexist.

To consider this catalogue as closed and all-inclusive would be a mistake. In fact, the principles listed in the first twelve articles are only those that are explicitly mentioned in Title I, Part I and Book I. However, looking at the Code as a whole, there are many other principles that are translated into legal instruments. To these one should add, from various sources, at least those principles that can be derived by interpretation, those that can be derived from administrative procedural law, those that have their origin in case law, or those that can be derived *ex lege* from other provisions of the Code, such as the principle of once only digitalisation as a rule of simplification or the principle of digitalization by default, according to which administrations, in order to achieve greater efficiency in their activities, act by means of computer and telematic instruments, in internal relations, between the various administrations and between the latter and private individuals[18].

Since it is necessary to strike a balance between coexisting values, the judge cannot be the only guarantor of this balance. The ordering and "*nomophylactic*" function of principles must then be derived from the very structure of the code. However, a potentially inappropriate and repetitive use of general principles, bordering on abuse, risks giving the judge an excessive power of

[17] On this topic, *L'attualità dei principi fondamentali della Costituzione*, M. Della Morte, F.R. De Martino, L. Ronchetti (eds) (2020).

[18] It is no longer constructed, as in the previous version, as an incentive for the use of digital tools, but has become an "obligation that finds constitutional coverage in the principle of good performance, as understood by the Constitutional Court, as a guarantee of the criteria of efficiency, effectiveness and cost-effectiveness", thus in G.M. Racca, *Le responsabilità delle organizzazioni pubbliche nella trasformazione digitale e i principi di collaborazione e buona fede*, *Dir. amm.* 601 (2022).

interpretation and threatens to undermine legal certainty and the predictability of judicial solutions to disputes.

To avoid this risk, the Code has adopted an innovative solution. The legislator decided to specify by law the concrete and precise content of certain principles, expressing their preceptive value, instead of relying on general clauses or on the ambiguity of general formulae as a means of overcoming the impossibility or difficulty of always identifying a precise rule[19]. In other words, the technique of "explained and preceptive principles" is not an arbitrary choice, but it seems to respond to a specific fear, namely that a general clause could be misused by giving the judge excessive interpretative power.

The "new" principles include, first and foremost, the principle of results (Article 1). Together with the principle of trust (Article 2) and access to the market (Article 3), it has a superior position because, according to Article 4 of the Code, these principles are given priority as the explicit criteria for the interpretation and application of the other rules of the Code. The fact that this quality is deliberately assigned only to these principles and not to others does not mean, despite what the lexical appearance may suggest, that the remaining principles cannot be used as hermeneutical standards for the systematic reading of the provisions of the Code itself, but rather that they are to be considered superior to the other eight principles.

[19] According to the Report of the Consiglio di Stato to the *Final Draft of the Public Contracts Code,* cit., "there was a desire to give concrete and operational content to general clauses that would otherwise be excessively elastic (see, for example, the specification of the concept of good faith, also for the purposes of the reciprocal liability of the contracting authority and the unlawful tenderer), or to use the rule-principle to resolve interpretative uncertainties (e.g, the principles delimiting the scope of application of the code, enumerating the relationships between tenders and free contracts on the one hand and the entrusting of social services to third sector entities on the other) or to transpose jurisprudential guidelines that have now become "living law" (as, for example, in the case of the rule on the peremptory nature of the grounds for exclusion and the correlated regime of atypical exclusionary clauses). More generally, through the codification of principles, the new project aims at fostering greater freedom of initiative and self-responsibility of contracting authorities, enhancing their autonomy and discretion (administrative and technical) in a sector in which the presence of rigid and detailed rules has often created uncertainties, delays and inefficiencies. This is because the law - especially a code - cannot chase the specific discipline of every aspect of reality, because it will always be late, but must instead provide the tools and the general and abstract rules to regulate it".

The purpose of the result rule is to provide a cultural signal of a profound change, a strengthening of the spirit of autonomous initiative and discretion of public administrations. In this perspective, administrations are obliged to pursue the result of the award of the contract and its execution, which must be carried out with the utmost timeliness and the best possible relationship between quality and price, on condition that this is done in compliance with three additional but already established principles, namely those of legality, transparency and competition.

The result principle is an implementation of other principles and, in the field of public procurement, a corollary of the constitutional principle of good performance and the related principles of efficiency, effectiveness and economy. It is not the idea of "results at any cost", nor is it the necessary satisfaction of citizens' demands. It is not to be pursued independently of the context, but rather in the interest of the community and for the achievement of the objectives of the EU.

The principle of result is the overriding criterion for the exercise of discretion and for determining the rule of the case, as well as for: a) assessing the responsibility of staff performing administrative or technical functions in the planning, design, award and execution phases of contracts; b) allocating incentives according to the modalities provided for in collective bargaining.

The logic of the administrative result requires the timely consideration of interests, the rapid weighing of them and the effective protection of them within the conditions and the logic of each area of public activity, according to a business studies definition. The principle of efficiency is the measure of the maximum achievement of user products (output) for a given level of resources.

European objectives are also taken into account: social needs, protection of health, the environment, cultural heritage and the promotion of sustainable development, including energy[20]. From this point of view, competitiveness, transparency, legality and value for money are instrumental goods. In other words, they do not constitute the object of interest in themselves, as is the case with the award of the contract and, above all, its execution (the principle of the result). Instead, they become the functional

[20] M. Comba, S. Treumer (eds), *Modernising Public Procurement: The Approach of EU Member States* (2018).

conditions for the achievement of the administration's interest in the result. In other words, "between the public interest of the administration - better quality of service at the lowest price - and the purely public interest of economic operators - competition in a free market open to all - the directives, in striking a balance between them, pay more attention to the former"[21]. The functionalisation introduced by the national legislator thus seems to be inspired by the latter view, but it goes much further by sanctioning an order in which competition becomes subordinate to the interest of the administration in the result.

The acceptance of the logic of the result also implies a shift of attention towards the phase of the execution of the contract, which for the first time assumes a central role in the publicist's perspective, to the detriment of the traditional phase of the selection of the contractor. The public invitation to tender, on which most of the effort is concentrated, is in fact only a preliminary stage, subordinated to what matters most, that is, the performance of the contractual relationship. This confirms that the notion of the biphasic activity of the administration – differentiated according to different legal rules depending on the moment when the administrative activity takes place – is increasingly losing its relevance in practice. It is no longer the case that, in a first phase, that of the selection of the contractor, the public administration acts according to forms characterised by the observance of rules and principles aimed at protecting the overriding public interest to be achieved. In the next stage, the definition of the contract, the public authority is placed at the same level as the private party, takes off its public face and acts in the exercise of its contractual autonomy.

A consequence of this basic approach is, for example, the principle of maintaining the contractual equilibrium (Article 9)[22],

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[21] E. Follieri, *Introduzione*, in *Corso sul codice dei contratti pubblici* (2017), 5 ff.

[22] Rules on contract modifications were added to the Procurement Directive 2014/24/EU and most of the provisions therein are based on the case law from the CJEU, particularly *Pressetext*. Thus, the EU legislator had found it necessary to clarify the conditions on contract modifications and take into account the case law of the CJEU. It analyses the different types of modifications covered by Directive 2014/24/EU in a semi-structured way by dividing them into permissible versus impermissible modifications. Here, it is possible for the reader to dive into different types of modifications of a contract that could potentially occur. Each topic has references on the case law of the CJEU, which makes it possible to explore the different types of conditions that must be

from which certain institutions have already been positively derived in the past, such as the revision of prices (Article 60). The result in terms of rules is: the simplification and reduction of the design phases for public works (the final design phase disappears: Article 41); the systematic re-introduction (and no longer pro tempore) of the integrated procurement (Article 44); the increase to the entire sub-threshold, also for works, of the amounts below which it is possible to resort to the negotiated procedure (still a public document, but with more rapid characteristics): Article 50, which incorporates the emergency regulation provided for by Decree-Law No. 76/2020, Article 1, paragraph 2, letters a) and b) – as amended by Decree-Law No. 77/2021 – and the consequent possible waiver of the provisional guarantee (Article 53, paragraph 1) for hypotheses other than direct award; the introduction of cascades of sub-contractors as a general rule, waived only by the individual hypotheses expressed in Article 119, paragraph 17, which must be absolutely indicated in the tender documents.

The principle of trust in administrative action is an absolute novelty. In a context of renewed confidence in the activity of the contracting authorities, this principle is intended to highlight and promote the freedom of assessment and the powers of initiative of the contracting authorities in order to prevent the phenomenon of defensive bureaucracy and to guarantee and promote confidence in the legitimate, transparent and correct action of the administration.

The subject of mutual trust is the legitimate, transparent and correct action of the above-mentioned parties. This principle is referred to as the basis for the allocation and exercise of power in the field of public procurement, in a provision that is more programmatic than concrete (para. 1). This provision is more of a declaration of intent than anything else. It gives the principle of fiduciary duty a special function, particularly with regard to public officials. It promotes and strengthens the initiative and decision-making autonomy of the latter, in particular with regard to the evaluation and choice of services to purchase and provide, in accordance with the aforementioned principle of results (para. 2).

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available before a modification can be considered permissible based on both the case law and the text of the provisions of Directive 2014/24/EU.

In order to make the initiative and decision-making autonomy of public officials more effective, the Code precisely defines and restrictively limits the cases of gross negligence that may give rise to the administrative liability of public officials. In the context of the activities of planning, drawing up, awarding and executing contracts, only the violation of the rules of law and administrative self-regulation, the manifest violation of the rules of prudence, expertise and diligence, and the failure to take the precautions, checks and preventive information normally required in administrative activities, to the extent that they are required of the public official by virtue of his specific competences and in relation to the concrete case, constitute gross negligence for the purposes of administrative liability. On the other hand, gross negligence is expressly excluded in the case of an infringement or omission that is the result of a reference to the case law or the opinions of the competent authorities (paragraph 3) [23].

In addition, Article 2 lays down a clear confidence-building measure: contracting authorities shall take measures to insure risks to personnel. To promote confidence in the lawfulness, transparency and regularity of administrative acts, contracting entities shall take measures to insure against personnel risks, to provide for the requalification of staff and to improve and enhance the professional skills of staff, including plans for the training of specialised units.

The purpose of this provision is to exclude from the hypothesis of gross negligence – and thus from the Treasury's liability, which does not apply in the case of slight negligence – any conduct that is not clearly based on non-compliance with the rules or the exercise of ordinary care. This provision leaves considerable room for interpretation as to what constitutes a flagrant breach and what does not. Nevertheless, the Code is

[23] In order to prove administrative liability, Article 21 of Decree-Law No 76 of 16 July 2020 modifies Article 1 of Law No. 20 of 14 January 1994 adding "Proof of wilful misconduct requires the demonstration of intent to cause the harmful event". Limited to acts committed after the date of entry into force of this Decree and until 30 June 2024, the liability of persons subject to the jurisdiction of the Court of Auditors in matters of public accounting for the liability action referred to in Article 1 of Law No 20 of 14 January 1994 shall be limited to cases where the production of the damage resulting from the conduct of the person acting is wilfully intended by him. The limitation of liability provided for in the first sentence shall not apply to damage caused by the omission or inaction of the agent.

intended to send a signal to allay the fears, more or less justified depending on the case, that often obstacle the administrative activities of public officials who are concerned about the possibility of being held liable by the Treasury.

The principle of access to the market requires contracting authorities and awarding bodies to promote access to the market for economic operators in accordance with the procedures set out in the Code, while respecting the principles of competition, impartiality, non-discrimination, publicity and transparency, and proportionality. The name has changed, but it is still the principle of maximum competition. Although it is one of the general principles contained in the first three articles of the Code, it has been subordinated to the principle of results, which was introduced at the beginning of the new Code, and has been placed even higher in the pyramidal logic of the new regulatory structure. The principle in question is a response to the need to guarantee the maintenance and establishment of a competitive market capable of ensuring that economic operators have equal opportunities to participate and thus have access to public procurement procedures.

In addition to the provisions relating to the general principles themselves (result, confidence, access to the market, good faith and protection of confidence, solidarity and horizontal subsidiarity, administrative self-organisation, negotiating autonomy, preservation of the contractual balance, peremptory grounds for exclusion, application of collective agreements), the codification of principles is also expressed in Title II, which sets out the principles common to all the books of the Code, concerning the scope of the rules, the single person responsible for intervention (RUP) and the phases of the procedure for awarding contracts.

3. The reduction and qualification of contracting authorities

During the preparatory work for the 2016 Code, and even more so after it was adopted, the issue that came to the fore most was that of the excessive number of contracting authorities. Faced with a succession of worrying statistics on the fragmentation of public demand, two converging solutions were identified at that time (Articles 37 and 38 of the Code). The first one was that of the

central purchasing bodies[24] and of the aggregations (in particular for the municipalities that are not the capitals of the provinces) and the second one was that of the qualification of the contracting stations. However, neither of these solutions was implemented, as the debate on the number of contracting entities gradually faded over time[25].

The aim of the 2016 reform was in fact to introduce an innovative natural selection mechanism for the development of contracting authorities and central purchasing bodies. This would have a significant impact on the organisational profiles of public administrations and introduce a process of continuous improvement in order to take advantage of the greater operational capacities allocated on the basis of the level of qualification achieved, with the incentive of being able to accumulate further rewarding requirements (also provided for in article 38 of the Code).

The link between the two levels has been established by the third paragraph of Article 37, according to which contractors who did not possess the qualification referred to in Article 38 could only use a central purchasing body or group with one or more

[24] The tasks of central purchasing bodies are set out in Article 37 and consist of: awarding contracts, concluding and executing contracts on behalf of administrations and bodies; concluding framework agreements to which qualified contracting stations may have recourse; managing dynamic purchasing systems and electronic marketplaces. See, R. Caranta, *Public Procurement and award criteria*, in C. Bovis (ed), *Research Handbook on EU Public Procurement Law* (2016), 149. According to C. Risvig Hamer, M. Comba (eds), *Centralising Public Procurement: The Approach of EU Member States* (2021), central purchasing bodies (CPBs) are placed "central" as a technique for aggregated procurement. Their task is to offer, on a permanent basis, central purchasing activities to contracting authorities that have combined their purchasing. Such activities can consist of the actual acquisition of supplies and/or services (i.e. wholesaler model) but can also relate to the award of public contracts or the conclusion of framework agreements (FAs), which contracting authorities can use with out the need to conduct a procurement procedure themselves (i.e. intermediary/agent model). For example, the national police division of a Ministry can conclude FAs through which local police forces make concrete purchases.

[25] The aggregations and centralization rule is among those 'suspended' by the '*Sblocca-cantieri*' decree (Decree-Law No. 32 of 18 April 2019), while the qualification of contracting stations has not been implemented in the absence of the necessary governmental implementing decree.

contracting entities possessing the necessary qualification for the purchase of supplies, services and works[26].

The mechanism for the qualification of contracting authorities and central purchasing bodies is based, according to Article 38, on a public list established by the ANAC; there was no single qualification, but a series of different possibilities, articulated in relation to sectors of activity and territorial basins, as well as to the type and complexity of the contract and to ranges of amounts. This last distinction seems particularly significant and is in line with the general approach of the legislation, which divides the same types of procedures (more or less complex) that can be used precisely according to the value of the contract.

The legislator has intervened on several occasions to rationalise and simplify this reputation system for the evaluation of administrations, in order to make this mechanism operational in practice, with the aim of rewarding contracting authorities that demonstrate their willingness and ability to plan, award and monitor the performance of a contract, as well as their suitability to issue public invitations to tender. However, the repeated legislative changes do not seem sufficient to make this mechanism work by overcoming the backwardness of the Italian administrative system. In essence, they do not appear to be sufficient to transform the discipline of qualifying procurement entities from an undifferentiated administrative task into a «specialised function - a trade, one would say, in the private sector - that requires the possession of specific requirements. These include, first and foremost, the development of a culture that is not only legal but also professional, economic and technical, measured and calibrated according to the size of the tenders and the quality and nature of the goods or services to be acquired or the works to be carried out»[27].

The architecture of the NRRP includes among the enabling reforms the simplification of the regulatory framework for public procurement as an essential objective for the efficient implementation of infrastructures and the revitalisation of

[26] According to Article 37, non-qualified contracting stations could still proceed directly and autonomously with the acquisition of supplies and services below EUR 40,000 and of works below EUR 150,000, as well as through orders from purchasing instruments made available by central purchasing bodies.

[27] Thus in L. Torchia, *Il nuovo Codice dei contratti pubblici: regole, procedimento, processo*, *Giorn. dir. amm.* 608 (2016).

construction activity. Urgent measures include the need to set a maximum time limit for the award of contracts, to reduce the time between the publication of the notice and the award of the contract, as well as measures to limit the time required for the execution of the contract. In order to achieve these objectives, one of the instruments mentioned is precisely the "reduction in the number and qualification of contracting entities", as a reputational criterion, comparable to that introduced for companies, which assesses professionalism and ability to perform correctly, but this time applied to public administrations.

In this way, the original idea of the 2016 Public Contracts Code is taken up again. The qualification system seems to function – or at least to be closely linked – to the objective of reducing the number of contracting authorities (which is estimated at more than thirty thousand). It also seems to allow the management of more complex contracts. In this way, the scope within which each administration can perform the functions of a contracting authority is subjectively limited, which imposes additional burdens on administrations, such as the need to obtain a qualification, and limits the contracts that can be awarded by non-qualified administrations to small economic amounts.

The 2023 reform aims to fine-tune and implement the selection mechanism for the development of contracting authorities and central purchasing bodies. It will have a significant impact on the organisational profiles of public administrations and introduce a process of continuous improvement in order to take advantage of the increased operational capacity allocated according to the level of qualification achieved.

It is well known that the poor technical equipment of administrations, the lack of specialised cultures and the deficit in the organisational and managerial activity of public apparatuses are some of the elements that today act as an obstacle, i.e. a barrier, to the awarding and execution of public procurements[28].

[28] As S. Cassese, *Amministrazione pubblica e progresso civile, Riv. trim. dir. pubbl.* 141 (2020), notes "The administration has, directly or indirectly, governed the country's infrastructure endowment for at least fifty years (just think of the railway network in the period from 1861 to 1905, the date of the redemption of concessions). It later provided, again directly or indirectly, for other infrastructures (think only of those in the Mezzogiorno, through the special Cassa, set up in 1950, or of the motorway network - Autosole, built in eight years). In recent decades, however, an infrastructure deficit has emerged. The average level of Italy's infrastructure is five points below the average of the five

For this reason, the legislator, in accordance with the objectives of the NRRP, pays particular attention to the issue of the quality of contracting authorities when delegating powers to rewrite the rules governing public procurement. It is enough to note that the latter is placed almost at the beginning, in letter c) of Article 1, among the many guiding principles and criteria of the delegation.

There are two equations that inspire this guiding criterion. On the one hand, the strengthening of the qualification system of administrations goes hand in hand with (or rather serves to achieve) their numerical reduction, i.e. their unification and consequent reorganisation. In short, in the eyes of the legislator, qualification serves to reduce the number of administrations and to impose the transfer of the relevant planning, awarding and execution competences on those administrations that do not pass the examination. In other words, it is the same (unrealised) objective that the executive had in 2016.

On the other hand, the public qualification system needs to be improved by introducing incentives for the use of central purchasing and auxiliary contracting authorities for the execution of public tenders. This implies the establishment of effective administrative cooperation systems to overcome the traditional system, whereby each administration issues a tender to meet its own needs.

Their reduction in number, merging and reorganisation require the strengthening of administrative structures in the direction of greater professionalism, the strengthening of the

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most developed countries in Europe. Between 2007 and 2016, the construction sector contracted by about 37 per cent. The average construction time has increased: 15 years for a major work, 8 of which for administrative time. According to ISTAT, public investments in recent years have decreased by 5 per cent. Payments for infrastructure construction have halved since 2004. It is significant to note that, while public contracts for works have decreased, those for supplies and administrative services have increased: the administration buys instead of having them made. Of the 37.5 billion of the Development and Cohesion Fund allocated for 2014-2020, in 2019 just under 12 per cent was committed and just under 3 per cent spent. A reflection of this stagnation of the contracting or tendering administration can be seen in the growth of the foreign turnover of Italian construction companies. That of the largest 43 construction companies increased fivefold after 2004. That of the top 4 groups is clearly higher than the foreign turnover of companies in other countries with similar turnover figures. In short, like Italian university graduates, so too do Italian construction companies go abroad to look for work". On this subject see also B.G. Mattarella, *La centralizzazione delle committenze*, *Giorn. dir. amm.* 613 (2016).

qualification and specialisation of the staff working in the contracting units, through the provision of specific training courses, in particular with regard to the central purchasing units working on behalf of the local authorities.

However, the qualification does not always apply. There is an important exemption based on value, which, for the sake of simplicity, takes into account the procurement activities with low economic impact that all contracting authorities can carry out, since the low economic relevance of these contracts does not justify the application of the qualification system. For supplies and services, the threshold is set at 140,000 euros, and for works at 500,000 euros, through the autonomous use of the telematic negotiation tools provided by the central purchasing bodies qualified in accordance with the regulations in force. The configuration of the powers of the non-qualified entities is designed to ensure a "hard core" of competence sufficient to deal with most of the tasks entrusted to the administrations, also in anticipation of the loss of qualification for higher value contracts.

For contracts above these thresholds, it is necessary to be qualified, otherwise ANAC will not issue the Tender Identification Code (CIG)[29]. There is a specific list of qualified entities, of which central purchasing entities, including aggregating entities, are included in a specific section.

The qualification covers three areas: planning, contracting and execution. The qualification for project planning and contracting is divided into three levels of amounts: a) *basic* or first level qualification, for services and supplies up to the threshold of 750,000 euro and for works up to 1 million euro; b) *intermediate* or second level qualification, for services and supplies up to 5 million euro and for works up to the threshold referred to in Article 14; c) *advanced* or third level qualification, with no limit on the amount.

[29] Under Article 62, all contracting authorities may proceed directly and autonomously with the purchase of supplies and services below the thresholds laid down for direct awards and with the award of works contracts below EUR 500 000, as well as with the award of contracts using purchasing tools made available by qualified purchasing centres and aggregating entities, without prejudice to the obligations to use purchasing and negotiation tools provided for in the current provisions on expenditure restraint. A list of qualified contracting entities will be drawn up by ANAC, which will ensure its management and publicity, and will include central purchasing entities, including aggregators, in a specific section.

Non-qualified contracting authorities procure supplies, services and works through a qualified central purchasing body or use qualified central purchasing bodies and qualified contracting authorities for auxiliary purchasing activities. Auxiliary purchasing activities include the management of procurement procedures in the name and on behalf of non-qualified contracting authorities. Central purchasing bodies and contracting authorities carrying out auxiliary purchasing activities are directly responsible for central purchasing activities carried out on behalf of other contracting authorities. They appoint a RUP who is responsible for the necessary links with the contracting entity receiving the intervention, which in turn appoints a person in charge of the procedure for its own activities[30].

Finally, it is interesting to note that the reputational mechanism of qualification opens the way to a situation of equality between the administration and private individuals. In the same way that economic operators are able to make statements that do not correspond to reality, the same thing could happen to the administration. In short, any automatic presumption of the legality of administrative action is lost. It's not allowed to use tricks to prove that you meet the requirements to qualify. It is for this reason that are sanctioned any declarations fraudulently intended to demonstrate possession of non-existent qualification requirements, including in particular: a) for central purchasing bodies, the declared existence of a stable organisation in which personnel continue to work de facto for the administration of origin; b) for contracting stations and central purchasing bodies, the declared existence of personnel assigned to the stable organisational structure who are de facto engaged in other activities; c) failure to inform ANAC of the loss of the requirements.

Qualification seems necessary, even essential. There can be no qualitative leap in the procurement market without control in

[30] In particular, the role and responsibilities of the central purchasing bodies should be taken into account; a procurement "malfunction" attributable to a central body may in fact also have a "systemic" effect, influencing the decisions of other administrations that have relied, for example, on a convention or framework agreement. And the reliability of the procurement system itself may be affected. Conversely, an unsuccessful tender by one contracting authority will only have a negative impact on that authority (except in the case of joint procurement).

the access phase, not only on the part of the private operators, but also - and above all - on the part of the public authority, which is responsible for ensuring that the expenditure is correct and useful. From this point of view, the role of the ANAC should be strengthened as an arbiter in the control of access to the sector before the start of the bidding process. Aiming for this role could also allow greater autonomy for the contracting bodies (more professional, efficient, reliable) to manage the procurement process in the way they consider most appropriate to public needs. The ANAC should therefore have adequate powers of information control over the subjects, to be exercised upstream.

What is the main purpose of the qualification scheme? The reduction of the number of contracting stations or, instead, the enhancement of their efficiency and the logic of the prevalence of the result according to a form of legitimation called output? The question seems pertinent, since the objectives stated in the legislative documents are different. Perhaps the truth lies somewhere in between, in the sense that qualification should not be understood as an absolute tool to reduce, but rather to improve, purchasing and executing capacities. The ultimate goal is therefore not to be able to count on one hand how many public bodies are able to tender, but how many are able to do so well.

In conclusion, there is no doubt that experimenting with a system that aims to measure confidence in the work of administrations in the logic of the prevalence of the result remains a difficult but at the same time compelling challenge. No one would want this to lead to an excessive mortification of the administrative and technical discretion of individual administrations. The qualification system can therefore be truly effective if it is articulated on the basis of two fundamental principles: trust in the contracting authorities (in line with the strengthening and digitalisation of public administration) and administrative and technical discretion (as the keystone of efficient procedures and good public spending). The reaffirmation of these principles in the new Code has the merit of reducing, also for the future, the risks of centralisation and formalistic rigidity and of privileging the objective of the procurement result in terms of quality and timeframe.

4. Results and discretion: the way to simpleness

Another basic idea that inspires the new Code is the simplification of certain procurement procedures. The drive for greater flexibility in procurement procedures is a response to the over-regulation of procurement procedures and the imposition of obligations, formalities and compliance requirements which, in addition to not (necessarily) falling within the scope of EU law, are slowing down the award and implementation of works and services.

The imposition by law of certain time-limits for the conclusion of tenders and contracts, the obligation to exercise substitute powers, the introduction of measures to speed up the award procedure are functional measures to counteract the "fear of signing", which is the expression of the "defensive bureaucracy" that often characterises the work of contracting authorities and generates a lack of confidence on the part of economic operators in the activities they carry out.

Simplification does not only have the function of speeding up or simplifying procedures, but it must also be combined with the recognition of a margin of discretion for the contracting authorities. In other words, in order to speed up the achievement of the result, the regulatory provisions entrust public officials with a wider power of choice, which corresponds to an invitation to take responsibility. The greater discretion conferred on contracting authorities by the new reform must be able to be expressed in all the phases of the articulated process leading to the concrete realisation of the realisable interest of which they are the bearers: from the preparatory and preparatory phase to the start of the award procedure, to the phase following the call for tenders, to the phase of performance of the contract.

The provision of general principles to guide the exercise of discretion also goes hand in hand with the granting of a greater degree of discretion. This is all the more true in view of the fact that, in accordance with the enabling act, the reformer's task was to rationalise, reorganise and simplify (all) public procurement rules.

Several examples could be given. Three will be chosen. The first relates to the methods for assessing the anomaly of the bid, i.e. the assessment of the congruence, seriousness, sustainability and feasibility of the best bid that appears to be abnormally low,

contained in Article 110 of the new Public Procurement Code[31]. An abnormally low bid could be the result of desperate competition by the more unscrupulous contractors to the detriment of the more reliable ones. An abnormal bid therefore raises the suspicion of lack of seriousness since, by appearing unsuitable to guarantee the economic operator a reasonable profit, it could conceal the risk of poor performance of the entrusted service. From the point of view of the contracting authority, therefore, the examination is characterised by the need to reconcile two requirements: to make it possible to identify the best contractor by facilitating and encouraging the widest possible participation of economic operators, and at the same time to avoid accepting tenders which would be detrimental to the public interest in the performance of the contract.

In particular, the RUP verifies the completeness and conformity of the administrative documents submitted by the tenderers and, if necessary, starts the preliminary investigation procedure; it verifies compliance with the conditions of participation and decides on any exclusion measures; where the award criterion is the lowest price, it may proceed directly to the evaluation of the economic tenders and, in any event, it shall verify the conformity of the tenders; where the award criterion is the economically most advantageous tender, it shall carry out all activities which do not involve the exercise of powers of evaluation with regard to the quality of the tenders and shall verify the anomaly of the tender.

This activity does not involve an evaluation of the quality of the tenders, let alone a comparative evaluation, but focuses on the technical and economic offer and, more precisely, on one or more price elements that are considered to be out of line with market

[31] In accordance with Article 110, contracting authorities shall evaluate the relevance, seriousness, sustainability and viability of the best tender which appears to be abnormally low on the basis of specific elements, including the costs declared in accordance with Article 108(9). The contract notice or the tender notice shall indicate the specific elements to be used for the evaluation. On the "sustainable procurement" when environmental and social considerations become increasingly important components of the procurement process in Europe, see B. Sjafjell, A. Wiesbrock (eds), *Sustainable Public Procurement Under EU Law. New Perspectives on the State as Stakeholder* (2016).
Where a tender appears to be abnormally low, the contracting authority shall request the economic operator in writing to explain the price or cost proposed and shall allow him a maximum of 15 days to do so.

values or, in any case, with reasonably sustainable prices; the assessment of the congruence or non-congruence of an economic offer is therefore formulated in absolute terms, in relation to each individual offer, on the basis of its credibility in terms of market values[32]. This is a complex activity requiring multidisciplinary skills and a specific technical sensitivity in the field of contracts. For this reason, it is expressly provided that the Commission, "at the request of the RUP", may play a supporting role in the verification of the anomaly of the tender (Article 93, par. 1).

As is well known, three methods for calculating the anomaly threshold have been established. This leaves it up to the administration to choose the most appropriate method in each case. In fact, the previous discipline provided for the *ex lege* determination of the anomaly thresholds, above which the review became mandatory, and of the minimum number of bids for the purpose of initiating the sub-procedure, which is also mandatory in this case. However, as things stand at present, the choice of whether or not to initiate the anomaly check is entirely left to the contracting authority. It is carried out each time the tender submitted appears to be abnormally low, on the basis of the "specific elements" contained in the contract notice or the tender documents. The discretionary power therefore concerns the an and quomodo of the anomaly check, and is carried out in accordance with predetermined forms of procedural cross-examination which are appropriately borrowed from the previous discipline. Only in the case of contracts below the European thresholds, which are awarded on the basis of the lowest price criterion, are there forms of automatic exclusion of tenders considered to be anomalous. From this point of view, the anomaly check is highly innovative, as it is the most tangible expression of the "discretionary revolution" [33].

As for the second example, a good contract is only possible in the presence of good projects. These projects must be able to be completed quickly and must not impede the speedy execution of works and services. This is the spirit in which many of the new Code's innovations should be seen: in particular, the reduction in the number of planning stages for public works from three to two; the generalisation of the "integrated contract" (award of works on

[32] See Consiglio di Stato, ad. plen., 29 November 2012, No. 36.

[33] See, in this sense, A. Cancrini, F. Vagnucci, *Le procedure di scelta del contraente e la selezione delle offerte*, *Giorn. dir. amm.* 325 (2023).

the basis of the feasibility study alone, with the contractor responsible for execution, *appalto integrato*); the increase in the thresholds for direct award and for simplified procedures below the thresholds. These provisions undoubtedly meet the need for speed and efficiency in the administration. Works, services and supplies may be awarded directly up to an amount of less than EUR 150,000.00 for the former and up to an amount of less than EUR 140,000.00 for the latter. In this hypothesis, the contract is awarded "even without consulting several economic operators", without any necessary opening up of the market. As a counterweight to direct awarding, there is the principle of rotating awarding[34]. This perspective aims to strengthen the role of administrative discretion. However, this does not always make it easier for contracting authorities to draw up tender documents or for economic operators to make a truly complete and informed offer. This is because of the risk of proliferation of administrative disputes associated with such a wide margin of administrative discretion.

A final demonstration of the relevance of discretion can be found in the current regulation on subcontracting[35]. Subject to adequate justification in the award decision, contracting authorities must specify in the tender documents the services or works covered by the contract to be performed by the successful tenderer. In order to avoid the possibility of hidden subcontracting, the national legislator has chosen to leave it to the contracting authority to set a reasonable limit.

The current regulation on subcontracting provides a final demonstration of the importance of discretion. Subject to adequate justification in the award decision, contracting authorities must specify in the tender dossier the services or works covered by the contract to be performed by the winning tenderer. In order to avoid the possibility of hidden subcontracting, the national legislator has chosen to leave it to the contracting authority's discretion to set a reasonable limit in relation to the predominant execution of the works. However, the justification must relate to the specific characteristics of the contract, i.e. the need to strengthen the control of the activities on site and, more generally, of the workplaces, in view of the nature or complexity of the

[34] Today codified in Article 49 of the new Public Procurement Code.
[35] See the Article 119.

services or works to be provided, or to ensure better protection of the working conditions and the health and safety of workers, or to prevent the risk of criminal infiltration.

Persons entrusted with contracts under the Code may subcontract the works or parts of works, services or supplies included in the contract, subject to the authorisation of the contracting authority, provided that: a) the subcontractor is qualified for the works or services to be performed; b) there are no grounds for excluding him; c) the works or parts of works, services and supplies to be subcontracted have been indicated at the time of the tender.

The main contractor and the subcontractor shall be jointly and severally liable to the contracting authority for the services covered by the subcontract. The contracting authorities shall indicate in the tender documents the services or works covered by the contract which, although subcontracted, may not be further subcontracted. In other words, there is a change from a prohibition to an ordinary rule (from which derogations can only be made with adequate justification) for cascades of sub-contractors. This is a reception of the Union's provisions, as interpreted by a first letter of formal notice of 24 January 2019 from the EU Commission in the framework of the infringement procedure against Italy no. 2018/2273, followed by a second letter of 6 April 2022. In conclusion, even in the possibility of using subcontracting, one can read a legislative openness towards flexible procedures, which is moreover confirmed by the strengthening of the principle of trust in article 2 of the new Code. This represents a change compared to the discredited discretionary choices made by the administrations under the previous regime. A trust that should lead us not to read with automatic suspicion the establishment of moments of contact, dialogue and negotiation with bidders, but one that values "managing", understood as choosing responsibly, using the flexibility necessary to realise the public interest in different contexts[36].

[36] S. Valaguzza, *Governare per contratto. Come creare valore attraverso i contratti pubblici* (2018).

5. The digital transformation of public procurement

The digitisation of the procurement lifecycle - from planning, to tendering, to full implementation - is the infrastructural cornerstone of the new Code. In fact, the need and urgency to digitise public procurement processes already emerged from the NRP, making it a necessary tool to achieve the conditional objectives of European funding.

It has three objectives. To prevent corruption by ensuring greater transparency, traceability, participation and control of activities. To reduce the time needed for tendering procedures through a comprehensive simplification. Finally, to implement the objectives of the NRP by improving procedures and relations between public administrations and economic operators.

Digitalisation is only one solution for reducing the time taken for award procedures and the various formalities involved in public procurement. But it is an obligatory, non-negotiable solution. The new technological and IT infrastructure (the National Digital Procurement Ecosystem) is not only the indispensable tool for streamlining public procurement procedures and managing all the administrative formalities that affect the different phases of public procurement. It is also the only place where administrative powers can be exercised and where economic operators can submit bids.

Innovations that could have a significant impact on the market and administrations include the implementation of the National Database of Public Contracts (BDNCP) and the Virtual Profile of the Economic Operator, with the creation of a digital infrastructure on which all compliance must be managed, and the provision for the use of automated procedures. Under the new regulatory framework, all administrative activities and processes related to the life cycle of public contracts must be carried out digitally through the digital infrastructure platforms and services of the contracting authorities. The National Digital Procurement Ecosystem represents the essential infrastructure and architecture to enable the respect and implementation of digital principles and rights, as an indispensable tool to ensure the effective implementation of the digital transition of public contracts.

Through the National Database of Public Contracts and telematic platforms, contracting entities must manage the operations related to the three-year planning and scheduling of purchases, the initiation and publication of tender documents, the

award procedure, the conclusion of the contract and the administrative and accounting operations necessary for its execution, up to the conclusion and acceptance of contracts.

Among the principles and digital rights set out - or referred to, through reference to the Code of Digital Administration, Legislative Decree No. 82/2005 - in the Code are: technological neutrality[37]; transparency[38]; the protection of personal data; IT security; single sending and unique place of publication[39]; accessibility of data[40] and information; interoperability and interconnection of databases and public platforms; and the availability of tools used by contracting stations. According to the *once-only* principle, economic operators are required to transmit their data only once to public administrations.

Finally, of particular relevance is the provision according to which, in order to improve efficiency, contracting authorities shall, where possible in relation to the type of procurement procedure, automate their activities by recourse to technological solutions, including artificial intelligence and distributed ledger technologies, in compliance with the specific provisions on this subject. Automation which, in the light of the express provision, may also concern the evaluation of tenders.

However, the provision seems susceptible to a restrictive interpretation of so-called weak artificial intelligence, in which the system is capable of managing a narrow range of parameters and situations, without exceeding the insurmountable limit, identified

[37] According to which, on the one hand, the costs associated with the operation of platforms may not be charged to competitors or the successful bidder, and on the other hand, it is forbidden to impose technologies or software with discriminatory effects or, in any case, excessively restrictive of competition.

[38] Regulated by Articles 20 and 28 of Legislative Decree No. 36/2023 in accordance with Legislative Decree No. 33/2013. The importance of which is evidenced by the obligation imposed by AGID in its Determination No. 132/2023 of 1 June 2023, which requires telematic platforms to preserve the information in the registry for at least two years.

[39] Under which economic operators are required to transmit their data only once to public authorities. Application of the *once-only principle* that will also have to be guaranteed at cross-border level, given the obligation of contracting authorities to adapt their systems to the technical and operational specifications imposed by Commission Implementing Regulation 2022/1463 for the automated cross-border exchange of evidence by 2023.

[40] Guaranteed through the compulsory use of open formats, with the consequent application of AGID's Guidelines for the *Exploitation of Public Information Assets*.

by the judges of Palazzo Spada, of performing mere arithmetic functions, however complex[41].

Moreover, the use of so-called strong artificial intelligence seems to be in contradiction with the obligation, provided for in Article 30 of Legislative Decree no. 36/2023, to guarantee both the knowability and the comprehensibility of the decision taken, according to which every economic operator has the right to be aware of the existence of automated decision-making processes concerning him and to receive significant information on the logic applied, and with the principle of non-exclusivity of the algorithmic decision, according to which a human contribution, capable of verifying, validating or refuting the automated decision, must in any case remain in the decision-making process.

6. Final remarks

The reform of public procurement law is one of the main objectives of the NRRP. Italy has committed itself to this reform, not because it is required to do so by European law, but because it has chosen to make a specific commitment to the EU. In fact, it is a "horizontal reform": that is, it is a precondition for revitalising the productive fabric, improving services to citizens and strengthening public investment.

[41] Differently, G.R. Conforti, *Digitisation in the New Public Contracts Code,* in 2 *Internet Law* 399 (2023), considers that the new Code '*provides for the use of automated procedures in the evaluation of tenders through the introduction of learning algorithms*'. In the sense that the use of machine learning systems would be incompatible with the exercise of discretionary powers M. Simoncini, *L'agire provvedimentale dell'amministrazione e le sfide dell'innovazione tecnologica*, *Riv. trim. dir. pubbl.* 529 ff. (2021). On the other hand, absolute preclusions are not considered to exist A. Cassatella, *La discrezionalità amministrativa nell'età digitale*, in *Scritti per Franco Gaetano Scoca* (2020), Vol. I, 675 ff.; L. Parona, *Poteri tecnico-discrezionale e machine learning: verso nuovi paradigmi dell'azione amministrativa*, in A. Pajno, F. Donati and A. Perrucci (eds.), *Intelligenza artificiale e diritto: una rivoluzione?* (2022), 131 ff. According to S. Bogojević, X. Groussot & J. Hettne, *The 'Age of Discretion': Understanding the Scope and Limits of Discretion in EU Public Procurement Law*, in S. Bogojević, X. Groussot & J. Hettne (eds), *Discretion in EU Public Procurement Law* (2018), discretion is less a matter of what a Member State may or may not do and more dependent on the legal tests that the court develops and applies in relation to discretion. This shows the significance of law in debating discretion, and the need for mapping the many varieties of discretion in EU public procurement law.

In other words, the European order is no longer an external constraint, but rather an external driving force on a voluntary basis, in the sense that it does not confine itself to setting limits and/or obligations that the national legislator must implement, but rather stimulates and urges the new reform of the discipline of public procurement. All this with a view to overcoming the limitations. Neither the numerous corrective measures nor the derogations have been able to resolve these limitations.

As the Consiglio di Stato has pointed out, the new layout of the legislative text «has attempted to write a Code that tells the story of the tendering procedures, accompanying the administrations and the economic operators, step by step, from the initial planning and design phase to the award and execution of the contract»[42]. The Code's index tells this story: it starts with principles, continues with the book dedicated to the contract in all its phases and ends with remedies and self-enforcement.

The choice of codification has the value of reducing legal uncertainty, bringing order to the extravagant rules contained in the most disparate sources, and systematising a multitude of rules characterised by a high degree of detail in order to reduce the vagueness of conduct[43]. In particular, Code No. 36/2023 seeks to avoid contradictions, logical leaps, unjustified deviations and complications which often make it impossible to identify the rationale of a rule or an entire institution.

To achieve this, the new Code does not make use of what is known as the code reserve, i.e. the provision that all the rules must be gathered and systematised exclusively in the codified text. The opposite choice was made in the previous text. Article 218 of Legislative Decree No. 50/2016 provided that "any regulatory intervention affecting this Code or the matters governed by it shall be implemented by explicit modification, integration, derogation or suspension of the specific provisions contained therein". This was tantamount to an argument that there could be no regulatory provisions in the public procurement sector outside the code, with

[42] *Explanatory Report*, 7 December 2022, 9 and 10.

[43] As M. Ramajoli, A *proposito di codificazione e modernizzazione del diritto amministrativo*, *Riv. trim. dir. pubbl.* 347 (2016), notes the modern idea of codification is a reaction to legal particularism: before the codification phenomenon, the law of Romanist countries was characterized by overabundance and fragmentation of sources and powers.

the aim of limiting as much as possible the instability due to the proliferation of regulatory sources.

This choice may also be due to an apparent recognition of the uselessness of Article 218 and, more generally, of provisions of this type, given that, in the case in point, the amendments and suspensions of the previous code discipline, especially those that occurred during the emergency phase, were so frequent that one could doubt that a "real code" still existed[44].

After leaving aside the criterion of code reservation, the legislator, in Decree-Law No. 36/2023, relies on the definition of general principles as a means of imposing from above a global vision of "how" relations between the recipient administration and the business world should be oriented. Principles can make the system simple, clear and rational because they allow any regulatory gaps to be filled by means of the hermeneutic method.

However, the desire for this type of legislative technique, which consists of recourse to general clauses, has more than one drawback when applied to the field of public contracts. It fundamentally alters the mode of jurisprudential intervention and it is the judge, operating within the elastic spaces offered by general clauses, who "directly identifies the principle, which, moreover, can almost never be traced back to an explicit and textual formulation, but must be derived from a series of indices, in a difficult balancing act with other principles, potentially

[44] C. Contessa, *Le novità del "Decreto semplificazioni", ovvero: nel settore dei contratti pubblici esiste ancora un "codice"*, *Urb. app*. 757 (2020). According to P. Bogdanowicz, *Contract Modifications in EU Procurement Law* (2021), the need for flexibility in public contracts has certainly been crucial these last years with different types of crises across the world; Covid-19, the war in Europe, and increased prices in the market, etc. In times of crisis, the need to make modifications in already established public contracts becomes more relevant than ever and thus, the topic of the contract modifications touches upon an important and highly relevant topic for public purchases. In most contractual relationships, making adjustments is necessary, but certain modifications in a public contract can lead to an obligation for the contracting authority to create a new competition for the contract and thus not all types of modifications to an existing contract are allowed. It discusses the possibilities in the EU legal regime that allow for creating modifications in existing public contracts. Thus, the focus of the book is purely on contract modification from a public procurement law perspective and does not take into account other rules that potentially could be relevant for contract modifications such as contract law.

conflicting and theoretically destined to prevail in a different factual context" [45].

It should be added that the latter, being not absolute but relative, require constant balancing and tempering with other potentially divergent principles. The comparison between outcome and access to the market, between self-organisation and competition, is compelling, as shown by the limits to reasonableness encountered when pursuing the principle of competitiveness[46]. Even those principles that are reinforced and have a fundamental value - such as result, trust and market access - must always be balanced within a broader regulatory framework. This is evidenced, for example, by the fact that the pursuit of the result must respect the principles of legality, transparency and competition.

In this perspective, the role of the judge is re-evaluated as "the guarantor of a new balance between legal regulation and the reconstruction of reality"[47]. Well, such a legislative technique, when combined with what has been called the fear of

[45] This reflection is due to N. Lipari, *Il diritto civile dalle fonti ai principî*, *Riv. trim. dir. proc. civ.* 5 (2018).

[46] Corresponds to A. Sanchez-Graells, *Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*, cit. at 4, 381, «according to the most elaborated construction of the principle of competition in the procurement setting so far – developed by Advocate General Stix-Hackl in her Opinion in the *Sintesi* case – the competition principle embedded in the EU public procurement directives might seem to be multi-faceted and could potentially fulfil at least three protective purposes. First, it would be aimed at relations between undertakings themselves and would require that there exists parallel competition between them when they participate in the tendering for public contracts. Second, it would be concerned with the relationship between the contracting authorities and the tendering undertakings, in particular in order to avoid abuses of a dominant position – both by undertakings against the contracting authorities (i.e., through the exercise of market or 'selling' power) and, reversely, by contracting authorities against public contractors (through the exercise of buying power). Third, the principle of competition would be designed to protect competition as an institution. Finally, as a complement to the previous functions or as an expression of the competition principle, EU public procurement directives set particular rules that operationalize the competition principle in different phases of the public procurement process such as transparency rules, rules on technical specifications, provisions on the selection of undertakings and on the criteria for the award of contracts, information disclosure rules, etc.».

[47] All quotations are contained in S. Rodotà, *Ideologies and Techniques of Civil Law Reform, Riv. dir. comm.* 83 (1967).

administration - where the official is uncertain because he or she wavers between contradictory normative and jurisprudential indications - certainly does not seem capable of facilitating the good performance of the administration, but rather of slowing it down. In short, it would seem that elastic regulatory systems are not always suitable for meeting the challenge of organising an efficient expenditure apparatus, as is necessary in a country facing the NRP.

In any case, the principles must be read in the light of the Code's primary objective, which is to define a (relatively) slim text, without excessive regulatory detail, which is self-executing and which, by establishing a set of general principles, provides criteria of interpretation and general guidelines to be followed in contractual activity within a framework of trust in the ability of administrations to exercise choice. The principles allow the introduction of a core of inalienable values[48] (specific and inherent to the system). They symbolically encourage and strengthen the contracting authorities to have recourse to technical discretion and discretionary powers, leaving behind a mentality that is obedient only to formal legality[49].

Principles are used not only to justify a right that one has, but also to give relevance to a right that one would like to have. From this point of view, they offer "good reasons to support its legitimacy and to convince as many people as possible, especially those who have the direct or indirect power to produce valid rules in that system, to recognise it" [50]. The idea is that they should have a message-principle content, with the aim of symbolically encouraging and strengthening the contracting authorities to use discretion and technical scope for evaluation, leaving behind a mentality obedient only to formal legality.

From this point of view, the definition of a set of general principles can help to provide operators with criteria for

[48] According to the report, the principles have an "ordering and nomophylactic function", express "values and evaluation criteria that are immanent to the legal order" and "constitute "the legal foundation of the discipline under consideration"; they are characterised by a prevalence of deontological content in comparison with the individual rules, as well as of completeness of the legal system and guarantee of the protection of interests that would otherwise not find adequate accommodation in the individual provisions".

[49] M. Ramajoli, *I principi generali*, in C. Contessa, P. Del Vecchio (eds), *Codice dei Contratti Pubblici* (2023), 45 ff.

[50] Così in N. Bobbio, *L'età dei diritti* (1990), 5.

interpretation and general guidelines to follow in their contractual activities, within a framework of confidence in the ability of administrations to choose, even though we are in the context of a code that is "not short", but rather detailed and characterised by over-regulation.

Since it is obvious that principles have no performative value, if the proclamation of principles appears to be the result of a cultural operation, the discourse can shift to the level of effectiveness. Trust cannot be created simply because the legislator declares it. The effectiveness of such a technique can then be debated, bearing in mind, moreover, that it is essentially lacking in a sanctioning apparatus. It can certainly be argued that it is not sufficient, since past experience shows how deeply rooted mistrust of those who administer is, as much administrative regulation proves. It is also clear that other means would have to be used to achieve a system that produces results or to overcome the fear of signing. It is also true that the reference to values could be resolved in general formulae that could lead to conflicts in their application.

In conclusion, the main novelty of this administrative regulation lies in the cultural significance of the general principles. It is not a culture of doubt, as was the case with the anti-corruption regulations, but a culture of trust. "It is obvious that the more a regulation is perceived as fair and efficient, the more effective it will be, i.e. it will be able to count on the compliant behaviour of its citizens. This means that, in this way, the fiduciary element can also circulate more in legal relations, since the effectiveness triggered by legitimacy can only generate expectations of a general conformity of behaviour" [51]. Any delegation of power presupposes the confidence of the system in the subject to whom it is conferred, in order to promote the sense of belonging of the administration to the community of the State, to prevent paralysis, to increase capacity and to encourage respect for substantive legality.

In this way, the administration is empowered to refine the art of interpreting the rules by developing pragmatism and a spirit of innovation within a framework of general legal principles[52]. In addition to simplifying the procedure for selecting the contractor,

[51] T. Greco, *La legge della fiducia. Alle radici del diritto* (2021), 104 ff.
[52] M. Ramajoli, *I principi generali*, cit. at 42, 50.

it is also necessary to simplify the phase of implementing the contract, which involves monitoring, supervising and coordinating in order to ensure that it is carried out in full, correctly and respectfully.

In short, the regulation proposed in the new Code acts as an architect of choice, deciding on a certain number of alternatives to present to the administrations, nudging them, giving them a gentle push. It leaves room for choice, it balances between several criteria, it requires more professionalism through qualification, preventing inexperienced decision-makers from being dangerous, it imposes the use of decision-supporting technologies to combine preferences with minimum effort. If this is the case, the challenge is to change the behaviour of contracting authorities in a predictable way, without prohibiting the choice of other options, but relying on mere nudging to improve the welfare of the public procurement market by orienting decisions towards efficiency objectives while respecting social needs, protection of health, environment, cultural heritage and promotion of sustainable development (including energy).

REGULATORY SANDBOXES AND INNOVATION-FRIENDLY REGULATION: BETWEEN COLLABORATION AND CAPTURE

Sofia Ranchordas[*] *and Valeria Vinci*[**]

Abstract

Regulatory sandboxes, controlled regulatory environments for the testing of novel products or processes, have garnered an increasing amount of attention over the last decade and have been recently presented as innovation-friendly instruments. This article contends that fostering responsible innovation through regulatory sandboxes presents significant challenges. First, there is no consensus on what the advancement of innovation entails, how to achieve it, and what the role of regulations and regulatory sandboxes should be in it. Second, there is a lack of clarity regarding the definition and functioning of regulatory sandboxes. Third, there is a risk of regulatory capture due to the close collaboration between regulators and regulates and potential lack of transparency regarding the choice of regulatory interventions within the sandbox.

Drawing on Italy's initial experiences with general and sector-specific regulatory sandboxes and existing scholarship on experimental regulatory instruments, this article contributes to the ongoing debate on regulation and innovation by critically examining the interplay between regulatory sandboxes and the promotion of responsible innovation. Furthermore, it explores the impact of regulatory sandboxes on the evolving collaborative dimensions of public law and provides policymakers and regulators with actionable insights for navigating this innovative regulatory tool.

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1. Introduction

Regulatory sandboxes, controlled regulatory environments for the testing of novel products or processes, have attracted considerable attention over the last decade[1]. Regulatory sandboxes emerged in the financial sector where they were first used as a safe testbed for Fintech[2]. More recently, regulatory sandboxes have expanded to other

[1] See T. Madiega, A.L. Van De Pol, *Artificial intelligence act and regulatory sandboxes*, European Parliamentary Research Service (2022); W. G. Johnson, *Caught in quicksand? Compliance and legitimacy challenges in using regulatory sandboxes to manage emerging technologies*, 17 Regul. & Governance 709 (2023); P. Vallance, *Pro-innovation Regulation of Technologies Review - Digital Technologies*, Report to the Chancellor of the Exchequer and to HM Government (2023); *Regulatory sandboxes in artificial intelligence*, OECD Digital Economy Papers, No. 356 (2023).

[2] B. Lim, C. Low, *Regulatory Sandboxes in Fintech*, in J. Madir (ed.), *Fintech* 302 (2019); D.A. Zetzsche, R.P. Buckley, J.N. Barberis & D.W. Arner, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 Fordham J. Corp. & Fin. L. 31 (2017); A. Alaassar, A.L. Mention & T.H. Aas, *Exploring a new incubation model for FinTechs: Regulatory sandboxes*, 103 Technovation 1 (2021); D. Ahern, *Regulators Nurturing Fintech*

sectors such as energy, healthcare, and telecommunications[3]. An important illustration of this expansion is the proposed AI Act ('AIA')[4] which enables Member States to establish general AI regulatory sandboxes[5]. Regulatory sandboxes have also been considered for the promotion of sustainable development and responsible innovation in the last 'Green Deal Industrial Plan for the Net-Zero Age'[6]. This Plan presents regulatory sandboxes as instruments likely to contribute to a predictable, flexible, and simplified regulatory environment[7]. More recently, the European Commission published a Commission Staff Working Document on "Regulatory Learning in the EU. Guidance on regulatory sandboxes testbeds, and living labs in the EU, with a focus section on energy"[8], which acknowledges that experimentation spaces such as regulatory sandboxes may help improve the regulatory governance of innovation and accelerate the deployment of innovative solutions. But is this as simple as it is presented? Can regulatory sandboxes truly foster innovation?

This article acknowledges the flexible and potentially innovation-friendly character of regulatory sandboxes. However, it also offers a critical perspective, arguing that the advancement of responsible

Innovation: Global Evolution of the Regulatory Sandbox as Opportunity-Based Regulation, 15 Indian J. L. Tech. 345 (2019).

[3] See, for example, *https://energy.ec.europa.eu/publications/regulatory-sandboxes-energy-sector_en*.

[4] *Proposal for a Regulation laying down harmonized rules on artificial intelligence ("Artificial Intelligence Act") and amending certain Union legislative acts*, COM/2021/206 final. On December 9 2023, Parliament reached a provisional agreement with the Council on the AI Act. The agreed text will now have to be formally adopted by both Parliament and Council.

[5] European Parliament, P9_TA(2023)0236, Artificial Intelligence Act, Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)) available at *https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html*.

[6] Brussels, 1.2.2023 COM(2023) 62 final, Communication from the European Commission, *A Green Deal Industrial Plan for the Net-Zero Age*.

[7] Id., Section 2.1.

[8] Commission Staff Working Document, *Regulatory Learning in the EU. Guidance on regulatory sandboxes testbeds, and living labs in the EU, with a focus section on energy*, SWD(2023) 277 final.

innovation through general-purpose regulatory sandboxes is challenging, particularly when the shortcomings of these instruments are not adequately considered. In addition, it also delves into the collaborative nature of sandboxes, discussing both their regulatory potential and shortcomings.

First, there is no consensus on what the advancement of responsible innovation entails in practice, how to achieve it, and what the role of laws and regulations should be[9]. Second, there is limited empirical evidence on the ability of general-purpose regulatory sandboxes to promote responsible innovation, particularly when compared to sector-specific regulatory sandboxes. Third, close collaboration between regulators and regulatees is a double-edged sword. A fruitful and open regulatory collaboration requires extensive exchange of information among sandbox participants and the regulator as well as the publication of evaluation reports. This is a process that many regulatees are not willing to embrace. However, regulatory opacity also has several downsides. Limited transparency and openness in the context of a regulatory sandbox may limit the ability of stakeholders outside the sandbox to scrutinize the equity of its measures, potential competitive advantages conferred to sandbox participants, and hold regulators accountable for agency drift. Furthermore, as described by the theory of regulatory capture, there is the risk that in the context of regular exchanges between regulators and regulatees, market actors may try to influence regulators to make decisions that benefit their own narrow special interests rather than the collective welfare. This article cautions against this effect by offering guidance on how to avoid this outcome[10].

The article reflects upon existing scholarship on experimental regulations and the advancement of innovation, as well as the recent operationalization of *Sperimentazione Italia*, a general-purpose regulatory sandbox that aims to advance responsible innovation in the public sector[11]. Drawing partly on the Italian experience with regulatory sandboxes, we show that the goal to promote responsible innovation

[9] A. Butenko, P. Larouche, *Regulation for innovativeness or regulation of innovation?*, 7 Law Innovation & Tech. 52 (2015).
[10] G. Stigler, *The theory of economic regulation*, 2 Bell J. Econ. & Manage. Sci. 3 (1971).
[11] Introduced by article 36 of Law Decree No. 76 dated 16 July 2020 converted by Law No. 120 dated 11 September 2020.

with this regulatory instrument is more complex than it seems. While *Sperimentazione Italia* is compatible with EU policies on responsible innovation, this sandbox provides its stakeholders with limited information, predictability, and clarity. The results of *Sperimentazione Italia* are limited at the time of writing, but the potential of this sandbox is far from being fulfilled. Despite the limited available evidence, this preliminary discussion aims to shed light on the potential and shortcomings of sandboxes to promote responsible innovation. Since regulatory sandboxes are a relatively novel instrument, much can be learned from similar forms of experimental regulations which have been implemented for centuries and about which there is more available legal, methodological, and practical knowledge[12].

This article is organized as follows. Section 1 distinguishes between different types of experimental regulatory instruments. Section 2 discusses the Italian experience with experimental legislation and regulations, including the initial results of *Sperimentazione Italia*. Section 3 delves into the intricacies of regulating technological change and the strategic use of regulation to foster responsible innovation. Section 4 discusses the potential and challenges of employing regulatory sandboxes to advance responsible innovation, including the risk of regulatory capture . Lastly, we conclude and draw broader implications of this discussion for Italian and EU public law.

2. Experimental Regulations and Regulatory Sandboxes

Experimental laws and regulations are far from being new phenomena in Italy or in the rest of the world[13]. Experimental legislation, a general term used to denote primary legislation authorizing legal experiments, has existed for centuries, dating back to 17th-century French law[14]. However, experimental laws and regulations remained relatively obscure and underused for centuries. Over the last two

[12] S. Ranchordás, *Experimental Regulations and Regulatory Sandboxes – Law Without Order?*, Law and Method 1 (2021).
[13] N. Maccabiani, *An empirical approach to the rule of law: the case of regulatory sandboxes*, 13 Osservatoriosullefonti.it 741 (2020).
[14] F. Crouzatier-Durand, *Réflexions sur le concept d'expérimentation législative (à propos de la loi constitutionnelle du 28 mars 2003 relative à l'organisation décentralisée de la République)*, 56 RFDC 675 (2003).

decades, there has been a growing scholarly, political, and legislative interest in the broader use of experimental legislation, experimental regulations, pilots, and policy experiments. This interest has been partly fueled by debates on the need to improve the quality of legislation and regulation[15]. This section begins with a brief distinction between different experimental legislative and regulatory measures. It then reviews the first experiences with experimental regulatory measures in Italy.

2.1. Experimental legislation and other experimental measures

There is no single definition of 'experimental legislation' or 'experimental law'. Instead, this term may be used loosely to refer to a wide range of legislative, regulatory, and policy instruments with a temporary nature[16].

First, there are few experimental statutes stricto sensu. Rather, in unitary states, legal experiments occur through a derogation or waiving mechanism, that is, there is a legislative disposition in a statute (experimental clause) authorizing a derogation from existing legislation. Experimental clauses establish the central requirements for the experiment, which will then be further developed in secondary legislation. Examples of these requirements are the duration of the experiment, the group or geographical area to which the experiment is applicable, the scope of the derogation, the objectives of the experiment, and the evaluation criteria. In most cases, experimental clauses apply to a limited number of dispositions and only allow for experiments within a specific sector or legal area. There are however examples of general experimental clauses or experimental laws that have a broader scope and allow for the adoption of experimental regulations in a large number of sectors. This is the case of the Flemish government decree of 7 December 2018 (*Bestuursdecreet*) which, in its chapter 4, allows the Flemish government to adopt experimental regulations and regulatory free zones (*regelluwe zones*).

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[15] R. Van Gestel, G. Van Dijck, *Better regulation through experimental legislation*, 17 EPL 539 (2011).

[16] See, for example, M.A. Heldeweg, *Experimental Legislation Concerning Technological & Governance Innovation – An Analytical Approach*, 3 Theory Pract. Legis. 169 (2015).

Experimental regulations and regulatory sandboxes have recently been regarded as regulatory tools that can be employed to stimulate innovation[17]. They are also perceived as strong alternatives to more cautious regulatory approaches to the regulation of novel phenomena and regulatory change, namely by the OECD[18].

The European Commission defined in the November 2023 Better Regulation Toolbox, regulatory sandboxes as "schemes that enable firms to test innovations in a controlled real-world environment, under a specific plan developed and monitored by a competent authority" and which are "usually organised on a case-by-case basis, include a temporary loosening of applicable rules, and feature safeguards to preserve overarching regulatory objectives, such as safety and consumer protection"[19]. Regulatory sandboxes enable a direct testing environment for innovative products, services, or business models, under a specific testing plan. This plan typically involves some degree of regulatory leniency combined with certain safeguards. This may include waiving existing rules, modifying otherwise applicable regulations, providing additional compliance assistance, or implementing other measures designed to support innovative market actors. In a regulatory sandbox, regulators work collaboratively with a small group of regulatees for a limited amount of time, furthering the trend to redefine regulation through collaborative negotiation[20].

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[17] "A regulatory sandbox brings the cost of innovation down, reduces barriers to entry, and allows regulators to collect important insights before deciding if further regulatory action is necessary." *Briefing on Regulatory Sandboxes*, UNSGSA Fintech Sub-Group on Regulatory Sandboxes, June 3, 2018. See also *G20 Survey on agile approaches to the regulatory governance of innovation*, Report for the G20 Digital Economy Taskforce, August 2021, available at *https://www.oecd.org/gov/g20-survey-on-agile-approaches-to-the-regulatory-governance-of-innovation-f161916d-en.htm*.

[18] OECD, Recommendation of the Council for Agile Regulatory Governance to Harness Innovation (Adopted by the Council at Ministerial level on 6 October 2021), recommendation IV.4, available at *https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0464#mainText*. See *infra*, Section 4.

[19] European Commission, *Better Regulation Toolbox*, July 2023, tool #69 (Emerging methods and policy instruments).

[20] See A.C. Amato Mangiameli, *Tecno-regolazione e diritto. Brevi note su limiti e differenze*, 32 Dir. inf. 147 (2017). The Author reflects on the enhanced negotiating nature of the law "*Il diritto si presenta sempre più come negoziato*". The Author makes reference to French literature on the issue, see F. Ost, *Le role du droit: te la vérité révélée à la réalité*

Regulatory sandboxes differ from experimental regulations on several grounds. First, sandboxes do not always entail the disapplication of existing laws and regulations[21]. Rather, sandboxes can be limited to providing customized or bespoke compliance assistance to regulatees or collaborating with them on the design of products to ensure compliance with regulations (e.g., Norwegian DPA regulatory sandbox for privacy-friendly AI systems; Spanish regulatory sandbox for AI)[22].

Second, a large part of regulatory sandboxes consists of policy decisions on eligibility, objectives, entry and exit requirements, and evaluation criteria which aim to promote innovation. Experimental regulations may be used for a number of other goals. Sector-specific regulatory sandboxes have sought to assist mainly startups to develop their products, allowing them to participate in a testbed for a short period of time (six months on average), and collaborate closely with the regulator and sometimes with each other[23]. In other words, regulatory sandboxes typically allow for customization of regulatory measures

négociée, in G. Timsit, A. Claisse & N. Belloubet-Frier (eds.), *Les administrations qui changent. Innovations techniques ou nouvelles logiques?* 73 ff. (1996).

[21] See 2023 Better Regulation Toolbox which refers to regulatory/legislative barriers. See also G. Lo Sapio, *Il regolatore alle prese con le tecnologie emergenti. La regulatory sandbox tra principi dell'attività amministrativa e rischio di illusione normativa*, 20 Federalismi.it 16 (2022).

[22] The Norwegian regulatory sandbox is established under the supervision of the Norwegian Data Protection Authority and aims at promoting the development of innovative artificial intelligence solutions that, from a data protection perspective, are both ethical and responsible (*https://www.datatilsynet.no/en/regulations-and-tools/sandbox-for-artificial-intelligence/*). This sandbox operates with three main principles for responsible artificial intelligence: lawfulness, ethic and robustness. These principles are based on the "Ethics guidelines for trustworthy AI" presented in 2019 by the High-Level Expert Group on AI appointed by the European Commission (see *https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai*). Spain has also recently established a regulatory sandbox for AI, aimed at creating a testing environment for the implementation of the legal requirements for certain AI systems that may pose risks to security, health, and fundamental rights. The sandbox allows the cooperation between authorities and AI developers for the implementation of those requirements (*Real Decreto 817/2023, de 8 de noviembre, que establece un entorno controlado de pruebas para el ensayo del cumplimiento de la propuesta de Reglamento del Parlamento Europeo y del Consejo por el que se establecen normas armonizadas en materia de inteligencia artificial*).

[23] S. Ranchordás, *Experimental Regulations and Regulatory Sandboxes*, cit. at 12.

and aim to reduce regulatory burdens of innovative companies. Regulatory sandboxes may thus not be experimental in the traditional sense of creating a completely different set of conditions to try a new measure. Rather, regulatory sandboxes' key feature is their aim to establish a stronger collaboration between regulators and innovators through regulatory flexibility. Therefore, regulatory sandboxes can be defined as collaborative regulatory instruments where regulators interact closely with a selected group of market actors (usually startups) to create a safe testbed to understand how to best regulate new types of services or products[24]. All types of experimental regulations and regulatory sandboxes are required to comply with existing constitutional, EU, and international law frameworks, including the principles of legality, equal treatment, legal certainty, and proportionality[25]. Experimental regulations and regulatory sandboxes and their implementation perils are—at the resemblance of many other instruments—grasped better when analyzed in practice. Therefore, the following subsection introduces the experience of Italy first with experimental regulations, and second, with regulatory sandboxes, including a general-purpose regulatory sandbox[26].

[24] See S. Ranchordás, *Innovation Experimentalism in the Age of the Sharing Economy*, 19 Lewis & Clark L. Rev. 871 (2015). The Author notes that "innovation is both a public and private activity which benefits highly from collaboration between the State and the private actors".

[25] S. Ranchordás, *Experimental Regulations and Regulatory Sandboxes*, cit. at 12; Id., *Experimental lawmaking in the EU: Regulatory Sandboxes*, EU Law Live (Oct. 22, 2021), University of Groningen Faculty of Law Research Paper No. 12/2021, Nov. 18, 2021 (last revised Feb. 2, 2022), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963810*.

[26] It should be mentioned that in June 2022 the Spanish government introduced the first AI regulatory sandbox which aims to "look at operationalising the requirements of the future AI regulation as well as other features such as conformity assessments or post-market activities". See *https://digital-strategy.ec.europa.eu/en/news/first-regulatory-sandbox-artificial-intelligence-presented*.

3. Experimental regulations and regulatory sandboxes in Italy

Literature on experimental legislation in Italy is still in its infancy[27]. The enactment of experimental regulations was initially linked to the development of flexible regulatory approaches in social policy[28]. More recently, experimental regulations and regulatory sandboxes have expanded to the regulation of emerging technologies. This section discusses the Italian experience with experimental regulations and regulatory sandboxes.

3.1. Experimental laws and regulations in Italy

In June 1998, Law No. 449/1997 introduced one of Italy's first legal experiments with the so-called minimum integration income ("*reddito minimo di inserimento*"), which established the provision of economic and social support measures for individuals at risk of those risking social exclusion and unable to survive or support their families due to illness, disabilities or social reasons[29]. This form of welfare benefit was approved on an experimental basis and was part of the reform of the Italian social security system initially conducted in limited areas of the country. This new measure also aimed to combat poverty by providing an income support contribution of up to ITL 500,000 per month and personalised assistance programs. The experiment lasted two years. A few years later, Law No. 10/2011 introduced another 12-month experiment concerning a 'social card' for individuals and families in need of financial assistance[30]. Experimental regulations were also adopted in the 1990s. Law No. 127/1997 introduced an experimental regulation with the goal of promoting digitalization, allowing for the testing of the Electronic Identity Card[31].

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[27] See E. Longo, *Time and Law in the post-COVID-19 Era: the usefulness of Experimental Law*, in S. Ranchordàs & B. van Klink (eds.), *Experimental Legislation in Times of Crisis*, Law and Method – Special Issue 1 (2021). See also F. Laviola, *Regolazione della tecnologia e dimensione del tempo*, 14 Osservatoriosullefonti.it 1163 (2021).

[28] See *infra*, Subsection 2.1.

[29] Article 59, par. 47 of Law No. 449 dated 27 December 1997.

[30] Article 2, paragraphs 46-49 of Law Decree No. 225 dated 29 December 2010 converted by Law No. 10 dated 26 February 2011.

[31] Known as Law "Bassanini-bis", the measure was introduced under Article 2, par. 10 and then implemented by different measures starting with the Decree of the President of the Council No. 437 dated 22 October 1999. Actual implementation of the measure started in 2001 with pilot projects in 83 municipalities.

While the mentioned experimental regulations introduced new legal regimes, not all experimental laws in Italy have followed this model. For instance, a different approach was embraced in the regulation of the 'micro-mobility', such as electronic hoverboards and e-scooters, under Law 145/2018[32]. This law allowed for possible derogations from existing legislation to test the introduction of new forms of sustainable electric transport.

Although experimental regulations have existed for a number of years, it was only with the approval of the fintech sandbox that Italian scholars and policymakers began devoting more attention to experimental regulations and in particular to regulatory sandboxes[33].

3.2. Italian *Regulatory Sandboxes*

In the next subsections, we introduce two different regulatory sandboxes currently active in Italy at the time of writing: a sector-specific regulatory sandbox concerning financial innovation (Fintech) and a general-purpose sandbox known as "*Sperimentazione Italia*"[34]. While the scope of the first is limited to a specific sector, the second one represents an interesting attempt to set up general-purpose sandboxes[35].

[32] Art. 1, paragraph 101, of Law No. 145 dated 30 December 2018 concerning State budget forecast for year 2019 and multiannual budget for the triennium 2019-2022.

[33] Experimental legislation in labour law has been examined by P. Ichino, *Come il metodo sperimentale può contribuire al progresso del diritto del lavoro*, 30 Riv. it. dir. lav. 393 (2011).

[34] See E. Longo, *Time and Law in the post-COVID-19 Era*, cit. at 27; N. Maccabiani, *An empirical approach to the rule of law*, cit. at 13; A. Merlino, *Il* regulatory sandbox *e la teoria delle fonti*, 17 Dir. pubbl. eur. Rass. online 111 (2022); E. Corapi, *Regulatory Sandbox nel Fintech?*, in E. Corapi, R. Lener (eds.*), I diversi settori del fintech*, 13 ff. (2019); M.T. Paracampo, *Dalle regulatory sandboxes al network dei facilitatori di innovazione tra decentramento sperimentale e condivisione europea*, 18 Riv. dir. banc. 219 (2019); F. Di Porto, A. Signorelli, *Regolare attraverso l'intelligenza artificiale*, in A. Pajno, F. Donati & A. Perrucci (eds.), Intelligenza artificiale e diritto: una rivoluzione?, vol. I, 617 ff. (2022). For first comments on *Sperimentazione Italia*, see G. Lo Sapio, *Il regolatore alle prese con le tecnologie emergenti*, cit. at 21; M. Trapani, *L'utilizzo delle sandboxes normative: una ricognizione comparata delle principali esperienze di tecniche di produzione normativa sperimentali e il loro impatto sull'ordinamento*, 15 Osservatoriosullefonti.it 215 (2022).

[35] A. Merlino, *Il* regulatory sandbox *e la teoria delle fonti*, cit. at 34.

3.2.1. The Italian Fintech Regulatory Sandbox

FinTech has pushed the boundaries of traditional regulatory frameworks in the financial world and revolutionized how traditional markets operate[36]. The Italian Fintech sandbox was introduced by Law Decree No. 34/2019[37], drawing on the UK experience with sandboxes in the financial sector. This sandbox is designed for operators in the banking, insurance, and finance sectors who wish to experiment with innovative services or products within a protected area under the monitoring of banking and financial supervising authorities, namely the Bank of Italy, IVASS, and Consob[38]. The Italian Fintech sandbox allows selected participants to operate in an experimental regulatory space where certain provisions under regulations issued by the supervising authorities can be derogated for a maximum period of 18 months, all under constant supervision and dialogue with supervising authorities[39].

The experimental provision is implemented by a ministerial decree, specifically Decree No. 101/2021 of the Ministry of Economy and Finance. This Decree establishes the criteria for admission to the sandbox and specific timeframes for the submission of admission requests. By outlining these requirements, the ministerial decree delineates the types of innovations intended to be promoted through the experiment[40]. Among these requirements, it is provided that the proposed activity shall be "significantly innovative." Furthermore, the innovation should be "responsible", delivering added value to end users and enhancing the overall efficiency of the financial system. This sandbox incorporates a "governance" element since it allows supervising

[36] S.T. Omarova, *Technology v Technocracy: Fintech as a Regulatory Challenge*, 6 J. Fin. Regul. 75 ff. (2020).

[37] Article 36, paragraph 2-bis of Law Decree No. 34/2019, converted with amendments into Law No. 58/2019 on the regulation of Fintech Committee and Experiment and implemented by Decree No. 101/2021 of the Ministry of Economy and Finance.

[38] *Regulatory sandbox lessons learned report*, UK Financial Conduct Authority (2017), available at *https://www.fca.org.uk/publications/research/regulatory-sandbox-lessons-learned-report*; B. Lim, C. Low, *Regulatory Sandboxes in Fintech*, cit. at 2; T.F. Hellmann, A. Montag, N. Vulkan, *The Impact of the Regulatory Sandbox on the FinTech Industry* (2022), available at *https://ssrn.com/abstract=4187295*.

[39] See *supra*, Subsection 1.1.

[40] Direction of the experiment should be explicitly indicated, See S. Ranchordás, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (2014).

authorities to select – within the legal requirements– which innovation can be tested and then potentially introduced to the market. Additionally, it promotes informal dialogues between supervising authorities and market operators, providing guidance to private actors and fostering regulatory learning. Following the experiment's successful completion and a favorable assessment of the sandbox, regulators may propose targeted amendments to sector-specific regulations in order to govern the tested products or services and their equivalents.

Other EU Member States have applied the described structure of fintech sandboxes to other regulated areas, such as transport, environment and energy[41]. Italy, on the contrary, has decided to promote innovation in these sectors through a general-purpose regulatory sandbox called *Sperimentazione Italia*.

3.2.2. *Sperimentazione Italia*

Sperimentazione Italia is an initiative that invites startups, companies, universities, and research centers to test their innovative projects for a limited period of time through a temporary waiver of existing regulations[42]. This general-purpose sandbox opens the way to experiments in the public sector, provided that the proposed innovation cannot be implemented under another existing law and certain legal requirements are met[43]. This general-purpose regulatory sandbox is part of the Italian Strategic Plan on AI for 2022- 2024 which aims to test innovative AI solutions in the Italian market and boost the digitalisation of private and public sectors. The ultimate aim of this Strategic Plan is to increase at least by 30% the presence of AI products and services in the market[44]. *Sperimentazione Italia* is the first general-purpose sandbox

[41] Germany introduced sandboxes under the Passenger Transportation Act: § 2(7) and §16 with regard to regulations on the operation of motor vehicles with automated and autonomous driving (adopted by the Fed. Cabinet in February 2022); France introduced regulatory sandboxes ("*bac a sable réglementaire*") in the energy sector under the supervision of the *Commission de Régulation de l'Energie*.

[42] *Sperimentazione Italia* was introduced by Law Decree No. 76/2020, converted into Law No. 120/2020.

[43] The most advanced Member States is France, which introduced an experimental clause in the Constitution in 2003: Art. 37, par. 1, of French Constitution.

[44] Italian Strategic Plan on AI for 2022- 2024 is an ambitious programme – jointly elaborated by the then Ministry of University and Research, Ministry of Economic Development, and Ministry for Technological Innovation and Digital Transition – to

adopted in Europe and could be an interesting point of reference for both future EU and national policies[45]. *Sperimentazione Italia* starting point is the identification of regulatory barriers to proposed innovations. Therefore, applicants ('innovators') should explain to regulators why existing rules hinder their innovative activity and why regulatory simplification is needed[46]. Despite its positive intent, this step may potentially discourage participation as it places the burden on innovators to initiate the procedure with evidence of the existence of regulatory barriers.

Law Decree No. 76/2020 identifies "urgent measures for simplification and digital innovation" and introduces under Title IV "provisions for innovation". Article 36 provides administrative simplification measures for innovation to favour the digital transformation of public administration, as well as the development, diffusion, and use of emerging technologies through the creation of regulatory sandboxes. Application requests should be submitted to the Department of the Presidency of the Council of Ministers in charge of digitalization and should include details on the requesting entities, characteristics of the proposed innovation, suggested duration of the sandbox, list of regulatory barriers, objectives and scope of the experiment as well as the expected benefits and risks, including relevant mitigation measures (Article 36). Furthermore, for the sandbox to be authorized, proposed innovations must have "a positive impact on the quality of the environment or life" and should have the potential to become successful.

promote the development and use of AI applications in Italy. It sets a series of specific objectives and identifies 11 priority sectors where investments should be addressed as well as 24 policies to be adopted in the next 3 years to promote the digitalization of Italian public and private sectors through AI applications.

[45] See G. Lo Sapio, *Il regolatore alle prese con le tecnologie emergenti*, cit. at 21; M. Trapani, *L'utilizzo delle sandboxes normative*, cit. at 34.

[46] "Two approaches are theoretically possible to set up a sandbox: one where the request (and identification of a regulatory barrier) is initiated by innovators, and another, where the regulator identifies legislative provisions for testing and calls for applications by interested organisations9 first, the sandbox reflects the paradigm of responsible innovation since only innovations having a positive impact on the quality of life and the environment can be admitted to the experiment." European Commission, *2021 Better Regulation Toolbox*.

These experiments cannot exceed one year and can be extended only once[47].

Given the simplification scope of the provision, the Decree sets a very strict (and optimistic) timeline for the procedure, establishing a maximum duration for each phase: 30 days for the assessment of the admission request and an additional period of 30 days for issuing the authorization or rejection decision. The Decree also establishes continuous monitoring obligations for the competent office of the Presidency of the Council, in collaboration with the Ministry of Economic Development. The cohort of applicants admitted to the regulatory sandbox is also required to submit a report at the end of the experiment. The Presidency of the Council and other responsible ministries are then expected to assess the outcomes of the experiment, considering the benefits the innovation can bring to the quality of life and environment. In case of positive evaluation, the involved authorities can propose permanent revisions to the temporarily derogated regulation based on the data collected during the experiment.

The Decree specifies that it is not possible to experiment with certain regulated sectors, some of which are already covered by specific sectorial experiments. This includes financial activities subject to authorization (Fintech), national security, birth registry, marital status and electronic identity card, elections and referenda, as well as any preventive measures related to public security. These exclusions are justified by the fact that these areas are typical representations of state authority, which cannot be subject to derogations on an experimental basis.

Based on publicly available documents, at the time of writing, two projects have been admitted to *Sperimentazione Italia*: the first project concerns the testing of autonomous driving buses in a restricted area of Turin (around 5 km), and the second one concerns an experiment with autonomous robots for last-mile delivery in a specific area of Milan[48].

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[47] The cooperation among Ministries is carried out through the institute of "Conferenza di servizi" under Law No. 241/1990.

[48] The approval of the two projects was announced by press releases on the webpage of the Department for Digital Transition: *https://innovazione.gov.it/notizie/articoli/innovazione-via-libera-alla-sperimentazione-di-navette-a-guida-autonoma-su-strada/*; *Al via la sperimentazione di Yape, il primo robot-fattorino per le consegne a guida autonoma*

While this general-purpose regulatory sandbox has great potential and it is still in its infancy, some shortcomings are already visible. First, there is limited information on the already approved experiments: the measures authorizing the sandboxes are not publicly available. While the protection of confidential information of market actors is a legitimate concern, the lack of openness can also be problematic. This may dissuade eligible participants from joining the regulatory sandbox and regulators from learning from existing experiments. This issue should be addressed to better balance the protection of innovations admitted to the experiment and transparency requirements. Since the actual authorization and the structuring of the sandbox ultimately depend on the authorizing measure issued by the Presidency of the Council, access to these documents would help us understand the functioning of the regulatory sandbox. Additionally, this would help shed light on the sandbox's compliance with constitutionally protected rights. Furthermore, information on successful sandbox experiences could promote the wider adoption of this regulatory instrument.

Second, *Sperimentazione Italia* is the first general-purpose sandbox within the EU and it contains some elements which could inspire future regulatory sandboxes at EU level if more guidance is provided. The exercise to reflect upon regulatory barriers and the close collaboration with innovators are two aspects to be considered, but additional guidance is required to avoid regulatory fragmentation. As others have remarked, generic sandboxes risk being 'devoid of defined admission thresholds and sufficient expertise or skills for some technologies relative to others'[49].

Third, the ambition to advance responsible innovation with a general-purpose regulatory sandbox overlooks the complexity of regulating technological change as well as the challenge of promoting responsible innovation with regulatory instruments. The next sections will delve into this point.

(*https://innovazione.gov.it/notizie/articoli/al-via-la-sperimentazione-di-yape-il-primo-robot-fattorino-per-le-consegne-a-guida-autonoma/*). The documentation concerning the projects and their approval is not publicly available.

[49] J. McCarthy, *From childish things: the evolving sandbox approach in the EU's regulation of financial technology*, 15 Law Innovation & Tech. 1 (2023).

4. Regulating (Responsible) Innovation

Can regulation truly advance innovation? Should regulation only promote responsible innovation? This section discusses existing scholarly perspectives that have sought to shed light on these two questions.

4.1. The Challenge of Regulating Technological Change

The regulation of technological change has been described as a wicked problem which requires alternative governance systems and an interdisciplinary reflection on innovation[50]. The regulation of technological change and innovation is indeed complex for a number of reasons[51]. First, innovation is an elusive concept which is hard to define, measure, and thus regulate. One of the most commonly used definitions of innovation has been proposed by the OECD Oslo Manual of Innovation. In its latest version (2018), innovation is defined as: 'a new or improved product or process (or combination thereof) that differs significantly from the unit's previous products or processes and that has been made available to potential users (product) or brought into use by the unit (process)'[52]. This definition of innovation contains three elements: (i) innovation can refer to both novelties or ameliorations, (ii) of existing products and processes; (iii) that have been made available to users. In other words, a brilliant new idea that has never exited a laboratory is thus not an innovation until it has reached its users.

Innovation has been too easily heralded by policymakers as a goal to strive for, a measurement of economic success, and a reason to

[50] G.E. Marchant, *Governance of Emerging Technologies as a Wicked Problem*, 73 Vand. L. Rev. 1861 (2020). See also M.A. Staner, G.E. Marchant, *Proactive International Regulatory Cooperation for governance of emerging technologies*, 55 Jurimetrics 153 (2015).

[51] While there is a broad agreement in the literature that new technologies create challenges for law and regulation, innovation law is mainly limited to Intellectual Property law, while too little is known and researched about "the most adequate and efficient mix of legal and policy instrument to promote innovation" and on "how different legal instrument can be employed to regulate and facilitate innovation". S. Ranchordás, *Innovation Experimentalism in the Age of the Sharing Economy*, cit. at 24; see also Id., *Constitutional Sunsets and Experimental Legislation*, cit. at 40; L. Bennett Moses, *Regulating in the Face of Sociotechnical Change*, in R. Brownsword, K. Yeung & E. Scotford (eds.), *The Oxford Handbook of Law, Regulation and Technology* 573 ff. (2017).

[52] OECD, Eurostat, *Oslo Manual 2018: Guidelines for Collecting, Reporting and Using Data on Innovation*, 4th ed. (2018), available at *https://doi.org/10.1787/9789264304604-en*.

relax regulatory frameworks. This position has often been advanced with little regard for its shortcomings and potential side-effects to sustainability, the rule of law, and human rights. As we explain later, responsible innovation does not always coincide with this general and primarily economic definition of innovation.

Second, it is challenging to regulate technological change because innovative products may disrupt the wider regulatory order, triggering concerns about its adequacy and regulatory legitimacy[53]. Differences in the timing of technology and regulation explain this difficulty. The literature has claimed there is sometimes a 'pacing gap' between the slow-going nature of regulation and the speed of technological change[54]. Technological innovations have specific development trajectories, investment and life cycles, and path dependencies that do not go well with the speed of technology[55]. Fast changing technologies challenge traditional regulatory techniques not only because regulators regulate slowly but also because there may be information asymmetries due to the reluctance of firms to disclose relevant information. This has been captured in the so-called Collingridge dilemma which explains that when an innovation emerges, regulators hesitate to regulate due to the limited availability of information[56]. Later when they have gathered enough information, it may be too late as technology may have changed or regulation may no longer be able to contain its risks and side-effects. In simple terms, regulators can typically only shape the development of a technology when it is at an early stage of development. However, at this stage, regulators do not know yet how a novel technology will affect society. Later, when technology has become societally embedded and regulators have gathered more information about their implications, it may no longer be possible to influence its development. Alternatively, this timing and information asymmetry problem can also result in overregulation which stifles

[53] R. Brownsword, K. Yeung & E. Scotford (eds.), *The Oxford Handbook of Law, Regulation and Technology*, cit. at 51.
[54] G.E. Marchant, *Governance of Emerging Technologies as a Wicked Problem*, cit. at 50.
[55] B.-J. Koops, *The Concepts, Approaches, and Applications of Responsible Innovation*, in B.-J. Koops, I. Oosterlaken, H. Romijn, T. Swierstra & J. van den Hoven (eds.), *Responsible Innovation 2*, 1 ff. (2015).
[56] D. Collingridge, *The Social Control of Technology* (1980).

investment in R&D and ultimately innovation due to the imposition of heavy burdens on businesses[57].

In most cases, however, regulation offers sufficient flexibility to accommodate new technological developments. However, it remains unclear how regulation can be employed to truly support and advance innovation. Legal and interdisciplinary scholarship as well in grey literature have offered different perspectives on how regulation can play an important role for innovation. We review in the following section the most common set of arguments.

4.2. Perspectives on the Regulation of Technological Change and Responsible Innovation

Regulation is a multilevel, multi-instrument, and complex phenomenon that is in permanent dialogue with society. Innovation and regulation have thus a reflexive relationship and depending on how they engage, the results will be different. A number of scholars have posited that regulation can steer innovation in a specific direction[58]. As noted by Butenko and Larouche, innovation is partially pre-determined (intentionally or unintentionally) by the existing structure of the regulatory environment[59]. Lobel has demonstrated that labor regulation, in particular non-competition clauses, may have a negative impact on the innovation process, as human capital relocates to areas with fewer mobility constraints[60].

At the same time, Ford has also argued that innovation will affect regulation no matter how it is structured: 'in its design, regulation constitutes the spaces in which innovation happens. It creates loopholes, opportunities, boundaries, and incentives. Different tradeoffs will make sense in different circumstances'[61]. Regulators aiming to deepen

[57] L. Bennett Moses, *Regulating in the Face of Sociotechnical Change*, cit. at 51.
[58] A. Butenko, P. Larouche, *Regulation for innovativeness or regulation of innovation?*, cit. at 9, 62. See also N.A. Ashford, R.P. Hall, *The Importance of Regulaton-Induced Innovation for Sustainable Development*, 3 Sustainability 270 (2011).
[59] A. Butenko, P. Larouche, *Regulation for innovativeness or regulation of innovation?*, cit. at 9. See also E. Longo, *Time and Law in the post-COVID-19 Era*, cit. at 27.
[60] O. Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. Corp. L. 931 (2020); Id., *Talent Wants to Be Free* (2013).
[61] C. Ford, *Making Regulation Robust in the Innovation Era*, in M. Maggetti, F. Di Mascio & A. Natalini (eds.), *Research Handbook on Regulatory Authorities* (2022).

their understanding of how innovation interacts with regulation need to consider the specific context in which innovation occurs. As innovation manifests differently across sectors, so too must the regulatory response be tailored. Ford identifies three main issues that arise from the misalignment of innovation with regulation: First, information and data gaps where regulators may lack sufficient knowledge about the potential risks associated with new products or practices[62]. Second, the issue of visibility, often a consequence of incremental innovation, where gradual changes remain unnoticed until a regulatory concern becomes critical. As technology changes, unforeseen risks, uncertainty, and opportunities may emerge. Despite the inevitable differences between different new technologies, uncertainty as to how and when to regulate is a common regulatory challenge. Third, the legibility challenge, which encompasses the difficulty in comprehending one's surroundings and forming accurate judgments.

The previous perspectives could suggest that innovation-friendly regulation should be flexible. Research has shown that while excessive regulation can indeed impact negatively R&D investment, rigid legal systems may be preferable at early stages of the technological development when legal certainty is essential to ensure commitment[63]. Scholarship has, nonetheless, cautioned against the impact of excessive regulation and obsolete regulation. On the one hand, excessive regulation, fuelled by special interest groups, has been found to stifle innovation in some sectors such as the legal profession, where the development of novel integrated legal products (for example, tax and accounting processes) and LegalTech (e.g., online divorce platforms), have been restricted by regulatory perceptions of how legal services should be delivered[64]. On the other, excessive regulation can be the result of the accumulation of regulations, including obsolete rules. This may impose significant costs on businesses and hinder innovation. This issue often stems from regulations that are predicated on outdated technological assumptions, owing to regulatory agencies' insufficient investment in

[62] Ibidem.
[63] L. Anderlini, L. Felli, G. Immordino & A. Riboni, *Legal Institutions, Innovation, and Growth*, 54 Int. Econ. Rev. 937 (2013).
[64] G.K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 Stan. L. Rev. 1689 (2008).

resources and staff training[65]. The lack of dialogue between regulators and firms has also been blamed for this disconnect between regulators and the innovation process. Stamford has argued that public regulators could stimulate innovation by creating collaborative initiatives between government, stakeholders, and innovators[66]. This would expand the role of governments in the innovation process beyond the financing of research through subsidies, tax incentives, and intellectual property rights[67]. By engaging more actively with innovators, public regulators can offer support with legal compliance, promote the refinement of outdated regulation, and contribute to the improvement of regulation while driving the innovation process forward.

The adoption of regulatory sandboxes and other innovation-friendly policies reflects the growing academic consensus on the symbiotic relationship between regulatory frameworks and technological change and the need to address some of the mentioned challenges. This scholarly and policy position is also supported by the argument that the EU's competitive edge and capacity for innovation can be significantly enhanced by adopting a regulatory stance that actively fosters and accommodates innovation. The adoption of the controversial innovation principle occurred within this context[68].

The proposed "European Declaration on Digital Rights and Principles for the Digital Decade" recognizes the need for an appropriate regulatory framework to underpin a responsible digital transformation[69]. This is confirmed in other policy documents developed at the EU level, such as the "New European Innovation Agenda" and the

[65] P. Ibáñez Colomo, *Future-Proof Regulation against the Test of Time: The Evolution of European Telecommunications Regulation*, 42 Oxford J. Legal Stud. 1170 (2022).
[66] S. Samford, *Innovation and public space: The developmental possibilities of regulation in the global south*, 9 Regul. Gov. 294 (2015).
[67] See also C. Goanta, *How Technology Disrupts Private Law: An Exploratory Study of California and Switzerland as Innovative Jurisdictions*, TTLF Working Papers No. 38, Stanford-Vienna Transatlantic Technology Law Forum 1 (2018).
[68] European Commission, Directorate-General for Research and Innovation, F. Simonelli, F., A. Renda, *Study supporting the interim evaluation of the innovation principle: final report*, Publications Office, 2019, *https://data.europa.eu/doi/10.2777/620609*.
[69] *European Declaration on Digital Rights and Principles for the Digital Decade*, COM(2022) 28 final, paragraph 6 of the Preamble.

Green Deal Industrial Plan for the Net-Zero Age[70]. These policy documents highlight some of the complexities of regulating innovation and reveal a growing attention towards the shortcomings of only considering innovation from an economic and business perspective. The focus of traditional scholarship on the relationship between regulation and economic innovation has ignored the potential downsides of unconstrained innovation on sustainability, the rule of law and human rights. This has resulted in a reformulation of the debate which is now focused on regulation and responsible innovation.

Responsible innovation redefines innovation in light of a set of values and moral considerations. There is a wealth of literature on responsible innovation which describes it as the incorporation of societal values, ethics and ideas of societal desirability, acceptability, and sustainability within the innovation process[71]. This strand of scholarship turns moral and public values (e.g., sustainability, privacy, autonomy) into requirements for design, research and development at an early stage of technology[72]. Responsible innovation seeks to contribute to sustainable development by advancing governance schemes that support innovation that avoid harm and promote products that protect the Earth's life-support system and improve living conditions (e.g., alleviate poverty)[73]. Responsible innovation entails a wide range of interests to be considered when regulating innovation. It is therefore important to reflect upon the most suited regulatory instruments to reach these objectives.

The regulation of innovation and in particular responsible innovation has been framed both by the longstanding scholarship on risk management, innovation studies, and the more recent ecological, public health, and political crises. To illustrate, both natural disasters and the pandemic have urged us to reflect on the relation with our

[70] Communication from the European Commission, *A New European Innovation Agenda*, COM(2022) 332, 5.7.2022. This is also recognized by Advocate General Pitruzzella in one of the first cases where the European Court of Justice addressed automated decision-making.

[71] B.-J. Koops, *The Concepts, Approaches, and Applications of Responsible Innovation*, cit. at 55.

[72] Ibidem.

[73] C. Voegtlin, A.G. Scherer, *Responsible Innovation and the Innovation of Responsibility: Governing Sustainable Development in a Globalized World*, 143 J. Bus. Ethics 227 (2017).

ecosystem and reconsider the role of scientific expertise as a resource against ecological and health catastrophes and disinformation about them[74]. These phenomena have also changed our relationship with "physical" spaces: they accelerated the evolution of the digital dimension and contributed to the development of technologies allowing us to interact in completely digitalized environments[75]. In the next section, we discuss how regulatory sandboxes engage with these new perspectives and contribute to the regulation of responsible innovation.

5. Regulatory Sandboxes and (Responsible) Innovation: Potential and Critique

This section explores how regulatory sandboxes can be instrumental in promoting responsible innovation. However, considering existing proposals to expand the use of this regulatory instrument, this section also presents a set of objections against it and words of caution.

5.1. Regulatory Sandboxes and Responsible Innovation: Potential

By strategically timing interventions, fostering dynamic partnerships between regulators and innovators, and adapting to shifts in societal values and needs, regulatory sandboxes hold the potential of effectively guiding the development of responsible innovation[76].

[74] See A.C. Amato Mangiameli, *Tecno-regolazione e diritto*, cit. at 20. The Author offers interesting reflections on the relationship between technology, law and regulation and society. See also O.W. Lembcke, *Techno-regulation and law: rule, exception or state of exception?: A comment to Han Somsen and Luigi Corrias*, 40 Rechtfilosofie & Rechtstheorie 131 (2011); L. Bennett Moses, *Regulating in the Face of Sociotechnical Change*, cit. at 51.

[75] The evolution of the digital sphere is currently causing a debate around the concept of "metaverse". See the study from the European Parliamentary Research Service, *Metaverse Opportunities, risks and policy implications*, June 2022, where the Metaverse is described as "an immersive and constant virtual 3D world where people interact through an avatar to enjoy entertainment, make purchases and carry out transactions with crypto-assets, or work without leaving their seat"; L. Floridi, Metaverse: a Matter of Experience, 35 Philos. Technol., No. 73, 1 (2022).

[76] See P. Vallance, *Pro-innovation Regulation of Technologies Review*, cit. at 1, 7-8.

Time: Temporary Character and Regulatory Flexibility

First, regulatory sandboxes set temporary measures that can respond to new challenges. This timing element helps address the critique that regulation may become, at some point, obsolete and disconnected from society, generating costs for firms, uncertainty, and creating a competitive disadvantage for businesses[77]. Nonetheless, Leenes et al. also remind us that the critique that regulation lags behind innovation often is exaggerated. Regulatory and legal frameworks tend to be relatively flexible and able to accommodate to most technological changes[78]. Nevertheless, temporary and experimental regulatory systems tend to offer the additional flexibility that may be required for the development of disruptive innovation[79].

Collaboration

Second, regulatory sandboxes reshape the relationship between regulators and market actors. They enable a closer public-private collaboration which benefits both innovators and regulators. Innovators can benefit from the artificially created regulatory environment to test the introduction of their products in the market. Within the sandbox, they do so under the supervision of the competent supervisory authority and may profit from bespoke guidance and regulatory comfort. Regulators, on the other side, have the chance to get to know a certain innovation, address the information asymmetries that are inherent to the innovation process, and shape an ad hoc testing environment. Here they can ensure that certain values are protected and specific objectives are pursued. The regulation and compliance that emerge from regulatory sandboxes are born out of a dialogue between regulators and innovators. Moreover, sandboxes can benefit society at large as they facilitate the testing of innovations that would otherwise not be granted access to markets[80]. This collaborative nature can reduce power asymmetries between regulators and regulatees.

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[77] P. Ibáñez Colomo, *Future-Proof Regulation against the Test of Time*, cit. at 65.

[78] R. Leenes, E. Palmerini, B-J. Koops, A. Bertolini, P. Salvini & F. Lucivero, *Regulatory challenges of robotics: some guidelines for addressing legal and ethical issues*, 9 Law Innovation & Tech. 1 (2017).

[79] C. Ford, *Making Regulation Robust in the Innovation Era*, cit. at 61.

[80] Regulatory sandboxes have also been defined as "schemes that enable firms to test innovations in a controlled real- world environment, under a specific plan developed

The demand for more flexible and collaborative regulation emerged in the late 90s as a response to less state-centered approaches to regulation. This concept has been depicted as a legal framework that creates "regulatory scaffolding," where public entities or regulators set the broad parameters, underpinnings, and institutional contours of a regulated domain, whilst deliberately leaving certain areas open within pre-defined, structured spaces. Flexible regulation was envisioned as porous and permeable to inputs coming from outside the regulatory structure and in particular by non-State actors[81]. Regulatory sandboxes contribute to this collaborative view of the regulatory process.

Evolving societal needs

Regulatory sandboxes enable regulation to adapt to changing societal values and overarching objectives. Regulating innovation with the "incorporation of societal values, ethics and ideas of societal desirability, acceptability, and sustainability" requires regulators to identify and balance such values and consider an extremely wide range of interests when defining the regulatory framework, increasing (and necessarily clearly defining) the space for the involvement of non-state actors in the policy making process. In the Communication 'A new European innovation agenda,' the European Commission underlines the importance of innovation for the achievement of the twin green and digital transition as well as the UN Sustainable Development Goals[82]. One of the five pillars of this agenda is the development of 'framework conditions for deep tech innovation'. This includes experimental approaches to regulation including regulatory sandboxes. Additionally,

and monitored by a competent authority. They are usually organised on a case-by-case basis, include a temporary loosening of applicable rules, and feature safeguards to preserve overarching regulatory objectives", European Commission, *2021 Better Regulation Toolbox*, tool #69. In the compromise text of the AIA, regulatory sandbox means "a controlled environment established by a public authority that facilitates the safe development, testing and validation of innovative AI systems for a limited time before their placement on the market or putting into service pursuant to a specific plan under regulatory supervision" (amendment to Article 3 – paragraph 1 new point 44 g).

[81] C. Ford, *Innovation and the State: Finance, Regulation, and Justice* (2017).

[82] Communication from the European Commission, *A New European Innovation Agenda*, cit. at 70.

the OECD recently considered regulatory sandboxes for the regulation of artificial intelligence and digital transformation[83].

5.2. General Critique

The employment of regulatory sandboxes to advance responsible innovation can be criticized on multiple fronts. First, in the EU, regulatory sandboxes lack a single definition and institutional framework for their establishment[84]. This could lead to confusion among regulators and the fragmentation of the European single market[85]. Furthermore, there is a general misinterpretation of the functions of regulatory sandboxes and the differences between sandboxes and other regulatory and non-regulatory experimental instruments[86]. As recently stressed by the OECD with regarding AI, regulatory sandboxes can be used to govern and regulate technology alongside other tools, but this requires a clear understanding of the different mechanisms available and their potential applications. Currently, there is still a lack of an internationally agreed definition of these instruments and standard typologies[87]. In the mentioned publication, OECD attempted for the first time to provide a classification of regulatory sandboxes and other mechanisms, trying to offer internationally shared criteria. Similarly, the European Commission, in July 2023, published a Staff Working Document offering guidance on the distinction between regulatory sandboxes, pilots, living labs, testbeds and other forms of experimentation.

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[83] *Regulatory sandboxes in artificial intelligence*, OECD Digital Economy Papers, cit. at 1.

[84] For a comparison among the different forms of regulatory sandboxes developed in Europe, see M. Trapani, *L'utilizzo delle sandboxes normative*, cit. at 34.

[85] S. Ranchordás, *Experimental Regulations for AI: Sandboxes for Morals and Mores*, University of Groningen Faculty of Law Research Paper No. 7/2021, May 6, 2021 (last revised Jul. 12, 2021), available at *https://ssrn.com/abstract=3839744*. Literature also points out that the precise definition of regulatory sandboxes varies depending on the jurisdiction using it, see B.R. Knight, T.E. Mitchell, *The Sandbox Paradox: Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege*, 72 S.C. L. Rev. 445 (2020).

[86] See *supra*, Section 2.

[87] "The newness of these mechanisms and lack of standard typologies means every sandbox is different". *Regulatory sandboxes in artificial intelligence*, OECD Digital Economy Papers, cit. at 1.

OECD classifies regulatory sandboxes based on the sphere of application (private/public/hybrid) and scope (law-specific; technology-based; generic/cross-sectorial; and regthech/govtech). However, current sandboxes proposals show a lack of understanding by regulators of these different approaches/applications. A shared and clear definition of regulatory sandboxes represents the first necessary step toward the possible creation of pan-European sandboxes[88], as planned within the proposed AI Act and recently attempted with Distributed Ledger Technologies[89].

A second line of critique concerns the experimental nature of regulatory sandboxes and their methodological validity. Regulatory sandboxes are often tailored to a specific sector, addressing a particular regulatory challenge, and meeting the needs of participants. This also means that those selected in a regulatory sandbox may benefit from a better market position, as they do not have to comply with the same regulatory burdens as other market actors. This could result in an uneven level-playing field. This possible "personalization" of the instrument and the resulting experiment may hinder the generalization of obtained results and, consequently, limit market-wide benefits[90]. In other words, the results obtained may only be valid for that specific sector, cohort, and regulatory project and a methodologically responsible generalization to other circumstances may not be possible. The proposed AI Act seeks to address some of these concerns with regards to the actual implementation of regulatory sandboxes, such as the risk of internal market fragmentation, lack of transparency and negative impacts on competition[91]. Article 53a (at the time of writing) provides for the Commission to adopt a delegated act "detailing the modalities for the establishment, development, implementation functioning and supervision of the AI regulatory sandboxes, including the eligibility criteria and the procedure for the application, selection, participation

[88] Ibidem.

[89] In February 2023, the European Commission launched a regulatory sandbox for innovative use cases involving Distributed Ledger Technologies (DLT).

[90] A. Attrey, M. Lesher, C. Lomax, *The role of sandboxes in promoting flexibility and innovation in the digital age*, Going Digital Toolkit, Policy Note, No. 2 (2020), available at *https://goingdigital.oecd.org/data/notes/No2_ToolkitNote_Sandboxes.pdf*.

[91] S. Ranchordás, *Experimental lawmaking in the EU*, cit. at 25, 7; Id., *Experimental Regulations for AI*, cit. at 85.

and exiting from the sandbox, and the rights and obligations of the participants, based on the provisions set out [in the AI Act]". Furthermore, Article 53 requires establishing authorities (i.e. authorities who set up and supervise the sandbox) to inform the AI Office (the Brussels-based 'European Artificial Intelligence Office' under Article 56 of the AI Act) of the establishment of a sandbox. The AI Office is then in charge of making publicly available a list of "planned and existing sandboxes". Lastly, paragraph 3 of article 53a, links sandboxes to "other Digital Single Market initiatives such as Testing & Experiment Facilities, Digital Hubs, Centres of Excellence, and EU benchmarking capabilities" thus acknowledging that there are other experimental mechanisms.

Many uncertainties concerning the use of sandboxes remain. For example, the scope and nature of AI regulatory sandboxes does not clearly emerge from the AI Act. At the time of writing, Article 53 lists the objectives of AI regulatory sandboxes such as the facilitation of the testing and development of innovative solutions related to AI systems as well the promotion of regulatory learning in a controlled environment[92]. However, further clarification may be needed regarding the design and classification of regulatory sandboxes, as some may have an experimental nature while others may primarily serve as collaborative compliance instruments.

A third source of concerns is the governance of regulatory sandboxes. The OECD mentions experimental regulation as governance frameworks susceptible of enabling the development of agile and future-proof regulation[93]. This governance element is particularly interesting with regard to responsible innovation and the necessary balancing of the different interests at stake. Regulatory sandboxes have the potential of giving direction to the innovation process so as to align it with overarching social, economic, and technological objectives and regulatory concerns. This governance element warrants further attention for several reasons. First, it relies on the active engagement and collaboration between regulators and innovators, setting them apart from other experimental regulations. Second, effective governance is

[92] See also recital 72.

[93] OECD, *Recommendation of the Council for agile regulatory governance to harness innovation* (Adopted by the Council at Ministerial level on 6 October 2021).

critical to understanding the potential and risks of regulatory sandboxes, particularly the risk of them being co-opted as vehicles for private interest lobbying. This last point merits further consideration.

5.3. Regulatory Capture

Despite its benefits, close collaboration between regulators and regulatees can generate regulatory capture and creating 'revolving door' effects[94]. While, in many cases, only smaller market actors (startups, SMEs) and hence, in theory, less powerful regulatees are eligible to participate in regulatory sandboxes, these instruments require by design close collaboration between regulators and firms and regular exchange of information. As discussed in the context of *Sperimentazione Italia* (see Section 2.2.2.), regulators invite regulatees to express their regulatory needs and identify solutions for regulatory burdens. This general-purpose sandbox also opens the door to an extensive regulatory discussion of the firms' position regarding a large number of perceived regulatory burdens and solutions on how to alleviate them.

The regulatory dialogue generated by general-purpose sandboxes like *Sperimentazione Italia* can create scenarios where regulators are systematically exposed to arguments from firms that may not align with the public interest. While this phenomenon may have many invisible ramifications in the case of general-purpose sandboxes, capture is also a risk in sector-specific sandboxes.

Firms participating in sandboxes have thus more opportunities to influence regulatory outcomes to reshape the regulatory environment in their favor, potentially at the expense of competitors, consumers, and, more generally, the public interest. The example of *Sperimentazione Italia* also reveals another aspect of regulatory sandboxes that can make regulators more prone to regulatory capture: as explained above, there is limited transparency regarding the operationalization of this regulatory environment. This lack of transparency contrasted with other sector-specific sandboxes where, at times, openness requirements can be perceived as excessive and discouraging to firms wishing to protect their business models. If the operations within a regulatory sandbox lack transparency, there is a greater chance for

[94] See also I. H-Y Chiu, *A Rational Regulatory Strategy for Governing Financial Innovation*, 8 Eur. J. Risk Regul. 743 (2017); J. McCarthy, *From childish things*, cit. at 49.

regulatory capture. This occurs as the public and other stakeholders outside the sandbox are not able to understand the fairness of the sandbox measures. For outsiders, it may difficult to discern if the issued bespoke guidance, tailored regulations, and waivers were solely justified by the experimental character of the regulatory sandbox or may grant an unwarranted benefit to certain firms which will not be shared by others. Furthermore, this lack of transparency makes it more complex to hold regulators accountable for their decisions in the context of regulatory sandboxes.

Regulatory capture has been loosely defined and misused over the last decades. Therefore, at first sight, it may seem difficult to imagine that regulatory sandboxes, with their limited duration, small cohorts, and restricted scope, can result in regulatory capture. However, in regulation, there is not one but many degrees of regulatory capture. Indeed, not all forms of regulatory influence generate the same capture dynamics or resulting impact. It is thus important to distinguish between strong and weak capture: while strong capture impairs the goal of regulation of pursuing the public interest; weak capture is, in some cases, the outcome of a compromise between regulators and market actors and it may still serve the public interest[95]. Furthermore, capture has a subjective dimension: as Coglianese has explained, "different people see different things. Those on the political left see signs of capture in weak laws or lax law enforcement, while those on the right see capture in strict laws imposing burdens on smaller businesses and new competitors"[96]. Capture is difficult to define, prove, and grasp. However, regulatory capture is mostly defined by the exercise of influence on regulators, for the benefit of the industry, and in detriment of the public interest. In other words, collaboration between firms and regulators in the context of a sandbox does not necessarily result in capture. Rather, regulation should be collaborative and should be the result of a regulatory conversation, rather than a monologue. Most regulations are indeed the result of information exchange, regulatory

[95] D. Carpenter, D.A. Moss, *Introduction*, in Id. (eds.) *Preventing Regulatory Capture* (2014).

[96] C. Coglianese, *The Elusiveness of Regulatory Capture*, The Regulatory Review, Jul. 5, 2016, available at *https://www.theregreview.org/2016/07/05/coglianese-the-elusiveness-of-regulatory-capture/*.

conversations, compromises, and a balancing of costs and benefits. A regulation has only been captured, at some level, if the regulation no longer serves the public interest.

McCarthy argues that the shortcomings of regulatory capture can be mitigated by legislative and policy considerations such as the ones proposed in the AIA[97]. This regulation, in its current proposed version, requires guided coordination of national authorities by a European AI Board. Enhanced transparency requirements such as publication of evaluation reports and justification of adopted measures can help address some of the concerns on regulatory capture, helping stakeholders understand better the reasons underlying certain regulatory interventions. The short duration of sandboxes and diversity of cohorts can also minimize regulatory capture. Ultimately, capture can be countered if regulators turn sandboxes into open, collaborative, and transparent conversational spaces from which the whole industry and consumers can benefit.

6. Conclusion and Broader Implications for Public Law

Regulation is a multilevel, multi-instrument, and complex phenomenon that is in permanent dialogue with society. The regulation of technological change and innovation is particularly challenging and requires the use of novel and more flexible instruments that can address the uncertainty and risks that often accompany the innovation process[98]. Regulatory sandboxes have emerged in this context as a responsive, temporary, and collaborative instrument that can help regulators and innovators reshape the regulatory process. This article discussed this subject both in Italy and in the European contexts. While regulatory sandboxes have the potential to reduce regulatory burdens and redesign more innovation-friendly regulatory frameworks, this instrument is not a panacea. We can distinguish two sets of key takeaways from our analysis.

First, there is an important difference between sector-specific and general-purpose regulatory sandboxes. Sector-specific

[97] J. McCarthy, *From childish things*, cit. at 49.
[98] R. Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 Hofstra L. Rev. 25 (2014).

regulatory sandboxes establish specific criteria, objectives, and allow market actors to be supervised directly by the regulator that is the closest to them. General-purpose regulation aim to pursue more general goals. However, pursuing innovation on general terms is a complex task. *Sperimentazione Italia* is an example of the latter: designed with the best of intentions to promote responsible innovation in the public sector, it has yet to attract broader market attention. Limited information, transparency, the imposition of numerous burdens on applicants, and its broader scope have not allowed the market to fully engage with the intended benefits of the regulatory sandbox. Regulatory sandboxes that offer limited guidance risk generating regulatory fragmentation, disregarding the risk of creating market inequalities among market participants, and generating legal uncertainty and may thus not be able to deliver fair and generalizable results.

Also, when regulating technological change, regulators should be aware of the possibility that the use of regulatory sandboxes instead of generally applicable regulations may change the regulatory message. Some regulatory burdens may be unnecessary while compliance with others may be essential to address certain risks. This should also not be forgotten when seeking to promote responsible innovation. Regulation should prioritize the rule of law and fundamental rights over technology or notions of economic innovation. Acknowledging the role of regulatory sandboxes in fostering responsible innovation is critical, yet it is equally important to address legal and regulatory challenges, including the risk of regulatory capture and disparities in market competition. Implementing comprehensive guidelines and ensuring transparency can effectively mitigate these issues.

The second set of takeaways concerns the broader implications of regulatory sandboxes to public law, both in Italy and in the EU. Moving forward, the growing adoption of regulatory sandboxes asks us to rethink the relationship between regulators and market actors and the need to continue to promote regulatory dialogues. Indeed, for decades, regulation has been losing its national, top-down, and authoritative character[99]. Regulators regulate now also through reputation, information and data, and the establishment of closer connections with market actors. Beyond discussed criticalities and necessary

[99] S. Cassese, Public law in crisis?, 15 ICON 585 (2017).

improvements, this is one of the key promises of regulatory sandboxes to public law: both sector-specific and general-purpose regulatory sandboxes enhance the collaborative dimension of public law, underlining the need for regulatory conversations with market actors. We have learned from *Sperimentazione Italia* and existing scholarship on sandboxes that initiating these regulatory conversations does not suffice. It is important to ensure that regulatees are provided with clarity, transparent information, and certainty.

THE CHARTER AWAKENS
THE EUROPEAN SOCIAL CHARTER AS A YARDSTICK FOR CONSTITUTIONAL REVIEW IN ITALY *

*Claudio Panzera***

Abstract
The paper offers an overview of the role played by the European Social Charter in the Italian legal system. The topic swiftly attracted the attention of legal scholars in 2018, right after the Constitutional Court had recognised a parametric status to the Charter in reviewing ordinary legislation. The Court's rulings relied on the principles previously applied to the European Convention on Human Rights, albeit with some notable differences that are here discussed in detail. After describing the initial, less significant phases of the Charter in domestic law, the paper focuses on the most recent developments by analysing their premises and effects on the implementation of the protected rights and by comparing the different techniques adopted to incorporate the ECHR (and EU law) into constitutional adjudication.

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* I had the opportunity to discuss the ideas expressed in this paper during the International Conferences on *The European Social Charter Turns 60: Advancing Economic and Social Rights Across Jurisdictions* (Turin University, 11-12 November 2021), and on *The effectiveness of the European Social Charter and the decisions of the European Committee of Social Rights in the national legal orders* (Ferrara University, 10-11 November 2022), promoted by the Italia Section of the RACSE/ANESC and sponsored by the Council of Europe. The paper is up-to-date as of October 31, 2023.

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There has been an awakening.
Have you felt it?
Star Wars – Episode VII

1. Preliminary remarks

The codification of a set of rights into a solemn document aims generally to give them visibility in order to promote their enforcement. In this regard, the European Social Charter (the ESC or simply the Charter) seemed to re-emerge in Italy just a few years ago after a long period of 'hibernation', exactly in 2018, when for the first time the Italian Constitutional Court (ICC) invalidated some legislative provisions on foot of an infringement of the treaty[1].

The Charter, in force since 1965 in the domestic system, had seldom been invoked in the past by the ordinary courts under the incidental review procedure[2], and never successfully until this time. In this sense, the 2018 decisions 're-awakened' the Charter by conferring it a supplementary parametric status for constitutional review, in accordance with the general pattern established in Article 117(1) of the Constitution[3].

Numerous questions arise from these circumstances: why did not the Charter wake up before? Was this awakening 'felt', at least

[1] Constitutional Court, Judgements Nos. 120 and 194/2018.
[2] The main features of this procedure are described in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), 54 ff.
[3] «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».

by jurists or politicians? On what grounds (normative frameworks, judicial procedures, legal theories) has been this result achieved? How will this innovation affect the interplay between the Italian legal system and other international and supranational constraints regarding the protection of the same rights, particularly the European Convention on Human Rights (ECHR) and European Union (EU) law?

With a view to providing a new assessment of the role played by the ESC in the Italian legal system, the paper develops as follows. It begins with a three-phase articulation of the path taken by the Charter in the domestic legal system (para. 2); after a brief overview of the first phase (para. 3), it focuses more extensively on the second (para. 4) and third ones (para. 5), drawing then some conclusions on the prospects of the Charter (para. 6).

2. The three phases of the ESC in the Italian legal system

The late 'discovery' of the ESC in judicial practice seems somewhat odd for a country that, as a founding member, witnessed the birth of the treaty, hosted its official signing 62 years ago and completed its incorporation into domestic law rapidly[4]. There are several reasons for this tardiness. Perhaps the most significant is the late enhancement of the treaty protection mechanism provided by the 1995 Additional Protocol on Collective Complaint Procedures (CCP), which gave new impetus to the enforcement of the Charter at conventional level. Another driving factor, at national level, is the development over the last 15 years of original normative frameworks and operating techniques regulating the Italian constitutional 'openness' towards international and supranational legal orders, particularly in the field of fundamental rights.

Indeed, the 2018 judgements represent the final stage of a process spanning six decades during which the Charter experienced a vast array of different conditions: 'hibernation', 're-launch', and, finally, 'awakening'. I will describe this point by referring to three phases labelled, respectively, the 'invisible' Charter, the 'renewed' Charter, and the 'parametric' Charter.

[4] Law No. 929/1965. By that time, only six founding States had incorporated the Charter (Norway, Sweden, and the United Kingdom in 1962, Ireland in 1964, Germany and Denmark in 1965), while the remaining Members accomplished the task much later (France in 1973, the Netherlands in 1980, Greece in 1984, Turkey in 1989, Belgium in 1990, Luxembourg in 1991).

3. The 'invisible' Charter (1965-1997): legal status and substantive value of a dormant instrument

The first phase is also the longest, covering 32 years (1965-1997), during which the Charter remained largely ignored by both lawmakers and the judiciary.

Although a monitoring of Italy's compliance with the ESC obligations was regularly carried out by the Committee of Independent Experts (later the European Committee of Social Rights: ECSR), the formal status assigned to the treaty in the domestic system did not allow it to bind subsequent legislation. Once the Charter had been incorporated by a statutory law, its relationships with all other laws fell under the domain of the chronological tenet (*lex posterior derogat priori*, a later law repeals an earlier one), notwithstanding the nature of 'international obligation' of the former[5].

This was actually a common status for all the treaties implemented by ordinary legislation, with the significant exceptions of the European Community law (implicitly based upon the 'sovereignty limitations clause' of Article 11 of the Constitution) and of the Pacts concluded with the Holy See (expressly covered by Article 7 of the Constitution)[6].

The same limit also formally applied to the ECHR, but the more effective control guaranteed over the years by the European Commission – later the European Court of Human Rights (ECtHR) – partially counterbalanced this formal drawback. In 1993, the ICC referred to the domestic incorporation of the Convention as an «atypical law», with the implicit aim of combining its non-constitutional status with the ability to resist (subsequent) repealing legislation[7]. This precedent encouraged ordinary judges' efforts to give substantive 'constitutional' value to the Convention despite its

[5] This view was not, however, unanimous in scholarly debate. Some authors disputed its excessive formalism and argued the case for a higher status of international agreements, at least to those concerning human rights by virtue of their connection with substantive constitutional provisions. These attempts relied upon manifold interpretative techniques, for a critical appraisal of which see G. Sorrenti, *Le Carte internazionali sui diritti umani: un'ipotesi di «copertura» costituzionale «a più facce»*, 3 Pol. dir. 349 (1997).

[6] Due consideration is given, on the other hand, to international customary law, with which the *whole* Italian legal system must conform in accordance with Article 10(1) of the Constitution.

[7] Constitutional Court, Judgement No. 10/1993.

formal 'legislative' status[8], but it could not overrule the consolidated paradigm and ultimately remained an isolated obiter in the ensuing constitutional case law.

Nevertheless, the fire was smouldering under the ashes. The increasing influence of ECtHR jurisprudence – between the conclusion of the first phase and the beginning of the second – drove the ordinary courts to explore new ways of aligning the domestic legislation with the Convention; some of them were basically undisputed (harmonisation on an interpretative basis), while others were quite critical (case-by-case disapplication, sometimes under the shield of EC/EU law)[9]. In any case, none of these tools were even theoretically taken into account with regard to the ESC, which thus remained judicially 'asleep'.

4. The *renewed* Charter (1997-2018): lights and shadows of a transitional phase

The second period, lasting about 20 years (1997-2018), is characterised by two concurring developments taking place at different levels. The first relates to the general re-launch of the treaty on a European scale in the mid-90s: a renewal to which Italy actively contributed, by a rapid ratification of both the 1995 Additional Protocol on CCP and the 1996 Revised Charter[10]. The second concerns a major constitutional reform that, in 2001, made the «international

[8] The most remarkable attempt was that of the Supreme Court of Cassation, 1st criminal sec., Judgement No. 2194/1993 (para. 8.2). At that time, however, some parts of the Convention had been already recognised as displaying direct effects: see Supreme Court of Cassation, un. sec., Judgement No. 15/1988.

[9] By means of an 'incorporation' in the general principles of EU law of the rights guaranteed by the Convention via Article 6(3) TEU. However, the outcome of these efforts appears empirically satisfying: «during more than half a century, the number of times international agreements yielded to subsequent domestic laws can be counted on the fingers of one hand or little more» (G. Tesauro, *Costituzione e norme esterne*, 2 Il Dir. UE 195, 212 (2009); my transl.). On this point, see E. Lamarque, *Regolare le antinomie tra norme pattizie e norme di legge: il potere del giudice comune tra interpretazione conforme, criterio di specialità e criterio cronologico*, in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni* (2020), 113.

[10] Laws Nos. 298/1998 and 30/1999, respectively. The trend has gained new political momentum with the launching of the so-called 'Turin Process': see the *Declaration of the Committee of Ministers on the 50th anniversary of the European Social Charter* of 12 October 2011, and especially M. Nicoletti, *General Report to the High-Level Conference on the European Social Charter* (2014), in *www.coe.int/en/web/turin-european-social-charter/turin-process*.

obligations» in which Italy has taken part or will take part legally binding for the legislative powers of the State and the Regions[11].

Although these two parallel and largely independent factors will eventually converge to strengthen the role of the ESC in Italy, at this stage their effects are somewhat misaligned (not simultaneous). From a European perspective, the revitalisation of the Charter system enhanced the influence of the treaty upon national legal orders relatively fast. At national level, the constitutional reform established the conditions for a change that would ultimately occur only *in the next stage*. The second phase can thus be defined as intermediate or 'transitional'.

For a better description of it, the paragraph is divided into three sections focusing, respectively, on the impact of the re-launch of the ESC at European level (4.1), on the new interpretative pattern – originally tailored to the ECHR – developed by the ICC in accordance with the cited constitutional amendment (4.2), and on the judicial disregard of the Charter throughout the first and second phases (4.3).

4.1 Consolidating the Charter: the CCP remedy

The new protection mechanism gave the treaty tangible opportunities to gain effectiveness in national legal systems. Indeed, the CCP compelled the contracting States to take the collective claims of 'detailed' violations of the Charter seriously, moving from a bottom-up reading of its provisions fostered by very active stakeholders[12]. Furthermore, States' implementation of the CCP has boosted the efficacy of the other pre-existing procedure (monitoring mechanism), that now focuses exclusively on follow-ups of non-conformity decisions delivered by the Committee within the CCP, on the basis of 'simplified' reports submitted every two years by the State parties to the 1995 Protocol[13].

The 'interdependence' of the two procedures represents the most significant feature of the whole protection system provided by

[11] Above, at 3.

[12] Since 1999, around 39 complaints have been lodged against Italy with 31 findings of infringements confirmed by the ECSR (Decisions on the merits of the Complaints Nos. 27/2004, 58/2009, 87/2012, 91/2013, 102/2013, 105/2014, 133/2016, 140/2016, 143/2017, 144/2017, 146/2017, 158/2017, 170/2018).

[13] ESCR Decisions of 2 April 2014.

the (revised) Charter[14]. The supervision of the reporting procedure entails an assessment of the state of compliance of each Party with previous decisions on complaints lodged against that country[15] – and *vice versa* to lodge a complaint may highlight a shortcoming in remedying non-conformity situations declared in a previous conclusion. Furthermore, this interaction is extremely positive for the 'spillover effect' of the interpretations adopted: namely, a statement on a Charter provision concerning a complaint lodged against State 'A' may well become the legal ground for conclusions concerning the monitoring report of State 'B', whether or not the latter has accepted the CCP Protocol[16]. Although far from the notion of binding precedent, this hermeneutic process could however serve as a 'functional equivalent' to *stare decisis* in the broader context of the ESC, as the main international (regional) 'centralised' social rights protection system[17].

4.2 Shaping the pattern: the 'ECHR protocol'

The amendment of Article 117(1) of the Constitution had minor effects on international customary law and EU law, whose higher status remained mostly unaltered. For treaties, however, it was different, because after the revision they have become, under certain conditions, a parameter for constitutional review.

What are these conditions?

Firstly, that the treaty has been incorporated into ordinary law. This premise stems from a systematic reading of Article 117(1) alongside Article 80 of the Constitution, stating that «Parliament shall authorise by law the ratification of such international treaties

[14] More extensively on this point: L. Jimena Quesada, *Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees*, in M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter and the Challenges of the XXI Century / La Charte Sociale Européenne et les défis du XXIe siècle* (2014), 143, 151 ff.

[15] Art. 40 of the *Rules of procedure* adopted by the ECSR.

[16] Until now, only 16 of the 46 Parties to the Charter system have accepted and ratified the CCP Protocol.

[17] After all, the same concept of 'judicial guarantee' takes on different nuances (control, compliance, and the like) when applied in international rather in national context. As to the ESC see now, also for further references, L. Mola, *La Carta sociale europea e il controllo internazionale sulla sua applicazione* (2022), 49 ff.

as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation»[18].

Secondly, that treaty provision is consistent with the Constitution; otherwise, the duty to respect international obligations would automatically invalidate the domestic law.

Thirdly, that the parametric use of the treaty *increases* the overall protection of the rights involved, so that State Parties are not allowed to downgrade the standard provided by the treaty, nor may the treaty prevent States from achieving higher levels of guarantee.

While the first condition originates from a doctrinal assumption, the others belong to the judicial formant, having been laid down in two landmark decisions regarding the ECHR delivered in 2007 by the ICC and further detailed in later judgements[19]. According to this approach:

1) the Convention has not been constitutionalised but serves as a supplemental parameter for the constitutional review of ordinary legislation when Article 117(1) is invoked;

2) when a conflict arises, judges are not allowed to disapply the law in favour of the Convention (as in the case of EU norms having direct effects, via Article 11) but may only refer the question to the ICC for a declaration of invalidity provided with general efficacy (*erga omnes*);

3) before the referral, judges must try to resolve the antinomy by reading the law in accordance with the Convention, inasmuch as the text of the challenged provision makes it feasible;

4) the claimed treaty provision must itself not violate the Constitution. If it happens, the proceeding judge shall refuse to give priority to the external rule and the contrast be resolved by interpreting the Convention in compliance with the Constitution or, alternatively, by raising an issue of constitutionality on the law

[18] I rely upon the arguments of A. D'Atena, *La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione Europea*, 4 Rass. parl. 913, 926 (2002), in excluding from the scope of the revised clause both international agreements concluded in simplified form (executive agreements) and ratified treaties lacking the necessary parliamentary authorisation. The scholarly debate on this point is synthetised by A. Bonomi, *Il 'limite' degli obblighi internazionali nel sistema delle fonti* (2008), 185 ff.

[19] Constitutional Court, Judgements Nos. 348 and 349/2007, as refined by the Judgements Nos. 311 and 317/2009, 80, 236 and 303/2011, 264/2012, 49/2015, 236/2016, 16/2020.

incorporating the treaty (the choice depends on the degree of constraint acknowledged to the ECtHR's interpretations: below, point 6)[20];

5) the overall outcome of the supplemental guarantees provided by the Convention in the national system must be positive for the entire set of fundamental rights (balancing test). Otherwise, the treaty will not complement the constitutional parameter (above, point 4);

6) in all the mentioned steps – harmonising interpretation, comparison of standards, and declaration of invalidity – ordinary and constitutional judges must refer to the Convention in the meaning given by the ECtHR. This constraint, however, is limited to the "essence" of its case law and acts at different degrees. It is *maximum* (binding) in proceedings where national judges are asked to put an end to the harmful effects of a violation declared by the Strasbourg Court or when the decision relates to a «pilot judgement» or expresses «consolidated» or «well-established» case law. Conversely, the constraint is *minimum* in all the other situations: national judges (and the ICC itself), far from being «passive recipients of an interpretative command issued elsewhere», may give the Convention the meaning most consistent with the Constitution to avoid a potential declaration of invalidity of the (law executing the) treaty, which would have detrimental effects on the entire legal system.

I will refer to the comprehensive framework outlined as the 'ECHR protocol'. It relies on the general pattern of the sources of law's theory called 'interposition of norms', that recurs when the content of a constitutional principle limiting legislative powers is necessarily actualised by a non-constitutional provision, so that a violation of the latter causes an indirect infringement of the former[21].

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[20] How to overcome the constitutional deadlock has not yet been clarified. According to the latest ICC case law, a third way – beyond interpretative harmonisation of the external provision and the annulment *in parte qua* of the executing law – would simply be to *ignore* the international constraint in deciding the pending case, as if it had never entered the domestic system. For this conclusion, see Constitutional Court, Judgements Nos. 238/2014 (regarding an international customary rule) and 49/2015.

[21] … given that the 'interposed source' is not at odds with the Constitution. Similar schemes are provided in Articles 76 (delegation law/legislative decree) and 117(3) (national law/regional law in concurring subjects), but the logic may also apply to other 'concordances' established by the Constitution, although it is disputed whether the different cases may be grouped under a single category or not.

The 'protocol' differs in several aspects from the pattern developed by the ICC to ensure the primacy of EU law, by which judges have a duty to 'set aside' a law contrasting with EU self-executing norms, being this latter subject exclusively to the supreme principles of the Constitution[22]. Indeed, both scholars and the judiciary have questioned if the treatment of the ECHR should be aligned to the EU standard, considering the status granted to the Convention by the EU primary law[23] and the 'conformity' interpretative rule established in the EU Charter of Fundamental Rights[24]. In fact, in recent years, constitutional case law concerning EU norms having direct effects has moved in the direction of a greater involvement of the ICC in cases of 'dual preliminarity'. This occurs when a national law is deemed to infringe the guarantees provided both by the Constitution and the EU Charter, causing a potential overlapping of competing legal remedies for the same right. In this event, judges are encouraged – though not obliged – to give priority to the question of constitutionality, referring to the ICC the decision to dialogue directly with the European Court of Justice (ECJ) by means of the preliminary ruling procedure[25].

In short, the relationships between national and European legal orders are anything but static: the general framework is undoubtedly more fluid now than in the past. This means that significant changes in the domestic use of the Convention, despite being unlikely at present, cannot be completely excluded in future, with subsequent adjustments (or substantive alterations) of the 'ECHR protocol'.

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[22] See below, at 31.

[23] Article 6(3) TEU.

[24] Article 52(3).

[25] The momentous turnaround is based on the «typically constitutional stamp of [the EU Charter's] contents», which «largely intersect with the principles and rights guaranteed by the Italian [and other Member States'] Constitution», and on the subsequent «need for an *erga omnes* intervention» within the domestic legal order that only the ICC can properly ensure. See Constitutional Court, Judgement No. 269/2007 (to which the reported quotations refer), followed by the Judgements Nos. 20, 63 and 117/2019, 182/2020, 84/2021, 149/2022. For a general account of this approach, from different perspectives, see: G. Martinico & G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and its Aftermath*, 15 Eur. Const. L. Rev. 731 (2019); G. Parodi, *Effetti diretti della Carta dei diritti fondamentali dell'Unione europea e priorità del giudizio costituzionale*, 4 Riv. AIC 128 (2022).

4.3 The judicial account of the ESC: two weights, two measures

The key issue, in my opinion, concerns the 'generalisation' of this 'protocol', namely its potential use for treaties other than the Convention, above all for the ESC. In fact, while the major Bill of Rights of the Council of Europe was being given more and more effectiveness in judicial and constitutional case law, its junior sister rarely came under the spotlight in courtrooms and always with uncertain results.

For more than half a century and until recently, the ESC has been referred to in constitutional review proceedings only six times, the first occurring in 1983 (nearly 20 years after the Charter' incorporation)[26]. When concretely taken into account by the ICC's reasoning, the treaty has mainly been used to corroborate internal guarantees of the rights claimed, as a confirmation of their fundamental value or a proof of the development of a common understanding at European level on the subject. On the other hand, the Charter has never been considered as a supplemental parameter for reviewing the challenged legislation, even after the amendment of Article 117(1) and the development of the 'ECHR protocol', though reasonable arguments for a parallel 'upgrade' of the ESC did not lack[27].

'Two weights, two measures'. Paradoxically, the conditions of the two sister Charters were more similar in the early phase, prior to 2001, when both were assigned a mere auxiliary role in the interpretation of the constitutional parameter.

Before the ordinary courts, the ESC was simply mentioned without any practical effect, in the best case while, and disregarded as a merely political (not legally binding) document in the worst[28]. The general stance taken was to ignore it, with the exceptions of two daring orders of the Court of first instance of Rome, in 2012 and 2015 respectively, condemning the Capitol Council for its discriminatory treatment of Roma and Sinti populations on account of the

[26] Constitutional Court, Judgements Nos. 163/1985, 86/1994, 46/2000, 434/2005, 80/2010, 178/2015.

[27] I stressed this point in previous works: see, among others, C. Panzera, *Rispetto degli obblighi internazionali e tutela integrata dei diritti sociali*, 2 Consulta Online 488 (2015), 495 ff.

[28] Supreme Court of Cassation, civil sec.-labour, Judgements Nos. 1670/2007, 21706/2008, and 6264/2010; Supreme Court of Cassation, 6th civil sec., Judgement No. 900/2015; Council of State, 4th sec., Judgement No. 4439/2000; Council of State, 6th sec., Judgements Nos. 1033/2002 and 5804/2002.

Charter's provisions concerning the right to housing and the protection against forced eviction, as interpreted by the ESCR[29]. But this is the typical exception that proves the rule.

5. The 'parametric' Charter (2018-): prospects and limitations of a new season

The legacy of the 'ECHR protocol' and its likelihood of becoming a general template for the interactions of national guarantees with (other) international human rights treaties are matters regularly debated in Italy[30].

The major features of the 'protocol' (points 1-5) are indeed of broad application. For example, the one requiring that the external norm respects the Constitution is also being applied to EU law and customary international law, albeit with regard only to the supreme principles of the Constitution and the core content of fundamental rights[31]. Actually, the 'interposed parameter' scheme of Article 117(1) has been applied also to other human rights treaties[32], before

[29] Court of first instance of Rome, 2nd sec., Judgements of 8 August 2012 and of 4 June 2015. The cases also affected the question of the personal scope of the ECS as defined in its Annex. On this crucial point, see: J.-F. Akandji-Kombé, *L'applicabilité* ratione personae *de la Charte sociale européenne: entre ombres et lumières*, in O. De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe/La Charte sociale européenne: une constitution sociale pour l'Europe* (2010), 91; G. Palmisano, *Overcoming the Limits of the European Social Charter in Terms of Persons Protected: the Case of Third State Nationals and Irregular Migrants*, in M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter*, cit. at 14, 171; C. Panzera, *The Personal Scope of the European Social Charter: Questioning Equality*, in J. Luther & L. Mola (eds./dir.), *Europe's Social Rights under the 'Turin Process'/Les droits sociaux de l'Europe sous le «Processus de Turin»* (2016), 173.

[30] See, for example, *I Trattati nel sistema delle fonti a 10 anni dalle sentenze 348 e 349 del 2007 della Corte Costituzionale*, 1 Osservatorio sulle fonti, special issue (2018).

[31] As to EU law, see Constitutional Court, Judgments Nos. 183/1973, 170/1984, 232/1989, 168/1991, 24/2017, 115/2018, 117/2019, 84/2021; for customary law, see Judgements Nos. 73/2001 and 238/2014. For a brilliant analysis of this multifaceted issue, see S. Polimeni, *Controlimiti e identità costituzionale nazionale. Contributo per una ricostruzione del 'dialogo' tra le Corti* (2018).

[32] Namely, the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change of 1997 (Judgements Nos. 124/2010 and 85/2012), the 2006 UN Convention on the Rights of Person with Disabilities (Judgement No. 236/2012), the 1989 UN Convention on the Rights of the Child and the 1996 European Convention on the Exercise of Children's Rights (Judgements Nos. 7/2015 and 102/2020), but not the 1985 European Charter of Local Self-Government (deemed a soft law instrument: Judgement No. 50/2015).

its extension to the ESC in 2018. The last phase – the 'awakening' – has thus begun.

5.1 The merits of the ICC judgements and the interest sparked within the legal environment

The first Judgement (No. 120/2018) concerns the right of military personnel to associate in trade unions. According to domestic law, they were strictly prohibited from forming professional associations within the Armed Forces or joining other (external) trade unions[33]. These exceptions to the general freedom of association had always been legitimised by the special nature and inner values of the military branch («compactness, unity, and neutrality»), such that prior issues of constitutionality on the same point were declared ill-founded[34]. The precedent has now been overruled after a crucial change occurred in the case law of the ECtHR and the ECSR relating to the same right[35].

Indeed, both the guardian bodies of the Council of Europe's 'sister Charters' declared that the restrictions applying to the members of the Armed Forces were legitimate insofar as they did not affect the 'essence' of the right at stake[36]. Thus, the general prohibition in force at that time in Italy was no more consistent with the new European judicial trend, as it totally deprived the military of their right to associate in trade unions. On this basis, the Constitutional Court ruled the non-conformity of the challenged provision, limited to the part preventing the military from forming professional associations within the Armed Forces (conversely, the prohibition on joining 'other' trade unions was upheld)[37]. It is noteworthy that the result has been achieved mostly in light of the external (European) rules than of the internal (constitutional) substantive norms protecting the claimed right.

The second Judgement (No. 194/2018) reviewed the latest rules governing the unlawful dismissal of workers, particularly the

[33] Article 1475(2) of Legislative Decree No. 66/2010 (Code of Legislation on the Armed Forces).
[34] Constitutional Court, Judgement No. 449/1999, on account solely of the domestic parameter (Article 39 Const.).
[35] See Articles 11 and 14 ECHR and Article 5 ESC, respectively.
[36] ECtHR, *Matelly v. France* and *ADEFDROMIL v. France* (2 October 2017); ECSR, *European Council of Police Trade Unions* (*CESP) v. France* (27 January 2016, Complaint No. 101/2013).
[37] On the reasons supporting this partial annulment, see sub-para. 5.2.

criteria for determining the due compensation[38]. The referral order raised several questions, some of which were declared inadmissible and others ill-founded. The Court, however, struck down the most controversial aspect of the challenged provision, namely the inflexible mechanism regulating the amount of compensation to which the dismissed worker is entitled.

This rigid automatism, based on a lump-sum payment depending exclusively on length of service, ultimately deprived judges of the discretion to adequate the compensation – within fixed lower and upper limits – to the circumstances of each case. The provision infringed the Constitution on multiple grounds:

a) different situations received the same legal treatment, in violation of Article 3 (equal treatment and reasonableness of laws);

b) the fixed amount might have been completely inadequate, especially at its *minimum*, with regard to both the redress and dissuasive effects[39], in breach of Articles 4 and 35 (protection of the right to work);

c) as it conflicted at the same time with the standard set forth in Article 24 ESC (protecting the right to «adequate compensation or other appropriate relief» for unlawful dismissal), it violated Articles 76 – by which the Legislative Decree is content-bound to the Delegation Law[40] – and 117(1).

The Charter's 'awakening' was undoubtedly felt by both scholars and the judiciary. On the one hand, scholars suddenly highlighted the change and launched an extensive debate over the Charter as a source of legal obligations, a means of social progression, and not least a reason for potential conflicts of national and European standards of protection[41]. On the other hand, the

[38] Article 3(1) of Legislative Decree No. 23/2015 (Jobs Act).

[39] *Id est*, the aims of compensating the loss suffered by the dismissed worker (redress effect) and of preventing employers from unfair terminations of contracts (dissuasive effect).

[40] Indeed, Article 1(7) of the Delegation Law No. 183/2014 recalled the respect of international obligations.

[41] From around a dozen comments, see: *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea?*, 7 Forum Online di Quad. cost. – Rass. 1 (2018); C. Salazar, *La Carta sociale europea nella sentenza n. 120 del 2018 della Consulta: ogni cosa è illuminata?*, 38 Quad. cost. 905 (2018); D. Russo, *I trattati sui diritti umani nell'ordinamento italiano alla luce delle sentenze n. 120 e 194 del 2018 della Corte costituzionale*, 13 Dir. umani dir. int. 55 (2019); C. Panzera, *La Corte e la libertà sindacale dei militari in un'atipica sentenza sostitutiva della Corte costituzionale*, 23 Federalismi.it 2 (2019); L. Mola, *The European Social Charter as a Parameter for Constitutional Review of Legislation*, 28 It. Y.B. Int'l L. Online 493

judiciary was encouraged to take the Charter more seriously than in the past as a piece of the composite normative framework shaping the rule of law in overlapping legal systems. Consequently, judges have begun to refer to the Constitutional Court new issues regarding the compliance of domestic legislation with the ESC commitments. In doing so, they act as both 'guardians' of all kinds of rights (including social ones) and primary 'gatekeepers' of the constitutional legal order, understood as the 'outcome of the interplay' between national and international/supranational sets of fundamental principles[42].

5.2 A 'weakened Force': the nature of the ECSR decisions according to the ICC (a critical assessment)

An insight into the reasoning underpinning the two decisions clarifies the new role of the Charter and permits to gauge the general implications of the 'ECHR protocol'[43]. In this regard, three aspects must be highlighted.

The first concerns the 'substantive' value of the Charter. As a human rights treaty, it is worthy of special consideration among all other international obligations:

(2019). Before the mentioned 'turn', there were very few contributions explicitly dedicated to the ESC in the domestic debate, mostly published in recent years: O. Porchia, *Carta sociale europea*, in *Dig. disc. pubbl.*, Agg. II, 122 (2005); F. Oliveri, *La* Carta sociale europea *tra enunciazione dei diritti, meccanismi di controllo e applicazione nelle corti nazionali. La lunga marcia verso l'effettività*, 8 Riv. dir. sic. soc. 509 (2008); C. Panzera, *Per i cinquant'anni della Carta sociale europea*, 3 Lex social. Rev. jur. der. soc. 41 (2013); M. D'Amico, G. Guiglia & B. Liberali (eds.), *La Carta Sociale Europea e la tutela dei diritti sociali* (2013); M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter*, cit. at 14; J. Luther & L. Mola (eds./dir.), *Europe's Social Rights*, cit. at 29; C. Panzera, A. Rauti, C. Salazar & A. Spadaro (eds.), *La Carta sociale europea tra universalità dei diritti ed effettività delle tutele* (2016).

[42] Court of first instance of Vibo Valentia, lab. sec., 13 March 2019 (in *Official Bulletin of the Italian Republic* 1st Special Series – Constitutional Court, No. 46/2019; hereafter: just *Off. Bull.*); Court of Appeal of Naples, 18 September 2019 (*Off. Bull.* No. 20/2020]; Court of first instance of Brescia, lab. sec., 2 May 2020 (*Off. Bull.* No. 37/2020); Court of first instance of Rome, 2nd sec., 26 February 2021 (*Off. Bull.* No. 24/2021). All the referrals have been declared inadmissible: Constitutional Court, Judgements Nos. 123 and 254/2020, No. 196/2021 and No. 183/2022 (but, in this last case only because of the respect of the legislative discretion).

[43] Although the ICC did not intend to forge a general legal pattern, but only to deal with the specific issues of the influence of Strasbourg Court's jurisprudence on the 'concentrated' nature of the Italian constitutional review system (further details in this paragraph), the potential effects of the 'protocol' go beyond the Convention itself and pose a question of consistency in the use of the mechanism.

> For the purposes of establishing whether it is admissible to invoke that interposed parameter, it must be pointed out that it features distinctive aspects that are highly specific compared to ordinary international agreements, which aspects it shares with the ECHR. In fact, whereas the ECHR sought to create a 'system for the uniform protection' of fundamental civil and political rights (Judgement No. 349 of 2007), the Charter constitutes its natural completion on the social level since, as stated in the Preamble, the Member States of the Council of Europe sought to extend protection also to social rights, recalling the indivisibility of all human rights.
>
> Thus, *by virtue of these characteristics*, the Charter must be classified as international law within the meaning of Article 117(1) of the Constitution[44].

Article 117(1) makes actually no distinction between international obligations on the basis of their subject which may, instead, be appraised under other constitutional provisions. The content of the Charter is crucial, on the other hand, for satisfying the preliminary condition of the 'interposition scheme', namely the conformity of the supplemental parameter with the Constitution, which is the second aspect to highlight. This condition is divided into a two-step assessment: firstly, it must be verified that the ESC does not contrast with any constitutional rule or principle (interpretative test); secondly, the outcome of the integration of external and internal guarantees must be positive for the system of national rights (balancing test).

Thus, in proceedings concerning the prohibition on members of the Armed Forces associating in trade unions, one of the referring judges correctly pointed out the need to ascertain whether and to what extent the Charter's standard of protection affected the conflicting public interest in the «compactness, unity, and neutrality» of this special bodies of the Executive branch[45]. In fact, the Court partly upheld the challenged provision, finding that the freedom to join 'other' trade unions (not limited to military personnel) was rightly prohibited:

[44] Constitutional Court, Judgement No. 120/2018 (para. 10.1 of the *Conclusions on points of law*; emphasis added).
[45] Council of State, 4th sec., Judgment No. 2043/2017, para. 5.3.6.

> Indeed, whilst the imposition of conditions and limits on the exercise of that right may be optional as a matter of international law, it is instead necessary within the national perspective, so much so as to exclude the possibility of any gap within the law, a gap that would constitute an impediment on the very recognition of the right to associate within a trade union[46].

The third aspect is the most interesting, but also the most questionable. It focuses on what makes the ESC different from (and hence not comparable with) the ECHR: the respective protection system, and particularly the interpretative function bestowed upon the correspondent supervisory bodies. While the Convention provides that ECtHR's jurisdiction «shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto»[47] and also that Member States «undertake to abide by the final judgment of the Court in any case to which they are parties»[48], no equivalent provision has ever been included in the ESC. Consequently, the interpretation carried out by the ECSR lacks the authority of *res iudicata*:

> Within the context of the relations thereby framed between the European Social Charter and the signatory states, the decisions of the Committee, whilst being authoritative, are not binding on the national courts when interpreting the Charter, especially if − as in the case at issue here − the expansive interpretation proposed is not confirmed by our principles of constitutional law[49].

This means that the relationships between the judiciary, the ICC, and the ESRC develop in a less rigid and formalised manner than those concerning the ECtHR, leaving within the domain of the Member States a more extensive 'margin of appreciation' than that pertaining to the parallel conventional context. Suffice to say that when Article 117(1) applies, the proceeding judge may always settle the potential conflict between domestic law and the ESC on an interpretative basis (by harmonising either the former or the latter),

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[46] Constitutional Court, Judgement No. 120/2018 (para. 15 of the *Conclusions on points of law*).
[47] Article 32(1).
[48] Article 46.
[49] Constitutional Court, Judgement No. 120/2018 (para. 13.4 of the *Conclusions on points of law*), restated in Judgement No. 194/2018 (para. 14 of the *Conclusions on points of law*).

no matter how stable the divergent interpretation given by the ECSR may be. Conversely, in cases involving the ECHR the judge shall comply with the consolidated case law of the European Court and, if necessary, raise a question of constitutionality.

Indeed, a practical aim of the 'ECHR protocol' was to counteract the 'judicial drain' from constitutional referral, namely the trends of ordinary courts to review domestic law by directly applying, in its place, the Convention as interpreted by the European Court. Recognising the ECtHR's interpretative predominance was part of the compromise to secure judicial review in the steady hands of the Constitutional Court. None of these risks has arisen with regard to the ESC and its influence on national legal systems is admittedly not comparable to that exerted by the ECHR over the decades.

However, in my opinion, the manifold interpretations of the ESC do not concur on such an equal basis as the Constitutional Court seems to purport[50].

The ones delivered by the ESRC are in all respects 'qualified' by the institutional task, granted to this body alone, to 'ascertain' that all Parties effectively comply with the commitments they have deliberately undertaken. In fact, the Member States cannot rely on a divergent interpretation of the Charter to avoid adopting the measures required as necessary by the Committee of Ministers in the follow-up phase. Moreover, in deciding whether to address a recommendation to the State concerned, the Committee of Ministers could not «reverse the legal assessment made by the» ECSR, which must be considered to all effects 'final'[51]. Though national authorities cannot be equated in this respect to the mentioned Committee, the claim that the ECSR's qualified interpretation is one of many that national judges may follow would ultimately lead to the 'erosion' of the very foundations of the Charter's protection system, which instead require all national authorities (judges included) to collaborate to make it effective.

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[50] It is worth remembering that the cited statement of the Court is aimed at neutralising the potential conflict of the external (extensive) interpretation of the ESC with domestic constitutional principles. In different conditions, the ECSR 'case law' has successfully integrated national standards, as in the Judgement No. 194/2018.

[51] This consolidated principle of ECSR 'case law' – see *Defence for Children International (DCI) v. the Netherlands* (20 October 2009, Complaint No. 47/2008, para. 21) – is tantamount to the concept of «*res iudicata*» at least in a formal sense: G. Palmisano, *L'Europa dei diritti sociali. Significato, valore e prospettive della Carta sociale europea* (2022), 161.

The criticism of the 'equivalent interpretation' thesis does not intend to support the opposite conclusion that the ECSR is endowed with an exclusive jurisdiction over the Charter (neither granted, to this extent, to the ECtHR), but rather to test the consistency of the different treatment of the two Charters under this aspect.

The 'functional' argument is also corroborated by the usual recourse, in Italian constitutional case law, to the principle of conformity when a claim is based on international norms, *id est* the duty to «follow the interpretation given in its original legal order»[52]. This tenet has been applied in several degrees to international customary law, EU law and ECHR provisions, but the special treatment of the ESC breaks the unitary value of the principle[53]. This unity might be accomplished at least in its *minimum* (procedural) content, that is when external qualified interpretations are taken into due account and given priority, though national judges may however depart from them with adequate justification, so that their interpretative autonomy – a pivotal element of State sovereignty – is preserved[54]. In this latter, 'softer' meaning, the conformity principle could apply to the ECSR's interpretations as well.

Moreover, as constantly directed by the principle of indivisibility of human rights, ECSR 'case law' represents a valid support for interpreting the corresponding provisions of the Convention and the EU Charter[55]. Indeed, the Committee's interpretations

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[52] Constitutional Court, Judgement No. 238/2014 (para. 3.1 of the *Conclusions on points of law*).

[53] Upon which see, amongst all, F. Salerno, *La coerenza dell'ordinamento interno ai trattati internazionali in ragione della Costituzione e della loro diversa natura*, in *I trattati nel sistema delle fonti*, cit. at 30, 11.

[54] On this last point, see G. Palmisano, *Le norme pattizie come parametro di costituzionalità delle leggi: questioni chiarite e questioni aperte a dieci anni dalle sentenze "gemelle"* in *I trattati nel sistema delle fonti*, cit. at 30, 14.

[55] The ECtHR itself ruled against the idea of a «watertight division separating» civil/political and social/economic rights since *Airey v. Ireland* (9 October 1979, para. 26), but it is mainly the ECSR that has opened the Charter to the influences of international and European human rights (case) law, giving effective proof of the claimed principle of the indivisibility of rights, as correctly pointed out by J.-F. Akandji-Kombé, *The Material Impact of the Jurisprudence of the European Committee of Social Rights*, in G. De Búrca & B. De Witte (eds.), *Social Rights in Europe* (2005), 90. On this interpretative stance see also C. Panzera, *La Carta sociale europea presa sul serio*, 18 Rev. gen. der. públ. comp. 1, (2015), 5 ff. For a broad assessment of the methods of interpretation followed by the ECSR, see F. Oliveri, *La Carta*

might fall indirectly under judicial concern in domestic proceedings whether their 'essence' was shared by the European Courts jurisprudence applying to the pending case.

Finally, similar conclusions can be drawn from the application of the general principles affirmed in the 1969 Vienna Convention on the Law of Treaties, considering ECSR 'case law' as a part of the «context» delimiting the ordinary meaning of the Charter's provision or as one of the «supplementary means of interpretation»[56]. Of course, the weight of each canon cannot be predetermined; however, national judges should (not fear to) emphasise the ECSR 'jurisprudence' when the Charter effectively supplements the constitutional parameter. The interpretations of this supervisory body could then be placed 'halfway' between the antipodes of unconditionally binding precedents and the equal concurrence of free interpretations.

A more thorough analysis of the 2018 constitutional judgements reinforces this conclusion. In the case concerning the freedom to associate in trade unions, the coupling of the relevant ECHR and ESR provisions was facilitated by the Committee's alignment to ECtHR *revirement* in *Matelly v. France* of 2014[57]. The parametric use of the Charter ultimately depended on that interpretative shift. Similarly, in the case involving the right of workers to adequate compensation for unlawful dismissal – Article 24 of the ESC supplementing the content of Article 35(3) of the Constitution – the Court actualised this principle by referring to ECSR decisions, once again, concerning other Countries[58].

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sociale europea come "strumento vivente". Riflessioni sulla prassi interpretativa del Comitato europeo dei diritti sociali, 10 Jura Gentium 41 (2013), 60 ff.

[56] Articles 31 and 32, respectively. For a comprehensive account on this point in reference to the ESC, see L. Mola, *Oltre la Cedu: la rilevanza della Carta sociale europea e delle decisioni del Comitato europeo dei diritti sociali nella recente giurisprudenza costituzionale*, in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni*, cit. at 9, 409, 422 ff.

[57] *CESP v. France*, cit. at 36 (paras 64, 78, 84-86 and 90-91), but see also *CGIL v. Italy* (22 January 2019, Complaint No. 140/2016) on the parallel prohibition on forming trade unions and on striking for members of another military force (*Guardia di Finanza*), wherein Constitutional Judgement No. 120/2018 is explicitly considered.

[58] Constitutional Court, Judgement No. 194/2018 (para. 14 of the *Conclusions on points of law*). Several constitutional and other national high Courts have started to refer to the ECSR 'jurisprudence' regardless of its formal status: namely, whether the respective States are party to the CCP Protocol or not. As rightly notes G. Palmisano, *L'Europa dei diritti sociali*, cit. at 51, 164 ff., this trend

Against this backdrop, the presumption of the Council of State, referring judge in the proceedings settled by the Judgement No. 120/2018, that the Committee's decisions not only lack direct effects but «neither are fit to generate international obligations upon the interested Member State» seems to be unfounded[59]. By contrast, the entire follow-up procedure is based on the compulsory nature of ECSR findings on the claimed infringement of the Charter.

In conclusion, many reasons support the argument of the 'duty of diligence' on national judges to refer to ECSR decisions relating to their own country and, in general, to its 'consolidated' case law when domestic legislation is deemed to conflict with the Charter. Of course, judges must test the conformity of this external interpretation (of the treaty) with the Constitution and, in the event of a contrast, refuse to integrate the international norm within the domestic parameter (up to raise a question of constitutionality *in parte qua* upon the law incorporating the Charter). At the same time, the ICC should acknowledge the qualified value of the Committee's interpretation and act accordingly. In fact, the stability of the interpretative trends that progressively detail the Charter's commitments is a preliminary condition for achieving the main purpose of that system: promoting effective social justice on a European scale.

6. Conclusions

This challenging goal has much to do with the questions concerning the features of social rights (mostly requiring 'positive' actions and financial support from public institutions) and the nature of the norms that protect them, generally expressed in the form of directive principles of social policy. As the Constitutional Court has put it, the Charter

> is made up predominantly of statements of principle requiring progressive implementation, thereby calling for particular

buttresses the «substantial interpretative authority» held by the Committee's decisions.

[59] Order cit. at 45 (para. 5.3.2). Less extreme, but strictly in line with the principled arguments of the Judgement No. 120/2018, is the reasoning underpinning Council of State, 5th sec., Judgement Nos. 1326 and 7762/2020.

attention when considering the time scales for and manner of their implementation[60].

For this reason, the prospects of the ESC are not separable from the issue regarding the limits of a judicial enforcement of social rights, which calls on the indefectible responsiveness of 'political' law-making. To this end, however, an increase in judicial concern for the Charter and dialogues with its guardian body might put lawmakers under pressure and successfully counterbalance regressive trends in the field of social rights.

Let us consider a couple of examples. During the horrible years of the global financial crisis begun in 2007-2008, neither the ECtHR nor the ECJ contained the national cutbacks of protection from increasing poverty and social exclusion of that time. The ECSR opposed the trend, ruling that the austerity measures adopted in Greece under the constraints of the loan conditionality (imposed by the IMF, ECB, and EU Commission) violated the Charter as to their «cumulative effect», which resulted in an excessive deprivation of the rights of pensioners to social security, disregarding the principle of proportionality («lesser means» test)[61]. A few months later, dealing with the balancing of economic freedom and social rights, the Committee found that the Swedish legislation enacting the ECJ ruling in the *Laval* case was in breach of the Charter's guarantees of the right to strike and collective bargaining of posted workers[62]. It

[60] Constitutional Court, Judgement No. 120/2018 (para. 10.1 of the *Conclusions on points of law*).

[61] *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*; *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*; *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece* (7 December 2012, Complaints Nos. 76-80/2012). But see also the earlier *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece* (23 May 2012, Complaint No. 66/2011). For a comparative account of these decisions, see L. Mola, *The Margin of Appreciation Accorded to States in Times of Economic Crisis. An Analysis of the Decisions by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures*, 5 Lex social. Revista jurídica de los derechos sociales 174 (2015).

[62] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* (3 July 2013, Complaint No. 85/2012) to compare with Case C-341/05, *Laval un Partneri Ltd*, ECLI:EU:C:2007:809. For a comment, see: Mª.C. Salcedo Beltrán, *El Consejo de Europa frente a la Unión Europea. Vulneración de la Carta Social Europea por 'Lex Laval'*, 77 Estudios Fundación 1 de Mayo 5 (2014); M.

was a warning for all Parties, but indirectly also for the EU and its Court: the *Bosphorus* doctrine would have not applied to the Charter system[63].

To conclude on the parametric role of the ESC in Italy, it is worth considering its implementation even beyond the recourse to the 'interposed norm' scheme. Below, I suggest three viable paths.

1) Even though legislative enactments regarding social rights often neglect the Charter as a source of inspiration akin to other internal (constitutional) or external (ECHR or EU) principles[64], judges should take the former into account, along with the respective ECSR 'case law', to the same extent as the latter. Indeed, greater visibility of the Charter would lead to broader awareness of the external constraints imposed upon domestic legislation, which is even more crucial when the respective standards of protection diverge[65].

2) Legislative provisions should be interpreted, as far as possible, fully in compliance with the Charter's obligations. This duty is not expressly stated in constitutional case law, but implicitly descends from the general principles applying to all treaties once incorporated into the domestic legal system, as a means for granting their *effet utile*[66]. The same duty is logically implied by the scheme envisaged by Article 117(1), at least for as long as the interpretative

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Bassini & F. Ferrari, *Reconciling Social Rights and Economic Freedom in Europe. A Constitutional Analysis of the Laval Saga (Collective Complaint n. 85/2012)*, in M. D'Amico & G. Guiglia (eds./dir.), *European Social Charter*, cit. at 14, 193.

[63] In this sense, see explicitly *Confédération française de l'Encadrement (CFE-CGC) v. France* (12 October 2014, Complaint No. 16/2003, para. 30); *Confédération générale du travail (CGT) v. France* (23 June 2010, Complaint No. 55/2009, paras 32-38); *LO-TCO v. Sweden*, cit. at 62 (paras 72-74).

[64] Until now, there are incredibly few laws and regulations which mention the Charter. A noteworthy exception is the Calabria Regional Law No. 47/2016 for the implementation of national legislation on women's right to abortion, which expressly refers to the ECSR decisions *International Planned Parenthood Federation - European Network (IPPF EN) v. Italy* (10 September 2013, Complaint Co. 87/2012) and *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (12 October 2015, Complaint No. 91/2013).

[65] A good example of a 'showcase' citation of the Charter, as part of the «integrated system of protections», is offered by Constitutional Court, Judgement No. 59/2021. Conversely, Court of Cassation, lab. sec., Judgement No. 6336/2023, relies on the non-judicial activity of the ECSR to set apart the potential (interpretative) impact of its decisions in a case concerning the principle of due compensation for unlawful dismissal.

[66] See J.-F. Akandji-Kombé, *La justiciabilité des droits sociaux et de la Charte sociale européenne n'est pas une utopie*, in J.-F. Akandji-Kombé (dir.), *L'homme dans la société internationale. Melangés en hommage au Professeur Paul Tavernier* (2013), 499 ff.

harmonisation of national law does not conflict with other constitutional norms. The 'duty to harmonise', if properly accomplished and not abused, could achieve two important results: firstly, to complement – and sometimes to prevent – the declaration of invalidity of the applicable law, conceived as the last resort (*extrema ratio*); secondly, to reduce the risks of 'non-compliance' assessments rendered by the Committee under both procedures, since its supervision encompasses the degree of effective enjoyment of the Charter's rights[67]. A decision delivered by the Court of first instance of Rome in 2021, extending the principle ruled in the Judgement No. 194/2018 to a case regarding a collective unlawful dismissal, displays a positive and reasonable use of ECSR 'case law' that other courts could hopefully replay[68]. Indeed, the current case law encompasses different uses of the ESC, such as: *a*) 'application' of the principles affirmed in Judgements Nos. 120 and 194/2018[69]; *b*) 'quotation' of the Charter alongside other international/EU or constitutional norms[70]; *c*) parametric use of the Charter to confirm the validity of the legislation[71], to harmonise the law on interpretative

[67] This is due to the directive nature of many Charter provisions, which burden the Parties with obligations 'of result' rather than 'of means'.

[68] Court of first instance of Rome, lab. sec., Judgement No. 8207/2021 (para. 11.7).

[69] Council of State, 4th sec., Judgements Nos. 2887/2019 and 3859/2019; Administrative Tribunal, Veneto-Venezia, 1st sec., Judgement No. 1103/2018; Court of 1st instance, Genova, Judgement 21 November 2018; Court of 1st instance, Rome, lab. sec., Judgement No. 9079/2018; Court of 1st instance, Perugia, lab. sec., Judgement No. 106/2021; App. Court, Venezia, lab. sec., Judgement No. 249/2022; Administrative Tribunal, Valle d'Aosta, 1st sec., Judgement No, 15/2023.

[70] Court of Cassation, un. sec., Judgement No. 20819/2021; Court of Cassation, 1st civil sec., Judgements Nos. 40495/2021, 3059 and 3246/2022; Court of Cassation, 3rd civ. sec., Judgement No. 15882/2019; Court of Cassation, lab. sec., Judgements Nos. 26675, 28439 and 32587/2018, 987/2020, 20216/2022, 27711 and 28320/2023; Council of State, 2nd sec., Judgement No. 7646/2019; App. Court, Florence, lab. sec., Judgement No. 19/2022; Court of 1st instance, Vicenza, Judgement No. 2489/2018.

[71] Court of Cassation, lab. sec., Judgement Nos. 12174/2019, 19660/2019, 12629/2020, 16711/2020, 16855/2020, 16917/2021; App. Court, Cagliari, lab. sec., Judgement No. 262/2021; Council of State, 7th sec., Judgements Nos. 906/2023 and 6291/2023.

basis[72], to refer questions of constitutionality to the ICC[73] or preliminary rulings to the ECJ[74].

3) Most Charter provisions incorporate directive principles to States' actions in the field of the labour market, healthcare, and social policies. Nonetheless, judges should not refuse direct application to norms having more precise and detailed content, particularly if this qualification originates from ECSR consolidated case law. The issue relates more generally to all treaties and has been addressed in Italy with specific regard to the ECHR. In fact, the caution guiding the ICC on this slippery point is plainly justified when the treaty is deemed to display direct effects in place of the applicable law. In this way, direct application is wrongly used as a means for concealing the conflict arisen and, ultimately, for taming it at judicial level in contrast with the concentrated nature of the Italian constitutional review system. Without a constitutional amendment or an enlargement of the ICC doctrine regarding international customary and EU law, it is difficult to foresee the development of a 'conventional' review alternative to the 'constitutional' one, expressly provided and already applied to the ESC in other European Countries (France and Spain, for example)[75]. Outside of this scenario, I do not see any real hindrances to give direct effects to the Charter, as long as some of its provisions fit to this end and there is no apparent clash with domestic law.

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[72] Court of 1st instance, Rome, lab. sec., Judgement No. 10149/2019; Court of 1st instance, Turin, 1st sec., Judgement No. 32/2019.

[73] Above, at 42.

[74] Council of State, 4th sec., Order No. 4949/2019; Court of 1st instance, Milan, lab. sec., Order 5 August 2019; App. Court, Naples, lab. sec., Order 18 August 2019. All referrals were declared inadmissible by the ECJ: see C-561/19, *Consorzio Italian Management e Catania Multiservizi SpA*, ECLI:EU:C:2021:799; C-652/19, *KO*, ECLI:EU:C:2021:208; C-32/20, *T.G.*, ECLI:EU:C:2020:441.

[75] For an appraisal of these recent trends, see: C. Nivard, *Le rôle des juges nationaux dans l'application de la Charte sociale européenne en France* and C. Salcedo Beltrán, *Le rôle des juges nationaux dans l'application de la Charte sociale européenne en Espagne*, 1 Europe des droits & libertés/Europe of Rights & Liberties 87 and 97 (2020). On the positive impact of this parallel scrutiny, L. Jimena Quesada, *Jurisdicción nacional y control de convencionalidad. A propósito del diálogo judicial global y de la tutela multinivel de derechos* (2013); on its spread in Europe, see G. Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 23 Eur. J. Int'l L. 401 (2012), 412 ff.

ARTIFICIAL INTELLIGENCE AT THE CROSSROADS BETWEEN THE EUROPEAN UNION & THE COUNCIL OF EUROPE: WHO SAFEGUARDS WHAT & HOW?

Costanza Nardocci[*]

Abstract

Building on the diverse legal statuses of European Union law and international human rights law, especially that deriving from the Council of Europe (CoE), within the sources of the law of the domestic constitutional system, the Article discusses the current state of the art of the legislative approaches to AI in the European and supranational scenarios.

It departs from the European Union's never-ending debate on the controversial and desired contents of the Artificial Intelligence Act in light of its implications in terms of AI's definitions, risk assessments, liability strategies, and selection of prohibited AI technologies, to then go on exploring the CoE's fast-growing activism towards the adoption of the first international human rights treaty on AI (the Revised 'Zero Draft' of the [Framework] Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law).

The comparison between the two normative approaches unveils the heterogenous rationale of the acts alongside their respective impact and traits: still strongly and almost exclusively bound to a privacy-based approach the EU's Artificial Intelligence Act, and, vice versa, more inclined to endorse a truthful human rights-based approach the CoE.

Eventually, the Article argues the urge for a mutual exchange between the two international organizations suggesting, that AI regulatory framework should adequately respect a human-centered approach reflecting the shared principles enshrined in national Constitutions and supranational human rights law treaties.

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1. AI comes to Europe: Regulation *vs.* non-regulation

It is not unusual that before new phenomena the law keeps a slow pace. Neither, that the law struggles to regulate phenomena of a multidisciplinary nature, heterogenous implications on an individual and collective basis, and eventually cross-borders and global impact.

Conversely, it could be unusual for national States to unanimously be willing to wait for supranational interventions, delegating the definition of the *rationale* and contents of perspective regulations almost entirely to supranational but not always politically representative institutions[1].

The revolution brought by Artificial Intelligence (hereafter, AI) does not solely rest on the challenging relationships that new technologies entertain with human beings[2]. Will AI support

[1] For the purpose of the article, reference is chiefly made to the Council of Europe and to all supranational organizations other than the European Union. For a general overview on the latest European development, see T. Giegerich, *How to Regulate Artificial Intelligence: A Screenshot of Rapidly Developing Global, Regional and European Regulatory Processes*, Saar Expert Paper (2023), Link: https://jean-monnet-saar.eu/?page_id=70.

[2] On the relationship between AI (the "machine") and humans, please see the comments by S.M. Fleming, *What separates humans from AI? It's doubt*, in *Financial Times*, 26th April 2021. Among others, argue in favor of the need to focus on the differences existing between humans and artificial intelligence, also, A. Rouvroy, *The end(s) of critique: Data-behaviourism vs. due-process*, in M. Hildebrandt, K. de Vries (eds.), *Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology* (2013), 143.

humans? Or, conversely, will AI substitute humans?[3] Will AI be capable of replicating human abilities? Or will AI continue to be confined to the artificial dimension without conquering the human sphere?

Moreover, AI's impact is also expanding on the side of domestic and international relations and among different legislation levels.

In different terms, as AI is challenging human lives, actions, and behaviors, humans are grappling with finding ways to control AI by resorting to normative and prescriptive responses.

Whereas until a few years ago the legal debate on AI was almost exclusively entrenched in the alternative between regulation and non-regulation[4], juxtaposing Europe's inclination to adopt a legislative framework to, especially, the United States' tendency to keep AI free from legal constraints, recent times witnessed instead a global move towards the acknowledged necessity to embed AI in coherent systems of laws[5].

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[3] The debate on the likelihood AI will replace humans in the labor market gathers a significant resonance following the publication of the 2023 ILO's Report, *Generative AI and Jobs: A global analysis of potential effects on job quantity and quality*, (2023). Fulltext available at the following link: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_890761.pdf.

[4] On the opportunity of keeping humans in the loop, contrasting the autonomous development of artificial intelligence technologies, see, among many others, F.M. Zanzotto, *Viewpoint: Human-in-the-loop Artificial Intelligence*, in 64 J. Artificial Intelligence Research 243 (2019); C. Cath, L. Floridi, *The Design of the Internet's Architecture by the Internet Engineering Task Force (IETF) and Human Rights*, 23(2) Sci. & Engin. Ethics 449 (2017). On the same issue, see, also, the Report delivered by the Council of Europe, *Algorithms and Human Rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications* (2018).

[5] On the role of law in regulating artificial intelligence, see, among others, G. De Gregorio, *The Normative Power of Artificial Intelligence*, 30(2) Ind. J. Glob. Leg. Studies 55 (2023). Even sooner, the literature extensively debated on the possibility and opportunity to regulate AI resorting to the rule of law. See K. Yeung, M. Lodge. (eds.), *Algorithmic Regulation* (2019); R. Brownsword, *Technological Management and The Rule of Law*, 8(1) Law, Inn. & Tech. 100 (2016). In a comparative perspective, worth mentioning is, first, the pivotal initiatives of the African Union Development Agency – NEPAD (AUDA-NEPAD), that convened in August 2023 to discuss the adoption of the *AU-AI Continental Strategy encompassing legislative, regulatory, ethical, policy, and infrastructural frameworks*. Previously, see, also the Study *AI for Africa: Artificial Intelligence for Africa's Socio-Economic Development*, that can be consulted at the following link: https://www.nepad.org/publication/ai-africa-artificial-intelligence-africas-

The European debate started before 2021 when the European Union published the first worldwide proposal of a regulation on AI, the now very well-known Artificial Intelligence Act[6].

The European Union was not alone at that time, as several other international organizations were sharing the same approach, questioning the benefits of AI and discussing its risks from a human-centered perspective. UNESCO[7] published several reports on the human rights implications of AI[8] and the Council of Europe launched a structural operation to study the impact of AI on human rights through the establishment 2019 of two Committees, the *Ad hoc* Committee on Artificial Intelligence (CAHAI)[9] and the Committee on Artificial Intelligence (CAI)[10].

At present, the European continent does not merely embody a favor for AI's regulation but is also witnessing a simultaneous increase in the attempts to regulate AI. The European Union and

socio-economic-development. Another leading role is being played by the Association of Southeast Asian Nations (ASEAN) that in February 2023 issued the draft of the "ASEAN Guide on AI Governance and Ethics", very likelihood eventually to adopt in 2024 and same is the case of Australia, that declared its willingness to regulate AI in 2023. See, in particular, the Australian Human Rights Commission's submission to the Department of Industry, Science and Resources of a document called "*Supporting Responsible AI: Discussion Paper*", link: https://consult.industry.gov.au/supporting-responsible-ai.

[6] The text of the initial proposal can be read at the following link: https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence.

[7] UNESCO dedicated lots of efforts in laying down principles on ethics and artificial intelligence. For an insight into the work of the international organization and to examine the texts discussed, please see the following link: https://unesdoc.unesco.org/search/605f84e9-ad3c-4637-b7ff-c9d4ab90e697.
UNESCO also committed itself to the study of a variety of AI's implications on a wide spectrum of human rights. UNESCO's official publications on AI and human rights might be consulted at the following link: https://www.unesco.org/en/artificial-intelligence.

[8] The literature has likewise expressed its concern. Among many, see M. Risse, *Human Rights and Artificial Intelligence: An Urgently Needed Agenda*, 41(1) Hum. Rights Quart. 1 (2019).

[9] For all the information on the composition, meetings, agenda, and reports of the activities undertaken by the CAHAI, see the dedicated webpage at the following link: https://www.coe.int/en/web/artificial-intelligence/cahai.

[10] As of the CAI, please refer to the following link: https://www.coe.int/en/web/artificial-intelligence/cai.

the Council of Europe are, in fact, currently both engaged in adopting legislative measures to norm AI[11].

However, it is questionable how the proposals will relate to one another and will build on analogous principles, as it may as well discuss the coherence of the *rationale* of the compared normative acts. Additionally, the different actors involved in the negotiations and the much wider number of States members of the process that is taking place before the Council of Europe – one for all, the presence of the United States – could be another factor to consider in the comparison between the simultaneous initiatives.

In light of the above, the Article aims to investigate, first, and draw an analogy, second, between the proposals of the European Union and the Council of Europe. The analysis will unveil the discrepancies, identify the gaps, to then discuss the challenges with the ultimate goal of clarifying where we stand now and what we should expect shortly.

2. The Continental Normative Approach to AI: one Binary or Two?

"The question is […] no longer if we want to make use of these powerful tools, but how we ensure that they are used for the good of humanity only"[12].

These are the words of the Chair of the Council of Europe's Committee on Artificial Intelligence, who is currently negotiating the drafting of the first international human rights law treaty on AI. Their importance lies, in that they explicit the *rationale* of the approach of the Council of Europe bound evidently to a broad human-centered interpretation of how AI technologies should relate with human beings. Thus, in the Preambles of the Zero Draft, the Revised Zero Draft, and, more recently, the Consolidated Working Draft there is nothing to suggest that the Council of Europe is taking a step back from this solid declaration. In other words, the main goal of the Council of Europe continues to be the identification of sets of effective legislative provisions to ensure that

[11] Reference is chiefly made to the debate on the so-called Artificial Intelligence Act, on the EU's side, and on the Framework Convention on AI, on the CoE's. The drafts and the discussion on the two texts will be further analyzed, respectively, under paragraphs Nos. 3, 4, and 4.1.

[12] T. Schneider, Chair of the CAI. The full statement can be read at the following link: https://www.coe.int/en/web/artificial-intelligence/cai.

AI is designed, used, and implemented in full compliance with fundamental human rights.

On the other side of Europe, the European Union is showing analogous concerns about the possible misuse and perilous consequences of AI.

Before examining how the two international organizations are approaching AI from the very beginning until the latest developments, it should be noted the overlapping goal behind the legislative attempts.

First and foremost, the Council of Europe and the European Union agree on the opportunity to introduce a legislative regulation on AI, opting for the adoption of a specific legislation and both are, therefore, rejecting the opposite alternative of the self-regulation of AI technologies[13]. Similarly, beyond the methodology (to regulate *vs*. to not regulate), there appears to exist a shared concern about the risks posed by AI. Despite the acknowledged benefits AI is capable of bringing to humans' daily lives, the Council of Europe and the European Union are both inclined to opt for a regulation based on its risks rather than on the necessity to simply legislate a phenomenon considered purely profitable and benign.

AI is conceived as possessing a twofold nature: one positive and human's friendly, recalling AI's abilities to help, support, and even take care of duties on behalf of humans; one negative, possibly dangerous, deriving from the uncontrolled and likely negative potentials of AI systems that could also perform to the detriment of the human beings.

Actually, as more and less recent data reports, AI proved to be not so seldom dangerous and likely in violation of human rights. The high rates of AI-derived discriminations, meaning differences in treatment caused by the malfunctioning of AI, in particular, clearly speak for themselves[14]. Moreover, the discussion over the

[13] To recall the key elements of the debate, please refers to the Symposium titled *How Will Artificial Intelligence Affect International Law?*, 114 Am. J. Int'l L. Unbound 138 (2020).

[14] On the discriminatory implications on AI, the literature started to focus not so longer ago. Among the most significant study, see, among others, A.D. Selbst, *Disparate impact in big data policing*, 52(1) Geo. L. Rev. 109 (2017); S.U. Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (2018); S. Barocas, A.D. Selbst, *Big data disparate impact*, 104(3) Cal. L. Rev. 671 (2016); P.T. Kim, *Data-Driven Discrimination at Work*, 58(3) William & Mary L. Rev. 857 (2017); F.Z. Burgesius, *Discrimination, artificial intelligence, and algorithmic decision-making* (2018); J. Kleinberg, J. Ludwig, S. Mullainathan, C.R. Sunstein, *Discrimination in*

risks of biases in the tech industry, caused by the lack of diversity in the actors involved, signals quite evidently the discriminatory effects that may occur in the design, development, and implementation of AI technologies.

All this considered, the Council of Europe and the European Union appear to converge on their approaches to AI, the normative and regulatory ones, and on the reasons behind the opportunity to regulate AI in light of the risks caused by new technologies and of the necessity to ensure their beneficial use.

Despite the overlapping approaches and rationale, some differences, nevertheless, do exist. The European Union, at least originally, linked AI regulation quite exclusively to data protection law as if AI was only a matter of privacy without impacting other human rights. On the contrary, the Council of Europe has since the very beginning always been convinced of the necessity to subordinate AI to the respect of a wider range of human rights and fundamental freedoms. A privacy-based approach for the European Union, and a human rights-based one for the Council of Europe.

Such a divergence seems in the latest developments of the EU's Artificial Intelligence Act mitigated by the more serious commitment of the EU institutions to AI's implications on the human rights sphere. However, this new reading of AI and human rights embodied in the latest version of the text will have to be kept under evaluation until definitive approval.

It is therefore still open to discussion whether the European Union and the Council of Europe are truly moving in the same direction and how the two texts will relate to one another once they are both approved. Surely, their impact on the domestic level will echo their different status in the system of the sources of law with the European Union's regulation expected to have the well-known binding effect that the CoE's treaty won't possibly have. Nevertheless, considering the large number of States, members,

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the Age of Algorithms, 10 J. Leg. An. 113 (2018), and, of the same A., also, J. Kleinberg, J. Ludwig, S. Mullainathan, A. Rambachan, *Algorithmic fairness*, 108 AEA Papers & Proceedings 22 (2018); see also C. Nardocci, *Intelligenza artificiale e discriminazioni*, in *Rivista "Gruppo di Pisa*, 2021, link: https://www.gruppodipisa.it/images/rivista/pdf/Costanza_Nardocci_-_Intelligenza_artificiale_e_discriminazioni.pdf., and Id., *Artificial Intelligence-Based Discrimination: Theoretical and Normative Responses. Perspectives from Europe*, 60(3) DPCE Online 2367 (2023).

and non-members of the Council of Europe, that are participating in the negotiations of the CoE's Convention, should not be underestimated the political relevance of the perspective treaty and even its possible influence on the ongoing debate within EU institutions.

3. The European Union & the Controversial Path towards the Adoption of the "Artificial Intelligence Act"

The European Union was – and, to some extent, still is – one of the leading international organizations in laying down the first regulation on artificial intelligence worldwide[15].

As mentioned, the European Union has almost always been in favor of the regulatory approach. The European Union's normative inclination became more concrete in April 2021, when what will be later called the "Artificial Intelligence Act" was initially presented[16].

At that time, the European Union was alone in the first row of AI regulation, and everything seemed to be moving very fast in the Continent. The United States was struggling between the two contrasting options, with the Federal Government quite far from taking into serious consideration the possibility of embedding technological innovation under the constraints of the law[17] and with few local governments conversely amid experimenting strategies to control the rapid development of AI systems. China

[15] An overview on the history and developments of the text is offered by J. Laux, S. Wachter, B. Mittelstadt, *Trustworthy artificial intelligence and the European Union AI act: On the conflation of trustworthiness and acceptability of risk*, Regulation & Governance 1 (2023).

[16] For a critical comment on the first draft, please refer to M. Veale, F.Z. Borgesius, *Demystifying the Draft EU Artificial Intelligence Act — Analysing the good, the bad, and the unclear elements of the proposed approach*, 4 Comp. L. Rev. Int'l 97 (2021).

[17] At least until the adoption by the of the *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* by the White House Office of Science and Technology Policy in October 2022. The text is available at the following link: https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf. Additionally, reference can be made to the *Algorithmic Accountability Act* of 2022. For a comparison between this latter Act and the former of 2021 proposal of the Artificial Intelligence Act, see J. Mökander, P. Juneja, D.S. Watson, et al., *The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: what can they learn from each other?*, 32 *Minds & Machines* 751 (2022).

was also not effectively equipped and likewise lacked a proposal for regulating AI, at least in 2021.

The European Union, therefore, was the only organization truly willing to adopt the first binding set of legal provisions that was expected to become law for 27 Countries globally in a few years. From this perspective, the European Union demonstrated to have acknowledged the existing concerns that other international organizations have started to express about the likelihood that AI may result in severe human rights violations. Not surprisingly, these international organizations were similarly operating in Europe. This was the case of UNESCO and the Council of Europe, which during those same years published a significant number of reports on the risks associated with the massive and uncontrolled resort to AI technologies.

The Artificial Intelligence Act aimed, thus, at stating the European Union's priority in the process of regulating AI.

Despite the existing studies and research available at the time of the delivery of the proposal hinged on the human rights implications of AI, the European Union was initially more concerned about the impact of AI on privacy and data protection law. In other words, at the outset, there was a more explicit inclination of the European Union to endorse a privacy-based approach to inspire the Artificial Intelligence Act. Despite the declared willingness to ensure the safe use of AI systems and their compliance with human rights were recurrent in the text, the Artificial Intelligence Act did not initially lay down any specific mechanism to contravene fundamental rights violations caused by AI systems. Similarly, the proposal contained a very scarce reference to the risks of discrimination deriving from AI technologies, which conversely constitute one of the major concerns related to the massive resort to AI.

As of April 2021, and after three years of activity led by the High-Level Expert Group on AI (HLEG), the text built on a series of documents published by the European Union in the years before, such as the White Paper on AI and the European Strategy for data both released in 2020, but also on several resolutions released by the European Parliament on AI. In the European Strategy for data, the European Union emphasized its "leading role model for a society empowered by data to make better decisions – in business and the public sector" and highlighted its preference for "a strong legal framework – in terms of data protection, fundamental rights,

safety, and cyber-security – […]" to pursue its ultimate goal, meaning "to capture the benefits of better use of data, including greater productivity and competitive markets, but also improvements in health and well-being, environment, transparent governance, and convenient public services".

Additionally, the proposal was very much connected with the General Data Protection Regulation (Regulation (EU) 2016/679) and the Law Enforcement Directive (Directive (EU) 2016/680), whose legal provisions were expected to be completed by those adopted in the new legislation on AI.

Undoubtedly, the European Union institutions and the proposal that came up in 2021 were strongly convinced of the opportunity to govern technological innovations, to boost its beneficial use in the EU marketplace, and to contain its risks.

As a result, the Artificial Intelligence Act perfectly fits in this scenario.

It was based on the risk criteria, as it is nowadays, to subject AI technologies to a more or less strict regulation depending on the levels of their possible negative impact on human rights. The risk-based approach was, therefore, also in line with a human-centric approach to AI. The inherent rationale behind the text was, thus, to prohibit only AI technologies capable of violating human rights and to, conversely, permit the gradual resort to all other technologies whose benefits were proved to overcome the threats posed to humans.

The objectives first followed by the European Union at the time of the adoption of the proposal were "to ensure that AI systems […] are safe and respect existing law on fundamental rights and Union values; ensure legal certainty to facilitate investment and innovation in AI; enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems; facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation"[18].

Recalling Article 114 of the TFEU as the legal base of the act, the memorandum insisted on the necessity to ensure the homogeneous regulation of AI and the fulfillment of the above-mentioned objectives by way of a single legislation binding all

[18] See the *Explanatory Memorandum* to the AI Act, 3.

Member States to avoid fragmentation and legal uncertainty[19]. The idea behind the proposal was, therefore, also to anticipate nation States' interventions which would have soon proved their inadequacy before the global nature of AI as a social phenomenon.

The more interesting aspect of the first version of the text hinged on the proposed categorization of AI technologies into three categories based on their respective risks to fundamental rights and safety. The text distinguished between unacceptable risk, high risk, and low or minimal risk. More specifically, the list of prohibited AI systems included practices thought to "have a significant potential to manipulate persons through subliminal techniques beyond their consciousness or exploit the vulnerability of specific vulnerable groups"[20].

Title II of the proposal prohibited AI technologies due to the unacceptable risks posed to human rights and European values. AI-based social scoring of natural persons for general purposes done by public authorities and real-time biometric identification systems were, for instance, both prohibited as well as all those AI systems capable of manipulating a person's behavior without his/her consciousness.

Besides prohibited AI technologies, the debate was more complex concerning the so-called high-risk AI technologies covered by Title III. Title III and Annex III, which were expected to enumerate AI systems considered high-risk in light of the criteria set out under the proposal, would soon become the target of the vast majority of amendments presented during the legislative process.

Without delving into too many details, high-risk AI systems were expected to comply with several criteria including, among others: record-keeping, to trace AI systems' work during their lifecycle (Article 12); transparency to enable users to know the

[19] The text read as follow: "[t]he nature of AI, which often relies on large and varied datasets, and which may be embedded in any product or service circulating freely within the internal market, entails that the objectives of this proposal cannot be effectively achieved by Member States alone. Furthermore, an emerging patchwork of potentially divergent national rules will hamper the seamless circulation of products and services related to AI systems across the EU and will be ineffective in ensuring the safety and protection of fundamental rights and Union values across the different Member States. National approaches in addressing the problems will only create additional legal uncertainty and barriers and will slow market uptake of AI".

[20] See the *Explanatory Memorandum* to the AI Act, 12.

functioning and likely outcomes of AI systems (Article 13); human oversight to ensure human's control of AI systems during the entire phases of their functioning; accuracy, robustness and cybersecurity (Article 15). Title III also contained a long list of obligations for providers and users of high-risk AI.

Regarding minimal or low-risk AI systems, the proposal allowed their use in the European Union without providing obligations to add to those already enforced at the EU and national level.

Lastly, regarding governance, Title VI established the European Artificial Intelligence Board with consultancy competencies together with national competent authorities designated by each Member State to ensure the implementation of the proposal of regulation.

After its first presentation in April 2021, a lot has happened.

Jumping to the most recent and significant developments, it is worth mentioning that in June 2023 the European Union lawmakers started the first trilogy and the second took place in July 2023 following the EU Council's position adopted in December 2022[21].

From December 2022 until the first trilogy, the Artificial Intelligence Act was subjected to several amendments as it emerged from the text adopted in December 2022 by the Council. In the "General Approach" to the Artificial Intelligence Act, two main points were discussed and challenged: the definition of AI systems and the enumeration and classification of AI technologies as high-risk under Annex III of the proposal. These two aspects represent the core of the proposal, in that they contribute to enlarge or conversely reduce the scope and ambit of application of the proposed regulation.

In particular, in December 2022 the EU's Council narrowed down the definition of AI systems in a way to include only machine learning AI technologies and systems developed through logic-and knowledge-based approaches. The two adjustments were at the center of several criticisms, that pointed to the fact that the exclusion of a vast type of software from the ambit of application of the proposal would have generated an increase in risks of human

[21] A note on the EU's approach is offered by M. Heikkilä, *The EU wants to regulate your favorite AI tools*, Politico, 10th January 2023, Link: https://www.technologyreview.com/2023/01/10/1066538/the-eu-wants-to-regulate-your-favorite-ai-tools.

rights violations that are not exclusively caused by machine learning systems[22].

Shortly before the adoption of the "General Approach" in December 2022, a similar debate took place as a result of the publication of the first EU Council's "General Approach" in the first half of 2022 in the EU Parliament, which likewise doubted the broader definition of AI, the selected high-risk AI technologies, and to some extent even the lack of a serious commitment to guarantee human rights and fundamental freedoms[23].

On this, it is worth considering that the definition accepted in the EU Council's "General Approach" was more in tune with that accepted by computer scientists who are known as being used to confining the definition of AI to software capable of replicating human abilities, developing autonomous and human-like abilities. While the amended definition might be more appropriate, the guiding principle should, however, be the likelihood of AI affecting fundamental rights regardless of the type of AI systems in question.

Not surprisingly, in November 2021, 114 NGOs presented the Statement "An EU Artificial Intelligence Act for Fundamental Rights. A Civil Society Statement"[24], indicating 9 objectives[25] EU institutions should orient their approach to AI. The Statement criticized several aspects of the first draft of the Artificial Intelligence Act.

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[22] Interestingly, the AI definition adopted by the US Blueprint for an AI Bill of Rights is much wider and it covers all AI systems that are considered capable of negatively impacting on fundamental rights. Accordingly, the text "applies to (1) automated systems that (2) have the potential to meaningfully impact the American public's rights, opportunities, or access to critical resources or services".

[23] Reference is made to the amendments proposed by the Parliamentary Commissions in charge of examining the text of the AIA: the IMCO, LIBE, JURI, ITRE and CULT Commissions.

[24] The full text of the Statement could be read at the following link: https://edri.org/wp-content/uploads/2021/12/Political-statement-on-AI-Act.pdf, 30 November 2021.

[25] The "Goals" set out in the Statement were directed towards the establishment of: 1. A cohesive, flexible and future-proof approach to 'risk' of AI systems; 2. the Prohibitions on all AI systems posing an unacceptable risk to fundamental rights; 3. the Obligations on users of high-risk AI systems to facilitate accountability to those impacted by AI systems; 4. the Consistent and meaningful public transparency; 5. Meaningful rights and redress for people impacted by AI systems; 6. Accessibility throughout the AI life-cycle; 7. Sustainability and environmental protections; 8. Improved and future-proof standards for AI systems; 9. A truly comprehensive AIA that works for everyone.

First and foremost, the choice to classify AI technologies on an *ex-ante* basis is considered "dysfunctional"[26] and inadequate, because it "does not consider that the level of risk also depends on the context in which a system is deployed and cannot be fully determined in advance"[27].

Secondly, the selection of the prohibited AI technologies, suggesting, among others, that biometric systems should always be prohibited, and to enlarge Annex III, adding new areas like healthcare and insurance. More importantly, the Statement was very much concerned with the human rights implications of AI, invoking a revision of the AIA willing to effectively protect the individual rights of those affected by AI systems and, especially, the right to access justice and to obtain a proper redress. Coherently, the Statement called for the revision of the notion of vulnerability, the AIA narrowed to age and disability, to include all factors of discrimination safeguarded under the EU Charter of Fundamental Rights.

In short, the Statement emphasized the need to develop a human-rights-based approach to AI and to loosen the exclusive connection between AI and privacy, which surely inspired the first drafts of the proposal.

The invitation of the 114 NGOs was somehow later acknowledged by the European Union in the recent version of the text published in June 2023[28]. In short, worth mentioning are the amendments that strengthen individual rights and, among these, the principles of equality and non-discrimination which were

[26] *Ibidem*, 1.

[27] *Ibidem.*

[28] Even more recently, 115 NGOs expressed their concerned on the latest version of the AIA presented in June 2023 with specific regard to the amended text of Article 6. On extract is emblematic of the rationale behind the statement when it is stated that: "[i]n the original draft from the European Commission, an AI system was considered 'high risk' if it was to be used for one of the high-risk purposes listed in Annex III. However, the Council and the European Parliament have introduced a loophole that would allow developers of these systems decide themselves if they believe the system is 'high-risk'. The same company that would be subject to the law is given the power to unilaterally decide whether or not it should apply to them. These changes to Article 6 must be rejected and the European Commission's original risk- classification process must be restored. There must be an objective, coherent and legally certain process to determine which AI systems are 'high-risk' in the AI act". The fulltext of the Statement may be read at the following link: Link: https://edri.org/wp-content/uploads/2023/09/AI-Act_Article-6-NGO-statement-draft-FINAL.pdf.

conversely not adequately addressed in the past versions of the AIA[29].

The impression is that the European Union has finally rightly connected AI with human rights advancing its proposal in a way consistent to ensure a proper safeguard of the individual rights of those negatively impacted by AI systems. Not only, therefore, does the European Union demonstrate to welcome the amendment proposals, but it also places the Artificial Intelligence Act in a coherent relationship with the simultaneous initiatives undertaken by the Council of Europe in recent years.

4. Faster than Expected: The Council of Europe towards the First Treaty on Artificial Intelligence

In 2019, the Commissioner for Human Rights of the Council of Europe delivered a report titled "*Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights*"[30]. The report was directed to the Member States of the Council of Europe and intended to ensure a human rights-friendly approach to AI technologies to guarantee their beneficial use and an effective contrast towards their risks.

Building on the resolutions and recommendations adopted by the Parliamentary Assembly of the Council of Europe in the previous years, the document prioritizes human rights' protection over any other competing interest at stake, listing ten "steps" to guide the Member States in their attempts to regulate AI[31].

Although no legislation existed at that time in Europe, neither none of the Member States of the Council of Europe had adopted a Country-specific regulation on AI yet, the ten "steps" defined the

[29] See, among others, the amendments new of the Recital No. 9 of the Preamble; amendments No. 35 about Recital No. 13; amendments Nos. 53 and 75.

[30] The document can be read in full at the following link: https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64. For an insight into the methodology and approach of the Council of Europe towards AI, see M. Breuer, *The Council of Europe as an AI Standard Setter*, in *Verfassungsblog*, (2022).

[31]The so-called "steps" or "areas of intervention" mentioned in the above-mentioned document are listed as follows: "human rights impact assessment public consultations; human rights standards in the private sector; information and transparency; independent oversight; non-discrimination and equality; data protection and privacy; freedom of expression, freedom of assembly and association, and the right to work; access to remedies; and the promotion of artificial intelligence literacy".

rationale that would have later supported the initiatives of the Council of Europe and, in short, the establishment of the two Committees asked to draft the first international human rights law treaty on AI.

The choice of negotiating a treaty is certainly the most significant aspect of the approach of the Council of Europe towards AI and technological innovation more broadly, in that it exploits the conviction of the opportunity to lay down a legislative framework to protect human rights, democracy, and the rule of law.

Everything started in 2019 when the Council of Europe appointed an *Ad Hoc* Committee on Artificial Intelligence (CAHAI) to identify the foundations of the future legal framework for the design, development, and application of AI systems. In December 2020, the CAHAI published its first Feasibility Study on the regulation of AI[32], which preceded its final report released based on the results gathered during the multi-stakeholder consultation on the elements of a legal framework on AI in 2021.

The feasibility study contains a very comprehensive analysis of the state of the art of national and supranational regulations applicable to AI, which the study carefully investigates before the identification of the "key values, rights and principles"[33], that should inform the CoE's future legislative framework on AI.

While the European Union was still struggling at that time to find a consensual definition of AI, the feasibility study chose, instead, to approach AI neutrally. The feasibility study shows to be more worried about the possible negative consequences of AI rather than about the identification of the most accurate and science-based definition. The focus on the human rights impacts of AI, thus, favored a bottom-up approach and the option for an "umbrella term"[34]. It is worth mentioning here a passage from the feasibility study that better clarifies the rationale behind the chosen

[32] The text of the CHAI's Feasibility Study can be read at the following link: https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da, 17 December 2020.

[33] *Ibidem*, 27.

[34] *Ibidem*, § 9. The Study goes further clarifying that: "[t]o avoid any form of anthropomorphising and to include all technologies falling under the umbrella term of 'AI', the terms 'AI systems', 'AI applications', 'AI solutions' will be generally preferred in this feasibility study to refer to algorithmic systems based, indifferently, on machine learning, deep learning, rule-based systems such as expert systems or any other form of computer programming and data processing", 2.

definition of AI. The CAHAI states that "a balance should be sought between a definition that may be too precise from a technical point of view and might thus be obsolete in the short term, and a definition that is too vague and thus leaves a wide margin of interpretation, potentially resulting in a non-uniform application of the legal framework"[35]. As a consequence, the CAHAI suggested that the term AI should be understood as "covering those practices or application cases where the development and use of AI systems, or automated decision-making systems more generally, can impact on human rights, democracy and the rule of law, and taking into account all of the systems' socio-technical implications"[36].

Moreover, the feasibility study acknowledged the existence of a variety of gaps in the domestic and supranational legal systems that suggest that the CoE adopted a uniform regulatory provision to avoid the hamper of "cross-border trade of AI products and services"[37], "the benefits of AI applications"[38], eventually the "more comprehensive level of protection regardless of the sector concerned"[39].

Similarly, to the European Union's resort to the risk-based approach, the feasibility study details the main elements of the perspective legislative framework that should also depart from the risks posed by AI systems to individual rights, to then set out the requirements developers and deployers should comply with.

Conversely, instead of the European Union's strategy that centered its regulation on the types of AI systems, the feasibility inverts this approach and starts with the identification of the human rights that are required to be safeguarded. Among these, the feasibility study recalls traditional human rights, such as human dignity, democracy and the rule of law, human freedom and autonomy, non-discrimination, gender equality and diversity, privacy, and data protection, along with new rights associated with AI. The latter is the case of the principles of transparency and explainability and of accountability and responsibility of AI systems. For each of these, the study carefully lists the key substantive rights and the key obligations in a way that should orient the legislative choices.

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[35] *Ibidem*.
[36] *Ibidem*, § 10.
[37] *Ibidem*, § 88.
[38] *Ibidem*.
[39] *Ibidem*, § 89.

Finally, the feasibility study dedicates its last chapter to the mechanisms and strategies to implement to ensure the compliance of AI systems with the rights and principles set out in the document.

After the Feasibility Study and the publication of the results of the multi-stakeholder consultation in April 2021, the CAHAI delivered its final report in December 2021. The report, "*Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law*"[40], includes the main elements and requirements of a "legally binding transversal instrument on AI" that should be met.

At the outset, the report emphasizes that the transnational nature of AI systems in terms of effects and actors involved should suggest that non-member States of the Council of Europe may likewise have access to the treaty to favor the far-reaching impact of the legislative framework and to contain the risks of excessive fragmentation of international human rights law instruments on AI. In line with the full awareness of the "transnational criteria" is, also, the preference for not too stark definitions and for striking a balance between legal certainty, which calls for precise definitions, and technology neutrality, which would opt for abstract definitions to allow the adaptation of the chosen terminology to the future technological developments.

About the elements of the legally binding transversal instrument on AI, the CAHAI follows the European Union's path and similarly endorses a risk-based assessment to categorize AI systems. Nevertheless, and more explicitly than the European Union, the CAHAI connects the evaluation of the risk to the likelihood of AI systems negatively impacting human rights, democracy, and the rule of law, therefore, contributing to unraveling the content and significance of the notion of "risk" that, conversely, the AIA seems to be taken too much for granted.

Additionally, worth mentioning are the indications about AI systems to be subjected to absolute prohibitions. Reference is made to AI systems using biometrics to identify individuals or to "infer characteristics or emotions"[41], especially when associated with

[40] The Study delivered on December 17th, (2021). Link: https://rm.coe.int/possible-elements-of-a-legal-framework-on-artificial-intelligence/1680a5ae6b.
[41] *Ibidem*, § 21.

public surveillance purposes, and to those technologies that make use of social scoring to allow or deny access to services[42].

In so far as the design and development of AI systems are concerned, the document states that safety and security must be the two elements any developers and deployers should rely on and that a legally binding instrument should also include tailored mechanisms to safeguard gender equality as well as strategies of protection for vulnerable groups and individuals. Particularly interesting, is the focus placed by the CAHAI on the principle of equality and non-discrimination, vice-versa not entirely considered by the European Union at least in the first drafts of the AIA. The CAHAI suggests including a specific legal provision requiring the respect of equal treatment and non-discrimination in the design, implementation, and application of AI systems.

This time, similarly, to the European Union, the CAHAI recommends that the future legally binding instrument should be based on the new principles associated with AI in their relationship with human beings to ensure the control and prevalence of the latter.

Transparency, explainability, and accountability argues the CAHAI, "are of paramount importance for the protection of the rights of individuals in the context of AI"[43]. Additionally, a certain level of human oversight is likewise welcomed and required.

Moving forward, particularly interesting is the efforts dedicated to the elements of safeguards. Within this framework, the document affirms the non-derogable nature of the right to access justice by specifying its corollaries in the context of AI. Therefore, a treaty should state the respect for the right to "an effective remedy before a national authority […], the right to be informed about the application of an AI system in a decision-making process; the right to choose interaction with a human in addition or instead of an AI

[42] Worth mentioning is also that, recently, the European Court of Human Rights (ECtHR) condemned Russia for using facial-recognition technology. In *Glukhin v. Russia*, [Third Section], n. 11519/20, 4th July 2023, the ECtHR sanctioned the respondent State for having allowed State police to resort to biometric service to identify suspects. The ECtHR concluded for the finding of a violation of Article 8 ECHR, arguing the illegitimacy of the interference in the applicant's right to private life due "to the lack of detailed rules in the domestic law governing the scope and application of measures involving the use of facial-recognition technology as well as the absence of strong safeguards against the risk of abuse and arbitrariness", see, extensively, §§ 82 ff. See, on this, also, *infra*.

[43] The CHAI's *Feasibility Study*, § 30.

system, and the right to know that one is interacting with an AI system rather than with a human"[44].

Further suggested provisions cover the establishment of compliance mechanisms, including at the domestic level, and the feasibility of additional legal instruments to adopt to ameliorate the accuracy of the risk-assessment process.

In light of these indications, the CAHAI concluded its mandate in 2021 and left the floor to the Committee on Artificial Intelligence (CAI)[45], which in 2022 started discussing the drafting of the first global human rights law treaty entirely dedicated to artificial intelligence.

The CAI was instructed to complete within the end of November 2023 the draft of an "[a]ppropriate legal instrument on the development, design, and application of artificial intelligence systems based on the Council of Europe's standards on human rights, democracy and the rule of law, and conducive to innovation, under the relevant decisions of the Committee of Ministers"[46].

The scope, ambit of application, and content of the proposed treaty are dedicated to the paragraph that follows.

4.1. From the Revised Zero Draft Framework Convention to the Consolidated Working Draft

The Revised Zero Draft [Framework] Convention on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law represents the most significant product of the Council of Europe's initiatives described above. Following the publication of the first version of the text (the "Zero Draft"), the CAI delivered an updated document in January of this year and, ultimately, in July, it delivered a Consolidated Working Draft that will be the basis for the upcoming negotiations that will be held in the fall[47]. The

[44] *Ibidem*, § 40.

[45] The CAI was set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2021)3 *on intergovernmental committees and subordinate bodies, their terms of reference and working methods*. The CAI will be in charge until December 31st., 2024.

[46] See the Terms of reference related to the establishment of the CAI, that can be read in fulltext at the following link: https://rm.coe.int/terms-of-reference-of-the-committee-on-artificial-intelligence-for-202/1680a74d2f.

[47] The 7th meeting of the CAI will take place in Strasburg on 24-26 October 2023.

Consolidated Working Draft[48] includes provisions that were discussed and approved by the CAI while examining the Revised Zero Draft during its first meeting and additional provisions proposed by the CAI's Chair in cooperation with the Secretariat.

Despite the scope, the ambit, and the *rationale* being analogous, the two texts differ in a variety of aspects starting from the structure of the proposed Convention. As the latter contains the legal provisions that will be discussed in the next CAI meeting, the following analysis will consider this last version without omitting to underline the most relevant amendments.

At the outset, it is worth mentioning that the Consolidated Working Draft seems to be inspired by the need to ensure a more homogeneous legal framework among the contracting States compared to the previous Revised Zero Draft, limiting references to domestic laws. While several elements are still waiting for the negotiations that will be taking place in October 2023, the Consolidated Working Draft smooths the relationship between the Convention's draft and domestic laws by significantly containing the areas of deference to existing domestic laws, thus, delaying the discussion concerning the reservations to the Convention as sets out under Article 32 of the Revised Zero Draft. The importance of the reservations is bound, as known, to the prerogative recognized to the contracting States to limit the application of certain provisions of the Convention in their respect, therefore, possibly limiting the enforcement of the treaty. It will be extremely interesting, therefore, to verify what the CAI will decide next October moving from the proposed text of Article 32 that as for now excludes that reservations can be made to the Convention.

In terms of accession to the Convention, instead, the Consolidated Working Draft preserves the approach of the Revised Zero Draft and, siding with the document delivered by the CAHAI, maintains that any non-member State of the Council of Europe, that has not participated in the elaboration of the Draft, may have access following a decision taken by "the majority provide for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers"[49].

[48] The fulltext of the document published on July 7th, 2023, is available at the following link: (https://rm.coe.int/cai-2023-18-consolidated-working-draft-framework-convention/1680abde66.

[49] See Article 30, § 1, of the Consolidated Working Draft.

The joint participation in the negotiating process of Israel, Canada[50], the United States, Mexico, and the Holy See is emblematic of the expected transcontinental impact of the CoE's Convention. Moreover, it signals the leading position of the Council of Europe in the regulatory process of AI, while other international organizations have not yet adopted similar positions, and the willingness of a large number of States to defer the regulation of AI to the supranational system of human rights protection instead of ruling on AI at the domestic level.

Although the overlapping *rationale*, the structure and contents of the Consolidated Working Draft are slightly different compared to the Revised Zero Draft.

The General Provisions set out very clearly the main principles together with the scope and the ambit of application of the proposed treaty. Under Articles 1 and 4, the Consolidated Working Draft, thus, states that the design, development, use, and decommissioning of AI systems must comply with the principles of human dignity, individual autonomy, human rights, democracy, and the rule of law, whereas Article 2 underscores that the risk-based approach will have to guide the measures implemented at the domestic level to give full effect to the Convention[51]. This will necessarily imply the endorsement of graduated and differentiated mechanisms, in light of the severity of the likelihood that AI systems will endanger some of the above-mentioned principles.

Additionally, and evidentially, such a deference to domestic legislation cannot but be regarded as one of the major weaknesses of the Draft[52].

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[50] Canada is no doubt one of the most significant example of State's effortless attempt to lay down a legislation on AI. Quebec, in particular, offers some peculiar insight starting with the *La Déclaration de Montréal pour un développement responsable de l'intelligence artificielle*, that can be read at the following link: https://declarationmontreal-iaresponsable.com/la-declaration/.

[51] According to the text that will be discussed within the year, "[i]n order to give full effect to the principles and obligations set out in this Convention, each Party shall maintain and take such graduated and differentiated measures in its domestic legal system as may be necessary and appropriate in view of the severity and probability of occurrence of adverse impacts on human rights and fundamental freedoms, democracy and the rule of law during design, development, use and decommissioning of artificial intelligence systems".

[52] Insists on the "archaic" system of implementation of the Draft Convention, that has never challenged in the subsequent versions of the text, is T. Giegerich, *How to Regulate Artificial Intelligence: A Screenshot of Rapidly Developing Global, Regional and European Regulatory Processes*, cit. at 1, 8 who, referring to the actual text of

The Consolidated Working Draft is instead remarkable, in that it specifies the criteria to take into consideration to evaluate the "risk". Instead of a blank reference, which could give rise to unwanted discretion, the text makes it clearer that the risk assessment will have to be based on the feasibility of AI systems to negatively impact human rights, democracy, and the rule of law. The importance of Article 2 has to be understood in light of the less clear choice of the European Union that, conversely, is silent as to the notion of risk and its significance for the AIA. Chapter I ultimately includes the definition of AI systems. Contrary to the EU's AIA, the CAI adopts a wider definition without giving rise to the criticisms connected to the chosen narrower notion of AI intended to cover solely machine learning and deep learning systems.

One valuable trait of the Consolidated Working Draft, then, lies in the structure of the text that moves from the enumeration of the obligations and principles developers and users must conform to. The human rights-based approach emerges, therefore, evidently already in the structure of the Convention which begins by listing the old and new human rights linked to AI. Therefore, Chapters II and III, respectively, recall the obligations and principles each contracting State has to secure in the processes related to AI systems.

Moreover, Chapter III explains the significance of the already known principles of transparency and oversight (Article 7); accountability and responsibility (Article 8); Equality and non-discrimination (Article 9), which lost third place as it was for the Revised Zero Draft where was it was more significantly placed in the Chapter dedicated to the General Provisions (Article 9); privacy and personal data protection (Article 10); safe, security and

Article 28, stating that "[i]n the event of a dispute between Parties as to the interpretation or application of this Convention which cannot be resolved by the Conference of the Parties, as provided for in Article 23, paragraph 1, c, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned", sheds light on the non-binding effect of the Draft Convention. The Author clarifies on this, that "Parties are unwilling to introduce any kind of compulsory third-party dispute settlement procedure which alone is suitable for effective settlement. Consequently, implementation mechanisms at the disposal of the States Parties to the Framework Convention are limited to diplomatic means".

robustness, tracing an appropriate and much-welcomed connection with cybersecurity-related issue already object of a specific treaty in the CoE's system of human rights (Article 11); safe innovation, which is extremely important as it concerns the phase of the testing of AI technologies which, again, must not interfere with human rights, democracy and the rule of law (Article 12).

Concerning access to justice, the Consolidate Working Draft invites the Member States to provide individuals with appropriate judicial remedies alongside effective procedural safeguards, among which the right to know that one is interacting with an AI system and the right to opt for interacting with a human being instead of with an AI system.

The rights to know and to opt for not interacting with an AI system go hand in hand with the other procedural safeguards domestic laws should respect. According to the proposed Article 14, § 1, the Consolidated Working Draft requires that individuals have access to the necessary guarantees and safeguards anytime they are subject to AI systems built to make decisions or to inform.

The Consolidated Working Draft goes on, like the Revised Zero Draft, detailing the provisions on risk assessment and training. Particularly, the Consolidated Working Draft shows a much more attentive care to the crucial role of training activities that according to the amended text should be provided to all those involved in the design, implementation, use, and decommission of AI systems, compared to previous Revised Zero Draft that, conversely, restricted the obligation for the contracting States to a mere external supervision delegated to an established ad hoc authority.

Additionally, and again contrary to the Revised Zero Draft that stated that the implementation of the Convention should be secured without discrimination at the opening of the text under Article 3, the Consolidated Working Draft postpones the reference

to the principle of non-discrimination under Articles 9[53] and 17[54] and enshrines it under a specific Chapter titled "Implementation of the Convention". Although the choice could be seen as a way of weakening the strength of the principle of non-discrimination, the Consolidated Working Draft goes on to specify additional rights in need to be safeguarded. Reference is made to the new Article 18 dedicated to the rights of persons with disabilities and children, which represents one true novelty for the Revised Zero Draft. Moreover, it will be interesting to verify whether the CAI will expand the number of vulnerable groups in light of the negative effects AI systems have demonstrated to cause to additional categories such as ethnic and national minorities, and indigenous communities. Also, no provisions of the Consolidated Working Draft target women and the recurrent gender-based discriminations deriving from AI technologies.

The implementation of the Convention is, then, left to further provisions about its complementary nature and relationship with other international human rights treaties and domestic laws. The Convention won't have to limit or derogate from already safeguarded human rights, other treaties, and domestic laws applicable in the field of AI.

Lastly, the Consolidated Working Draft proposes only one major amendment in the Chapter dedicated to the role of contracting States in the application of the Convention. While the Revised Zero Draft provided for the establishment of national supervisory authorities tasked with oversight functions, the Consolidated Working Draft chose to defer to the contracting States how to oversight the respect of the Convention at the domestic

[53] The proposed text of Article 9 states that: "[e]ach Party shall take the necessary measures a view to ensuring that the design, development, use and decommissioning of artificial intelligence systems respect the principle of equality, including gender equality and non-discrimination" and, also, that "[e]ach Party is called upon to adopt special measures or policies aimed at eliminating inequalities and achieving fair, just and equal outcomes, in line with its applicable domestic and international human rights and non-discrimination obligations".

[54] According to Article 17, "[t]he implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, gender identity, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds".

level. No further amendments to the Consolidated Working Draft were suggested as to the final clauses of the text.

Besides the differences between the two texts, only that of the Consolidated Working Draft will be examined and discussed in the fall. Whether the CAI will go back to the previous text or beyond the options endorsed in the Consolidated Working Draft is left to further analysis in light of the future developments of the ongoing process before the Council of Europe.

5. It Takes Two to Tango? Perspectives and Challenges at the time of "the Wait" …

The above analysis of the EU's Artificial Intelligence Act and, especially, of the CAI's Consolidated Working Draft aimed at describing the major traits of the European's approach towards AI[55].

No doubt exists anymore in Europe as of the preference for the regulatory or normative approach, that has been commonly shared by the two major European international organizations since the very beginning. Europe has always, in fact, looked at AI as a phenomenon requiring legal boundaries and rules contrary to the United States and to some extent the United Nations as well, firmly convinced of the urge to let AI develop on its own and that, conversely, recently started working domestically and internationally for laying down specific legislations.

In Europe, while the purpose of regulating AI brings together the European Union and the Council of Europe, there are nevertheless a few comments worth making[56].

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[55] Very recently a debate on AI regulation also started within the United Nations. On 18 July 2023, the UN Security Council started off a discussion on AI for the first time. The document *Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System,* CCW/MSP/2019/9, Annex, see the full text at the following Link: https://www.ccdcoe.org/uploads/2020/02/UN-191213_CCW-MSP-Final-report-Annex-III_Guiding-Principlesaffirmed-by-GGE.pdf.

[56] Although referred to the initial initiatives of the CAHAI, interesting comments on the comparison between the EU's and the CoE's commitments in regulating AI are expressed by M. Breuer, *The Council of Europe as an AI Standard Setter*, cit. at 30, who significantly emphasized that "[b]y and large, the two proposals would seem to be complementary with each other but of course, views might be divided on specific questions. One major issue could be whether the CAHAI's concentration on the use of AI in the public sector leads to stricter standards, compared to the market approach of the Commission proposal. Conversely, the

The first deals with the different impacts arising from the adoption of the two texts.

The European Union is discussing the approval of a regulation, that will be compulsory applied in the legal systems of all the Member States with no chances for derogations at the domestic level. Coherently with the subsidiarity nature of international human rights law, the Council of Europe's Convention will, conversely, act as a supplementary tool expected to integrate and complement already existing supranational and domestic laws and regulations[57].

Additional aspects concern the territorial application, the methodology, the scope, and the content of the AIA and the Council of Europe's Zero Draft Convention on AI.

We are not necessarily speaking of differences. More often, the heterogeneity traceable between the texts has progressively been smoothen in recent processes, in the case of the AIA especially. Despite the latter was originally intended to be more concerned with AI's implications on data protection and privacy than on human rights, the text published in mid-June 2023 shortens the distances with the CoE's approach to embracing an explicit human

CAHAI's emphasis on minimum standards could also lead to even more lenient standards. In any event, it is good to see the human individual placed in the centre of AI regulation".

[57] The precedence of the AI Act over the CoE's Convention is also established in the latter text under Article 26, according to which: "[p]arties which are members of the European Union shall, in their mutual relations, apply European Union rules governing the matters within the scope of this Convention".

rights-based and a clearer ethical sensibility[58], in the attempt to close the gap with the text released in April 2021[59].

The territorial application is an additional element of possible separation. The choice to allow non-member States to access the treaty sanctions, in fact, the further reach of the CoE's Convention compared to the AIA that will be applicable solely within the 26 member States of the European Union.

The weight of the larger territorial impact of the CoE's Convention will, nevertheless, be evaluated after its definitive approval to verify whether the non-member States will eventually sign and ratify the treaty. As for now, it should be welcomed the wider composition of the States sitting at the table of the negotiations. It signals the willingness of a vast number of – Western, except for Israel – States to adopt uniform rules to govern AI systems and, at the same time, the shared acknowledgment of the necessity to opt for global solutions avoiding fragmentations. This was one of the indications of the CAHAI's Feasibility Study described above that the CAI seems to have taken seriously in the drafting process of the Convention.

On the same issue, it will also be interesting to wait for the responses of the United Nations, that have until now postponed the discussion on the approval of any legally binding instrument but has recently engaged in a debate about the opportunity to lay down a set of Guidelines on AI and human rights. Similarly, there are

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[58] Among the official documents released at the supranational level, see *AI Ethics Guidelines Global Inventory* released in 2020 by *Algorithm Watch*, Link: https://inventory.algorithmwatch.org; AIHLEG (High-Level Expert Group on Artificial Intelligence), *Ethics Guidelines for Trustworthy AI*, European Commission, 2019, Link: https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai. Also, see J. Fjeld et al. *Principled artificial intelligence: Mapping consensus in ethical and rights-based approaches to principles for AI* (2020); L. Floridi, *Translating Principles into Practices of Digital Ethics: Five Risks of Being Unethical*, 32 Phil. & Tech. 185 (2019); A. Jobin, M. Ienca, E. Vayena, *The Global Landscape of AI Ethics Guidelines*, 1 *Nature Machine Intelligence* 389 (2019); L. Langlois, C. Régis, *Analyzing the Contribution of Ethical Charters to Building the Future of Artificial Intelligence Governance* in B. Braunschweig, M. Ghallab, (eds.) *Reflections on Artificial Intelligence for Humanity* (2021), 15.

[59] Additionally, the last version of the text proves to be more consistent with the European Union's Charter of Fundamental. Rights, although it continues to be questionable the lacking references to the EU Directives on anti-discrimination law that should have conversely been taken properly into account.

States across the globe, China first, that preceded Europe and that now count on country-specific laws on AI. Here, the questions revolve around how the EU's regulation will act and react towards other Western and Eastern States domestic legislations, on the one hand, and international human rights law instruments towards the upcoming CoE Convention, on the other[60].

A third aspect concerns the different methodologies followed by the EU and the CoE.

While the Council of Europe engaged in a public consultation for the adoption of the CAHAI's Feasibility Study that was expected to precede the CAI's mandate, the European Union kept the debate entirely within its institutions. Interestingly despite the European Union not resorting to any public consultation, European NGOs had a say on the AIA highlighting the most significant criticisms of the first draft.

Different methodologies, yes, but quite eventually similar outcomes, at least in the *rationale*. The AIA has, in fact, progressively taken into account the major critiques of the 114 NGOs' Statement delivered in November 2021, getting closer to the *rationale* that in the same years was guiding the CAHAI, first, and the CAI, right after.

Moving on in the comparative analysis, a fourth trait that initially greatly distances the AIA from the work of the Council of Europe dealt with the rationale underneath the two proposals. Whereas time proved the divergence was more apparent than real, the investigation of the two texts suggests that it should be kept in mind the origins of the AIA and the Revised Zero Draft Convention. The AIA was, as said already, more concerned with the impact of AI systems on privacy, couched as if it was the prominent and almost exclusive field AI might have been capable of affecting. On the other side, the Council of Europe conversely diminished at the very beginning the weight of privacy and data protection, looking at the intersection between AI and human rights.

The years that followed demonstrated the increasing contamination between the European Union and the Council of Europe as to the content of the respective regulations. On this, it could be easily sustained that, perhaps, it was more the Council of

[60] A very interesting overview is offered by a recent publication of UNESCO, *Missing links in AI governance*, (2023), Link: https://unesdoc.unesco.org/ark:/48223/pf0000384787.

Europe to influence the European Union than the other way round. The lack of concern towards human rights implications, which originally featured the AIA, has been, in fact, progressively reduced, while the Council of Europe started publishing the previous draft of the Framework Convention.

Between 2021 and 2023, the European Union incorporated numerous references to human rights other than those related to privacy and data protection, enhancing the levels of safeguards towards traditional human rights and "new" rights associated with AI, such as transparency, explainability, and the so-called right to know. Moreover, the General Approach published in June 2023 seems to have finally filled the gaps, highlighted in the above-mentioned Statement delivered less than two years before by the 114 NGOs[61], finally linking the AIA with the EU's anti-discrimination law, thus enforcing the safeguard of the principles of equality and non-discrimination even within the AI's discourse.

Eventually, although different in their scope and effects on the domestic level – of compulsory application of the EU's act/subsidiary and subject to domestic norms governing international law placement in the national system of the sources of law, the CoE's –, the two supranational organizations have reached quite similar, if not entirely overlapping, conclusions as to the strategies to handle the challenges brought by AI systems.

Besides the coherence in terms of scope and rationale, it remains unclear whether and how the two acts will complement one another. That is to say, whether the AIA and the Framework Convention will be keen on jointly operating in such a way to ensure a coherent set of legal provisions regulating AI in Europe. The coordination between the acts would be particularly important, in light of the non-overlapping States' composition of the two supranational organizations, which suggests that the homogeneity of the legal provisions will create a common space, avoiding domestic fragmentation and contrasting rules.

Moreover, the coherence between the AIA and the Framework Convention will favor the extra-European application of the adopted rules. The participation of non-member States of the Council of Europe in the negotiations that are currently taking place following the lead of the CAI would expand the enforceability of the CoE's regulation on a global basis, eventually impacting a vast

[61] On this, see, above, Par. No. 3.

majority of Western States beyond those that are formal members of the Council of Europe. Despite the absence of approved legislation, Europe is striving to keep the lead and is doing so even by crossing European boundaries.

The more Europe will succeed in ensuring the cooperation between its two most prominent supranational organizations, the more it will play out as a true leader in laying down the first and territorially broader regulation on AI possessing a strong human-rights basis.

While we wait, the European Court of Human Rights has just delivered in July 2023 its first judgment on AI, sanctioning the use of biometric systems for public surveillance, considered "highly intrusive" and in violation of both the right to private life (Article 8 ECHR) and of freedom of expression (Article 10 ECHR)[62]. Whether the ECtHR's judgment will affect the European debate on AI systems and beyond to soon to say[63]. Certainly, the judgment signals that Courts are eventually starting to have a say on AI's

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62 See, ECtHR, *Glukhin v. Russia*, no. 11519/20, 4 July 2023. Additional cases delivered by the ECtHR on the human rights issues pertaining to new technologies maybe examined by looking at the case-law gathered under the related factsheet at the following link: (https://www.echr.coe.int/documents/d/echr/FS_New_technologies_ENG. On the ECtHR's judgement, see F. Palmiotto, N. Menéndez González, *Facial recognition technology, democracy and human rights*, 50 Comp. L. & Sec. Rev. (2023). Also, for a brief comment, see N. Camut, *Russia illegally used facial recognition to arrest protestor, human rights court rules*, in Politico, 4th July 2023, link: https://www.politico.eu/article/russia-illegally-used-facial-recognition-to-arrest-protestor-european-human-rights-court-rules/.

63 Worth mentioning are even more recent worldwide developments on AI and human rights. Right after the Global Summit on AI held last November 2023 in the United Kingdom, the "Bletchley Declaration" was adopted. The text might be read at the following link: https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023. Another worth mentioning initiative was the Meeting hosted in Kyoto in October 2023 with the participation of the Council of Europe at the 18th United Nations' Internet Governance Forum, *The Internet We Want - Empowering All People*. See, more specifically on this, the speech of the CoE's Secretary General at the following link: https://www.coe.int/en/web/deputy-secretary-general/-/%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B-internet-governance-forum-%C2%A0opening-remarks-at-the-session-shaping-artifical-intelligence-technologies-to-ensure-respect-for-human-rights-and-democratic-values-.

impact on human rights and that individuals are slowly beginning to successfully bring their cases to justice.

The future of AI and humans is ahead of us. It is a matter of time, but, maybe, Europe is on the right track[64].

64 See, also, the initiatives undertaken in the United States of America, among which the Executive Order of President Joe Biden to regulate IA on the federal level, *on Safe, Secure, and Trustworthy Artificial Intelligence*. Fulltext available at the following link: https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/, which follows the previous *Bluebrint for an AI Bill on Human Rights*, cit. above, and an even more recent Executive Order, adopted in February 2023, significantly entitled *Strengthen Racial Equity and Support for Underserved Communities Across the Federal Government*.

ADMINISTRATIVE LOOPS AND THE 'CORRECTION' OF CONTESTED DECISIONS PENDING JUDICIAL REVIEW: EFFICIENT TOOLS FOR THE FINAL SETTLEMENT OF DISPUTES?

Martina Condorelli[*]

Abstract

In recent years, in several EU Legal systems, remedies have been put in place to guarantee both a final dispute resolution and the safeguard of authorities' decisions and their effects from the disruption caused by annulment. These tools, encouraging or allowing the correction or substitution of the challenged decision during judicial proceedings, often stem from pragmatic case-law and seem to demonstrate a rising concern for legal certainty and efficiency. At the same time, they also raise serious concerns about fundamental principles such as due process, separation of powers and the right to a fair trial.

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Introduction

In countries of continental legal tradition, the action for annulment has long been the main remedy against the unlawful use of administrative powers. Annulment finds its justification in the need to eliminate administrative acts that do not conform to the

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normative paradigm, thus restoring the rule of law. In several European systems, the satisfaction of the interests of the applicant for judicial review is (in Belgium and France, specifically in reference to the *contentieux de l'excès de pouvoir*) or was (formerly, in the Netherlands and Italy) considered a mere by-product of the elimination of the administrative decision[1]. In recent years, however, critics have pointed out that in many cases, the annulment of an unlawful may not provide an effective legal protection for the applicant, while also posing a threat to other interests at stake. In short, annulment can often prove to be an ill-conceived remedy: "*Whether viewed from the perspective of the opposing party or the applicant, it can often mean too much or too little*"[2].

Too little, on the one hand, because, under certain conditions, an annulment does not prevent the administration from taking a substantially similar new decision. Thus, the remedy can either be entirely or at least partially useless to the applicant, while still imposing a significant burden on the administration, which is often forced to exercise its powers again in order to replace the annulled decision. At the same time, an abrupt and retroactive quashing of a decision can result in a disproportionate harm to the other interests involved, in that it creates a legal void that can hinder the execution of activities of major importance, such as infrastructural projects.

As a result, two trends in the recent development of administrative justice in Europe can be observed.

The first trend results from the evolution of the theory of the validity of administrative acts from a strictly legalistic approach to a more substantive approach that takes into account the substantive correctness of the decision[3]: in many jurisdictions the subject of judicial review has shifted from an assessment of the mere compliance of the decision to legal requirements to an assessment of its substantial correctness. This objective was mainly pursued by

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[1] In this context, the German system appears as an outlier, inasmuch as it has always been unequivocally aimed at the protection of individual rights. Ever since the adoption of the Administrative Courts Procedure Code, the judge was provided with a wide range of powers that go beyond annulment, allowing for a complete satisfaction of the applicant. See *infra*, section 3 of the paper.

[2] F. Pugliese, *Nozione di controinteressato e modelli di processo amministrativo* 122 (1989).

[3] The literature on this matter is extensive. See, for a comparative approach, D.U. Galetta, *Le traitement contentieux des irrégularités procédurales en droit comparé*, in J. B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative* 845 ff. (2016).

rendering some types of defects moot, either by specific legal provisions[4] or by the establishment of conditions under which an annulment cannot be declared by case-law[5]. These mechanisms do not allow for a rectification of the contested decision: the alleged inability of the acts' defects to influence the content of the decision or to deprive the person concerned of a guarantee simply precludes the annulment.

Despite its importance in many of the jurisdictions considered here, the *ex lege* mootness of "formal" defects in a challenged decision will not be discussed in this paper, because it merely implies a judgement of non-relevance of certain defects, without requiring any corrective intervention on the part of the judge or the concerned authority.

Instead, this paper examines another development in administrative law that has led to the emergence of judicial tools aimed at avoiding an annulment and its effects by allowing a correction or substitution of the contested decision.

This result can be achieved in various ways, the first being granting courts a power to modulate the temporal effects of the annulment judgement[6]. On top of preventing the disruption caused

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[4] See art. 46 of the German VwVfG, the scope of which was widened in 1996; art. 6:22 of the Dutch AwB; article 14, § 1, sect. 2, of the Belgian *lois coordonnées sur le Conseil d'État*; art. 21-octies, para. 2, of the Italian *Legge sul procedimento amministrativo*; Art. 48, para. 2, of the Spanish *Ley del procedimiento Administrativo Común de las Administraciones Públicas.*

[5] See, for example, Cons. État, December 23rd 2011, *Danthony*, in *R.F.D.A.* 284 (2012).

[6] In Belgium, Article *14b* of the *Lois coordonnées sur le Conseil d'État* provides that '*at the request of one of the parties, and if the litigation section considers it necessary, it will indicate the effects of the individual acts which have been annulled or, in general, the effects of the annulled regulatory acts which are to be regarded as definitive or which are to be maintained provisionally for a period of time to be determined by it. The measure in question may be taken only in exceptional circumstances, such as to justify breach of the principle of legality. The measure must be specifically reasoned and must be taken in an adversarial procedure between the parties. The measure may be adopted taking into account the interests of third parties*". On the use of the power to modulate the effects of annulments by the Belgian Conseil d'État, see S. Verstraelen, P. Popelier, S. Van Drooghenbroeck, *The Ability to Deviate from the Principle of Retroactivity: A Well-Established Practice Before the Constitutional Court and the Council of State in Belgium*, in E. Steiner (ed.), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* 81 ff. (2015).
In the Netherlands, art. 8:72, para. 3 of the AwB provides that "*the court may decide which of the effects of the annulled act are to be maintained*". Although art. 8:72, para. 3, AWB does not provide for specific conditions for the exercise of the power, the

by the retroactive effects of an annulment, when used to defer the effects of the annulment to the date of the issuance of the new decision, the power of modulation can indeed allow for a seamless replacement of the unlawful decision and avoid the creation of a legal vacuum[7].

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case-law of the Dutch Council of State on the matter has established that the modulation of the temporal effects of annulment can only be implemented after the exercise of an adversarial procedure, after a careful assessment of all the interests at stake.

In other countries, such as France and Italy, in the absence of a specific provision on this point, administrative courts have spontaneously assumed the power to modulate the effects of the judgment. In France, the power was recognized in Cons. État, Ass., May 11th, 2004, *Association AC! et autres*, 3 R.F.D.A. 454 (2004), commented by C. Landais e F. Lenica, *La modulation des effets dans le temps d'une annulation pour excès de pouvoir*. For an in-depth reconstruction of how power is exercised in case law, see A.C. Bezzina, *2004-2014: les dix ans de la jurisprudence AC!*, R.F.D.A. 735 (2014) and O. Mamoudy, *D'AC! à M6 en passant par Danthony*, A.J.D.A. 501 (2014).

In a similar effort to avoid disruptive annulments, in Cons. Stato, sez. VI, May 5th, 2011, n. 2755, 8 *Urb. App.* 927 (2011), commented by A. Travi, *Accoglimento dell'impugnazione di un provvedimento e «non annullamento» dell'atto illegittimo*, the Italian Council of State asserted its power to modulate the effects of the annulment judgment judicial power of modulation of the effects of the annulment judgment, drawing inspiration from EU procedural law. In Italy, although it is often used by administrative courts, this power remains controversial. The modulation may either take the form of a qualitative limitation of the effects of the judgement (i.e., all the ordinary effects of the annulment judgement are excluded except for its prescriptive effect on the subsequent activities carried out by the authority) or of a deferral of the temporal effects of the annulment to the date of the issuance of the new decision. In both cases, the modulation allows the authority to replace an unlawful decision seamlessly, without creating a legal vacuum in the time needed to conduct a new administrative procedure: see on this topic M. Condorelli, *La modulazione degli effetti della sentenza di annullamento* 166 ff. (2022).

[7] Art. 8:72, para. 3 of the AwB is often used to defer the effects of the decision, as pointed out in K. Albers, L. Kjellevold, R. Schlossels, *The principle of effective legal protection in administrative law in the Netherlands*, in Z. Szente, K. Lachmayer (eds.), *The principle of effective legal protection in administrative law. A European comparison* 242 (2017), in cases where, after the annulment, the administration can adopt a decision with the same content as the annulled one or if the unlawful decision has produced material consequences that it would be *disproportionate to* eliminate (for example, in the case where a building has already been built on the basis of a permit annulled for a "minor" defect). In these cases, at the request of one of the parties, the judge may order the administration to compensate the applicant for the damage caused if the conditions for liability are met.

In France, for example, administrative courts can postpone the effects of the annulment to allow the authority to issue a new decision, amended of defects,

A similar result has also been achieved either through the introduction of so-called administrative loops, which give the court the power to suspend the judicial proceedings and let (or even order) the administrative authority to exercise its powers again under its supervision, or by allowing a spontaneous reopening of the administrative proceedings pending court proceedings so that the authority can remedy the defects of the challenged decision.

Contrary to modulation techniques, which are specifically designed to protect public or general interests, *even against the interests of the applicant*[8] (who presumably sought the annulment in order to

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before the unlawful decision is quashed (*Ex multis*, see Cons. État, July 9, 2015, *Football Club des Girondins de Bordeaux et autres,* No. 375542; Cons. État, 11 April 2012, *GISTI*, No. 322326). In these cases, the annulment is not avoided, but its disruptive effects are greatly reduced by ensuring continuity between the effects of the unlawful decision and those of the new act: see on this topic J. Sirinelli, *Les annulations d'application différée*, 5 R.F.D.A. 797 (2019).

A similar effect is also achieved through conditional annulments, which give the administration a deadline to remedy the defects of the challenged act; at the expiration of said deadline, in the absence of a correction, the act is voided (see Cons. État, July 27, 2001, *Titran*, 2 R.R.J. 1513 *(*2003) commented by F. Blanco, *Le Conseil d'État, juge pédagogue*). Authorities are not bound to comply with the conditional request, so conditional annulments leave a choice on whether to validate the act and uphold its contents or not. According to L. Dutheillet de Lamotte, G. Odinet, *La régularisation, nouvelle frontière de l'excès du pouvoir*, 33 AJ.D.A. 1816 (2016), "*le vice qui entache l'acte initial (que l'on pense à un défaut de consultation ou d'information, ou même à une incompétence interne à l'autorité administrative) étant susceptible d'avoir une influence sur le dispositif de cet acte, il ne peut y avoir de régularisation sans réaffirmation de ce dispositif*".). This guarantees the absence of an interference on the administrative activity: see H. Bouillon, *La régularisation d'un acte administratif après annulation conditionnelle*: *une technique en gestation*, 3 A.J.D.A. 142 (2018).

The technique of deferred annulment is also commonly used in Italy, as mentioned in footnote n. 7, to avoid the creation of a harmful legal vacuum in the time needed to replace the unlawful decision: see M. Condorelli, *La modulazione degli effetti della sentenza di annullamento*, cit. at 6, 174 ff.

[8] In exceptional instances, the modulation can be used to namely better protect the applicant's interests. The Italian leading case on modulation was precisely founded on the need to better protect the interests of the applicant. The case concerned the legitimacy of the wildlife hunting plan adopted by the Apulia Region in 2009: the appellant, an environmental association, complained that the plan had been adopted without the prior carrying out of the strategic environmental assessment procedure required by Legislative Decree No. 152 of 3 April 2006. The Council of State found the appeal well-founded but, noting that an immediate annulment, with ex tunc effects, would have created a legal vacuum detrimental to the same constitutional values pursued by the appellant, ruled that the ruling should only produce the effect of binding the administration

get rid of the unlawful decision), administrative loops were developed to efficiently enforce the rights of the applicant and definitively solve the dispute with the authority. While both judicial tools require a 'cooperation' between the court and the authority, administrative loops appear particularly interesting as they alter the ordinary sequence in which jurisdictional redress takes place and uniquely intertwine judicial and administrative proceedings.

In this paper we will mainly look at administrative loops and spontaneous validations of contested decision by the authority, assessing both their effectiveness in reaching a final resolution of the dispute and examining the concerns they raised about fundamental principles such as due process, separation of powers and the right to a fair trial.

These did not have the same scope and impact in the jurisdictions considered. In France and the Netherlands, instruments such as administrative loops proved to be quite successful, while in Germany and Belgium similar measures were strongly criticized and eventually repealed or declared unconstitutional. In Italy, administrative loops were never incorporated into statutes and the correction and upholding of a contested decision by the authority (*convalida*) during court proceedings remains controversial.

An analysis of the specific characteristics of these remedies, carried out considering the legal context and the purposes for which they were developed, is essential to understand the strengths and limitations of these solutions and to draw some conclusions on the apparent decline of the remedy of annulment.

1. The reopening of administrative proceedings during judicial review: Dutch administrative loops

Originally, Dutch administrative courts were considered guarantors of objective legality, based on the French model of the *juge de l'excès de pouvoir*[9]: as in France, the traditional remedy for

to replace the contested act, within a given period of time. In particular, the Council of State stated that the "fundamental" rule of the retroactivity of annulment could be derogated from, or even annulment (that is to say, the eliminatory or restorative effects of annulment) excluded altogether where the 'ordinary' effects of the judgment granting the application could have produced results that were "incongruous, manifestly unjust or contrary to the principle of effectiveness of judicial protection".

[9] L. Van den Berge, *The Relational Turn in Dutch Administrative Law*, 13 Utrecht Law Review 99 (2017).

unlawful decisions consisted in their annulment with retroactive effects[10]. In 1994, with the entry into force of the general administrative law act (*Algemene Wet Bestuurecht*, hereinafter AWB), the model of objective jurisdiction was abandoned in favor of a subjective model, designed to protect the individual rights of the citizens[11]. Although the administrative courts were endowed with new powers[12], the action for annulment remained the main remedy available against unlawful activity of administrative authorities. In a context of widespread dissatisfaction with the Dutch administrative justice system, the centrality of the annulment remedy was the main source of discontent among both legal scholars and practitioners, in that it could result in Pyrrhus victory for the applicant while, at the same time, prove very detrimental to administrative efficiency and legal certainty[13].

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[10] S. Jansen, *The Dutch administrative loop under scrutiny: How the Dutch (do not) deal with fundamental procedural rights*, 3 Maastricht Faculty of Law working paper (2017).

[11] An action for annulment is now granted only to those who are 'directly affected by an administrative act' (art. 1:2 AWB), whereas art. 8:2 AWB prohibits the possibility of acting for the annulment of regulatory or general acts altogether. The evolution in a subjective sense of the Dutch administrative process culminated in the introduction in 2013 of Art. 8:69a AWB, which introduced the principle of *schutznorm* into the Dutch administrative procedural law.

[12] Primarily the power to uphold the legal effects of the annulled act, regulated by art. 8:72, para. 3 AWB.

[13] See S. Jansen, *The Dutch administrative loop under scrutiny: How the Dutch (do not) deal with fundamental procedural rights*, cit. at 10, 4, who remarks "*The disadvantages of* [...] *the annulment mechanism* [...] *are obvious. They bring about legal uncertainty and may have a negative societal impact. This mechanism often severely delays the commencement of important economic and societal infrastructure projects. Moreover, interested (legal) persons who are opposed to the project can (mis)use the aforementioned mechanism to bar or at least delay decision-making and hence the actual execution of the project.* " See also the *Parliamentary Papers II* 2007/08, 31352, *https://zoek.officielebekendmakingen.nl/kst-31352-6.html*, where it is observed that « *usually, the administrative court is forced to quash a defective decision, with the result that the administrative body has to go through an extensive decision-making procedure in order to properly remedy the identified defect. This consequence leads to the delay of projects with a public interest, to considerable additional costs, and thus to social irritation. Incidentally, not only among administrators, but also among local residents who benefit from the rapid realization of the project, about which an appeal procedure has arisen. However, the problem of inefficient judicial appeal procedures and the associated 'sluggishness' of administrative decision-making is not limited to major infrastructure projects* […] *Even relatively small building plans are regularly confronted with serious delays, because it is only after the full course of an appeal procedure or reading of the final judgment of the administrative court that clarity arises about the need to rectify a defect.*

These arguments gave rise to a debate on how to improve the effectiveness of administrative justice. Following the 2010 reform of the general administrative law act, Dutch administrative judges were endowed with additional powers aimed at resolving the dispute "*as definitively as possible*", as the new art. 8:41a AWB now specifically requires the courts to do. Dutch courts were given the power to ascertain with a non-final judgement the unlawfulness of the challenged decision and give the administration the possibility to correctly re-exercise its powers within a specific timeframe[14]: this new tool was called "*bestuurlijke lus*" or administrative loop[15].

This reform was inspired by the jurisprudential custom of suspending the judgement to give the authority time to remedy the defects of the challenged measure based on directions given by the judge[16]. By strengthening the 'pedagogical' role of administrative courts, this jurisprudential technique allows a new exercise of administrative powers in order to definitively solve the dispute while promoting both administrative efficiency and the restoration of legality[17].

This may be beneficial for the local resident who has applied to the administrative court against a (building, demolition or construction) permit, but it is burdensome and frustrating for those who have been granted a permit at the time. A recent and controversial example is the decision to widen the busy A4 at Leiderdorp, which was annulled by the Administrative Jurisdiction Division due to shortcomings in the investigation into the air quality near Leiderdorp (ABRvS 25 July 2007, BR 2007, 867). As a result, the road widening can only take shape much later than is desired by many – including a large number of local residents, since their living situation will improve considerably as a result of the planned intervention – even though all parties involved agree that repair of the identified defect is necessary. In addition, disputes involving only two parties – an administrative body and one citizen – can lead to long-term legal uncertainty, with imminent financial problems for stakeholders, due to a defect that, in hindsight, could have been resolved quickly and easily. This includes decisions on benefits (such as a benefit under the Work and Income according to Labor Capacity Act) and other entitlements (such as a disabled parking card) that require a medical examination, decisions on benefits under the Work and Social Assistance Act, and decisions on the legal status of civil servants.»

[14] For example, by modifying the statement of reasons or by allowing the applicant to have a hearing.

[15] Art. 8:51a-d and 8:80a-b AWB.

[16] This « informal » loop, which was already widespread before the 2010 reform, continues to be used in simpler cases: see W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking* 10 ff. (2014).

[17] See in this regard M. Boone, P. Langbroek, *Problem-Solving Initiatives in Administrative and Criminal Law in the Netherlands*, in 14 Utrecht Law Review 64

To effectively guide the authority, the measure by which the *bestuurlijke lus* is activated must specify, as precisely as possible, the procedures required for remedying the decisions' defects[18]: Dutch administrative loops are essentially remand orders with specific indications on how to re-exercise power.

Once the instructions contained in the interlocutory judgement have been carried out, the administrative authority is required to inform the judge[19]. The parties are then allowed to debate the new decision through the presentation of written briefs[20]. If the *bestuurlijke lus* is successful, the contested decision is either voided and replaced by the new decision or merely amended and upheld[21]. In both cases, the original appeal against the contested decision is declared well-founded, which entitles the applicant to damages and the reimbursement of court fees[22].

In order to provide effective protection in case of validation or unsatisfactory replacement of the contested decision, art. 6:19 AWB establishes that the scope of the appeal is automatically extended to the new decision or the amended decision[23]. This provision makes the application of the loop less costly for the applicant than the ordinary path of annulment and issuing of a new decision, which could warrant the need to apply again for judicial review.

Compared to the provisions limiting the possibility of obtaining the annulment of decisions tainted by certain types of defects and leaving it to the court to make a counterfactual assessment on the outcome of a lawful procedure[24], by allowing the re-opening the administrative procedure, administrative loops seem to better ensure the protection of the applicants' rights. Indeed, the correction of the contested decision remains the sole responsibility of the

(2018); A. Verburg, B. Schueler, *Procedural justice in Dutch administrative court proceedings*, 10 Utrecht Law Review 60 (2014).

[18] Art. 8:80a, para. 2, AWB.

[19] Art. 8:51b, para. 2, AWB.

[20] Art. 8:51b, para. 3, AWB.

[21] See *Parliamentary Papers II* 2007/08, 31352, section 7.

[22] See W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking*, cit. at 16, 43 ff. The question of not leaving the applicant 'empty-handed' as a result of the application of the loop is especially tackled in *Parliamentary Papers II* 2007/08, 31352, section 7.

[23] Art. 6:19, para. 1 AWB prescribe that by law, the application for review shall also relate to a decision to revoke, amend, or replace the contested decision, unless the parties have an insufficient interest in doing so.

[24] See, *supra*, footnote n. 5.

authority, which is free to disregard the instructions of the judge and face the annulment of the decision: this system thus guarantees the absence of interference of the judicial power in the administrative activity.

The Dutch general administrative law act does not establish the types of defects that can be remedied through the application of the administrative loop. Bearing in mind that art. 6:22 AWB provides that the defects of the decision are to be disregarded if they have not prejudiced the applicant [25], the scope of art. 8:51a appears to be limited to those defects the remedying of which *could* alter the substance of the contested decision. The only specific limitation to the application of the loop is established by art. 8:51b, pursuant to which the loop cannot be used if third parties risk being damaged "*in a disproportionate manner*" by a correction of the challenged act. Said limitation is, however, interpreted in a restrictive manner by case-law, which tends to make extensive use of the instrument[26].

Versatile as they may be administrative loops are not suited to resolve any dispute. It seems that in cases where the intervention required by the authority appears excessively lengthy or complex, the courts tend to refrain from applying the loop and resort instead to voiding the contested decision[27]. The courts also tend to resort to annulment when the need for a speedy resolution of the dispute is not paramount[28]: in these cases, the courts seem to avoid interfering

[25] Before 2013, the provision allowed the court to reject the application for judicial review only if the defect was procedural or formal in nature. The provision was modified through law n. 162 of December 20th 2012.

[26] See in this regard the paper of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, *Increasing the efficiency of Supreme Courts' powers. The Netherlands*, presented at the Seminar organized in Brussels on 1 and 2 March 2012, available at http://aca-europe.eu/seminars/Brussels2012/Netherlands.pdf.

[27] S. Jansen, *The dutch administrative loop under scrutiny: How the Dutch (do not) deal with fundamental procedural rights*, cit. at 10, 3, A. Verburg, B. Schueler, *Procedural justice in Dutch administrative court proceedings*, cit. at 17, 60. This could be due to the increase of the judges' workload entailed by the application of the loop in complex cases (See W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking*, cit. at 16, 11).

[28] See W. Ch.W. Backes, E.M.J. Hardy, A.M.L. Jansen, S. Polleunis and R. Timmers, M.A. Poortinga, E. Versluis, *Evaluatie bestuurlijke lus AWB en internationale rechtsvergelijking*, cit. at 16, 10 ff. Indeed, the order to remedy a defect is often carried out by administrative bodies more quickly and with greater priority than the order to adopt a new decision after the annulment, so

in administrative activity, rather than taking on the pedagogical role associated with activating the loop.

The cases in which the courts tend to waive the loop show the shortcomings of this tool, which are probably exacerbated by the self-restraint of administrative judges in interfering and guiding the administration, both in cases where it can be avoided and in complex cases, where much more investigation and assessment of interests is required on the part of the authority to correctly decide.

2. Belgian 'close-ended' administrative loops

Upon its creation, the Belgian Council of State's purview, also based upon the French model of the *juge de l'excès de pouvoir*, was strictly limited to an objective control of the legality of administrative decisions and its powers essentially consisted in the annulment of unlawful decisions with *ex tunc* and *erga omnes* effects[29]. Following an ongoing debate on the limits of judicial review in terms of adequate protection of applicants, a reform of the procedure was carried out in 2014 and several new powers were conferred on the Council of State[30]. Amid the new tools in the administrative judge's toolbox, the 2014 reform introduced administrative loops[31], which were already in use before Flemish administrative courts since 2012[32]. Like their Dutch counterparts, Belgian administrative loops

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the application of the administrative loop can be also aimed at a faster resolution of the dispute.

[29] B. Lombaert, *Le Conseil d'État est-il toujours un juge du contentieux objectif de l'excès de pouvoir ? Réflexions sur la place et le rôle du Conseil d'État dans le système belge de protection juridictionnelle contre l'administration*, in F. Belleflamme (ed.), *La justice administrative* 301 ff. (2015).

[30] Other than introducing administrative loops, the 2014 reform also gave the Council of State the power to limit or defer the effects of annulments, to reform administrative decisions in specific cases, and to order the administration to issue a decision. The judicial review procedure had been previously reformed in 1990, when interim relief measures (*référés*) and the power to sanction the administration for the inexecution of an annulment decision (*pouvoir d'astreinte*) were introduced.

[31] Through an amendment of Article 38 of the Rules on the Council of State (*Lois coordonnées sur le Conseil d'État*, in short LCCE) by Art. 13 law of January 20th 2014.

[32] This tool was first introduced in the context of building permits and urban planning disputes by Article 4.8.4. of the Flemish Urban Planning Code ("VCRO"), as amended by art. 5 the Decree of 6 July 2012, published in the *Moniteur belge* of August 23rd 2012. It gave the Council for permit disputes the power to allow the authority to purge the contested building permit from its

were developed to curb 'unnecessary' or 'useless' annulments and to resolve disputes more efficiently and definitively[33].

The conditions under which the loop could be activated were also similar, both for the Flemish Courts and for the Federal Council of State: it could be used only if the defect could be corrected within a short period of time (three months or a different 'reasonable time limit'), without altering the substance of the act[34]. The provisions on administrative loops did not specifically indicate which defects could be corrected; however, parliamentary works preliminary to the introduction of the Flemish loop cited as examples of the correction of a statement of reasons the compulsory holding of a hearing or the acquisition of a mandatory opinion from another authority[35]. Concerning proceedings before the Council of State, the only procedural condition for the application of the loop was the need to hold a hearing beforehand and to allow the presentation of briefs on the subject; the Flemish rules did not even provide for such obligation[36].

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irregularities within a set deadline and uphold the contested decision. It was subsequently extended to other Flemish administrative courts (the environmental Court and Council for electoral disputes) by the Decree of April 4th 2014, published in the *Moniteur belge* of October 1rst 2014, which harmonized the organization and proceedings of certain Flemish Administrative Courts.

[33] See B. Cambier, A. Paternostre, Th. Cambier, *Les accessoires de l'arrêt d'annulation et la boucle administrative*, in F. Belleflamme (ed.), *La Justice administrative* cit. at 29, 236 ff.

[34] Art. 38, para. 1 and 2, LCCE ; Art. 4.8.4. VCRO ; art. 34 of the Decree of April 4th 2014 on the Flemish Administrative Courts procedure.

Thus, for example, the administrative loop could not have been applied if the authority had failed to carry out an environmental impact assessment or to obtain a necessary opinion, since compliance with those obligations could have led to a modification of the substance of the contested act, as H. Bortels, *The Belgian constitutional court and the administrative loop: a difficult understanding*, published on June 15th 2016, *www.ius-publicum.com*, 7.

[35] Concerning Flemish loops provided by the Decree of April 4th 2014, see Doc. parl., Parlement flamand, 2013-2014, n° 2383/1, in *https://docs.vlaamsparlement.be/pfile?id=1038648*, 39, where it is specified that « *An administrative act will no longer be considered unlawful if e.g. the application necessary to issue the administrative act was submitted later, the necessary statement of reasons was provided later, the necessary consultation of an interested party was held later, the duty to be heard was fulfilled later, a necessary opinion was subsequently obtained. Citizens are rightly increasingly given the opportunity to complete an incomplete file. Similarly, administrative authorities must be given the opportunity to correct procedural and formal errors in time.* »

[36] This omission was specifically criticized by the Belgian Constitutional Court, which held that it constituted a violation of the parties' right to be heard. See Cour

Although the Belgian loops shared the same name and a similar *rationale* to their Dutch counterparts, they presented several problematic differences from the latter. The required upholding of the content of the decision narrowed the scope of administrative loops to purely formal or procedural errors [37], which also fell under the purview of a provision of irrelevance due to their inability to influence the content of the decision[38]. Moreover, the use of the loop could only result in the rejection of the appeal, which could entail the loss of court fees, absent a specific provision guaranteeing charge of legal expenses to the authority subject to the loop[39]. Finally, no specific provision was made to allow the applicant to challenge the correction decision issued following the loop.

In 2014[40] and 2015[41], the Belgian Constitutional Court deemed both the Flemish and the federal loops unconstitutional, based on various arguments.

The Court held that administrative loops infringed the principles of independence and impartiality of the judge, given the foregone outcome of the proceedings following their application: by

constitutionnelle 8 May 2014, no. 74/2014, cit. (section B.8.5); 29 October 2015, no. 152/2015, cit. (section B.13.5)

[37] Although the text of the regulations did not expressly refer to it, this fact clearly emerges from the *Rapport fait au nom de la Commission de l'Intérieur et des affaires administratives* (Document Parlementaire n. 5-277/3, in www.senate.be) It should be noted that the aforementioned report included defects of the statement of reasons among procedural errors susceptible to be amended through an administrative loop, contrary to the opinion of legal scholars, who rejected the idea of a correction or implementation of the statement of reasons through the use of the loop: see B. Cambier, A. Paternostre, Th. Cambier, *Les accessoires de l'arrêt d'annulation et la boucle administrative*, cit. at 33, 243 ff.

[38] Art. 14, para. 1, sect. 2, LCCE, which provides that the decision's irregularities or defects "*shall give rise to annulment only if they were likely to influence the meaning of the decision taken, deprived the interested parties of a guarantee or affected the competence of the author of the act.*». It has been accurately noted that administrative loops serve a similar purpose and a similar scope to the aforementioned rule: B. Cambier, A. Paternostre, Th. Cambier, *Les accessoires de l'arrêt d'annulation et la boucle administrative*, cit. at 33, 249 ff.

[39] Although the issue of legal fees was discussed during parliamentary debates but ultimately was not regulated. Art. 30/1 LCCE, which provides that, as a rule, legal expenses should be charged to the losing party, although exceptions can apply (see Senate Document n. 5.2277/1, in www.senate.be).

[40] Cour constitutionnelle, 8 May 2014, No 74/2014, available at *https://www.const-court.be/*, concerning art. 4.8.4. VCRO.

[41] Cour constitutionnelle, 16 July 2015, no. 103/2015, concerning Art. 38, para. 1 and 2, LCCE ; Cour constitutionnelle 29 October 2015, no. 152/2015, concerning art. 34 of the Decree of April 4th 2014, available at https://www.const-court.be/.

ordering the administration to rectify the decision, the judge would implicitly express its conviction as to the appropriateness of upholding the act before the conclusion of judicial proceedings[42]. The Court also criticized the obligation imposed on the administration to leave the contents of the challenged act unchanged, which was qualified as an undue interference in its sphere, given that following an 'ordinary' annulment, the authority is free to issue a decision with a different content from the annulled one[43].

The Court also held that the Flemish administrative loop infringed the right to judicial protection in omitting to specifically provide that the legal costs should be charged to the authority, whenever the successful application of the loop determined the rejection of the application for judicial review[44]. Furthermore, in the absence of a provision allowing the applicant to challenge the decision resulting from the application of the loop curtailed the right to judicial protection for third parties who could be negatively affected by the new decision issued within the administrative loop[45].

Finally, the inclusion of defects pertaining to the statement of reasons among those susceptible to be corrected was found to be a violation of the fundamental right to a reasoned administrative decision, enshrined in the law of July 29th 1991[46] and in art. 6, para. 9 of the Aarhus Convention[47]. The Court held that the right to a statement of reasons is intertwined with the right to a jurisdictional control over administrative decisions and allows for the respect of the principle of equality of arms in judicial proceedings: allowing the administration to supplement a defective statement of reasons with

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[42] Cour constitutionnelle, 8 May 2014, No 74/2014, section (B.7.4); Cour constitutionnelle, 16 July 2015, no. 103/2015 (B.11.4); Cour constitutionnelle 29 October 2015, no. 152/2015 (B.12.4).

[43] See Cour constitutionnelle, 8 May 2014, no. 74/2014 cit. (B.7.1 to B.7.3), 16 July 2015, no. 103/2015 cit. (B. 11.1 to B.11.3); 29 October 2015, no. 152/2015, cit. (B.12.1 to B.12.3).

[44] See Cour constitutionnelle, 8 May 2014, no. 74/2014 cit. (B.12.4), 29 October 2015, no. 152/2015, cit. (B. 18.4).

[45] See Cour constitutionnelle, 8 May 2014, no. 74/2014 cit. (section B.8.4), 16 July 2015, no. 103/2015 cit. (B.12.4); 29 October 2015, no. 152/2015, cit. (sections B.13.4).

[46] See Cour constitutionnelle 29 October 2015, no. 152/2015, section B.14.5; Cour constitutionnelle, 8 May 2014, no. 74/2014, section B.9.5.; Cour constitutionnelle 6 July 2015, no. 103/2015 cit. (B. 13.4).

[47] Cour constitutionnelle, 8 May 2014, no. 74/2014, section (B.9.5); Cour constitutionnelle 6 July 2015, no. 103/2015 cit. (B. 13.4)

virtually no consequences on the legality of the decision would obliterate these rights.

Following the 2014 judgement, a reformed administrative loop was introduced in the Flemish legal system, with a more limited scope[48]. This new tool featured a specific provision to guarantee an adversarial debate both on the use of the loop[49] and on the contents of the decision resulting from it[50]; moreover, the scope of the appeal is automatically extended to the new decision[51] and a right to challenge the resulting decision following the end of the trial was also granted to third parties[52]. The necessary upholding of the corrected decision after the application of the loop was also eliminated, making the tool more similar to its Dutch counterpart. Today, a successful application of the loop always results in the annulment of the contested decision and the issuance of a new decision (that can have new contents). If the court finds that the new decision is lawful, the appeal is rejected[53]; however, legal fees are to be entirely or partially charged to the authority[54].

This version of the loop was upheld by the Constitutional Court[55], which maintained that its new features complied with the principles of impartiality of the judge, of adversarial proceedings, and the right to a reasoned decision.

3. The principle of *Reparatur geht vor Kassation* in German law and the partial failure of German 'administrative loops'

The German fundamental law of 1949 establishes that "*Should any person's rights be violated by public authority, they may have recourse*

[48] Art. 5 of the Decree of July 3rd 2015 published in the *Moniteur Belge* of July 16th 2015, which amended the Decree of April 4th 2014, concerning in particular the procedure before the Council for permit disputes and the Flemish Environmental Court. The loop can thus be essentially applied in disputes concerning building permits and environmental sanctions. It is worth noting that the federal legislator did not introduce, as its Flemish counterpart, a new version of the administrative loop in the LCCE.

[49] Art. 34, para. 2, of the Decree of April 4th 2014.

[50] Art. 34, para. 5, of the Decree of April 4th 2014.

[51] Art. 34, para. 4, of the Decree of April 4th 2014

[52] Art. 34, para. 9, of the Decree of April 4th 2014.

[53] Art. 34, para. 6, of the Decree of April 4th 2014.

[54] Art. 33, para. 2, of the Decree of April 4th 2014, as amended by art. 4 of the Decree of July 3rd 2015.

[55] Cour Constitutionnelle, December 1rst 2016, n. 153.

to the Courts" (art. 19, para. 4, GG), thus aligning German administrative justice to a model of review aimed to protect the subjective rights of citizens[56]. Ever since its introduction, in 1960, the Administrative Courts Procedure Code (VwGO) provided for an ample and comprehensive set of remedies beyond the action for annulment[57]. The variety of these remedies, which are carefully tailored to the fulfil the needs for judicial protection of the applicant, makes Germany an exception among all the countries analyzed in this paper.

The original version of § 45 of the Federal Administrative Procedure Act (VwVfG) granted the authority the power to validate the challenged decision with *ex tunc* effects by rectifying a number of its defects[58] up until the decision of the administrative appeal: the application for judicial review marked the deadline for the validation of the administrative decision. In 1996, in the context of a reform of the Administrative Courts Procedure Code, this deadline was extended after the application for judicial review[59] and some measures akin to administrative loops were introduced.

The courts were given the power to both order the authority to correct the decision's formal or procedural errors within a period not exceeding three months, should it not delay the resolution of the case (§ 87, para. 7 VwGO)[60] and to suspend the trial to allow the validation of the challenged decision (§ 94 VwGO). In the

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[56] See on this legislative choice, M.C. Romano, *Il processo amministrativo in Germania : pluralità delle azioni ed effettività della tutela*, in V. Cerulli Irelli (ed.), *La giustizia amministrativa in Italia e in Germania* 183 (2017).

[57] Which included the action for annulment (*Anfechtungsklage*), the action for injunction, which can be brought to obtain a judgement condemning the authority to issue a decision (*Verpflichtungsklage*), the action for a declaratory judgement, which can be brought to establish the existence or non-existence of a legal relationship or the nullity of an administrative act (*Feststellungsklage*) and the general action for condemnation (*allgemeine Leistungsklage*).

[58] § 45 VwVfG allows for the validation of the decision in the following cases: 1) if the application necessary for the issuance of the act is submitted posthumously by the private individual; 2) if the statement of reasons is completed posthumously; 3) if the hearing of the private individual is held posthumously; 4) if the mandatory opinion of a commission provided for by the procedure is issued posthumously; 5) if the mandatory opinion of another administration is obtained posthumously.

[59] In 2002, the deadline was again anticipated to the last judicial ruling on the facts. On the evolution of this provision, see D. U. Galetta, *Violazione di norme sul procedimento e annullabilità del provvedimento* 33 (2003).

[60] The power could only be exercised whenever it would not result in undue delays in resolving the dispute.

parliamentary debate that preceded the adoption of the mentioned reforms, a provision allowing the judge to pronounce annulments only if the administrative authorities had previously been given the opportunity to correct decisions was also discussed, but it was not included in the final draft of the reform[61].

§ 87, para. 7, and § 94, para. 2 VwGO proved to be highly controversial. Criticisms mainly focused on the possible violation of the principle of separation of powers, neutrality of the judge and equality of arms they entailed[62]. German scholars pointed out that the provisions could lead to an inappropriate and unconstitutional shift of the relationship between the judge and the administration, since they would systematically benefit the latter and make the former an 'assistant' to the authority, endangering its neutrality: ordering the administration to rectify the act would have been likely to tarnish the parties' perception of the judge's impartiality[63]. Criticism was also levelled at the possibility of completing the statement of reasons during judicial review, which was seen as a hurdle to obtain an effective judicial protection for the applicant[64]. Conversely, advocates of the reform highlighted the wording of § 87 and 94 VwGO, which explicitly subjected the issue of their use to the discretion of the judge, implying that he should primarily consider economy and procedural efficiency rather than the interests of authority[65].

§ 87, para. 7 and § 94, para. 2 VwGO were ultimately repealed in 2002 due to their ineffectiveness in speedily solving disputes[66].

As of today, administrative courts can no longer order the administration to correct the challenged decision. However, a special regulation concerning infrastructural projects provides that defects in the assessment of public and private interests shall result in the annulment of the decision of project approval only whenever such

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61 F. Grashof, *Neighbours 'reinventing the wheel' or learning from each other? - The Belgian administrative loop and its constitutionality: a comparison to the German debate*, 4 Maastricht Faculty of Law Working Paper 6 (2017).

62 F. Grashof, *Neighbours 'reinventing the wheel' or learning from each other? - The Belgian administrative loop and its constitutionality: a comparison to the German debate*, cit. at 61, 11 ff; See also D.U. Galetta, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, cit. at 59, 34 ff.

63 F. Grashof, *Neighbours 'reinventing the wheel'*, cit. at 61, 13.

64 D. U. Galetta, *Violazione di norme sul procedimento e annullabilità del provvedimento*, cit. at 60, 36.

65 F. Grashof, *Neighbours 'reinventing the wheel'*, cit. at 61, 13.

66 F. Grashof, *Neighbours 'reinventing the wheel'*, cit. at 61, 7.

flaws cannot be rectified by means of modifications to the plan or by a supplementary procedure[67]. In such cases, the courts must dismiss the request for annulment and merely declare the unlawfulness and non-enforceability of the decision, leaving to the authority the choice on whether to remedy the defect through a limited reopening of the procedure[68] or start over the proceedings for the approval of the project[69]. Case-law has held that, even though the requested annulment is denied, the declaration of non-enforceability of the project guarantees the right to an effective judicial protection of the applicant provided by art. 19, para. 4 GG and European law[70].

The German environmental code also provides that in proceedings concerning certain types of planning or project approval decisions[71], the court has the power to suspend the judicial proceedings in order to allow the planning authority to correct the decision by posthumously carrying out an Environmental Impact Assessment (EIA) or EIA screening, by holding a public participation hearing or by correcting other procedural errors "*of comparable severity*" which have deprived the concerned public of the opportunity to participate in the decision- making process, as provided by the law[72].

The authority can also spontaneously initiate the correction of the contested decision under § 45 VwVfG and § 114, para. 2, VwGO [73]. The former provision allows to remedy a certain number of violations, including holding a compulsory hearing or acquiring the

[67] § 75, para. 1a, second sentence, VwVfG, as modified in 2013.

[68] As specified by BVerwG 9 A 16.16, decision of April 25th, 2018, in https://www.bverwg.de/, with this regulation, the German legislator aimed to ensure that in such cases the entire, time-consuming administrative procedure does not have to be repeated; instead, it wanted to give the planning approval authority the opportunity to remedy the error in a supplementary procedure limited to the correction of the defects.

[69] See P. Schuetz, *Das ergänzende Verfahren nach § 75 Abs. 1a S. 2, erster Halbsatz, VwVfG*, 11 *Online-Zeitschrift für Umwelt- und Planungsrecht* 418 (2021).

[70] See BVerwG 9 A 31.10, judgment of December 20th, 2011, in *https://www.bverwg.de/*.

[71] See the decisions listed in § 1, para. 1, n. 1 to 2b and n. 5 of Legal remedies in environmental matters Act (UmwRG), mainly pertaining to the approval of industrial or infrastructural installations.

[72] § 4, para. 1b, last sentence, UmwRG.

[73] On the scope of art. 45 VwVfG and 114 VwGO, see D.U. Galetta, *Violazione* cit. at 61, 34 ff.; J. Becker, *La sanatoria dei vizi formali nel procedimento amministrativo tedesco*, in V. Parisio (ed.), *Vizi formali, procedimento e processo amministrativo* 20 ff (2004).

mandatory opinion of other administrations or committees posthumously and uphold the contested decision pending judicial review, up until the last instance on the merits.

§ 114, para. 2, VwGO allows the authorities to expand on an incomplete statement of reasons of discretionary acts (*Nachschieben von Gründen*) during judicial proceedings. German administrative law provides that discretionary decisions must indicate not only to the legal and factual basis of the decision, but also the 'point of view' taken by the administration in the exercise of its discretionary powers (*Gesichtpunkte*): this component of the statement of reasons can be supplemented under § 114, para. 2 VwGO, ultimately allowing for a posthumous exercise of the authorities' discretionary powers, up until the end of judicial proceedings[74].

Despite the broad formulation of § 114, para. 2 VwGO[75], German case-law narrowed its scope by specifying that a posthumous supplement of the statement of reasons is admissible: a) whenever the reasons stated by the authority already existed at the time the decision was issued: only documented substantive 'selection considerations' which were decisive for the decision and were not or not sufficiently reflected in the statement of reasons may be supplemented posthumously[76]; b) the nature and substance of the administrative act is not changed by the completion of the statement of reasons[77]; c) the posthumous supplementation of the statement of reasons does not disrupt the legal defense of the applicant, forcing them to completely rethink their defensive arguments[78].

§ 45, § 75, para. 1a, second sentence, VwVfG and § 114, para. 2, VwGO reflect the adoption on the part of the German legislator

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[74] M. Delsignore, M. Ramajoli, *The 'weakening' of the duty to give reasons in Italy: an isolated case or a European trend?*, 27 European Public Law 23 (2021).

[75] According to part of the German doctrine, the provision would have allowed the authority to radically change the statement of reasons: see D.U. Galetta, *Violazione* cit. at 59, 37.
This interpretation was nonetheless rejected by the Federal Tribunal case-law: see, for example, BVerwG 9 B 30.13, decision of July 15th 2013, which held that the provision does not allow for an "unrestricted" extension of discretionary considerations or their complete replacement, but only for the completion of a defective statement of reasons.

[76] See, for example, BVerwG 1 WB 40.21, decision of February 24th 2022, in https://www.bverwg.de/.

[77] See BVerwG 5 C 12.10, judgment of November 11th 2010, in *https://www.bverwg.de/*.

[78] See, for example, VGH Munich, judgment of January 30th 2018 – 22 B 16.2099.

of the jurisprudential principle of "*Reparatur geht vor Kassation*"[79], according to which a correction of the decision is always preferable to its annulment, even when the defect is substantial rather than procedural. This approach was questioned by German scholars, who observed, with reference to § 45 VwVfG, that it provides the authorities with a recovery session, allowing them to proceed to a merely 'formal' correction of the decisions' defects, all while leaving the contents of the decision unchanged[80]. Legal scholars therefore devised a constitutionally oriented interpretation of art. 45 VwVfG: according to the doctrine of the *realen Fehlerheilung* ("*effective correction of errors*"), a validation must always allow the applicant to be put in the same position as he would have been in, in the absence of the defect[81]. As a result, the validation process should entail an actual and effective redress of the violation[82].

4. The remedial function of administrative courts in French law and the principle of *sécurité juridique*

Until recently, in the *contentieux de l'excès de pouvoir*, administrative courts were merely able to void a contested administrative decision should they find it unlawful[83]. However, despite their

[79] On this principle, see D.U. Galetta, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, cit. at 59, 38. It is based on the idea that annulling an administrative act can cause significant disruptions. In practice, it entails that administrative authorities should consider avoiding annulment, by correcting or modifying the defective act and upholding it.

[80] For example, the omission of a hearing could be redressed by holding it posthumously, without really considering the observation raised by the concerned party.

[81] F. Grashof, *Neighbours 'reinventing the wheel' or learning from each other? - The Belgian administrative loop and its constitutionality: a comparison to the German debate*, cit. at 61, 13; E. Schmidt-Aßmann, *L'illegittimità degli atti amministrativi per vizi di forma e del procedimento e la tutela del cittadino*, 3 Dir. Amm. 471 (2011).

[82] This view seems to be also shared by the Federal Tribunal. Concerning the posthumous holding of a hearing, the Tribunal held that the arguments raised by the party in the hearing are to be subsequently included in the decision in order to avoid its annulment: see BVerwG decision of October 14th 1982, 3 C 46.81, cited by H. Punder, *German administrative procedure in a comparative perspective : observations on a path to ius commune proceduralis in administrative law*, 11 International Journal of Constitutional Law 94 (2013) (see footnote n. 84 in particular).

[83] The law of February 8th, 1995 allowed administrative courts to either order a measure of execution, or instruct the administration to carry out a new

legalist tradition and the conception of the *contentieux de l'excès de pouvoir* as a *procès fait à l'acte*[84], in the last two decades, French administrative courts devised several tools aimed at avoiding the annulment of unlawful decisions[85]. In addition to validations carried out either directly by the court or by the authority during judicial proceedings[86], French case-law developed several other methods

assessment of the applicant's request. These provisions are now incorporated in articles L-911-1 and L-911-2 of the *Code de la justice administrative*.

[84] This expression, coined by E. De Laferrière, *Traité de la juridiction administrative et des recours contentieux*, vol. 2 (1896) 561, can be roughly translated as « trial of the administrative decision ».

[85] See, on this topic, B. Seiller, *L'illegalité sans annulation*, 18 A.J.D.A. 963 (2004); F. Blanco, *Du juge censeur au juge correcteur*, 30 A.J.D.A. 1722 (2014) ; A. Frank, *Le justiciable et les politiques jurisprudentielles. Les illégalités neutralisées*, 5 R.F.D.A. 785, (2019); C. Lantero, *Sécurité juridique et mutation des annulations platoniques*, 19 A.J.D.A. 1100 (2019) ; B. Seiller, *Les décisions régularisées*, 5 R.F.D.A. 791 (2019) ; L. Janicot, *Réflexions sur une nouvelle voie l'annulation sèche et l'annulation différée : la définition de règles provisoires par le juge de l'excès de pouvoir*, 1 R.F.D.A. 41 (2021).

[86] The Council of State case-law has long recognized the administrative judge the power to correct *ex officio* some formal defects of the decision, such as the indication of the provisions on which the exercise of administrative powers is based (*substitution de base légale*) whenever a decision with identical content could have been issued on the basis of a different provision, thus upholding the challenged act (Cons. État, 8 March 1957, *Sieur Rosé et autres*, *Lebon,* 147). This procedure can only be carried out if the same decision could have been adopted within the framework of an identical power of appreciation, based on rules of equivalent scope, with the same procedural guarantees that had been afforded to the applicant (Cons. État, 3 December 2003, *El Bahi*, *Lebon*, 479): in other words, it is only admissible whenever it appears clear that the authority could immediately take a decision with identical content, basing it on a different legal provision. A similar logic underlies the case-law on the correction of the statement of reasons (*substitution de motifs*). Initially, it was only admitted for bound decisions, based on the idea that a decision with identical contents should in any event have been adopted (see Cons. État, June 8, 1934, *Augier*, *D.*, 1934, III, 31; Cons. État, July 23rd 1976, *Ministre du Travail v. URSSAF du Jura*, *Lebon*, 362). In cases of bound powers (*compétence liée*), the judge may also consider as "neutralised" both defects of *illégalité interne* (Cons. État, 30 September 1998, *Ministre de l'Intérieur v. M. Mansouri*, *Lebon*, 346) and defects of *illégalité externe* (Cons. État, 14 May 2003, *Syndicat des sylviculteurs*, in www.conseil-etat.fr), where it appears that an act with identical content should in any case have been issued by the Administration. In 2004, the possibility of the substitution of grounds was extended to discretionary acts, for reasons of efficiency and procedural economy: see Cons. État, February 6th 2004, *Hallal*, Lebon, 48, which extended to the *contentieux de l'excès de pouvoir* a guideline developed in the context of *plein contentieux objectif* (Cons. État, 23 November 2001, *Compagnie nationale Air France*, *Lebon*, 230), by virtue of which the *substitution des motifs* may be ordered by the court even if the contested act was issued in the exercise of discretionary powers.

aimed at preventing *ex tunc* annulments or at least at diminishing their impact. Their introduction was justified above all by the desire to improve the efficiency of administrative justice[87] and to prevent possible disruptions caused by the annulment of administrative decisions, out of concern for the proportionality of the ruling[88] and the need to protect legal certainty (*sécurité juridique*[89]), i.e., the stability of administrative acts and the rules contained therein[90]. Today, in the context of the *contentieux de l'excès de pouvoir*, the consequences of challenging an unlawful decision (which traditionally could only

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However, scholars acknowledged that the *substitution de motifs* entails an intervention of the judge that far surpasses that needed for the *substitution de base légale*, at least when a discretionary power is concerned: see F. Donnat, D. Casas, *L'administration doit-elle pouvoir invoquer devant le juge de l'excès de pouvoir de nouveaux motifs à ses décisions ?*, 8 A.J.D.A. 436 (2004). The substitution of reasons forces the court to fictitiously put itself in the position of the administration to examine whether an identical decision could also have been taken on different grounds. The technique of the substitution of grounds is consequently used with greater caution and, unlike the substitution of the legal basis, it requires the administration to specifically request it, indicating the new reasons on which the decision is founded. This avoids the risk of encroachments on the discretionary power of the administration: only the latter has the power to ascertain the circumstances of the case and to state the additional reasons of the decision. To request a substitution of reasons, the administration has to consider the appropriateness of maintaining the challenged decision. The substitution of grounds allows the administration to choose whether and how to uphold the content of the act, while the judge merely assesses the lawfulness of the decision in light of the new statement of reasons given by the administration.
Recently, the Conseil d'État specified that the new statement of reasons can be gathered by the administration's defense briefs, even in the absence of a formal request of substitution of the grounds on the part of the administration: Cons. État, 19 May 2021, *Commune de Rémire-Montjoli*, *A.J.D.A.*, 2021, 1070. Obviously, the new grounds for the decision should be formulated precisely enough, in order to allow the applicant to respond.

[87] This topic was widely studied in French literature. *Ex multis*, see C. Leclerc, *Le renouvellement de l'office du juge administratif* (2015); Blanco F., *Pouvoirs du juge et contentieux administratif de la légalité* (2010).

[88] B. Seiller, *L'illégalité sans annulation*, cit. at 85, noted the all-or-nothing nature of the remedy, which can, in certain circumstances, be *too effective*: «*l'annulation, si elle garantit l'apurement de l'ordonnancement juridique par la disparition de l'acte illégal, présente parfois les inconvénients des procédés radicaux.*»

[89] Enshrined as a *principe général du droit* by the French Conseil d'État in Cons. État, 24 March 2006, *Société KPMG et autres*, *www.conseil-etat.fr*. On the impact of the principle of legal certainty in the evolution of the *contentieux de l'excès de pouvoir*, see the Dossier *Légalité et sécurité juridique: un équilibre rompu?*, published in 19 A.J.D.A. 1086 (2019).

[90] W. Gremaud, *La régularisation en droit administratif* 17 ff. (2021).

lead to its annulment *ex tunc*) may vary depending on the area of law considered, the nature of the error identified by the judge, the factual circumstances of the dispute and the substantive interests behind it[91].

The French legislator also introduced some measures akin to administrative loops in specific sectors affected by a high level of litigation[92], often of "triangular" nature (i.e., concerning the applicant for judicial reviews, the authority and a third party which is usually the beneficiary of the contested act[93]).

These measures must be framed within the context of *recours pour excès de pouvoir*, where *locus standi* is traditionally very broad, in accordance with the objective nature of jurisdiction, which aims *primarily* at restoring legality: to be able to bring an action, the applicant must merely prove an interest in the annulment of the challenged decision[94]. In some areas of litigation, such as those pertaining to construction rights, this broad access to the judge has led to a very high volume of litigation, resulting in delays or indefinite interruptions of projects, slowing down both economic activity and the construction of housing[95].

In order to find solutions to deal with these issues, in 2013, a research group was tasked with formulating proposals to reform the judicial review of several acts pertaining to the *contentieux de*

[91] See on this topic O. Mamoudy, *Sécurité juridique et hiérarchisation des illégalités dans le contentieux de l'excès de pouvoir*, in A.J.D.A. 1108 (2019). The increasing consideration of the material interests of the parties has led legal scholars to signal a process of subjectivization of the *recours pour excès de pouvoir*: see cf. J. Sirinelli, *La subjectivisation du recours pour excès de pouvoir*, 6 R.F.D.A. 529, (2016).

[92] In both sectors of construction and environmental law disputes, the legislator has also intervened to limit the access to the judge, through a restriction of *locus standi:* See L 600-1-2 Code de l'urbanisme (as modified by the law n° 2018-1021) and L-142 Code de l'environnement.

[93] Like construction permits disputes, urban planning disputes and environmental litigation.

[94] Which can also be understood in a broad sense: it can consist in a merely "moral" or abstract interest. On this matter, see C. Broyelle, *Le recours pour excès de pouvoir est-il destiné à protéger la situation juridique du requérant?*, in A. Travi (ed.), *Colloquio sull'interesse legittimo* 23 (2014).

[95] The constitutional status of the right to housing is particularly highlighted: see the Labetoulle report, p. 4).

l'urbanisme[96]. One of the seven solutions[97] identified in the group's final report consisted in giving the judge of the power to order the administration to correct a contested building permit (and other permits addressed to individuals, such as demolition permits) within a certain deadline[98].

This proposal was implemented by Order No. 2013-638 of 18 July 2013, which amended art. L 600-5 and introduced art. L 600-5-1 of the *Code de l'urbanisme.* Art. L 600-5 of the *Code de l'Urbanisme* allows the court, whenever the defect only affects part of the decision and appears easily rectifiable, to pronounce a partial annulment and give the interested party a deadline to request the correction and upholding of the decision to the administration, even after the completion of the building project. Art. L 600-5-1 allows the judge, in cases where the defect in the building permit can be corrected, to suspend proceedings and establish a deadline for the correction of the decision. The correction measure is discussed by the parties of the judicial proceeding; only after these formalities have been carried out can the judge decide on the merits of the case. The correction of the contested decision is strongly encouraged, as art. L 600-5-1 establishes that the judge must give a full justification for his refusal to suspend the proceedings and give the administration a deadline to regularize the measure.

In 2015[99] and 2017[100] the loop provided for under art. 600-5-1 *Code de l'urbanisme* was also extended to disputes regarding urban

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[96] This task force issued the Report titled *Construction et droit au recours: pour un meilleur équilibre* (often called Labetoulle Report, from the name of the chair of the research group), available at *https://www.viepublique.fr/sites/default/files/rapport/pdf/134000300.pdf.*

[97] The main other solution was the restriction of *locus standi*, as enforced by art. L-600-1-2 and L-600-1-3 of the Urban Planning code, which stipulate that a challenge to a construction permit is admissible («*recevable*») under two conditions: first, that the building and/or the activities necessary for construction must directly affect the conditions of occupation, exploitation, or enjoyment of the property which the applicant regularly holds or occupies or which is the subject of a promise of sale, lease, or preliminary contract referred to in Article L-261-1 of the *Code de la construction et de l'habitation*. This rule does not apply to application for judicial review brought by the state, local authorities, or associations.
Interest in the appeal must exist from the time the permit application is published in the municipal house.

[98] Labetoulle Report, 12 ff.

[99] See order No. 2015-1174 of September 23, 2015.

[100] See order No. 2017-80 of January 26, 2017.

development plans[101] and, like in Germany, to environmental disputes[102], thus expanding what scholars called the «corrective function» (*office correcteur*) of French administrative courts[103].

These reforms did not provoke the backlash that was seen when similar measures were introduced in Germany: on the contrary, they are globally thought to improve both legal certainty and the efficiency of the administration, while also avoiding an encroachment on the prerogatives of the authorities, precisely because they give the administrative authority some leeway in deciding whether to uphold the challenged decision, ensuring that no interference is carried out in the exercise of administrative discretion[104].

At the same time, several critical issues, pertaining both to the respect of the procedural rules and to the repercussions on the right to a fair trial and an effective jurisdictional protection, were pointed out by legal scholars.

These reservations mainly relate to the remedying of deficiencies in the investigation of the matter or the posthumous obtaining of opinions from other administrations. In these cases, critics feared that validations could be instrumentalized for the sole purpose of upholding the contested decision, as such use of the remedy would have called into question the usefulness and relevance of the procedural rules the violation of which is deemed correctable[105].

Secondly, scholars pointed out that the correction of an illegal decision could rarely benefit the applicant, who often seeks the elimination of the act rather than the mere restoration of the rule of law[106]. The correction of the contested decision could contribute to a feeling of injustice and perception of bias on the part of the judge[107], especially when, following the correction of the contested decision and the dismissal of the application for judicial review, the applicant is charged with the legal fees[108].

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101 Article L 600-9 of the *Code de l'urbanisme.*

102 Article 181-18 of the *Code de l'environnement.*

103 See W. Gremaud, *La régularisation en droit administratif*, cit. at 90, 21.

104 W. Gremaud, *La régularisation en droit administratif*, cit. at 90, 320.

105 B. Seiller, *Les décisions régularisées*, cit. at 85.

106 See F. Martin, *La légende de l'annulation*, 1 R.F.D.A. 134 (2021).

107 B. Seiller, *Les décisions régularisées*, cit. at 85, noted that the correction of administrative acts is, from the point of view of the litigant, eminently questionable. It is tolerable only if one takes another point of view, that of the beneficiary of the contested act, whose situation is secured.

108 The problem of which party should bear the costs of the litigation in the event that the contested decision is corrected has not been solved either by the law or

However, the latter criticism failed to reverse the trend described here, probably because in the traditional conception of the *contentieux de l'excès de pouvoir*, the question of the material satisfaction of the applicant is not yet so central[109].

5. 'Informal' loops and the administrative review of the challenged decisions during judicial proceedings in Italian law

In Italy too, until recently, the only remedy available for the protection of legitimate interests (*interessi legittimi*) infringed on by an unlawful administrative decision was the action for annulment. Today, although actions for damages[110] or for injunction[111] can also be brought against an authority, annulment and remand to the authority remains the main remedy against the unlawful exercise of administrative powers[112].

Italian law does not provide for a tool comparable to administrative loops. A similar result, however, has been achieved

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by case-law. On the contrary, Art. L. 761-1 of *the Code de justice administrative* provides that in all proceedings the court shall order the party liable to pay the costs or the unsuccessful party to pay the other party the amount it fixes for the costs incurred.

[109] Professor Jean Rivéro, who advocated for an increased consideration of the effectiveness of judicial remedies, famously reported the surprise of administrative judges for his concern: "*But Mr. Professor, why are you interested in the applicant? The applicant is the "token" that is introduced into the apparatus and that triggers the litigation mechanism*". See J. Rivero, *Une crise sous la Ve République : de l'arrêt Canal à l'affaire Canal in Le Conseil d'État de l'an VIII à nos jours. Livre jubilaire du deuxième centenaire* 36 (1999).

[110] Art. 30 of the italian code of administrative judicial proceedings (*Codice del processo amministrativo* or c.p.a.).

[111] Art. 30, para. 1 and 34 para. 1, c) c.p.a.

[112] See, *ex multis*, M. Clarich, *Commento all'art. 29 del Codice del processo amministrativo*, published in *www.giustizia-amministrativa.it* on July 15th 2010; M. Clarich, *Le azioni nel processo amministrativo tra reticenze del codice e apertura a nuove tutele*, published in *www.giustizia-amministrativa.it* on November 11th 2010. The action for injunction, introduced by d.lgs. 14 settembre 2012 n. 160, can only be brought in conjunction with the action for annulment (art. 34, para. 1, c), c.p.a.) and a judicial injuction to issue a decision favorable to the applicant can only be obtained in case of bound powers or when no further margins for the exercise of discretion remain and no further investigations need to be carried out by the administration (art. 31, para. 3, c.p.a.). Outside of these limited hypotheses, the applicant can only obtain the annulment of the unlawful decision and/or the reparation of the damages incurred.

through the use of atypical interim relief measures to stay the contested decision and order the administration to reconsider the case based on the judge's instructions, not unlike the Dutch administrative courts did before the introduction of administrative loops[113]. This technique, known as 'remand', was originally developed to provide an interim relief to citizens damaged by decisions rejecting applications, who could not avail themselves of the typical interim relief measure of the suspension of the effects of a challenged decision[114]. More recently, however, the technique of *remand* was explicitly referred to as a way of reopening the administrative procedure pending judicial review in order to allow the administration to correct its previous assessment and possibly settle the dispute[115]. By ordering the administration to reconsider the matter, courts encourage an out-of-court settlement of the dispute[116] through the issuance of a new decision bound to replace the contested one with *ex nunc* effects. As it is the case for administrative loops, the remand technique places the authority under the tutelage of administrative courts: an assessment of the compliance to the interim measure before the same judge who issued it is possible in the context of an executory judgement (*giudizio di ottemperanza*), which can be carried out to obtain the enforcement of a court-issued measure, be it a sentence or an interim relief measure[117].

A spontaneous review of the affair can also be carried out by the authority, using the power to amend unlawful decisions and uphold their effects (*potere di convalida in autotutela*) provided by 21 *nonies*, sect. 2 of the Italian general law on administrative procedure[118]. This validation remedy presents some similarities to the

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113 *Cf. supra*, footnote n. 17.

114 See A. Travi, *La tutela cautelare nei confronti dei dinieghi di provvedimenti e delle omissioni della P.A.*, 3 Dir. Proc. Amm. 331 (1990).

115 See Cons. Stato, sect. V, August 5th, 2022, n. 6939; sect. IV, April 29th, 2022, n. 3397; sect. VI, March 17th, 2020, n. 1903, in *www.giustizia-amministrativa.it.*

116 As recognized, for example, by T.A.R. Marche, sect. I, November 11th, 2009, n. 1443, in *www.giustizia-amministrativa.it*, which admitted that "*very often the function of propulsive* [or 'remand'] *orders is to allow the applicant further interlocution with the authority, for the commendable purpose of reaching an extrajudicial resolution of the matter.*"

117 See art. 112, para. 2, b) and art. 113 c.p.a. Unlike Dutch administrative loops, the review of the administration's activity is not automatic, since it is carried out in the context of an enforcement judgement (*giudizio di ottemperanza*) that can be requested by the beneficiary of the measure.

118 Law no. 241/1990, as modified by law n. 15/2005.

one provided for by § 45 VwVfG[119], in that it allows the authority to 'cure' an otherwise voidable decision and uphold it. However, while § 45 VwVfG specifically allows for a correction of the decision's defect pending judicial proceedings, art. 21 *nonies*, para. 2, does not specifically indicate whether a contested decision can be corrected. In fact, it merely states that it is possible to validate a voidable decision within a reasonable time after its adoption if there are public interest reasons for doing so. The vagueness of this provision has given rise to a debate both on the possibility of validating a contested decision and on the scope of the errors that can be remedied. The only very clear feature of this power of correction is it is explicitly aimed at protecting the public interest[120]. This aspect differentiates this remedy from the most of the other included in this study, which are more aimed at offering a more effective remedy to the party affected by the unlawful decision or at reopening administrative proceedings in order to redress the errors made.

In this section of the article, we will discuss both the power of validation and the technique of 'remand', evaluating their effectiveness in providing a fair and final solution to the dispute.

The 'remand' technique, as previously mentioned, was devised as an atypical interim relief measure; however, its potential for dispute resolution did not go unnoticed, and the pragmatic use of interim measures to reach a final dispute settlement under the judge's tutelage was praised by some scholars[121].

Critics pointed out that the 'remand' technique entails an improper use of interim judgements, which are not designed to settle a dispute but rather to grant an interim relief during judicial proceedings[122], based on a summary analysis of the legal and factual

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[119] Discussed in section 3 of this paper.

[120] In line with this specific function, the validation can only be carried out if there is a public interest (different from the mere restoration of legality) in doing so: see art. 21 *nonies*, para. 2, of the administrative procedure act (law n. 241/1990).

[121] G. Sorrentino, *Ordinanza cautelare e jus superveniens*, 3 Dir. Proc. Amm. 451 (1995) (especially 458 ff.); R. Garofoli, L*a tutela cautelare degli interessi negativi. Le tecniche del remand e dell'ordinanza a contenuto positivo alla luce del rinnovato quadro normativo*, 4 Dir. Proc. Amm. 857 (2002); M. Andreis, *Tutela sommaria e tutela cautelare nel processo amministrativo* 176 ff. (1996); F. Pugliese, *Nozione di controinteressato e modelli di processo amministrativo*, cit. at 2, 126 ff.

[122] E.F. Ricci, *Profili della nuova tutela cautelare amministrativa del privato nei confronti della pubblica amministrazione*, 2 Dir. proc. amm. 276 (2002); A. Travi, *Misure cautelari di contenuto positivo e rapporti fra giudice amministrativo e pubblica amministrazione*, 1 Dir. proc. amm. 174 (1997) ; R. Villata, *La Corte costituzionale frena bruscamente la tendenza ad ampliare la tutela cautelare nei confronti dei*

bases of the appeal: the use of 'remand' to settle the dispute thus runs the risk of amounting to a summary judgement[123]. A dissenting case-law also cautioned against the use of 'remand' as a means of settling the dispute, arguing that the enforcement of an interim order (whose scope, by definition, is only limited to granting interim relief pending trial) cannot cause the definitive replacement of the contested decision, settling the dispute before the delivery of the final judgement[124].

Furthermore, the Council of State has argued in the past that the replacement of the contested decision through 'remand' could harm the positions of both parties: the applicant because if the appeal is well founded, he or she would be entitled to the annulment of the contested measure in addition to a compensation for the damage resulting from the annulled measure; the authority, because it is also entitled by law to a judgment on the lawfulness of the contested measure[125].

This strict jurisprudential orientation did not prevail, and the use of remand measures in the context of interim relief proceedings remains common. Administrative case-law usually distinguishes the situations in which a new decision is issued by the authority as a mere execution of the interim relief measure and those in which the remand order leads to an actual review of the case and spontaneous decision of the authority to self-annul the contested decision (*annullamento in autotutela*)[126] and subsequently issue a new decision[127].

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provvedimenti negativi, 4 Dir. Proc. Amm. 619 (1991); A. Travi, *La tutela cautelare nei confronti dei dinieghi di provvedimenti e delle omissioni della P.A.*, 3 Dir. Proc. Amm. 331 (1990); E.M. Barbieri, *I limiti al processo cautelare amministrativo*, 2 Dir. Proc. Amm. 220 (1986).

[123] See A. Travi, *La tutela cautelare nei confronti dei dinieghi di provvedimenti e delle omissioni della P.A*, cit. at 122; M. Andreis, *Tutela sommaria e tutela cautelare nel processo amministrativo*, cit. at 121, 299.

[124] On this issue, see G. Sigismondi, *La tutela cautelare con effetti irreversibili*, in P. Cerbo, G. D'Angelo, S. Spuntarelli (eds.), *Amministrare e giudicare. Trasformazioni ordinamentali* (2022) 159 (see in particular p. 193 ff.).

[125] See Cons. Stato, sect. VI, January 20th 2011, n. 396, in *www.giustizia-amministrativa.it*.

[126] Provided by art. 21 *nonies*, para. 1, law. n. 241/1990, introduced by law n. 15 of February 11th, 2005.

[127] For this distinction, see for example Cons. Stato, sect. V, August 5th 2022, n. 6939; sect. IV, April 29th 2022, n. 3397; sect. VI, March 17th 2020, n. 1903, in *www.giustizia-amministrativa.it.*

In the latter cases, the dispute is settled: the applicant's interest is fulfilled, and the judge can declare the discontinuation of the matter (*cessazione della materia del contendere*)[128]. In the former cases, on the other hand, the decision issued in direct enforcement of the interim relief measure is bound to lose its effects if the application for judicial review is rejected on the merits[129].

The importance of this distinction lies in the nature and effects of the decision issued by administrative authorities: only the spontaneous issuance of a different decision following a review of the affair cannot be impacted by the outcome of the judgement[130] since the it stems from the exercise of administrative powers and not merely from the execution of the interim measure.

The judge's decision to allow the administration to reopen the administrative procedure and re-examine the case, rather than merely ordering the adoption of a particular decision, may be influenced by several factors. For example, the time needed to conduct a re-examination of the case and the urgency of providing the applicant with immediate protection of the interest may prevent the court from ordering a re-opening of the procedure (e.g., where the protection of an instrumental interest in participating in a competitive procedure is so imminent that the competent administration cannot review the exclusion decision). In cases where such questions do not arise, an efficient use of the precautionary measure, which leaves the administration sufficient room to conduct a

[128] See art. 34, para. 5, c.p.a. The declaration of the discontinuation of the matter is considered a judgement on the *merits* of the case, and specifically on the satisfaction of the applicant's claim: see Cons. Stato, sect. V, August 30th 2022, n. 7571 in *www.giustizia-amministrativa.it.*

[129] However, in certain areas of litigation, such as those related to examinations for professional qualifications (*i.e.*, the bar examination), the law (art. 4, para. 2 *bis*, d.l. June 30th 2005, n. 115 (conv. l. August 17th 2005, n. 168) itself provides for the possibility of an interim injunction to definitely settle the dispute by stipulating that candidates possessing the prescribed qualifications who passed the written and oral examinations are entitled to obtain the professional qualification, even if admission to the examination by the board was the result of an interim relief measure. This provision is broadly applied especially by first-instance administrative case-law, which extended its scope to other examinations and recruitment procedures, such as admission tests to medical schools: see, *ex multis*, T.A.R. Lazio, sect. III, August 17th 2020, n. 9226; April 15th 2020, n. 3936; February 18th 2020, n. 2162; sect. I, January 8th 2020, n. 136, in www.giustizia-amministrativa.it.

[130] Which cannot proceed, as the judge will be bound to declare a discontinuation of the matter, as stated before.

complete re-examination of the matter in the light of the judge's indications, appears as a good remedy to settle the dispute definitively out of court.

While the review, self-annulment and subsequent replacement of the challenged decision on the part of the administration is possible at the initiative of the court, through a 'remand' measure[131], as mentioned before, the spontaneous validation and upholding (*convalida*) of a contested act during judicial proceedings remains somewhat controversial.

Now enshrined by art. 21 *nonies*, sect. 2 of law no. 241/1990[132], the power of validation allows the issuing authority to correct the defects of the decision in order to uphold it, with *ex tunc* effects, provided that the defect can be corrected and – as previously discussed - the validation can be justified in light of public interest[133].

Unlike § 45 VwVfG and § 114, para. 2, VwGO, art. 21 *nonies*, sect. 2, l. 241/1990 does not list the errors that can be corrected; however, traditionally, legal scholars have held that only procedural or formal defects without any bearing on the contents of the decision can be subject to validation[134].

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[131] Or at the initiative of the authority itself, pursuant to art. 21 *nonies*, l. 241/1990.

[132] Introduced by law n. 15/2005.

[133] Even before its codification, this power was traditionally recognized by legal scholars and administrative case-law in the context of the broader power of '*autotutela*', which literally means 'self-protection'.
The provision does not specify whether this general power of validation (*convalida*) can be exercised pending judicial review, nor the scope of the defects susceptible of being corrected. Legal scholars and administrative case-law (see, for example, Cons. Stato, sect. VI, April 27th 2021, n. 3385, cit.) consider that only a correction of formal or procedural errors that do not affect the substance of the decision is allowed: see M. Ramajoli, R. Villata, *Il provvedimento amministrativo* (2017) 692 ff. On the topic of the effects of validation after the introduction of art. 21 *nonies*, sect. 2, see G. Mannucci, *Della convalida del provvedimento amministrativo*, 1 Dir. Pubbl. 201 (2011) (see particularly 210 ff.), in which different theories concerning the temporal effects of validations are discussed. More recently, the topic was also discussed in N. Berti, *La modifica dei provvedimenti amministrativi* (2022).

[134] The broad formulation of art. 21 *nonies*, para. 2, l. 241/1990 gave way to multiple interpretations regarding its scope. Some authors argued that the power of validation's scope was extended to substantial defects of the decision : see V. Antonelli, *La convalida del provvedimento annullabile e la riforma del procedimento amministrativo*, 7-8 Foro amm. C.d.S. 2220 (2005) ; N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*, 1 Dir. Proc. Amm. 190 (2022).

After the introduction of art. 21-*octies*, sect. 2 l. 241/1990[135] the residual scope of the power of validation was reduced[136], but it surely still applies to the correction of formal or procedural errors in discretionary decisions[137].

The validation requires carrying out administrative proceedings - with the participation of the concerned parties - to determine whether the upholding of the decision is in the public interest and whether its errors can be remedied pursuant to art. 21 *nonies*, para 2, l. 241/1990[138]. Unlike § 45 VwVfG, art. 21 *nonies*, para 2, l.

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[135] The provision, mentioned in footnote n. 4, stipulates that a decision made in violation of procedural or formal rules is not voidable if, due to its bound nature, it is evident that its content could not have been different in the absence of the violations. A decision is also not voidable if the authority failed to notify the person concerned of the initiation of the proceedings (as prescribed by art. 7 l. 241/1990) if the authority proves in court that the content of the decision could not have been different if the person concerned had been made aware of the proceedings.

[136] See in particular V. Cerulli Irelli, *Osservazioni generali sulla legge di modifica della l. 241/1990*, published in February 2005 in *www.giustamm.it*; G. Mannucci, *Della convalida del provvedimento amministrativo*, cit. at 133 (especially 213 ff.); M. Ramajoli, R. Villata, *Il provvedimento amministrativo*, cit. at 133, 696, who tend to exclude from the scope of art. 21 *nonies*, sect. 2, l. 241/1990 all formal errors bearing no impact on the content of a bound decision, due to their inability to cause the annulment of the contested decision under art. 21 *octies*, sect. 2, l. 241/1990 : the conditions for validation cannot be met, since the exercise of the power presupposes the voidability of the decision. However, Cons. Stato, sect. VI, April 27th 2021, n. 3385, III Foro it. 377 (2021), commented by A. Travi; in Dir. Proc. Amm. 190 (2022), commented by N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*; and in *www.giustiziainsieme.it*, commented by F. Aperio Bella, *Limiti alla convalida in corso di giudizio (nota a Cons. Stato, sez. VI, n. 3385/2021)*, recently stated that "*There is no doubt about the possibility of amending formal and procedural errors, including that of (relative) lack of jurisdiction. It must be considered possible for the public administration also to proceed with the validation of a measure that cannot be annulled pursuant to the aforementioned paragraph 2 of Article 21-octies (considered to be a rule applicable to judicial proceedings), although in this case the legal utility consists at most only in greater certainty and stability of the administrative relationship*". However, this opinion does not seem to take into account the prohibition of self-annulment of a decision when the conditions for the application of Article 21 octies, para. 2 are met, thus negating the purely procedural relevance of the rule. Moreover, greater stability of the decision could not be achieved, since it already is not voidable under both art. 21-octies para. 2 and art. 21-nonies para. 1 l. 241/1990.

[137] Except the defect deriving from the omission of the notice of initiation of proceedings (art. 7 l. 241/1990), which falls under the scope of art. 21-octies, sect. 2, l. 241/1990.

[138] M. Ramajoli, R. Villata, *Il provvedimento amministrativo*, cit. at 133, 693.

241/1990 does not define the procedural steps necessary to 'cure' a voidable decision; according to the prevailing doctrine, the assessment on the 'curability' of the decision is carried out through a mere re-evaluation of the documents acquired in the course of the investigation in the original proceedings[139], which makes it difficult to remedy certain types of procedural errors such as those pertaining to the participation of interested parties[140].

Concerning the question of the validation of contested decisions, art. 6, law of March 18th, 1968, n. 249 only explicitly allows for the validation of a decision issued by an authority without jurisdiction (*ratifica*) pending judicial review.

It has been debated whether the authority can similarly correct any other defect and confirm the contested decision, absent a specific rule allowing[141] (or banning[142]) it to do so. For a long time, under the prevailing legal doctrine[143] and case-law, validation was prohibited pending judicial review. The main reason for this prohibition was based on the idea that the subject of judicial review is the contested decision, the content of which cannot change during the court proceedings: according to the prevailing opinion, the validation of the contested decision would unjustly prevent the applicant from obtaining an annulment to which he was entitled by virtue of the decision's unlawfulness[144].

In the past twenty years, the case-law position on the issue evolved[145], due to multiple factors, such as the renewed conception

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139 G. Mannucci, *Della convalida del provvedimento amministrativo*, cit. at 133, 239. This opinion is not shared by N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*, cit. at 136, 209, who argues that, given the broad formulation of art. 21 nonies, para. 2, l. 241/1990, the validation procedure could entail a reopening of the administrative proceedings and a further investigation.

140 G. Napolitano, *La logica del diritto amministrativo* (2014) 150.

141 See L. Mazzarolli, *Convalida* (dir. Amm.), *Enc. giur.*, IX (1988) 3.

142 See P. Virga, *Diritto amministrativo. Atti e ricorsi* 143 (1987) who held that "*nothing prevents validation from taking place pending judicial review*".

143 See G. Santaniello, *Convalida* (dir. amm.), in *Enc. dir.*, X, 503 (1962) (see p. 505 in particular); L. Mazzarolli, *Convalida*, cit. at 142, 3; P. Ravà, *La convalida degli atti amministrativi* 214 ff. (1937).

144 See G. Santaniello, *Convalida* (dir. amm.), cit. at. 505.

145 The first decisions to allow a validation pending judicial proceedings (outside of the specific hypothesis of a correction of a defect of incompetence, explicitely allowed by law) can be traced back to the end of the nineties: see Cons. Stato, sect. IV, July 26th 1998, n. 991, *Foro it.*, Rep. 1998, entry *Atto amministrativo*, n. 525;

of the true subject of judicial review, now considered by some legal scholars and case-law to have shifted beyond the contested decision and encompassing the whole relationship between the applicant and the authority[146]. The growing concern for the efficiency of justice and the subsequent wariness towards "useless annulments" also gave way for the described shift in the position held by case-law[147].

The introduction, in 2000, of a tool allowing the applicant to challenge a new decision issued by the authority and related to the matter sub judice (*motivi aggiunti*)[148], was fundamental in the definitive lifting of the jurisprudential ban on validations pending judicial review, as it allowed for the challenge of the subsequent validation decision, thus granting a remedy to the applicant in case of validation of the contested act[149].

C.G.A.R.S., December 28th 1998, n. 682, *id.*, Rep. 1999, entry *Atto amministrativo*, n. 464.

146 See V. Cerulli Irelli, *Convalida in corso di giudizio e tutela della pretesa sostanziale*, in 6 Giorn. Dir. Amm. 641 (2002) and in case-law, explicitely, C.G.A.R.S. April 20th 1993, n. 149, III *Foro it*. 616, (1993); in 3 Dir. proc. amm. 577 (1994), commented by A. Zito, *L'integrazione in giudizio della motivazione del provvedimento: una questione ancora aperta*.

147 Cons Stato Sez. IV, June 26th 1998, n. 991, *Foro it.*, Rep. 1998, entry *Atto amministrativo*, n. 525.

148 See art. 1, law of July 21rst 2000, n. 205.

149 V. Antonelli, *La convalida del provvedimento annullabile e la riforma del procedimento amministrativo*, cit. at. 134. In administrative case-law, see T.A.R. Molise, January 29th 2003, n. 41, Foro it., Rep. 2003, entry *Giustizia amministrativa* n. 891.

The validation through a correction of the statement of reasons[150] pending judicial proceedings[151], however, remains widely debated in legal scholarship[152] and administrative case-law.

As a rule, posthumous interventions on the statement of reasons were traditionally deemed inadmissible by case-law. The main reason provided for this was the same given to ban validations after the application for judicial review, and proceeded from the idea that the object of the judicial review is the challenged decision and its motivation, whose content cannot shapeshift during the judgement[153]. Furthermore, it was maintained that allowing an *ex-post* validation of a decision lacking a complete statement of reasons

[150] It should be noted that this is a multifaceted phenomenon: it may consist in completing the statement of reasons based on elements acquired during the administrative procedure or in adding new elements to the statement of reasons; moreover, it may take place either during the court proceedings, through pleadings drafted by the defense or through a procedure of validation. For these distinctions, see G. Taccogna, *Giusto processo amministrativo e integrazione della motivazione dell'atto impugnato*, 3 Dir. proc. Amm. 696 (2005) ; G. Tropea, *La c.d. « motivazione successiva » tra attività di sanatoria e giudizio amministrativo*, 3 Dir. amm. 531(2003).

[151] Which started to be admitted by a growing case-law from the early 2000s. However, the leading case for this new case-law can be traced back to the early nineties : see C.G.A.R.S., April 20th 1993, n. 149, III Foro it. 616 (1993) which argued that while the inadmissibility of a posthumous integration of the statement of reasons may seem to offer greater procedural protection to the applicant, this greater protection is only apparent: an annulment for the mere lack of motivation too often constitutes a procedural victory, since it cannot prevent the administration from adopting a new similar harmful measure with an adequate motivation.

[152] The literature on the topic is extensive: see G. Virga, *Integrazione della motivazione nel corso del giudizio e tutela dell'interesse alla legittimità sostanziale del provvedimento impugnato*, 3 Dir. proc. amm. 529 (1993); G. Tropea, *La c.d. motivazione successiva tra attività di sanatoria e giudizio amministrativo*, cit. at 150; M. Occhiena, *Il divieto di integrazione in giudizio della motivazione e il dovere di comunicazione dell'avvio dei procedimenti ad iniziativa di parte: argine e contenimento del sostanzialismo*, 2 Foro amm. T.A.R. 524 (2003); G. Taccogna, *Giusto processo amministrativo e integrazione della motivazione dell'atto impugnato*, cit. at 150; V. Parisio, *Motivazione postuma, qualità dell'azione amministrativa e vizi formali*, 9 Foro amm. T.A.R. 3087 (2006); M. Ramajoli, *Il declino della decisione motivata*, 3 Dir. proc. Amm. 894 (2017); G. Tropea, *Motivazione del provvedimento e giudizio sul rapporto*, 4 Dir. proc. amm. 1235 (2017); R. Musone, *Gli sviluppi del divieto di motivazione postuma del provvedimento amministrativo*, 3 Giorn. Dir. Amm. 316 (2018); E. Senatore, *L'integrazione postuma della motivazione del provvedimento amministrativo fra ordinamento interno e comunitario*, 4 Federalismi.it 20 (2018).

[153] G. Cocozza, *Contributo ad uno studio della motivazione del provvedimento come essenza della funzione amministrativa* 217 (2020).

would imply that the authorities could emit such decisions, and that citizens could be forced to challenge them without proper knowledge of their motivation[154], rendering the right to defense against the unlawful acts of the administration[155] impossible to fully exercise.

In the early 2000s, case-law started admitting a correction of the statement of reasons arguing that some errors pertaining to it could be considered merely formal. It was argued, for example, that the annulment can be avoided whenever the full reasoning followed by the authority can be inferred from previously issued subprocedural measures, allowing for a completion of an insufficient reasoning[156]. Concerning bound decisions, some case-law allowed a decision that is not fully reasoned to be upheld, equating the absence of a statement of reasons with a formal defect that cannot lead to the annulment of the act[157].

More recently, however, administrative courts seem to have returned to a stricter attitude[158] regarding the defects of the statement of reasons[159], based both on the right to a fair trial, which entails the equality of the parties and the right to an effective judicial protection[160], and a rethinking of the status of the statement of reasons as a fundamental component of administrative decision-

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154 A. Pubusa, *Il giudizio: "officina per la riparazione" degli atti amministrativi? Note sull'art. 21-octies, comma 2*, l. n. 241 del 1990, 5 Foro Amm. T.A.R. 1750 (2005).

155 Enshrined in art. 113 of the Italian Constitution.

156 Cons. Stato, Sect. V, April 18th 2001, n. 2330, in Foro amm. 872 (2001).

157 No need for a validation could technically arise in such case since the decision would not be voidable. See, for example, Cons. Stato, sect. V, August 20th 2013, n. 4194, *Foro it.*, Rep. 2013, entry « *Atto amministrativo* », n. 360; sect. IV, June 7th 2012, n. 3376, *ibid.*, entry « *Atto amministrativo* », n. 36; Cons. Stato, sect. VI, August 18th 2009, n. 4948, *Foro amm. C.d.S.*, 2009, 1881; August 25th 2009, n. 5065, *Foro amm. C.d.S.*, 2009, 1909.

158 The introduction of new elements by way of the defense briefs is now widely considered inadmissible: see Cons. Stato, sect. VI, March 9th 2021, n. 2001, in www.giustizia-amministrativa.it; October 19th 2018, n. 5984, *Foro it.*, Rep. 2019, entry *Atto amministrativo*, n. 1998. The indiscriminate disregard of defects pertaining to the statement of reasons of decisions resulting from the exercise of bound powers has also been put into question: see Cons. Stato, sect. III, April 30th 2014, n. 2247, in www.giustizia-amministrativa.it.

159 On this evolution, which seems to have taken place after the introduction of art. 21 *octies*, para. 2, l. 241/1990, see R. Musone, *Gli sviluppi del divieto di motivazione postuma del provvedimento amministrativo*, cit. at 152, 321 ff.

160 Cons. Stato, Sect. IV, March 4th 2014, n. 1018; Cons. Stato, Sect. V, August 20th 2013, n. 4194, in www.giustizia-amministrativa.it.

making, which could not be merely corrected posthumously[161]. This change in case-law falls in line with the position taken by the Italian Constitutional Court on the issue, which held that defects pertaining to the statement of reasons cannot be considered merely formal[162]. The renewed importance attached to the statement of reasons makes it necessary to reconsider the scope of the validation power under art. 21 *nonies*, para. 2, l. 241/1990, since not all defects of the statement of reasons can be regarded as purely formal.

This issue was addressed in a recent decision of the Council of State, which deemed that the validation of the contested decision is allowed in cases where the flaws of the statement of reasons do not reflect substantial breaches in the carrying out of administrative functions, but only the inadequacy of the justifying formal discourse, resulting in a purely formal defect in its expression. The decision endorsed the use of validation powers during judicial proceedings, arguing that the challenge of the validation (which may occur spontaneously or after a remand to the authority) through *motivi aggiunti* determines a shift of the judgement scope to the entire matter, which can facilitate both sides of the judgement, as it gives the plaintiff a quicker and more effective judgement on the possibility of a favorable outcome while allowing the authority to avoid a 'disproportionate' annulment[163].

However, this judgement left several questions unanswered, regarding in particular the right to an effective judicial protection against the original unlawfulness of the decision and the related issue of the consequences in terms of liability for any damage

[161] Cons. Stato, sect. VI, March 9th 2021, n. 2001; Cons. Stato, sect. V, March 27th 2013, n. 1808, in *www.giustizia-amministrativa.it.* This idea is developed in G. Cocozza, *Contributo a uno studio sulla motivazione del provvedimento come essenza della funzione amministrativa*, cit. at 152.

[162] Corte cost., ord. March 17th 2017, n. 58 and ord. May 26th 2015, n. 92, in *www.cortecostituzionale.it*) declared the inadmissibility of the preliminary question on the constitutionality of art. 21 *octies,* para. 2, l. 241/1990 as applied to defects of the statement of reasons because the referring judge failed to attempt to find a constitutionally oriented interpretation of the provision. The Court then cited administrative case-law that holds that the lack of the statement of reasons can in no way be equated with a breach of procedural rules or a formal defect, since it constitutes the precondition, the basis, the focus and the essence of the lawful exercise of administrative powers (Art. 3 of Law No. 241/1990) and therefore an irreplaceable safeguard of substantive legality (see, for example, Cons. Stato, Sect. III, April 7th 2014, n. 1629; Cons. Stato, Sect. VI, June 8th 2010, n. 3642, in www.giustizia-amministrativa.it).

[163] Cons. Stato, sect. VI, April 27th 2021, n. 3385, cit.

suffered by the applicant prior to the correction of the decision[164]. Ultimately, the judgement only specifically recognized the right to a complete reimbursement of litigation costs borne by the applicant[165].

Conclusions

This research has attempted to shed light on some elements of convergence in the systems studied, where either the legislator or case-law have sought to limit annulments by encouraging or allowing a correction of the decision pending judicial review.

This trend signals a skepticism about the effectiveness of the remedy of annulment that can be detected both in legal systems that feature an administrative jurisdiction aimed at the protection of rights[166] and systems of objective law, in which the decision unequivocally remains the lone subject of the judicial review[167].

Concerning the former, this development is also understandable in the context of the shift of the object of judicial review from the contested decision to the relationship between the applicant and the authority: under certain conditions, judicial proceedings may provide a suitable occasion for a re-examination of the affair under the guidance of the court, and the subsequent definitive settlement of the dispute - which the annulment of the contested act does not always provide. It is interesting to note, however, that a similar approach has also been followed in the systems of objective law.

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[164] Due to the retroactive effects of the validation decision, which 'erases' the original unlawfulness of the validated decision, damages could not be requested by the applicant pursuant to art. 34, para. 3, c.p.a. that provides « *when, in the course of the trial, the annulment of the challenged measure is no longer useful to the plaintiff, the court shall ascertain the unlawfulness of the act if there is an interest for compensation purposes* ». However, a compensation could be still claimed based on the conduct of the authority : see N. Berti, *Autotutela conservativa, motivazione del provvedimento e giudizio amministrativo*, cit. 134, 205; see also G. Mannucci, *Della convalida*, cit. at 133, 244, on the need to limit the retroactivity of the validating effects in order to allow for the recognition of the original unlawfulness of the contested decision and the subsequent award of damages.

[165] Although, confusingly, in the same judgement the Council of State did not condemn the authority to reimburse these costs to the applicant, as observed by F. Aperio Bella, *Limiti alla convalida in corso di giudizio (nota a Cons. Stato, sez. VI, n. 3385/2021*, cit. at 136.

[166] The Netherlands, Germany, Italy.

[167] France, Belgium.

The reasons for the development of these remedies are manifold but can mainly be traced back to the perceived 'disproportionate' effects of the annulment, when comparing the merits of the claimant's substantive claim and the effects of the annulment (i.e., the restriction or slowing down of administrative action or the harm of general interests protected by the unlawful decision). This is particularly clear in certain sectors of litigation, such as environmental or urban planning disputes, where the safeguard of the contested decision through its amendment or correction is particularly encouraged by statutes[168].

The design of these remedies also probably stems from a fundamental lack of confidence in the administration's ability to promptly and correctly re-exercise its powers after the annulment. In this respect, placing the administration under the guidance of a judge is thought to ensure a faster resolution of the dispute and a more certain outcome of the affair.

Overall, administrative loops can ultimately be linked to the growing importance of legal certainty and efficiency - which are especially crucial to economic actors - in the statutory or jurisprudential design of judicial remedies[169], and it is no coincidence that, in all the countries considered, they were introduced in the context of legislative reforms aimed at improving the efficiency of administrative justice (in a specific sector, or as a whole).

Despite the expectations placed in the ability of administrative loops carried out by the authority to solve the dispute efficiently and definitively, this research has shown that they are not without critical issues, which scope varies on account of the constitutional context in which these tools were adopted.

One of the common issues observed pertains to the possible overstepping of the boundaries between judicial and administrative activity and the related question of the applicant's right to judicial protection. In relation to these two aspects, two different

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[168] See the Flemish Decree of April 4th 2014, as amended by art. 4 of the Decree of July 3rd 2015, § 75, para. 1a, second sentence, VwVfG, as modified in 2013; § 4, para. 1b, last sentence, UmwRG, Art. L 600-9 and 600-5-1 of the *Code de l'urbanisme* and art. 181-18 of the *Code de l'environnement*, discussed respectively in section 2, 3 and 4 of this paper.

[169] G. Napolitano, «*Judicial review of administrative power*». *The legal design of judicial review systems : a comparative overview*, 1 *Riv. Trim. Dir. pubbl.* 86 (2018), noted that «*the financial crisis made evident that even the administration of justice is a scarce resource and that the protection of public decisions from excessive or specious legal challenges before courts can be useful to foster economic growth*».

models of remedies can be outlined: we will refer to them as 'close-ended' loops and 'open-ended' loops.

Rather than providing an efficient resolution of the dispute *sub judice*, 'close-ended' administrative loops are designed to systematically prevent the annulment of the unlawful act, through a merely formal correction of its defects. As the Belgian Constitutional Court pointed out regarding the now repealed federal loops and the previous version of Flemish loops[170], their "predetermined" outcome hinders the separation of powers, curtailing the authority's ability to alter the contents of the contested act based on a new and different appraisal of the relevant circumstances as a consequence of the requested 'correction'. Moreover, 'close-ended' loops expose themselves to the same criticisms that have been levelled at provisions stipulating the irrelevance of certain defects of the administrative decision: they can signal the *de facto* irrelevance of the violated provisions. While they formally restore the rule of law, they can only result in the upholding the challenged decision, rarely benefitting the applicant.

In contrast, under 'open-ended' loops, the judge assumes a pedagogical role vis-à-vis the authority, which is given specific instructions on how to remedy the defects of the contested decision. The execution of these instructions is supervised by the judge and the resulting decision is then assessed in an adversarial procedure between the parties. Even more importantly, the outcome of the authority's intervention is not predetermined. This offers three important advantages. First, 'open-ended' loops avoid the appearance of a bias in favor of the authority and the risk of undue interference of the courts in administrative matters since they imply a genuine reopening of the administrative procedure. Second, by allowing a modification of the decision (with *ex nunc* effects), instead of its mere upholding as it is, the 'open' outcome of the loop does not negate *a priori* the impact of the breach in the shaping of the decision's content; on the contrary, it allows for the same re-exercise of the administrative power that would occur after the annulment of the decision. Finally, 'open-ended' loops can result in the issuing of a decision that may well be satisfactory to the applicant, as the authority is not bound to uphold its previous decision.

The question of the abstract 'open-endedness' of the remedy is also crucial in assessing the effectiveness of spontaneous

[170] See *supra*, section 2 of the paper.

validations carried out by the authority during judicial proceedings as an alternative dispute resolution tool.

One of the problems that were identified in Italy and Germany concerns whether the validation procedure allows for an actual and effective redress of the violation. As German and Italian scholars have argued, a validation under § 45 VwVfG, § 114 VwGO or art. 21 *nonies*, para. 2, l. 241/1990 must entail the opening of an *ad hoc* administrative procedure to ensure that a genuine and effective correction of the defect is carried out and that no other reason prevents the upholding of the contested decision. In short, in order to be considered an efficient tool for the final settlement of a dispute, validations should not be carried out for mere 'defensive' purposes; instead, they should require a good faith effort on the part of the defendant authority in redressing the errors of the contested decision.

This particularly applies to validations pertaining to the statement of reasons, which appear as a particularly sensitive issue considering the crucial function of this part of the administrative decision in allowing a full exercise of the right to legal protection, as the duty to state reasons is intended to enable individuals to assess whether there are sound grounds for an appeal[171]. Indeed, the risk of the authority 'blindsiding' the applicant through a substantial and unforeseeable alteration of the contents of the contested act, thus disrupting the applicant's defensive strategy and frustrating the effort put in the judicial challenge, is at the root of the strict limits established by Italian and German case-law to the possibility of amending the statement of reasons[172].

Another fundamental issue raised in the systems considered concerns the ability of these remedies to effectively protect the rights of the citizen affected by the unlawful act and, more broadly, the question of the consequences of original unlawfulness of the decision. Allowing or even encouraging the validation and subsequent upholding of the challenged decision pending judicial review without consequences for the authority may unjustifiably disregard the investment made by the applicant in the judicial challenge and

[171] This aspect was particularly underlined by the Belgian Constitutional Court in declaring the unconstitutionality of the Federal administrative loop and the first version of the Flemish administrative loop : see *supra*, section 2 of this paper.
[172] See, in particular, the conditions set forth by German and Italian case-law to allow a correction of the statement of reasons respectively under § 114, para. 2 VwGO (detailed in section 3 of this paper) and art. 21 *nonies,* para. 2, l. 241/1990 (detailed in section 5).

violate the principle of equality of arms. Indeed, it must be borne in mind that after the correction of the decision, the applicant ends up with the decision they have been entitled to under the law, but only after bearing the effort and costs of the court proceedings.

If these costs are imposed on the applicant irrespective of the original unlawfulness of the contested decision, his right to legal protection could indeed be infringed and the validation of the contested decision should then be considered as an unjustified procedural privilege granted to the authority, which would only benefit from the applicant's action to correct its errors (without suffering any consequence). The merits of the original appeal should therefore be examined in order to order the authority to pay the costs of the proceedings.

Finally, it is crucial that the new decision or the validation decision issued by the authority can be challenged by the applicant[173], possibly without additional costs, by extending the subject matter of the judgement. This should be considered as the necessary counterpart to the authority's power to amend or replace the contested decision during the court proceedings, either on its own initiative or by order of the court.

[173] See, for decisions issued after an administrative loop, Art. 6:19 AWB, Art. 34, para. 4, of the Decree of April 4th 2014 on the organization and jurisprudence of certain Flemish administrative courts, respectively discussed in sections 1 and 2 of the paper) or through a specific remedy allowing the applicant to challenge the subsequent validation decision (Art. 43 c.p.a., as discussed in section 5 of the paper).

ADDRESSING THE INTERPLAY BETWEEN COMPETITION LAW AND DATA PROTECTION LAW IN THE DIGITAL ECONOMY THROUGH ADMINISTRATIVE COOPERATION: THE CJEU JUDGMENT IN THE *META PLATFORMS* CASE

Leonardo Parona[*]

Abstract

The article addresses the issues posed, both at the normative and at the enforcement level, by the interplay between competition law and data protection law, in light of the recent judgment of the Court of Justice in the *Meta Platforms v. Bundeskartellamt* case. The judgment innovates the interpretation of the rules composing the two normative domains, marking a shift from separateness to a logic of complementarity. Nonetheless, while easing the terms of the complex interaction between the two sets of rules and principles, the judgments leaves some questions, in terms of administrative cooperation among the competent enforcement authorities, unanswered. The latter are framed by the Article in terms of missing steps in the way forward, which, also in light of recent developments in EU law (*e.g.* DMA, DSA, AI Act and Data Act), seems to be a steep one.

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1. Introduction

Considering the fact that, in the digital economy, data undisputedly constitute one of the most valuable goods and a driver of profit-making dynamics, it might seem self-evident that competition law would complement data protection law, in order to prevent companies with access to strategic datasets from abusing their market power to the detriment of users and competitors. The interplay between the two normative realms and their enforcement mechanisms have been nevertheless characterized, at least in the last decade, by significant tensions, if not open contrasts, both in terms of objectives and in terms of competences.

The need to address the interplay between data protection and competition law has been perceived worldwide by public institutions[1] and especially by competition authorities[2]. Within the

[1] A report issued by the UK Parliament anticipated, already more than five years ago, that the degradation of privacy standard perpetrated by dominant online platforms could potentially be framed as an abuse of dominant position, in that it negatively impacted upon the quality of the service provided, leaving no valid alternative to the users (see The UK House of Lords – Select Committee on European Union, *Online Platforms and the Digital Single Market* (10th Report of Session 2015–16, 20 April 2016), para 180).

[2] For instance, the US Federal Trade Commission acknowledged that privacy can constitute a non-price competition parameter which could become especially critical in merger operations; however in the specific case in which the issue arose (the *Google/DoubleClick* case) it concluded that «evidence does not support a conclusion it would do so» (FTC Statement concerning Google/DoubleClick – FTC File No. 071-0170 (2007), 2–3). In similar terms see also the joint report issued in 2016 by the French and the German competition authorities and the position expressed by the Catalan Competition Authority, aimed at fostering cooperation with the Data Protection Authority (see, respectively, the report *Competition Law and Data,* available online at the following Internet address: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2, and Autoritat Catalana de la Competència, *The Data-Driven Economy: Challenges for Competition,* 2016, 42, available online at the following Internet address: https://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions

multi-layered normative framework of the European Union, the issue has manifested itself on several occasions, and Member States have already tried to cope with it by looking for a balance in the interaction between potentially non-convergent sets of rules[3].

In this unsettled context, a recent judgment[4] of the Grand Chamber of the Court of Justice of the European Union expressed

/Eco-Dades-i-Competencia-ACCO-angles.pdf). All of them are in line with the holistic approach enshrined in the 2016 Opinion of the European Data Protection Supervisor on coherent enforcement of fundamental rights in the age of Big Data (EDPS, Opinion 8/2016), which launched the Digital Clearing House initiative, *i.e.* a network of authorities based on voluntary collaboration). With regard to Asian countries see for instance S. Van Uystel, Y. Uemura, *Online Platforms and the Japan Fair Trade Commission: the DeNA case as an example of early market intervention,* in B. Lundqvist, M.S. Gal (eds.), *Competition Law for the Digital Economy* (2019), 231 (who show how the Japanese Fair Trade Commission has generally been resistant to applying the Antimonopoly Law to new developments in the market, especially in the digital economy) and V. Sinha, S. Srinivasan, *An integrated approach to competition regulation and data protection in India,* 9(3) *CSI Transactions on ICT* 151 (2021), (who clarify that even the Indian competent authority (the Competition Commission of India) has pointed out the pitfalls of keeping a firewall between the two regulatory realms).

[3] See for instance the case involving Facebook decided a couple of years ago by the Italian Council of State Council of State, Sixth Section, 29 March 2021, n. 2631, which ruled that Facebook's processing of users' data for commercial and profiling purposes represented an unfair commercial practice (the focus being here mainly on the interaction between data protection and consumer law). For an analytical comment of the judgment see S. Franca, *L'intreccio fra disciplina delle pratiche commerciali scorrette e normativa in tema di protezione dei dati personali: il caso Facebook approda al Consiglio di Stato,* 2 *Riv. Reg. Merc.* 362 (2021). In the same line of reasoning, the CJEU more recently established that consumer protection associations may bring legal proceedings (even in the absence of a mandate conferred for that purpose and independently of the infringement of specific rights of the data subjects), against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation (Court of Justice of the European Union, Third Chamber, 28th April 2022, in case C-319/20, *Meta Platforms Ireland Ltd. v. Verbraucherzentralen Bundesverband,* with the comment of E. Mišćenić, *Case note on Meta Platforms Ireland (EuGH v. 28.4.2022 – C-319/20),* 19(5) *Zeitschrift für das Privatrecht der Europäischen Union* 206 (2022)).

[4] Court of Justice of the European Union, Grand Chamber, 4th July 2023, in case C-252/21, *Meta Platforms Inc. et al. v. Bundeskartellamt;* hereinafter "the

some fundamental principles which possibly ease the terms of such complex normative interaction[5], while still posing some challenges in terms of administrative cooperation among the competent enforcement authorities.

The judgment of the Court originates from a request for preliminary ruling of the *Oberlandesgericht* (Higher Regional Court) Düsseldorf, issued in a case where Meta[6] challenged a decision of the *Bundeskartellamt* (the Federal Cartel Office, that is the German competition authority, hereinafter FCO)[7]. The controversy began in February 2019, when the FCO terminated a proceeding against Meta's data processing activities with a decision establishing that the latter abused its dominant position

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judgment". When references will be made in the footnotes to paragraph numbers without further specifications, they are intended to be referred to this judgment.

[5] Such complex interaction has been at times depicted in critical terms, as if finding a balance between the two normative realms represented an overstretching; for this position see: G.A. Manne, B. Sperry, *The problems and perils of bootstrapping privacy and data into an antitrust framework,* and R. Pepper, P. Gilbert, *Privacy considerations in European merger control: a square peg for a round hole,* both in *Antitrust Chronicle,* 2015, 2, 1 ff. A more conciliative view is expressed by N. Zingales, *Data protection considerations in EU competition law: funnel or straightjacket for innovation?,* in P. Nihoul, P. Van Cleynenbreugel (eds.), *The role of innovation in competition analysis* (2018), 79. A more critical view of this aspect of the judgment is that of O. Brook, M. Eben, *Another Missed Opportunity? Case C-252/21* Meta Platforms V. Bundeskartellamt *and the Relationship between EU Competition Law and National Laws, J. Eur. Comp. L. & Practice,* (Online), 2023.

[6] In the text we only refer to Meta for reasons of brevity, however, the proceeding was actually brought against Meta Platforms, Meta Platforms Ireland and Facebook Deutschland.

[7] The proceeding was initiated on 2nd March 2016 on the basis of paragraphs 19(1) and 32 of the *Gesetz gegen Wettbewerbsbeschränkungen* (hereinafter GWB, *i.e.* the law against competition restrictions, an English translation of which is available online at https://www.gesetze-im-internet.de/englisch_gwb/). Under Section 19(1) GWB, principles of the legal system that regulate the appropriateness of conditions in unbalanced negotiations (*i.e.*, between consumers and traders) can be taken as a benchmark when assessing whether business terms are abusive under competition law. The case immediately sparked debate; for some early comments see R. McLeod, *Novel but a long time coming: the Bundeskartellamt takes on Facebook,* 6 *J. Eur. Comp. Law & Practice* 367 (2016); G. Schneider, *Testing art. 102 TFEU in the digital marketplace: insights from the Bundeskartellamt's investigation against Facebook,* 4 *J. Eur. Comp. Law & Practice* 213 (2018); M.N. Volmar, K.O. Helmdach, *Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation,* 2-3 *Eur. Comp. J.* 195 (2018).

on the German market for social networks by imposing, through general contractual conditions and thanks to its market power, certain terms to Facebook's users which violated several GDPR's provisions. The controversial practices, as will be further clarified, consisted in *collecting* users' data generated by various services offered by Meta and third parties[8], *linking* such data to Facebook users' profiles and, finally, *using* such data for several direct and indirect profit-making purposes. Given their unlawfulness, the FCO prohibited Meta from perpetrating such abusive practices and required it to adapt its contractual terms.

While introducing certain policy changes and making some efforts to increase transparency and comply with GDPR's provisions[9], Meta brought an action against the FCO's decision before the Higher Regional Court of Düsseldorf, which, in April 2021, filed the aforementioned request for preliminary ruling. On the one hand, the German court raised doubts as to whether national competition authorities can, in the exercise of their functions, ascertain the legitimacy in terms of compliance with the GDPR, of a company's data processing activities, and eventually sanction the latter on the basis of such finding; on the other hand, it doubted on the interpretation and application of certain GDPR provisions.

The CJEU judgment stemming from such preliminary reference procedure, is both relevant, for the number and complexity of the questions it addresses[10], and innovative from a

[8] In addition to data provided directly by users when signing up for the relevant online services, Meta also collects other user- and device-related data on and off the social network and the services provided by the group.

[9] To be more precise, on 31st July 2019, Meta Platforms introduced new terms of service following a related initiative of the European Commission and of national consumer protection organizations of several Member States. The updated terms expressly state that the user agrees to be shown targeted advertisements instead of paying a monetary price to use Facebook services. Furthermore, since 28 January 2020, Meta Platforms has been offering at a global level the so-called 'Off-Facebook-Activity' service, which allows users to view a summary of the information concerning themselves and obtained in relation to their activities on websites and apps other than Facebook, as well as to disconnect data about past and future activities from their Facebook accounts, if they wish so (see paragraphs 32-33).

[10] As will be further clarified, such questions do not only concern the interplay between data protection law and competition law (questions 1 and 7 of the

methodological and substantial point of view, since it does not follow an all-or-nothing approach, but builds instead a nuanced solution[11], which delineates a balanced interplay between data protection and competition law.

These aspects will be further expounded in the present article by illustrating, first, how the controversy regarding Meta's data processing activities is emblematic of some of the most crucial legal issues characterizing the digital economy [12] (paragraph 2). We will secondly analyze the key passages through which the judgment addresses and untangles the tension between data protection and competition law (paragraph 3). Thirdly, we will discuss some critical issues posed by the judgment, especially in terms of the administrative enforcement of the principles of law established by the CJEU (paragraph 4). Some open questions, as well as some conclusive considerations, will be finally presented in the final paragraph in light of the conducted analysis and of current developments in EU law (paragraph 5).

2. Meta's data processing activities within the broader context of the digital economy

The issues raised by the controversy lie, as anticipated, at the heart of a broader debate concerning the delimitation of the respective roles and the possible interplay between competition law and data protection law in the digital economy [13]. Such

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preliminary ruling), but also a series of issues specifically related to several interpretative issues insisting upon GDPR provisions (questions from 2 to 6).

[11] The CJEU substantially follows the Conclusions presented by Advocate General Rantos and endorses the position of the *Bundeskartellamt*. See *infra,* especially Paragraph 3.

[12] The notion of digital economy is hereinafter referred to in the broad meaning assigned to it by the OECD, *i.e.* as «an umbrella term used to describe markets that focus on digital technologies. These typically involve the trade of information goods or services through electronic commerce. It operates on a layered basis, with separate segments for data transportation and applications» (see OECD The Digital Economy, DAF/COMP(2012)22, 7 February 2013, 5, available at http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf).

[13] Among the extensive literature on this topic, see F. Costa-Cabral, O. Lynskey, *Family ties: the intersection between data protection and competition in EU law,* 54(1) *Comm. Market L. Rev.* 11 (2017); G. Colangelo, M. Maggiolino, *Data Protection in Attention Markets: Protecting Privacy through Competition*, 8(6) *J. Eur. Comp. Law &*

interplay is well summed up by the position expressed by the *Bundeskartellamt*, according to which «where access to the personal data of users is essential for the market position of a company, the question of how that company handles the personal data of its users is no longer only relevant for data protection authorities. It becomes a relevant question for the competition authorities, too»[14].

As it is well known, Meta Platforms operates the social network Facebook as well as several other social networks and services, among which WhatsApp and Instagram. Facebook's business model (but, to a certain extent, the same logic applies also to the other platforms) is based on financing through user-tailored online advertising. More precisely, while access to the social network Facebook and to the rest of the apps and services offered by Meta is free, the company's revenue derives from the price paid by advertisers, who obtain the chance to attract new customers.

This aspect – widely recognized, though still fundamental – deserves a further clarification: although users do not pay a monetary price to access the platform and use its services (rendering the market at issue a *zero-price* one), they do need to accept the specific terms of use by adhering to the consumer agreement, which includes the *privacy policy* unilaterally established by the provider[15]. According to the latter, the user

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Practice 363 (2017). In such interplay among normative bodies, a significant role is also played by consumer law – though not in the present controversy – as observed for instance by I. Graef, D. Clifford, P. Valcke, *Fairness and enforcement: bridging competition, data protection, and consumer law,* 8(3) *Int. Data Privacy Law,* 200 (2018) and W. Kerber, *Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection*, 11 *J. Intell. Prop. Law & Practice* 856 (2016).

[14] Bundeskartellamt, *Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive*, 19 December 2017, available online at the following Internet address: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/ 2017/19_12_2017_Facebook.html. As will be further clarified, this consideration is shared by the Court of Justice.

[15] By signing up to Facebook, the user accepts the *user agreement,* which refers to the company's general terms as far as data and cookies policies are concerned (the *privacy policy*) (paragraph 28). It is worth adding that in the latest months (after the judgment of the Court was issued) in certain geographical area, included EU Member States, Facebook is making it explicit that if users do not wish to have their data used for targeted advertising, they will have to pay a

discloses a series of personal and non-personal data, which are then monetized directly and indirectly by the provider, mainly through profiling activities[16]. Moreover, it is worth adding that, besides the data directly provided by the users when signing up for a given service (such as Facebook), Meta also collects other user- and device-related data on and off that specific service or social network (off-Facebook data), which are linked to the various user accounts. The aggregate view of such data intuitively allows detailed conclusions to be drawn about the users, whose data therefore provide a gateway to extract consumer information concerning both actual and potential purchasing power and preferences[17]. Being instrumental to targeting online advertising, data represent a key revenue source; one that has been defined, as it is well known, in terms of "new currency"[18].

The aforementioned business model is technically possible thanks to the online collection of huge quantities of data (Big Data), their interpolation, and the automated creation on such basis of detailed personal profiles of social network users[19].

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monthly subscription of 12,99 €. By paying such price, Facebook declares that users' data and information will no longer be used, and that advertising will no longer be shown to the user. Meta's announcement is available online: https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/.

[16] The indirect monetization of personal data can be qualified as a hidden cost paid by the user, as explained by M.S. Gal, D.L. Rubinfeld, *The hidden costs of free goods: implications for antitrust enforcement,* 80(3) *Antitrust Law J.* 562 (2016) and F. Polverino, *Hunting the wild geese: competition analysis in a World of "Free",* 1 *Concorrenza e mercato* 545 (2012).

[17] These practices constitute typical examples of «digital market manipulation», which «causes or exacerbates economic harms», as observed by R. Calo, *Digital market manipulation,* 82 *Geo. Wash. L. Rev.* 1026, 1027 (2013).

[18] The evocative expression is frequently used both in scientific discussions and in the political debate; see recently C.A. Makridis, J. Thayer, *Data is the New Currency,* in *The Wall Street Journal,* 31st June 2023, observing that, at least in the US, antitrust law still fails to account for how companies exploit users' information to dominate markets. For an early use of the expression see W.D. Eggers, R. Hamill, A. Ali, *Data as the new currency. Government's role in facilitating the exchange,* 13 *Deloitte Rev.* 19 (2013). More generally on the topic see A. Marciano, A. Nicita, G.B. Ramello, *Big data and big techs: understanding the value of information in platform capitalism,* 50 *Eur. J. L. & Eco.* 345 (2020).

[19] This point is clear in the reasoning of the Court at paragraph 27. Another important case in which algorithmic manipulation has been assessed as a type of conduct that may raise competition concerns is represented by the *Google*

Platforms such as those provided by Meta (and especially Facebook) operate in (*rectius* constitute themselves) two-sided markets[20]. This kind of – digital – markets feature networks effects, meaning that the platform's value, and therefore the provider's revenues, increase the more participants are active on the platform and the more data they put into it.

Such dynamics, which trigger monopolistic tendencies, raise the question whether a new market power definition shall be provided[21]. The accumulation of Big Data in the hands of a single company (or group, as in the case of Meta) therefore represents a matter of concern for competition authorities, which in fact, in the last couple of years, have worldwide initiated several investigations against the major platforms[22]. This is so from two

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Search case, addressed by the European Commission in 2017 (Commission Decision C(2017) 4444 final), on which see K. Bania, *The European Commission's decision in* Google Search. *Exploring old and new frontiers of competition enforcement in the digital economy,* in B. Lundqvist, M.S. Gal (eds.), *Competition Law for the Digital Economy*, cit. at 2, 264. The decision is relevant for our discussion in that it started a paradigm shift in the evaluation on anti-competitive conducts, considering also non-monetary and data-driven transactions between a search engine and its users as parameters to be weighed in a competition analysis. At paragraph 158 of such Decision, the Commission recognized that «even though users do not pay a monetary consideration for the use of general search services, they contribute to the monetization of the service by providing data with each query. In most cases, a user entering a query enters into a contractual relationship with the operator of the general search service».

[20] As clarified in the economic literature, in a two-sided market two sets of agents or customer groups interact through an intermediary (which in the digital economy is an online platform), and the decisions of one set of agents affect the outcomes of the other set of agents. The intermediary benefits by the presence of the two sets of agents on the platform and optimizes its profits by pricing the two groups differently. In our case, one group (users) pays through data, whereas the other (advertisers and companies in general) pays the price required in order to advertise products or services online. On this topic see L. Filistrucchi, D. Geradin & E. van Damme, *Identifying two-sided markets,* 36 *World Competition* 33 (2013); M. Rysman, *The economics of two-sided markets,* 23(3) *J. Econ. Perspectives* 125 (2009); J.-C. Rochet, J. Tirole, *Platform competition in two-sided markets,* 1 *J. Eur. Econ. Ass'n* 990 (2003).

[21] The question is formulated by H.K. Schmidt, *Taming the shrew: is there a need for a new market power definition for the digital economy?,* in B. Lundqvist, M.S. Gal (Eds.), *Competition Law for the Digital Economy*, cit. at 2, 29.

[22] For an analysis of the topic and an overview of the main cases see M. Wörsdörfer, *What happened to "Big Tech" and antitrust? And how to fix them!,* 21

distinct but related points of view: on the one hand, Big Data are an indicator of market power (and possibly dominance); on the other hand, Big Data (and the monopoly over them) can be used in several ways that are detrimental to competition [23]. These anticompetitive practices may consist in exclusionary conducts (*i.e.* excluding actual or potential competitors [24]) or in the imposition of unfair conditions on users (as it was the case in the controversy).

These underlying economic dynamics, as will be further discussed, are crucial in the legal analysis conducted by the Court of Justice.

Having outlined the broader context of the digital economy, it is now possible to turn our attention to the specific circumstances of the case at issue. Meta's processing of personal data is based on three different, but related, operations, the criticalities of which derive from their undeniable interconnectedness[25], an aspect which is underlined by the CJEU but which, adopting an atomistic approach, has in the past been at times underestimated[26].

Philosophy of Management 345 (2022) and V. Robertson, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data,* 57 *Comm. Mrkt. L. Rev.* 185 (2020).

[23] See H.K. Schmidt, *Taming the shrew: is there a need for a new market power definition for the digital economy?*, cit. at 21, 42 and B. Lundqvist, *regulating competition in the digital economy. With a special focus on platforms,* in B. Lundqvist, M.S. Gal (Eds.), *Competition Law for the Digital Economy*, cit. at 2, 2. For a general analysis of the topic see M. Stucke, A. Grunes, *Big Data and competition policy* (2016) and A. Ezrachi, M. Stucke, *Virtual competition: the promise and perils of the algorithm-driven economy* (2016).

[24] In this perspective, it has been proposed to qualify data as an essential facility, the monopoly over which, together with exclusionary conducts, amounts to a violation of competition law. For this theory see I. Graef, *Data protection and online platforms. Data as essential facility?* (2016), especially Chapter 7.

[25] Such interconnectedness also derives from the circumstance that Meta Platforms Inc. is the outcome of a series of merger and acquisition operations occurred in the last ten years, which have significantly accrued the quantity of data concentrated in the hands of one single gatekeeper.

[26] Atomistic approaches to the digital economy might be praised for their clarity and for serving a didactic function; they appear nonetheless unfit to realistically depict how digital economy actually works. According to S.Y. Esayas, *Privacy-as-a-quality parameter of competition. Some reflections on the skepticism surrounding it,* in B. Lundqvist, M.S. Gal (eds.), *Competition Law for the Digital Economy*, cit. at

Such activities, which have been briefly referred to in the Introduction, are the following: *i)* the *collection* of data, both within Meta's own services and apps, and on third party websites; *ii)* the *linking* of the latter with the former, in order to gain greater knowledge and insight on each user's preferences; *iii)* the *use* of such data for fine-tuning services and for tailoring advertising (*i.e.* profiling)[27].

As long as they take place within the EU, Meta's data processing activities must comply with the GDPR, the well-known core principles of which, enshrined in Article 5, are: lawfulness and fairness; purpose limitation; minimization; accuracy or data quality; storage limitation; data security; accountability. On the basis of such regulation, personal data processing is in principle prohibited, unless it is specifically permitted and except for data that have been anonymized (leaving here aside the issues of re-identification that affect anonymization processes). We could in other words say that, opposite to EU and national rules on the freedom of economic enterprise – that represent the backbone competition law builds upon – according to which every business activity is allowed unless specifically forbidden, data protection law works the other way round: a specific legal justification shall

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2, 126, 150 such approaches rely on two underlying assumptions: «(i) distinguishing among different processing activities and relating every piece of personal data to a particular processing is possible; and (ii) if each processing is compliant, the data privacy rights of individuals are not endangered». The Author, however, agreeably observes that «these assumptions are untenable in an era where companies process personal data for a panoply of purposes, where almost all processing generates personal data and where data are combined across several processing activities».

[27] See paragraph 28. Profiling, which is *per se* a controversial practice, generates in turn a series of other problems, which cannot however be dealt with within the scope of the present article. We refer, in particular, to the so-called "filter bubble" and the "creepiness effect". The former refers to the consequence of content personalization, according to which users are only exposed to contents that they are interested to, and that they agree with (determining, among other things, political polarization); see on this E. Pariser, *The Filter Bubble: how the new personalized web is changing what er read and how we think* (2011). The latter refers to the feeling of being observed and tracked by others, who assess and capitalize at the cost of the users' privacy; see on this L. Barnard, *The cost of creepiness: how online behavioral advertising affects consumer purchase intention* (2014).

in fact be provided to allow a company to process data within its economic activity[28].

The questions addressed to the Court of Justice in the request for preliminary ruling insist upon several aspects of the issues that have just been mentioned. Focusing here on the ones that matter the most for the interplay between data protection and competition law in a public law perspective, we shall briefly recall that the German Court asked: i) whether a competition authority of a Member State can find, in the context of the examination of an abuse of a dominant position by an undertaking, that the latter's general terms of use relating to the processing of personal data and the implementation thereof are not consistent with the GDPR, and, if so, whether Article 4(3) TEU must be interpreted as meaning that such a finding by the competition authority, having incidental nature, is also possible where the same or similar terms are being simultaneously investigated by the competent data protection authority (questions 1 and 7)[29]; ii) whether the consent given by the user of an online social network to the operator of such a network may be considered valid, according to Article 4(11) GDPR, and, in particular, whether it can be considered freely given, where that operator holds a dominant position on the market for online social networks (Question 6)[30].

The remaining questions formulated by the referring court (Questions 2-5) exclusively concern data protection law, not imping upon the interplay between the former and competition law, which in fact remains, with regard to this set of questions, on the background. They insist, more precisely, upon the interpretation of Articles 6(1)(b)-(f), 9(1), and 9(2)(e) of the GDPR, which respectively establish the lawfulness requirements for data processing activities in general and with regard to special categories of personal data (such as those revealing, on the one

[28] N. Zingales, *Data protection considerations in EU competition law: funnel or straightjacket for innovation?*, cit. at 5, 108.

[29] These questions therefore insist upon the interpretation of Article 51 et seq. of the GDPR (comprised within Chapter VI of the GDPR, dedicated to independent supervisory authorities), read in conjunction with Article 102 TFEU and 4(3) TEU.

[30] Besides Article 4(11), already mentioned in the text, the questions insist upon the interpretation of point (a) of the first subparagraph of Article 6(1) and Article 9(2)(a) of the GDPR, respectively concerning the lawfulness of processing activities and the processing of special categories of personal data.

hand, racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and, on the other hand, genetic data, biometric data and data concerning health or a natural person's sex life or sexual orientation)[31]. In its answer to this latter set of questions, the Court narrowly interprets the legal bases (other than consent) for data processing.

As anticipated, in the following paragraph the analysis will be conducted from a public law perspective and it will, therefore, focus on the former set of questions, illustrated above under points i) and ii).

3. The interplay between data protection law and competition law in the judgment of the Court

The Court's analysis departs from the acknowledgment of the circumstance that both the facts of the controversy and, consequently, the questions formulated by the referring Court, require to address, and possibly shed light on, several interactions between data protection and competition law.

In this regard, it is necessary to recognize that a certain conduct carried out by a company such as Meta may alternatively: comply with both data protection law and competition law; comply with the former but still violate the latter, or vice-versa; or, finally, violate both normative bodies. To be more explicit, it is possible to say that, considering the different objectives of the two legal disciplines, data processing may breach competition rules while complying with the GDPR[32], and that, conversely, unlawful conducts under the GDPR do not automatically violate competition law. What is undeniable, according to the Court, is therefore that, in circumstances as the ones presented by the case at issue, the two normative domains objectively overlap, however, a clash between the two sets of legal norms and enforcement

[31] Except for few aspects, Meta's contractual terms and practice were found to be in violation of several GDPR provisions by the *Bundeskartellamt*, whose decision was found to be based on a correct interpretation of EU law by the Court of Justice, which, in turn, deemed Meta's exploitation of personal data in violation of the GDPR. See paragraph 64 ff.

[32] In *AstraZeneca v. Commission* (C-457/10, paragraph 132), the Court of Justice recalled that, in the majority of cases, an abuse of dominant position consists of conducts which are otherwise lawful under branches of law different from competition law, such as data protection law, as enshrined in the GDPR.

mechanisms does not constitute an inevitable outcome, but only one possible unwanted effect, which can both be prevented and, eventually, mitigated.

3.1. The relevancy of data protection violations in competition proceedings and the possibility for a competition authority to ascertain them

As far as the first question is concerned[33], the Court of Justice moves from the general consideration that the competences assigned by the two normative bodies to national authorities (*i.e.* competition authorities as the *Bundeskartellamt* on the one hand, and data protection authorities on the other) are distinct. Such distinctness, which entails the performance of distinctive tasks and the pursuance of diverse objectives, might be intended as a first – though not *per se* decisive – guarantee against the risk of conflicts.

Until few years ago, distinctness was however conceived by European Institutions in terms of strict separateness of the two domains, with the consequence that «privacy-related concerns flowing from the increased concentration of data within the control of Facebook […] [did] not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules»[34].

A firewall between the two regulatory domains had therefore to be preserved, according to that view. The rigid respect of enforcement competences, however, was to a certain extent detrimental to a full and effective application of EU law[35].

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[33] The one introduced *supra* at point i) of Paragraph 2.

[34] That was, in particular, the position of the European Commission in the decision concerning the *Facebook/WhatsApp* case, of 3 October 2014 (C(2014) 7239 final, paragraph 87). Such position was more recently confirmed by the Court of Justice (CJEU, Grand Chamber, *Facebook v. Gegevensbeschermingsautoriteit,* 15 June 2021, C-645/19) which established that under the GDPR national supervisory authorities are only competent for the performance of the tasks explicitly assigned to them, and exclusively on the territory of the Member State. In earlier rulings on a related topic (*i.e.* privacy threats deriving from the accumulation of data in one single hand as a result of mergers) the Court of Justice contented itself with indicating that privacy as such was beyond the scope of competition law (see for instance *Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios,* C-238/05, paragraph 63).

[35] For a critical comment of the approach aimed at maintaining such separation in the interpretation and enforcement of the two regulatory realms see G.

Only gradually access and collection of data – including personal data – via digital platforms began to be considered an indicator of market power and, therefore, to be included among the parameters of competition relevant in the digital economy[36]. Not doing so, as wisely observed by the Court in the judgment here commented, would in fact disregard the reality of how businesses work in the digital era and undermine competition law's effectiveness[37].

To state, as the Court does, that rules on the protection of personal data shall be taken into consideration by competition authorities when examining an abuse of a dominant position, does not however imply that the competences attributed to the latter authorities shall be extended. The solution envisaged by the Court of Justice is balanced also under this point of view; in fact, to ensure consistency, it recalls the duty to cooperate and tries to further articulate it in procedural terms. The latter aspect – besides the criticalities that will be discussed in Paragraph 4 – is especially important, and it was arguably not strictly required to the Court, which could have simply referred to the general principle of sincere cooperation as enshrined in Art. 4(3) TEU[38].

Buttarelli, *Strange bedfellows: data protection, privacy and competition,* 34(12) *The Comp. & Int. Lawyer* 1 (2017), observing both in the US and in Europe a tendency to «work in silos». For a more critical view of the inefficiencies of this regulatory approach see I. Scott, T. Gong, *Coordinating government silos: challenges and opportunities,* 1 *Glob. Pub. Pol'y & Gov.* 20 (2021); R. O'Leary, *From silos to networks: hierarchy to heterarchy,* in M.E. Guy, M.M. Rubin (eds.), *Public administration evolving: from foundations to the future* (2015), 85; F. Froy, S. Giguère, *Breaking out of policy silos: doing more with less* (2010).

[36] See the position of the European Commission in the *Microsoft/LinkedIn* case (Commission Decision C(2016) 8404 final) and the judgment of Court of Justice, First Chamber, 14th March 2013, *Allianz Hungária Biztosító Zrt v. v Gazdasági Versenyhivatal,* in the case C-32/11. On the topic see S.Y. Esayas, *Privacy-as-a-quality parameter of competition. Some reflections on the skepticism surrounding it,* cit. at 26.

[37] See paragraphs 50 and 51. Since data represent a key source of competitive advantage in providing service through online platforms, data protection law becomes an essential component in the regulation of the competitive process, with the consequence that, in turn, compliance or noncompliance with data protection rules constitutes a significant competitive differentiator.

[38] In his Conclusions, Advocate General Rantos contents himself with referring to the general principle of loyal cooperation and to the right to good administration, which implies in turn a duty of diligence and care (paragraphs 28-29 of the AG Conclusions, presented on the 22nd September 2022). On the

As observed as well by AG Rantos[39], the Court underlines that the issue at stake is not currently addressed by EU law[40], and, more precisely, that it cannot be ruled under GDPR provisions on the cooperation among data protection authorities[41], nor under competition law rules concerning the cooperation among national authorities and the EU Commission[42], since they have a precise and distinct scope of application.

In the absence of specific rules on cooperation, the Court first recalled the general duty of Member States, including their administrative authorities, to «take any appropriate measure to ensure fulfilment of the obligations» arising from acts of the EU institutions, and «refrain from any measure which could jeopardise the attainment of the European Union's objectives»[43].

Secondly, it introduced a substantial limitation, by stating that a competition authority can consider and interpret the GDPR within a proceeding of its competence only when this is necessary to issue a decision falling within the scope of its tasks[44].

Thirdly, if such necessity threshold is surpassed, even in the absence of risks of potential divergences, the competition authority must consult the data protection supervisory authority that would be competent under the GDPR to address the issues at stake. Such duty becomes more stringent when there is an actual risk of contrasting interpretations concerning the same or similar contractual terms or practices. More precisely, the competition authority must always ascertain whether analogous conducts have already been the subject of prior decisions by a data protection authority. In the presence of such decisions, although the

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principle of cooperation see M. Klamert, *The Principle of Loyalty in EU Law* (2014), especially 235 ff. on the duties to consult and inform.

[39] Paragraph 29 of the AG Conclusions.

[40] See paragraphs 42, 43 and 53. It is worth noting that some national authorities have already coordinated their activities in a spontaneous manner, as it is the case with the Italian Competition, Communications and Data Protection authorities (see AGCM, AGCOM, Garante Privacy, *Indagine conoscitiva sui Big Data,* 10th February 2020, available at www.agcm.it).

[41] The issue is partially addressed by chapters VI and VII of the GDPR, which establish 'one-stop-shop' mechanisms for the exchange of information and for mutual assistance between supervisory authorities.

[42] See Chapter IV of UE Regulation n. 1/2003.

[43] Paragraph 53, citing *UPC Nederland* (C-158/11) and *Sea Watch* (C-14/21 and C-15/21).

[44] Paragraph 54.

competition authority cannot depart from them, it can nonetheless draw its own (and potentially different) conclusions, considered that the same facts might be diversly qualified under the perspective of competition law[45].

Fourthly, shall the competition authority have doubts as to the scope of the assessment carried out by a data protection authority, the former shall consult and seek further cooperation from the latter. The same duty applies when the conduct under scrutiny, or a similar one, is being simultaneously examined by the two authorities. Such consultation is aimed at dispelling doubts and, eventually, determining whether the competition authority should wait for the data protection one to issue a decision, before stating its own assessment[46].

Besides imposing a duty to seek cooperation on part of the competition authority, the CJEU also qualifies the respective obligations of the data protection authority. The latter shall, in fact, respond to requests for information and cooperation «within a reasonable period of time», and inform the former of the intention to initiate a proceeding (eventually in cooperation with other national data protection authorities or with the European Data Protection Board). Shall a data protection authority not reply within a reasonable time, then the proceeding competition authority seeking cooperation would be allowed to continue its own investigation, in the same way as it would do in case no objections to the investigation had been raised[47].

Applying the principles just elaborated to the referred case, the CJEU upheld the *Bundeskartellamt*'s interpretation of the normative framework and, therefore, its conduct. In fact, before adopting the contested decision, the German competition authority contacted both the federal and the regional data protection supervisory authorities (as well as the Irish one) and waited for their responses. The latter confirmed that no investigations were being conducted in relation to facts similar to those at issue in the main proceedings and raised no objection to the competition authority's action. Finally, in the reasoning of the decision sanctioning Meta, later challenged in court, the

[45] Paragraph 56.
[46] Paragraph 58.
[47] Paragraph 59.

Bundeskartellamt expressly referred to the outcome of such administrative cooperation[48].

3.2. The issue of consent: is it freely given when the data processing undertaking holds a dominant position?

As far as the second question is concerned[49], the interpretation of the interplay between the two normative realms offered by the Court also paves the way to a balanced solution with regards to the validity of consumers' consent to online data processing activities. That is so, more precisely, with reference to the specific issue of consent being freely given by a user (under Article 4(11) GDPR[50]) to a platform operator holding a dominant position in the market for online social networks.

As recalled by the Court, according to recital 42 of the GDPR, consent cannot be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or subsequently withdraw consent without detriment[51]. Recital 43 adds that consent cannot be considered valid if there is a clear imbalance between the data subject and the controller and that it is presumed not to be freely given if it is not possible for the user to give separate consent to different personal data processing operations. A further normative parameter relevant under this point of view in the analysis of the Court is represented by Article 7(4) GDPR, under which the circumstance that a contract's performance is conditional upon the consent to personal data processing activities

[48] Paragraphs 60-61.

[49] The one introduced *supra* at point ii) of Paragraph 2.

[50] In its judgment of 11th November 2020, *Orange Romania* (C-61/19, paragraphs 35-36 and the case-law there cited), the Court of Justice clarified that the wording of Article 4(11) of the GDPR, which defines the consent of the data subject, appears even more stringent than Article 2(h) of Directive 95/46, in that it requires a «freely given, specific, informed and unambiguous» indication of the data subject's wishes in the form of a statement or by «a clear affirmative action» signifying agreement to the processing of personal data relating to him or her. Moreover, as the EDPB pointed out, the adjective "free" implies real choice and control for data subjects (see EDPB Guidelines 5/2020, paragraph 13). The same paragraph specifies, inter alia, that consent cannot be considered freely given if, on the one hand, the data subject feels compelled to consent or will endure significant negative consequences in case he or she refuses to consent, and, on the other hand, consent is presented as a non-negotiable part of terms and conditions.

[51] Paragraph 143.

that are not necessary for the performance of the contract itself, must be taken into due account[52]. Finally, according to the first paragraph of the same provision, where processing is based on consent, it is the controller who bears the burden of demonstrating that the data subject has specifically consented to the processing of personal data.

In light of this – briefly recalled – normative framework, the CJEU observes that the fact that the operator of an online social network holds a dominant position does not *per se* prevent users from validly giving their consent to the processing activities of their personal data carried out by that operator[53]. Nonetheless, such circumstance undoubtedly bears significant consequences in terms of the possible existence of an imbalance favoring the latter, since the former's freedom of choice might be affected by a limitation, if not a complete impairment, of the possibility to freely refuse or withdraw consent[54].

Although the point is among the ones requiring further verification by the referring court, the CJEU finds that the controversial data processing activities at issue in the case do not appear to be «strictly necessary for the performance of the contract between Meta Platforms Ireland and the users of the social network Facebook»[55]. This is especially evident for the processing of off-Facebook data, but the same applies to other data processing operations, with reference to which users – according to applicable EU law, as interpreted by the Court – must be free to express individual refusals, instead of being obliged to refrain entirely from using the service[56].

Conclusively, the Court affirms that, although holding a dominant position does not automatically vitiate users' manifestations of consent to data processing activities, this aspect is nevertheless «an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for the operator to prove»[57].

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[52] Paragraph 145.
[53] Paragraph 147.
[54] Paragraphs 148-149.
[55] *Id*.
[56] Paragraphs 150-151.
[57] Paragraph 154.

4. The missing steps: looking for administrative cooperation procedures

The previous paragraphs have illustrated the answers provided by the Court, which, as anticipated at the outset, address in a complementary – instead of opposing – perspective, fundamental issues of coordination that affect the interplay between competition law and data protection law both at the normative and at the enforcement level. The latter aspect, which can be more precisely framed in terms of administrative cooperation, is however thorny[58], raising questions that exceed the scope of the interpretative ones referred to the Court, but which complement them; they ought therefore to be addressed here for the sake of completeness.

Differently from issues of administrative enforcement and cooperation that are encompassed within one single regulatory domain, the interaction and coordination among enforcement authorities operating in distinct sectors have been to a significant extent neglected by EU law and scholarship[59]. This represents a direct consequence of the traditional "vertical silos" normative approach based on the separateness of the various domains we

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[58] The view that this aspect represents a possible point of weakness of the judgement is shared by I. Graef, Meta platforms: *How the CJEU leaves competition and data protection authorities with an assignment, Maastricht J. Eur. Comp. L.* 1, Online First, (2023) especially 9-10, observing that while the Court opens the door for establishing further synergies between the two legal domains, it also leaves competition and data protection authorities with an assignment to coordinate their respective competences and interpretations of the law.

[59] EU law and scholarship, in fact, devote far greater attention to the latter aspect, and this emerges as well from the judgment of the Court when focusing on enforcement mechanisms and their coordination as envisioned by the GDPR and Regulation 1/2003 (see *supra* notes …). For an exception see P. Larouche, A. De Streel, *Interplay between the New Competition Tool and Sector-Specific Regulation in the EU: expert study* (2020). More generally, on the topic of the enforcement of EU law see M. Scholten (ed.), *Research Handbook on the Enforcement of EU Law* (2023); S. Montaldo, F. Costamagna, A. Miglio (eds.), *EU Law Enforcement: The Evolution of Sanctioning Powers* (2021); M. Maggetti, F. Di Mascio, A. Natalini (eds.), *Handbook of Regulatory Authorities* (2022). See for instance the coordinated enforcement action on the role of data protection officers https://edps.europa.eu/press-publications/press-news/press-releases/2023/coordinated-enforcement-action-role-data-protection-officers-0_en.

have referred to at an earlier stage, and, in turn, it weakens enforcement[60].

At the Member State level, such issues have instead been taken into some consideration by legal scholars whom, with regard to independent administrative authorities, have expounded the topic of their potentially overlapping competences[61]. That scholarship, however, mostly concerned the interactions and possible conflicts among either sector specific authorities (such as for instance financial market authorities and communications authorities) or between one of the latter and an authority provided with general competence, *i.e* mainly the national competition authority[62]. Relationships among authorities provided with general competences (such as data protection and competition ones, as in the case at issue) remained instead significantly understudied also at the national level[63].

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[60] See *supra,* Paragraph 3.1, especially note 35 and accompanying text.

[61] See for instance, in the Italian literature, S. Cassese, *L'Autorità garante della concorrenza e del mercato nel "sistema" delle autorità indipendenti*, 1 *Giorn. dir. amm.* 1 (2011); G. della Cananea, *Complementarità e competizione per le autorità indipendenti*, in C. Rabitti Bedogni, P. Barucci (Eds.), *20 anni di antitrust. L'evoluzione dell'Autorità garante della Concorrenza e del Mercato*, Vol. I, (2010), 309, especially 315. M. Clarich, *Le competenze delle autorità indipendenti in materia di pratiche commerciali scorrette,* in *Giur. comm.*, 2010, 5, 688 ss. For more general contributions on the topic, in the Italian literature, see S. Cassese, C. Franchini, *I garanti delle regole* (1996); F. Merusi, *Democrazia e autorità indipendenti* (2000); A. La Spina, G. Majone, *Lo Stato regolatore* (2000); G. Tesauro, M D'Alberti, *Regolazione e concorrenza* (2000); M. Clarich, *Autorità indipendenti. Bilancio e prospettive di un modello* (2005); M. D'Alberti, A. Pajno (eds.), *Arbitri dei mercati. Le autorità indipendenti e l'economia* (2010).

[62] On the topic see N.W. Averitt, R.H. Lande, *Using the "consumer choice" approach to antitrust law*, 74 *Antitrust L.J.* 175 (2007) and, in the Italian literature: F. Cintioli, *La sovrapposizione di competenze delle autorità indipendenti nelle pratiche commerciali scorrette e le sue cause (dopo gli interventi dell'Adunanza plenaria del 2012 e del 2016)*, in Vv. Aa., *Scritti in onore di Ernesto Sticchi Damiani* (2018), 199; L. Lorenzoni, *Il riparto di competenze tra Autorità Indipendenti nella repressione delle pratiche commerciali scorrette*, 1 *Riv. It. Antitrust* 83 (2015); L. Torchia, *Una questione di competenza: la tutela del consumatore fra disciplina generale e discipline di settore*, 10 *Giorn. dir. amm.* 953 (2012); L. Arnaudo, *Concorrenza tra autorità indipendenti. Notarelle bizzarre intorno ad un parere del Consiglio di Stato*, 6 *Giur. comm*. 916 (2010).

[63] For a recent exception see P. Manzini, *Antitrust e privacy: la strana coppia,* in P. Manzini (ed.), *I confini dell'antitrust. Diseguaglianze sociali, diritti individuali, concorrenza* (2023), 123 ff.

The judgment of the CJEU addresses this gap in EU law[64], offering an answer that is based on the complementarity of the functions entrusted to competition authorities and data protection ones, and on the coordination of enforcement actions. As we have seen, on the one hand, this answer entails that, competition authorities can ascertain GDPR violations within their inquiries, as long as they coordinate their action with the competent data protection authorities (see Paragraph 3.1); on the other hand, the solution envisioned by the Court makes it clear that violations of competition rules (such as abuses of dominant positions) complement the normative framework according to which data protection authorities exercise their functions (see Paragraph 3.2).

The Court of Justice's affirmation of the duty to cooperate, which functionally stems from the need to ensure a coordinated enforcement of EU sectoral rules and normatively derives from the general principle enshrined in article 4(3) TEU, is indeed a step forward in addressing some of the most urgent problems affecting the legal regime of online platforms in the digital economy[65]. Nonetheless, both history and practice suggest that cooperation between administrative authorities, which are institutional actors operating within complex systems[66], is better ensured within

[64] Previous caselaw of the CJEU mainly addressed the issue of contrasts, rather than coordination, and interpreted contrasts among authorities in a narrow way. See for instance Court of Justice, Second Chamber, 13th September, 2018, *AGCM v. Wind Tre,* in the case C-54/17, where it established that issues of competences typically arise in case of «conflict» between applicable provisions, a term which «refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end» (Paragraph 60).

[65] In this sense, the envisioned cooperation might represent a successful strategy of «coalition capacity» among administrative authorities; the expression is borrowed from G. Napolitano, *Conflicts and strategies in administrative law,* 12 *Int'l J. Const. L.* 357 (2014), at 366.

[66] The expression is borrowed from G. della Cananea, *Complexity and Public Authorities. A View from Italy,* in M. De Donno, F. Di Lascio (eds.), *Public Authorities and Complexity. An Italian Overview* (2023), XI.

procedures whose requirements and terms are established by written law[67].

Several gaps and practical uncertainties affect the CJEU judgment's effective implementation under this point of view. Just to mention the most evident issues, that is the case of: the conditions upon which the duty to initiate a cooperation becomes stringent in a given case; the form and time of consultations and information exchanges; the mandatory (or non-mandatory) nature of the obligation to wait for a reply; the binding or non-binding force carried by the competent authority's opinion; the possible avocation of the case by one authority and the establishment of conjunct enforcement actions.

Filling these gaps is indeed a complex task and it has a bearing on delicate institutional balances; it would be therefore unthinkable to even attempt an answer in the present article. What can be nonetheless observed here is that sharp-edged solutions seem utterly unfit for addressing these issues: a chronological or first-arrived-first-served criterion of coordination, the simple interchangeability of data protection and competition authorities, as well as a – highly improbable – fusion of the two, are all options that seem both normatively untenable and practically unworkable.

Finally, in addition to the uncertainties of procedural nature affecting the coordination duty affirmed by the CJEU, the solution envisioned in the judgment also raises concerns of a more general and systemic nature, impinging upon the principle of legal certainty and on the coherence of the legal system. Under this latter point of view, it cannot for instance be excluded that, based on the solutions adopted following the CJEU's judgment, a company might first be found – incidentally – not in violation of the GDPR by the inquiring competition authority, then persist in its – putatively legitimate – data processing practices, but finally be found at a later stage nonetheless in violation of data protection rules by the competent authority. The proceeding authorities' efforts of coordination envisioned by the CJEU's judgment could of course prevent the occurrence of this kind of situations and, especially, of their inconsistent outcome. However, both the aforementioned procedural uncertainties and the inapplicability in

[67] See on the topic J. Freeman, J. Rossi, *Agency Coordination in Shared Regulatory Space,* 125(5) *Harv. L. Rev.* 1131 (2012), and F. Cortese, *Il coordinamento amministrativo. Dinamiche e interpretazioni* (2012), especially 135 ff.

these matters of a *ne bis in idem* principle, do not ensure that this case constitutes a mere hypothetical, representing – rather – a risk.

Antinomies and incoherencies are of course not a novelty to our legal systems, but they can be nonetheless exacerbated by the normative and enforcement conundrums that characterize the regulation of the digital economy. When multiple authorities, tasked with distinctive competences and pursuing different objectives, apply the same normative framework but reach conflicting outcomes, a *vulnus* is clearly inflicted to the legal system's coherence (as well as to citizens and enterprises' legitimate expectations).

That is why the solution envisaged by the CJEU, while representing a fundamental step towards the right direction, must be followed by further steps of the legislators (both European and of the Member States) and of national administrations, that will need to give form, procedure, and substance to administrative cooperation.

5. The complex way forward

Current European Union law developments interact in different ways with the principles established in the commented judgment: in part they represent complementary steps in the direction envisioned by the Court of Justice; in part they pose further challenges at the enforcement level. By mentioning recent EU law, reference goes here, in particular, to the regulations composing the EU Digital Services Package (*i.e.* the Digital Markets Act and the Digital Services Act, hereinafter DMA and DSA) [68] and to the draft regulations on artificial intelligence (hereinafter AI Act)[69] and data (hereinafter Data Act)[70].

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[68] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and
fair markets in the digital sector (DMA) and Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (DSA). See on the topic A. Manganelli, A. Nicita, *Regulating Digital Markets. The European Approach* (2022).

[69] European Commission Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence, COM(2020)842 final. On the topic see G. Resta, *Cosa c'è di "europeo" nella Proposta di Regolamento UE sull'intelligenza artificiale?,* 2 *Dir. informaz. e informatica* 323 (2022) and B. Marchetti, L. Parona, *La regolazione dell'intelligenza*

Especially the DMA seems to be built upon the same principles established by the Court – or *vice versa*, considered that the judgment was issued after the entry into force of the DMA[71]. The key provision under this perspective is represented by Article 5(2), according to which gatekeepers (among which Meta is included, being therefore subject to the supervision of the European Commission[72]) shall not «(a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper; (b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services; (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and (d) sign in end users to other services of the gatekeeper in order to combine personal data» unless the user has been presented with the specific choice and has given consent. Such requirements are instrumental both to competition, aiming at ensuring that gatekeepers «do not unfairly undermine the contestability of core

artificiale: Stati Uniti e Unione europea alla ricerca di un equilibrio, in *DPCE Online,* Monographic Issue, 236 (2022) and the literature there cited.

[70] European Commission Proposal for a Regulation of the European Parliament and of the Council on harmonized rules on the fair access to and use of data, COM(2022)68 final.

[71] Although there is no express reference to this in the reasoning of the judgment, it is possible to argue that the Court interpreted the normative framework applicable to the controversy in light of the principles established by the DMA (we shall recall that the DMA entered into force 1st November 2022, the judgment was issued on 4th July 2023, and the facts of the controversy date back to February 2019). On the DMA see A.C. Witt, *The Digital Markets Act – Regulating the Wild West,* 60 *Comm. Mrkt. L. Rev.* 625 (2023).

[72] Gatekeepers are undertakings providing core platform services (according to Article 2) designated as such by the European Commission under the procedure individuated by Article 3. On 6th September 2023 the Commission qualified Meta among the gatekeepers (together with Alphabet, Amazon, Apple, ByteDance and Microsoft). The qualification in terms of gatekeeper is subject to periodical revision (at least every two years) and gatekeepers are required to comply with DMA's provisions within 6th May 2024.

platform services», and to a more effective protection of users' data[73].

This provision patently resonates with the principles established by the Court of Justice in relation to the need to «enable end users to freely choose to opt-in to such data processing and sign-in practices by offering a less personalised but equivalent alternative […] without making the use of the core platform service or certain functionalities thereof conditional upon the end user's consent»[74].

These commonalities are indeed welcome, in that they consolidate a complementary vision of the interplay between data protection and competition law in the digital economy. Some reasons of concern emerge, however, with regard to the interaction and coordination of the different enforcement competences established by these and other EU regulations and by national laws.

Both the DMA and the DSA bluntly address the issue by stating – as it is usually the case – that they apply «without prejudice» to other EU law rules[75]. Furthermore, some provisions of the DMA and of the DSA indeed encompass various forms of cooperation; nonetheless, on the one hand, they do not lay down detailed procedural rules, but rather establish a general duty to cooperate and to exchange information, and, on the other hand, they mainly follow a vertical silos approach, circumscribing cooperation among the national authorities competent for each sector[76].

These aspects *per se* deserve further attention[77]. They shall be, moreover, closely scrutinized in that they add a layer of complexity to enforcement competences: data protection and competition rules, as it is well known, are mainly enforced through *ex post* controls carried out either by national authorities or by the EU Commission and the EU Data Protection Board

[73] See Recital 36 of the DMA.

[74] *Id.*

[75] See respectively Article 1(6) of the DMA and Article 2(4) of the DSA.

[76] See respectively Recital 90 and Article 37 ff. of the DMA, Recitals 125-126 and Article 49 ff. of the DSA, and Article 23 of the proposed AI Act.

[77] For an early comment on some of these issues see J. Blockx, *The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices,* 14(6) *J. Eur. Comp. L. & Practice* 325 (2023)

(depending on the relevancy of the violation); the DMA and the DSA confer enforcement competences – to be exercised both through *ex ante* controls and *ex post* investigations – to the European Commission[78]; whereas, finally, national authorities will foreseeably represent the main enforcers of the AI Act.

The challenges posed by the digital economy, as exemplified by the controversy at issue in our case, call for considerable synergy efforts on part of the regulators and of the enforcing authorities; the outlined scenario, however, intuitively renders cooperation among such authorities complicated, both in theory and in practice. In light of the reasoning of the Court and of the analysis conducted in the previous Paragraphs, the way forward indeed needs to be represented by stronger administrative cooperation; such way, though, is steep and paved with obstacles.

[78] The DMA, in particular, is enforced by the European Commission, with national authorities being only allowed to initiate investigations into potential infringements and then having to pass information to the Commission according to Article 38(7) and recital 91 of the DMA. On the topic see A.C. Witt, *The Digital Markets Act – Regulating the Wild West,* cited at 71, 643 ff.

PRESERVING ENVIRONMENTAL SAFEGUARDS IN THE ANTHROPOCENE: NON-REGRESSION AMONG ENVIRONMENTAL LAW PRINCIPLES AND ITS IMPLICATIONS

*Marta Pecchioli**

Abstract

The Anthropocene era, characterised by a significant human influence on the Earth's environment, calls for urgent legal responses to counter ecological degradation. This paper discusses the principle of non-regression within environmental law as an innovative means to combat climate change and preserve the well-being of all living species. The principle requires that existing legal guarantees for the protection of the environment should not be diminished over time and, where possible, should be improved. Despite its importance, challenges arise regarding its implementation and compatibility with other legal principles. The analysis explores first the evolution of environmental law principles, the challenges they pose and the intersection between environmental law and human rights. Secondly, it moves on to investigate the proliferation of the principle of non-regression at the international and European levels. It states that such principle is gaining ground, even in the absence of its explicit recognition in legal sources. Finally, it addresses concerns about its impact on two founding principles of the EU and of all democratic systems, namely the rule of law and equality, arguing that they are unjustified. Ultimately, the study emphasises that, although challenges persist, the principle of non-regression is less problematic than it seems and an important tool for reshaping environmental law in the age of the Anthropocene. In order to ensure its effectiveness, it is necessary to change the way environmental protection laws are viewed, shaped and implemented.

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Introduction

The term 'Anthoropocene' is used to describe the era after the Industrial Revolution, characterised by a significant impact of human activities on Earth. The transformation and subsequent degradation of the environment by human action has become particularly evident since the 1950s[1], highlighting the need for a different approach to inhabiting the planet. This transition involves recognizing the intrinsic connection between economic and ecological in-

[1] The so-called Great Acceleration: see Hibbard et al., 'Decadal interactions of humans and the environment' in R. Costanza et al., *Integrated History and Future of People on Earth* (2006).

terests and moving from a neo-liberal economic model to an ecological one[2]. Accordingly, it has been noted that '*l'urgence écologique se traduit par une urgence juridique*'[3], thus highlighting the pressing need for legal responses and a swift shift in the understanding of development principles.

This work does not wish to contribute to the longstanding discourse concerning legal mechanisms in the battle against climate change. Instead, it deals with the innovative principle of environmental non-regression, which provides that public authorities are prohibited from reducing or weakening legal guarantees of rights over time. While this principle has been endorsed about the values enshrined in Article 2 TEU[4], as well as in the domains of trade, investment[5] and labour[6], its application in the environmental context is still evolving. This has led to uncertainties regarding its nature, enforceability and relationship with other legal principles. This article aims to tackle some of these concerns. The analysis begins with a brief summary of the features and challenges of environmental law principles (Section I). Then, it raises the question of the existence of a principle of environmental non-regression by looking at its spread in international and national law (Section II). Finally, it explores the potentially problematic interplay between non-regression and two other principles that are central to democratic societies, namely the rule of law and equality (Section III).

SECTION I

1. The legal features of environmental law principles and their challenges

Principles generally emerge more slowly than rules, as a consequence of a change in the social substratum to which positive law

[2] W. E. Rees, *Ecological economics for humanity's plague phase*, 169 *Ecol Econ* (2020).
[3] O. Barriere, *L'urgence écologique, un impératif juridique*, 46(1) *RJE* 5 (2021).
[4] See e.g. E. Dice, *The Principle of Non-Regression in the Rule of Law in the EU* (2023) and D. Kochenov, *The Acquis and Its Principles: The Enforcement of the 'Law' Versus the Enforcement of 'Values' in the EU*, in A. Jakab and D. Kochenov, *The Enforcement of EU Law and Values* (2017).
[5] A.D. Mitchell and J. Munro, *An International Law Principle of Non-Regression from Environmental Protections*, 72(1) *ICLQ* (2023).
[6] See Section III.

gradually conforms[7]. Environmental law principles emerged as a response to ecological concerns, when awareness of the need to promote cooperation between States in order to achieve common benefits began to grow. On the one hand, the foundational substantive principles of environmental law developed between the 1972 Stockholm Conference and the 1992 Rio Conference[8]. The former enshrines the right to a high-quality environment and the prohibition of transboundary pollution. The latter establishes the principles of sustainable development (SD), intergenerational equity, precaution (PP), common but differentiated responsibility (CBDR) and the polluter pays principle (PPP). On the other hand, the Aarhus Convention of 1998 introduced procedural rights. Its pillars are the access to information, public participation and access to justice in environmental matters.

The importance played by principles is undisputed. In line with their etymology[9], they reflect the ethical values of a community, thus serving as a foundation for more detailed legislation and influencing the reasoning of judges. Yet, as their formulation is more general than rules, they might seem to contravene legal certainty. This claim, however, faces three obstacles. Firstly, the principles' strength lies precisely in their flexibility[10], which makes them adapt better and faster to different situations, ultimately determining their stability. Secondly, the distinction between rules and principles is not always as clear-cut as it might seem[11]. The formulation of some principles (such as the prohibition of transboundary pollution, the PP, or the PPP) seems quite narrow as discretion mainly concerns the modalities of implementation of the obligation. Instead, principles like that of SD[12], CBDR or intergenerational eq-

[7] N. Granato, *Il principio di non regressione in materia ambientale*, 3 *Giustamm.it* (2020).

[8] Which approved the United Nations Framework Convention on Climate Change (UNFCCC).

[9] From latin '*principium*'.

[10] T. Tridimas, *The General Principles of Law: Who Needs Them?*, 52(1) *Les Cahiers de Droit* (2015) talks about the 'protean nature' of general principles of law.

[11] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* 453 ff (2020).

[12] On its controversial nature, see J. Verschuuren, *Principles of Environmental Law: The Ideal of Sustainable Development and the Role of Principles of International, European, and National Environmental Law* (2003) and V. Lowe, *Sustainable Development*

uity have a vaguer content, which classifies them as proper principles[13]. Thirdly, when a case cannot be resolved by relying on rules alone, the use of principles is made more legitimate by the use of mid-level principles. These are embodied in the principles themselves and, being more restrictive than the latter but less than the rules, they mediate between the two, allowing agreement on interpretation even when there is no consensus on the fundamental principle[14].

To define the legal nature of principles is a more complex task[15]. This is due to their often ambiguous and open-ended formulation, their different interpretations by different legal systems and their enunciation in unconventionally legal sources of law, such as merits review decisions, policy documents and international soft law agreements[16]. Moreover, they are not exclusively written, some principles belonging to customary law[17], or being inferred by deduction[18]. The question therefore arises whether principles of environmental law, even where not explicitly or implicitly contained in treaties, are capable of direct application. Although the point is debated, support is given here to the thesis dictating that, in order to maintain the normative scope of a principle, its reiteration in normative documents (even non-binding ones, as long as its wide acceptance is demonstrated[19]) and its formulation in sufficiently prescriptive terms are sufficient[20].

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and Unsustainable Arguments, in Boyle A. and D. Freestone (eds.), *International Law and Sustainable Development* (1999).

[13] U. Beyerlin, *Different Types of Norms in International Environmental Law Policies, Principles, and Rules*, in D. Bodansky et al. (eds), *The Oxford Handbook of International Environmental Law* (2007).

[14] K. Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12(1) *Law Philos* (1993).

[15] See, R. Dworkin, *Taking Rights Seriously* (2013) and R. Alexy, *A Theory of Constitutional Rights* (2002).

[16] See E. Scotford, *Environmental Principles and the Evolution of Environmental Law* 3-28 (2017).

[17] M. Vordermayer-Riemer, 433 (2020).

[18] A principle that can be derived by inference is that of intergenerational equity. Although variously mentioned in international treaties, its legal status has remained undefined and, in any case, its meaning is said to be implicit in the concept of SD: see V. Barral, *Sustainable Development in International Law: Nature; and Operation of an Evolutive Legal Norm*, 23(2) *EJIL* 380-381 (2012).

[19] M. Vordermayer-Riemer, *Non-Regression in International Environmental Law*, cit. at 17, 460.

[20] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, cit. at 11, 458.

From the assertion of the normative nature of environmental law principles derives the question of their justiciability. Scotford notes that environmental law principles can be used by judges as policy or legal instruments[21]. In the first case, they do not influence the outcome of the decision at all. In the second case, they are used teleologically to resolve questions of interpretation or to limit the discretion exercised by legislators. In any case, they are rarely used as a means of independent judicial review, especially if they are particularly general and likely to change their meaning according to the context of application. In this vein, it has been argued that the PP and PPP, being more 'stable' than other principles of environmental law, are more frequently litigated in court[22]. Overall, the Court of Justice's (ECJ) jurisprudence demonstrates a tendency to make environmental law principles justiciable by indirect means, as it often resorts to implicit or explicit links between them and the relevant measure under scrutiny[23]. This could also be due to the fact that the courts, considering the broad scope of principles, do not deem themselves competent to carry out a penetrating review of their merits.

A further obstacle to the correct functioning of environmental law principles is to be found in their insufficient practical application[24] and in the inadequacy of the efforts to realise the goals set by the United Nations Framework Convention on Climate Change (UNFCCC)[25]. This has been compounded by the failure to make proper efforts to create legal systems capable of scratching the

[21] E. Scotford, *Environmental Principles and the Evolution of Environmental Law*, cit. at 16, ch 4.
[22] C. Hilson, *The Polluter Pays Principle in the Privy Council*, 30(3) *J Environ Law* 512 (2018).
[23] Examples of the former are Case T-13/99 *Pfizer v. Council* [2002] ECR II-3305; Case C-2/90 *Commission v. Belgium* (*Walloon Waste*) [1992] ECR I4431; of the latter: Case C-293/97 *R v. Secretary of State for the Environment and MAFF*, *ex p. Standley* [1999] ECR I-2603; Case C-236/01 *Monsanto v. Presidenza del Consiglio dei Ministri* [2003] ECR I-8105. See C. Hilson, *Rights and Principles in EU Law: A Distinction without Foundation?*, 15(2) *MJ* (2008).
[24] T. Scovazzi, *Il Principio Di Non-Regressione Nel Diritto Internazionale Dell'ambiente* in D. Marrani (ed.), *Il Contributo del Diritto Internazionale e del Diritto Europeo all'affermazione di una Sensibilità Ambientale* (2017).
[25] W.F. Lamb et al., *A Review of Trends and Drivers of Greenhouse Gas Emissions by Sector from 1990 to 2018*, 16(7) *Environ Res Lett* 73005 (2021). See also J. Kuyper et al., *The Evolution of the UNFCCC*, 43(1) *Annu Rev Environ Resour* (2018).

causes of environmental disruption beyond the surface[26]. This is due, on the one hand, to the difficulty of reconciling different political and cultural visions[27] and in the unwillingness of many States to undertake concrete commitments. An example of this can be provided by looking at the evolution of the CBDR principle, which will be discussed below. On the other hand, in light of the complexity of the topic and the increasing environmental crises, the legislation has exponentially grown, giving rise to the fragmentation of environmental law[28]. This has accentuated regulatory inconsistencies[29], and further discouraged States from fulfilling their environmental pledges[30].

2. The right to a healthy environment as a human right

Nowadays, there is a widespread awareness that without a healthy environment, other fundamental rights, such as the right to life and dignity, cannot be realised (and vice versa). Therefore, environmental issues can be widely recognised as being closely related to human rights. It is suggested that when talking about environmental protection the phrasing 'expansive right to the environment'[31] or 'human right to the environment'[32] would be the most

[26] J.G. Speth, *Red Sky at Morning: America and the Crisis of the Global Environment* 102 (2004). See also W. Boyd, *Climate Change, Fragmentation, and The Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32(2) *U Pa J Int'l L* (2010).

[27] According to the Brutland Report, 'The Earth is one but the world is not'. See World Commission on Environment and Development, *Our Common Future* 26 (1987).

[28] F. Zelli and H. van Asselt, *The Institutional Fragmentation of Global Environmental Governance: Causes, Consequences, and Responses – Introduction*, 13(3) *GEP* (2013).

[29] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, cit. at 11, 405 who states that 'while the volume of laws is increasing, their quality is declining'.

[30] J.C. Morgan, *Fragmentation of International Environmental Law and the Synergy: A Problem and a 21st Century Model Solution*, 18(1) *Vt J Envtl L* (2016).

[31] L.E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law - It Depends on the Source*, 12 *Colo J Int'l Envtl L & Pol'y* (2001) says that the expansive right to the environment incorporates the right *to* environment (with its anthropocentric emphasis) and that *of* environment (focused on the environment's intrinsic value).

[32] D. McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 *ICLQ* 810 (1996). In the opposite vein, see G. Handl, *Human Rights and Protection of the Environment: A Mildly "Revisionist" View* in A.C. Trinidade, *Human Rights, Sustainable Development and the Environment* (1992).

appropriate. These expressions encompass both the substantive principles and rights aimed at guaranteeing minimum standards of environmental quality, as well as the procedural ones linked to them.

The first document to account for the link between environmental law and human rights was the Stockholm Declaration which, also with respect to intergenerational equity, guaranteed individuals the right to freedom, equality and adequate living conditions, to be realised 'in an environment of a quality that permits a life of dignity and well-being'[33]. Later, this has been recognised in various reports, international soft law instruments, national constitutions and judicial decisions. In the EU, the right to the environment does not appear in the Treaties as a fundamental right. However, since the Lisbon Treaty was introduced and gave the Charter of Fundamental Rights (and thus Article 37 on the protection of the environment therein) the same legal value as the Treaties, it contains all the virtues of such rights[34]. Yet, the autonomy of a human right to the environment struggles to be recognised. Judicial decisions usually protect environmental interests when their impairment is linked to that of a human right, such as the right to life or that to private and family life[35]. Even the recognition in national constitutions does not seem to guarantee a subjective right to bring legal action[36].

To admit that environmental protection is now a human right could, firstly, facilitate its justiciability. Indeed, when a fundamental right is at stake, any holder can claim protection from a court. Furthermore, the argument that most environmental provisions, due to their generality, are considered to contain guiding principles

[33] Preamble and Principle 1.

[34] M. Prieur, *Le Principe de Non Regression "Au Cœur" du Droit de l'Homme* 137 at <https://e-revista.unioeste.br/index.php/direitoasustentabilidade/article/view/12361/8610>.

[35] *E.H.P. v Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984); *Oneryildiz v Turkey* (2002) ECHR App no 48939/99; *López Ostra v Spain* (1994) ECHR App no. 16798/90; *Kyrtatos v Greece* (2003) ECHR App no. 41666/98. An independent right to a healthy environment has been recognized, for example, in *Commission of the European Communities v Council of the European Union* (Case C-176/03 [2005] ECR I-07879) and *Taskin and Others v* Turkey (2004) ECHR App no 46117/99.

[36] G. Romeo and S. Sassi, *I modelli di costituzionalismo ambientale tra formante legislativo, giurisprudenziale e culturale*, 2 *DPCE Online* (2023) at <https://iris.unibocconi.it/handle/11565/4056896> 814-815 and the mentioned case law.

that influence the interpretation and application of the law without being judicially enforceable, would be curbed. Secondly, it would increase the efforts of public authorities in environmental protection, as the recognition of a human right is followed not only by a negative obligation on their part (i.e. the duty to abstain from actions that might lead to its limitation, destruction or abrogation), but also a positive one[37]. The latter would be particularly evident in the case of measures aimed at implementing principles such as sustainable development, CBDR or intergenerational equity, which have a distinctly programmatic nature.

Overall, the question of whether it is possible to recognise the autonomy of a human right to the environment depends on the political setup of each legal system and its willingness to leave the courts free to interfere in the decisions of governments[38]. In Europe, despite some hesitations, the requirements for affirming the existence of such a substantive and independent right seem to be met[39]. This proposition is supported by certain judicial rulings[40], the enshrinement of environmental protection in national constitutions, the importance attached to effective judicial protection and to procedural rights, as well as the scope of Article 37 of the ECHR.

SECTION II

In advocating the existence of a principle of non-regression, the legal doctrine has played a central role. Since, to date, the affirmation of the principle at the international level has encountered some obstacles, various scholars[41] have attempted to abstract it by studying and comparatively analysing treaties, international declarations, constitutional provisions and judicial decisions. Some significant milestones are briefly examined in the course of this sec-

[37] P. Craig, *EU Administrative Law* 510-511 (2006).
[38] A. Boyle, *Human Rights or Environmental Rights - A Reassessment*, 18 *Fordham Envtl L Rev* 507 ff (2007).
[39] See N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81(1) *Nord J Int Law.*
[40] See Section II, para. 1.1.
[41] Particularly important is the analysis conducted in France by Michel Prieur and the *Centre International de Droit Comparé de l'Environnement* (CIDCE).

tion, before moving on to discuss the Global Pact of the Environment (GPE), which represents the first case of a multilateral environmental agreement to codify the principle of non-regression.

1. Direct and indirect recognition of non-regression at international and EU level

In international law, a first reference, albeit indirect and partial, to the principle of non-regression can be found in the document *The Future We Want*, adopted in 2012 following the Rio+20 Conference. Paragraph 20 states: 'It is critical that we do not backtrack from our commitment to the outcome of the Earth Summit'. The choice of the verb 'backtrack', instead of 'regress', was due to the concern (expressed primarily by the United States during the negotiations in New York) that the explicit assertion of a principle of non-regression would tie the hands of Congress excessively. Later, the principle was mentioned in the Escazù Agreement and in the International Covenant on Environment and Development. Except for these minor examples, no other international document contains an explicit reference to the principle. Even in the Paris Agreement, despite its ambitious scope, non-regression can only be inferred by reference to the duty of environmental progression. Given the difficulties in directly affirming the principle, some deny that international environmental law has ever recognised the existence of the principle or given a normative character to it[42].

The EU, in the run-up to Rio+20 and although a 2011 European Parliament Resolution called 'for the recognition of the principle of non-regression in the context of environmental protection as well as fundamental rights', surprisingly appeared among the Parties that were against its unequivocal inclusion in *The Future We Want*, on the grounds that such principle does not exist in international law. Moreover, the Treaties lack an explicit reference to this principle, only imposing a duty of progression in environmental protection[43].

[42] A.D. Mitchell and J. Munro, *An International Law Principle of Non-Regression from Environmental Protections*, cit. at 5, 63-64.

[43] Explicitly mentioned in Articles 3 and 4(3) of the Paris Agreement and implicitly derived by a joint reading of Articles 191 TFEU, 3 TEU and 37 of the Charter of Fundamental Rights.

1.1. Non-regression in national law and the cases of France and Belgium

Many states around the world have granted special safeguards to environmental protection. Among these, only a few have recognised a duty of non-regression in their constitutions, national laws and judicial decisions[44]. However, the terminology used by jurists to describe the retreat of the level of protection varies: standstill, *effet cliquet*, intangibility, *status quo*, eternity clause, *prohibicion de regressividad* or *de retroceso* are just some of the expressions to indicate the same phenomenon.

Outside the EU, direct references to the principle can be found in the legislation of some South American countries. For example, the Constitution of Ecuador recognises nature as a subject of law[45] and prohibits the regression of fundamental rights, including that to the environment[46]; the Constitution of Bhutan states that at least 6% of the territory must always be covered by forests[47]; in Paraguay, non-regression is mentioned in the regulation on air quality along with other principles of environmental law[48].

In the EU, non-regression has so far received special attention mainly in France and Belgium[49]. In Belgium, the Constitution provides under Article 23 for a right to the 'protection of a healthy environment'. Although the right to the environment is traditionally referred to as a third-generation right, characterised by a strong collective dimension, the Belgian Constitution classifies it as second-generation, thus equating it with economic, social and cultural rights. The latter require the State to fulfil a positive obligation, which is in line with the Constitution having recognised a right to the *protection* of the environment, rather than the right to a healthy environment *per se*. According to the preparatory documents, the

[44] For an overlook, see L. Collins and D. Boyd, *Non-Regression and the Charter Right to a Healthy Environment*, 29 *J environ law pract* 285 (2016).
[45] Article 71 ff.
[46] Article 11(8).
[47] Article 5(3).
[48] Article 4 of Law no. 5211 on Air Quality (2014).
[49] There are also references in laws, legislative proposals and case law of other Member States. See S. Candela, *Il Principio di Non Regressione Ambientale all'Interno dell'Ordinamento Giuridico Italiano: Indici di Emersione e Prime Iniziative di Riconoscimento*, 2 *RQDA* 30 (2021); A. De Nuccio, *El principio de No Regresión Ambiental en el Ordenamiento Español,* 2 *RQDA* 80 (2021).

provision does not have a direct effect and does not confer subjective rights, but it entails a standstill obligation[50]. This was explicitly acknowledged by the Belgian Constitutional Court only in 2006, in a ruling that, however, limited the scope of such standstill rule[51].

In France, the duty of non-regression was included in Article L110-1 II (9) of the *Code de l'environnement* as one of the principles related to sustainable development. Since this took place through a legislative provision, the proposal to strengthen the principle by promoting it to a higher legal status has been put forward on several occasions, albeit unsuccessfully[52]. The principle was first declared compliant with the Constitution by the *Conseil constitutionnel* in 2016[53] and subsequently applied by the *Conseil d'État*[54]. However, also the French judges, while claiming that the principle of non-regression was compatible with the precautionary principle and while recognising its intelligibility and normative force, have limited its scope. Both rulings will be analysed in greater detail below[55].

2. The Global Pact for the Environment

The GPE originated from the willingness to incorporate the main principles of environmental law into a single document, establish the founding act of an ecological citizenship and contribute to reforming the constitutions of States. The initiative was promoted in France by the *Club de Juristes*, an international network of scholars from various countries. The European Commission supported the initiative through a Recommendation[56] aimed at obtaining authorisation from the Council to negotiate the pact on behalf

[50] I. Hachez, *L'Effet de* Standstill*: le Pari des Droits Économiques, Sociaux et Culturels?*, 24 *APT* (2000).
[51] *D'Arripe and Others v. Walloon Government* (Belgian Constitutional Court, no. 135/2006).
[52] See F. Bouin, *Cinq Années d'Application du Principe de Non-Régression en France*, 2 *RQDA* 72 (2012).
[53] See J. Dellaux, *La Validation du Principe de Non-Régression en Matière Environnementale par le Conseil Constitutionnel au Prix d'une Redéfinition a Minima de sa Portée*, 42(4) *RJE* (2017).
[54] *Décision no. 404391 du 8 décembre 2017.*
[55] Section III, para 1.3.
[56] Recommendation for a Council Decision authorising the opening of negotiations on a Global Pact for the Environment (COM/2018/0138 final).

of the EU. The draft of the pact was presented in Paris in June 2017 and negotiations are still ongoing[57].

The GPE begins with the Preamble, which sets out the international treaties and soft law instruments from which it draws its inspiration. Compared to these, in some respect the GPE constitutes a novelty. A first element of innovation is the choice of the term 'pact': this reveals the intention to present the agreement as ethics-based, representative, democratic and legitimate as possible. Regarding its content, it is based on two pillars, namely the universal right to an ecologically sound environment (Article 1) and the duty to care for it (Article 2), which are a leitmotif of environmental law agreements. Here, what is new is the scope of application, since the duty to protect the environment is extended by the GPE to private law subjects, recognising that not only public authorities are to play a pivotal role in environmental protection. The following provisions set out principles familiar to environmental law, without introducing any significant changes, except for Articles 16 and 17[58], which codify for the first time the principles of resilience and non-regression respectively. These two eco-legal principles, born out of the dialogue between law and natural sciences[59], are connected and complementary. On the one hand, the principle of non-regression requires that there be no retreat in the level of environmental protection guaranteed by the law in force; on the other hand, the principle of resilience aims to identify the criticality of each ecosystem in order to prevent its deterioration.

With regard to its impact in the legal scenario, the GPE has been greeted with general optimism, as it was deemed capable of strengthening the scope of environmental law principles, promoting their incorporation into national law and, moving away from a

[57] For an overview, see P. Thieffry, *The Proposed Global Pact for the Environment and European Law*, *Eur Energy Environ Law Rev* (2018); M. Monteduro et al., *Testo e Contesto del Progetto di «Global Pact for the Environment» Proposto dal Club des Juristes*, 1 *RQDE* (2018).

[58] However, Monteduro et al., ibid, argue that the GPE also paves the way for a broader responsibility of States regarding the cross-border nature of prevention, as it imposes a 'reinforced' duty of vigilance. In fact, Article 5, which enshrines the principle of precaution, by requiring States to monitor the activities undertaken in their territories in order to avoid possible repercussions beyond their borders, ties in with Article 7, which contains a complementary duty of information linked to the prevention principle enshrined in Article 5.

[59] N. Granato, *Il principio di non regressione in materia ambientale*, cit. at 7.

sectoral approach to the development of environmental law, encouraging the abandonment of legislative fragmentation[60]. Moreover, if the binding nature of the Pact were recognised, as advocated by the *Club de Juristes*, the problem around the justiciability of its principles could be overcome. The latter would be given direct effect, thus becoming enforceable in court. In this sense, the ECJ would likely be accorded a central role not only as guarantor of the enforcement, but also as the body responsible for defining the trajectory to be taken by the Member States within the framework of the Pact. Without denying its potential, however, it seems wrong to claim that the GEP is without its drawbacks[61]. First, as noted, it largely reproduces principles affirmed elsewhere, without introducing remarkable innovations. In this regard, it has been argued that it is not radical enough, as it 'often regurgitates many, though not all, generally accepted principles of IEL and that it is mostly devoid of an eco-centric ethic of socio-ecological care'[62]. Second, the involvement of non-state actors and subnational entities in its implementation is insufficient, since it is limited to an encouragement contained in Article 14, which is devoid of effect and weaker than the due diligence required from private actors by Article 2. Third, the Pact does not address the central cause of the environmental crisis, that of distributive equality. There is no reference to the latter either in the Preamble or in the resilience principle. This displays the long-standing inconsistency, typical of global law, of contaminating universalist aspirations with a typically Western worldview. Fourth, no mechanism for monitoring and resolving disputes in the global sphere is envisaged. Fifth, it cannot be ignored that the GPE is currently under negotiation and that, if experience teaches us anything, such process generally leads to a decrease in the provisions' prescriptiveness.

Finally, although the *Club de Juristes* has maintained that the GPE is binding, doubts remain as to the legal nature of this instru-

[60] See M. Burger et al., *Global perspectives on a global pact for the environment* (2018) at <https://ccsi.columbia.edu/news/global-perspectives-global-pact-environment>.

[61] See S. Biniaz, *10 Questions to Ask About the Proposed Global Pact for the Environment, Columbia Law School Sabin Center for Climate Law* (2017) at <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1090&context=sabin_climate_change>.

[62] L.J. Kotzé and D. French, *A Critique of the Global Pact for the Environment: a Still-born Initiative or the Foundation for* Lex Anthropocenae? 18(6) *INEA* 816 (2018).

ment. In light of the nature of a pact, the doctrine is divided between those who consider it to be a soft law instrument[63] and those who consider it to be *quasi*-hard law[64]. In reality, the distinction might be of little relevance. On the one hand, soft law can mature into hard law when it generates expectations of conformity that translate into state practices accepted as law[65]. In this sense, the GPE seems to be fit for purpose. On the other hand, to assume that only hard law gives rise to legal obligations would be simplistic and indeed wrong. Soft law agreements also have an authoritative force vis-à-vis the parties entering into them. They simply reflect the evolution of international relations, which have become more flexible and cooperation-oriented[66].

3. Non-regression beyond codification: the implicit recognition

The previous paragraphs have tried to persuade on the progressive popularity of the principle of non-regression at the international and national level. However, if such development was not enough to persuade about the existence and normative scope of the principle, it could be useful to explore whether its existence could be upheld even in the absence of an explicit mention, either because

[63] See T.P. Navajas and N. Lobel, *Framing the Global Pact for the Environment: Why It's Needed, What It Does, and How It Does It*, 30(1) *Fordham Envtl L Rev* 57-58 (2018).
[64] B. McGarry, *The Global Pact for the Environment: Freshwater and Economic Law Synergies*, 21(4) *J Int Econ Law* (2018). Some believe that the Pact does not reflect contemporary environmental problems at all and has no normative force: see C.R. Payne, *A Global Pact for the Environment, in American Society of International Law Insight*, 22(12) (2018) at <https://www.asil.org/insights/volume/22/issue/12/global-pact-environment>.
[65] L. Collins, *Are We There Yet - The Right to Environment in International and European Law*, 3 *McGill Int'l J Sust Dev L & Pol'y* 126 (2007).
[66] L.E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law*, cit. at 31, 43-44. The same applies in areas other than environmental law. For a more in-depth discussion of the general debate on soft law, see J. J Kirton and M. J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance* (2016); D. Bradlow and D. Hunter, *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law* (2019). Specifically on the justiciability of soft law instruments, see Ş. Oana, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (2013).

it is implicit in other general principles, or because it would be guaranteed by the connection between environmental law and human rights.

With regard to the first point, the principle of non-regression appears very similar to those of precaution, intergenerational equity and sustainable development. The PP requires the adoption of appropriate protective and preventive measures when it is not certain that a phenomenon is harmful to the environment, but there are objective and scientifically reliable doubts that it could be. As a technical assessment is required to carry out the measurement, this principle seems to overlap with that of non-regression, which also demands for scientific measurements. The two principles, however, differ in terms of the proportionality assessment they imply, which balances environmental concerns against the other interests at stake. In the case of non-regression, proportionality would act as a catalyst because environmental interests are those that must suffer the lesser restriction. In the case of precaution, it would act as a restraint, because it ensures that precautionary measures impose the least possible sacrifice on interests other than the environmental ones[67]. Moreover, since non-regression aims not only to maintain the standard of protection achieved but also, whenever possible, to improve it, it seems to have a solidaristic vocation that is absent in prevention[68]. As for the principle of intergenerational equity, it implies that States must maintain the diversification (the so-called 'conservation of options') of the natural heritage and preserve its quality (the so-called 'conservation of quality'[69]). Such obligation appears to delineate a duty not to regress in the level of protection. On closer inspection, however, the two principles differ. Intergenerational equity, being strongly future-oriented, is more uncertain from a theoretical point of view and more difficult to use in practice. Furthermore, the non-regression principle has a greater impact as it seeks to prevent *de facto* and *de jure* backward steps, regardless of their impact on options and quality[70]. Finally, the principle of non-regression also differs from that of sustainable development. The

[67] A. De Nuccio, *El principio de No Regresión Ambiental en el Ordenamiento Español*, cit. at 49, 100.

[68] A. Scarpati, *Principio di Non Regressione nell'Ordinamento Belga e Francese, tra Formante Giurisprudenziale e Normativo*, 2 *DPCE Online* 761 (2023).

[69] Both expressions are by M. Vordermayer-Riemer, *Non-Regression in International Environmental Law*, cit. at 17, 436-437.

[70] Ibid.

latter is extremely broad and nebulous. It is characterised by a strong transnational dimension, which is missing in the idea of regression, and encompasses interests beyond environmental protection[71]. Moreover, many doubts exist among experts as to its normative scope, since it is not yet clear whether SD is an ideal, a principle, a meta-principle, or a proper rule[72].

While arguing that there is no need to codify non-regression seems to be open to challenges when considering its affinity with other principles of environmental law, it might be easier to advance the same claim in light of the link between environmental law protection and human rights. In this vein, it has been observed that the principle of non-regression is a false legal creation of environmental law, being derived from human rights law[73]. The Preamble of the Universal Declaration of Human Rights states that the objective of human rights is to 'promote social progress and better standards of life', whilst Article 30 states that the Declaration cannot be interpreted in a way 'aimed at the destruction of any of the rights and freedoms set forth herein'. Similar statements are also found in Article 5 of the Covenant on Social, Economic and Political Rights and the European Convention on Human Rights (ECHR)[74]. A teleological interpretation of these provisions makes it clear, as already discussed, that the recognition of a human right is followed not only by a negative duty, but also by a positive obligation on the part of the State. If, in order to ensure a right, public authorities must invest resources, it is not clear why they should subsequently limit its level of protection. Therefore, if human rights protection is to be progressive, it also cannot regress. Recognition of the existence of a human right to a healthy environment thus presupposes a standstill obligation without making it necessary to categorise it as belonging to the first, second or third generation of rights.

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[71] E. Scotford, *Environmental Principles and the Evolution of Environmental Law*, cit. at 16, 193 ff.

[72] See n 12.

[73] M. Prieur, Une Vraie Fausse Création Juridique: le Principe de Non-Régression, *RJE no. spécial* (HS16) (2016).

[74] Especially the Preamble and Articles 17 and 53.

SECTION III

After having attempted to dispel doubts about the existence of a principle of non-regression by arguing that it is gradually emerging at international and national level, this section investigates the potentially conflicting relationship between the obligation of non-regression and two founding principles of the European Union and of all liberal democracies: the rule of law[75] and the principle of equality. Although equality can be considered a value included in the broader notion of the rule of law, for the purposes of this paper the two concepts will be treated separately. As will be seen, in relation to them, non-regression poses the same and additional problems with respect to the other principles of environmental law.

1. Non-regression and the rule of law

In its relation to rule of law, non-regression becomes particularly relevant with regard to three of its corollaries[76], namely those of legal certainty, the right to judicial review and the separation of powers.

1.1. Non-regression and legal certainty

The principle of legal certainty presupposes, firstly, 'the ability to identify the subject matter as a legal norm'[77] and, secondly, that the law is accessible, intelligible, clear and predictable[78]. The normative dimension of the principle of non-regression has already been discussed. With respect to the second requirement, non-regression seems to comply with legal certainty. By stipulating that the protection afforded to environmental interests may not be regressed, it prescribes a minimum threshold below which it is prohibited to go. At a closer look, however, this principle, rather than possessing characteristics of foreseeability in itself, confers such characteristics on the rules to which it applies. The idea of non-regression, *per se*, appears difficult to be defined: how is regression measured? And from what point in time is it to be assessed?

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[75] This paper does not share Raz's view that respect for the rule of law and democratic values do not necessarily go hand in hand: see J. Raz, *The Rule of Law and ITS Virtue* in Id., *The Rule of Law and the Separation of Powers* (2017).
[76] See T.H. Bingham, *The Rule of Law*, 66(1) *CLJ* (2007).
[77] R. Alexy, *Legal Certainty and Correctness*, 28(4) *Ratio juris* 443 (2015).
[78] T.H. Bingham, *The Rule of Law*, cit. at 76, 69.

A fair attempt to answer these questions exists in the French and Belgian doctrine, especially in light of their greater development of the principle of non-regression compared to other Member States. Regarding the question of whether regressive measures should be considered individually, or as a whole, it has been argued that a global approach is preferable when necessary to integrate into a single set of initiatives that are part of the same problem or contribute to the protection of the same ecosystem[79]. As to the moment from which regression is to be measured, given the positive obligation that the duty to protect the environment places on the State, it might be preferable to calculate it by looking at the immediately preceding legislation, instead of the moment in which the principle was introduced into national law[80]. Moreover, it is questionable whether the principle should only apply to substantive regressions, or also to procedural ones, and whether it applies both to general and more specific provisions. As to the first point, considering the extensive nature of environmental law, which includes procedural obligations, it seems intuitive to assume that the latter may also be subject to a lowered level of protection. With regard to the second point, it appears more reasonable to focus on the protected good, rather than on the type of rule that enshrines it. If, regardless of the rule that has been changed, the general level of protection afforded to that good decreases, a violation of the non-regression principle occurs.

What emerges is that the non-regression obligation alone cannot do much. Its effectiveness depends on parameters that allow for the detection of possible backward steps. Following the example of Belgium[81], this can be achieved by introducing a legislative evaluation procedure and by developing reliable indicators to assess the effects of the legislator's choices. Such a strategy, by linking the assessment to scientific parameters, could perhaps tackle the objections of those who claim that the definition of progress (and, therefore, that of regress) cannot be objective. Nevertheless, one cannot overlook the challenges entailed in such an assessment, which appear to exceed those required when evaluating backsliding in the

[79] L. Dutheillet de Lamothe, *Droit national - Principe de Non-Régression*, 43(1) *RJE* (2018).
[80] Ibid.
[81] I. Hachez, *L'Effet de* Standstill, cit. at 50.

common values enshrined in Article 2 TEU. Indeed, in the environmental sphere the regression threshold is more 'mobile'[82], as it lacks the fixed threshold of the *aquis communautaire* to serve as limit.

1.2. Non-regression and judicial review

It has already been noted that principles are more hardly justiciable than rules in light of their often general (if not generic) formulation and their enunciation in non-traditional sources of law. As to their level of precision, however, principles vary. In this regard, non-regression is likely to be more easily justiciable than other principles of environmental law. In fact, once the way to measure any step backwards in the level of protection has been established, the principle of non-regression would contain a specific obligation that would make it considerably similar to a rule. Therefore, the greatest obstacle to a direct judicial review of non-regression is the absence of its express enshrinement in the law of most Member States, along with its enunciation in the GPE. Since the latter is still in draft form, it is unclear whether it will culminate in a binding treaty or a soft law instrument. Although the difference between hard and soft law is actually more nuanced than many claim, the first option would be preferable in order to ensure the smooth enforceability of its principles. What is more troublesome, however, is the lack of global enforcement mechanisms within the Pact. The monitoring of the implementation of the GPE is mentioned in Article 21, which, nonetheless, only provides for an independent expert group to facilitate compliance. Moreover, the formulation of such provision indicates a great reliance on the conduct of the Parties, upon which the efficacy of the Pact depends. Therefore, on the one hand, it is to be hoped that the prolonged negotiations will not water down the (already rather permissive) scope of the GPE and, on the other hand, that the latter will promote the incorporation of the principle of non-regression at the constitutional level, making it a means of independent judicial review available to the courts.

[82] A. Festa, *Indipendenza della Magistratura e Non-Regressione nella Garanzia dei Valori Comuni Europei. Dal Caso Repubblika alla Sentenza K 3/21 del Tribunale Costituzionale Polacco*, 3 *Freedom, Security & Justice: European Legal Studies* 88 (2021).

1.3. Non-regression and the separation of powers: litigation as a tool for enforcement

While waiting for an explicit recognition of the principle of non-regression by national legislators, the question arises as to whether a 'reverse' enforcement is possible. In other words, one wonders whether the courts could oblige national public authorities to respect non-regression through their rulings. The issue, however, raises problems from the point of view of the separation of powers. While proponents of rights-based theories support judicial activism, political constitutionalists warn against the danger of a 'government by the judges'[83]. According to them, judges, unlike legislators and politicians, have 'neither power nor will, but only judgement'[84]. This would be even more the case in the environmental sphere, given the wide discretion granted to public authorities in setting national policies to address climate change. Nevertheless, there are two circumstances in which even political constitutionalists admit the possibility of judicial power interfering with the political one: when the law is clear and predictable (and thus the boundaries of discretion are well delineated), or when fundamental rights are at stake[85]. Without demeaning the complex nature of the debate, it does not seem difficult to find arguments that would reassure political constitutionalists about the possibility of judges enforcing non-regression. Drawing from what has been argued above, it can be pointed out that, on the one hand, the principle of non-regression has a more precise scope than other principles of environmental law and, on the other hand, the right to live in a healthy qualitative environment is a fundamental right.

Further arguments could, however, be advanced in favour of litigation as a tool for the enforcement of environmental non-regression. Firstly, the case law has already independently applied non-regression in the field of worker protection. In his opinion to the landmark *Mangold*[86] judgment, Advocate General Tizzano has clarified the meaning of Article 8(3) of the Framework Agreement on

[83] P. Craig, *Political Constitutionalism and the Judicial Role: A Response*, 9(1) *ICON* (2011).
[84] Translation from A. Ferrari Zumbini, *The Judicial Power: the Weakest or the Strongest One? A Comparison Between Germany and Italy*, 2 *IJPL* 328 (2023).
[85] P. Craig, *Political Constitutionalism*, cit. at 83.
[86] Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

Fixed-Term Work[87], explaining that the non-regression clause therein is not merely exhortative, but rather binding on the national legislator. However, he also argued that such provision should not lead to a crystallisation of the working conditions, as its main objective is not to prevent the reduction of standards, but to promote transparency. That is, the level of protection should not be reduced without providing an objective and proportionate reason to support it[88]. The same approach was reiterated in *Angelidaki*[89] and *Sorge*[90]. Although, in light of the restrictive scope accorded to the principle, it has been contended that the transparency obligations referred to in these pronouncements are too easy to fulfil[91] and that the non-regression clause is overbroad (and, therefore, ineffective[92]), these judgments have succeeded in indicating the possibility for the European courts to impose limits on national legislators when amending the rules on the protection of workers. However, two remarks are due. To begin with, according to the principles of division of competences and subsidiarity, the ECJ cannot impose a non-regression obligation on Member States in areas not covered by EU competence. Moreover, in the above-mentioned cases the ECJ was relying on the existence of a Directive[93] featuring a non-regression clause related to workers' protection. The absence in EU law of a provision prescribing non-regression in environmental protection is an obstacle to the courts' activism on the matter.

Secondly, imposing environmental non-regression duties on public authorities would not actually result in the annulment of their power. This aspect has been addressed by the Belgian and French case law, which has demonstrated that judges are aware that they do not have unlimited powers when imposing limits on political authorities. The cited *D'Arripe and Others v. Walloon Government* judgment of the Belgian Constitutional Court allows the inference

[87] 'Implementation of this Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the Agreement'.
[88] Paras 58-62.
[89] Cases C-378/07 to C-380/07, *Angelidaki et al. v Organismos Nomarkhiaki Aftodiikisi Rethimnis*, [2009] ECR I-3071.
[90] Case C-98/09, *Sorge v Poste Italiane* [2010] ECR I-05837.
[91] S. Peers, *Non-Regression Clauses: The Fig Leaf Has Fallen*, 39(4) *ILJ* 441 (2010).
[92] L. Corazza, *Hard Times for Hard Bans: Fixed-Term Work and So-Called Non-Regression Clauses in the Era of Flexicurity*, 17(3) *ELJ* 395 (2011).
[93] Council Directive 1999/70/EC of 28 June 1999, implementing the Framework Agreement on Fixed-Term Work.

to be drawn that the principle of standstill is to be applied only to substantial regressions[94] and that retrogession is permissible only when justified by a public interest. The same has been held by the French courts, which since the pronouncement of constitutionality of Article L110-1 II (9) have accorded non-regression a minimum scope[95]. They ruled that non-regression is binding only upon regulatory authorities (not on legislative ones) and that the legislator is always free to amend a previous law, as long as constitutional requirements are not deprived of legal guarantees. In France, however, the limitation to the functioning of the principle can be justified by the fact that the standstill obligation was introduced by legislation, not by an amendment to the Constitution. Indeed, the *Conseil Constitutionnel* has implicitly clarified that the ordinary legislator does not enjoy the same authority as the constituent assembly.

Despite these attempts at downsizing, the principle retains an important function. It sets the minimum level of protection against which the validity of a restriction is examined and requires legislators to justify their regressive choices. At the same time, it does not tie their hands excessively: the legislator can take a step forward, or one sideways. And he can even take a step backwards, if justified[96]. Therefore, it can be argued that the principle of non-regression does not diminish, but rather enhances the legislative function[97]. In this sense, the 'compensation' of regressions with an objective justification is a manifestation of the balancing of different interests, to be carried out through a proportionality test. It can be said, accordingly, that where one opts for a 'moderate' view of non-regression, which requires for an objective justification to allow regressions in environmental protection, accusations of excessively powerful judges are unlikely to arise.

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[94] See M. Martens, *Constitutional Right to a Healthy Environment in Belgium*, 16(3) *Review of European Community & International Environmental Law* 293 (2007), who suggests that such criterion should be abandoned as it is excessively focused on the justification of the intensity of the decrease of protection rather than on the justification of the decrease itself.

[95] *Conseil constitutionnel, Décision no. 2016-737*; more recent judgments are: *Conseil d'État, Décision no.* 420804 *du 9 octobre 2019*; *Conseil d'État, Décision no. 426528 du 30 décembre 2020; Conseil Constitutionnel no. 2020-809 DC du 12 décembre 2020*.

[96] I. Hachez, *L'Effet de* Standstill, cit. 50, 79.

[97] Ibid.

1.3.1. Limits to *locus standi*

An obstacle to the viability of litigation as an enforcement tool is the difficulty of claiming the impairment of the right to the environment when there is no violation of an individual interest. Since environmental protection does not comprise a specific subjective right, but rather a collective interest, traditional rules of standing struggle to apply. This seems contrary to the right to extensive access to justice in environmental matters guaranteed by the Aarhus Convention. Article 9(2) provides that access to justice is to be granted to the 'members of the public concerned' who have a sufficient interest or, where a Party's law so provides, who can assert the impairment of a right. Although Article 9 appears to guarantee the effectiveness of judicial protection thanks to its broad scope, one cannot ignore its 'soft'[98] nature and its continuous references, especially under Articles 9(2) and 9(3), to the discretion of the Parties as to the fulfilment of the requirements for legal standing. Issues emerge particularly in the EU because Member States' traditional objective of judicial review is to protect individual interests[99]. As a consequence, especially in the past members of the public and environmental associations have mostly been denied standing on the grounds that they did not have a sufficient interest under national law or could not assert the impairment of a right of their own[100]. A progressive reversal of the trend can be observed in recent years. From a normative perspective, following the amendment of Regulation no. 2006/1367 (implementing the right to judicial review under the Convention in Europe), NGOs and 'members of the public' are now granted more grounds for bringing actions before the courts. Yet, the most significant changes can be witnessed in the case-law[101], which increasingly recognises environmental associations' legitimacy to act for the violation of collective interests[102], in

[98] E. Rehbinder, *Judgement on German Implementation of the Aarhus Convention*, 41(3) *Envtl Pol'y & L* 145 (2011).
[99] Article 263(4) TFEU.
[100] See S. Poli and T. Tridimas, *Locus Standi of Individuals Under Article 230(4): The Return of Euridice?* in A. Arnull et al. (ed), *Continuity and Change in EU Law* 70 (2008).
[101] See L. Krämer, *The EU Courts and Access to Environmental Justice* in B. Boer (ed), *Environmental Law Dimensions of Human Rights* (2015).
[102] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255; Case C-664/*15 Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation contro Bezirkshauptmannschaft Gmünd*

the name of the principles of broad access to justice and effectiveness of protection. This has proven necessary also in light of the assertion that natural resources constitute a heritage common to the peoples of Europe[103] and the identification of associations as subjects of law, as envisaged in the Convention itself.

Although these developments are to be welcomed, it cannot be ignored that thus far the Court has only extended standing before national courts. The possibility of bringing an action for infringement of provisions protecting the environment (and thus also of the principle of non-regression) directly before the ECJ is still excluded. This is at odds with the fact that, according to Article 216(2) TFEU, the Aarhus Convention and Article 47 of the EU Charter on Fundamental Rights are binding not only on the Member States, but also on the EU institutions themselves. Moreover, the references made by the Convention to state sovereignty make its scope too permissive, thus hindering effective judicial protection of environmental interests.

2. Non-regression and equality

Investigating non-regression in light of equality is interesting because, if the latter is intended as equality before the law, it should be concluded that the prohibition of backwards steps in environmental protection is incumbent on all States. This is in line with the conception of natural heritage as a right to be enjoyed by all humanity and, therefore, as a right that everyone has a responsibility to preserve. Such argument, however, would amount to debasing equality, reducing it to a one-dimensional concept that only considers equality of treatment. The substantive dimension of equality, which pertains to the content of rights and is status-based[104], would be left out. This requires acknowledging, firstly, that countries – even inside the EU – significantly differ in their development and economic possibilities and, secondly, that these differences become

[2017]; Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673.

[103] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7; Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221; Case C-404/13 *ClientEarth v The Secretary of State for the Environment* [2014]; Case C-723/17 *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest* [2019].

[104] T. Tridimas, *The General Principles of EU Law* (2006) 59-60.

particularly evident when it comes to combating climate change[105]. Therefore, in accordance with substantive equality, 'subsistence' regressions[106] should be legitimised when necessary to promote economic and social progress.

2.1. Equality, equity and justice in environmental law: the Common But Differentiated Responsibilities principle

The substantive dimension of equality is intertwined with the concept of justice and, more specifically, with that of equity. Although often used interchangeably, the concept of equity differs from that of equality because it is broader and the very prerequisite of formal equality. Equity's objective is to ensure that everyone has an equal chance of success. Hence, it aims at levelling the playing field, recognising that additional support or resources may be needed to overcome historical disadvantages or systemic barriers. Equity, nonetheless, also leaves room for differences. These stem from merit and personal skills, which allow some individuals to stand out among the others. As a result, disadvantageous situations can arise alongside advantageous ones, but the latter could not be indicated as unfair, having both originated from identical conditions.

Sadly, the evolution of environmental law cannot be said to have paid sufficient attention to the value of equity. Indeed, the former is said to be characterised by a 'double inequality'[107] which reverses the distribution of risk and responsibility. Despite the fact that developed countries (the so-called global North) are responsible for most of the climate-related damage[108], they do not suffer its most severe consequences. These predominantly affect the least progressed countries (the so-called global South), that, however, have contributed least to the current crisis.

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[105] A. Underdal and T. Wei, *Distributive Fairness: A Mutual Recognition Approach*, 51 *Environ Sci Policy* (2015).

[106] C. Shaw, *The Role of Rights, Risks and Responsibilities in the Climate Justice Debate*, 8(4) *International Journal of Climate Change Strategies and Management* 511 (2016) writes about 'subsistence emissions'.

[107] D. McCauley and R. Heffron, *Just Transition: Integrating Climate, Energy and Environmental Justice*, 119 *Energy Policy* (2018).

[108] See A.D.F. Giardina, *Il Principio delle Comuni ma Differenziate Responsabilità*, G&A (2020) at <https://www.giustiziaeambiente.it/professionisti/avvocato-giardina/notizie-avv-giardina/34-il-principio-delle-comuni-ma-differenziate-responsabilita.html>.

The CBDR principle[109] aims precisely at addressing this problem. It was created following an ideal of justice and solidarity, under the awareness that those who have endangered the Earth's climate have an ecological debt that they must honour[110]. Accordingly, when first introduced by the Kyoto Protocol, such principle imposed quantified emission reduction targets only on industrialised countries. Its interpretation and implementation, however, soon proved to be 'major sources of disagreements'[111]. Indeed, developed countries believed in the need to focus on current and future contributions to climate change, thus insisting on the inclusion of rapidly developing countries such as China and India in the obligations, whereas developing States understood the CBDR principle as based on historical responsibility and demanded that a clear North-South distinction be maintained. As a consequence of this debate, the 'top-down' approach of the Protocol gradually faded[112], until it was abandoned with the Paris Agreement and replaced by a bottom-up one. The latter consists of a pledge-and-review formula, wherein each country freely declares its climate targets within a given timeframe. Albeit acknowledging the disadvantaged situation of some countries, it provides only for voluntary, rather than legally binding obligations, thus offering few guarantees to success.

For the sake of fairness, it must be observed that the reason for this change cannot be attributed solely to the intention of 'stronger' States to impose their views and interests on the weaker ones[113]. Indeed, operationalising the CBDR principle is not a simple task[114]. How should the historical contributions to climate change be distinguished, in order to establish the causal link for the attribution of liability? And who should be held accountable: governments,

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[109] For an overview, see J. Brunnée and C. Streck, *UNFCCC as a Negotiation Forum: Towards Common but More Differentiated Responsibilities*, 13(5) *Climate Policy* (2013); C. Okereke and P. Coventry, *Climate Justice and the International Regime: Before, During, and after Paris*, 7(6) *Wiley Interdiscip Rev Clim Change* (2016).

[110] See S. Caney, *Climate Change and the Duties of the Advantaged*, 13(1) *CRISPP* 218 (2010).

[111] C. Okereke and P. Coventry, *Climate Justice and the International Regime*, cit. at 109, 837.

[112] See UNFCCC 2009, UNFCCC 2010, UNFCCC 2011.

[113] On the 'westernisation' of principles see C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17(1) *Eur J Int Law* (2006).

[114] R. Dellink et al., *Sharing the Burden of Financing Adaptation to Climate Change*, 19(4) *Glob Environl Change* (2009).

companies or citizens? In addition, such principle is not completely ineffective. In the judgment *Urgenda v The Netherlands*[115], a court recognized for the first time its normative content and concluded that the Netherlands had a duty of leadership in climate mitigation by the mere fact of being a developed country, irrespective of the proof of its responsibility.

Despite these considerations, the feeling that more is to be done persists. It is sufficient to look at the Paris Agreement or the GPE to realise how hard it is to include in the treaties rules that tackle inequality and poverty and to design a strategy that distributes the burdens fairly between countries, not exclusively focused on the distinction between North and South.

2.2. Regressive measures as a limit to mutual recognition

Mutual recognition is a non-hierarchical form of governance[116], alternative to harmonisation and derived from the principle of mutual trust, which is both its presupposition and objective. It assumes that between different political-administrative systems there can be, if not equal legal norms, at least equal objectives, which should give rise to equality of treatment. If equality is the condition of the existence of mutual recognition, it follows that the latter is undermined by different regulatory standards.

In the EU, mutual recognition, as defined from the *Cassis de Dijon*[117] judgment onwards, provides that goods or services lawfully produced and marketed in one Member State may circulate freely in the others. An exception is added to this rule: mutual recognition must be balanced against other interests, in particular those related to safety, health, consumer and environmental protection[118]. The relation between the latter and free trade can be particularly challenging[119]. On the one hand, in order to attract investment, some Member States would be inclined to lower their standards, giving rise to the a 'race to the bottom' in environmental protection. On the other hand, States with higher levels of protection

[115] The Hague District Court, *Urgenda Foundation v. The State of the Netherlands* (2015).
[116] A. van den Brink et al., *Mutual Recognition and Mutual Trust: Reinforcing EU Integration?: Introduction*, 1(3) *European Papers* 861 (2016).
[117] Case 120/78 *Cassis de Dijon* [1979] ECR 649.
[118] J. Pelkmans, *Mutual Recognition in Goods. On Promises and Disillusions*, 14(5) *Journal of European Public Policy* (2007).
[119] See C. Poncelet, *Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship?*, 15(2) *Int'l Comm L Rev* (2013).

could restrict trade with more permissive ones. Consequently, if environmental protection standards were lowered in one country as following the implementation of a regressive measure, the others should be free to derogate from the principle of mutual recognition.

Although this may sound straightforward in theory, it may prove more complicated in practice, especially within the EU. Here, in the (explicit) attempt to create an 'ever closer union'[120] and in the (implicit) one to prioritise economic interests, the concept of mutual trust has acquired the status of a constitutional principle. Opinion 2/2013[121] has clarified that the sharing of 'a set of common values' justifies the existence of mutual trust between Member States. The ECJ drew further consequences from this, stating that the compliance with common values is presumed among member States, except in extraordinary circumstances[122]. Therefore, the inference that failure to respect non-regression could fall within the exceptions to mutual recognition is not obvious, albeit desirable. However, this is not sufficient to promote the abandonment of mutual recognition in favour of maximum harmonisation in order to promote greater levels of protection. Indeed, not only does mutual recognition allow for more flexibility and an increasing legitimacy[123] in the European '*demoi*-cracy'[124], but it can also be used to exploit the connection between Member States to spread best practices in countries that try to keep standards low to invite investment. In order to accomplish this goal, blind trust should be replaced with a constructive one, to be built on knowledge, mutual cooperation and monitoring. In other words, it is necessary to shift from a 'blind\w\ 1' form of mutual recognition to a 'managed'[125] one.

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[120] Article 1 TEU.
[121] Case Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU* [2014].
[122] Joined Cases C-404/15 and C-659/15 PPU*, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016].
[123] S.K. Schmidt, *Mutual Recognition as a New Mode of Governance*, 14(5) *J Eur Public Policy* 670 (2007).
[124] K. Nicolaidis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, 14(5) *J Eur Public Policy* 682 (2007).
[125] R. Roy, *Environmental standards in world trade: a study of the trade-environment nexus, disadvantages of the unilatereal imposition of standards and mutual recognition as an alternative* 215 ff (2015).

Conclusion

The recent inclusion of the principle of non-regression in the landscape of environmental principles has underlined its importance in the fight against climate change. However, it has also ignited the debate about the chances of its operability. Some of these are common to all principles of environmental law, and are tied primarily to the challenge of making them directly justiciable, in light of their broad wording and enshrinement in non-traditional legal instruments. Others, instead, are inherent to the principle itself.

This paper has addressed two main concerns posed by environmental non-regression. Firstly, it has tried to curb the doubts around its existence. Although progressive openness towards its recognition can be observed in the legislation and jurisprudence of some States, the principle still struggles to be included into positive law both at international and national level. I have argued that non-regression is sufficiently widespread and debated to be seen by wise lawmakers as a limitation of their freedom to legislate, even when it has not found explicit mention in their legal system. This is substantiated by the fact that the right to a healthy environment should be considered a human right and, as such, it should not admit any downgrading in the protection it guarantees.

Secondly, the paper has addressed the question of compatibility of non-regression with the principles of rule of law and equality. I have maintained that the former is by no means irreconcilable with the latter. Regarding the rule of law, once appropriate indicators are created to objectively determine how potential backtracking should be evaluated, issues of legal certainty would rarely arise. Moreover, non-regression would not endanger the democratic guarantees and the separation between the political and judicial power. As the principle does not aim to prevent changes in the law, but rather damage to the environment, a legislative intervention that relaxes standards without threatening the environment is unlikely to be condemned. In addition, the contention that it excessively ties the legislator's hands should be dismissed, since lawmakers are constantly called upon to balance interests within the scope of their functions.

Regarding equality, I have claimed that no violation of the principle arises if States are asked, when implementing environmental non-regression, to intensify or diminish their efforts accord-

ing to their economic and developmental capacities. On the contrary, such differentiation would be the embodiment of equity. The latter, being implied in the idea of substantive equality and in the principle of common but differentiated responsibilities, is irreconcilable with a 'one-size fits all' approach. Differences in resources to deal with the climate crisis between countries are also relevant to mutual recognition, especially in the EU. If compliance of Member States with the principles of environmental law was monitored, rather than taken for granted, mutual recognition could be waived against States that did not comply with non-regression.

Overall, many steps need to be taken before environmental non-regression can be considered fully effective. However, these do not depend on its nature, which does not seem as troublesome as many suggest. Rather, they are due to the economic and political set-up which is dominant in the EU and in all Western countries and likely to undermine the proper functioning of environmental law. Albeit being characterised by a self-proclaimed 'high level' of protection, such set-up is fragmented, highly discretionary and lacking precise control mechanisms. This suggests that short-term economic gains are still prioritised over the denationalisation of interests in natural goods and the promotion of fundamental ideas of justice.

THE IMPACT OF THE RIGHT TO PERSONAL DATA PROTECTION ON THE DESIGN OF THE EUROPEAN DIGITAL IDENTITY WALLET

Davide Baldini[*]

Abstract

The paper addresses the introduction of a unique persistent identifier in the context of the proposed reform of the eIDAS Regulation, exploring its implications in light of the fundamental right to personal data protection recognized by EU primary law. The new identifier aims to enhance identification accuracy and trust in the European Digital Identity Wallet envisaged by the eIDAS Proposal. However, it raises concerns vis-à-vis the principles of data protection by design, purpose limitation, and data minimization. It is suggested that these three principles, read together, set clear boundaries for the EU legislator when deciding the techniques used for the functioning of the European Digital Identity Wallet. The paper argues that the new identifier is not in line with the right to personal data protection, is at risk to be at odds with some Member States Constitutions, and concludes by proposing some possible ways forward.

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1. Electronic identities and EU Law

Electronic identities[1] have become increasingly widespread over the last few years, especially after the COVID pandemic[2], as they greatly facilitate activities across online platforms and services, both public and private. Within the EU, electronic identities may be either State-issued, or issued by private parties such as banks[3] or social network providers[4], albeit with different degrees of legal certainty and possibility of use, depending on Member State law and practice.

EU Law currently leaves, in fact, the possibility to create State-issued electronic identities at the discretion of Member States, providing only limited harmonization. In particular, Regulation 910/2014 on electronic identification and trust services (so-called «eIDAS Regulation»)[5] has been adopted by the European Union on 23 July 2014 and came into force on 1 July 2016. The stated aim of this Regulation, as laid down in its recitals, is to «enhance trust in

[1] Although no EU-level definition of electronic or digital identity exists, the EU Commission defines it as «a digital representation of a natural or a legal person which allows the identity holder to prove who they are during online or offline interactions and transactions», cfr. European Commission, *Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) n° 910/2014 as regards establishing a framework for a European Digital Identity*, SWD (2021) 124 final, pt. 1, par. 6.

[2] In the case of Italy, this has been the case especially for the «SPID» identities: Osservatori.net Digital Innovation, *Con la pandemia cresce l'identità digitale in Italia, ma il potenziale è ancora alto* (2021), available at https://www.osservatori.net/it/ricerche/comunicati-stampa/identita-digitale-italia, accessed on 2024.02.02.

[3] This is especially the case for Northern European countries, where electronic identity solutions are often provided by financial institutions. See European Commission, *Impact Assessment Report*, cit. at 1, pt. 1, 7-8.

[4] E.g., «Login with Google», «Login with Facebook» and «Login with Apple».

[5] Regulation (EU) No 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257/73.

electronic transactions in the internal market by providing a common foundation for secure electronic interaction between citizens, businesses and public authorities»[6], with a view to «remove existing barriers to the cross-border use of electronic identification means»[7]. Given its purpose to further the Internal Market, the legal basis of the Regulation rests on Article 114 TFEU.

The eIDAS Regulation governs electronic identification within the EU by defining, within its Chapter II, the principles regulating the transnational use of electronic identities across Member States. In doing so, it specifies the common technical architecture and policies for Member States schemes to achieve interoperability between each other. This aim is operationalized thanks to the so-called «Interoperability Framework»[8], which enables transmission of Member States electronic identities schemes through a set of nodes. Moreover, although it did not create a harmonized EU electronic identity, the eIDAS Regulation established the mutual recognition of national electronic identities, by encouraging Member States to notify their own identity solutions to the European Commission.

Against this background, on 3 June 2021 the European Commission has issued an amendment proposal to the eIDAS Regulation[9] (henceforth, «eIDAS Proposal»), with the aim of furthering the scope and overall enhancing the current eIDAS framework. The Commission's initiative stemmed from the mandatory periodical revision of the eIDAS Regulation, as provided under its Article 49. In the context of said revision, the Commission noted, on the one hand, that the eIDAS Regulation has furthered the development of the Single Market[10] while remarking, on the other hand, several shortcomings that have hindered the full achievement of its objectives related to electronic identities, amongst which:

[6] Recital 2 of the eIDAS Regulation.
[7] Recital 12 of the eIDAS Regulation.
[8] Art. 12 of the eIDAS Regulation.
[9] European Commission, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity*, 2021/0136(COD).
[10] European Commission, *Report to the European Parliament and the Council on the evaluation of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS) (2021)*, p 7.

- Only 14 Member States had notified electronic national identity schemes to the Commission, while only 59% of the EU population had access to cross-border electronic identity solutions in accordance with the eIDAS Regulation[11].
- Failure to cover the provision of electronic attributes, such as medical certificates, driving licenses or professional qualifications[12].
- Limited possibilities for private parties, such as service providers or online platforms, to connect to the eIDAS system[13].
- Failure to fully comply with the data minimization principle, as users are not allowed to limit the sharing of identity data to what is strictly necessary for the provision of a given service[14].

As a result, the eIDAS Proposal advanced by the Commission endeavours to produce a shift from the current framework, based on voluntary notification of national schemes to the Commission and the subsequent mutual recognition of national electronic identities, to a system that allows users to share electronic attestations of attributes (such as driving licenses, student IDs, professional certificates and so on), while giving users more control over their personal data.

In doing so, the eIDAS Proposal advances the establishment of a so-called «European Digital Identity Wallet» or simply «Wallet», i.e., a mobile application which Member States will be obliged to offer to their citizens and residents, allowing for their online and offline identification, as well as allowing the electronic attestation of attributes. To ensure the widespread adoption of the Wallet, under the eIDAS Proposal both public administrations – when providing eGovernment services – and Very Large Online Platforms[15] –

[11] European Commission, *Impact Assessment Report*, cit. at 1, pt. 1, 4.
[12] *Ibid.*, pt. 1, par. 2-3, 10-12.
[13] *Ibid.*, pt. 1, par. 2.
[14] *Ibid*.
[15] Art. 25 of the eIDAS Proposal. The definition of «Very Large Online Platform» is to be found within Art. 33 of the Digital Services Act (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L

when providing authentication to their services[16] – will be obliged to accept the new system as a means of identification.

One of the major features of the eIDAS Proposal is the introduction of a unique persistent identifier amongst the minimum set of person identification data that compose the Wallet[17]. The identifier consists of an alphanumerical string aimed at uniquely identifying a person for an indefinite amount of time. While the introduction of this identifier aims at facilitating identity matching and ensure the unique identification for each user, it also brings about significant concerns in terms of compliance with the current EU legislation on personal data protection and, more generally, in terms of its impact on the rights and freedoms of individuals.

In this respect, given that the identification of a natural person via electronic means amounts to a «processing of personal data» under applicable EU legislation on personal data protection, the eIDAS Proposal will have to comply with such legislation – which is part of EU primary Law – with particular reference to Article 8 of the Charter of Fundamental Rights of the European Union (henceforth, the «Charter»)[18] and to the General Data Protection

277, 27.10.2022, at 1–102. Other online platforms can be forced by the Commission to support the Wallet in the future, via delegated acts.

[16] The aim of the obligation is to provide users with an alternative means of identification when using Very Large Online Platforms, thereby providing an alternative to the use electronic identity solutions envisaged by the platforms themselves (such as «Login with Facebook», «Login with Google», and so on), and thereby provide a counter-balance to their role as de facto electronic identity gatekeepers, as noted by the Commission within the Report mentioned in n. 10, *supra*. In this respect, there is a clear connection with Art. 5, par. 7, of the Digital Markets Act, which prevents gatekeepers from forcing users to use the gatekeeper's own electronic identity solution (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, at 1–66).

[17] Art. 11a of the eIDAS Proposal.

[18] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, at 391–407. Art. 8 of the Charter reads: «1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority».

Regulation (henceforth, the «GDPR»)[19]. This paper will specifically address the issue posed by the introduction of the abovementioned unique persistent identifier in light of the current EU data protection legislation and, in so doing, it seeks to highlight the impact that the principle of data protection by design has on the shaping of technical solutions at the legislative level, where those solutions involve the processing of personal data.

In order to do so, while this Section 1 has introduced the matter, Section 2 will explore what are unique persistent identifiers and their uses, both in general and with particular reference to the eIDAS Proposal. Subsequently, Section 3 will analyse the compliance of the eIDAS proposed identifier vis-à-vis the current EU legislation on personal data protection, with specific reference to three foundational data protection principles enshrined in the GDPR: data protection by design, purpose limitation and data minimization; the last part of Section 3 will also briefly touch upon the possible contrasts between the unique persistent identifier and data protection guarantees provided by some EU Member States Constitutions. Section 4 will address some possible privacy-friendly technological alternatives to the use of the unique persistent identifier. Finally, Section 5 sketches some conclusions.

2. Unique persistent identifiers: functions and use-cases

2.1 Unique persistent identifiers in general

A unique persistent identifier can be defined as a «string of letters and numbers used to distinguish between and locate different objects, people, or concepts»[20]. When used to identify objects, such as academic or literary work, the use of unique persistent identifiers is irrelevant from a data protection standpoint, as it does not trigger the material scope of application of data protection law: the Digital Object Identifier («DOI») used to locate specific digital objects such as academic papers, is an example of this type of identifier.

[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, at 1–88.

[20] National Library of Medicine, *Persistent Unique Identifier*, available at https://www.nnlm.gov/guides/data-glossary/persistent-unique-identifier, accessed on 2024.02.02.

However, unique persistent identifiers can also be assigned to natural persons, therefore triggering the applicability of data protection law. In this respect, a distinction can be drawn when such identifiers are assigned to a natural person in an online or offline context[21]. Given their persistent nature, which may in some cases even allow to identify and trace the activities of a person for their entire lifetime, this type of identifiers is highly intrusive on the rights and freedoms of natural person, as shall be seen in Section 3 below. In practice, when used to identify a natural person online, some of the most common persistent unique identifiers are the following[22]:

- Device identifiers, such as the «IMEI («International Mobile Equipment Identity»)[23], «MAC Address («Media Access Control Address»)[24] or static IP Addresses («Internet Protocol Address»)[25].
- Cookies, with specific reference to the «permanent» variant of cookies.
- Web beacons.

The processing of this type of identifiers can take place for a number of reasons, but in the online context the tracking of users

[21] However, this distinction is somewhat blurred, as offline identifiers such as the passport number may be used also in an online context, for example when voluntarily disclosed by the user to an online actor.
[22] Medium.com, *What are 'persistent identifiers'?* (2019), available at https://medium.com/golden-data/what-are-persistent-identifiers-af62d135d4c0, accessed on 2024.02.02.
[23] The IMEI consists of an electronic serial number used in some countries to blacklist devices that have been identified as stolen, therefore preventing the device from working on a mobile network (*ibid.*).
[24] The MAC Address consists of a unique identifier for a piece of hardware (such as a mobile device) on a network. This identifier enables tracking of individual devices as they move across different network connections (*ibid.*).
[25] The IP Address consists of a series of digits assigned to networked computers to facilitate their communication over the Internet. When a website is accessed, the IP address of the computer seeking access is communicated to the server on which the website consulted is stored. That connection is necessary so that the data accessed may be transferred to the correct recipient. See Court of Justice of the European Union, *Patrick Breyer v Bundesrepublik Deutschland*, Case C-582/14, ECLI:EU:C:2016:779, par. 15-16.

for advertising purposes is one of the most relevant[26]: digital advertising companies strive to identify a user as persistently as possible over time, in order to track their behaviour across multiple platforms for as long as feasible with a view to being able to create an accurate profile of the user and – ultimately – target them with highly personalized advertising[27]. Other applications of user-related persistent unique identifiers in the online context include anti-fraud purposes: for example, e-commerce retailers may want to consistently identify a user across multiple sessions to prevent fraudulent behaviour, such as creating multiple accounts in order to benefit from offers reserved to new clients.

While online unique persistent identifiers are usually assigned and subsequently processed by private actors such as digital advertising firms, so-called «offline» unique persistent identifiers are usually State-issued and are used for public-related purposes, such as for streamlining the assignment of social welfare benefits, paying taxes, registering a change of residence, and so on: examples of this type of identifiers are the tax code (e.g., the «*Codice Fiscale*» used in Italy), the VAT code, the ID-card number, passport number, and so on.

It should be noted that the abovementioned identifiers have varying degrees of permanence over time: for example, the «*Codice Fiscale*» used in Italy remains the same for the whole life of an individual, while the ID-card number is re-assigned as soon as a new ID-card is issued to the individual (e.g., in case of loss or expiration of the previous card), the IMEI changes as soon as the person buys a new phone, and so on.

In the next sub-Section, we will specifically address the main elements of the unique persistent identifier introduced by the eIDAS Proposal.

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[26] *Ex multis*: I. Sivan-Sevilla et al., *Unaccounted Privacy Violation: A Comparative Analysis of Persistent Identification of Users Across Social Contexts* (2020), Federal Trade Commission, available at https://www.ftc.gov/system/files/documents/public_events/1548288/privacycon-2020-ido_sivan-sevilla.pdf, accessed on 2024.02.02, at 1.

[27] For an overview on how the personalized advertising ecosystem works, see: Information Commissioner's Office, *Update report into adtech and real time bidding*, (2019), available at https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906-dl191220.pdf, accessed on 2024.02.02.

2.2. The unique persistent identifier in the context of the eIDAS reform

As mentioned above, the eIDAS Proposal introduces, within its Article 11a, a unique persistent identifier amongst the minimum set of «person identification data» that compose the Wallet. The identifier consists of an alphanumerical string aimed at uniquely identifying a person for an indefinite amount of time.

In order to understand the purpose of this identifier, it is firstly necessary to address what is the minimum set of «person identification data» referred to above. With this expression, Article 3.3 of the eIDAS Regulation defines «a set of data enabling the identity of a natural or legal person, or a natural person representing a legal person to be established». Currently, this set of data is composed of four mandatory and four optional attributes that are to be transmitted in cross-border identifications cases. Mandatory attributes are (i) the first and (ii) the last names of a person, (iii) their date of birth and (iv) a unique identifier[28]: this is the minimum amount of data which any electronic identity solution must transmit to public or private service providers (so-called «Relying Parties») who use the eIDAS identity to authenticate users in the context of cross-border authentication to access online public services.

As a result, within the current text of the eIDAS Regulation, the unique identifier which is part of the mandatory set of data is not necessarily persistent, but rather «as persistent as possible in time»: in practice, the identifiers currently used for issuing eIDAS-compliant identities at Member State level are often not persistent, based on Member State determination [29].

In this respect, the function of the abovementioned set of four data items – and, in particular, the unique identifier – is to unambiguously identify the holder of the electronic identity. However, within the eIDAS Proposal, the identifier which is part of this set is now required not only to be «unique», but also «persistent»: in this respect, a unique identifier which is also indefinitely persistent in time has a higher identifying power vis-à-vis the identity holder, facilitating identity matching when using an electronic

[28] Annex 1 to the eIDAS Regulation. The optional attributes – which may be required or not, depending on the Member State choice – are (i) the first and last name(s) at birth, (ii) the place of birth, (iii) the current address and (iv) the gender.
[29] As will be seen *infra* in Section 3.5, this has mostly been done to accommodate those Member States where the presence of a persistent identifier would contrast with national constitutional law.

identity solution and ensuring the unique identification of each individual. According to the European Commission's impact assessment of the eIDAS Proposal, this change would therefore «considerably facilitate the comparison/matching of various identities of the same person, issued in various contexts or by different Member States (record matching / identity matching) which currently hinders citizens' effective authentication and access to services»[30].

This identifier, along with the other data items referred to above, would then be used to add electronic attestations of attributes to the Wallet, and – more importantly – the identifier would also be shared by the Wallet app with any Relying Party, i.e., with any public or private digital service provider that relies on the Wallet for the purpose of authenticating users to its services.

As already mentioned, given their persistent nature, this type of identifier is highly intrusive on the rights and freedoms of natural person, and has been critically defined as capable to «uniquely identify every person with an alphanumeric string that stays with them for the rest of their lives»[31]. This issue shall be better explored in the next Section.

3. The eIDAS proposed unique persistent identifier through the lenses of the right to personal data protection

3.1 EU Data Protection Law and unique persistent identifiers

The use of unique persistent identifiers has long been considered problematic from a data protection perspective by EU Data Protection Authorities: for example, as far back as 2013, the Article 29 Working Party stated, in relation to the use of identifiers by mobile applications, that: «*App developers (…) should not use persistent (device-specific) identifiers, but, instead, use low entropy app-specific or temporary device identifiers to avoid tracking users over time*»[32]. For this reason, Google and Apple – i.e., the two most important gatekeepers governing user access to mobile applications – have developed

[30] European Commission, *Impact Assessment Report*, cit. at 1, pt. 1, 5.

[31] European Digital Rights (EDRi), *eIDAS Policy Analysis* (2022), available at https://epicenter.works/sites/default/files/eidas-policy_paper-ewedri_0.pdf, accessed on 2024.02.02, at 1.

[32] Article 29 Working Party, *Opinion 02/2013 on apps on smart devices* (2013), available at https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf, accessed on 2024.02.02, at 19.

temporary device identifiers which app developers are contractually bound to use in lieu of device-specific persistent identifiers[33], if they want to distribute their application through Apple's AppStore or Google's PlayStore[34].

As already seen, in light of current EU data protection legislation, the creation and processing of identifiers which are linked to a natural person amounts to a processing of personal data[35]. It follows that the use of these identifiers has an impact on the right to the protection of personal data, recognized and protected by EU primary legislation under Articles 8 of the Charter[36] and 16.1 of the TFEU[37]: the validity of the new provisions of the eIDAS Proposal have therefore to comply with this fundamental right. In this respect, as illustrated by the official explanations of the Charter[38], the content of the right to personal data protection is to be found within secondary Union legislation on data protection, especially the GDPR[39]. Whether the unique persistent identifier envisaged by the current eIDAS Proposal respects the right to personal data protection has therefore to be assessed in light of the relevant GDPR rules and principles.

In this respect, as we will see below, the principles which are most impacted by the introduction of the unique persistent identifier envisaged by the eIDAS Proposal are the principles of purpose limitation[40] and data minimization[41], read in the light of the overarching principle of data protection by design and by default[42].

3.2 The principle of data protection by design

[33] Such as the IMEI or MAC address: see section 2, *supra*.
[34] These temporary identifiers are Apple's «Identifier for Advertisers» («IDFA») and Google's «Google Advertising ID» («AAID»).
[35] Arts. 4(1) and 4(2) GDPR.
[36] See n. 18, *supra*.
[37] «Everyone has the right to the protection of personal data concerning them».
[38] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, at 17–35, esp. the paragraph «Explanation on Article 8 — Protection of personal data». See also: O. Lynskey, *The Foundations of EU Data Protection Law* (2015), at 132-134.
[39] The official explanations refer to Directive 95/46/EC, which has however been superseded by the GDPR: as a result, any reference to the Directive should now be read as a reference to the GDPR (*ex* Art. 94 GDPR).
[40] Art. 5.1(b) GDPR.
[41] Art. 5.1(c) GDPR.
[42] Art. 25.1 GDPR.

The principle of data protection by design, embedded in Article 25 GDPR, requires the data controller to implement data protection principles[43] through the adoption of «appropriate technical and organisational measures», both «at the time of the determination of the means for processing and at the time of the processing itself»[44]. A key point of this principle is that the «appropriateness» of the technical and organisational measures has to be assessed by the data controller following a risk-based approach, meaning that the higher the risk for the rights and freedoms of data subjects created by the personal data processing activity, the stronger and more robust the technical and organisational measures will need to be.

The overarching aim of the data protection by design it to ensure the appropriate and effective embedding of data protection principles within the very design of data processing activities. In the words of the European Data Protection Supervisor, the principle «requires consideration of safeguards both at the design and operational phase, thus aiming at the whole project lifecycle and clearly identifying the protection of individuals and their personal data within the project requirements»[45]: in this sense, the data

[43] Data protection principles are the six fundamental principles envisaged in Art. 5 GDPR: (a) lawfulness, fairness, and transparency, (b) purpose limitation, (c) data minimization, (d) accuracy, (e) storage limitation, (f) integrity and confidentiality.

[44] The full text of the provision reads as follows: «Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects».

[45] European Data Protection Supervisor, *Opinion 5/2018 – Preliminary Opinion on privacy by design* (2018), available at https://edps.europa.eu/sites/edp/files/publication/18-05-31_preliminary_opinion_on_privacy_by_design_en_0.pdf, accessed on 2024.02.02, at 6. It should be underlined that this principle, alongside other rules and principles of the GDPR, is aimed at data controllers and – as a result –does not apply to data processors, or to producers of product and services. However, in the context of the eIDAS Proposal, this principle applies to the design and architectural choices of the electronic identity solutions themselves: see N. Tsakalakis et al. *Data Protection by Design for Cross- Border Electronic Identification: Does the eIDAS Interoperability Framework*

protection principles outlined in Article 5 GDPR can be considered as goals to be achieved via the implementation of technical and organisational measures.

Against this background, it is therefore necessary to address the requirements stemming from the principles of purpose limitation and data minimization, by reading them in light of the overarching principle of data protection by design.

3.3. The principle of purpose limitation

The principle of purpose limitation, enshrined under Article 5.1(b) GDPR, provides that personal data must be «collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes». Applying this provision in line with data protection by design requires the data controller to shape the design of the processing in a way which avoids – or at least minimizes – the risk of further unlawful processing with a different purpose than the original one: in the words of the European Data Protection Board, «the purpose of processing should guide the design of the processing and set processing boundaries».[46]

It follows that the techniques envisaged by the eIDAS Proposal must be designed and implemented in a way that minimizes the risk of further processing of the mandatory attributes – including the identifier – for purposes incompatible with the original one. As already seen, in the case of the eIDAS Proposal, the stated purpose connected with the processing of the persistent unique identifier is to facilitate the comparison and matching of various identities related to the same individual.

In order to adequately address the level of risk that the use of the identifier produces for the rights and freedoms of the data subject, it should be again stressed that the set of attributes – including the identifier – is shared with Relying Parties each time the identity holder uses the Wallet to authenticate to an online service. As mentioned above, Relying Parties are those providers of online services that rely on the Wallet to authenticate users: they involve not

Need to Be Modernised?, in E. Kosta et al. (eds.), *Privacy and Identity Management. Fairness, Accountability, and Transparency in the Age of Big Data* (2018), at 2-3.

[46] European Data Protection Board (EDPB), *Guidelines 4/2019 on Article 25 Data Protection by Design and by Default* (2020), available at https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf, accessed on 2024.02.02, at 20.

only public, but also private service providers. Amongst the latter are also Very Large Online Platforms, often operated by «Big Tech» companies such as Google, Meta, and Amazon, who rely on online tracking and profiling as their main means of generating revenue[47], but also other private organizations may decide to allow users to authenticate via the Wallet. In this respect, it has been noted that «Facebook and other companies are only waiting to add such an official unique, lifelong identifier to their users' identities and will find a way to trick users into doing so»[48].

Although each sharing of the identifier with a Relying Party will have to be actively and specifically consented by the individual, it is now widely understood that consent is often not an effective means to enable users to make genuinely informed decisions, especially in online environments, due to the «consent fatigue» phenomenon[49].

As observed above in Section 2, the more persistent the identifier, the more effectively it can be leveraged to track and profile individuals overtime. In this respect, it should also be underlined that the identifier envisaged by the eIDAS Proposal is even more long-lasting than device-persistent identifiers, such as the IMEI or the MAC Address, because it typically remains the same for the entire lifetime of the individual (as opposed to the lifetime of the device). It is therefore reasonable to assume that AdTech and Big Tech companies, such as those operating Very Large Online Platforms, will do anything in their power to leverage the new identifier to boost their data-driven practices, based on tracking and profiling of users[50]. It is now widely understood that profiling – especially when the profile is highly precise, persistent over time and based on vast amounts of data – produces, in turn, risks of discrimination, manipulation of users' behaviours, and other interferences with fundamental rights[51].

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[47] *Ex multis*: S. Zuboff, *The Age of Surveillance Capitalism* (2019).

[48] *eIDAS Policy Analysis*, EDRi, cit. at 31, 2.

[49] *Ex multis*: A. Mantelero, *The Future of Consumer Data Protection in the E.U. Re-Thinking the "Notice and Consent" Paradigm in the New Era of Predictive Analytics*, 30 Computer Law & Security Review 6 (2014).

[50] EDRi, *eIDAS Policy Analysis*, cit. at 31, 1-2.

[51] *Ex multis*: Article 29 Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679* (2018), available at https://ec.europa.eu/newsroom/article29/items/612053, accessed on 2024.02.02; European Union Agency for Fundamental Rights, *Bias in Algorithms -*

Further risks created by the use of the unique persistent identifier may arise in cases where the Wallet app is compromised by a malicious attack: if this were to happen, an attacker could easily link together all uses of the Wallet made by a single user by leveraging the identifier, thereby bypassing the security measures envisaged to achieve unlinkability of user actions[52], such as the mandatory separation between person identification data and other information required by Articles 6a.7 and 45.f.3 of the eIDAS Proposal[53].

In light of the above, it seems reasonable to conclude that the processing of the persistent unique identifier does not achieve purpose limitation by design; on the contrary, the identifier will likely risk being used for purposes incompatible with its stated aim, ultimately creating high risks for data subjects' rights and freedoms. In this case, the high risks produced by the sharing of the unique persistent identifier are arguably inherent to its very existence and cannot be effectively mitigated via other technical or organizational measures[54]. As a result, the only viable solution to achieve by

Artificial Intelligence and Discrimination (2022), available at https://fra.europa.eu/en/publication/2022/bias-algorithm, accessed on 2024.02.02.

[52] Unlinkability refers to a privacy by design goal which aims at avoiding the possibility to link together different datasets, flows or processes, which could violate data minimisation and purpose limitation and lead to unlawful user profiling (see *inter alia*: Conference of the Independent Data Protection Supervisory Authorities of the Federation and the Länder, *The Standard Data Protection Model*. v 2,0b (2020), at 27). The eIDAS Proposal expressly seeks to achieve unlinkability in Arts. 6a.7 and 6a.4.b. According to the former provision, Wallet issuers are prohibited from monitoring the usage of the Wallet, and to combine person identification data with further information. Consistently, issuers must maintain the person identification data separated from any other data, both at a logical and physical level. Additionally, the latter provision prohibits service providers from knowing the recipients of the attributes, so that they are prevented from linking together the attributes. See: A. Ortalda, N. Tsakalakis, & L. Jasmontaite, *The European Commission Proposal Amending the Eidas Regulation (Eu) No 910/2014: A Personal Data Protection Perspective* (2021), Brussels Privacy Hub, available at https://brusselsprivacyhub.eu/onewebmedia/Proposal%20to%20amend%20eIDAS.%20A%20personal%20data%20protection%20perspective_BPH_December%202021.pdf, accessed on 2024.02.02, at 8.

[53] *Ibid.*

[54] This is also the conclusion reached by many policy analyses of the eIDAS Proposal: EDRi, *eIDAS Policy Analysis*, cit. at 31, 1-2; European Data Protection Supervisor (EDPS), *Formal comments of the EDPS on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity* (2021), available at https://edps.europa.eu/system/files/2021-07/21-07-28_formal_comments_2021-0598_d-1609_european_digital_identity_en.pdf, accessed on

design compliance with the principle of purpose limitation seems to be the deletion of Article 11a of the eIDAS Proposal in its entirety[55].

3.4. The principle of data minimization

The principle of data minimization is established by Article 5.1(c) GDPR, and provides that personal data shall be «adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed». This principle requires the data controller to pay close attention to the actual relevance of each category of personal data which is to be processed in light of the stated purpose, as the controller has to be able to demonstrate such relevance[56]. In order to achieve data minimization by design, data controllers are required to ensure that each category of personal data is genuinely necessary to fulfil the purpose of the processing, and only process such data if it is not possible to fulfil the purpose by other, less intrusive means; according to the European Data Protection Board, this should be achieved by applying state-of-the-art technologies aimed at minimising the personal data processed[57] or even aimed at achieving full-fledged data avoidance, when appropriate[58]. In particular, to evaluate whether the unique persistent identifier is in line with said requirements, it is necessary to assess whether its processing is:

2024.02.02, at 4; C. Busch, *eIDAS 2.0: Digital Identity Services in the Platform Economy* (2022), Centre of Regulation in Europe (CERRE), available at https://cerre.eu/wp-content/uploads/2022/10/CERRE_Digital-Identity_Issue-Paper_FINAL-2.pdf, accessed on 2024.02.02, at 16-17.

[55] Although the possibility of revising the article to introduce an identifier which is "unique per service" has also been suggested, as more privacy-friendly alternative. See *ibid.*, at 17.

[56] Art. 5, par. 2, GDPR.

[57] A well-known example of such a technology is «pseudonymization», which is defined by art. 4, no. 5, as «the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person».

[58] «Data avoidance» entails refraining from processing personal data altogether, when possible in light of the relevant purpose: see EDPB, *Guidelines 4/2019*, cit. at 46, 21.

- genuinely necessary to achieve the stated purpose of the processing, namely, facilitating the comparison and matching of various identities related to the same individual, and;

- in line with state-of-the-art technologies aimed at achieving data avoidance and minimisation[59].

Again, in line with the risk-based approach and given the high risks for the rights and freedoms of data subjects which is linked to the unique persistent identifier, the assessment of these two elements should be conducted thoroughly and rigorously.

In this respect, while it is true that the use of the unique persistent identifier can facilitate the accurate authentication of the electronic identity holder, alternative measures can arguably achieve the same result without having to process any identifier at all, as shall be seen *infra* in Section 4.

Furthermore, as seen in Section 3.3 *supra*, the presence of this identifier undermines the unlinkability of user interactions, which is a privacy goal connected with the achievement of both purpose limitation and data minimization by design[60]. In turn, the lack of unlinkability produces risks of identity theft, surveillance, and of abuse by AdTech and Big Tech companies[61].

Lastly, the use of a unique persistent identifier also undermines the effectiveness of pseudonyms. The possibility for an individual to use a pseudonym is currently envisaged by Article 5.2 of the eIDAS Regulation[62], and is formally retained in the text of the eIDAS Proposal. The identifier, when disclosed to Relying Parties along the rest of the minimum data set, could be easily associated with the pseudonym, thereby negating any privacy benefit for the identity holder who decided to use a pseudonym[63].

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[59] *Ibid.*

[60] Conference of the Independent Data Protection Supervisory Authorities of the Federation and the Länder, *The Standard Data Protection Model*. v 2,0b, 2020, at 27

[61] W. Wiewiórowski, *Where are we heading with digital identities?* (2023), Cybersecurity Standardisation Conference, available at https://edps.europa.eu/system/files/2023-02/23-02-07_ww-enisa_en_2.pdf, accessed on 2024.02.02, at 5.

[62] «Without prejudice to the legal effect given to pseudonyms under national law, the use of pseudonyms in electronic transactions shall not be prohibited».

[63] See: Ortalda et al., *The European Commission Proposal*, cit., at 52, 9.

3.5 Potential contrasts with personal data protection guarantees enshrined in some EU Member States Constitutions

Finally, it is worth noting that the presence of a persistent unique identifier could collide with the provisions of some EU Member States Constitution aimed at protecting personal data. This, in turn, could lead to a conflict between EU Law and fundamental rights protection at the national level, should Article 11a of the eIDAS Proposal enter into force in its current form.

Most notably, the German Federal Constitutional Court has ruled, in its seminal 1983 «Census Decision»[64] that the use of a general identifier that makes it possible to «register and catalogue the individual citizen in his or her entire personality» – which is arguably the case for the identifier envisaged by the eIDAS Proposal, as seen above – violates the right to informational self-determination recognised by the German Constitution[65].

Other Member States which prohibit or strictly regulate the use of persistent unique identifiers at the Constitutional level are Austria[66] and Portugal, where paragraph 5 of Article 35 of the Portuguese Constitution, titled «Use of information technology», expressly states that «the allocation of a single national number to any citizen is prohibited»[67].

4. Privacy-Enhancing Technologies as a way to implement techniques in line with data protection by design

As already argued, compliance with the principle of data protection by design requires to embed data protection principles – such as purpose limitation and data minimization – in the very design of the processing, in a way that minimizes interferences with the rights and freedoms of data subjects. In particular, the embedding of purpose limitation and data minimization by design when

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[64] Federal Constitutional Court [1983] Case 1 BvR 209, 269, 362, 420, 440, 484/83, ECLI:DE:BVerfG:1983:rs19831215.1bvr020983, par. 119.

[65] See, *inter alia*: B. Sümer & J. Schroers, *The new digital identity Regulation proposal and the EU data protection Regime* (2021), https://www.law.kuleuven.be/citip/blog/the-new-digital-identity-regulation-proposal/, accessed on 2024.02.02.

[66] Bundesgesetz über das polizeiliche Meldewesen. BGBl. I Nr. 9/1992 (1992) s 16a. See also: Ortalda et al., *The European Commission Proposal*, cit. at 52, 9.

[67] Translation provided by the Portuguese Parliament official website: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf, accessed on 2024.02.02.

using the Wallet points toward the achievement of unlinkability of user actions, as a specific privacy goal to be achieved by the eIDAS framework: in other words, in order to effectively mitigate the risks for the rights and freedoms of individuals, it must be technologically impossible for any of the actors involved in the eIDAS framework to track the usage of the Wallet across multiple services.

Although the use of a unique persistent identifier undermines the achievement of unlinkability, it is suggested that its underlying aim to reduce the risk of abuse, ambiguity, or errors when using the Wallet could still be effectively achieved by using other techniques which have a smaller impact on the rights and freedoms of data subjects. Similar data protection-friendly techniques are usually called *Privacy-Enhancing Technologies* or «*PETs*»[68].

While it is not the aim of this paper to analyse each possible PET which could be used in the context of the eIDAS framework, it is worth noting that many other solutions have been suggested in the literature or are already used in practice by Member States or even at Union level.

One possible solution – already deployed in Austria[69] – could be the use of an identifier that is «unique per service» as opposed to «unique per person»: this so-called sector-specific personal identifiers or «ssPIN» would prevent the possibility of tracking and subsequent profiling of individuals when using the Wallet to authenticate for different services[70].

Another example of the use of a PET that could be adopted as a replacement to the use of the envisaged identifier can be found in the (no longer in force) Regulation (EU) 2021/953 on the EU Digital COVID Certificate[71], which incorporated safeguards at the technological level to achieve the unobservability of user interactions, including an offline verification mechanism via a public key

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[68] IlSole24Ore, *Cosa sono le Privacy Enhancing Technologies?* (2022), https://www.infodata.ilsole24ore.com/2022/02/13/cosa-le-privacy-enhancing-technologies/, accessed on 2024.02.02.

[69] European Commission, *eGovernment in Austria* (2018), available at https://joinup.ec.europa.eu/sites/default/files/inline-files/eGovernment_in_Austria_2018_vFINAL.pdf, accessed on 2024.02.02.

[70] C. Busch, *eIDAS 2.0*, cit. at 54, 17.

[71] Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211, 15.6.2021, at 1–22.

infrastructure[72]. Other solutions based on cryptography, such as pseudonymous identifiers or pseudonymous electronic signatures, could also be explored[73].

The above examples show that effective use of electronic identities and implementation of data protection by design techniques are not incompatible goals, but can actually work together with the aims of the eIDAS regulation. In order to achieve compliance with the principles stemming from the fundamental right to personal data protection – enshrined in EU primary law – while at the same time facilitating user authentication, the eIDAS legislator should carefully consider a technical solution which replaces the current unique persistent identifier. This alternative solution should make it technologically impossible tracking and profiling of the user across multiple services, with the final aim of preventing any possibility of public or private surveillance of Wallet usage.

It seems that the European Commission is already aware of this, and it is reconsidering its position on the identifier[74]. However, the persistent unique identifier is still present in the Council general approach on the eIDAS Proposal adopted during December 2022, although its use is limited to instances where user identification is required by law[75]. At the time of writing, the trilogues are still ongoing, therefore it will have to be seen whether the persistent unique identifier manages to be included in the final version of the Regulation.

5. Conclusion

As argued above, the achievement of «by design» compliance with the principles of purpose limitation and data minimization – which are part of the fundamental right to personal data protection enshrined in Article 8 of the Charter – requires the legislator to ensure the unlinkability of users' interactions with the Wallet. In other

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[72] *Ibid.*, Art. 4.2.

[73] W. Wiewiórowski, *Where are we heading with digital identities?*, cit. at 61, 5.

[74] L. Kabelka, *Commission says single identifier in eIDAS reform "not necessary"* (2022), Euractiv.com, https://www.euractiv.com/section/digital/news/commission-says-single-identifier-in-eidas-reform-not-necessary, accessed on 2024.02.02.

[75] Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity - General approach*, 2021/0136(COD), Art. 11a, par. 2.

words, the legislator must lay down techniques that make it technologically impossible for any of the actors involved in the eIDAS framework to track the usage of the Wallet across multiple services.

However, the unique persistent identifier currently envisaged in the eIDAS Proposal, including in the Council general approach, seems not to be the appropriate instrument to ensure compliance with these principles: the extensive circulation of the unique persistent identifier with Relying Parties creates high risks of misuse and exploitation, to the detriment of fundamental rights and freedoms of identity holders.

It is suggested that a possible way forward, which may allow the Union legislator to achieve its legitimate aims, while at the same time complying with the principles of purpose limitation and data minimization by design, is the adoption of Privacy-Enhancing Technologies in lieu of the identifier currently envisaged by Article 11a of the eIDAS Proposal.

More broadly, this analysis has allowed us to highlight the influence that the relevant principle of data protection by design, provided by Article 25 GDPR (also relevant to the Charters of some EU Member States), has on the eIDAS regulatory framework: this principle requires the legislator to shape the techniques envisaged in the legal instrument in a way that minimizes interferences with fundamental rights and freedoms of individuals involved in the processing.

BOOK REVIEW

ADMINISTRATIVE PUBLIC POWER: COMPARATIVE ANALYSIS IN EUROPEAN LEGAL SYSTEMS, EDITED BY EDUARDO GAMERO-CASADO (NAVARRA: THOMSON REUTERS-ARANZADI, 2021)

Leonardo Parona[*]

As recognized by the Editor in the book's Foreword, at the heart of this work lies a «concept that is not unequivocally labelled» in the legal systems included in the scope of the analysis, which is part of a broader comparative research aimed at enquiring on the exercise of public functions as a criterion for the application of administrative law. On the one hand, the awareness of the existence of such labelling risks – which are, to a large extent, intrinsic in every comparative effort, since they concern the relationship between law, language, and legal translation – is reflected by the book's subtitle, which explicitly refers to *public function, öffentliche Verwaltung, puissance publique, potestà amministrativa, potestad administrativa* and *wladza publiczna.* On the other hand, the issue is posed as a *caveat* in the Introduction of Diana-Urania Galetta, who raises the fundamental question – and provides methodological coordinates to answer it – whether we are «comparing the incomparable».

The objective of the analysis carried out in the book is twofold: from a theoretical point of view, it aims at identifying the scope of the concept of administrative function in each legal system; from a practical point of view, it expounds how such concept operates as a criterion for the application of a specific legal regime, *i.e.* administrative law. This latter objective is further articulated in several issues, which, considered altogether, push the analysis at "the boarders" of administrative law, by focusing on: *i)* the application of administrative law to the activity of legal persons subjectively included in the public sector, while governed by private law (*e.g.* public corporations, foundations and associations);

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ii) the subjection of private bodies exercising public functions to administrative law principles and rules; *iii)* the inclusion, within the concept of administrative functions, of several activities, such as the granting of subsidies and the awarding of contracts, characterized by the production of favorable effects. In the three cases, administrative functions are arguably accompanied by a movement of the administrative law regime, respectively in the sense of its return (after attempts to escape from it), its extension, and its evolution.

These and further questions are variously addressed by outstanding European scholars in the seven Chapters that compose the book, which are shaped in the form of national reports, although they do not follow a rigid and pre-fixed structure. Chapters' content and extent are, in fact, heterogeneous, reflecting the specificities of each legal system (more precisely those of Spain, France, Italy, Germany, Poland, the United Kingdom and the European Union), and allowing the reader to grasp a genuine inner vision of the topics, one that does not bend to a rigid and schematic juxtaposition.

In the first Chapter, Eduardo Gamero-Casado expounds the concept of *potestad administrativa* in Spanish law. The analysis begins with a systematic classificatory effort, where the Author clarifies that a *potestad* is a power granted by the law that is exercised unilaterally to satisfy the interest of third parties, which can be qualified in terms of *potestad administrativa* when such power is conferred to satisfy the general interest, the realization of which is qualified as a legal non-renounceable duty. As further explained, *potestad administrativa* is characterized by several features (one-sidedness, promptness, enforceability) and shall be exercised in compliance with legal requirements in terms of competence and procedural guarantees, which may in part vary, depending on the *potestad* being exercised (which can for instance be classified, based on its effects, as either favorable or unfavorable). Specific attention (Paragraph IV) is finally dedicated by the Author to the distinction between the titularity of a *potestad administrativa* and its exercise, an issue with regard to which the conferral of public powers to private persons (both private individuals and public sector entities with private law legal personhood) shows all of its relevance and complexity. After a rich diachronic analysis, the Author reaches the conclusion that the concept of *potestad administrativa* currently encompasses very different manifestations, which share common

features and must comply with core principles of administrative law, while still differing with reference to several aspects of the applicable legal regime.

In the second Chapter, Jean-Bernard Auby's analysis begins by recognizing that the concept of *puissance publique* played a fundamental role in the historical building of French administrative law, both from a theoretical point of view and from a practical one – two aspects which were genetically intertwined in the institution of the *Conseil d'État* and in the affirmation of its jurisdiction. However, the Author further clarifies that, although the concept still represents an important component of several constructions French administrative lawyers resort to for determining the legal regime of specific institutions or situations, *puissance publique* plays an overall limited practical role in modern administrative law. Auby explains how the central stage has rather been contended, and then occupied, by the concept of *service public,* which currently plays a greater practical role. The Author concludes that *puissance publique* nevertheless remains conceptually unavoidable for understanding French administrative law and – we might add – for comparing it with other legal systems.

The third Chapter, written by Giacinto della Cananea, introduces the concept of administrative function in the Italian legal system by placing it in the context of the multifarious duties of the government, which, from a diachronic perspective, have both changed in nature and increased in quantity. The Author observes how, besides the core functions of the State, the beginning of the twentieth century featured a significant growth in the field of public services; della Cananea explains that, on the one hand, only among the former an authoritative trait can be properly identified, and, on the other hand, administrative functions through which powers governed by public law are exercised, only constitute part of a broader category. The Author further clarifies the latter aspect by expounding the two criteria employed by Italian administrative law Scholars, jurisprudence, and the legislator to define administrative functions, *i.e.* the subjective criterion (centered on the exercise of a function by a public authority) and the objective one. The second criterion, which, among other things, allowed the Italian legal system to achieve better coherence with EU law, constitutes the conceptual link in force of which several hypotheses in which private bodies carrying out objectively administrative functions, can be included among the subjects exercising functions

governed by public law. The exercise of such functions, as explained by della Cananea, entails a series of consequences in terms of legal regime (such as compliance with standards of legality, publicity, fairness, and procedural guarantees) and of judicial protection. The Author concludes his analysis by observing that a broader vision of administrative law, *i.e.* one that is anchored to the exercise of a public function (regardless of the nature of the agent), is not only advisable, but also necessary.

In the fourth Chapter, Jens-Peter Schneider differentiates among several legal concepts related, in German administrative law, to that of public function. The Author distinguishes tasks (*Aufgaben*) and powers *(Befugnisse*) among the duties of the public administration (*öffentliche Verwaltung*) and clarifies that while both *Beamte* and *Verwaltungshelfer* can discharge public duties, the exercise, on a regular basis, of public powers is reserved to the former, while the latter may only carry out preparatory activities, often characterized by a technical nature. Nonetheless, also private parties (*Beliehene*) can be authorized by law, or on the basis of a legislative provision, to exercise administrative powers. Furthermore, by linking the exercise of public functions to the concept of State authority (*Staatsgewalt*), and, through the latter, to the principle of democratic legitimation (characterized by different levels of intensity), the Author emphasizes the deep relationship existing between constitutional law and administrative law. As it is well known, such relationship is not clearly an exclusive prerogative of the German legal system, but it has undeniably been masterfully theorized by German legal Scholars. Through an analysis of several legislative provisions and of their consolidated interpretation, the Author explains that, according to German law, most public law rules (*e.g.* those codified in the *Verwaltungsverfahrensgesetz, i.e.* the Federal Administrative Procedure Act, and in the *Verwaltungsgerichtsordnung, i.e.* the Administrative Courts Proceedings Act) are still based on certain formal requirements, which can narrow their effective scope of application. Notwithstanding such critical aspects in the application of public law rules, which derive from the ambiguity of the concept of *öffentliche Verwaltung,* the Author concludes that a common trend towards an expansion of the legal protection against the various forms of administrative functions can be detected in German law.

The fifth Chapter, authored by Marek Wierzbowski, expounds the concept of public function in the Polish legal system. The analysis begins, even in this case, with an issue of lexical ambiguity. In fact, the Polish term *wladza publiczna* can, on the one hand, be interpreted in a subjective way, bearing an all-encompassing attractive force which includes in the concept every public authority (from the judiciary, to local entities) as well as private entities charged with public functions (superior authority) by way of an authorization of the State. On the other hand, the term can – although this occurs less frequently – be interpreted in a functional (or objective) sense, meaning the exercise of a superior public power (regardless of the nature of the agent exercising such power). This premise is important and necessary, because it allows the reader to understand how broad the concept of public function is in Polish law, and how limited is its theoretical relevance in the construction of Polish administrative law. The Author, for instance, explains that if «you look into handbooks of Administrative law, you would rarely find the expression public function or public power» (p. 165). Finally, the concept also plays a limited role in practical terms, considered that the Code of Administrative Procedure does not refer to public function nor to administrative function for delineating its scope of application, making instead reference to proceedings carried out by public authorities (or, at times, other – also private – specified entities performing public tasks).

Gordon Anthony explains in the sixth Chapter how and under which points of view public functions are relevant in UK administrative law. Coherently with the common law legal tradition of the United Kingdom, the Author moves from caselaw (rather than theoretical systematizations) and adopts the perspective of judicial review, in which the concept of public function has traditionally played – and still plays – a limited role. More precisely, being the UK system of administrative law mainly built on the principle of the sovereignty of parliament, from which derives the *ultra vires* doctrine, the concept of public functions emerged in the caselaw mainly – if not only – in the specific context of decision-making by private – or non-statutory – bodies. To determine the nature of the functions exercised in such controversies, courts resorted to the source of power test, which was however ambiguous in some of its applications. In fact, while the test meant that a decision taken on the basis of a statutory

authorization could surely be considered an exercise of a public function, it also meant that where the basis was a contract, the function would only be considered as private in nature. The drawbacks in terms of judicial protection and accountability deriving from the public-private divide, as associated with the source of power test, are neatly pointed out by the Author, who subsequently explains how the enactment of the Human Rights Act of 1998 (HRA) offered an opportunity to address the issue in different terms. The Act, in fact, considers a public authority – subject to obligations and judicial review under the HRA – «any person certain of whose functions are functions of a public nature». Notwithstanding some creative precedents, duly analyzed in the Chapter, the Author concludes that, especially where public functions are contracted out to private entities, «an element of dogmatism has meant that gaps in the law have, in fact, become even more pronounced» (p. 189).

Finally, in the seventh Chapter, Herwig C.H. Hofmann and Jasmin Hiry address the concept of public function in EU law, acknowledging, first of all, the peculiarities of discussing such issue in a legal system which is built on the principle of conferral. The principle implies that, for a public function to be identified in EU law, a public power, which requires acting in the public interest, shall be conferred. Two elements are therefore necessary: a European public power, and a European public interest. Since this broad definition applies both to the legislative and to the administrative powers conferred to EU Institutions, the Authors deepen the analysis on the concept of administrative function in EU administrative law. They point out how, in EU's multi-level structure, much of the implementation (and therefore of the administrative function) is carried out by national authorities. The analysis, of course, recalls the notions of indirect, direct and co-administration in EU administrative law, to the elaboration of which, most of the Authors of this book have significatively contributed. The Authors finally look at the limits of the notion of administrative function, from the perspective of the limits of delegating the latter within the normative and institutional framework of EU law.

The book does not include a conclusive chapter carrying out, for instance, a comparative overview of the results presented in the seven chapters, as it can be found in other recent publications on subjects closely related to the one addressed here. This does not,

however, leave any gap in the analysis, and this is so for several reasons. Firstly, as already mentioned at the beginning of this review, the book is part of a broader research project, to which the book undoubtedly contributes deeply, by expounding a core, complex and often under-explored concept. Secondly, both the Editor's Foreword and Galetta's Introduction provide a useful framework, and individuate some common threads that lead the reader along the Chapters. Elaborating on this, we could in fact observe that: the concept of administrative function seems nowadays anchored to an objective dimension in most of the considered legal systems (with the exception of Poland); the concept shares the main features of the concept of public function (where it is theorized), although it presents some other traits that are peculiar to it; the concept is not only theoretically relevant, but entails several practical consequences in terms of the applicable legal regime and of judicial protection; elements of formalism and dogmatism in the notion of public function tend to restrict the scope of application of administrative law. Thirdly, and conclusively, from a practical point of view it would have been a hard task that of comparing the results presented in the Chapters, expounding the similarities in the notions and in the legal regimes, as well as the peculiarities that justify the presence of differences. It would have been even more difficult to explain the legal, historical and cultural reasons of such commonalities and diversities.

The circumstance that the book leaves some of these questions open to the reader does not diminish the value of the reached outcome, it confirms, rather, the fact that it addresses a fundamental concept in administrative law, paving the way to further comparative researches.