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ENVIRONMENTAL LAW

ANNUAL REPORT - 2010 - SPAIN

(January 2011)

Prof. Blanca LOZANO[*] and Diana COGILNICEANU[**]

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1. MAIN LEGISLATIVE NOVELTIES

1.1 Order 143/2010 of the Ministry of the Environment, and Rural and Marine Affairs, of 25 January, on the establishment of an Integral Management Plan for the conservation of fishery resources in the Mediterranean

The main aim of this Order is to establish an Integral Management Plan deemed to regularize the fishing activities in the Spanish Mediterranean area, such as trawling, purse seine fishing, fixed and small fishing equipments and longline fisheries, as to preserve and improve fishery resources. The Plan will be applied until the 31st of December 2012, with the possibility to be prolonged.

The described regulation has the meaning to preserve some concrete species. As the Order's "Statement of Motives" declares, "several scientific reports have confirmed the worrying situation of these fishing species, and taking into consideration their commercial value, it is a fact that the Mediterranean fisheries, in a medium term, are in a grate danger".

The regulatory actions contained in this Plan concern Spanish flag vessels that aspire to carry out fishery activities in the Mediterranean area. Some of those actions refer to: **(i)** the establishment of temporary restrains regarding longline fisheries; **(ii)** the total prohibition of the bottom trawl fisheries beyond 1000 metres, in all the exterior waters of Spanish Mediterranean coastline; **(iii)** the total prohibition of trawling activities, dredges and seines, over the layer of some protected marine species; **(iv)** the total prohibition of trawling activities in marine areas marked by concrete coordinates; **(v)** restrain the total amount of Spanish vessels daily catch when purse seine fishing activities are being carried out.

1.2. Law 8/2010, of 31 March, on the establishment of the disciplinary regulatory framework foreseen in the UE Regulations on registering, evaluating, authorising and placing restrictions on chemical substances and mixtures (REACH) and on classification, packaging and labelling of chemicals and their mixtures (CLP) that modifies it

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The aim of this Law is to establish the disciplinary regulatory framework applicable in case of infringement of the abovementioned UE Regulations (1907/2006 and 1272/2008, respectively), according to their own provisions (as they demand to the Member States to adopt "effective, proportionate and dissuasive" sanctions in case of infringement of their stipulations).

The Law regularizes infringements and sanctions, and establishes the basic legal framework to be applied to the responsible subjects, prescriptive right, concurrency of sanctions, provisional measures and damage reparation and indemnification actions (in case of environmental damages, the reparation process is the established upon the Law 26/2007, of 23 October, on Environmental Responsibility).

The Law recognizes the environmental legislative powers attributed to the Autonomous Communities regarding monitoring, inspection and control actions to be carried out in their own territories, as to guarantee the due accomplishment of the stipulations contained in the both UE Regulations, as well as to produce complementary regional legislation, to establish, if needed, additional protection legislation (because the Constitutional Court has allowed to the Autonomous Communities to establish a more restrictive sanctions in case of infringements) and to exercise their legislative authority as to impose sanctions (the competence for that will correspond to the regional competent entity in which territory the infringement took place; if the infringement is committed in more than one Autonomous Communities, the competence will correspond to the one that has observed the infringement first).

An interesting observation is the fact that besides the traditional classification between serious, major and minor infringements (the sanctions may ascend to 1.200.000 Euros, by the way), the Law classifies the sanctions upon their nature, depending if they are related to chemical substances or their mixtures. As for the rest, is being maintained the traditional proceeding of temporally (not exceeding a five years period of time), total or partial, closure of the responsible plants or the faculty of the competent entities to publically publish the definitive sanctions, the concurrent facts and the identity of the offender (s).

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Stands out the preventive purpose of the Law, materialized by the faculty of the Administration to adopt provisional measures before the judicial procedure, and to subsidiary execute the preventive and corrective measures, at the expense of the responsible subject, when an imminent danger or already occurred damaged have been produced, if the subject itself is not willing to act properly or its actions are not sufficient.

1.3. Law 6/2010, of 24 March, regarding the modification of the Law on Environmental Impact Assessment of projects

This partial modification of the consolidated version of the Law on Environmental Evaluation of Projects (known as TRLEIA) is foreseen with the purpose to simplify and speed up the existent bureaucratic procedure, which was delaying excessively the beginning of the activities, as well as to adapt its provisions upon the Law 17/2009, of 23 November, on free access to and exercise of service activities (known as "Umbrella Law", in order to carry out a proper transposition of the Services Directive). The main novelties of this Law are the next ones:

1. The new regulatory framework specifies the actions to be implemented upon an Environmental Impact Assessment procedure (EIA in Spanish), composed by three phases: Phase 1: determination of the Study's on Environmental Impact achievements (the project promoter makes a formal requirement to the competent environmental body and this one determines the achievements of the Study); Phase 2: Study on Environmental Impact (the Study, its submission to public information and consultations); Phase 3: Declaration on Environmental Impact (DIA in Spanish), granted by the competent environmental body.

2.The duration of EIAs, competence of the Central Administration, is considerable reduced: **(i)** all the actions to be implemented during the Phase 2 can not exceed the time limit of 18 months, considered from the day when the project promoter receives the formal notification on the Study's on Environmental Impact achievements; **(ii)** the transfer of the file to the competent environmental body will have to be done in the same period of time, and once received, the body in charge will have a 3 month term for the granting of the Declaration on

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Environmental Impact. This way, the total duration of the procedure is of 21 months; half as much the previous duration, of 43 months.

3.If in a maximum of 18 months term, considered from the day when the project promoter receives the formal notification on the Study's on Environmental Impact achievements, the competent environmental body did not receive from the prior competent body the Study on Environmental Impact, neither the technical documentation of the project nor the public opinion results, the file will be closed (which implies the need to reopen from the beginning the entire process of the EIA; this kind of legal solution is already foreseen in the TRLEIA, as to surpass the deadlines imposed by the Autonomous Communities).

To avoid that kind of legal unfair lapses, "when the delay is exclusively or partially attributable to the Administration, the competent environmental body will have to decide, by means of a reasoned decision, *ex officio* or at the request of the prior competent body, if there is a need to close the file or it is possible merely extend the deadline, to a maximum month term". This is a manner to protect a diligent project promoter, avoiding the definitive closure of the file when the delay is not his fault.

4. The Law was adapted to the provisions contained in the "Umbrella Law", in order to carry out a proper transposition of the Services Directive. This way, it introduces the obligation to submit a statement of responsibilities or a previous communication as to access to an activity or its development procedure and, eventually, the granting of the EIA; the statement of responsibilities or the previous communication can not be submitted until the EIA is not carried out, and, in any case, the need to provide the accrediting documentation. The Law also declares that the statement of responsibilities or the previous communication won't have any legal validity or efficiency if their content is not according with the DIA.

The need to obtain a statement of responsibilities or a previous communication, once the project has been submitted to the EIA, implies two important consequences: **(i)** the need to redefine the status of the "prior competent body", which will assume powers regarding the granting of the EIA; it will be "a Central Administration, regional or local body in charge

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empowered with enough competences to authorize, adopt or control the promoter's activity upon the statements of responsibilities or previous communications, submitted to an environmental impact assessment procedure"; **(ii)** a subsequent consequence not foreseen by the Law, but obvious enough to be announced: the need to revise the jurisprudence that considers the Declaration on Environmental Impact as a mere preparatory act, and, there for, not able to be appealed by itself, but only once the authorization is granted. So, when the project will only require a previous communication or a statement of responsibilities, the granting of the DIA will imply the ending of the proceeding and, consequently, the possibility to apply its results directly.

5. It is established the need to identify the author(s) of the Study on Environmental Impact or of the required documentation regarding those types of projects contained in the Annexe II and for those ones that, without being included in the Annexe I, may affect directly or indirectly the spaces of the "Nature Network 2000" (known as "Red Natura 2010"). Even so, the Law did not consider necessary to demand from the subscriber of those documents to posses a high professional education or a sufficient capacity and experience in the field, as have already done some other Autonomous Communities (Castilla and León, Castilla la Mancha and the Balearic Islands).

1.4. Royal Decree 367/2010, of 26 March, on the modification of several environmental regulations for their adaptation to the Law 17/2009, on free access to and exercise of service activities, and the Law 25/2009, on modification of several laws for their adaptation to the Law on free access to and exercise of service activities

The purpose of this Law is to complement the transposition into the national legislation of the UE Services Directive, regarding environmental activities. To that end, several regulations have been modified (on prevention and integral control of contamination matters, air quality, waters, coasts, natural environment and genetically modified organisms), as to their adaptation to the prescriptions contained in the referred UE Directive and its transposition laws, deemed to achieve an easier proceeding scheme; to introduce the publicity, impartiality, transparency and competitive concurrency principles into the service

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activities; and the substitution in some cases of the authorizations by statements of responsibilities or previous communications.

1.5. Law 13/2010, of 5 July, modifying the Law 1/2005, of 9 March, on regulatory framework of greenhouse gases emissions trading, as to improve it and extend it to aviation activities

As the title itself indicates, the purpose of this Law is to modify the Law 1/2005, transposing into the national legislation the modifications introduced by the recent two UE Directives, after revising the UE Directive 2003/87/CE, on the communitarian greenhouse gases emissions trading system (UE Directive 2008/101/CE, which includes the emissions produced by aviation activities into the trading system, and the UE Directive 2009/29/CE, which carries out a profound revision of that system). This legislative initiative is due to the gained experience upon all these years (to be more specific, from the 1st of January 2005, when the greenhouse gases emissions trading system began).

The main novelty of it consists in the fact that, from 2013 to 2020, the allocation of emission rights will be realized by means of auction sales. The ambition of the legislative power was to offer a real and effective opportunity to the small and medium companies a "full, fair and equitable" access to the emissions trading market, avoiding this way the production of "undesirable distributional effects", as the ones occurred in the electricity sector. The Climate Change Secretary of State will be the responsible body in charge to publish a detailed report, after each auction sale, including the price of each auction period.

Nevertheless, the Law foresees a transitional free allocation period of emission rights until 2020, beneficing those sector/subsectors exposed to a considerable risk of carbon leakage[1],

[1] Those ones for whom the appliance of the greenhouse gases emissions trading system may cause an increase of emissions produced in third countries that haven't imposed in their industries similar reduction obligations.

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and also the urban heating and high-efficiency cogeneration systems. In general terms, are excluded from this free allocation system the producers of electricity, the capture facilities, the pipelines for transport and storage emplacements for carbon dioxide.

As for the *new entrants*, a 5% of the total communitarian amount of emission rights has been reserved for them, for the period 2013 – 2020. The rules on the free allocation system to be applied to new entrants will be established upon future communitarian regulations and, if necessary, national regulations implementing this Law (please bear in mind that it is completely prohibited the free allocation of emission rights to new entrants that produce electricity). In case that some of the reserved emission rights would remain undelivered, they would be auctioned as regular ones.

Because of the disappearing from 2013 of the National Allocation Plans (the European Commission will be the body enabled to calculate and publish the amount of emission rights to be conceded to each Member State), has been introduced a new concept, the one of *trading period*, who's duration was established in a 8 years period of time.

The allocation system is introduced by means of the Cabinet of Ministers´ agreement and creates the legal figure of *automatic lapsing of emission rights*, in case that those rights wont be used during their trading period (or emission production).

Upon this Law, transposing the UE Directive 2008/101/CE, the aviation sector is being introduced in the communitarian greenhouse gases emissions trading system. The Law regulates all the aspects applicable to the greenhouse gases emissions trading system in the aviation sector, some of them different from the general trading system (for example, the non existence of the emission authorization legal figure, replaced by monitoring plans). The Law previews that from the 1st of January 2013, the 15% of the total amount of emissions rights will be auctioned in benefice of the aviation sector.

Another important matter is the relative to the Annex I of the Law (where have been included the aviation activities), which regulates the applicable regime, but also incorporates into the greenhouse gases emissions trading system all the new industrial sectors contained in the UE Directive 2009/29/CE, such as the petrochemical, ammonia and

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aluminium sectors. The regulatory framework is extended also to other two greenhouse gases kinds, easily measured and monitored with sufficient precision (nitrous oxide emissions produced by some chemical mixtures and perfluorocarbons emissions produced by the aluminium sector).

Last but not least is the content of the Fifth Additional Provision of the Law, including the possibility to grant emission rights or credits to projects located in national territory not submitted to the greenhouse gases emissions trading system.

1.6. Royal Decree 943/2010, of 23 July, which modifies the Royal Decree 106/2008, of 1st February[1], on batteries and accumulators and the environmental management of their waste

The importance of this Decree is the possibility given to the producers of batteries and portable accumulators generating hazardous waste, as to comply with their legal obligation, to collect and duly manage the generated waste not only, as so far, by the means of **(i)** a deposit and return system or **(ii)** an integral management system, but also using a **(iii)** public management system; this last option, of new creation, extends considerable the legal options to be applied by the producers of batteries and portable accumulators.

1.7. Law 40/2010, of 29 December, on geological storage of carbon dioxide

This Law has the meaning to introduce in the national legislation the provisions established upon the UE Directive 2009/31/CE. The legislative strategy is to capture, transport to specific emplacements by means of tubes or tanks and, finally, inject into an adequate underground geological structure the carbon produced by industrial activities, in order to achieve its permanent storage.

The two administrative tools designed by the new regulatory framework of CO_2 are the *investigation license* and the *storage concession*, granted both of them by the Ministry of Industry, Tourism and Commerce, previous favourable reports from the Ministry of the

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Environment, and Rural and Marine Affairs and the competent Autonomous Community where the storage emplacement is located.

The *investigation license* is granted as to determine the storage capacity of a land, allowing to its owner to investigate for a period of time of 6 years (extendible to 3 more). The Geological and Mining Institute has already designed a map including the CO_2 storage areas, for more than 20.000 millions tones (20 Gt). And as regards the *storage concession*, this one will offer to its owner the possibility to storage the gas for a 30 years period of time, extendible for two more consecutive periods of 10 years.

Both of them may be transmitted, having obtained previously the authorization from the Ministry of Industry, Tourism and Commerce. After the definitive closure of the activity, the Central Administration will assume the ownership and control of the storage emplacement, as well as the responsibility charge.

Regarding the transportation of the CO_2, it will be the Ministry of Industry, Tourism and Commerce the competent body who will adopt in the future an appropriate regulatory framework.

The Law also establishes a hard disciplinary regime, composed by sanctions from 500.000 Euros (minor infringements) to 5.000.000 Euros (serious infringements).

1.8. Law 41/2010, of 29 December, on protection of marine environment

This Law has transposed to the national legislation the UE Directive 2008/56/CE, of 17 June 2008, establishing a regulatory framework in the filed of the communitarian marine environmental policy (Marine Strategy Framework Directive). This Law will be applicable to the territorial sea, to the Atlantic and Cantabrian exclusive economic zones, to the Mediterranean fisheries protection zone and to the continental platform (that's: all the marine waters, including the seabed, subsoil and natural resources). The Law also regulates the waste poured by Spanish ships and aircrafts into the marine waters, the incineration activities carried out in the see area and the collocation of equipments upon the see grand.

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The administrative tool to be applied is the "*marine strategies*", containing rules regarding the protection and preservation of the marine environment, the prevention and reduction of waste, and also the preservation of the biodiversity. The Ministry of the Environment, and Rural and Marine Affairs will define for each marine coastal demarcation, previously consulting the Autonomous Communities, the characteristics of a good environmental status, elaborating afterwards a Measures Programme (for a 6 years period of time), as to achieve or maintain a good environmental status of the national waters.

Regarding the waste poured by Spanish ships and aircrafts into the marine waters, it will be regulated upon specific applicable legislation and other regional agreements, if any.

And as to the legal responsibilities for environmental damages caused to the marine environment, the applicable framework is the Law 26/2007, of 23 October, on Environmental Responsibility.

2. RELEVANT JURISPRUDENCE

2.1 Noise pollution: Supreme Court Decision, of 3 February 2010 (appeal n.º 202/2007, reporting judge Rafael Fernández Valverde)

This Court Decision resolves an administrative - contentious proceeding submitted by an Owners Association of cottages and plots against some specific aspects of the Royal Decree 1367/2007, which develops the Law 37/2003, on Noise, regarding the acoustic zoning, quality objectives and acoustic emissions, and also declares the cancelation of a provision contained in this Regulation.

Upon the article 8.1 of the Noise Law, "*the Central Government will define the objectives of the acoustic quality applicable to different types of acoustic areas, for already existing or future situation*".

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The Court Decision declares, admitting the appellants' claims regarding this point, the non-compliance of the above mentioned regulatory provision, contained in the Table A of the Annex II of the Regulation, referred to the "Acoustic quality objectives", in its paragraph f), on "territorial sectors related to general systems of transport infrastructures or other public facilities in need of those infrastructures."

The main cause of this claim was because, meanwhile in other five Sectors foreseen in the Table A the acoustic quality objectives are established upon concrete noise rates, expressed in decibels, in the Sectors described in the paragraph f) the acoustic quality objectives are "undetermined", containing a footnote simply declaring that "in these territorial sectors will be adopted adequate preventive measures on acoustic contamination, in particular, applying the technologies with a minor acoustic impact, chosen between the best available techniques".

The Court declares that this kind of regulatory ambiguity can not be accepted, bearing in mind that is not the same establish, as an acoustic quality objective, a concrete noise rate than disposing that an adequate preventive measures is foreseen to be adopted, because the preventive measures are tools to be applied for the achievement of the final objective and if this objective hasn't have been properly defined, all the remaining mechanisms included in the Law loss their meaning. The Decision also declares that this kind of ambiguity may only lead to a serious lack of defence, which impedes the citizens to defend their legal interests before the competent public authorities.

This way, the Court Decision cancels the former expression "undetermined" contained in the Table A, where are established the "acoustic quality objectives for noise applicable to existing urbanized areas", of the Annex II of the Regulation, regulating the "acoustic quality objectives". Nowadays, they are working on a Draft Amendment of the Royal Decree 1367/2007, as to replace the expression "undetermined" by a footnote expressing that, regarding the limits of those territorial sectors, will not be exceeded the acoustic quality objectives for noise applicable to other acoustic areas adjacent to the first ones".

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2.2 Waste: National High Court Judicial Order, of 17 February 2010

This Judicial Order was highly acclaimed by ecological organizations, because of the immediate cessation of the fosto-plaster waste discharges carried out by the companies FERTIBERIA and FMC FORET into the Huelva's marshes. The background of the case is the following:

- In 1965, a factory producing phosphoric acid was implanted in the city of Huelva, purchased afterwards by the company FERTIBERIA, S.A. The evacuation of that acid implied the production of other by-product called fosto-plaster, a toxic and hazardous industrial waste, which was poured into the Huelva's marshes.

- The company was sanctioned for illegal waste discharges in 1998; even the natural persons responsible of the factory were condemned for crimes against the natural resources and the environment (2002).

- On November 27th of 2003, the Ministry of Environment emits an Order declaring the extinction of the concession granted to FERTIBERIA. The company applies the Order, but the National High Court dismisses the claim by the Decision from June 27th, 2007, and ordains the cessation of the waste discharges.

- After the publication of this last Court Decision, declaring the extinction of the concession, between the time period of October 2007 and February 2009, the General Directorate for Coasts has requested seven times to FERTIBERIA to comply with the extinction order, and to cease consequently the waste discharges.

- By the Judicial Order of 14 December 2009, the National High Court disposes the execution of the Decision and imposes the immediate cessation of the waste discharges starting from December 31st of 2010 and not from 2012, as was pretended by the company and other administrations, taking into consideration "all the involved interests, as to allow the accomplishment of an orderly transition and properly environmental protection".

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Against this Judicial Order, the involved companies have presented an application for reconsideration before the same judicial body, pleading the damages that the provisional execution of the order would cause to the workers, other companies and installations, but the Judicial Order from February 17th declares the prevalence of the environmental general interest over the private interest of the appellants and, there for, the cessation of the waste discharges as scheduled. The company already has ceased the discharges and now foresees to carry out soil remediation works, because it has been poured more than a hundred million of tons of fosto-plaster on 1.200 acres of marsh.

2.3 Environmental Impact Assessment: Supreme Court Decision of 27 October 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

The Court Decision resolves a contentious proceeding submitted by an Ecological Association against the Council's of Ministries Agreement from May 25, 2007, on public utility and project implementation approval of Penagos-Güeñes air power line, in the Cantabrian and Vizcayan provinces.

The Supreme Court cancels this tracing, justifying that the "power line doesn't pass along the edge, as it's foreseen in the Environmental Impact Declaration (DIA), but within the Triano and Galdames forestall Biotope, which is a protected area; this why, consequently, the authorization violates the conditions established in the DIA and has been issued by an improper use of the technical discretionally power of the Administration.

The Court Decision declares null the appealed agreement, regarding the tracing of the project's implementation, and announces that the Electrical Network of Spain (REDESA or "Red Eléctrica de España) has to draft a new power line project, avoiding this time the Triano and Galdames forestall Biotope.

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2.4 Environmental Impact Assessment: Supreme Court Decision of 25 May 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

In this relevant Court Decision, the Supreme Court rejects the cassation appeal submitted by the Regional Community of Madrid and entirely confirms the High Court of Justice of Madrid Decision annulling the Decree 131/2001, of the Executive Government of the Autonomous Community, which has declared the prevalence of the general interest of the granite mining exploitation activity of the mountain "Pinar del Consejo", included in the Catalogue of Public Utility Mountains, property of the City Council of Cadalso de los Vidrios.

The Environmental Impact Declaration (DIA) granted for the mining exploitation project was negative, because of its harmful effects on the environmental values of the mountain. These environmental values included in the DIA receive a high legislative protection, because this area is included in the Special Protection Area for Birds (ZEPA), upon the UE Directive 79/409/CEE, including species listed in the national and regional catalogue of threatened species, two of them as endangered species, and as part of the Draft of the Regional List of Communitarian Importance Places.

The confrontation created between the negative DIA and the competent Regional Ministry regarding the implementation of the project was finally resolved by the Executive Government of the Regional Community of Madrid, deciding the definitive execution of the project and imposing to the responsible company the obligation to reforest the quadruple of the eventually occupied area and to promote the declaration of prevalence of the new use of the mountain prior its public utility, as to proceed in the future to its elimination from the mentioned Catalogue (required by the Regional Community of Madrid Law 16/1995, on Forest and Nature Conservation).

The declaration as null of the decree that foresees the prevalence of the new use of the mountain prior its public utility is confirmed by the Supreme Court. The Court Decision states that the Court is not judging neither replaces "the deliberation power of the Regional

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Community of Madrid, by giving its approval to the quarry activity", but the Court states openly that during the proceeding has occurred "a clear and evident infringement of the national and European environmental legislation", because of the following reasons:

- The obvious insufficiency and inadequacy of the adopted compensatory measures (consisting, mainly, to carry out reforestation actions), as they are mere legal obligations already included in the Regional Community of Madrid Law on Forest and Nature Conservation, for un-cataloguing cases or transformation of public utility use of mountains.

The mining exploitation is located in a place of "priority natural habitat and/or species", upon the UE Habitats Directive, and, from this point of view, have been violated the provisions contained in its article 6.4, second paragraph, as "for a situation of these characteristics, there has to be a much more intense conditioning"; in particular, it provides that "it would only be possible to present pleadings –as motivation for the project's approval- if they consist in considerations related to human health and public safety, or prior positive effects for the environment, or other imperative reasons of general public interest".

In this concrete case, the Court hasn't appreciate "imperative reasons of general public interest" that would allow the execution of the project, because, even if the mentioned Decree have been enumerated serious labour, economic and social problems of the municipality and of the mining company itself, in case that the works are eventually paralyzed, from the presented documents is impossible to perceived a real "labour and social situation in Cadalso de los Vidrios that may conduct to an imperative situation of general public interest; nor a special labour situation different of other neighbouring municipalities".

- Finally, because "was also infringed the same article 6.4, in its second paragraph, as it demands, beside of a specific motivation, the previous consultation of the European Commission; in particular, it says that "in this last case, using appropriate legal channels, it will be necessary to consult previously the European

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Commission"; reality that didn't happened either in this case". The absence of this previous consultation "also implies the invalidity of the Agreement, because of the substantial nature of the fault, mainly because it makes impossible the control carried out eventually by the Commission in this material environmental field".

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"NUCLEAR RENAISSANCE" IN ITALY

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Prof.ssa Laura AMMANNATI

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6. THE NUCLEAR SAFETY AGENCY

1. LEGISLATIVE CONTEXT

The Italian programme to restart the way towards energy production from nuclear source (the so called "Nuclear Renaissance") has been framed into a broad rethinking about the nuclear energy experience at European level. This renewed interest is justified even by the need of reducing the CO2 emissions in the air and of having a more balanced energy mix by 2020. Nuclear energy, like renewable energies, can help to achieve this goal (see also the European proposals about energy policy of 2007, the new nuclear power plants under construction in Finland and France, the running debates in UK as well as in Germany and Sweden).

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In Italy the first legislative step on this track was Law No. 99 of 23 July 2009 which lays down milestones of the new regulatory framework concerning nuclear power (Article 25 "delegating tasks to the Government in the nuclear field" which allows the government to issue one or more implementing decrees providing i)rules for the siting of nuclear power plants, of spent fuel and radioactive waste temporary storage facilities and of the final repository for waste, ii) the requirements regarding the licensing procedure for the construction, operation and dismantling of those plants and iii) the compensation to be paid to the populations living in the proximity of the sites; Article 26 entitles the Interdepartmental Committee for Economic Planning (CIPE) to issue two implementing decisions defining i) the typology of nuclear reactors and power facilities which are to be located in our country and ii) the measures to be adopted in order to promote the creation of consortia for the construction and operation of nuclear power plants) and the principles for the establishment of the "Nuclear Safety Agency" which represents the regulatory body of the sector (Article 29).

According to the delegation, the government approved the Legislative Decree No. 31 of 15 February 2010 (hereinafter "decree") which sets out rules for the siting, construction and operation on the national territory of nuclear power plants, nuclear fuel fabrication facilities, storage systems for spent fuel and radioactive waste, as well as compensatory measures and public information campaigns. This decree was approved within the time limit required by the law, i.e. mid-February and it entered into force on 23 March 2010.

The decree has a really complex structure as it includes a wide range of norms in order to regulate all legal key aspects of the nuclear field. Nevertheless it does not conclusively regulate many elements whose solution is differed to further ministerial regulations of the Economic Development Ministry, in cooperation with other Ministries. Choosing this kind of legislative system "in stages" causes uncertainty in respecting fixed time limits and in defining the content.

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2. MAIN ELEMENTS OF THE REGULATORY FRAMEWORK

There are three milestones of regulation of nuclear power as depicted in the decree: 1) the "Nuclear Strategy" which is a programmatic preliminary document worked out by the government. It includes strategic goals such as international alliances necessary for a rapid reduction of our technological gap, the capacity required and the time limits for construction and operation of facilities and moreover instructions regarding the temporary and long-term management of radioactive waste (about this point see the recent proposal of European directive of 3 November 2010); 2) the specification of the sites as potential locations of nuclear power plants, the so called "eligible sites"; 3)the definition of requirements for nuclear operators in charge of operating a new nuclear plant.

The "Nuclear Strategy" represents the real starting programme of returning to nuclear power and is placed in continuity, as an integral part, with the "National Energy Strategy" foreseen by Law No. 133/2008 as a tool of shaping the national energy policy. However neither this document nor the Nuclear Strategy which should have been defined within three months after the approval of decree No. 31 exist yet.

Among the preliminary steps following the definition of the Nuclear Strategy the procedure aimed at defining the sites for the construction of power plants plays a key role. This point is, as presumable, extremely delicate. But the decree only shapes a series of "technical criterion" that have to be assessed and developed in to a scheme of standards brought forward by the Nuclear Safety Agency and defined by the Economic Development Ministry in cooperation with the Ministry of Infrastructures and the Ministry of the Environment. Subsequently the scheme is subjected to public consultation where regions, local administrations and bodies characterised by qualified interests take part. The final draft approved with a ministerial decree along with the Nuclear Strategy is subjected to strategic environmental assessment (SEA). After which the emerging comments could influence retroactively the documents subjected to the SEA which in that case would be modified correspondingly.

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The procedure is structured in a really complex way and foresees the interested populations' involvement. This step is essential in order to obtain wide and deep social consensus not only because of the construction of infrastructures characterised by high environmental impact but especially in case of production of nuclear energy that is socially not well accepted. However the scheme does not encompass the precise indication of the eligible sites because only potential operators must indicate one or more sites as the location for a nuclear power plant when they submit the application for the certification.

A further essential element in the regulatory framework is the definition of the requirements that operators have to meet. What is to be highlighted is that the operators' requirements are the same even when operators are organised as consortia. The whole set of these requirements qualifies identity and structure of the potential operator. Actually, first of all, the submission of the "intervention programme" and, consequently, the application for the certification of the site and then the application for the "single licence" foresees that operators meet the requirements concerning many areas (providing suitable human and financial resources as well as technical and professional capabilities; ability in managing the activities relating to the planning, construction and operation of nuclear power plants and the storage and management of radioactive waste; and, more in general, availability of organisational structures necessary to set up and manage the licensing procedure and the activities concerning safety and radioprotection).

Nevertheless a more detailed description of those requirements is differed to a decree of the Economic Development Ministry which should be issued within 30 days after CIPE has approved one of the two implementing decisions foreseen by law No. 99. Regarding this step that is constitutive of the whole licensing procedure no deadline for the approval is given by the law itself.

The requirements necessary in defining operators should not hinder promoting cooperative patterns (consortia) as showed by the well-established Finnish experience. However it seems necessary that the operator, even if in cooperative form, must be equipped with all the necessary capabilities from the time he submitted the "intervention programme" to the Economic Development Ministry. Said programme represents the

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starting document of the procedure. The certification that operators meet the established requirements will be released together with the single licence by the Economic Development Ministry.

3. SPECIFIC RISKS OF THE NUCLEAR SECTOR

According to established legal and economic literature the nuclear sector is characterised by specific risks which especially are: i) market risks connected with the unpredictability of energy prices; ii) operation and performance risks reliant, in a liberalised market, on the technological adequacy; iii) risks connected with construction (as the events concerning the construction of the Finnish power plant in Olkiluoto demonstrates) ; iv) regulatory risks regarding modifications and interventions required by regulatory authorities aimed at increasing safety which can influence the project profitability and delay the operation of the power plants; and lastly the political risk that is the most pernicious as it is influenced by social consensus for nuclear power.

Regarding "regulatory risks", article 17 of decree No. 31 foresees that, within 60 days after being put into force, an implementing decree should be approved by the Economic Development Ministry, in cooperation with the Ministry of Economics and Finance. The ministerial decree should define some instruments of financial and insurance coverage "against risks of delayed time limits for construction and operation of power plants" caused by events independent from operators, excluding risks stemming from contracts with suppliers.

Therefore the kind of risks which we are referring to does not concern potential delays caused by excessive length of administrative procedures, but only delays eventually occurring between the assignment of the single licence and the operation of the power plant (for instance, either delays linked to the supervisory activities of the construction or to the rise of legal arguments - not referring to supply contracts - or the change of technical standards on ongoing projects).

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The political risk is much more insidious because, on the one side, citizens always have the opportunity to block the production of nuclear energy by means of a referendum and, on the other side, there are no legal instruments which can constrain the succeeding parliaments and governments to comply with previous legislative choices and political decisions. Regarding this point a first attempt to hinder the new start of the nuclear sector in Italy by means of a referendum is ongoing. Just on 12 January 2011 the Constitutional Court ruling established the legitimacy of the referendum questions.

4. SITE CERTIFICATION AND "SINGLE LICENCE" PROCEDURE

Title 2 of decree No. 31 which includes the disposals regarding the integrated licensing procedure states that the construction and operation of nuclear power plants are activities of compelling state interest. Therefore such activities are subjected to the integrated licensing which is granted, on operator's instance and with the prior approval of the Unified Conference of regions, state and local Authorities, by ministerial decree of the Economic Development Ministry in cooperation with the Ministry of the Environment and the Ministry of Infrastructure.

The new licensing procedure for the siting, construction and operation of nuclear power plants is structured in two fundamental phases: the first regards the site certification; the second and subsequent regards the single licence procedure for construction and operation of the power plant and the final certification of the operator. Indeed this one, as holder of the license, is in charge of the safety controls and radio protection as well as of the management of radioactive waste and nuclear fuel while the power plant is in function.

The site certification procedure will be carried out by the Nuclear Safety Agency. Starting from the operators' application regarding one or more sites the Agency will carry out the technical assessment and, if this preliminary investigation is successful, will issue the certification for each proposed site within a time limit of 120 days. At the same time the Agency will forward the certification to the Economic Development Ministry, the Ministry of the Environment and the Ministry of Infrastructures. Afterwards the certification will be

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submitted to the region where the site is located in order to obtain its agreement on the base of a prior approval of the municipality concerned.

Lacking the agreement the procedure foresees the intervention of an Inter-institutional Committee formed by representatives of the three ministries mentioned above, the region and the municipality involved. In case of disagreement the final decision is entrusted to the Council of Ministers where the president of the region concerned takes part.

Downstream of this procedure the decree foresees also the agreement of the Unified Conference on the list of certified sites. If the Conference does not decide within two months, the final decision will be taken by the Council of Ministers. On this base the Economic Development Ministry in cooperation with the Ministry of the Environment and the Ministry of Infrastructures adopts the decree of approval of the list of certified sites.

At this stage of the integrated procedure, for each certified site the operator concerned must submit the application for a licence for construction and operation of the nuclear power plant and for the final certification of himself as operator within 24 months after the issue of the decree.

The disposal regarding this phase of the procedure provides that the Agency carries out the preliminary technical assessment and reports its binding opinion within 12 months to the Economic Development Ministry which calls a so-called “services conference” involving the Agency, the ministries and the region and the local Authorities concerned and all the other administrations and parties involved in order to obtain all necessary opinions and agreements. If a local authority does not allow the necessary agreement to be reached, the Council of Ministers shall replace the agreement with the local authority involved by decree.

5. NATIONAL WASTE REPOSITORY AND TECHNOLOGY PARK

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The decree dedicates a specific title to "procedures for the siting, construction and operation of the national waste repository for the permanent disposal of radioactive waste, the technology park and the associated compensatory measures".

Article 26 of this decree puts Sogin – a state owned company separated from Enel when the former energy monopolist was privatised and already responsible for waste management and decommissioning of the nuclear power plants operating before the antinuclear referendum in 1987 - in charge of decommissioning of the new plants at the end of their life cycle and for the safe storage of waste and spent fuel. Moreover Sogin has the duty to construct and operate the national repository and a related technology park which will be characterised by an integrated system of scientific research, operational work and technology development regarding the management of radioactive waste and spent fuel.

The licensing procedure for the siting, construction and operation of the national waste repository is similar to that foreseen for new nuclear power plants.

Furthermore the decree requires the creation of a fund targeted at ensuring the necessary funds for the decommissioning of the plants at the end of their life time. At the same time it establishes the financial responsibility of operators and provides that the fund has to be managed in a transparent way by a dedicated body which is independent from the contributors of the fund. The fund is fed by the single licence holders' annual contribution. The organisation in charge is a public body called State Equalisation Fund for the Electricity Industry. And the amount of the contribution is fixed by the Electricity and Gas Authority (AEEG, the Italian energy regulator), on the basis of a proposal of Sogin (the public company mentioned above) and on the advice of the Agency.

6. THE NUCLEAR SAFETY AGENCY

The Nuclear Safety Agency is established and organised by Law No. 99 of 2009 (article 29). Its charter was approved, with a significant delay, in April 2010 rather than mid-November 2009 as foreseen and finally published at the beginning of July roughly at

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the same time as the decree (No. 105 of 8 July 2010) which modified the incompatibility regime regarding the appointment of the president and the members of the board who have been appointed recently and are now under scrutiny of the parliamentary commissions concerned.

Apart from several critical comments about this regulatory Agency still "on paper", highlighting its potential role in the nuclear system could be in some ways interesting. Actually the Agency has been empowered to manage many fundamental activities. Summarising they are as follows:

(1) powers concerning both technical regulation such as setting general standards and prescriptions relating to single power plants and administrative regulation (licences, authorizations, certifications and so on)

(2) investigation and supervisory powers especially aimed at guaranteeing safety, health and the environment

(3) sanctioning powers strictly connected with the exercise of supervision up to the eventual interruption of the activities and further to the proposal to revoke the licence by the same administration that issued it

(4) powers concerning information activities for the public also by means of reports and inquiries.

The relevant role of the Agency is evident in all steps concerning site certifications, control on the individual requirements of operators, supervision on the technical standards of power plants up to the definition of the binding opinion concerning construction and operation licensing. Furthermore the Agency is the body which must guarantee, at each level and within the different procedures, the safety standards established by the international and supranational authorities.

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ENVIRONMENT (CONSTITUTIONAL COURT, 2009)

ANNUAL REPORT - 2011 - ITALY

(January 2011)

Prof. Rosario FERRARA

1. In 2009 the Italian Constitutional Court tackled various themes of environmental nature and its judgments are numerous and significant (over fifty, starting with decision n. 10/2009).

Setting aside the specific topics and sub-topics that are the subject of the individual judgments (affecting all areas: water, air, soil, pollution, etc.), in this field we may observe that the *focus* of the constitutional jurisprudence is still the issue of the division of the legislative competences between the State and the Regions in the field of public policies of protection of the environment when the theme of administrative competences (of the State, of the Regions, and of the lesser territorial authorities) are not directly involved.

In other words, also where the double dilemma arises as to whether on the one hand the environment is a *quid unicum* (an asset which has to be considered as a single unit) or whether it should instead be considered as a complex plurality of assets, and on the other hand whether the environment as such is a non-material or a material asset, the analytical reasoning of our constitutional judge, and naturally of his judgments, always ends up with providing an initial – and sometimes a full - answer to a recurrent question: Who does what and what do they do?

In this context, the constitutional jurisprudence of the year 2009 is aimed at investigating the relationship - which is as chaotic as it is delicate – between the legislative competences of the State and those of the Regions, in the light of articles 117 and 118 of the Constitution, as expressed by Constitutional Law n. 3/2001.

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Indeed it is known that art. 117, secondo comma, lettera s) Cost. attributes to the exclusive legislative competence of the State the regulation of the "protection of the environment, of the ecosystem and of the cultural heritage" whereas the subsequent third comma of the same art. 117 identifies as a matter of "concurrent (between the State and the Regions) legislative competence" ("*competenza legislative concorrente*") a plurality of sectors that are objectively implicated and connected with the protection of the environment: the safeguarding of health and food; the administration of the territory; the nationwide production, transportation and distribution of energy; above all the valorisation of the cultural and environmental heritage, and so on.

And to this should be added the fact that, in the light of the fourth comma of art. 117 Cost., any matter that is not expressly attributed either to the exclusive legislative competence of the State, or to the concurrent competence of the State and the Regions, falls under the exclusive (or residual) competence of the Regions. This is a problem which immediately arose with regard to matters which had already traditionally been attributed to the concurrent jurisdiction of the Regions (hunting, building, etc.: cf. the text of art. 117 Cost. prior to the constitutional Reform of 2001).

All this explains and justifies the oscillations of our constitutional jurisprudence and enables us to understand, on the other hand, the important result of conceptual organization that has been achieved through the judgments of the year under consideration.

2. In the year 2009 the Constitutional Court delivered the following judgments on the protection of the environment in our legal system: n.10/2009; n.12/2009; n. 25/2009; n. 30/2009; n. 45/2009; n. 53/2009; n. 61/2009; n.79/2009; n.84/2009; n.86/2009; n.88/2009; n.109/2009; n.122/2009; n.137/2009; n.139/2009; n.141/2009; n.145/2009; n.153/2009; n.165/2009; n.166/2009; n.173/2009; n.186/2009; n.218/2009; n.220/2009; n. 225/2009; n.226/2009; n.232/2009; n.233/2009; n.234/2009; n.235/2009; n.238/2009; n.240/2009; n.241/2009; n.246/2009; n.247/2009; n.248/2009; n.249/2009; n.250/2009; n.251/2009; n.254/2009; n.260/2009; n.272/2009; n.279/2009; n.282/2009; n. 290/2009; n.300/2009; n.302/2009; n.307/2009; n.309/2009; n.314/2009; n.315/2009; n.316/2009; n. 322/2009; n.339/2009.

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This is evidently rather a vast body of judgments (53, to be precise!) which are moreover ascribable to some homogeneous trends of thought and deliberation, as we have just seen. It therefore seems preferable to intervene selectively on those decisions that have contributed most towards determining or consolidating the trends and orientations which had already emerged in previous years, or to outline new interpretative lines of the constitutional norms (arts.117 and 118 Cost., which are obviously connected with arts. 9 and 32 as regards the more general principles).

In this context decision n. 61/2009 appears to be of particular value, as its logical antecedent is, to some extent, represented by the previous decisions n. 12/2009, nos. 62, 104 and 105 of 2009.

In decision n. 61/2009 the Court once more tackled the *vexata quaestio* of the distribution of competences between the State and the Regions, in the light of art. 117 Cost., at last and definitively surmounting the jurisprudential trend set in motion by the "mother of all judgments", namely by decision n. 407/2002. After the new "*titolo V°*" of the second part of the Constitution came into force, decision n. 407/2002 led to the formulation of a real process of "dematerialization" of the subject of the environment. Thus the environment (*rectius*, the protection of the environment) was no longer a subject in the technical sense, it was instead a value and, as such, it was able to mobilize the competences of all the subjects of our multilevel system (and especially the legislative competences of the Regions, despite the clear literal contents of the formula about which see art. 117, secondo, comma, lettera s) Cost.).

However, decision n. 61/2009 affirms the pre-eminence – and indeed the exclusivity – of the legislative power of the State in the field of the environment, stating the principle by which, according to what is written in the grounds for the decision: "The Regions, in the exercise of their competences, shall respect the State provisions on the protection of the environment, but for the purposes of achieving the specific objectives of their competences (on the subject of safeguarding health, administration of the territory, exploitation of the environmental heritage, and so on) they may establish higher levels of protection...."

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This is a most interesting point as it is not the matter of the environment as such that is, so to speak, fragmented and disjointed, to the extent that it takes on the character of (mere) value. It is instead thanks to fundamental issues of concurrent competence, between the State and the Regions (objectively implicated and connected with the public policies of protection of the environment), that the Regional legislative powers possess an important diffusive capacity, to the point of being able legitimately to raise the threshold and the standards of environmental protection in their territory of competence. This appears to be an important hermeneutic operation if we consider that, in the light of art. 117, terzo comma, Cost., on the subject of competing legislative competences the State can only provide for the "determination of the fundamental principles…" of the single matters. In any case, according to what also the best doctrine has pointed out in comment to this and other coeval decisions by the Constitutional Court (P. MADDALENA, *La tutela dell'ambiente nella giurisprudenza costituzionale,* in *Giornale di diritto amministrativo*, fasc. n.3/2010, 307ff and F. FONDERICO, commenting, moreover, on subsequent decision n. 225/2009, *ivi*, fasc. n. 4/2010, 369ff.), what appears clear and beyond dispute is the exclusive (and even the intangible) nature of the legislative competences of the State in the field of the environment. This means that the albeit active, and not merely marginal or supporting, role of the Regions has to be derived from other matters (those of concurrent competence), without subtracting anything from the ordinative and diriment value of letter *s)* of art. 117, primo comma, Cost.

In this regard the doctrine (P. MADDALENA, o*p. loc. cit.*) certainly hits the mark by pointing out that the judge of the constitutionality of the laws thus states equally the principle according to which the environment is always and in any case "material", objectively a "material" asset (also on this point reiterating the less recent constitutional jurisprudence) while concluding, from another point of view – but in reality with fully consistent logic – that if the State is bound to ensure the "minimum standard of protection" this in no way subtracts from the fact that the aforesaid standards and levels of protection have to in any case entail "appropriate and not reducible" care "of the environment". "Appropriate" and not "reducible" - and therefore "high" - protection which the individual Regions can implement if required, but only thanks to the mobilization of other faculties and powers, in the wake of art.117, terzo comma, Cost.

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To fully grasp the elements of originality and novelty of the trend outlined by the aforementioned decision n. 61/2009 which leads, to some extent, to results of a certain degree of stability – almost a solid and stable point from which there is no going back – it may be useful to consult decision n. 62/2008 on the subject of the regulation of refuse which instead appears to follow in the wake of the previously cited decision n. 407/2002 (the "mother of all judgments", as we have already said). And indeed according to this decision of 2008 the legislative competence of the State on the subject of the protection of the environment is interwoven with other interests, with other different competences which are above all ascribable to the Regions: from here to state that the environment is a "value" (and not a matter in the true sense) is a short step, and thus we return to the spirit of decision n. 407/2002.

In any case, the judgments subsequent to decision n. 61/2009 and especially n.12/2009 and n. 30/2009 appear broadly to confirm the assumptions of the often cited decision n. 61/2009. In particular, these judgments uphold the concept that the national regulation regarding the protection of the environment plays the role of "limit", in the sense that it prevails over the regulations made by the Regions (including the Special Statute Regions) even on subjects and fields of their competence.

3. In any case, it is with decision n. 225/2009 that the new jurisprudential trend appears to receive definitive and stable consecration. Without any doubt, this is the weightiest and most important decision to have been issued by our constitutional judge in the year 2009 with regard to the subject of the protection of the environment in our constitutional system (cf. P. MADDALENA, op. loc.cit e F. FONDERICO, *op. loc. cit.*).

Indeed it is stated that: "The subject "protection of the environment" has a content which is at the same time objective, as it refers to an asset (the environment), and finalistic because it aims at the best conservation of the asset itself. On the environment various State and Regional competences are concurrent; however, they remain distinct from one another,

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pursuing autonomously their specific objectives through the provision of various disciplines".

So the environment is certainly an asset, it takes the form of a material object and with regard to it there is a plural concurrence of State and Regional powers; the assumptions of this concurrence are in any case constructed according to the principles of autonomy and differentiation/distinction.

The Constitutional Court is perfectly coherent when it adds that "The State is entrusted with the protection and conservation of the environment, by means of establishing "appropriate and not reducible" levels of "protection", while it is up to the Regions, in full respect of the levels of protection established by the State provisions, to exercise their own competences, aimed essentially at regulating the enjoyment of the environment, preventing the environment from being compromised or altered". And so the guideline which had already clearly emerged with the previous decision n. 61/2009 is confirmed, apart from the fact of distinguishing in a clear-cut manner between one competence (of the State) aimed at ensuring appropriate and not reducible levels of protection of the environment and the direct Regional powers aimed instead at regulating the concrete forms of the enjoyment of the asset "environment", without that enjoyment turning into a lower level of its protection.

To this should be added, on the same wavelength as a large part of the jurisprudence which became consolidated in the year 2009, that "State competence, when it is the expression of the protection of the environment, is a limit to the exercise of the Regional competences", pointing out that "The Regions themselves, in the exercise of their competences, shall not violate the level of protection of the environment set by the State" and that, moreover, "The Regions themselves, so long as they remain within the limits of the exercise of their competences, can attain higher levels of protection, thus having an indirect effect on the protection of the environment". Which, all things considered, cannot let us forget, in the opinion of the Constitutional Court, that "This possibility is, however, excluded in the cases in which the State law has to consider itself binding, as it is the fruit of a balance between several interests which may be in contrast with each other".

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It is certainly significant that our constitutional judge has reached clear-cut conclusions in the context of a process of balancing/comparison between the protection of the environment and that of health (art. 32 Cost., to be read in connection with art. 117, terzo comma, Cost.).

Indeed the Court fully grasps the links between functions (and above all between culture and values) which bind together in a sort of inextricable *quid unicum* the safeguarding of health and the protection of the environment, as "there is no doubt that the healthiness of the environment conditions human health". And on the other hand it is no less true (at least from the legal point of view!) that "the two competences have different objects", in the sense that the Regional regulations aimed at safeguarding the human right to health can only reflect indirectly on the environment which has already been made the subject of "appropriate" regulations and protection by the law of the State.

Consequently, in the field of the protection of the environment the State has exclusive legislative competence. According to art. 188 Cost. the State therefore has the right grant to itself, i.e. to the Regions or to the lesser territorial authorities, the exercise of administrative functions regarding the environment, in the light of the principles of subsidiarity, appropriateness and differentiation.

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NEW RULES ABOUT PUBLIC FINANCE AND ACCOUNTANCY

ANNUAL REPORT - 2011 - ITALY

(January 2011)

Prof. Livia MERCATI

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1. FOREWORD

In the last three decades the italian legislation concerning public finance and accountancy has been changed almost every ten years; the reference text dates back to 1978 (law n. 468) and was later amended by three laws: n. 362/1988, n. 94/1997 and n. 208/1999.

As far as public finance management and planning are concerned, several regulations have jointly defined a set of rules which is much more complicated and

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structured than one would imagine by taking into account the article 81 of the Constitution, that, as is widely known, refers to the annual budget only.

It is important to remember that with law n. 468/1978 both Financial Law and Cash Basis Accounting were introduced together with Accrual Basis Accounting, the Triennial Budget, and Cash Reports. Furthermore law n. 362/1988 created the Financial Economic Programming Document (DPEF) and the provisions linked with the financial law. Law n. 94/1997 restructured the annual budget, distinguishing between the so-called political budget, divided into basic provisional units of resource (UPB) which are subject to Parliament approval, and the so called administrative or management budget, which is then divided into expenditure categories. Finally law n. 208/1999, widened the content of the Financial law, set up a reserve fund for standing expenses and made compulsory the writing of a technical report about the schemes of legislative decrees.

Law n. 196/31st December 2009, which was introduced to make the existing regulations on Public Finance match the needs created by the institutional changes and the state of public finances, abrogated all these regulations and systematized the whole discipline modifying then evry aspect of Public Finance regulation.This law in particular modified the coordination between different levels of government, the definition of the objectives of public finance, the harmonization of accounting systems, the planning of the objectives of public finance, the documents regarding public accounting, the financial coverage of the expenditures, the Cash Management of public entities, and the planning of cash flows and control systems.Nell'ultimo trentennio il legislatore italiano è intervenuto in materia di contabilità e finanza pubblica con cadenza pressoché decennale; il testo normativo di riferimento risale infatti al 1978 (l. n. 468) ed è su quel testo che hanno inciso i successivi interventi di riforma, introdotti con la l. n. 362/1988, con la l. n. 94/1997 e con la l. n. 208/1999.

2. THE MAIN CONTENTS OF LAW NUMBER 196/2009

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The new public finance and accountancy law is therefore a new organic regulation that implements changes by both making specific provisions immediately effective and by referring to delegated legislation. Much of legislation has been delegated to the Government, and therefore most of the reform will be realized by specific legislative decrees, such as the transition to cash only budget, the harmonization of accounting systems, the consolidation of a budget system structured in missions, programmes and actions, the strengthening of accounting systems and the creation of a Consolidation Act regarding public accountancy and treasury (see article 2, article 30, paragraph 8, articles 40, 42 and 49).

The key points of the law can be summarized as follows:

a) the law is aimed at realizing a unitary policy on public finance and an accounting harmonization which should be in line with the so called ?Fiscal Devolution? (law n. 42/2009). The principle according to which the objectives of Public Finance are shared at all levels of government and among all the entities that make up Public Administration is therefore reaffirmed. All data concerning different administrations must be gathered and published using the same methodology and the same accounting criteria. The reform implements this aspect establishing that all the entities making up the aggregation of Public Administration, as Public Accountancy calls it, must share an harmonization programme of accounting and budget systems and schemes as well as presentation and approval deadlines (articles 1, 2, 8; see, *infra*, § 3).

b) Planning cycle and tools are modified (art. 7 and 10), through triennial financial planning which includes details on the State budget. The law establishes that budget planning should be more detailed than the current one, and that it should outline the documents of the trends and planning steps of the economic accounts, of the cash account and of the borrowing requirement for all Public Administration offices (articles: 10,11, 12; see, *infra*, § 4).

c) The reform provides a new budget structure which is based on ‘missions’ and ‘programmes’, according to the scheme used experimentally since the 2008 budget. Law n.

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196/2009 codifies on a permanent basis the new budget which is divided into big functional aggregations (the State's main missions) and a limited number of programmes characterized by defined and quantifiable objectives, which need to be approved by Parliament and which all correspond to a centre of responsibility (art. 21). This also leads to greater flexibility in planning and allocating budget resources and gives the possibility of resource adjustments within the same mission (see, *infra*, § 5).

d) Law n. 196/2009, with art. 39, adds a spending review to the budget process, and the creation of special teams in charge of analysing and assessing expenditure, which have the task of monitoring the measures which were taken during the budget planning session (art. 39, paragraph 1). The assessment of the results achieved compared to the programmatic targets stated in the DFP and the monitoring of the efficiency of the measures aimed at reaching such targets are based on the cooperation between the Economy Ministry and the administrations involved. It is aimed at monitoring public expenditure and its evolution in time, and at reaching the overall efficiency within the Public Administration (see, *infra*, § 6).

3. PUBLIC FINANCE OBJECTIVES AND THE MULTI-LEVEL INSTITUTIONAL SYSTEM

In the last few years the national sovereignity has been downsized in favour of supranational (European Union) and sub-national (Regions and local entities) levels of government and a multilevel system has therefore been created and has then evolved.

As far as the first issue is concerned, this fact is confirmed by the agreements signed during the creation of the European Monetary and Economic Union, which imposed greater precision while implementing budget policies, following the directives of the Stability and Growth Pact adopted within the EU. On the other hand the second issue is a consequence of the change made to Title V of the Italian Constitution (implemented by law n. 3/2001), which deeply redefined institutional relations between central and peripheral entities, giving new functions to regional and local levels of government which are granted a

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wide sphere of autonomy. The creation of a multi-level system highlighted the need to guarantee an indispensable coordination between the objectives of the financial policies of central Governments and territorial entities through the rules established by the Stability and Growth Pact. In Italy this requirement is met by the Internal Stability Pact, which was first born with the 1999 Financial Law (law n. 448/1998), and whose implementation rules were later modified by the following financial laws throughout the years. The new public finance and accountancy law confirms what has just been said, mentioning explicit cooperation - not just of the public administration as a whole but between all its components as well - in order to reach the objectives of Public Finance.

For the same reason law n.196/2009 says that Regions, the autonomous provinces of Trento and Bolzano and the local agencies will set the targets of their annual and long term budgets in line with the programmatic ones stated in the DFP (article 8, paragraph 1). It also stipulates that the internal Stability Pact should be characterized by stability, consistency, compliance with European parameters and respect of agencies managerial autonomy. (article 8, paragraph 2).

The Public Finance Decision and the Stability Law are intended to, respectively, defining the content and sanctions of the Internal Stability Pact (see article 10, paragraph 2, letter f) and identifying its implementation rules (see article 11, paragraph 3, letter m). It is clear that lawmakers, because of the above mentioned rules, had to face the problem of the governance of a multi-level financial relation system, in a context that, evolving towards devolution models, indicates two potentially conflicting objectives to be achieved: on the one hand the 'right to a budget' of the local legislative assemblies with their autonomy guaranteed by the Constitution (article 119) and on the other hand the national public finance, its unitary character and the transparency of accounts. In this field the coordination between the above mentioned laws and law n. 42/2009 -concerning fiscal devolution- is still unsatisfactory.

4. THE BUDGET PROCESS

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The law amended the State's economic and financial planning tools and timing, putting off of the fulfilments linked to the planning cycle as opposed to what law n. 468/1978 had stated. The new planning cycle started with the Joint Report on Public Economy and Finance (RUEF), edited by the Minister of Economy and Finance and handed in to both Chambers by the 15th of April of each year. This report is supposed to update the macro-economic and public finance previsions for the current year according to the final balance and the manoeuvre approved in the previous year. (article 12).

Not later than July 15th the Government is to send the guidelines for the distribution of budget objectives to the Permanent Committee for the Coordination of Public Finance and to the Chambers. In such a way the Government makes the system of 'autonomies' aware of the programmatic objectives set year by year as well as the penalties for local agencies in case they break the limits of the internal Stability Pact. Subsequently, once the judgement of the committee- which is due by 10th of September - has been acquired, the Government draws the blueprint of the Public Finance Decision (DFP) which is then handed in to the Parliament by 15th of September - for its approval or possible amendments - which replaces the Economic and Financial Planning Document (DPEF) with some differences (article 10). The cycle ends with the presentation and implementation of the regulations that constitutes the Public Financial Manoeuvre (article 11), that is to say the Stability Bill of Law (which replaces the Financial Bill of Law and which acquires triennial programmatic importance), the Budget Bill of Law , the Bills linked to the manoeuvre, which, can even be presented out of session by the end of February and finally, the Stability Pact update (article 7).

5. THE BUDGET STRUCTURE

The estimated budget, based on the financial accountancy system registers debit and credit both in the competence phase (assessment and appropriation) and in the cash phase (encashment and payment). It gives every single Ministry the power to carry out expenses after a review and a Parliamentary vote.

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In the beginning the Parliament used to vote on all 'budget's chapters' (several thousands) which were then inserted in the estimated expenditure reports one for each ministry. This framework made the procedure extremely tight and it did not assure the control of neither efficiency nor effectiveness in relation to the public policies to be implemented. As a consequence this control was limited to formal aspects.

With regard to the need to define public policies of each sector, and to monitor the efficiency of administrative activities by Law n. 94/1997, target functions were introduced in the budget structure; moreover the Parliament's approval process was shifted from the single spending category to basic estimated units. Each unit corresponded to an administrative centre of responsibility. The complex organizational structure of the State - 'who' does 'what' - was then perfectly represented but 'if' and 'how' target objectives were reached remained unaccounted for.

To address this need law n. 196/2009 (art. 21, paragraph 2) codified yet another budget structure, based on 'missions' and 'programmes'. Missions represent the main functions and strategic objectives of public expenditure was aimed at; programmes consist of the statement of the objectives and goals to be reached. In other words, programmes are the budget classification units through which missions are carried out. They represent a homogeneous aggregation of activities carried out within each single Ministry, in order to reach well defined objectives. Such programmes are to be approved by Parliament.

Each programme is agreed upon through the second level of functional classification, the C.O.F.O.G. (Classification of the functions of government). The implementation of each programme is assured by a single administrative unit, which is a first-level organizational inside the Ministries, a Department or General Direction (see article 3, paragraph 2, legislative decree n. 300/1999).

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Each phase of the estimated expenditure includes the 'preliminary notes' that outline the criteria adopted to express the targets formulated in terms of levels of services and interventions, resources to be allotted for their implementation as well as effectiveness and efficiency indicators to be used to evaluate the outcomes.

6. THE SO-CALLED 'SPENDING REVIEW'

The 'expenditure analysis and evaluation' introduced by article 39, law n. 196/2009, is slightly different from the traditional formal juridical control method - which does not take concrete results into account - and uses its own tools of economic analysis to check the results of resource management by each administration.

The resulting activity clearly meets the need to overcome the incremental logic of public finance decisions, contributing to the evolution of the system towards a real planning of needs, in which the budget is defined upon a zero-base criteria. That means an evaluation of the effectiveness curried out each year independently from the previous years allocations.

The triennial planning and the link between expenditure and results reminds us of the Anglo-Saxon *spending review* which is based on the fundamental feature of establishing the triennial spending limits which are a series of objectives agreed on between *Treasury* and the other Ministries in a previous phase of the budget planning process.

On the contrary, in the Italian system, budget planning seems to be following a *bottom-up* procedure (article 23, law n. 196/2009). The Ministries, on the basis of the Mef (Ministry of economic and finance) instructions, outline the objectives and the resources according to the current legislation, without an initial political decision that establishes the resources available for expense programmes.

In practice, even though the new tool is a sign of an evolution towards to budget policy, it risks becoming a formal fulfilment, into another missed opportunity, as it does not have a direct impact on the budget process.

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FISCAL FEDERALISM AND *PUBLIC PROPERTY FEDERALISM*

ANNUAL REPORT - 2011 - ITALY

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1. INTRODUCTION

The two terms *fiscal federalism* and *public property federalism* (federalism implemented through assignment of State properties to regional and local authorities) are taken to mean, respectively, the transformation that is taking place in Italy in the set-up of public finance, and the transfer of real estate that the State would convey to the Municipalities, the Provinces and the Regions. Both processes stem from the constitutional reform (Constitutional Law No. 3 of 18 October 2001), which has completely changed the part of the Constitution concerning these public bodies. Only recently, with Law No. 42 of 5 May 2009, did the implementation, for aspects concerned, the design outlined by the constitutional reform get underway as regards the aspects under examination. This law limits itself to granting different legislative delegations to the Government, and it is worth pointing out that it was approved by the favourable vote of the parties forming the majority, while the major opposition party abstained.

The law in question takes care to ensure that the implementation of the delegations is sufficiently shared, and thus provides for the setting up of a special Parliamentary Committee and of a Joint Technical Committee: the first (Art. 3) must express its opinion on the delegated decrees implementing the delegation and must then verify the state of implementation of the decrees, ensuring the link with the Regions and the Local Authorities; the second (Art. 4) must furnish shared information bases in connection with the implementation of the delegation and is composed of technicians appointed by the Government, the Regions and the Local Authorities, in addition to by the Senate and the Chamber of Deputies. The time limit within which the delegations must be exercised is 24 months, but it is established that at least one of the delegated decrees must be adopted within the shorter time limit of 12 months from the coming into force of the Parliament act of delegation.

Among the various delegations granted to the Government the only one that has already been implemented regards *public property federalism* (Delegated Decree No. 85 of 28 May 2010); as instead regards *fiscal federalism*, at the moment only some schemes for

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delegated decrees are available, concerning, respectively, the Municipalities and the Regions.

2. The resources of Regions and Local Authorities under the new constitutional discipline

Under the new constitutional discipline the financial autonomy of Regions and Local Authorities must be formed by their own taxes and revenues, as well as tax revenue sharing (Art. 119(2)). Their own taxes are established directly by the public bodies themselves and allow them to administer their own tax burden policy; their revenues derive from property management and from the sums owed for the use of services rendered by the public bodies to the population. Through their own taxes and revenues the public bodies have autonomy in terms of revenues, while the power to share in revenue taxes only ensures spending autonomy and involves part of the proceeds from some State taxes being granted to the public bodies (Regions or Local Authorities) that represent the communities that produced them.

It is worth mentioning that these three types of revenues are of a fiscal nature, in the sense that the proceeds thereof depend on the degree of wealth of the pertinent communities: this engenders very unequal situations owing to the pronounced territorial imbalances that characterise the distribution of wealth in Italy. Precisely in view of this, the setting up of an equalisation fund is provided for in order to supplement, through financial transfers, the resources of the public bodies that represent the communities "with less fiscal capacity per inhabitant" (Art. 119(3) of Constitution).

Also provided for is a further typology of State transfers, likewise intended to perform a function of redressing imbalance. In effect, the instrument of the equalisation fund serves only to remove the disadvantages generated by the fiscal nature of the system's revenues: i.e. it provides the public bodies that represent the less wealthy communities an amount of resources greater than those which they would otherwise have at their disposal, such as to allow them to operate (and therefore to supply services and to perform functions)

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in the same way as the public bodies that find themselves in more favourable conditions. The equalisation fund instead leaves unmet the need to overcome the imbalances underlying the lesser fiscal capacity or greater needs of certain communities. Precisely for this purpose it is provided that, in order to further ends other than the routine performance of functions, the State allocates additional resources to Regions and Local Authorities, and may even implement special intervention measures for their benefit (Art. 119(5)). Logically, the function of structural equalisation performed by such measures requires, according to the same jurisprudence of the Constitutional Court, that they not be addressed indiscriminately to all public bodies of the same institutional level, but be targeted just for public bodies having the pertinent factors of imbalance.

The system is then completed by the recognition that Regions and Local Authorities have at their disposal assets of their own attributed according to the general principles determined by the State law. Moreover, they may resort to indebtedness, with, however, the specification that this is possible exclusively for financing investments (Art. 119(6)). This power is further limited annually by State laws that fix the fundamental principles for the co-ordination of public finance: involved are provisions which, in conformity with EU restrictions concerning the prohibition against excessive deficits and with the stability and growth pact, place precise restrictions on the various categories of public bodies to curb the expansion of spending and of indebtedness (the so-called "internal stability pact").

3. FEDERALISM MARKED BY SOLIDARITY AND FEDERALISM MARKED BY EGOISM

The Constitution does not limit itself to listing the typologies of revenues that must make up the financial autonomy of Regions and Local Authorities, but also goes so far as to take a position as to their quantitative dimension, in fact establishing that the overall proceeds coming from revenues of a fiscal nature (their own taxes and revenues, as well as the sharing of revenue taxes), possibly supplemented (in the case of the public bodies that

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represent communities with less fiscal capacity per inhabitant) by resources deriving from the equalisation fund, must enable Regions and Local Authorities "to fund in full the public functions assigned them" (Art. 119(4)). And is it precisely in the reading of this provision that two different conceptions have emerged of *fiscal federalism*: that of *federalism marked by solidarity* and that of *federalism marked by egoism*.

The interpretation that follows the first of the two conceptions starts from the assumption that the rule intends to guarantee each public body as to the amount of resources at its disposal. For this purpose, the determination of the cost of the administrative functions that each public body is called on to exercise becomes the first operation to be performed in building the entire system; it is on this dimension that the formation of the revenues of the public body are then shaped in such a way as to be able to provide corresponding proceeds.

Since the equalisation fund is allocated exclusively to public bodies with less fiscal capacity, the other public bodies – those with greater fiscal capacity – must be put in a position to cope with the cost of the functions solely with their fiscal policy/means. In other words, in the case of these public bodies, the cost of the functions – meaning the cost required for the exercise of the same under conditions of ordinary efficiency and in accordance with standardised modalities – is assessed in relation to the fiscal capacity of the pertinent community for the purpose of recognising to the public body a sort of fiscal pressure rate the management of which, performed in conjunction with an effective level of suppression of tax evasion, is potentially able to provide sums corresponding to the cost of the functions. Such fiscal pressure is first of all formed by quotas of sharing in tax revenues and secondly by standard tax rates and revenues of their own; the rates are standard in the sense that they are taken as the basis for computation, but actually can be modified by the public bodies entitled to the tax, just as they likewise can change the rules concerning what is subject to taxation and anything else that contributes to determining taxation in this case.

The same fiscal pressure is then also recognised to the public bodies whose community has less fiscal capacity, but logically it is unable to provide such public bodies with revenues corresponding to the cost of their functions: this makes necessary a

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corrective measure to be implemented by means of the instrument of the equalisation fund, which the Constitution specially provides for this purpose (Art. 119(3)). This fund must serve to finance the part of the cost of the functions of public bodies with less fiscal capacity that is unfunded by the proceeds from their own taxes and revenues, and by tax revenue sharing.

Thus, a fiscal equalisation is brought about that is at once complete and yet always partial, in the sense that it makes the extent of the fiscal capacity of the single communities indifferent only insofar as the part of fiscal pressure necessary to fund the standard cost of the functions. Fiscal equalisation instead does not regard (which is why it is always only partial) whatever further part of fiscal pressure that the public body may have decided to impose on its taxpayers when faced with a higher-than-standard cost of the functions: in other words, in order to increase services the poorer communities must burden themselves with far greater fiscal pressure than would the richer communities, which imbalance is in no way redressed.

The interpretations of the rule that follow the idea of a *federalism marked by egoism* instead start from the observation that the arrangement under examination is excessively generic, so much so as to leave unresolved the extent to which fiscal equalisation must be practised. In particular, a lack of specification is alleged as to whether the correspondence between the cost of the functions and the resources must operate on a national basis or in reference to each public body. It is also alleged that it has not been clarified whether the equalisation fund must be earmarked just for the public bodies with a fiscal capacity below national fiscal capacity or if public bodies with a fiscal capacity less than that of the public bodies with greater fiscal capacity also must benefit from it.

But these interpretations mainly seem to start from the implicit assumption of a sort of disengagement of the State in the matter of the funding of the cost of the functions, in the sense that, once recognised to Regions and Local Authorities the ambits within which they can exercise their power of taxation, it is these public bodies that have to decide the cost of the functions and, by setting the rates of their own taxes and, more generally, through the exercise of their autonomy in terms of revenues, must take responsibility for

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finding the resources, in addition to those provided by tax revenue sharing and by the equalisation fund, necessary for funding the cost of the functions. It is wholly evident that in this way the preceptive value of the constitutional provision is greatly attenuated, because in the face of the recognition to Regions and Local Authorities of rather broad ambits of taxation able to allow them sufficient autonomy in terms of revenues, it would be impossible to draw from the rule any indication as to the degree of equalisation and the quantification of the pertinent fund.

For that matter, whereas in the interpretations oriented toward f*ederalism marked by solidarity* it is precisely the resources provided by the equalisation fund that have the nature of residual revenues, i.e. intended to cover the difference between the cost of the functions and the effective proceeds of the tax revenues of the public body, in this different context of *federalism marked by egoism*, it is instead their own taxes and revenues that have the nature of residual revenues, while the equalisation fund, whatever its size, would in any case be in keeping with the constitutional rule.

4. FURTHER PROBLEMS OPENED BY THE NEW CONSTITUTIONAL DISCIPLINE

A further question raised, in connection with the aspects under examination, by the new constitutional discipline pertains to the relations among the various levels of government in the construction and functioning of *fiscal federalism*, a question concerning which two different models always have clashed: the *binary* model and the *top-down* model.

The *binary* model prefigures a distinct relationship of the State 1) with the Regions; 2) with the Local Authorities: it is the traditional model, which has essentially prevailed up to now and that has won the favour of the same Local Authorities, especially that of the major Municipalities, which have seen in it the solution for escaping the danger of the Regions' centralistic tendencies. The *top-down* model instead gives shape to an articulation of relations from the State to the Regions and from them to the Local

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Authorities, in such a way that the Regions would come to play a fundamental role of junction between the State and Local Authorities.

The circumstance that among the matters of concurrent legislative power (i.e. where the State can establish only fundamental principles, while it is up to the Regions to enact detailed rules) is that concerning the co-ordination of public finance and of the tax system (Art. 117(3)), ought to testify in favour of the *top-down* model, which co-ordination, according to the Constitutional Court, takes shape in both dynamic and static terms.

The co-ordination of the first type is that with which the co-ordinator public body (the State through fundamental principles and the Regions through detailed regulation) orients and directs, including in relation to the contingent needs of the economic situation, the exercise of autonomy by the co-ordinated public bodies (the Regions by the State, and the Local Authorities by the State and Regions). In this regard it must be remembered that the State has made wide use of this power of dynamic co-ordination, to such an extent that it has been viewed by many as the means for imposing on Regions and Local Authorities particularly detailed and minute prescriptions about the carrying out of their activities: a like way of understanding dynamic co-ordination has given rise to widespread litigation that in most cases has been resolved by the Constitution Court in favour of the State.

Static co-ordination is instead that by means of which the entire system of *fiscal federalism* is constructed, thus bringing about the constitutional design: and it is precisely the circumstance that in this respect the Regions have concurrent legislative power that confirms the idea of a preference of the Constitution for the *top-down* model.

In the opposite direction, as a factor that instead testifies in favour of the *binary* model, there is the circumstance that provided among the matters reserved to the exclusive legislative power of the State is that concerning the "equalisation of financial resources." A model of the *binary* type would therefore seem to apply to the part concerning the equalisation fund.

The position of the Constitutional Court on these themes has been ambiguous. On the one hand, it has recognised that the saving clause of Art. 23 of the Constitution in the

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matter of tax obligations, and therefore also of levy, and the absence of legislative powers assigned to the Local Authorities make necessary legislative discipline of the fundamental aspects of local taxes; while on the other hand, in passing it has specified that "in the abstract situations of normative discipline can be conceived both at three levels (State legislative, regional legislative and local regulatory) and at just two levels (State and local, or regional and local)". In effect, the recognition of law at two levels (regional and local) testifies in the sense of the superseding of the *binary* model of finance of autonomous non-central public bodies (centred on a distinct and separate State-Regions and State-Local Authorities relationship) and of the replacement with a *top-down* system of State-Regions-Local Authorities relations. But even the hypothesis of law at three levels does not contradict in the least the *top-down* model, in view of the fact that in any case it is up to the State to define the fundamental principles of co-ordination of the tax system. Vice versa, the hypothesis of law at two levels (State and Local Authorities) would seem to reproduce in full the traditional *binary* model.

5. THE COMPROMISE SOLUTION OF THE PARLIAMENT ACT OF DELEGATION WITH REGARD TO THE FUNDING SYSTEM

The guiding principles and criteria indicated by the delegation for the implementation of fiscal federalism make it possible to discern, as the basic philosophy that ought to inspire the entire reform, the compromise between the idea of federalism marked by solidarity and that of federalism marked by egoism. This basic orientation is found in both parts of the Parliament Act of delegation, that relating to the financing of the Regions and that concerning the financing of the Local Authorities, which orientation is pursued by differentiating the model in relation to the type of functions that the resources to be recognised to the public bodies would fund.

5.1 With regard to the Regions

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The financing of the Regions is regulated differently depending on whether it involves functions necessary for ensuring essential levels of services (those established by State laws in such a way that they are guaranteed throughout the national territory even if concerning matters of regional legislative power) or has to do with the remaining functions.

As regards the former, it is provided that to the Regions shall be recognised taxes with a rate and tax base that are uniform, as well as a tax additional to IRPEF (personal income tax) and a sharing in the VAT (State value added tax) revenues (Art. 8(1)d)) and it is specified that these tax rates and the quota of sharing shall be determined in such a way that the Region with the greatest fiscal capacity is potentially able (i.e. by exercising an effective system of assessment and collection) to obtain thereby a yield corresponding to the standard cost of the functions in question (Art. 8(1)g)). For the remaining Regions – those with less fiscal capacity – it is instead established that each of them shall be granted a share of the equalisation fund corresponding to the difference between the cost of the functions in question, on the one hand, and, on the other hand, the yield from such sharing and from their own taxes earmarked to fund them (Art. 9(1) c)1 and d)).

Involved is a system that certainly, at least in static terms, corresponds to the interpretations consistent with the idea of a *federalism marked by solidarity* and that, if anything, presents critical points in terms of its dynamic functioning. In fact, the share of equalisation fund due to each Region is commensurate with the difference between two amounts, only one of which (the yield from its own taxes and from tax revenue sharing) is susceptible, in a different degree, to adapting automatically to the increase in the gross domestic product and to the increase in prices, while the other amount (the standardised cost of the functions) does not present an analogous characteristic, so that without an automatic updating mechanism the difference between the two amounts is bound to decrease, as consequently also are – in not only real but also even monetary terms – the resources assigned to each Region from the equalisation fund. In the face of this possible outcome the Parliament Act of delegation limits itself to prescribing a periodic verification of congruence of the coverage of the need in connection with the functions in question [Art. 10(1)d)); logically, this not rule out that delegated decrees may provide for parameterising the cost of the functions to the dynamic of the increase in prices or some other factor.

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A completely different system is provided for the funding of the remaining functions of the Regions, which follows closely the interpretations inspired by the idea of *federalism marked by egoism*. In fact, for the funding of these functions the Parliament Act of delegation recognises to the Regions a tax additional to IRPEF, whose rate must be established in such a way as to provide a yield on a national basis corresponding to the total amount of the transfers currently arranged by the State in order to fund the functions in question (Art. 8(1)h)). Moreover, a contribution from the equalisation fund is provided for the benefit of Regions that, owing to their lesser fiscal capacity, are unable to obtain from the additional tax a yield corresponding to the transfers currently received from the State for such functions, which, however, must not cover but merely reduce the differences of yield without altering the order thereof (Art. 9(1)b) and g)2): in other words, the Parliament act of delegation places as a restriction the provision that the Regions with less fiscal capacity in any case (even following their participation in the sharing of the equalisation fund) shall have at their disposal less resources per capita than those provided to the Regions with greater fiscal capacity from the yield of their taxation.

5.2 With regard to the Local Authorities

The system is differentiated as concerns the Local Authorities as well, and in this case distinguishes the funding of the Local Authorities' fundamental functions (those specified by State laws even if concerning matters of regional legislative power) from the funding of the remaining functions.

The Parliament Act of delegation limits itself to prescribing a funding for the former "on the basis of standard needs" and through their own taxes, and sharing in State and regional tax revenues, as well as additions to such taxes and the equalisation fund (Art. 11(1)b)). In particular, in the fiscal system to be recognised to the municipalities for funding these functions priority should be given to VAT and IRPEF revenue sharing, and the taxation of real estate (Art. 12(1)b)), while in such fiscal system for the Provinces priority should be given to sharing in an unspecified revenue tax and to the yield of taxes

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relating to motor vehicle transport (Art. 12(1)c)). As for the equalisation fund, it is provided that it shall consist of two parts, one intended for Municipalities and the other for Provinces and Metropolitan Cities, the amount of which, with regard to the funding of fundamental functions, should correspond to the difference "between the total of the standard needs for the same functions and the total of the standardised revenues of general application due" to the public bodies (Art. 13(1)a)). The funds should be shared among the Regions (on the basis of the same criteria used to determine the total amount thereof), which in turn should allot the pertinent available funds to the public bodies, applying an indicator of financial need (equal to the difference between the standard value of the outlay and the standard amount of their own taxes and revenues), and an indicator of need of infrastructure (that also takes into account the infrastructure funds of the European Union) (Art. 13(1)c)).

Overall, a system is involved that seems to propose again the one provided, with regard to the Regions, for the funding of the essential level of services, even if with no lack of ambiguous and less than clear features.

As regards the remaining functions – those not defined as fundamental, currently performed by the Local Authorities – the Parliament Act of delegation limits itself to establishing their funding by means of their own taxes, the sharing of unspecified taxes and through the equalisation fund (Art. 11(1)c)). However, no indication of a quantitative type is furnished by the Parliament Act of delegation as to either the total amount of the part of each fund allotted to the funding of these functions or the amount of the share due to each public body. The only specification – generic – is that, as concerns these functions, the two parts of the equalisation fund are "directed toward reducing the differences among the fiscal capacities" (Art. 13(1)f)): in other words, something more must be given to those with less fiscal capacity. Just how much, however, is left unsaid.

5.3 The most critical features

The greatest criticism that has been levelled at the overall design of the Parliament Act of delegation regards the provision for two different models of federalism depending

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on the type of functions that must be funded. In effect, the Constitution in no way makes a distinction of the kind, which distinction, moreover, has slight justification.

Indeed, the circumstance that the essential levels of the services are heterodetermined and that the supplier public body is unable to shirk the duty of providing them is not per se sufficient to justify a greater need for solidarity compared with other functions performed by the public body and with other services provided by it. In fact, these functions and services also are generally found in the same condition of the essential levels since – and here we have one of the novelties introduced by the constitutional reform – generally the public body put in charge of enacting the laws and of deciding the content of the administrative activities is not the one that then implements them and that bears the cost of doing so.

Next, as for the fact that the only guarantee furnished to the Local Authorities is the system for funding their fundamental functions, it must be borne in mind that to this qualification, which presupposes a judgement of greater importance of these functions for the autonomy of the public bodies, the Constitution has not linked a different system of theirs, but has only reserved the singling out thereof to State law so as to guarantee the public bodies against any tendency toward regional centralisation.

Furthermore, this diversified funding system, depending on the type of functions, risks conditioning in a negative manner the exercise of the legislative power with which the State must attend to determining the essential levels of the services and to identifying the fundamental functions of the Local Authorities. Actually, in order for the Regions to have guarantees as to the dimension of their tax system, they must hope that the determination of the essential levels of services will cover the most part of their administrative competencies (and they will do everything to ensure that it does). Likewise, in order to have some (perhaps lesser) guarantee regarding the amount of their resources, the Local Authorities must press the State so that it defines as fundamental the greatest number of functions. But this way decisions about the essential levels of services and about the fundamental functions will end up by being taken on the basis of an evaluation of financial interests that have nothing to do with the aspects that the Constitution would want to be considered.

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6. THE COMPROMISE SOLUTION WITH REGARD TO RELATIONS AMONG VARIOUS LEVELS OF GOVERNMENT

A compromise solution is also found with regard to the other question, the much debated matter of the relations among the various levels of government and of the choice between the binary model and the top-down model. And in fact, the circumstance that delegated decrees, enacted by the State, must establish the funding system of the Local Authorities would seem to propose again the binary model which, in this matter, has traditionally characterised relations among the levels of government. However, there are different elements opposed to this that instead testify in favour of the top-down model.

In the first place, the role assigned to the Regions in connection with the equalisation funds must not be forgotten, which funds the State allots to them for allocation among the Local Authorities. In the second place, it must be borne in mind that the system for funding the Regions, previously summarised, ought to include among its purposes the functions pertaining to the matters within the scope of their concurrent and residual legislative power, which functions are only in part exercised at the administrative level by the Regions, which, with their laws, must instead allocate to the Local Authorities: and since the funding follows the exercise of the administrative functions and not of legislative power, it is inevitable that the Regions must then see to it that most of the resources that the decrees implementing the delegation will guarantee to the Local Authorities get to them. Closely connected with this point is the provision authorising the Regions to establish new taxes of the Local Authorities, defining the ambits of autonomy recognised to them (Art. 12(1)g)). Moreover, it is even provided that the Regions shall establish for the benefit of the Local Authorities shares in the yield of their taxes and of their tax revenue shares – and this despite the fact that the Constitution provides exclusively for the sharing of State revenue taxes.

All in all, while the Regions-Local Authorities relations that conform to a top-down model are many, they are nonetheless sparingly regulated by the Parliament Act of

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delegation, with the risk of leaving the Local Authorities at the mercy of the Regions in the event that the decrees implementing the delegation fail to fill this normative gap. Conversely, the traditional binary model remains, after all, limited to the funding of fundamental functions.

7. PUBLIC PROPERTY FEDERALISM

The discipline provided under Delegated Decree No. 85 of 2010, which has implemented the Parliament Act of delegation regarding *public property federalism*, deals with three aspects: the determination of the properties to be transferred to Regions and Local Authorities, the identification of the assignee institutions of the transfers, and the modalities for the utilisation of such properties.

As for the determination of the properties to be transferred, the decree establishes that a set of assets must in any case be conveyed (State maritime and water property, airports of regional and local interest, mines); moreover, it establishes that some of the remaining available assets are exempt from transfer (ports and airports of national importance, networks/systems of national interest, railways, items forming part of the cultural patrimony, State parks and natural reserves), while others must be singled out by means of a rather complex procedure. This procedure is initiated by the State administrations, which compile lists of the properties necessary for them, and concludes with decrees by the Prime Minister (Italian abbreviation "DPCM") which, in agreement with the representative organ of Regions and Local Authorities and at the proposal of the Minister of the Economy, single out the properties to be conveyed.

The assignees are public bodies that have requested from among the lists of properties to be transferred those that interest them, accompanying the request with the submission of a plan concerning the valorisation thereof. In the event that a property is requested by more than one public body, the assignment shall take place on the basis of a set of criteria as stated in the decree, which are the same used in compiling the lists of the properties to be transferred. The assignment takes place with a DPCM, at the proposal of

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the Minister of the Economy, and may be arranged on a *pro quota* basis in favour of more than one public body.

Except for State maritime, water and airport properties, the properties are transferred to the alienable assets (i.e. to the assets intended for economic exploitation) of the assignee public bodies, which, however, can include them in their institutional properties or inalienable assets (i.e. assign them for the direct exercise of their institutional functions). Any fees/rents that the public bodies gain from the assets are detracted from the resources recognised to them at the time of implementation of fiscal federalism, while only 75% the resources gained from the alienation of the properties are granted to the public body, with the remainder going to the State and allocated for the reduction of the public debt.

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PUBLIC CONTRACTS

ANNUAL REPORT - 2010 - ITALY

(November 2010)

Prof. Gabriella M. RACCA

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1. THE ITALIAN IMPLEMENTATION OF EUROPEAN DIRECTIVES N. 2004/18/EC AND 2004/17/EC

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The Italian market value for public procurements (concerning the total expenditure for the purchase of works, services and supplies) in 2008 exceeded the value of 221 billion Euro (European Commission, Internal Market, *Public procurement indicators 2008*, april 27, 2010) equal to 14,08% of National GDP. The Italian Authority for the Control of public contracts, calculated the amount of resources involved contracts exceeding 150,000 euros was 79,4 billion euros in 2009, equivalent to 6.6% of GDP, while the previous year was 76 billion euro, representing 6% of GDP (Italian Authority for the Control of public contracts, *Relazione annuale 2009*, 22 giugno 2010). The amount of contracts covered by EU Directive n. 2004/18 was 58 billion euro (about 41.6% for work, approximately 24.8% for supplies and approximately 33.5% for services), and 21 billion concerned the special sectors (about 34.1% to work, about 33.2% to supplies and about 32.5% to services).

EU Directives of March 31, 2004, no. 2004/17 e n. 2004/18[1] regulating public contracts, works and supplies have been implemented in Italy by means **of Legislative Decree no. 163, of April 13, 2006 of the Public Contracts Code** (hereafter **PCC**).

1.1 The allocation of Legislative power between State and Region[2]

[1] **TREATIES:** C. Franchini (eds.), *I contratti di appalto pubblico*, Torino, UTET, 2010; M. Clarich (eds.), *Commentario al Codice dei contratti pubblici*, Torino, Giappichelli, 2010; C. Franchini (eds.), *I contratti con la Pubblica Amministrazione*, UTET, Torino, 2007, I e II, in P. Rescigno – E. Gabrielli (eds.), *Trattato dei contratti*,Torino, UTET, 2007; A. Carullo – G. Iudica, *Commentario breve alla legislazione sugli appalti pubblici e privati*, Cedam, Padova, 2009; A. Grazzini, *Appalti e contratti - Percorsi giurisprudenziali*, Giuffrè, Milano, 2009; M. A. Sandulli - R. De Nictolis - R. Garofoli (eds.), *Trattato sui contratti pubblici*, Giuffrè, Milano, 2008; M. Baldi – R. Tomei, *La disciplina dei contratti pubblici - Commentario al codice appalti*, Ipsoa, Milano, 2009.

[2] **STATE-REGION COMPETENCE:** A. Massera, *La disciplina dei contratti pubblici: la relativa continuità in una materia instabile*, in *Giornale Dir. Amm.*, 2009, 1252; D. Casalini, *Il recepimento nazionale del diritto europeo dei contratti pubblici tra autonomia regionale ed esigenze nazionali di «tutela dell'unità giuridica ed economica» dell'ordinamento*, in *Foro Amm. – C.d.S.*, 2009, 1215-1237.

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The State has exclusive legislative competence on competition and consequently, on public contracts[3]. In time Regions have filed claims before the Constitutional Court so as to assert their competence on: public contracts design and planning (Corte Cost. n. 221/2010); contracts below threshold (Corte Cost. n. 401/2007); exclusion of abnormally low tenders (Corte Cost. n. 160/2009).

The Constitutional Court left to Regions only a limited discretion in the choice of the composition and functions of the jury.

1.2 The Italian Authority for the Control of public contracts

Italian PCC (art. 6) envisages the institution of the Italian Authority for the Control of public contracts (*Autorità di vigilanza sui contratti pubblici*), with the task of monitoring both the award and the execution of public contracts.

This authority submits proposals of legislative amendments to PCC to the Government and opinions on the correct interpretation and implementation of the PCC. It also prepares for the Parliament an annual report on public contracts award and execution (for further reference visit www.avcp.it).

The Authority's Monitoring Board on public contracts was created to collect and process data on public contracts over 150 thousand euro awarded and executed in Italy, so as to define standard cost according to territory and sector.

The Monitoring board has also recently started to manage a database of non compliant bidders that were excluded from public bids due to violations or false declarations, either in the selection or in the execution phase.

[3] Art. 117, co. 2, lett. *e, l, m, s*, Cost.

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The Authority's activities are funded by the State, the awarding authorities and partly by bidders. Their set contribution, in fact, is mandatory for participation in the award procedures.

2. SUBJECTIVE AND OBJECTIVE COVERAGE, IN HOUSE PROVIDING, CONCESSIONS, PFI AND PPP

The subjective coverage of public procurement legislation is often litigated in Italy. Some interpretative uncertainties still undermine the non-industrial and commercial character of **the body governed by public law**[4]. The qualification of body governed by public law was denied for a consortium company whose shares were partially held by public authorities and whose task was to run a public market area since it bears the economic risk of its activities (Cass., SS.UU., n. 8225/2010). On the other hand, three companies entrusted respectively with the tasks of building and operating airport facilities (Cass., SS.UU., ord. n. 23322/2009), highway facilities (T.a.r. Lazio, Roma, sect. III, n. 2369/2009 e T.a.r. Puglia, Bari, sect. I, n. 399/2009) and organizing a Public Fair were considered bodies governed by public law.

[4] **BODY GOVERNED BY PUBLIC LAW**: S. Girella (a cura di), *Organismi di diritto pubblico e imprese pubbliche : l'ambito soggettivo nel sistema degli appalti europeo e nazionale*, Milano, Angeli, 2010; D. Casalini, *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, in *Urb. e app.*, 2009, 882-889.

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The constant specification of **in house providing**[5] requirements through ECJ case-law (ECJ, C-324/07, *Coditel Brabant SA*; ECJ, C-573/07, *Sea s.r.l. v Comune di Ponte Nossa*) shed light on the interpretative issues at stake at the national level, mainly underlining the distinction between property of and control over the in house provider as for the assessment of the similar control requirement (ECJ, C-371/05, *EU Commission v Italy*; ECJ, C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo)* c. *Transformación Agraria SA (Tragsa), Administración del Estado*). The requirement is met whenever several public authorities, holding even a minimal share in the in house provider's capital, exercise the actual power of defining the industrial strategies and the core decisions of the in house provider (Cons. Stato, sect. V, 3 February 2009, n. 591, Cons. Stato, sect. V, 9 March 2009, n. 1365 e Cons. Stato, sect. v, 26 August 2009, n. 5082). The essential destination requirement shall be assessed both from a qualitative and quantitative point of view (ECJ, C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia c. Administración del Estado*; Corte Cost. n. 439/2008) but the Italian legislation limited the in house provider's activities outside its relevant territories, forbidding even the power of tendering in awarding procedures issued by public authorities other than the controlling ones (l.d. n. 223/2006 converted by law n. 248/2006).

[5] **IN-HOUSE PROVIDING**: for the similar control requirement see R. Cavallo Perin, D. Casalini, *The control over in-house providing organizations*, in *Public Procurement Law Review*, n. 5/2009, 227-240; for a wider perspective see R. Caranta, *The In-House Providing: The Law as It Stands in the EU*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. Comba, *In-House Providing in Italy: the circulation of a model*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; F. Cassella, *In-House providing - European regulations vs. national systems*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. G. Pulvirenti, *Recenti orientamenti in tema di affidamenti in house*, in *Foro Amm. – C.d.S.*, 2009, pag. 108; G. Corso e G. Fares, *Crepuscolo dell'in house?*, in *Foro it.*, 2009, I, 1319; H. Simonetti, *Il modello delle società in house al vaglio della corte costituzionale*, in *Foro it.*, 2009, I, 1314; G. Piperata, *La corte costituzionale, il legislatore regionale ed il modello «a mosaico» della società in house*, in *Regioni*, 2009, 651.

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The most recent exception to public procurement rules set out by ECJ in C-480/06 *Commission v Germany*), concerning cooperation arrangements among public authorities aiming at carrying out public tasks jointly and without a financial consideration, did not yet find application in our national case-law. Nonetheless, several forms of cooperation and joint exercise of public tasks among local public authorities are long known in the Italian legal system (art. 15, law n. 241/1990 and art. 31-33, l.d. n. 267/2000) and were recently favoured or even imposed by the budgetary law (l. n. 244/2007, art. 2, § 28; l.d. n. 78/2010, art. 14, § 25-31).

The awarding of **public services concessions** falls outside the scope of EU Directive on public procurement and is subject to the European principles of competition in the internal market (CGCE, 9 September 2010, C-64/08, *Ernst Engelmann*; CGCE, 3 June 2010, in C-203/08, *Sporting Exchange Ltd* v *Minister van Justitie*). Recently the Italian State Council stated that **public services concessions** shall be awarded by means of an open or restricted procedure, whereas the use of a negotiated procedure comply with the EU principles only in case of extreme urgency or disproportionate costs in choosing alternative solutions due to their different technical characteristics (Cons. Stato, V, 21 September 2010 n. 7024).

As for **project financing initiative**[6], following a EU Commission infringement procedure against Italy, (Cons. Stato, IV, 13 January 2010, n. 75), Italian legislation was amended, restoring equality of treatment between the promoter and any other participant (art. 153, § 1-14 modified by l.d. n. 152/2008). PFI in Italy is designed as a two-fold procedure where the first phase (to choose the promoter) is not an awarding procedure subject to the relevant EU rules, whilst the second phase is subject to EU directives on public procurement as far as it aims to choose the final concessionaire (Cons. Stato, Ad. plen., 15 April 2010, n. 1; Cons. Stato, V, 28 May 2010, n. 3399).

[6] **PFI:** G. Manfredi, *La finanza di progetto dopo il d.lgs. n. 152/2008*, in *Dir. amm.*, 2009, 429; V. Cesaroni, *La finanza di progetto*, in *Riv. amm.*, 2009, 119; M. Mattalia, *Il* Project financing *come strumento di partenariato pubblico privato* in *Foro Amm. – Cds*, 2010, 23.

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As for the definition of **economic operator**, any individual or legal person offering work, supply or service provision on the market, regardless of its legal qualification as **non-profit organisation**[7], NGO, public or private body in the relevant national system, is considered an «economic operator» according to EU directives on public procurement (Cons. Stato, VI, 8 June 2010, n. 3638; Cons. Stato, V, 25 February 2009, n. 1128; Cons. Stato, sect. V, 26 August 2010 n. 5956).

3. AWARDING PROCEDURES

3.1 Qualitative selection of tenderers and technical specifications

In Italy, there's a specific system for **work suppliers' suitability requirements' verification**[8], according to which licensed private companies (SOAs) have the task of certifying and assessing the qualification requirements of undertakings which provide works (art. 34 e 40, PCC). The suitability requirements of suppliers and service providers can be self-declared by the latter and their assessment is done by each single contracting authority within each single awarding procedure, thus entailing a considerable amount of time and resources. The verification concerns the winning tenderer and at least 10 % of the other participants chosen by lot (art. 48 PCC).

[7] **NO PROFIT ORGANIZATION**: S. Mento, *La partecipazione delle fondazioni alle procedure per l'affidamento di contratti pubblici*, in *Giornale Dir. Amm.*, 2010, 151.

[8] **WORK SUPPLIERS QUALIFICATION SCHEME**: L. Giampaolino, *Il codice degli appalti e il sistema di qualificazione*, in *Riv. trim. appalti*, 2009, 301.

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The extreme detailed Italian discipline on suitability requirements (including personal situation, economic and financial standing and technical and professional ability) often leads to interpretative issues which courts try to settle through the application of principles such as ***favor partecipationis*****, equality of treatment** and **non discrimination**[9], in order to allow for the widest possible participation.

Italian PCC was amended in order to comply with an ECJ decision (ECJ, sect. IV, 19 May 2009, C-538/2007) stating that any national provision defining cases of exclusion from an awarding procedure has to be proportional and reasonable and the exclusion shall follow a specific procedure which the participants are allowed to take part in. Italian PCC presently (art. 38) provides for the exclusion of participants who are substantially and mutually linked only insofar as it is proved that the relevant offers of the linked participants come from the same decisional structure (Cons. Stato, VI, 25 January 2010, n. 247; Cons. Stato, VI, 26 February 2010, n. 1120; C.G.A., 21 April 2010, n. 546; Cons. Stato, VI, 7 April 2010, n. 1967; Cons. St., sect. V, 6 April 2009, n. 2139; Cons. St., sect. V, 8 September 2008, n. 4267). This is the case of firms using the same venues, having the same telephone number, whose chief executives are relatives Cons. Stato V, 10 February 2010, n. 690). Italian case-law requires a specific procedure to assess the **substantial links**[10] among tenderers in order to allow their exclusion Cons. St., sect. IV, 12 March 2009 n. 1459; C. Stato, sect. V, 20 August 2008, n. 3982) and rules for the recording of the exclusion by the

[9] ***FAVOR PARTECIPATIONIS*** **AND EQUALITY OF TREATMENT:** S. Monzani, *L'integrazione documentale nell'ambito di un appalto pubblico tra esigenze di buon andamento e di tutela della par condicio dei concorrenti*, in *Foro Amm. – C.d.S.*, 2009, 2346; I. Filippetti, *Par condicio e favor partecipationis nell'interpretazione degli atti di gara*, in *Urb. e app.*, 2009, 821.

[10] **SUBSTANTIAL RELATIONSHIP AMONG TENDERERS**: S. Monzani, *L'estensione del divieto di partecipazione ad una medesima gara di imprese controllate o collegate in nome della tutela effettiva della concorrenza*, in *Foro Amm. – C.d.S.*, 2009, 666; M. Briccarello, *Collegamento sostanziale: il superamento del divieto assoluto di partecipazione alla gara*, in *Urb. e app.*, 2010, 731; S. Ponzio, *Il procedimento per l'accertamento del "collegamento sostanziale" tra imprese negli appalti pubblici*, in *Foro Amm. – C.d.S.*, 2010, 1795.

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Authority for the control of pubic contracts (Cons. Stato, VI, 15 June 2010, n. 3754; Cons. Stato, VI, 5 February 2010, n. 530).

A widespread ground of exclusion is the false or defective self-declaration of the **personal situation requirements**[11] by the tenderers (T.a.r. Piemonte, sect. II, 16 March 2009, n. 772; Cons. Stato, V, 2 February 2010, n. 428; Cons. Stato, VI, 6 April 2010, n. 1909; Cons. Stato, V, 11 May 2010, n. 2822; Cons. Stato, VI, 22 February 2010, n. 1017; Cons. Stato, V, 13 July 2010, n. 4520; Cons. Stato, V, 26 May 2010, n. 3364; Cons. Stato, V, 23 February 2010, n. 1040) that are required even with regard to the economic operator whose qualitative requirements the tenderer relies upon (Cons. Stato, VI, 6 April 2010, n. 1930; Cons. Stato, V, 23 February 2010, n. 1054; Cons. Stato, VI, 15 June 2010, n. 3759). Italian PCC provides also for the exclusion of tenderers who has incurred in previous breaches of public contract even if agreed upon with other contracting authorities (art. 38, § 1, lett. f, PCC; Cons. Stato, V, 15 march 2010, n. 1550; Cons. Stato, VI, 28 July 2010, n. 5029)

3.2 Negotiated procedure and competitive dialogue

[11] **PERSONAL SITUATION**: G. Ferrari, *Dichiarazione personale del possesso del requisito di moralità da parte dei singoli rappresentanti dell'impresa*, in *Giornale Dir. Amm.*, 2010, 537; G. Manfredi, *Moralità professionale nelle procedure di affidamento e certezza del diritto*, in *Urb. e app.*, 2010, 508; A. Azzariti, *Requisiti di capacità tecnico-professionale e cause di esclusione negli appalti di forniture delle asl*, in *Sanità pubbl. e privata*, 2009, 5, 77; G. Ferrari - L. Tarantino, *Revoca di aggiudicazione provvisoria per condanna penale dell'amministratore e direttore tecnico*, in *Urb. e app.*, 2009, 1518; P. Patrito, *L'art. 38 del codice dei contratti pubblici nuovamente al vaglio della giurisprudenza*, in *Urb. e app.*, 2009, 858; D. De Carolis, *Vicende soggettive delle imprese, obblighi del partecipante e poteri della stazione appaltante*, in *Urb. e app.*, 2009, 327; F. Bertini, *Durc e gare di appalto, tra dubbi e certezze*, in *Urb. e app.*, 2009, 10, 1214; G. Ferrari, *Verifica dei requisiti di ammissione in caso di scissione societaria*, in *Giornale dir. amm.*, 2009, 539; M. Napoli, *Imprese vittime della criminalità organizzata ed esclusione dalle pubbliche gare*, in *Urb. e app.*, 2009, 1413; F. A. Giordanengo, *Sulle caratteristiche essenziali dei consorzi stabili*, in *Foro Amm. - T.a.r.*, 2010, 1567.

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The **negotiated procedure** is frequently used in Italy: as for the public contracts (including those below threshold) awarded in 2009, more than 30% (with peaks of m0ore than 60% in the sectors covered by directive n. 17/2004) of the overall tendering procedures are negotiated procedure, accounting for a 20%-25% of the total public contracting expenditure. Therefore our PPC did not implement two of the cases justifying use of the negotiated procedure with prior publication of a contract notice, according to EU Directive n. 18/2004, art. 30, § 1, lett. b) and c): the exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing as well as the case of services, *inter alia* services within category 6 of Annex II A, and intellectual services insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision.

The negotiated procedure without prior publication of a contract notice entails the simultaneous dispatch of invitations to submit a tender to, at least, three economic operators meeting the qualitative selection criteria for the provision of the subject-matter of the contract, thus reducing considerably the competition for the award of the contract.

The implementation of **competitive dialogue**[12] in Italy has been postponed until the entry into force of the Government regulation enforcing the code (Art. 253, § 1-*quarter* PCC), foreseen in the near future. Since the implementation of PCC, a kind of competitive dialogue in Italy has been used solely as a possible instrument to award the few public contracts that do not fall within the scope of the Directives, such as concession of works or services and other forms of PFI and PPP. Nonetheless, Italian PCC limits the use of competitive dialogue which is not available for the most complex work procurements such

[12] **COMPETITIVE DIALOGUE**:, G. M. Racca - D. Casalini, *Implementation and application of competitive dialogue: experience in Italy*, *Public Procurement: Global Revolution V*, University of Copenhagen, 9-10 september 2010; on the comparison between competitive dialogue and French *marchés de définition*: S. Ponzio, *Gli "appalti di definizione" nell'ordinamento francese. La violazione dei principi di trasparenza e concorrenza nell'aggiudicazione degli appalti pubblici*. in *Foro Amm. – C.d.S.*, 2010, 22.

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as strategic infrastructure works and production plants (art. 161-205 PCC), far beyond the purpose of EC law (whereas 31 of EU Directive n. 18/2004).

3.3 Evaluation criteria

The **distinction between qualitative requirements and selection criteria**[13] (ECJ, sect. I, 24 January 2008, in C-532/06, *Emm. G. Lianakis AE* v *Dimos Alexandroupolis*; Circolare del Dipartimento per le Politiche Europee della Presidenza del Consiglio, March 1 2007; Cons. St., sect. V, n. 2716/2009) is still debated in Italy since Italian administrative courts allow or the evaluation of subjective elements whenever they seems decisive in granting the fair performance of the contract, mainly in case of services contract (Cons. St., Sect. V, 21 May 2010, n. 3208; Cons. St., sect. V, 12 June 2009, n. 3716; Cons. St., sect. V, 2 October 2009, n. 6002; Cons. Stato, V, 22 June 2010, n. 3887).

In case of awarding on the ground of the **most economically advantageous tender criterion**[14], the contracting authority must appoint a **jury**[15] whose composition is defined by Italian PCC in details (art. 84 PCC). The members of the jury must have

[13] **DISTINCTION BETWEEN QUALITATIVE REQUIREMENTS AND SELECTION CRITERIA:** M. E. Comba, *Selection and Award Criteria in Italian Public Procurement Law*, in *Public Procurement Law Review*, 2009, 122; A. Annibali, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app.*, 2010, 201.

[14] **MOST ECONOMICALLY ADVANTAGEOUS TENDER:** I. Franco, *Trasparenza e pubblicità nelle gare di appalto con il criterio dell'offerta economicamente più vantaggiosa*, in *Urb. e app.*, 2009, 137; C. Contessa, *L'offerta economicamente più vantaggiosa: brevi note su un istituto ancora in cerca di equilibri*, in www.giustamm.it; A. Mascaro, *Appalti: il prezzo non prevale automaticamente sulla qualità se la lex specialis rispetta i parametri di proporzionalità e ragionevolezza*, in www.dirittoegiustizia.it.

[15] **JURY**: M. Sichetti, *La commissione giudicatrice nella procedura di valutazione dell'offerta economicamente più vantaggiosa*, in *Corriere Merito*, 2010, 3; C. Silvestro, *Funzionari interni componenti delle commissioni giudicatrici e requisiti di professionalità*, in *Urb. e app*, 2009, 1373.

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adequate professional skills with regard to the subject-matter of the contract (Cons. Stato, IV, 31 March 2010, n. 1830; Cons. Stato, V, 14 June 2010, n. 3732; Cons. Stato, V, 30 April 2009, n. 2761) and they must be appointed before the opening of the envelopes that contain the offers (Cons. Stato, V, 6 July 10, n. 4311).

According to the principle of **transparency**[16], every sessions of the awarding body must be open to the public, the only exception being the evaluation of the single element of the most economically advantageous tender criterion by the jury (Cons. Stato, VI, 8 June 2010, n. 3634).

As for the most economically advantageous tender (art. 83, § 4, PCC), Italian rules compel contracting authorities to define in advance, within the contract documents, the elements of tender subject to evaluation and their relative weighting (T.a.r. Piemonte, sect. II, 19 March 2009, n. 785). The jury is allowed to specify the criteria used to mark each element used to determine the most economically advantageous tender, providing that this specification do not entail a modification of the relevant criteria (Authority, opinion n. 119 of 22 January 2007; n. 90 of 20 March 2008; n. 125 del 23 April 2008; n. 183 del 12 June 2008; Cons. Stato, V, 8 September 2008, n. 4271; Corte di Giustizia, decision of 24 November 2005, case C-331/04).

The most economically advantageous tender criterion is sometimes applied in Italy by means of **mathematical formulae**[17] which should provide an easier marking of the single element of the tender, and can seem to be an aid to the objective evaluation of the tender. Nonetheless, they can be thwarted by bidders and may lead to further criticalities instead of smoothing the process. The proportionality and reasonableness of these formulae

[16] **PUBLICITY OF SESSIONS**: A. Gandino, *Sulla pubblicità delle sedute di gara: riflessioni a margine della trasparenza amministrativa nel codice dei contratti pubblici (e non solo)*, in *Foro Amm.-Tar*, 2009, 1276.

[17] **MATHEMATICAL FORMULA**: M. Mattalia, *L'offerta economicamente più vantaggiosa e l'applicazione della formula matematica prevista dal disciplinare di gara*, in *Foro Amm. C.d.S.*, 2010.

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are often subject to judicial review in order to avoid that a single element of the tender alone could turn to be decisive for the final awarding (Cons. Stato V, 9 April 2010, n. 2004; Cons. St., V, 22 June 2010, n. 3890; Cons. St., VI, 17 December 2008, n. 6278). Some problems may arise when the price element of the tender is zero, since the mathematical formula becomes inapplicable or has an unexpected outcome (leading to a zero mark), thus leading to the exclusion of the tender (Cons, Stato, V, 16 July 2010, n. 4624).

In case of **abnormally low tenders**[18], the contracting authority shall verify their constituent elements by consulting the tenderer, taking account of the evidence supplied (Cons. Stato, VI, 15 July 2010, n. 4584; Cons. Stato, sect. IV, 30 October 2009 n. 6708; Cons. St., sect. V, 13 February 2009 n. 826; T.a.r. Puglia, Lecce, III, 24 September 2009 n. 2186) even when the contract documents require the tenderer to provide in **advance**[19] the justifications of some elements of the tender when the latter is submitted (Cons. Stato, V, 17 February 2010, n. 922; Cons. Stato, VI, 2 April 2010, n. 1893). To that aim, among the details of the constituent elements of the tender which can be considered relevant are: the possible economic exploitation of the service provided in other markets or other contractual relationships (Cons. Stato, V, 2 February 2010 n. 443), the timetable of the contract perfomance (T.a.r. Calabria, Reggio Calabria, 4 June 2010 n. 532) and the reutilization of

[18] **ABNORMALLY LOW OFFER**: M. Pignatti, *Il giudizio sulle offerte anomale tra effettività del contraddittorio ed oggettività nelle valutazioni*, in *Foro Amm. – C.d.S.*, 2009, 1302; T. Del Giudice, *La rilevanza della concorrenza «effettiva» nel giudizio di anomalia dell'offerta: riflessioni in ordine alla compressione dell'utile d'impresa*, in *Foro Amm. – Tar*, 2009; A. Manzi, *Le novità in materia di offerte anomale*, in *Urb. e app.*, 2010, 270; E. Santoro, *Offerte anomale e calcolo del costo del lavoro: favor per le imprese che assumono lavoratori dalle liste di mobilità*, in *Urb. e app.*, 2010, 208; L. Masi, *Offerte con ribassi identici nel procedimento di determinazione della soglia di anomalia*, in *Urb. e app.*, 2010, 186; L. Miconi, *Il problema dei ribassi elevati nell'affidamento dei servizi di architettura e ingegneria: breve commento al nuovo regolamento di attuazione del d.leg. 163/2006 e parere del consiglio di stato n. 313/2010*, in *www.giustamm.it*.

[19] G. Fares, *Sulle conseguenze dell'omessa presentazione delle giustificazioni preventive*, in *Foro Amm.-Tar*, 2009, 813.

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materials and ancillary services produced during the contract perfomance (T.a.r. Lazio, Roma, III *ter*, 20 may 2010 n. 12518).

Public purchasing aggregation[20] has been one of the main focus of the recent Italian legislation who established central purchasing bodies at the local level[21] able to network with the national central purchasing body (Consip)[22] which, since 2000[23], is entrusted with the task of awarding framework contracts which the government administrations are compelled to take part in[24]. However it is worth noticing that the framework contracts awarded by Consip concern a very few category of products and services, set out annually by a Ministerial decree. Local authorities shall refer to Consip's

[20] **PURCHASING AGGREGATION**: G. M. Racca, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119; G. M. Racca, *La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro*, in *Foro Amm. – C.d.S.*, 2010, 1475; G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI (2010); G.L. Albano e F. Antellini Russo, *Problemi e prospettive del Public procurement in Italia tra esigenze della pubblica amministrazione obbiettivi di politica economica*, 2009, in *Economia Italiana*, 809; D. Broggi, *Consip: il significato di un'esperienza, Teoria e pratica tra e-Procurement ed e-Government*, Roma, 2008, 9.

[21] L. 27 december 2006, n. 296, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)*, art. 1, c. 455. See also: Autorità per la Vigilanza sui Contratti Pubblici di Lavori, Servizi e Forniture, *Censimento ed analisi dell' attività contrattuale svolta nel biennio 2007-2008 dalle Centrali di Committenza Regionali e verifica dello stato di attuazione del sistema a rete*, 27 e 28 january 2010, in *http://www.avcp.it/portal/public/classic/*.

[22] See agreement of 21 december 2009 between SCR-Piemonte S.p.A. and Consip S.pA., in *http://www.consip.it*.

[23] L. 23 december 1999, n. 488, *legge finanziaria per l'anno 2000*, art. 26.

[24] legge 23 december 1999, n. 488, *Budgetary law for 2000*, e art. 26, providing the mandatory participation in Consip agreement for any public authority, apart from the municipalities with less than 1000 or 5000 (if mountain) citizens. See also the *Budgetary law for 2001*, art. 58; L. 24 december 2003, n. 350, *Budgetary law for 2004*, art. 3, § 166; d.l. 12 july 2004, n. 168, art. 1, conv. in L. 30 july 2004, n. 191; L. 24 december 2007, n. 244, art. 2, § 574, *Budgetary law for 2008*.

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framework contracts as price and quality **benchmarks**[25] for their own purchasing[26] (Cons. St., sect. V, 2 February 2009, n. 557) and local civil servants who fail in enforcing these benchmarks are **liable** (C. conti, sect. giur. Reg. Valle d'Aosta, 23 November 2005, n. 14).

3.4 Contracts below the EU thresholds

In Italy, public **contracts below threshold**[27] are highly widespread, commonly as a result of a lack of supply chain planning or malpractices in procuring management that can sometimes be regarded as subdivisions to prevent their falling within the scope of EU Directive, thus in breach of the latter (art. 9, § 3, Directive n. 18/2004; Cons. Stato, sect. V, 9 June 2008 n. 2803).

In Italy, public contracts below threshold are subject to the same principles but to simplified rules with respect to those applicable to the contracts above EU threshold: the contract notices can be published in any local newspapers and journals as well as only on the contracting authority's website, thus strongly limiting its advertising effect and reducing possible competition; the economic, financial and technical qualitative selection requirements are simpler and lower and the deadlines for tenders submission are shortened

[25] **BENCHMARKS: A**rt. 1, c. 4, lett. c, d.l. 12 july 2004, n. 168; S. Ponzio, *La verifica di congruità delle offerte rispetto alle convenzioni Consip s.p.a. negli appalti pubblici di forniture e servizi* in *Foro Amm. - CdS*, 2009, 2352; I. Pagani, *Appalti di fornitura ed "anomalia esterna" rispetto alle previsioni del codice dei contratti pubblici*, in *Urb. e app.*, 2009, 592.

[26] L. 23 december 1999, n. 488, art. 26, c. 3, providing Consip framework contracts' price and quality as mandatory benchmarks for any contracting authority, apart from the municipalities with less than 1000 or 5000 (if mountain).

[27] **CONTRACT BELOW THRESHOLD**: E. D'Arpe, *Le acquisizioni in economia di beni e servizi mediante la procedura di cottimo fiduciario*, in *Corriere merito*, 2009, 95; M. Giovannelli e F. Bevilacqua, *Ammissibilità della procedura negoziata ai contratti fino a cinquecentomila euro*, in *Urb. e app.*, 2009, 401.

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(art. 121-124 PCC). The compliance with EU principles applicable to public contracts that fall outside the scope of EU directives of the rule which allows contracting authorities procuring below threshold to exclude abnormally low offer without requesting the tenderer any details of the constituent elements of his tender is still debated in Italy (Cons. Stato, sect. cons. atti normativi, 6 February 2006 n. 355/06; ECJ, sect. IV, 23 December 2009, in C-376/2008, *Serrantoni Srl and Consorzio stabile edili Scrl* v *Comune di Milano;* ECJ, sect. IV 15 May 2008, C-147/06 *SECAP Spa* v *Comune di Torino* e C-148/06 *Santorso soc. coop. Arl* v *Comune di Torino*; Interpretative Communication on *relativa al diritto comunitario applicabile alle aggiudicazioni di appalti non o solo parzialmente disciplinate dalle direttive «appalti pubblici»*, in GUCE 1 June 2006, C-179/2).

Besides the ordinary awarding procedures for public contracts below threshold, Italian PCC (art. 125) allows contracting authorities to directly provide works, services and supply by means of using their own material and human resources (*amministrazione diretta*) or to enter into the public contract by means of a negotiated procedure (*cottimo fiduciario*: T.a.r. Campania, Napoli, sect. I, 9 June 2010, n. 13722; T.a.r. Piemonte, sect. II, 19 march 2009, n. 785: T.a.r. Toscana, sect. II, 22 June 2010, n. 2025).

Contracting authorities often purchase below threshold through the e-marketplace established by Consip (*Mercato Elettronico della Pubblica Amministrazione*[28] - M.E.P.A.): through the MEPA, economic operators may offer supply and services to public authorities who can purchase directly without issuing any awarding procedure.

[28] **E-MARKETPLACE – MERCATO ELETTRONICO DELLA PUBBLICA AMMINISTRAZIONE:** d.P.R. 4 april 2002, n. 101, art. 11, *Regolamento recante criteri e modalità per l'espletamento da parte delle amministrazioni pubbliche di procedure telematiche di acquisto per l'approvvigionamento di beni e servizi.*

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3.5 Environmental and Social Considerations [29].

The Italian PCC, according to ECJ case-law (ECJ 17 September 2002, cause C-513/99, *Concordia Bus*), allows for social and environmental considerations to be include as qualitative selection criteria, technical specifications or most economically advantageous tender criteria (art. 2, § 2 and art. 83, § 1, lett. *E*, PCC).

Some social clauses are expressly provided by Italian legislation which automatically integrates the contract documents even when the latter do not explicitly provide so: it is the case of the compulsory employment of disabled persons (law 12 march 1999, n. 68; Cons. Stato, V, 19 June 2009, n. 4028). A commonly widespread social clause is also the one providing for the compulsory employment of the incumbent provider's employees by the winning tenderer, if compatible with the latter's organization chart (Cons. St., V, 16 June 2009, n. 3900).

4. EXECUTION OF THE CONTRACT

[29] **SOCIAL AND ENVIRONMENTAL CONSIDERATIONS**: R. Caranta – S. Richetto, *Sustainable Procurements in Italy: Of Light and Some Shadows*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 143; G. M. Racca, *Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 165; D. Perotti, *La «clausola sociale», strumento di salvaguardia dei lavoratori nel conferimento o nel trasferimento di attività a carattere economico-imprenditoriale da parte delle pubbliche amministrazioni*, in *Nuova rass*., 2009, 24; P. Cerbo, *La scelta del contraente negli appalti pubblici fra concorrenza e tutela della «dignità umana»*, in *Foro Amm. - T.a.r*., 2010, 1875; A. M. Balestrieri, *Gli "appalti riservati" fra principio di economicità ed esigenze sociali*, in *Urb. e app*., 2009, 789; G. Ferrari – L. Tarantino, *Gara pubblica e costo del lavoro*, in *Urb. e app*., 2009, 248.

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The Italian PCC regulates the **public contract performance phase** as well (Cons. giust. amm. sic., sect. giurisdiz., 21 July 2008, n. 600). Nevertheless, the quality standards promised with the tender submission is not always delivered and procuring entities often accept a different and less worse performance as far as the economic operators fail to fulfil the obligations undertaken[30]. Italian PCC compels the contracting authorities to appoint a supervisor of the contract performance (art. 119, PCC) but breaches of contract still frequently happen because of lack of professional skills in managing the performance phase of the public contract.

The more detailed rules concern the execution of works contract (art. 130 et seq. PCC): contracting authorities have the power of supervision of works which entails the power of issuing orders on the performance of works (art. 1662 cod. civ.) (Cons. Stato, VI, 26 May 2010, n. 3347). A specific discipline concerns **subcontracting**[31] (art. 118, PCC) which has to be authorized by the contracting authority (Cons. Stato, sect. IV, 24 March 2010 n. 1713; T.a.r. Lazio, Roma, sect. III, 4 January 2010 n. 34) and entails the disclosure of the subcontractors at the tender submission (Cons. Stato, sect. V, 14 May 2010 n. 3016; Cons. Stato, sect. IV, 30 October 2009 n. 6708).

ECJ qualifies any amendments of the public procurement term and conditions during its performance as a new award in breach of EU rules on public contracts (ECJ, sect. III, 19 June 2008, in C-454/06, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich*, see also: ECJ, sect. III, 29 April 2010 C-160/08, *EU Commission* v *Germany*;

[30] **CONTRACT PERFORMANCE**: G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI(2010); R. Cavallo Perin – G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm.*, 2010, 325; A. M. Balestreri, *L'applicabilità di meccanismi revisionali ai contratti di concessione di servizi*, in *Urb. e app.*, 2009, 393.

[31] **SUBCONTRACTING**: G. Balocco, *Mancanza od irregolarità della dichiarazione di subappalto ed esclusione dalla gara*, in *Urb. e app*, 2009, 1132.

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ECJ, sect. Grande, 13 April 2010, in C-91/08, *Stadt Frankfurt am Main*; ECJ, sect. III, 25 March 10, in C- 451/08, *Helmut Müller GmbH*). In Italy any **extension of a public contract**[32], if not provided for in the contract documents and conditions, is forbidden as it account for a new direct award without any prior publication of the contract notice (Cons. Stato, VI, 16 February 2010, n. 850).

The fair and correct performance of the public contract is achieved also through the provision of penalties in case of breach of contract which, in case of severe misconduct, can lead to the termination of the contract (T.a.r. Campania, Napoli**,** I, 20 April 2010 n. 2026).

5. THE ITALIAN IMPLEMENTATION OF EUROPEAN REMEDIES DIRECTIVE 2007/66/EC

EU Directive n. 2007/66 has been implemented in Italy by the leg.d. 20 March 2010, n. 53 now included in the new Code of administrative procedure (*Codice del processo amministrativo*, d.lgs. 2 July 2010, n. 104 – hereafter CAP)[33]. The new Code of

[32] **EXTENSION OF PUBLIC CONTRACT**: S. Usai, *La proroga programmata del contratto d'appalto*, in *Urb. e app.*, 2010, 705; G. Ferrari - L. Tarantino, *Proroga contratti di trasporto*, in *Urb. e app.*, 2009, 1148.

[33] **JUDICIAL REVIEW**: M. Lipari, *La direttiva ricorsi nel codice del processo amministrativo: dal 16 september 2010 si cambia ancora?*, in *Foro Amm. - T.a.r.*, 2010, (5) LXXIII; M. Lipari, *Il recepimento della «direttiva ricorsi»: il nuovo processo super-accelerato in materia di appalti e l'inefficacia «flessibile» del contratto*, www.giustamm.it; V. Lopilato, *Categorie contrattuali, contratti pubblici e i nuovi rimedi previsti dal d.leg. n. 53 del 2010 di attuazione della direttiva ricorsi*, www.giustamm.it.; M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario*, in *www.federalismi.it*; R. De Nictolis, *Il recepimento della direttiva ricorsi nel codice appalti e nel nuovo codice del processo amministrativo*, in *www.giustizia-amministrativa.it*; F. Saitta, *Contratti pubblici e riparto di giurisdizione: prime riflessioni sul decreto di recepimento della direttiva n. 2007/66/CE*, www.giustamm.it; F. Cintioli, *In difesa del processo di parti (note a*

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administrative procedure (art. 133) entrusts the administrative courts (Tribunali Amministrativi Regionali and Consiglio di Stato) with the power of declaring the ineffectiveness of the contract as a consequence of the award annulment and regulates the consequences of the failure to comply with the standstill period.

Before the implementation of EU Directive n. 2007/66, the **competence over public contracts litigation** was divided between the administrative court, as for the disputes concerning the awarding procedure, and the ordinary courts (tribunals, court of appeal, Cassazione), as for disputes regarding the contract performance which starts after the contract stipulation. After the implementation of EU Directive n. 2007/66, the administrative courts can declare the award void and the contract ineffective (Cass., SS.UU., ord. 5 march 2010, n. 5291; Cass., SS.U., ord. 10 february 2010, n. 2906; Cons. Stato, V, 15 June 2010, n. 3759), whereas the ordinary courts maintain the competence over the disputes raising during the performance phase (Cons. Stato, VI, 26 may 2010, n. 3347; Cons. Stato, V, 1 April 2010, n. 1885), save the application of special public law rules in this phase (e.g. subcontracting: Cons. Stato, IV, 24 march 2010, n. 1713).

The administrative courts shall grant the renewal of the illegal awarding phases and the following new award[34], whenever it is possible (Cons. Stato, V, 9 march 2010, n.

prima lettura del parere del consiglio di stato sul «nuovo» processo amministrativo sui contratti pubblici), in *www.giustamm.it*; A. Bartolini - S. Fantini - F. Figorilli, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urb. e app.*, 2010, 638; S. Foà, *L'azione di annullamento nel Codice del processo amministrativo*, in *www.giustizia-amministrativa.it*; V. Cerulli Irelli, *Osservazioni sulla bozza di decreto legislativo attuativo della delega di cui all'art. 44 l. n. 88/09*, in *www.giustamm.it*.; R. Caranta, *Il valzer delle giurisdizioni e gli effetti sul contratto dell'annullamento degli atti di gara*, in *Giur. It.*, 2009, 6; F. Goisis, *Ordinamento comunitario e sorte del contratto, una volta annullata l'aggiudicazione*, in *Dir. proc. amm.*, 2009, 116; R. Calvo, *La svolta delle sezioni unite sulla sorte del contratto pubblico*, in *Urb. e app.*, 2010, 421.

[34] F. Tallaro, *L'esecuzione in forma specifica dell'obbligo di contrarre nei confronti della pubblica amministrazione*, in *Rivista NelDiritto*, 2009, 1195; G. Ferrari - L. Tarantino, *Obbligo della stazione appaltante di formulare una nuova graduatoria di gara*, in *Urb. e app*, 2009, 1385; M. Sinisi, *Il potere di autotutela nell'ambito delle procedure di gara fra annullamento dell'intera procedura e annullamento dei singoli atti della medesima*

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1373). After the contract subscription, the administrative judge can declare its **ineffectiveness** whenever: a) the award was done without prior publication of the contract notice; b) the award followed a negotiated procedure or direct provision of works, services and supply outside the cases; c) the contract was subscribed not complying with the standstill period (art.121-122, CAP). Whenever the declaration of ineffectiveness is not possible, the judge will rule for compensation of damages[35] (Cons. Stato, V, 15 June 2010, n. 3759 where few months were left before the conclusion of the contract performance).

Italian law implemented the EU rules on the **standstill period**, setting a period of 35 days before the signing of the contract (art. 11, § 10-10bis PCC; T.A.R. Campania, Napoli, Sect. I, 14 July 2010, n. 16776), as well as the relevant derogations provided for in EU Directive n. 89/665/EEC, art. 2*b* as amended by EU Directive n. 2007/66.

Alternative penalties have been implemented in art. 123 of the CAP for the cases in which the principle of ineffectiveness is deemed to be inappropriate, with the imposition of fines to the procuring entity of a penalty ranging from 0.5% to 5% of the total value of the award price. Such fines will be included in the State's budget. An alternative penalty provides the shortening of the duration of the contract, ranging from 10% to a maximum of 50% of the remaining duration of the contract.

sequenza procedimentale, in *Foro Amm.-Tar*, 2009, 31; M. Didonna, *Il subentro nel contratto di appalto dopo l'annullamento dell'aggiudicazione*, in *Urb. e app.*, 2010, 588; V. De Gioia, *Autotutela demolitoria e risarcimento dell'aggiudicatario*, in *Urb. e app.*, 2009, 429.

[35] **COMPENSATION FOR DAMAGES:** E. Boscolo, *L'intervenuta esecuzione dell'opera pubblica: il limite all'annullamento e la sequenza accertamento-risarcimento*, in *Urb. e app.*, 2010, 89; A. Reggio d'Aci, *Il G.A. riduce le prospettive di risarcimento per mancata aggiudicazione*, in *Urb. e app.*, 2009, 557; B. Gagliardi, *Esecuzione di un contratto* sine titulo, *arricchimento senza causa e diritto all'utile di impresa*, in *Dir. proc. amm.*, 2009, 806.

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The quantification of damages[36] for illegal awarding of a public contract amounts in any case to the expenses sustained in preparing and submitting the tender and, only if the economic operator is able to prove that he would have been the awarding firm, also to the profit the economic operator would have gained by performing the contract (max. 10% of the contract value profit provided for by art. 345 Law 20 march 1865, n. 2248, all. F is only a guideline). The lost profit should amount to less than 10% reaching up to 5% of the contract value whenever the economic operator fails to prove the impossibility of using its own technical and human resources and machinery in performing other contracts (Cons. Stato, sect. VI, 21 September 2010, n. 7004). The amount of compensation is further reduced when there is no evidence of the right to the award of the contract. Damages may also refer to the loss of qualitative selection requirements the economic operator would have achieved with the contract performance (amounting to a 1-5% of the contract value) (Cons. Stato, sect. VI, 27 April 2010, n. 2384).

6. WEB SITES

www.gazzettaufficiale.it Gazzetta Ufficiale della Repubblica Italiana
www.cortecostituzionale.it Corte Costituzionale
www.quirinale.it Presidenza della Repubblica

[36] **QUANTIFICATION OF DAMAGES**: G. Crepaldi, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento*, in *Foro Amm. – C.d.S.*, 2010, 868; G. M. Racca, *Contratti pubblici e comportamenti contraddittori delle pubbliche amministrazioni: la responsabilità precontrattuale*, in *Rivista NelDiritto*, n. 2/2009, 281; H. Simonetti, *Il giudice amministrativo e la liquidazione del danno: temi e tendenze*, in *Foro it.*, 2009, III, 313.

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www.parlamento.it Parlamento italiano

www.camera.it Camera dei deputati

www.senato.it Senato della Repubblica

www.governo.it Governo italiano Presidenza del Consiglio dei Ministri

www.sviluppoeconomico.gov.it Ministero dello Sviluppo economico

www.cnel.it Consiglio Nazionale dell'Economia e del Lavoro

www.cortedicassazione.it Corte Suprema di Cassazione

www.giustizia-amministrativa.it Consiglio di Stato – Tribunali Amministrativi Regionali

www.corteconti.it Corte dei Conti

www.agcm.it Autorità garante della concorrenza e del mercato

www.agcom.it Autorità per le garanzie nelle comunicazioni

www.bancaditalia.it Banca d'Italia

www.garanteprivacy.it Autorità garante per la protezione dei dati personali

www.avcp.it Autorità per la vigilanza sui Contratti pubblici

www.consip.it: Consip S.p.A.:

www.cnipa.gov.it Centro nazionale per l'informatica nella pubblica amministrazione

www.autorita.energia.it Autorità per l'energia elettrica e il gas

www.giustizia-amministrativa.it Consiglio di Stato

www.appaltiecontratti.it Appalti e contratti

www.giustamm.it Giustizia amministrativa

www.neldiritto.it Neldiritto:

http://dejure.giuffre.it DeJure

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BASIC OF PUBLIC CONTRACTS IN ITALY

ANNUAL REPORT - 2011 - ITALY

(February 2011)

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1. ADMINISTRATIVE ACTION BY CONTRACTS

Public administrations can conclude all the categories of contracts existing in the legal system. There is no general restriction to make contractual agreements, except for particular provisions concerning specific categories of public entities or specific subject matters. Furthermore, according to national courts (see Corte di Cassazione, II, no. 2624/1984; Consiglio di Stato, V, no. 4680/2001; Regional Administrative Court for the Region Liguria – TAR Liguria, no. 155/2005), also administrations apply the general provision of the Civil Code (CC), Art. 1322, which entitles the parties to bargain contracts not explicitly regulated by the Code itself.

Moreover, in the last years new rules on administrative action extended the entitlement of public bodies to use contractual instruments in a general way: symbolically, legislative policies stimulated administrations to pursue public interests by applying private law, with

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the aim of streamlining and improving the efficiency of the whole system, whenever possible (i.e., when there is no mandatory rule compelling administrations to develop unilateral action by exercising administrative powers). In addition, Art. 11, L. no. 241/1990, entitles public bodies to conclude "administrative agreements" (so called "accordi integrativi o sostitutivi del provvedimento") with private parties, with the aim of determining the contents of administrative (discretionary) measures or replacing them at all. In this case the principles of private law should apply only if they are consistent with the administrative procedure; nonetheless the actual implementation of this rule is troubled (except for urban planning agreements).

Even though private law entered the administrative action, administrations shall also apply specific public rules in bargaining public procurements, such as service, supply and work contracts, and in contracting out instrumental services in order to improve their efficiency. This means that even if contracts concluded by public bodies are essentially subject to the CC and, more generally, to private law – except for some particular cases (game and gambling contracts, loan contracts) –administrative law, especially after the adoption of the European Directives, provides rules which modify or supplement CC, in order to protect both the public interests in the development of the public contractual action - guaranteeing, in particular, the constitutional principle of impartiality (Art. 97 of the Constitution) and the maximization of economic advantages for public entities - and the European principles of freedom to provide services and of open and full competition. On these grounds, the procedures that public bodies should follow in bargaining (so called "procedure di evidenza pubblica") should match both the principles and the rules of administrative law and the private law principle of fairness.

As a result, according to the phases of public contracting, a double standard system regulates "public contracts": the selection of competitors follows public rules, whereas private law applies in the performance of the contract (once it has been awarded). This means that the choice of the private partner must be made in compliance with a competitive procedure and the whole contractual action must comply with the principle of good faith and of protection of legitimate expectations.

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Furthermore, the double standard system exists also in the field of judicial protection, albeit with some recent innovations: following the general rule on judicial competence – which assigns to civil courts the protection of individual rights ("diritti soggettivi") and to administrative courts the protection of legitimate interests ("interessi legittimi") – bid protests are submitted to administrative courts, while contracts disputes refer to ordinary courts (Art. 133 (1), Code of Administrative Process - hereafter CAP). During the performance of a public contract, indeed, contractual parties have rights and obligations in an equal and synallagmatic relationship, whereas in the tendering procedure, the contracting administration exerts some authoritative powers over the competitors, whose legal position matches the notion of legitimate interest (as the Joint Divisions of "Corte di Cassazione" confirms, by judgment no. 27169/2007, administrative action by contract may be perfectly divided into two phases, the first one governed by administrative law, the second one by private law).

However, the distinction between private law and administrative law is not so sharp, because there are several interferences between the two legal frames: on one side, public administration may be sued by the winner of the competition for pre-contractual liability, if the awarded contract is not concluded by the end of the *standstill period* (that is a minimum period during which the signature of the contract in question is suspended); on the other side, public administration holds some powers of unilateral intervention during the performance of the contract, such as that one to terminate it for default or for convenience. In this legal framework, the intersections between public and private law must be verified case by case.

On these premises, this report aims at analysing the main characteristics of Italian contract law on public procurement.

2. THE LEGAL FRAMEWORK ON PUBLIC CONTRACTS

Unlike French "droit administratif", Italian administrative law does not recognise the category of "administrative contracts", but since the beginning of Italian Kingdom some

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acts have regulated specific categories of public contracts. The first and most important statute was L. no. 2248/1865, "Allegato F", concerning public work procurement. Moreover, the 1923 regulation concerning the State budget and public expenditures (R.d. no. 2440/1923) provided a set of general rules about tenderer selection and contract award criteria, holding public auction as a general principle (with the exceptions indicated in the same statute and in some other special statutes) for contract award.

In this framework, EU law has deeply modified national contract regulation, by compelling public entities to implement new procedural rules aimed at guaranteeing an open and full competition among private undertakings in the EU internal market. Moreover, EU Directives oblige Italian legal system to recognise unsuccessful tenderers compensation for damages produced by infringements of European regulations (or national statutes implementing them), regardless of the nature of the affected private interest: this way, EU law has overcome the historical distinction in Italian system between "individual rights" and "legitimate interests".

Since 2006 the Code of Public Contracts (CPC), concerning public works, public services and public supplies, has come in force (see D. Lgs. no. 163/2006). It transposes the Directives 2004/17/EC and 2004/18/EC, which regulate those public contracts with a significant impact (assessed on an economic threshold basis) on transactions between Member States; but it also regulates the same types of contracts (i.e., public procurements), which value is under the European economic thresholds.

Substantially, the CPC maintains the double standard system for contracts with public administrations, providing that what is not expressly regulated by the Code should comply with L. no. 241/1990 (Administrative Procedure Act) as it regards award procedures and other related administrative activities, and with CC as it concerns the contractual activity itself (Art. 2, CPC). Moreover, although the CPC is mainly a public law statute, it provides a number of references to private law, so that interferences between the two legal frames are continuous and relevant.

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3. CONTRACT AWARD PROCEDURE

As a general principle, every public entity assigning benefits by contracts to private persons through the allocation of limited resources shall make a call for competition. Indeed, in accordance with the ancient idea laid down in the State budget and public expenditure statutes, tendering procedures have been deemed necessary to guarantee both best value for money and greater administrative advantages for the contracting authority, as well as to prevent public officers' misconducts and briberies. In this view, law aims at favouring public administrations' interests: e.g., the 1923 regulation has exempted the administration from the duty to give reasons, even in the case of exclusion of a tenderer from the contract awarding procedure.

However, EU law has introduced a new balance among the interests at stake, since it has stated that public tendering is deemed necessary in order to guarantee equal chances of the economic operators for public contract awarding and, more generally, whenever a public entity provides market players with an opportunity of profit (see Consiglio di Stato, VI, no. 362/2007). Pursuant to some rulings of the European Court of Justice (ECJ) on the correct interpretation of 2004 directives, competition has become a key principle in contract awarding, aimed at guaranteeing the transparent, equal and non-discriminatory conduct of contracting administrations regardless of the threshold criteria.

In the national system, the CPC has precisely implemented the cardinal rules of EU law, providing a unifying framework for the whole field of public procurements. So, the open, restricted and negotiated procedures shall apply not only to those public procurements with an amount exceeding the economic thresholds fixed by the European Directives, but also to the ones under that EU threshold (with the exception of specific cases – regulated in Art. 121, CPC – which aim at simplifying the typical constraints of formal tendering procedures, even though they comply with the fundamental principles of the EU regulation, mentioned by Art. 2. CPC). Moreover, the same principles also apply to the excluded contracts for procurement, such as contracts on a lot of public services, contracts on weapon production and trade and contracts awarded under international rules (Art. 27, CPC); Art. 30, CPC, also provides that the competitive selection for service concessions

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"shall be conducted in compliance with principles derived by the Treaty and the general principles of public contracts".

However, the implementation of EU principles concerning the awarding of local services of economic interest was more troubled, because of a strong tradition of in house providing by local authorities, formerly managed by special public utilities and lately managed by joint stock companies, wholly or partly owned by the local authorities. Recently, the recourse to in house providing has been reduced by administrative jurisprudence and by the legislator. On one hand, the Joint Chambers of the Council of the State ("Consiglio di Stato") and other administrative courts applied in a strict way the in house providing criteria developed by the ECJ; on the other hand, statutes authorised the companies awarded without a competitive selection to operate only within more restricted functional and territorial limits and, finally, assessed the exceptionality of the direct awarding itself, recognising in the tendering procedure ("procedure competitive ad evidenza pubblica") the ordinary awarding of local utilities. But this rule applies in a different way if the company shares a mixed-ownership, composed by both local public authorities and the private parties chosen by a competitive procedure (see d.P.R. no. 168/2010).

Therefore, the CPC implements the principles of non-discrimination, equal treatment and transparency, laid down in the EU Treaties, in order to ensure open and full competition among the economic operators of all the Member States in the field of public procurements. However, the transparency principle is generally observed throughout the whole administrative action by contract, at least in its elementary components, such as the provision of appropriate advertising forms and the setting of suitable deadlines for the presentation of candidatures and tenders. In order to achieve a minimum standard of competition, the Code itself provides a simplified application of these rules also to the under-threshold contracts and to the excluded contracts (see Articles 27, 30, 110, 125, CPC).

Especially, as a relevant component of the transparency principle the Code charges the contracting authority with the legal burden to provide in a proper notice the requirements

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for presentation of candidatures and tenders, the contract award criteria, and the specifications of the subject matter of the contract itself, even in cases of direct bargaining. This general rule has been developed by administrative courts over time: for instance, the TAR Piemonte, no. 1524/2002, has upheld that the call for an informal tender creates for the contracting administration an implicit commitment to the principles of transparency and "par condicio"; therefore, the authority itself cannot modify the conditions of the subject matter by the beginning of the procedure and the preparing of tenders. This way, transparency meets the requirements of equal treatment and non-discrimination in order to level playing field.

Eventually, the CPC provisions maintain an old feature of Italian law in this field, quite strengthened in the '90s: precautions against "opportunistic behaviours" of the parties. This is the reason why provisions about negotiated procedures are more restrictive than in the European law, national rules preferring anonymous candidates and secret tenders. This fact contributes to the peculiar complexity of regulation, which is scantily oriented to flexibility and mildly interested in the optimisation of joined welfare (and the Code has not expressively repealed the 1923 regulation in the part relating to contracts).

However, this over-structured system has not prevented public entities from enjoying a substantial contractual freedom: sometimes, *against the law*, as demonstrated by the impressive case-law of both administrative and ordinary courts, as well as by some judgments of the ECJ on actions brought by the EU Commission against Italy for infringements of EU law by State, regional or local authorities; sometimes, *beyond the law,* as the extensive use of contractual schemes as invented in business practice by public bodies demonstrates.

Therefore, public administrations have been condemned and their contract award decisions have been quashed on the ground of the lack of any competitive tendering procedure or the abuse of negotiated procedures (see, respectively, ECJ, 2008, C-337/05 and TAR Lazio, II, no. 3886/2008); or on the ground that, when proceeding by a public notice, the contracting party cannot ask further participatory requirements than those laid down by the law, if they are disproportionate with the value of the contract at stake or they

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are irrelevant for the subject matter. Furthermore, another ground for annulment is the rejection of an abnormally low tender, without verifying in detail the justifications given by the competitor about the seriousness and reliability of the tender itself (see, respectively, Consiglio di Stato, V, no. 426/2010, and TAR Puglia, I, no. 3541/2006).

On the other side, public entities can also conclude some kinds of contracts (or combinations of them) created in the business practice by private operators (especially in the experience of multinational companies), such as factoring, insurance brokering, engineering, global service, performance bond, project financing, leasing option, sponsorship. All of those contracts can be included in the framework of *public-private partnership* rules provided by the CPC and in some cases specifically regulated by CPC itself.

4. PERFORMANCE OF PUBLIC CONTRACTS

Administrative and financial controls have always been among the most characteristic elements in the procedure of "evidenza pubblica". Articles 11-12, CPC, provide that the final award decision does not produce binding effects on the contracting administration, until its approval by the competent controlling body of the same administration (*id est*, a senior civil servant). Moreover, the decree approving the contracts concluded by the State administrations must also be submitted to the Court of Auditors ("Corte dei Conti") for external control on administrative and financial regularity, when they involve incomes to the contracting administration or they concern public works above the EU threshold or their amount exceeds one tenth of the EU value (Art. 3, L. no. 20/1994). It should be noted that Art. 19 of the 1923 Regulation laid down similar provisions, establishing that all final award decisions and all contracts did not bind the contracting administration, until they were approved by the minister or by a delegated authority, and could be executed only after this approval; and that the decrees approving the contracts should be controlled by the "Corte dei conti".

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On the contrary, basically the performance of public contracts has always belonged to the realm of ordinary law and EU law has not provided relevant transformation on this side of the regulation yet. Therefore, public contracts are generally subjected to CC rules on invalidity, remedies in case of breach and the consequent contractual liability, and enforcement of the contract by judgment of civil courts. However, public entities being endowed with some special powers, the CPC contains eight provisions which establish specific "principles on the performance of the contract".

Broadly speaking, Art. 1372, CC, provides two fundamental principles on contractual relationships: the duration of the synallagmatic obligations (and of their binding effects) as long as established in the contractual regulation; and the impossibility to modify contractual terms and to cancel the contract by one of the parties. Both these principles enforce the ancient rule "pacta sunt servanda". Therefore, by applying this provision (sometimes reminded in the case-law), on one hand, the contractual freedom of public administrations in acting for the best care of public interests is recognised; and, on the other hand, the same capability of such public entities to modify the content of the contract, as determined by agreement, by exercising their special powers, is limited.

However, both the CC and the statutes governing private contractual relationships have some exceptions as it regards the possibility of modifying and cancelling the contract, thus impairing the traditional image of the sanctity of the contract itself. This way, private law tackles the problems connected with the occurrence of unexpected events, from which frustration, impossibility or impracticability of contract may derive; but the presence of a public entity in the contractual relationship can certainly be a stimulus to break the equal positions of the parties and the contractual balance, which is linked to the resulting distribution of risks and benefits.

Furthermore, since the regulation on State expenditures, administrative law has entitled public administrations to lay down, by specific documents, detailed and technical rules for every type of contracts or for particular contracts (respectively called "capitolati generali" and "capitolati speciali". See Art. 5 (7), CPC). On one hand, these specifications aim at integrating the contract notice drawn up by the contracting authorities for a tendering

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procedure, working as "lex specialis" regulating the procedure itself, included the award criteria. Moreover, on the other hand, they determine the conditions of the contract performance, integrating the contract regulation after its awarding. In any case, they can advantage public bodies in the contract performance.

Academic literature and the case-law on public contracts have been debating a lot on the legal nature of such contract documents and at present it is a general opinion that the "capitolati generali" (at least that one on public works procurement used by government departments) have the same character of government regulations, while the "capitolati speciali" (at least as regarding the performance of the particular contract) are "general conditions of contract", like in private contractual relationships, and therefore they are subjected to the rules of CC on unfair terms in consumer contracts (Consiglio di Stato, V, no. 6774/2005. Regarding CC, see Art. 1469-bis ff.).

Administrative law has traditionally assigned to contracting public entities the so called "jus variandi", as a partial remedy to the bounded rationality of the administration itself and consistently with the nature of public works procurement as a long-term contract. In particular, Art. 11 of the 1923 regulation established that in the light of an increasing or a decreasing of works during the implementation of a contract, the private contractor is obliged to submit, under the same terms, up to the fifth of the contractual price; beyond this limit, he has the right to cancel the contract. This unilateral power of public administrations has a relevant correlation with the right guaranteed to private parties by Art. 1661, CC: both the provisions take into account the indispensability of the additional works, and consider the changed nature of the contract as the extreme limit to the modifications of the content.

Substantially CPC confirms this regulation, but Art. 132 refers not only to the modifications occurred during the execution of the designed works, but also to the risks in performing activity (such as the so called *geological surprise*). In particular, it provides an exhaustive list of the eligible modifications, due to their essential character and to their relation with the occurrence of unexpected events.

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Furthermore, Art. 5, CPC, authorises the Government to adopt a regulation establishing the amount of penalties, consistently with the amount of contracts and the reasons of not-fulfilment, as well as the modalities for their enforcement; but also the CC provides the possibility of sanctions for the breach of contract or the fulfilment on late of the contractual obligations in the relationships between private operators (being there only the limit of their non-proportionate amount assessed as an unfair term).

Indeed, the powers to cancel the contract unilaterally have been deemed more relevant. In particular, Art. 134 and Art. 136 of the CPC provide public entities to withdraw existing contracts for convenience ("recesso dal contratto") or for default ("risoluzione del contratto per grave inadempimento, grave irregolarità, grave ritardo"); Art. 135 adds the power to withdraw contracts for offences concerning the professional conduct of the economic operator concerned, condemned by a judgment having the force of "res judicata", and for revocation of the certification of suitability by bodies established under public law. Moreover, a previous withdrawal for default by a public entity may be a condition for an order of exclusion from future competitive procedures developed by the same authority, on the ground that "the normal level" of confidence could be impaired (So, TAR Lazio, II, no. 5182/2000. See also Consiglio di Stato, V, no. 1500/2010, regarding a previous termination for default by another public administration).

However, some similar powers are also provided for the contractual relationships between private economic operators (Art. 1671 and Art. 1662, par. 2, CC), albeit in accordance with the framework of the Code itself (Art. 1218 and Art. 1375), as powers of "*private self-remedy*" ("autotutela privatistica" or "interna"). And then, the most insidious provisions for the equality of the contracting parties are the administrative prerogatives of "*public self-remedy*" (so called "autotutela pubblicistica" or "esterna"), which stem from the special capability of public administrations to pursue public interests. These powers allow the public party to set aside the award of a contract or quite the public notice itself and then the whole tendering procedure, at any time (Art. 11, CPC. See also Art. 6, D. Lgs. no. 53/2010, as amended by Art. 3(19), Annex 4, CAP), so that also during the performing phase, the contract can become ineffective.

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The financial compensation for the private contracting party varies according to the reasons of the exercise of these unilateral powers by public entities. First of all, in case of modifications unilaterally charged on, the nature of the additional amount is assessed as a contractual payment (and not as compensatory damages). Secondly, the termination for convenience entitles the economic operator to the payment of the performed works and the value of the existing materials on site, in addition to the tenth of the amount of non-run. Thirdly, the termination for default too entitles the economic operator to the payment of the performed works; but the final settlement of the terminated contract establishes also the costs resulting from the award of a new contract to another economic operator to be charged on the defaulting contractor.

Moreover, in case of failure or not suitable performance, the suspension of the payment by the public entity is considered as a form of "*private self-remedy*" in accordance to Art. 1460, CC. On the contrary, the lawful exercise of the special powers included in "*public self-remedy*" may entitle the contracting partner only to claim a form of pre-contractual liability, while the wrongful exercise of the same powers entitles the economic operator, who has been awarded the contract, to the compensation for damages (which the administrative courts have been usually determining by the same flat-rate above mentioned).

The primacy of the position reserved to the public administration does not affect the private nature of the contract (especially, for public works); then performing it, the private partner is entitled to legal rights, with corresponding obligations on the public body ("Corte di Cassazione" – Joint Divisions, no. 10525/1996). Thus, the private partner may also sue in civil courts by the general action of termination of contract for breach of the public entity itself (Article 1453 of CC); however, the claimed breach should be reviewed as it regards the possible effect resulting from the lawful exercise of the special powers included in the "*public self-remedy*" ("Consiglio di Stato", VI, no. 6275/2008).

As the breach of the economic balance of the contract is concerned, the CC provides some remedies in order to avoid the termination of the contract itself due to external

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factors: to this end, Art. 1467 (3), CC, allows to the party to offer a fair change in the contractual conditions.

Furthermore, specific clauses about the recovery of the contract's economic balance (above all in case of new legislative or governmental regulations) may be included in the public notice and in the other contract documents for the tendering procedure, and then may be reproduced in the contractual regulation, so creating a real contractual obligation. More precisely, for long-term contractual relationship (such as the public works concession), Art. 143, CPC, provides that a restatement of new conditions of balance should be agreed, whenever new mechanisms or price conditions coming from new legislative and governmental regulations would affect the balance of the economic and financial plan of the activity awarded by the concession. The failure of this agreement can bring the economic operator to cancel the contract.

Moreover, Art. 133, CPC, referring to public works procurements, excludes the application of Art. 1664 (1), CC, which entitles both parties to seek review of contractual price whenever increases or decreases in the cost of materials or workmanship have been occurring for more than ten percent of the total price. This means that no price revision is allowed, being on the contrary applicable the criterion of fixed price. However, the price may be increased according to evolution in inflation by a rate established by a government decree, which may be further increased (but also decreased) in case of increases (or decreases) of the costs in construction materials due to exceptional circumstances. Furthermore, the revision possibly resulting from par. 2 of the 1664, CC, according to which economic operators can obtain a fair compensation for the occurrence of considerable difficulties in performing and the resulting modifications to the original design, is among the modifications of the contract included in the list provided by Art. 132, CPC.

On the contrary, according to Art. 115, CPC, all public services and public supplies procurements must hold a clause for price revision, without any reference to the occurrence of unforeseen conditions (differently from the CC). The different treatment of the categories of public procurements may be explained in the following way: because of the

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greater onerousness of the performance in public works contracts, the purpose of containing the economic burden on public budgets has been prevailing, albeit without transforming the contract itself into an hazardous one, but using a sort of legal "value maintenance clause" rather than a "hardship clause" (differently also by works concession). And in order to meet the risks to the completion of works or to the quality of the performance, the national regulation on public contracts has opted for a system of insurances (Articles 75, 111, 113 and 129, CPC).

As the end of the public contracts is concerned, Art. 12 of the 1923 regulation established as a general rule that the definition of a certain term of the contractual relationship is mandatory for public bodies; moreover, ordinary expenses (like in the case of rent contracts) may not be exceeding a nine years time. Somehow, this rule is connected with Art. 57 (7), CPC, which forbids tacit renewals of public procurement contracts and sanctions the automatically renewed contract as void, even though this prohibition aims especially at guaranteeing an effective competition.

From the same point of view, CPC recognises the relevant role played by time in the regulation of public contracts: this is true in the case of additional deliveries by the original supplier, awarded by negotiated procedure without publication of a contract notice (the time-limit is three years); in the case of framework agreements (the time-limit is four years); and in the case of public works concessions (the time-limit is thirty years), where the contract duration may be extended with the aim to recover the contractual economic balance (Art. 57, Art. 59 and Art. 143,CPC).

Moreover, according with a consolidated case-laws (Consiglio di Stato, V, no. 6281/2002), modifications in the terms of the contract following a new direct bargaining are not allowed, because public entities must bargain by applying particular procedures ("procedure di evidenza pubblica") even though they have contractual freedom. Therefore, the modifications to a contract should also be concluded by applying the same procedure.

As the contract completion is concerned, being the contracting partner generally chosen through a competitive procedure, public contracts should be implemented by the awarded

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party. This protects administrations from the pressures of criminal organizations, which are always interested in assignment and subcontract of public contract (note that Art. 247, CPC, does not affect the controls provided by other statutes aimed at preventing criminal offences).

CPC confirms this general principle in Art. 118 (1), but it also provides some exceptions: Art. 116, CPC, regulates the modifications of the contract depending on subjective events of the contracting partner and Art. 117, CPC, affects the possibility of assigning the amount owed by public entities. Moreover, Art. 118 – as amended by D. Lgs. no. 152/2008 – authorises the awarded operator to subcontracting with quantitative limits (30% of the prevailing category of works, 30% of the whole amount of the contract in case of services and supplies) which should be defined time by time by the contracting authority in the public notice. Furthermore, competitors should indicate in their tenders the parts of the contract they are planning to subcontract and the contracting public entity retains the control on the suitability of the subcontractors, paying directly the amount owed for the performance to each subcontractor.

In conclusion, pressures, stemmed from both internal factors and the competitive market, have made the national regulation on the modifications of public contracts more restrictive than the EU law. At least with regard to subcontracting, which assures a wide discretion to the authorising public administration; and this is one of the general principles which applies also to excluded contracts (Art. 27, CPC). However, further limits to the possibility to renegotiate the contractual terms are going to be provided from the pro-competitive regulation applicable to public procurements, as in the case of the restricted use of the negotiated procedure for the awarding of additional works or deliveries to the contractual partner.

[*] Basically this report is based on the contribution by A. Massera in the volume edited by R. Noguellou and U. Stielkens, *Droit comparé des contrats publics,* Bruxelles, Bruylant, 2010. For a further analysis of the issues discussed due reference should be made to this essay

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ACTES UNILATERAUX

APPORTS DE L'ANNEE - 2010 - FRANCE

(Février 2011)

Prof. Pierre DELVOLVE

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1. SUR LA NATURE DES ACTES UNILATERAUX
2. SUR LE REGIME DES ACTES UNILATERAUX

L'année 2010 a apporté certaines précisions concernant tant la nature des actes administratifs unilatéraux que certains aspects de leur régime. Dans les deux cas, il ne s'agit pas d'innovations, encore moins de bouleversements. Mais sont soit illustrés des principes déjà reconnus soit complétées des solutions antérieures.

1. SUR LA NATURE DES ACTES UNILATERAUX

La question de l'identification des actes administratifs unilatéraux est une question classique, dont la solution a des conséquences sur leur régime, contentieux et non contentieux. Dans le premier cas, il s'agit de savoir si un acte présente les caractéristiques permettant de le contester devant la juridiction administrative, dans le second de déterminer les exigences auxquelles il est soumis, notamment pour son adoption et sa diffusion.

L'année 2010 illustre cette problématique avec trois arrêts qui ont été rendus par le Conseil d'Etat.

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Le premier concerne des actes adoptés par des organismes à statut de droit privé. Dans le prolongement de l'arrêt du Conseil d'Etat du 31 juillet 1942, Monpeurt (Recueil des arrêts du Conseil d'Etat, 1942, p. 239 ; Les grands arrêts de la jurisprudence administrative, par M. Long, P. Weil, G. Braibant, P. Delvolvé et B. Genevois, Dalloz, 17ème éd., 2009, p. 326), il est admis que des actes adoptés par des organismes de droit privé dans l'exercice d'une mission de service public dont ils sont chargés et des prérogatives de puissance publique dont ils sont dotés, sont des actes administratifs. Il en est ainsi en particulier lorsque un acte pris par un organisme de droit privé concerne l'organisation du service public, comme l'a reconnu le Tribunal des conflits dans le fameux arrêt Compagnie Air France c/époux Barbier du 15 janvier 1968 (Recueil p. 709 ; Les grands arrêts... p. 564).

C'est ce qu'a jugé le Conseil d'Etat dans un arrêt du 11 février 2010, Mme Borvo (req. n° 324 233 ; Actualité juridique, Droit administratif, 2010, p. 670, chronique S.-J Liéber et D. Botteghi) à propos d'une délibération du conseil d'administration de la Société France Télévisions :

« *Considérant que la délibération du conseil d'administration de France Télévisions en date du 16 décembre 2008 chargeant son président-directeur général de mettre en oeuvre de nouvelles règles de commercialisation des espaces publicitaires affecte la garantie des ressources de la société, lesquelles constituent un élément essentiel pour assurer la réalisation des missions de service public confiées à cette société en vertu des dispositions de l'article 43-11 de la loi du 30 septembre 1986, dont celles de diversité, pluralisme, qualité et innovation dans les programmes mis à disposition des publics ; que, par suite, cette délibération, qui touche à l'organisation même du service public, relève de la compétence de la juridiction administrative* ».

Ce même arrêt permet aussi de cerner la nature d'actes qui émanent d'organismes publics. La qualité de l'auteur d'une mesure ne suffit pas à donner à celle-ci la qualité d'acte administratif. Pour qu'il y ait un « acte » au sens juridique exact du terme, il faut une manifestation de volonté produisant des effets de droit. Dans certains cas, une autorité administrative se borne à manifester une intention, à exprimer un souhait : il ne s'agit pas

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encore d'une décision. Mais lorsqu'est franchi un seuil où apparaît un ordre, la mesure est un véritable acte administratif pouvant être contesté devant le juge administratif. Tel a été le cas dans l'affaire :

« *Considérant que la lettre du ministre en date du 15 janvier 2008, après avoir rappelé le contexte de la réforme législative alors en cours relative à la suppression de la publicité dans le service public de la télévision, demande au président-directeur général de la société France Télévisions d'envisager les mesures nécessaires afin de ne plus commercialiser les espaces publicitaires entre 20 h et 6 h sur France 2, France 3, France 4 et France 5 à partir du 5 janvier 2009 conformément à l'esprit et à la lettre de la réforme législative en cours ; qu'eu égard à la précision des mesures énoncées et de l'échéance qu'elle fixe pour leur application, la lettre du ministre doit être regardée comme comportant une instruction tendant à ce que soient prises les mesures en cause ; qu'elle constitue ainsi une décision faisant grief* ».

Quant au fond, le Conseil d'Etat a jugé que le ministre n'avait pas le pouvoir d'enjoindre à France Télévisions de ne plus faire de publicité et que sa décision était illégale ; par voie de conséquence, l'était aussi la délibération du conseil d'administration de France Télévisions qui n'avait fait que l'exécuter.

Le même genre de question, mais sur des objets différents, se pose pour les nombreuses mesures que les chefs de service prennent pour assurer le fonctionnement des services placés sous leur autorité. On parle souvent à ce sujet de mesures d'ordre intérieur. Beaucoup d'entre elles ont été considérées comme « ne faisant pas grief » et donc comme insusceptibles d'être attaquées devant le juge administratif. Tel a été le cas pendant longtemps pour des décisions de caractère disciplinaire prises au sein d'établissements scolaires, militaires ou pénitentiaires. La jurisprudence se montre plus rigoureuse depuis les deux arrêts rendus par le Conseil d'Etat le 17 février 1995, Hardouin, Marie (Recueil p. 82 et p. 85 ; Les grands arrêts... p. 692). Elle a été enrichie en 2007 par trois arrêts du 14 décembre 2007, Planchenault, Rec. p. 474 ; Boussouar, Rec. p. 495, Payet, Rec. p. 498, relatifs à des décisions concernant des prisonniers (déclassement d'emplois, changement d'affectation, placement sous le régime des rotations de sécurité).

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Elle vient de l'être encore par un arrêt du Conseil d'Etat du 26 novembre 2010, Ministre d'Etat, garde des sceaux, ministre de la justice (requête n° 329 564) à propos de la décision du directeur d'un centre pénitentiaire limitant le nombre de personnes admises simultanément au parloir :

« *Considérant que la décision par laquelle un chef d'établissement pénitentiaire fixe les modalités essentielles de l'organisation des visites aux détenus, et notamment le nombre de visiteurs admis simultanément à rencontrer le détenu, est indissociable de l'exercice effectif du droit de visite ; que par sa nature, cette décision prise pour l'application des dispositions citées ci-dessus affecte directement le maintien des liens des détenus avec leur environnement extérieur; que compte tenu de ses effets possibles sur la situation des détenus, et notamment sur leur vie privée et familiale, qui revêt le caractère d'un droit fondamental, elle est insusceptible d'être regardée comme une mesure d'ordre intérieur et constitue toujours un acte de nature à faire grief* ».

Comme dans les cas précédents, c'est l'effet de la décision sur le « statut » de l'intéressé, l'altération de ses droits, qui conduisent à y voir, non pas une mesure d'ordre intérieur, mais un acte administratif que contrôle le juge administratif.

C'est une autre qualification qui était en cause, celle de document administratif, dans l'arrêt rendu par le Conseil d'Etat (Section) le 7 mai 2010, Bertin (req. n° 303 168 ; Actualité juridique, Droit administratif 2010, p. 1133, chronique S.-J. Liéber et D. Botteghi). La notion ne se confond pas avec celle d'acte administratif et n'a pas les mêmes effets.

Un acte administratif peut être un document administratif en ce qu'il prend la forme de celui-ci, un document administratif peut comporter une véritable décision adoptée par une autorité administrative. Mais, à l'inverse, il existe des actes administratifs qui n'ont pas la forme de document (par exemple, une décision implicite) et des documents administratifs qui ne constituent pas des actes administratifs (par exemple une circulaire qui n'est pas impérative).

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La qualification d'acte administratif a pour principal intérêt de permettre un recours contre lui devant le juge administratif. Celle de document administratif est essentiellement destinée à permettre au public d'y accéder.

La loi du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public, plusieurs fois modifiée, a reconnu un droit de communication des documents administratifs aux personnes qui en font la demande, au moins dans certaines conditions

Selon son article 1er alinéa 2, « *tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, à l'exception des avis du Conseil d'Etat et des tribunaux administratifs, prévisions et décisions revêtant la forme d'écrits, d'enregistrements sonores ou visuels, de traitements automatisés d'informations non nominatives* ».

La question s'est posée de savoir si des documents concernant les juridictions, et spécialement les juridictions judiciaires peuvent être considérés comme administratifs. Ce ne peut être le cas des décisions de justice elles-mêmes, qui sont des documents juridictionnels. Mais il existe des mesures qui, se rapportant à l'organisation de la justice, ne sont pas en elles-mêmes des décisions juridictionnelles.

Dans le cadre de la jurisprudence issue de l'arrêt du Tribunal des conflits du 27 novembre 1952, Préfet de la Guyane (Recueil p. 642 ; Les grands arrêts …, p. 436), elles ont été considérées comme des actes administratifs relevant du contrôle de la juridiction administrative, y compris lorsqu'elles émanent de magistrats (Conseil d'Etat 17 avril 1953, Falco et Vidaillac, Recueil p. 175 ; 13 mars 1987, Bauhain, Recueil p. 95). On aurait pu penser que des mesures relatives à la composition des juridictions, qui sont des actes administratifs, étaient en même temps des documents administratifs relevant du droit de communication.

Le Conseil d'Etat a décidé le contraire :

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« Considérant que les documents, quelle que soit leur nature, qui sont détenus par les juridictions et qui se rattachent à la fonction de juger dont elles sont investies, n'ont pas le caractère de document administratif pour l'application de la loi du 17 juillet 1978 ;

Considérant que les tableaux mensuels des assesseurs des quatre chambres correctionnelles du tribunal de grande instance de Lyon pour la période de septembre à décembre 1999, dont M. A a demandé la communication, déterminent la composition de la juridiction pendant cette période ; qu'ils se rattachent ainsi à la fonction de juger dont le tribunal est investi; qu'en conséquence, ils n'ont pas le caractère de document administratif et n'entrent donc pas dans le champ d'application de la loi du 17 juillet 1978 ».

La solution s'explique par la spécificité de la fixation des tableaux des formations de jugement et son rattachement à la fonction de juger : en conséquence il ne s'agit pas de documents administratifs - alors qu'il s'agit d'actes administratifs. C'est une illustration de la dissociation des deux notions et, partant, de celle de leur régime.

2. SUR LE REGIME DES ACTES UNILATERAUX.

Parmi les solutions à signaler en 2010, certaines concernent l'adoption des actes, d'autres leur application dans le temps.

En ce qui concerne l'adoption des actes, une ordonnance du Président de la République (prise en vertu d'une habilitation législative) du 6 mai 2010 a apporté une première remise en ordre dans les dispositions législatives renvoyant pour leur exécution tantôt à un décret simple tantôt à un décret en Conseil d'Etat. L'ordonnance ne concerne que le code rural mais les principes qui ont déterminé son dispositif pourront être mis en oeuvre pour d'autres législations.

Le renvoi par le législateur à un décret en Conseil d'Etat (imposant obligatoirement l'examen du projet de décret par le Conseil d'Etat, sans que le gouvernement soit obligé ensuite de retenir la position du Conseil d'Etat) ou à un décret simple, n'est pas décidé, le plus souvent, en fonction d'une claire vision des besoins pouvant justifier la délibération du Conseil d'Etat. On sait que celle-ci peut contribuer à

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éclairer le gouvernement et qu'elle peut constituer une sorte de garantie pour la forme et le fond du texte ; mais on ne sait pas exactement en quoi cela peut être nécessaire.

Désormais le renvoi à des décrets en Conseil d'Etat ne devrait être décidé que dans deux séries de cas (qui peuvent se croiser) : pour des textes concernant les droits, libertés ou principes de valeur constitutionnelle ; pour ceux qui concernent les grandes lignes d'une réglementation majeure. Pour les autres, le renvoi à un décret simple suffit. Dans tous les cas, il s'agit de textes pris sur le fondement de dispositions législatives, dont les décrets (simples ou en Conseil d'Etat) déterminent les conditions d'exécution.

La grille de répartition est appliquée au code pénal. Il reste à l'appliquer à d'autres codes et aux nouvelles lois qui seront adoptées.

Il reste aussi à adopter le décret, en Conseil d'Etat ou non, auquel renvoie la loi lorsqu'il est nécessaire à sa mise en oeuvre. Le refus de l'adopter constitue une illégalité.

C'est ce qu'a jugé le Conseil d'Etat dans un arrêt du 22 octobre 2010, Société Document Channel (requête n° 330 216) :

« *Considérant qu'aux termes de l'article 1369-8 du code civil, dans sa rédaction issue de l'ordonnance du 16 juin 2005 : 'Une lettre recommandée relative à la conclusion ou à l'exécution d'un contrat peut être envoyée par courrier électronique à condition que ce courrier soit acheminé par un tiers selon un procédé permettant d'identifier le tiers, de désigner l'expéditeur, de garantir l'identité du destinataire et d'établir si la lettre a été remise ou non au destinataire. (...) / Lorsque l'apposition de la date d'expédition ou de réception résulte d'un procédé électronique, la fiabilité de celui-ci est présumée, jusqu'à preuve contraire, s'il satisfait à des exigences fixées par un décret en Conseil d'Etat. / Un avis de réception peut être adressé à l'expéditeur par voie électronique ou par tout autre dispositif lui permettant de le conserver. / Les modalités d'application du présent article sont fixées par décret en Conseil d'Etat' ;*

Considérant que ces dispositions ne permettent de présumer la fiabilité des informations relatives à l'identité de l'expéditeur et du destinataire et à la remise d'un

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courrier électronique afférent à la conclusion d'un contrat ou à ses modalités d'exécution, que dans la mesure où le procédé électronique utilisé est conforme à des prescriptions réglementaires fixées par décret en Conseil d'Etat ; que si l'absence de mesures réglementaires ne fait pas obstacle à la faculté, prévue par l'article 1369-8 du code civil, d'employer un procédé électronique afin d'envoyer un courrier recommandé avec accusé de réception relatif à un contrat, elle ne permet toutefois pas de satisfaire à la présomption instituée par le législateur ; qu'en dépit des difficultés techniques éventuellement rencontrées par l'administration dans l'élaboration des textes dont l'article précité prévoit l'intervention, son abstention à les prendre à la date de la décision attaquée s'est prolongée au-delà d'un délai raisonnable ; que, dans ces conditions, la décision implicite née le 31 mai 2009, par laquelle le Premier ministre a refusé d'édicter le décret prévu par les dispositions précitées de l'article 1369-8 du code civil méconnaît l'article 21 de la Constitution et doit, par suite, être annulée ».

L'arrêt admet a contrario, comme des arrêts antérieurs (par exemple Conseil d'Etat 13 juillet 1951, Union des anciens militaires titulaires d'emplois réservés à la S.N.C.F., Recueil p. 403) que le gouvernement ne commet pas une illégalité en ne prenant pas le règlement qui n'était pas nécessaire pour que la loi puisse s'appliquer. Mais il confirme que « l'exercice du pouvoir réglementaire comporte non seulement le droit mais aussi l'obligation de prendre dans un délai raisonnable les mesures qu'implique nécessairement l'application de la loi » (en ce sens par exemple 28 juillet 2000, Association France Nature Environnement, requête n° 204 024, Recueil, p. 323).

L'adoption d'un acte administratif doit être suivie d'une publicité adéquate pour qu'il soit porté à la connaissance des intéressés. Pour des actes de portée générale, il doit s'agir d'une publication. Deux arrêts viennent reconnaître l'un, les limites, l'autre, les modalités de cette obligation.

Le premier est celui qu'a rendu le Conseil d'Etat le 16 avril 2010, Association AIDES (requête n° 320 196 ; Actualité juridique . Droit administratif 2010, p. 1878, note L. Delabie) à propos du décret créant un traitement automatisé de données à caractère personnel, dénommé CRISTINA, au profit de la direction centrale du renseignement

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intérieur (c'est donc un fichier de police), et d'un second décret dispensant de publication le premier. Cette dispense était fondée sur l'article 26 de la loi du 6 janvier 1978 relative à l'information, aux fichiers et aux libertés, qui la prévoit pour certains fichiers intéressant « *la sûreté de l'Etat, la défense ou la sécurité publique* ».

Après s'être fait communiquer le décret créant le fichier pour en vérifier le contenu, le Conseil d'Etat a admis qu'il entrait dans le champ de la possibilité de dispense de publication. En outre, il a considéré

« *qu'il résulte de l'examen auquel le Conseil d'Etat s'est livré, après communication du décret attaqué, que, compte tenu notamment de la finalité du traitement automatisé litigieux, de la nature des données enregistrées qui sont en adéquation avec la finalité du traitement et proportionnées à cette finalité, des conditions de leur collecte et des restrictions d'accès instituées, que le traitement automatisé dénommé CRISTINA ne porte pas au droit des individus au respect de leur vie privée et familiale une atteinte disproportionnée aux buts de protection de la sécurité publique en vue desquels a été pris le décret ; que, par suite, les moyens tirés de la méconnaissance de l'article 6 de la loi du 6 janvier 1978 et de l'article 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales doivent être écartés* ».

Il y a donc des limites à l'obligation de publier les actes réglementaires.

Le second arrêt concerne, en quelque sorte en sens inverse, l'effort de publication poursuivi par le gouvernement pour les circulaires ministérielles. L'importance de celles-ci dans la vie administrative a déjà été soulignée. Leur foisonnement les rend difficilement identifiables. C'est pourquoi il a été décidé par un décret du 8 décembre 2008 : qu'elles sont tenues à la disposition du public sur un site Internet relevant du Premier ministre ; qu'une circulaire ne figurant pas sur ce site n'est pas applicable ; et qu'elle doit être réputée abrogée. Dans un arrêt du 16 avril 2010, Azelvandre, req. n° 279 817, le Conseil d'Etat en a tiré les conséquences au sujet d'une circulaire qui ne figurait pas sur le site, en constatant que, par suite, elle doit être regardée comme abrogée.

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L'affaire dépasse la question de la publicité pour rejoindre celle de l'application d'un acte administratif dans le temps : la non-publication ou plutôt l'absence de nouvelle publication d'une mesure peut valoir abrogation.

La principale difficulté de l'application des actes administratifs dans le temps est celle de leur rétroactivité. En vertu d'une jurisprudence marquée par l'arrêt du Conseil d'Etat du 25 juin 1948, Société du Journal l'Aurore (Recueil p. 289 ; Les grands arrêts ..., p. 384), elle est interdite, sous réserve de rares exceptions.

L'une d'entre elles a été mise en évidence par un arrêt du Conseil d'Etat du 19 mars 2010, Syndicat des compagnies aériennes autonomes (requête n° 305 049 et autres) dans le cas où doivent être tirées les conséquences de l'annulation d'un acte administratif par la juridiction administrative : s'il est nécessaire de prendre un nouvel acte pour combler la lacune (on dit parfois le « *vide juridique* ») résultant de l'annulation alors qu'il y aurait dû y avoir une réglementation pour la période pendant laquelle s'appliquait l'acte annulé, le nouvel acte peut et même doit rétroagir :

« *Considérant qu'Aéroports de Paris, qui devait assurer la continuité du fonctionnement du service public aéroportuaire, pouvait valablement fixer rétroactivement de nouveaux tarifs applicables pour la période couverte par les décisions annulées, dès lors que l'annulation des décisions des 7 et 13 mars 2006 n'a pu prolonger l'application des décisions tarifaires applicables pour la période précédente* ».

Cette rétroactivité est même double : non seulement le nouvel acte va s'appliquer dans le passé, mais son adoption est régie par les dispositions en vigueur à la date à laquelle la décision initiale a été prise. Le Conseil d'Etat considère

« *qu'en outre, si, en règle générale, il appartient à l'autorité compétente, lorsqu'elle est appelée à prendre une nouvelle décision à la suite de l'annulation pour excès de pouvoir d'une précédente décision, de tenir compte des éléments de fait et de droit existant à la date de cette nouvelle décision, il en va différemment lorsque la décision annulée fixe, comme en l'espèce, des tarifs pour une période déterminée ; que l'autorité compétente doit, dans une telle hypothèse, remplacer la décision annulée par une nouvelle*

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décision en appliquant les éléments de fait et de droit à la date à laquelle la décision initiale a été prise ; que, par suite, Aéroports de Paris n'a pas commis d'erreur de droit en tenant compte, pour fixer les tarifs applicables du 1er mai 2006 au 31 mars 2007, de la situation de droit et de fait existant à la date de la décision initiale ».

Cette dérogation très remarquable aux principes de l'adoption et de l'effet dans le temps des actes administratifs s'explique par la continuité nécessaire du fonctionnement du service public.

Elle pourrait valoir, non seulement dans le cas d'annulation d'un acte administratif par le juge, mais encore dans celui de son retrait par l'auteur de l'acte.

Le régime du retrait a été marqué par l'arrêt du Conseil d'Etat du 26 octobre 2001, Ternon (Recueil 497, conclusion Séners ; Les grands arrêts..., p. 815), selon lequel

« *sous réserve de dispositions législatives ou réglementaires contraires, et hors le cas où il est satisfait à une demande du bénéficiaire, l'administration ne peut retirer une décision individuelle explicite créatrice de droits, si elle est illégale, que dans le délai de quatre mois suivant la prise de cette décision* ».

Mais l'arrêt Ternon ne règle pas tout : d'une part, il réserve lui-même les solutions pouvant être aménagées par des dispositions législatives ou réglementaires ; d'autre part, il ne concerne que les décisions individuelles explicites, non les décisions individuelles implicites, ni les décisions réglementaires ; de plus, il renvoie aux actes créateurs de droits.

Sous ces trois aspects, la jurisprudence récente a apporté des solutions.

Tout d'abord, l'aménagement d'un régime spécial se trouve illustré à propos du retrait de la nomination d'un magistrat, par l'arrêt du Conseil d'Etat (Section) du 1er octobre 2010, Mme Tacite (req. n° 311 938). Il n'y a pas vraiment de disposition spéciale qui en aménage le régime. C'est plus généralement sur le statut des magistrats et sur la protection particulière qui doit leur être accordée que se fonde le Conseil d'Etat pour écarter le régime de droit commun du retrait défini par l'arrêt Ternon.

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« *Considérant qu'aux termes de l'article 16 de la Déclaration des droits de l'homme et du citoyen : 'Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution' ; qu'en vertu de l'article 64 de la Constitution : 'Le Président de la République est garant de l'indépendance de l'autorité judiciaire./ (...) Une loi organique porte statut des magistrats (...)' ;*

Considérant que le principe de séparation des pouvoirs et celui de l'indépendance de l'autorité judiciaire, que traduisent ces dispositions constitutionnelles, imposent que des garanties particulières s'attachent à la qualité de magistrat de l'ordre judiciaire ; qu'ils impliquent notamment que ces derniers ne puissent se voir retirer cette qualité et les garanties particulières qui s'y attachent qu'en vertu de dispositions expresses de leur statut et dans les conditions prévues par ces dernières ; qu'aucune disposition ne prévoit qu'un magistrat de l'ordre judiciaire puisse se voir privé de sa qualité en dehors de la procédure disciplinaire régie par les dispositions figurant au chapitre VII de l'ordonnance du 22 décembre 1958 portant loi organique relative au statut de la magistrature ; qu'il en résulte que le Président de la République ne pouvait rapporter le décret, fût-il illégal, du 18 juillet 2007 et ainsi priver Mme A, en dehors de toute procédure disciplinaire, de la qualité de magistrat de l'ordre judiciaire que ce décret lui avait conférée ; que Mme A est par suite, et sans qu'il soit besoin d'examiner les autres moyens de la requête dirigés contre le décret du 16 novembre 2007, fondée à en demander l'annulation pour excès de pouvoir ».

En deuxième lieu, pour les actes réglementaires, le Conseil d'Etat a repris, dans l'arrêt déjà cité, du 19 mars 2010, Syndicat des compagnies aériennes autonomes, la formule de l'arrêt Dame Cachet du 3 novembre 1922 (Recueil, p. 790) qui pendant longtemps a déterminé le régime de retrait de tous les actes administratifs, individuels ou non. Elle continue à s'appliquer aux actes réglementaires :

« *Considérant qu'il incombe à l'autorité administrative de ne pas appliquer un texte réglementaire illégal, même s'il est définitif ; qu'en outre cette autorité peut*

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légalement rapporter un tel texte si le délai du recours contentieux n'est pas expiré au moment où elle édicte le retrait du texte illégal ou si celui-ci a fait l'objet d'un recours gracieux ou contentieux formé dans ce délai ».

Enfin les limites au retrait des actes individuels tenant, aussi bien d'ailleurs dans l'arrêt Ternon que dans l'arrêt Dame Cachet, à la création de droits, portent sur une notion difficile à cerner : on n'a jamais pu définir exactement ce qu'est un droit acquis. Cependant, si le bénéfice d'un acte est subordonné à l'accomplissement de conditions, l'acte ne peut être créateur de droits si les conditions auxquelles il est subordonné ne sont pas remplies. C'est ce que vient confirmer l'arrêt du Conseil d'Etat du 5 juillet 2010, Chambre de commerce et de l'industrie de l'Indre, requête n° 308 815.

« *Considérant que l'attribution d'une subvention par une personne publique crée des droits au profit de son bénéficiaire ; que toutefois, de tels droits ne sont ainsi créés que dans la mesure où le bénéficiaire de la subvention respecte les conditions mises à son octroi, que ces conditions découlent des normes qui la régissent, qu'elles aient été fixées par la personne publique dans sa décision d'octroi, qu'elles aient fait l'objet d'une convention signée avec le bénéficiaire, ou encore qu'elles découlent implicitement mais nécessairement de l'objet même de la subvention* ».

Si le régime du retrait se trouve ainsi précisé par la jurisprudence récente, il n'en garde pas moins une complexité, qui est par elle-même une source d'insécurité alors qu'il se veut garant de la sécurité juridique.

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ADMINISTRATIVE INTERNAL REVIEW

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Prof. Margherita RAMAJOLI

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1. INTRODUCTION

Administrative decisions adopted at second instance are characterised by the fact that then relate to previous administrative decisions (so-called **internal review**).

Furthering public interest requires that the administration have the power to review its previously rulings when validity or appropriateness are in doubt, adopting, if necessary, related measures.

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The administration is required to protect the public interest on an ongoing basis by, for example, reversing decisions as a way of protecting their goals even though this may create problems with regard to the rights and legitimate expectations created with the decision at first instance and the resulting reliance of private individuals on the stability of the decision.

Currently, Article 21-*quinquies* and Article 21-*nonies* of Italian Law no. 241/90, introduced by Law no. 15/2005, regulate the reversal, *ex officio* annulment and confirmation of decisions, expressly codifying the most important administrative internal reviews, which are thus typified in general terms and no longer left, as before, to development through case law and the academic literature.

However **case law** is still **essential in this area**, contributing to delineating the general features of internal review, with particular reference to issues of jurisdiction (section 3), indemnity payments following the reversal of an administrative decision (section 4) and the power of internal review in cases where a provisional award has been made (section 5).

Furthermore, it needs to be mentioned that in 2010 has been enforced the "advance notice of the intention to appeal to the courts" that puts the administration in a position to decide whether or not to "take action under internal review" (section 2).

2. ADVANCE NOTICE OF THE INTENT TO APPEAL TO THE COURTS AND THE EXERCISE OF THE POWERS OF INTERNAL REVIEW BY THE TENDERING AUTHORITY

The new Article 243-*bis* of the Italian Code of Public Contracts, introduced by Article 6 of Italian Legislative Decree no. 53/2010 transposing Directive 2007/66/EC, has provided for a **notice of appeal requirement to the tendering authority in the area of public procurement.**

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This "advance notice of appeal" puts the administration in a position to decide in good time whether or not to "take action under internal review" procedures in light of suspected irregularities. It is a **preventive dispute resolution mechanism centred on the exercise of the power of internal review**.

Individuals who intend to appeal to the courts must inform the tendering authorities of the presumed violations and of their intention to file an appeal. The notice must contain a concise summary of the presumed irregularities in the administrative decisions and the grounds for the appeal that the party intends to raise in the proceedings, without prejudice however to the right to raise different or additional grounds for appeal in the proceedings.

This notice may be presented at any time before the interested party has filed an judicial review; it does not prevent the further continuation of the tender procedures, or the commencement of the grace period for the conclusion of the contract determined pursuant to Article 11(10), or the commencement of the time limit for the filing of an judicial review.

Within 15 days of receipt of the notice, the administration must "communicate its own views in relation to the grounds indicated by the interested party, and decide whether or not to take action under internal review". There no requirement to adopt an internal review before the above time limit, but simply a decision as to whether or not to initiate the review procedure.

However, this decision cannot be a mere decision over whether or not to exercise internal review powers, but must contain indications as to whether or not the grounds raised are well-founded.

Consequently, although the law is silent on this point, it may be appropriate to involve any other interested parties in the review proceedings, such as the successful party, through the notice of the initiation of proceedings pursuant to Article 7 of Italian Law no. 241/1990.

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A failure by the administration to respond to the notice is considered equivalent of a denial ("equivalent to a refusal of internal review"). Both the failure by the undertaking to give notice as well as the silence on the part of the tendering authority amount to conduct proceedings may be assessed for the purposes of the decision on costs, as well as pursuant to Article 1227 of the Italian Civil Code on contributory negligence, and hence the level of compensation may be reduced "in line with the seriousness of the negligence and extent of the consequences that resulted from it".

"The total or partial refusal of internal review, whether express or tacit", may be challenged only along with the decision to which it refers or, if the latter has already been challenged, by filing additional grounds (new paragraph 6 of Article 243-*bis* of the Italian Code of Public Contracts, introduced by Article 3 of Annex 4 to Italian Legislative Decree no. 104/2010).

The **advance notice** of the intention to file an appeal **will have a marginal role in reducing litigation**. The reason lies both in the very short time limit of 30 days for the filing of an appeal with the courts, as well as the fact that providing notice does not entail the suspension of the time limit for filing an appeal with the courts, nor of the grace period for the conclusion of the contract.

Accordingly, the specific arrangements put in place to govern the advance notice transform the institution from a dispute prevention mechanism into a mere instrument with the function of notifying the administration of the existence of the risk of irregularities in the award procedure.

3. JURISDICTION OVER DECISIONS TO WITHDRAW PUBLIC FUNDING

In 2010 there was a significant body of case law concerning **the division of jurisdiction between the administrative courts and the ordinary courts over cases involving decisions to withdraw public funding**. A settled view has been established

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which uses a general criterion to regulate the division of jurisdiction based on the identification of the "procedural segment" affected by the reversal and its "reason".

Administrative case law follows the settled case law of the Supreme Court of Cassation (Cass., sez.un., 17 febbraio 2010, n. 3679) and distinguishes between the **"static" occurrence of the award of funding** and the "dynamic" situation relating to the use of that funding.

The former falls under the **jurisdiction of the administrative courts**, whilst any other aspect relating to the manner in which the funding is used and compliance with the commitments undertaken falls under the jurisdiction of the ordinary courts (Cons.Stato, sez. VI, 11 gennaio 2010, n. 3; sez. V, 16 febbraio 2010, n. 884; 23 settembre 2010, n. 7088; 10 novembre 2010, n. 7994).

Moreover, the issue of jurisdiction over public funding is also governed by the normal criteria regulating jurisdiction based on the nature of individual legal rights.

A private party has a **legitimate interest** when the dispute concerns not only the procedural stage prior to the award of the benefit, but also the subsequent stage if **the funding has been annulled or used unlawfully or due to the fact that it went against the public interest from the outset**.

On the other hand, such a person will have an individual right if the dispute arises during the disbursement stage of the funding or the withdrawal of the subsidy on the basis of an alleged breach by the recipient; this is also the case for challenges to decisions classified as revocation, expiry or termination, provided that they result from the alleged failure by the beneficiary to abide by the obligations assumed in return for the award of the funding.

In fact, this activity is not authoritative, and there is no balancing of the public interest against that of the private party; it is rather necessary to assess, now on an equal footing, whether or not the parties have complied with the obligations accepted or imposed following disbursement of the funding (Cons.St., sez. V, 16 febbraio 2010, n. 884; sez. VI,

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3 giugno 2010, n. 3501; Cons.Giust.Amm.Reg.Sic., 21 settembre 2010, n. 1232; Cons.St., sez. V, 10 novembre 2010, n. 7994; Tar Umbria, Perugia, sez. I, 23 giugno 2010, n. 383; Tar Trentino Alto Adige, Trento, sez. I, 24 giugno 2010, n. 164; Tar Sicilia, Palermo, sez. I, 29 novembre 2010, n. 14192).

Thus, for example, a withdrawal due to the insolvency of the beneficiary undertaking and the finding that it is impossible for the undertaking to fulfil the obligations undertaken when the funding was granted is not the expression of a power of internal review through a new balancing of the public interests involved in the decision to award the funding. It falls under the jurisdiction of the ordinary courts since it impinges upon the individual right "to the continuation of the funding, claimed to have been violated due to the failure to meet the prerequisites for an end to disbursement of the benefit and, therefore, for the breach objected to by the administration" (Cons.St., sez. VI, n. 3/2010; sez. V, n. 7088/2010).

4. INDEMNITY PAYMENT FOLLOWING THE REVERSAL OF AN ADMINISTRATIVE DECISION

Case law has on various occasions had the opportunity to specify the rules governing the institution of the indemnity payment made by the administration to an individual directly affected by the reversal pursuant to Article 21-*quinquies* of Italian Law no. 241/1990.

A **prerequisite** for the award of an **indemnity payment** to the individual who directly suffers the detriment is the **lawfulness of the decision to reverse** (so-called responsibility of the public administration for lawful acts). In the event that the reversal is unlawful there may possibly be grounds for compensation for damage (Cons.St., sez. V, 10 febbraio 2010, n. 671; 6 ottobre 2010, n. 7334).

Contrary to what occurs in situations involving the compensation for damages due to liability, for which the negligence of the party that caused the damage is an essential

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prerequisite, in cases involving an indemnity payment **it is not necessary to ascertain any negligence on the part of the administration** (Cons.St., sez. V, n. 671/2010; n. 7334/2010).

A **reversal without an indemnity payment is not unlawful**: the failure to make an indemnity payment does not have the effect of vitiating or invalidating the reversal decision, but simply permits the private party to take action to obtain the indemnity payment (Cons.St., sez. V, n. 7334/2010). In particular, the indemnity payment will be due to the private party if "the legitimate reversal … impinges upon long-standing relations (on an administrative act with lasting effect) and is caused by supervening reasons of public interest, by a change to the factual situation or by a new assessment of the public interest" (Cons.St., sez. VI, 17 marzo 2010, n. 1554).

The prompt adoption of a decision to countermand the decision to reverse does not in itself preclude an indemnity payment: the indemnity payment is subject only to the occurrence of "detriments to the parties directly affected", but may impinge upon the quantification of the indemnity due (Cons.St., sez. V, n. 671/2010).

If the reversal was due only to a clear material error, or the damage was brought about by negligent conduct by the private party, then no indemnity payment will be due (Cons.St., sez. VI, n. 1554/2010); even in the cases involving the reversal of the provisional award of a public contract there will be no indemnity payment (on this specific point, see below).

The **indemnity payment must be limited to the "actual loss"**, as expressly provided for under paragraph 1-*bis* of Article 21-*quinquies* of Italian Law no. 241/1990. Case law has interpreted actual loss to include the cost of participation in the tender procedure due to breach of the "entitlement not to be involved in pointless negotiations" (Cons.st., sez. V, n. 671/2010; n. 7334/2010). In any case, the prerequisites are not met for requesting reimbursement of the cost of participation in the event that the undertaking obtains compensation of the damage resulting from the failure to make the award; in this

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case, there can be no greater benefit than that resulting from the award (Cons.St., sez. V, n. 671/2010).

Also in cases involving lawful reversals, private parties may suffer recoverable damages, and which are not limited only to those leading to an indemnity payment; in this case the damages do not result directly from the reversal, but from other irregularities (either procedural or of another nature) committed by the administration (Cons.St., sez. V, 21 aprile 2010, n. 2244; n. 7334/2010).

It has also been clarified in the case law that it is possible to cumulate, within the same proceedings, claims for compensation (on the basis of the unlawful nature of the reversal) and claims for indemnity payments (on the basis of the actual violation caused by lawful yet harmful conduct) due to the effects of the reversal. If the private party challenges the lawfulness of the reversal and seeks compensation, he may however also make a claim in the alternative for an indemnity payment, in the event that the claim for compensation is ruled groundless; the indemnity payment is in fact a residual remedy (Cons.St., sez. VI, 17 marzo 2010, n. 1554).

On the other hand, the administration need **not** make **any indemnity payment** in cases involving a "**reversal as penalty**" or "**reversal by expiry**" in which, in the cases provided for under statute, it reverses a favourable decision under the terms of the legislation as a consequence of the recipient's conduct when the latter breaches specific legislative provisions. In fact, in these cases the reversal does not depend on considerations of expediency, but is the mandatory consequence of a breach of the law (Cons.St., sez. V, 13 luglio 2010, n. 4534).

5. AWARDS AND INTERNAL REVIEW POWERS

All definitive decisions within a tender procedure, from the tender notice to the definitive award, may be reversed under internal review procedures. Article 11(9) of the Italian Code of Public Contracts refers to the "exercise of powers of internal review in the

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cases permitted under applicable legislation" and therefore results in the automatic application of the provisions of Italian Law no. 241/1990 (see also Article 2(3) of the Code).

Different arrangements apply to cases in which it is the **provisional award** that is reversed. In these cases, case law considers that if the administration decides to reverse the provisional award, then **the commencement of the relative procedure need not be notified to the provisionally successful tenderer** (Cons.St., sez. V, 12 febbraio 2010, n. 743; sez. VI, 6 aprile 2010, n. 1907; 9 aprile 2010, n. 1997; Tar Lazio, Roma, sez. II, 30 aprile 2010, n. 8975; sez. III, 9 settembre 2010, n. 32177) .

Where a definitive award has been made the successful tenderer is in a qualified legal position and therefore may enter into dialogue with the administration, "presenting facts and submitting observations and assessments aimed at best identifying the concrete and current public interest"; on the other hand, **the provisionally successful tenderer only has a *de facto* expectation** that the procedure will be concluded and has not received a qualified award (Cons.St., sez. V, n. 1997/2010; Tar Lazio, Roma, sez. II, n. 8975/2010; sez. III, n. 32177/2010).

It has thus been concluded that in order to eliminate that expectation and the provisional award, it is sufficient to adopt a decision to defer "by which the tendering authority gives its decision supported by reasons not to proceed to the definitive award and pre-announces the reversal of the decisions taken during the intervening period" (Cons.St., sez. V, n. 1997/2010; Tar Lazio, sez. II, n. 8975/2010; sez. III, n. 32177/2010).

The decision not only does not require the separate initiation of a procedure, but does not even require particular motivation: it is sufficient for example to give notification that it is not possible to initiate the implementation of projects on grounds for reasons out of its own control and that it intends to annul the tender procedure previously held, by decision that is sufficient to constitute notice of a provisional award (Cons.St., sez. V, n. 1997/2010). However, there is no lack of judgments at first instance in which it has been held that the administration is always under an obligation to assess the interests affected, to

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carry out a detailed inquiry – albeit without the right to make representations – and to give adequate reasons for its choice (Tar Lazio, sez. II, n. 8975/2010).

Moreover, in cases involving the reversal of a provisional award **there is no obligation to make an indemnity payment**: the indemnity payment is due only in the event that decisions with enduring effect are reversed and not also in cases involving the reversal of decisions with unstable or ephemeral effects, such as a provisional award (Cons.St., sez. VI, 17 marzo 2010, n. 1554; Tar Sicilia, Palermo, sez. I, 13 aprile 2010, n. 4945).

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ACTOS Y CONTRATOS

INFORME ANUAL - 2010 - ESPAÑA

(Febrero 2011)

Prof. Julio V. GONZÁLEZ GARCÍA

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1. INTRODUCCIÓN

El año 2010 ha sido un año extrañamente prolijo en relación con los actos administrativos y los contratos públicos en el ordenamiento jurídico español. Como consecuencia de los deberes de transposición de dos Directivas, se han producido cambios legislativos en ambos sectores que justificarían aisladamente que se explicaran en estas páginas.

En relación con los actos administrativos, aunque formalmente la reforma se operó en los últimos días de 2009, la transposición de la Directiva 2006/123 ha abierto la puerta a una forma diferente de entender las formas de intervención en las actividades de servicios; sustituyendo los actos de conclusión del procedimiento por el género de las comunicaciones previas.

En materia de contratos, la necesidad de transponer la Directiva de recursos ha supuesto un cambio tanto en los procedimientos de recurso como en las causas de invalidez de los contratos públicos. Empezaré el desarrollo por este último apartado.

2. APROXIMACIÓN SUMARIA AL RÉGIMEN DE RECURSOS EN MATERIA DE CONTRATOS EN EL DERECHO ESPAÑOL.

2.1 Introducción

La aprobación de la Directiva 2007/66/CE del Parlamento Europeo y del Consejo, de 11 de diciembre de 2007, por la que se modifican las Directivas 89/665/CEE y 92/13/CEE del Consejo en lo que respecta a la mejora de la eficacia de los procedimientos de recurso en materia de adjudicación de contratos públicos (Directiva de recursos en adelante) tiene una notable importancia en la regulación de la contratación pública, constituyendo un complemento inescindible de las Directivas que recogen los procedimientos de adjudicación de los contratos.

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La Directiva de recursos ha sido objeto de transposición al ordenamiento español a través de la Ley 34/2010, de 5 de agosto, de modificación de las Leyes 30/2007, de 30 de octubre, de Contratos del Sector Público, 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales, y 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa para adaptación a la normativa comunitaria de las dos primeras. Como se puede apreciar, es básicamente una Ley de modificación de la Ley de Contratos del Sector Público (LCSP, en adelante) y por ello, supondrá incorporar a una norma, de por sí compleja, un sistema de recursos que altera la práctica española en la materia a través de la creación de un Tribunal especial de naturaleza administrativa.

La cuestión de los recursos en materia de contratos, de sus efectos constituye un punto siempre conflictivo, con dos intereses que son contrapuestos. Por un lado, el interés de los participantes en el procedimiento de contratación y que no han resultado adjudicatarios, que pueden pensar que la resolución administrativa no fue la adecuada. Dilatar en el tiempo la resolución del recurso, aunque sea favorablemente al recurrente, supone negar la justicia material ya que es previsible que el contrato esté ejecutado. Al mismo tiempo, cuando se recurre e hipotéticamente se anula un contrato adjudicado se está sin duda provocando un perjuicio al interés general, manifestado en el retraso en la prestación que va a recibir el ente público; riesgo que no es menor teniendo en cuenta que estamos en un momento de incremento de la litigiosidad, tanto administrativa como judicial. Por ello, la solución que se proporcione ha de ser cuidadosa para que ninguno de los dos intereses tenga un prejuicio apriorísitico imposible de asumir.

En todo caso, toda modificación de la normativa, por brillante que sea, se enfrenta a un problema que frena su aplicabilidad: la mayor complejidad de los contratos –de los que los mecanismos de colaboración público privada constituyen el punto mayor-, la sofisticación de los mecanismos de adjudicación –cuyo paradigma es el diálogo competitivo-; el mayor grado de tecnificación y el aumento de la litigiosidad hacen que disponer de un control judicial efectivo y razonable resulte especialmente dificultoso. Aquí no podemos olvidar, tampoco, que el Derecho llega hasta un determinado punto y que los

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ámbitos de discrecionalidad administrativa que existen –y es necesario que existan- suponen un freno (material) en el control.

La reforma en el ordenamiento español va a pasar por la redefinición de las causas de nulidad de los contratos y, en segundo lugar, en la modificación del procedimiento de recurso, derogándose el régimen especial de revisión de decisiones en materia de contratación y sustituyéndolo por un mecanismo que incorpora un Tribunal de naturaleza administrativa. A la exposición de ambas cuestiones se dedican las siguientes páginas.

A los efectos del entendimiento del régimen español, sí conviene señalar su complejidad. Complejidad que se ve aumentada por el hecho de que convivan en el ordenamiento contratos sometidos a regulación armonizada –los que están sometidos a las Directivas comunitarias- y los que carecen de esa calificación, que dependerá no sólo de la cuantía sino también de la entidad adjudicataria. Este hecho se traduce, sin dudas, en que el régimen de revisión pueda producir cierta inseguridad.De hecho, los contratos que no llegan a los umbrales comunitarios tienen que someterse al régimen general de los recursos administrativos.

Por último, conviene tener presente que el Tribunal especial se ha creado por ley en el verano del 2010 y su composición se ha retrasado hasta el final del mes de octubre. No hay, por tanto resoluciones que puedan ilustrar la eficacia del mecanismo creado con el legislador.

2.2 Previo: modalidades de nulidad de los contratos del sector público

A los efectos de un adecuado entendimiento de cuál es el régimen español de las modalidades de recurso en materia de contratación pública conviene tener presente un dato esencial: las causas de invalidez de los contratos resultan especialmente complejas y tienen consecuencias sobre los mecanismos de recurso. Precisamente por ello, aun introduciendo un elemento inicialmente no previsto en el esquema general.

La incorporación de los contenidos de la Directiva de recursos se ha traducido en una redefinición de los supuestos de nulidad de los contratos públicos. A la tradicional

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distinción del Derecho español entre motivos de "Derecho administrativo" y de "Derecho civil" habrá que añadir una tercera categoría definida en los artículos 37 y siguientes como "supuestos especiales de nulidad" que, siguiendo la clasificación anterior, podría clasificarse como motivos de "Derecho comunitario", dado que son los motivos que proceden de la transposición de la directiva.

2.3 Modificación del sistema de recursos en materia de contratación: configuración de tribunales administrativos especiales

El primer punto que ha de ser destacado es la configuración de un órgano para los contratos de la Administración General del Estado un órgano específico para conocer de los litigios: el Tribunal Administrativo Central de Recursos Contractuales, compuesto por un Presidente y un mínimo de dos vocales, aunque este último número variará en función del número de asuntos que puedan llegar a él. Será el órgano que conozca de las reclamaciones que se susciten por los expedientes de contratación del Consejo General del Poder Judicial, el Tribunal Constitucional y el Tribunal de Cuentas. Pata el resto de los entes del sector público habrá que articular un mecanismo equivalente.

A pesar de su naturaleza administrativa, es un órgano especializado que actuará con plena independencia funcional en el ejercicio de sus funciones. De hecho, los designados como Magistrados tendrán reconocido su carácter independiente e inamovible, estando tasadas las causas de remoción del puesto, de acuerdo con las reglas usuales. La duración del nombramiento será de seis años y no podrá prorrogarse.

2.4 Cuestión de nulidad para motivos de derecho comunitario

El primer elemento que conviene reseñar es la bifurcación de los mecanismos de recurso para la resolución de los litigios que surjan en los procedimientos de contratación. La ley 34/2010 crea, por un lado, una "cuestión de nulidad" y articula un recurso especial de contratación que se analizará en el epígrafe siguiente. No obstante, queda en la opción del recurrente utilizar esta vía de recurso o el recurso especial, lo cual ha obligado al legislador a incluir una cláusula por la que se declara que la cuestión de nulidad se podrá

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inadmitir –debería, sería más lógico- "cuando el interesado hubiera interpuesto recurso especial regulado en los artículos 310 y siguientes sobre el mismo acto habiendo respetado el órgano de contratación la suspensión del acto impugnado y la resolución dictada".

En el fondo, la cuestión de nulidad no es sino una adaptación del procedimiento general del recurso especial en materia de contratación, en el sentido de alteración de los plazos en los diversos trámites del recurso y la omisión de otros; concretamente la no obligatoriedad de hacer el anuncio previo que sí se exige en el otro recurso. La única regla sustantiva especial es que carece de efectos suspensivos automáticos.

Sus caracteres más relevantes son los siguientes:

a) Carácter contractual: no es un recurso contra los actos dictados en el procedimiento de adjudicación, sino contra los contratos ya formalizados cuando se den los supuestos especiales de nulidad (art. 37.1 LCSP).

b) Carácter extraordinario o tasado: el recurso contractual sólo puede interponerse cuando concurran los supuestos especiales de nulidad de los contratos, sin que pueda fundarse en otros motivos ni tan siquiera en las causas generales de nulidad de pleno derecho (arts. 37.1 y 39.1 LCSP).

c) Carácter no suspensivo: su interposición no produce la suspensión automática del contrato impugnado [art. 39.5.b) LCSP], sin perjuicio de solicitar medidas provisionales

Resolución del recurso y medidas complementarias

La estimación de la cuestión de nulidad o recurso contractual se manifiesta en la declaración de nulidad, que sólo puede acordarse en los supuestos especiales previstos en el art. 37 (art. 38.1 LCSP). Con carácter general, los efectos de esta declaración de nulidad llevarán, en todo caso, la del mismo contrato, que entrará en fase de liquidación, debiendo restituirse las partes recíprocamente las cosas que hubiesen recibido en virtud del mismo y si esto no fuese posible se devolverá su valor, debiendo la parte que resulte culpable indemnizar a la contraria de los daños y perjuicios que haya sufrido (art. 35.1 LCSP

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reformado por Ley 34/2010). No obstante, para evitar efectos mayores derivados de la declaración de nulidad, se permite la sustitución, manteniendo en consecuencia la validez del contrato, adoptando una sanción alternativa (art. 38.2). Se trata de una opción que tiene que solicitar el órgano de contratación ya sea durante las alegaciones ya durante la fase de ejecución de la resolución y que está sujeto al cumplimiento de determinadas exigencias.

2.5 Recurso especial en materia de contratación

Naturaleza del recurso y actos susceptibles de recurso

El primer elemento que ha de ser tenido en cuenta es que este recurso tiene naturaleza potestativa, en cuanto al acceso a la jurisdicción contencioso-administrativa. Esto significa que las vías de recurso judicial están abiertas sin necesidad de interponer esta modalidad de recurso.

No obstante, es previsible que, a diferencia de lo que ocurre con otros supuestos de recursos administrativos, que son muy poco empleados por los ciudadanos, puede tener un recorrido bastante mayor, por dos razones: una por su carácter sumario y por reglas procesales que permitirán una mayor efectividad del recurso y, en segundo lugar, en la medida en que el retraso que acumula la jurisdicción contencioso-administrativa hace que en buena medida quede carente de contenido el objeto del recurso. Ahora bien, ello no obsta para que los procedimientos de recurso se puedan continuar en el contencioso con lo que parte de los efectos benéficos que se quieren obtener pueden perderse en el camino.

Resolución del recurso

El procedimiento del recurso especial finaliza con la resolución. El plazo para dictarla es de cinco días hábiles a contar, no desde la interposición, sino desde la recepción de las alegaciones de los interesados o del transcurso del plazo señalado para su formulación y el de prueba en su caso (art. 317.1 LCSP). La duración total del procedimiento es realmente muy breve: la suma total de los días previstos para los distintos trámites es de 12 días hábiles, a la que en su caso habría que añadir los 10 días hábiles para la práctica de la prueba.

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El Tribunal, a la hora de dictar la resolución, tiene plenas capacidades para dictar aquella resolución que considere más adecuada, de acuerdo con los principios de congruencia y motivación. a) Anulación de actos ilegales; b) Indemnización de daños y perjuicios; c) Levantamiento de medidas cautelares. d) Posible imposición de sanción

Efectos de la resolución del recurso

El recurso especial es una primera instancia independiente, administrativa y no jurisdiccional, pues las resoluciones del tribunal administrativo de contratación son susceptibles de posterior recurso contencioso-administrativo (art. 21.1 LCSP). Frente a la resolución dictada en el procedimiento del recurso especial solo puede interponerse recurso contencioso-administrativo, de acuerdo con las nuevas reglas sobre competencia y legitimación -ya reseñadas-de la LJCA reformada por la Ley 34/2010 (recurso directo por los interesados y las entidades adjudicadoras); sin que sea susceptible de revisión de oficio por nulidad de los actos administrativos prevista tanto en el art. 34 de la LCSP como en el art. 102 de la Ley 30/1992 ni de la fiscalización por los órganos de control financiero de las Administraciones públicas (art. 319.1 LCSP).

3. ACTOS ADMINISTRATIVOS

La aprobación de la Directiva 2006/123/CE, del Parlamento Europeo y del Consejo, de 12 de diciembre, relativa a los servicios en el mercado interior, ha supuesto un cambio de gran envergadura en cuanto a los mecanismos de intervención en las actividades de servicios. El plazo de transposición, concluido el 28 de diciembre de 2009 ha motivado que se modifiquen las normas de procedimiento y actos administrativo para adaptar las formas de intervención administrativa a la nueva regulación comunitaria.

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La Directiva de servicios se ha transpuesto al ordenamiento español[1], en primer término, a través de una norma transversal -la *Ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio*, coloquialmente conocida como *Ley paraguas*- y, en un segundo escalón, a través de una serie de disposiciones con rango de ley específicas tanto del Estado como de las Comunidades autónomas, dentro de las cuales hay que citar expresamente a la *Ley 25/2009, de 22 de diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio* –coloquialmente conocida por *Ley ómnibus*-.

3.1 Autorización como género y como especie

El régimen que está previsto en la Directiva de servicios afecta a un conjunto amplio de mecanismos de intervención de los poderes públicos en las actividades de los particulares. Se puede afirmar que la *autorización* aparece como un concepto que afecta a toda aquella actividad administrativa en virtud de la cual se realice cualquier actividad de control/delimitación de las actividades de servicios, yendo de las más intensas –como son el otorgamiento de permisos para el ejercicio de actividades, esto es las autorizaciones tradicionales- a la ordenación de todas las formas de registro de operadores, aunque sean motivados por el ejercicio de actividades reguladas. En este punto, resulta necesario recordar que la propia Directiva determina que por régimen de autorización hay que entender "cualquier procedimiento en virtud del cual el prestador o el destinatario están obligados a hacer un trámite ante la autoridad competente para obtener un documento oficial o una decisión implícita sobre el acceso a una actividad de servicios o su ejercicio" (artículo 4).

[1] Normativamente no se puede proporcionar un listado por su extensión, que además se amplía día a día. Puede verse, el tomo de recopilación Directiva de servicios y normativa de transposición, Ed. Aranzadi (2010).

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Desde esta perspectiva, la autorización deja de ser un título habilitante en la Directiva de servicios para transformarse en el género de las modalidades de intervención administrativa sobre las actividades de servicios; lo cual imposibilita la articulación del régimen comunitario. No obstante, al lado del género, conviene examinar cómo se articulan las posibilidades que tienen los entes públicos y ante qué tipo de situaciones pueden ser utilizadas las especies de autorizaciones que cumplan con la función tradicional de esta modalidad de títulos.

3.2 Valoración de los mecanismo de intervención administrativa en las actividades de servicios

Como se acaba de indicar, las Leyes paraguas y ómnibus configura un régimen de actos de intervención en las actividades económicas de servicios incluidas en el ámbito de aplicación de la ley que está compuesto por autorizaciones, declaraciones responsables y actos comunicados. Tres modalidades de intervención que responden a finalidades distintas y que, de hecho, plantean el momento de la actividad administrativa en diferentes puntos. Precisamente por ello, la ley recoge unas notas que ha de aplicar la Administración competente que constituyen principios sobre el cómo y el cuándo de la intervención administrativa.

El nuevo artículo 39 bis de la LRJPAP, recordando el contenido del artículo 6 del Reglamento de Servicios de las Corporaciones Locales, establece, en este sentido, que: "*las Administraciones Públicas que en el ejercicio de sus respectivas competencias establezcan medidas que limiten el ejercicio de derechos individuales o colectivos o exijan el cumplimiento de requisitos para el desarrollo de una actividad, deberán elegir la medida menos restrictiva, motivar su necesidad para la protección del interés público así como justificar su adecuación para lograr los fines que se persiguen, sin que en ningún caso se produzcan diferencias de trato discriminatorias".* Principio de menor restricción y exigencia de motivación de la opción elegida por el regulador son, en consecuencia, los puntos sobre los que se estructura la arquitectura de intervención administrativa.

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3.3 Las comunicaciones previas como mecanismo de intervención preferente y sus dos especies en el nuevo artículo 71 bis de la LRJPAC

La Ley ómnibus introduce un nuevo precepto en la Ley 30/92, de Régimen Jurídico y de Procedimiento Administrativo Común (LPC, en adelante), el artículo 71 bis, que tiene carácter básico por aplicación del artículo 149.1.18 CE, que cumple la función de establecer la normativa esencial de esta modalidad de intervención administrativa. Con ello, se proporciona un carácter general a todo el territorio nacional de las soluciones que se habían ido desarrollando las Comunidades autónomas, vinculadas a sus propios procesos de simplificación administrativa, adoptadas en el curso de la crisis económica..

De acuerdo con lo previsto en el artículo 71 bis LPC el género de las comunicaciones previas consiste en una declaración efectuada por un particular a la Administración responsable por la que comunica "no sólo los datos e informaciones requeridos por la disposición legal que la regule, sino también –y quizá fundamentalmente- la intención de realizar una concreta actividad. Se trata, en definitiva, de una declaración de voluntad dirigida a la producción de un efecto jurídico concreto previsto por la norma y querido por el interesado: la inversión en ese caso de la prohibición relativa instrumental establecida por la norma, o en otros términos, la obtención del título habilitante"[2]. No es, como es conocido, un instrumento novedoso, aunque sí se puede predicar esta característica de la generalización que hace la legislación de procedimiento administrativo para cualquier procedimiento, y, más aún, que constituye el mecanismo primario que está a disposición de los entes públicos para intervenir la actividad de los particulares.

Esta modalidad de intervención administrativa acostumbra a operar sobre aquellas actividades en las que se pretende ganar en eficacia en el control que realizan las Administraciones públicas, sin que por ello se resienta el interés general, en la medida en que las potestades administrativas se ejercerán a posteriori. Es, por ello, un modelo que

[2] ARROYO JIMÉNEZ, L., Libre empresa y títulos habilitantes, CEPC, Madrid (2004), p. 349.

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sirve a la liberalización de mercado que acostumbran a estar, además, desregulados –como ocurre con las actividades de servicios incluidas en el ámbito de aplicación de la directiva- y, por otra parte, permite disponer de una ordenación de los procedimientos administrativos simplificado, modulado, con lo que ello conlleva en relación con el cumplimiento del principio de celeridad administrativa. Téngase en cuenta que en el contexto de la transposición de la Directiva de servicios el disponer de procedimientos simplificados resulta especialmente importante, en la medida en que su tramitación se debe realizar de forma electrónica.

Esta es la esencia general de las dos figuras que recoge el nuevo artículo 71 bis LPC; declaración responsable y comunicación previa. De acuerdo con las definiciones legales, nos encontramos ante comunicación previa en aquellos casos en los que se presenta ante la Administración un "*documento mediante el que los interesados ponen en conocimiento de la Administración Pública competente sus datos identificativos y demás requisitos exigibles para el ejercicio de un derecho o el inicio de una actividad, de acuerdo con lo establecido en el artículo 70.1"*. Por su parte, la declaración responsable es aquél documento "*suscrito por un interesado en el que manifiesta, bajo su responsabilidad, que cumple con los requisitos establecidos en la normativa vigente para acceder al reconocimiento de un derecho o facultad o para su ejercicio, que dispone de la documentación que así lo acredita y que se compromete a mantener su cumplimiento durante el periodo de tiempo inherente a dicho reconocimiento o ejercicio"*.

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