

**ADMINISTRATIVE JURISDICTION, RULES AND
COMPETITIVENESS**

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Dott.ssa Biancamaria RAGANELLI

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1. NEW NEEDS FOR MARKET AND CITIZEN PROTECTION

Over the last few years, the Italian administrative judicial system has been playing an increasingly crucial role in the legal system and market dynamics. Administrative courts – who are the natural judges for public interest in the economy – deal with areas ranging from Energy and Transport to Communications and Infrastructure, in an increasingly competitive scenario. As Administrative Court decisions have an increasingly strong impact on the economic and social systems, the way the relevant proceedings are carried out and their duration have become factors for Country change acceleration, development, competitiveness, growth, and modernisation.

Apparently, the non-recognition of “the reasons of the market and economic performance” – in rules and regulations as well as court decisions – is one of reasons for the Italian economic system’s structural low productivity and lack of competitiveness¹. The duration of legal proceedings seems to prove it. As a matter of fact, it is one of the causes for the inefficiency of the judicial system in a broad sense, which may have a negative impact on the Country’s economic growth.

Similar remarks may apply to Italy’s administrative judicial system, in that the increase in the “supply of justice” due to the establishment of Regional Administrative Tribunals (T.A.R) entailed a sharp increase in the demand for justice as well as remarkably

¹ In the international literature the relationship between law, justice and efficiency has been analyzed in different context. For examples, W. Kerber, Should competition law promote efficiency? - Some reflections of an economist on the normative foundations of competition law, in Drexl, Josef, Idot, Laurence, and Joel Moneger (eds.), *Economic Theory and Competition Law*, Cheltenham, Edward Elgar, 2008; G. Hadfield, The Price of Law: How the Market for Lawyers Distorts the Justice System, *Michigan Law Review*, vol. 98, n. 4, 2000; M. Barendrecht, Understanding the Market for Justice, Tilburg University Legal Studies Working Paper No. 009/2009. In the Italian literature, among the others M. BIANCO, S. ROSSI, *Il diritto, la giustizia, l’efficienza*, in S. ROSSI, *Controtempo. L’Italia nella crisi mondiale*, Roma-Bari, 2009; B. RAGANELLI, *Efficacia della giustizia amministrativa e pienezza della tutela*, Giappichelli, Torino, 2012.

longer trial durations, thus making the demand for protection and justice to actual Administrative Court decisions ratio significantly disproportionate.

According to the European Court of Human Rights' latest yearly report, Italy ranks among the Countries showing the highest number of pending cases. Over the last few years, the Italian economy has been growing at a slower pace than the average of euro-zone Countries, thus recording the same trend as that of the last two decades. The main issues seems to be low productivity and lack of competitiveness, due to high the cost of labour, high company taxation, lack of research activity, development, and innovation.

Italy's low productivity is also due to its inefficient general regulatory system and bureaucracy, which hinder competitive development. Despite the progress recorded after the reforms of the last few years, the overall context is still penalising if compared to that of other Countries, as it is shown by the World Bank's *Doing Business survey* and the Bank of Italy's latest yearly report. Italy's unstable regulatory framework lacks clarity and consistency.

Notwithstanding the ambitious programs launched in the last few years with a view to reforming and streamlining Italy's regulatory and administrative framework, a lot still needs to be done also in terms of quality of the Country's rules and regulations, which are very complex and not in line with those of other nations, yet.

Full protection for citizens vis-à-vis the public administration and the effectiveness of such protection – also in terms of impact on market dynamics – strongly depend on the objectives of the new laws adopted, the ways to pursue said objectives, and court decision interpretations.

The recent evolution of the Italian administrative process was entailed by the need to broaden citizen's judicial protection vis-à-vis the public administration, in line with the "fair trial" model, without prejudice to other worth-protecting market needs expressed in the principles of procedural economy, fast trial, and reduction of pending legal disputes. However, notwithstanding the aforementioned efforts, full protection vis-à-vis the public administration has not been obtained, yet. As a matter of fact, there still exist areas lacking

adequate protection. There are various cases and legal institutions showing the lack of efficacy of Italy's Administrative Process in meeting the need for full protection of citizens and market business operators. "Due to our lawmakers' short-sightedness, the disproportionate scope of the judicial activity and, probably, the lack of interest and opinions from academic commentators, the administrative judicial system needs to be improved and enhanced"². This statement still applies to Italy's system.

2. THE EVOLUTION OF ITALY'S ADMINISTRATIVE PROCESS

Over the last few years, Italy's Administrative Process has been positively evolving.³ Such significant evolution was due to a series of reasons, which are partly linked to the changes introduced in the Italian Public Administration.

As to Law, an attempt was made to try and meet the new needs for market and citizen protection by transforming the proceeding and relating protection techniques, whose refinement has been promoted by administrative court decisions themselves, which aim at making increasingly performing tools available so to meet the demand for justice by finding solutions and making administrative proceedings expeditious and more effective.

The new laws have been trying to adjust to new needs and economic trends and make the system more efficient, by trying and coordinating the growth of the Justice Service with a reasonable duration of proceedings, procedural economy and concentration,

² A. POLICE, *La piena giurisdizione del giudice amministrativo*, in G. DELLA CANANEA, M. DUGATO, *Diritto amministrativo e Corte Costituzionale*, Napoli, 2006, p. 137.

³ C. FRANCHINI, *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, in S. BATTINI, C. D'AURIA, G. DELLA CANANEA, C. FRANCHINI, A. MASSERA, B.G. MATTARELLA, G. NAPOLITANO, A. SANDULLI, L. TORCHIA, G. VESPERINI (a cura di), *Il diritto amministrativo oltre i confini*, Milano, 2008, p. 166; L. TORCHIA, *Diritto amministrativo, potere pubblico e società nel terzo millennio o della legittimazione inversa*, *ivi*, p. 46.

and the strengthening of emergency remedies.

It has long been thought that the relation between the Administration and the Judicial System was regulated by the principle of separation of powers, and the desire to marry the public authority of the Administration and the freedom of citizens found in the administration's orders the only expression of administrative activity deemed legally relevant. As a consequence, appeal proceedings followed, where other forms of protection showed minor and regressing relevance.

After going through remarkable and deep transformation, today's Public Administration is significantly different compared to the framework described above. As a matter of fact, it features multiple accountable entities, at different levels (including state, supranational, and global entities wielding public powers), and increasingly complex and heterogeneous ways of action, which materialise in formal acts and mere behaviours, including omissive conduct.

However, as the Public Administration's organisation and ways of action change, so does also the way of seeing the relations between citizens and the Public Administration. This entailed an increase in the need for protection and, therefore, a widening of the range of tools available, brought about by an evolutionary process that affected three different aspects, namely judicial action by the judiciary, judicial action within the Administrations, and the so-called ADR.

The whole system protecting citizens in their relations with the Public Administrations has been changing over time, due to the widening of the Administrative Courts' powers and the evolution of the laws and regulations on jurisdiction and trial. In such a framework, court decisions have played a crucial role, acting as interpreters of the Law – thus often filling major regulatory gaps – providing guidelines and guiding the Administration. Among the regulations designed to be applied to real cases are also

general rules, and they contributed outlining the relevant Administrative Law institutions.⁴ As a matter of fact, court decisions have long contributed to put some order in a regulatory inadequate administrative system.

3. THE ROLE OF ADMINISTRATIVE COURTS CONSIDERED AS THE MARKET COURT, LAWMAKERS AND EU INFLUENCE

In the above framework, the very role of Administrative Court has changed. As a matter of fact, the Administrative law judge is no longer a simple judge of the administration, but has become the judge of public powers, who takes action whenever public powers are wielded, regardless of the juridical positions involved.

Therefore, the judge's role has become more comprehensive⁵. This legislative evolution concerning exclusive jurisdiction and economic regulation makes Administrative Courts the courts of market failures and, hence, of economic regulation, thus giving them an overall view of the special mechanisms governing the juridical relations of new Public Economic Law⁶.

⁴ C. FRANCHINI, *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, op. cit., p. 168; S. CASSESE, *Problemi delle ideologie dei giudici*, in *Riv. trim. dir. proc. civ.*, 1969, p. 413 ss.; ID., *La giustizia amministrativa in Italia*, p. 771 ss.; ID., *Consiglio di Stato e pubblica amministrazione: da una riforma all'altra*, in S. CASSESE, *Il Consiglio di Stato e la riforma costituzionale*, Milano, 1997.

⁵M. S. GIANNINI, *Diritto amministrativo*, vol. II, Milano, 1993, p. 230; ID., *La tutela del cittadino nei confronti dei pubblici poteri*, in *Atti del VI convegno nazionale degli studiosi del processo civile*, Milano, 1970, p. 1630; M.S. GIANNINI, A. PIRAS, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, in *Enciclopedia dir.*, vol. XIX, Milano, 1970, p. 234 ss.; P. AIMO, *Le origini della giustizia amministrativa*, Giuffrè, Milano, 1990.

⁶ M. CLARICH, *La giurisdizione esclusiva e la regolamentazione dell'economia*, in *Foro amm. Tar*, n. 10, 2003, p. 3149.

In this perspective, Administrative Tribunals have contributed – among other things – widening procedural legitimation, thus making justice accessible for an increasing number of actors; strengthening protection for all protected interests, including not only forfeiture cases (*interessi oppositivi*), but also interests involving applications or claims on the authorities (*interessi pretensivi*) and declaring them difficult to define; affirming the right to pre-trial precautionary protection; admitting the possibility for *translatio iudicii* in the event of any mistake in selecting the appropriate court; widening the possibilities of obtaining evidence during the preliminary investigation or pre-trial stage, and strengthening control on the administration’s discretion by identifying abuse of power; pronouncing declaratory judgements and judgements for plaintiffs, besides judgments of annulment.

A similarly relevant role has been played by law-makers, in that they contributed formalising jurisdictionally consolidated trends. This way, some court decisions were transformed into laws – although not always to the letter – thus favouring the development of the legal system, including by introducing some general principles “imported” from other areas of Law.

In particular, Law n° 205/2000 was an important attempt to reform Administrative Law, which should be given credit for extending exclusive jurisdiction, granting administrative tribunals the power to rule in the area of consequent property rights (*diritti patrimoniali consequenziali*) – also in matters that do not fall under exclusive jurisdiction – and on compensation for damage due to the infringement of legitimate interests, thus modifying procedural regulations and introducing measures aimed at accelerating legal proceedings. In this perspective – in order to guarantee timely and effective dispute settlement – law-makers have introduced special judicial procedures in various economic sectors, including public works, public services, and independent administrative authorities.

The Code of Civil Procedure that entered into force in 2010 (the Code) and was subsequently supplemented by Legislative Decree n° 195 of November 15th 2011, goes along the same evolution lines described above, aiming at widening the range of protection tools and methods made available to meet the citizens’ demand for justice. The introduction of organic procedural regulation is the result of a complex and ambitious

operation, aiming at making a fragmented and patchy regulatory framework in line with the systems of other European Countries (such as Spain, France, and Germany) and with the provisions of the European Convention for the Protection Of Human Rights and Fundamental Freedoms (Articles 6 to 13).

Last but not least, other similarly significant inputs have come from the European Union. As a matter of fact, the EU considered as an integrated body of national legal systems requires some forms of coordination.

4. THE EFFECTIVENESS AND FULLNESS OF CITIZEN JUDICIAL PROTECTION VIS-À-VIS THE PUBLIC ADMINISTRATION

According to the European Union's principle of the *effectiveness of judicial protection*, the rights of all European citizens vis-à-vis any national and EU administration have to be defended.

As European Law is increasingly harmonised, new forms of coordination and harmonisation of the European judicial systems and judicial control rules become necessary. In such a framework, the decisions of the Court of Justice played a major role by contributing to the formal recognition of a series of fundamental principles – including full judicial protection of EU citizens, their right to reparation, as well as the right to disapply any provision of national Law that is contrary to EU Law. Along the same lines, the European Convention on Human Rights not only provides for a series of rights and freedoms relating to fair trial, but also sees to their effectiveness by complementing national laws with rules and regulations protecting worth defending interests and guaranteeing the enforcement of such laws.

Legal science has placed significant focus on the concept of effectiveness of judicial protection in terms of constitutional interpretation and legal policy. The substantive principle relating to the situations protected was said to be linked to the interest of the community in the operational composition of interests – in order for the defence of

consumer's interests in the goods of life to be full, it must be actually substantive vis-à-vis supplying companies, regardless of the structure of the interests in terms of subjective right and legitimate interest.⁷ As our Constitution associates subjective rights and legitimate interests for judicial protection purposes (Articles 24 and 113 of the Constitution) and provides for constitutional protection for situations relating to a series of goods of life, it follows that the judicial protection of legitimate interests is full, thus being as strong as the protection of rights. Nevertheless, as the judicial system has not always been capable of ensuring effective protection, in some cases it has been supplemented with additional forms of protection.

The progressive establishment of the value of *full protection*⁸ is one of outcomes of the revolution Administrative Law has gone through in the last few years, which has

⁷M.S. GIANNINI, *Discorso generale sulla giustizia amministrativa* (III), in *Rivista di diritto processuale*, 1964, p. 247; ID., *La tutela del cittadino nei confronti dei pubblici poteri*, in *Atti del VI convegno nazionale degli studiosi del processo civile*, Milano, Giuffrè, 1970, pp. 163 ss. Sul tema si veda anche E. CANNADA BARTOLI, *Decisione amministrativa*, in *Nuovissimo digesto it.*, V, 1964, p. 268 ss.

⁸ In the past Italian literature C. VITTA, *Diritto amministrativo*, vol. II, Torino, 1937; E. CANNADA BARTOLI, *Processo amministrativo, considerazioni introduttive*, in *Noviss. Dig.it.*, XIII, *ad vocem*, Torino, 1966; F. BENVENUTI, *Processo amministrativo (struttura)*, in *Enc. dir.*, XXXVI, *ad vocem*, Milano, 1987; V. CAIANIELLO, *Diritto processuale amministrativo* Torino, 1994; S. CASSARINO, *Manuale di diritto processuale amministrativo*, Milano, 1990; ID., *Il processo amministrativo nella legislazione e nella giurisprudenza*, II, Milano, 1987; E. FAZZALARI, *Sentenza civile* in *Enc. dir.*, XLI, *ad vocem*, Milano, 1989; C.E. GALLO, *Processo amministrativo*, in *Dig. disc. pubbl.*, XI, *ad vocem*, Torino, 1996; G. GORLA, *Giurisprudenza*, in *Enc. dir.*, XIX, *ad vocem*, Milano, 1997; V.E. ORLANDO, *La giustizia amministrativa*, in ID., *Primo trattato completo di diritto amministrativo italiano*, III, Milano, 1901; M. NIGRO, *Giustizia amministrativa*, Bologna, 1976; E. PICOZZA, *Processo amministrativo (normativa)*, in *Enc. dir.*, XXXVI, *ad vocem*, Milano, 1987; A. ROMANO, *Commentario breve alle leggi sulla giustizia amministrativa*, Padova, 1992; A.M. SANDULLI, *Manuale di diritto amministrativo*, Napoli, 1989; G.B. VERBARI, *Principi di diritto processuale amministrativo*, Milano, 1995; P. VIRGA, *Diritto amministrativo – atti e ricorsi*, II, Milano, 1999; ID., *La tutela giurisdizionale nei confronti della P.A.*, Milano, 1982; E. FERRARI, *Decisione giurisdizionale amministrativa*, in *Dig. disc. pubbl.*, IV, *ad vocem*, Torino, 1989; A.M. SANDULLI, *Il giudizio innanzi al Consiglio di Stato ed ai giudici subordinati*, Napoli, 1963.

strongly shaped its peculiar features. Actually, a shift has taken place from the principle of effectiveness of the protection to that of fully meeting the needs for protection.

However, despite the evolution of the role played by Administrative Tribunals – which have become the courts of public powers that intervene whenever public powers are wielded – absolutely *full* protection has apparently not been obtained, yet.

As everybody knows, in national legal systems the expression “administrative process” designates the “range of remedies” provided for by the system with a view to ensuring compliance of administrative action with general laws and principles, including the principles of reasonableness and proportionality. The aforesaid phrase expresses different needs, namely, on the one hand, that of providing adequate protection tools vis-à-vis the Administration; on the other hand, the need to guarantee compliance with the Law, making sure that administrative action is legal and adequate in terms of expediency. This approach characterises the ideology and structure of the so-called “administrative State”⁹ and, today, it has apparently been adopted also by Countries that were traditionally lacking special public administration regulations.

Today more than in the past, the expression “administrative process” designates both judicial and non-judicial redress, including out-of-court redress. It refers first of all to those protection tools available within the Administration itself, such as administrative appeals, whose scope and efficacy vary from Country to Country.

The progressive influence of the EU on national administrative process regulations has also led to the enhancement of forms of *non-judicial protection*, via the administrative process or specialised external bodies, as well as by providing for some forms of protection from formally legal acts that, however, are the results of maladministration. Generally speaking, judicial protection in the strict sense is not precluded, in full compliance with the

⁹ M. NIGRO, *Giustizia amministrativa*, cit., 1976, p. 27.

principle of the effectiveness of judicial protection that envisages the right to an independent and impartial judge. This principle is not challenged in any way.

Special focus has been placed on alternative dispute resolution (ADR) methods (including administrative appeals), together with mediation and conciliation provided for by public law with a view to widening access to justice – as recommended by the European Union – but also for their important case load reduction effect, allowing overcoming the so-called *litigation crisis*. ADR falls within the procedural concept of administrative process, seen as the outcome of the proceeding stemming spontaneously from compliance with specific rules of conduct, in line with the principle of *due process of law*¹⁰.

This new approach does not diminish the importance of judicial protection. As it has been highlighted with specific reference to conciliation and arbitration by independent authorities, “when judicial redress is complemented with additional remedies aiming at guaranteeing adequate protection to the new requests coming from society, the judicial system is the main protection institution – and no longer the only one – in that it can have other forms, which are potentially more favourable for users and consumers”, but also for all citizens and business operators. They are more favourable because they are streamlined and less expensive; furthermore, they are put in place by suitable and specialised entities. However, this necessarily requires a change in the judge’s stance and role in the legal system.

5. EFFICACY OF THE ADMINISTRATIVE PROCESS, ADMINISTRATIVE ACTIVITY AND GOALS

In the light of the above remarks, when any regulatory reform is introduced, its

¹⁰ G. DELLA CANANEA, *Al di là dei confini statuali*, Bologna, 2009.

impact and efficacy – that is, the ability of rules and regulations to reach set objectives and provide for full protection of citizens vis-à-vis the Public Administration – should also be examined. In other words, new laws should be assessed based on their efficacy, without however neglecting the reasons of economic performance.

The principle of efficacy is implicitly included in the principle of cost effectiveness provided for by Article 1 of Law n° 241/1990, which however expresses a wider concept relating to additional cost-benefit analysis profiles, other than merely accounting ones. Generally speaking, this term refers to the ability to reach set goals with the least possible amount of resources. However, there are many interests at stake that hamper the design of effective actions.

Under Article 1 of Law n° 241/1990, administrative activity should pursue goals provided for by the law and abide by the principles of cost effectiveness, efficacy, fairness, publicity, and transparency.

The debate is not only about the potential conflict between private and public interests, but also about the potentially conflicting objectives that should be pursued by administrative action on the one hand, and the administrative process on the other hand. Examples include the need to guarantee larger participation in the proceeding (thus making proceedings more “democratic”), or that of favouring easier access to judicial protection (which is deemed to guarantee more effective protection); meeting such needs inevitably impacts on the efficiency of administrative activity and process, ultimately also influencing the duration of proceedings¹¹.

¹¹ B. G. MATTARELLA, *Pubblica amministrazione e interessi*, IN S. BATTINI, C. D’AURIA, G. DELLA CANANEA, C. FRANCHINI, A. MASSERA, B.G. MATTARELLA, G. NAPOLITANO, A. SANDULLI, L. TORCHIA, G. VESPERINI (a cura di), *op. cit.*, p. 132 ss.; M. D’ALBERTI, *La visione e la voce: le garanzie di partecipazione ai procedimenti amministrativi*, in *Riv. Trim. dir. Pubbl.*, 2000, p. 1 ss.; G. CORSO, *Attività amministrativa e mercato*, in *Riv. Quadrimestr. dei pubbl. servizi*, n. 2, 1999 p. 7 ss.

It is an open challenge that law-makers are facing, with the irreplaceable contribution of case law.¹²

However, some hindrances exist, which are partially related to the choices our law makers made at some important points – which were too cautious and diverted the course of action from the objectives to be pursued – and partially to stiff stances in some lines of decisions. They ultimately have a significant impact on the fullness of protection vis-à-vis the Public Administration and on effectiveness itself, in terms of impact on market dynamics. In various situations “attacks against administrative legality and, hence, against the protection of citizens” have been reported.¹³ A typical example is the stance of the Council of State defending preliminary administrative action (*pregiudiziale amministrativa*), which was also reaffirmed after the publication of the Code of Administrative Procedure and the explicit recognition of independent action for damages.

Lawmakers and case law should place more focus on the need for expeditious and effective proceedings and the principles of action efficacy and procedural economy, constantly assessing the costs and benefits for society and aiming at improving the efficacy and overall effectiveness of judicial services as a whole.

This way, it is possible to have a remarkable impact on the Public Administration’s way of acting, in a new perspective that goes beyond criticism for adopting an intrinsically “non-economic” judicial system, which is the result of a costless and timeless function where each individual process has an absolute value.

The precondition is that full protection of citizens vis-à-vis the Public Administration and its effectiveness – also in terms of impact on market dynamics –

¹² On the rule of the judge and on his “legislative role”, R.A. POSNER, *How judges think*, London, 2008. On the juridical discretion of the judge A. BARAK, *Judicial discretion*, 1989, Yale University Press).

¹³ F. MERUSI, *I sentieri interrotti della legalità*, Bologna, 2007, p. 177.

strongly depend on the objectives underlying any legislative choice, and not only on the ways to pursue said objectives and the interpretative contribution of court decisions. The recent regulatory reform and court decision evolution aimed at adjusting to the new, above-mentioned need for protection, but they were not always successful. There are various cases and institutions that show the limitations of the Italian Administrative Process and its lack of effectiveness, considering the need for full protection of citizens and market business operators.

A Public Administration's "limited liability" model appears in many cases and, at times, is even backed by court decisions. This model – based on the principles of procedural economy, a reasonable duration of all proceedings and the reduction of case-load – does not facilitate the attainment of the objectives of full protection of citizens, effective and efficient administrative process, with the.

Public Administration's accountability envisaged in the system of actions provided for by the Code of Administrative Process is the result of sometimes questionable choices, which have led to the partial or non-recognition of some specific actions, the adoption of unclear solutions relating to the independence of the action for damage, and the analysis of procedural costs for various liability actions. Ultimately, such choices condition the success of the actions that should meet the aforementioned needs for protection relating to substantial juridical situations, and the administrative proceeding keeps on focusing on the administrative adjudication or order instead of dealing with the relation between the Administration and the citizen.

A clear example of the lack of effectiveness in meeting the need for full protection of citizens and market business operators, is the institution of pre-trial precautionary protection, which was also introduced in Italy as a preliminary and provisional way of protecting the appellant's interests – while waiting for the court decision – allowing avoiding possible damage caused by the immediate effects of the Administration's order or conduct. As it is considered as an irreplaceable element for the defence of general public interest in effective protection against the misuse of public power, it has recently been extended to the whole administrative proceeding. This institution plays an important

reduction role in reducing caseload, and its enhancement is deemed positive in view of an improvement in the overall effectiveness of the administrative process. Obtaining a pre-trial judgment on the petition allows having a preliminary opinion on the Public Administration's conduct and, in the event of dismissal with clearly stated and sound reasons, it discourages legal action. Nonetheless, if on the one hand it can reduce the risk that the parties might suffer from damage due to the enforcement of an administrative order – which cannot always be fully redressed by the trial proceeding – on the other hand, the order suspension produces costs for the Public Administration and the relevant community. As it is pointed out below, envisaging a more effective action for damages against the Public Administration could allow meeting both opposite needs, without depriving the precautionary measure of its relevance.

Public contracts and appeal procedures related to public contracts provide another particularly significant example. The procedure – which has been recently reformed following the input of the EU legislation – aims at making effective and expeditious procedural tools available, guaranteeing the effectiveness of judicial protection and compliance with EU and national regulations. Some tools have been envisaged to ensure better protection that actually lessen the need for expeditious performance of the contract and potentially increase legal disputes. Envisaging a better liability system, strengthening protection for business operators damaged by illegal awarding of contracts through better action for damages, could contribute improving the overall efficiency and efficacy of the judicial system and would encourage Public Administrations to better fulfil their functions. Should the Public Administration be held fully accountable for its conduct, the sanctionative mechanism for the transfer of damage “costs” to the liable actor and its prevention would be implemented more effectively, thus improving the efficiency of administrative action and the wielding of the relating powers. This is why designing a different liability and accountability system compared to the existing one – which is currently based on “many, unclear, and complicated rules”¹⁴ should be the priority of any

¹⁴B. G. MATTARELLA, *La trappola delle leggi. Molte, oscure, complicate*, Bologna, 2011.

efficient judicial system. As a matter of fact, evidence shows that complex rules lessen the Administration's accountability.¹⁵

Today's regulatory production processes – which are more complex than in recent past – result in a plethora of unclear provisions. Regulatory inflation, combined with the biases of a legislating Government, have negative effects such as cost increase, uncertainty, and corruption. Over the last 20 years, Italian lawmakers have placed increasing focus on the theme of law production both in terms of quantity and quality, but results are still poor.

6. INCREASING DEMAND FOR JUSTICE, DURATION OF PROCEEDINGS AND FULLNESS OF PROTECTION

Among other factors that have an impact on the full protection of citizens is the duration of proceedings.

As it was pointed out by the President of the Court of Cassation in his speech for the opening of Judicial Year 2008, joint implementation of both principles of fullness and concentration of protection, allows better adjusting our system to a European *Ius Commune*.

This is why an important factor with significant impact on the fullness of protection guaranteed by the legal system is the litigation reduction. Ours is an increasingly congested, hence slow, inefficient, and ineffective procedural machinery.

In particular, the excessive length of proceedings is considered as an obvious symptom of the inefficiency of the judicial system as a whole, which might have a negative impact on the Country's growth.

¹⁵ D. BÖS, M. KOLMAR, *Self-correcting mechanism in public procurement: why award and contracts should be separated?*, CESifo Working Paper n. 302, Munich, 2000.

Over the last few years, the demand for Justice in Italy has been growing significantly, with peaks in 1994 and 1998. The inadequacy of the response to such increase in the demand for judicial services is shown by two main indicators, namely the increase in pending cases and the average length of proceedings. In view of building a European area of justice – to be obtained by strengthening judicial cooperation of EU Member States – our Country’s judicial system is still incapable of giving a timely response and meeting the needs of society.

Consensus on the idea that the length and costs of Italian judicial action entail inefficiency that, in turn, can have a negative impact on the Country’s growth, allowed focusing the debate about the functioning of the judicial system on such indicators. This approach was also strengthened by Strasbourg Court’s ruling against Italy for violating the fundamental right – provided for by the Constitution – to a reasonable length of proceedings.

Instead, the new concept of judicial system – that is now unmistakably reaffirmed in the Constitution and in the Convention on Human Rights – is evidence of some change in society and values, where time seems to become a value and no longer a measurement. Focus shifts from abstract legal certainty to a certain definition of relations, which allows performing reliable assessments for the production of goods and services to be traded.

Following the legal recognition of the principle of “reasonable duration”, the time factor gains relevance that goes beyond the assessment of the judicial system’s functioning, in that it makes the right to take legal action – which should be enforced both in procedural regulations and in the organisational structure of the judicial system – tangible. Only this way can the judicial system – which has long been the expression of the supremacy and protection of rights – provide a real “service” to the community. In this framework, its efficiency and effectiveness can be measured and assessed. Moreover, the service usefulness and cost parameters gain relevance.

Awareness of all this seems to be shown in recent rulings of the European Court of Human Rights that, at times, seems willing to subordinate the “hearing publicity” principle

itself to the proceeding's effectiveness and expeditiousness (EU Convention on Human Rights, *Case: Udorovic v. Italy* – Division II – ruling of May 18th 2010, Appeal n° 38532/02).

The slowness of the Italian judicial system compared to other Countries is clearly shown by some World Bank data on the number of procedures required to obtain the contract performance. Of course, the less the procedures required, the shorter and cheaper it is for all parties. The number of litigations can decrease, thus allowing faster meeting the needs of the parties involved. Italy requires more procedures than France, Germany, Great Britain, but also the United States of America and the OECD Countries average, also showing proportionally higher costs calculated as a percentage of the case's value. As to the time necessary to obtain full performance of a contract by the other party after a favourable pronouncement, in Italy it takes almost three times as long as it does in France, Germany, and Great Britain.

The length of administrative procedures can also have significant impact on the time it takes to meet the needs of citizens and business operators, as well as on general economic development, as this is one of the main reasons for Italy's infrastructural backwardness compared to other major European Countries.

In Italy, the decision was made to entrust the law with the task of providing for a reasonable length of proceedings (Art. 111, par. 2). Instead, under the Convention (Art. 6), single individuals have full right to a reasonably short proceeding, which makes it easier for citizens to have the violation of said right acknowledged. Nonetheless, in Italy, compensation-related problems do not concern domestic regulations providing for such right but, rather, their enforcement, which is not always suitable. In particular, it is worth highlighting some attempts of certain court decisions to limit the enforcement of fair compensation rights by interpreting the conventional regulatory framework less favourably for single individuals compared to the interpretations of the European Court. In principle, Italy has effective and structurally suitable remedies available, allowing protecting the right to a reasonable duration of proceedings. However, their implementation is often inadequate, also due to the stances of law-makers on the one hand and court decisions on

the other hand.

As it has been repeatedly pointed out, Italy has a serious problem in terms of slowness of the legal system, which affects all kinds of proceedings, including administrative ones.

Therefore, rules and regulations are particularly sensitive tools, to be used very cautiously, also reckoning their impact on market dynamics and on the overall efficiency of the citizen protection system vis-à-vis the Public Administration. In such a framework, those tools could hopefully be used to reverse the trend and – by analysing the impact of new regulations more regularly – favour the obtainment of expected results and the enforcement of principles, including supranationally imposed ones.

For the demand for judicial services to be fully met by a suitable supply of such services, access to various protection systems – those within the administration, external, and alternative ones – should always be assured through a methodological approach that should duly consider the different interests at stake, including the impact on market dynamics.

Always bearing in mind all the above-mentioned precautions, ADR methods in the broad sense – also including administrative self-protection – are today one of the facets of administrative process, which allow providing faster, swifter, and cheaper judicial services thus contributing reducing the number of judicial disputes.

This does not diminish the relevance of the role played by administrative courts and their jurisdiction. On the contrary, it contributes enhancing their significance in their capacity as drivers of the progressive improvement of the judicial system and positive and voluntary drivers of change in the Italian society. In this perspective, court decisions may go beyond their mere complementarity with rules and regulations and make up for law instability, thus favouring the evolution of the relationship between the judicial system and the administration.

In this new, different context– which is increasingly open to the influence of

economic dynamics – the real challenge the Italian administrative judicial system is going to face in the near future is that of ensuring market equilibrium, by skillfully dosing and balancing the various interests at stake.