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SELF-ANNULMENT OF ADMINISTRATIVE ACTS IN BREACH OF EU LAW: THE ITALIAN EXPERIENCE

Francesco GOISIS[1]

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1. SCOPE OF THE PAPER

[1] Professore straordinario di Diritto amministrativo presso l'Università degli Studi di Milano.

Purpose of this paper is analyzing a topic already widely addressed by the jurisprudence and the scholars: which impact may really have EU law, and, especially, its jurisprudence, in the evolution, in Italy and in the Italian jurisprudence, of the self-annulment (in other terms, annulment *ex officio*, by the same Administration which has released the act[2]) of administrative acts not in line with EU law[3].

[2] On the self-annulment of administrative acts under Italian administrative law, see, in the international literature, in general terms, RAMAJOLI, *Administrative Internal Review, annual report, 2011, Italy*, in *Jus Publicum Network Review*, and, with specific attention to the influence of EU law, ELIANTONIO, *The Enforcement of EC Rights Against National Authorities and the Influence of Koebler and Kuehne & Heitz on Italian Administrative Law: Opening Pandora's Box?, Maastricht Faculty of Law Working Paper No. 2006/4*.

[3]On the this topic, many contributions have been offered by the legal scholars.

Among others, ARDITO, *Autotutela, affidamento e concorrenza nella giurisprudenza comunitaria*, in *Dir. amm.*, 2008, 631; especially. 662; BECKER, *Application of Community Law by Member States' Public Authorities*: *between Autonomy and Effectiveness*, in *Comm. Market Law Rev*. 2007, 44, 1035.; CARANTA, *Comment to Case C-453/00, Kuhne & Heinz NV v. Produktschap voor Pluimvee en Eieren*, in *Comm. Market Law Rev.*, 2005, 42, 179; CARINGELLA, *Affidamento e autotutela: la strana coppia*, in *Riv. it. dir. pubbl. com.*,2008, 425; CHITI, *Diritto amministrativo europeo*, Milano, 2008, 572; CONTALDI, *Atti amministrativi contrastanti con il diritto comunitario*, in *Dir. Un. Eur*., 2007, 747; D'ANCONA, *Interesse pubblico, discrezionalità amministrativa e istanza di parte nell'annullamento d'ufficio: riflessioni su recenti sviluppi dottrinari e giurisprudenziali fra diritto interno e diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2009, 574.; DEL SIGNORE, *Il ruolo della Pubblica Amministrazione nazionale ai fini dell'effettività del diritto comunitario*, in *Riv. it. dir. pubbl. com*., 2009, 442.; DE LUCA, *Sull'obbligo di riesame delle decisioni amministrative contrarie al diritto comunitario"*, in *www.giustamm.it*.; DE PRETIS, *«Illegittimità comunitaria » dell'atto amministrativo definitivo, certezza del diritto e potere di riesame*, in *Giorn. dir. amm*., 2004, 723; FERRARI, *Annullamento in autotutela di provvedimenti contrastanti con il diritto comunitario*, in *Giur. It*., 2008, 1286.; GALETTA, *Autotutela decisoria e diritto comunitario*, in *Riv. it. dir. pubbl. com*., 2005, 35; GALETTA, *I procedimenti di riesame, in La disciplina generale dell'azione amministrativa: saggi ordinati in sistema*, edited by CERULLI IRELLI, Napoli, 2006, 393, 398; GAROFOLI, *Concessione di lavori: discrezionalità del potere di annullamento d'ufficio e vincoli comunitari*, in *Urb. e app*., 1998, 1343; GATTINARA, *Il ruolo comunitario delle amministrazioni nazionali alla luce della sentenza Kuhne & Heitz*, in *Dir. com. scambi internaz*., 2004, 489; GIOVAGNOLI, *L'atto amministrativo in contrasto con il diritto comunitario: il regime giuridico e il problema dell'autotutela decisoria*, in *www.giustamm.it*; GRECO, *Illegittimità comunitaria e pari dignità degli ordinamenti*, in *Riv. it. dir. pubbl. com*., 2008, 505; GRECO, *Il potere amministrativo nella (più*

This legal issue has been largely debated. Still, it remains substantially unsettled. We will try to elaborate certain answers, also in the light of the recent reform of art. 97 of Constitution[4].

2. THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE: PROCEDURAL AUTONOMY AND PRINCIPLE OF EQUIVALENCY

European jurisprudence, although probably still in progress and so susceptible of stronger developments, shows, so far, a certain degree of prudence.

It is manifest and declared, in fact, the attention with which the European Court of Justice (ECJ) (sometimes in contrast with the opinions of General Advocates[5]) avoids to

recente) giurisprudenza del giudice comunitario, in *Riv. it. dir. pubbl. com.*, 2009, 819; GRUNER, *L'annullamento d'ufficio in bilico tra i principi di preminenza e di effettività del diritto comunitario, da un lato, ed i principi della certezza dl diritto e dell'autonomia procedurale degli Stati membri, dall'altro*, in *Dir. Proc. Amm*., 2007, 235 ss.; PIGNATELLI, *L'illegittimità "comunitaria" dell'atto amministrativo*, in *Giur. cost*., 2008, 3635.; RAIMONDI, *Atti nazionali inoppugnabili e diritto comunitario tra principio di effettività e competenze di attribuzione*, in *Dir. Un. Eur*., 2008, 773; TABOROWSKY, Comment to *Joined cases C-392/04 & C-422/04, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04), formerly ISIS Multimedia Net GmbH & Co. KG v. Bundesrepublik Deutschland*, in *Comm. Market Law Rev*., 2007, 44, 1463; VALAGUZZA, *La concretizzazione dell'interesse pubblico nella recente giurisprudenza amministrativa in tema di annullamento d'ufficio*, in *Dir. Proc. Amm*, 2004, 1245; VILLATA - RAMAJOLI, *Il provvedimento amministrativo*, Torino, 2006, 560.

[4] Constitutional Law 20 April 2012, no. 1, which introduced a new par. 1 in art. 97 of Constitution, according to which «Public Administrations, in coherence with European Union law sistem, shall ensure an equilibrated balance-sheet and the sustainability of public debt» (« Le pubbliche amministrazioni, in coerenza con l'ordinamento dell'Unione europea, assicurano l'equilibrio dei bilanci e la sostenibilita' del debito pubblico»).

[5] See for example Opinion of Advocate General Lèger released on the 17 June 2003, case C-453/00, *Kuhne & Heitz*: « The principles of direct applicability and the primacy of Community law, and also the provisions of Article 10 EC, preclude a national administrative body from refusing an individual's claim for payment based on

invade (except in very particular and marginal cases[6]) the field of procedural and judicial autonomy of member states.

The interest of full effectiveness of EU law is, in other terms, limited by the procedural choices that the member states lawfully may oppose to compulsory (i.e., not discretional) self-annulments and to the absence of time-limits for the exercise of the power of self-annulment. These limitations may find an explanation essentially in the need of safeguarding the principle of legal certainty (so to avoid that «administrative acts which produce legal effects» are «called into question indefinitely»[7]), and, at the same time, in the protection of the legitimate reliance of the recipient of the act (wherever the act is beneficial for the recipient).

For sake of completeness, the position so manifested by the EU judges does not impose any time limits or substantive limits to the self-annulment. It simply legitimates possible national choices to establish terms and guarantees, if and to the extent that the

Community law on the ground that the claim seeks to call into question a prior administrative decision which has become final, following the dismissal of an action for the annulment of the decision by a decision which has the legal authority of a final judgment, although that final decision is based on an interpretation of Community law which was invalidated by the Court in a subsequent preliminary ruling ».

[6] See the judgment of the ECJ, 13 January 2004, case C-453/00, *Kuhne & Heitz*, in which the obligation of internal review of administrative acts is made subject to four stringent conditions: « The principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where - under national law, it has the power to reopen that decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and - the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court. ».

[7] ECJ, 19 September 2006, C-392/04 e C-422/04, *i-21 Germany GmbH* e *Arcor*, point 51.

latter are reasonable[8]. This position seems consistent with the one about revocation of EU unlawful administrative acts: enjoying a presumption of validity (as, in the EU judges view, also the national administrative acts), EU administrative acts create a legitimate reliance on the recipients, and thus are revocable exclusively without unreasonable and disproportional sacrifices for the recipient[9].

Equally clear is, on the other side, in relation to self-annulment, the request, from EU law, of an equivalent regime between the safeguard offered to EU legality and, respectively, to the national one.

In few words, where and to the extent that, in a given legal system, self-annulment of administrative acts is mandatory as a result of violations of domestic law, equally mandatory should be, at the same conditions, the self-annulment for violation of EU law: «It must be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the

[8]See in particular, ECJ, grand chamber, 12 February 2008, case C-2/06,*Willy Kempter KG*: «Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence ».

[9] See for example ECJ, 26 February 1987, case C-15/85, *Cons. Coop. D'Abruzzo c. Commissione*, point 10: « under Community law, as under the national laws of the various Member States, an administrative measure, even though it may be irregular, is presumed to be valid until it has been properly repealed or withdrawn by the institution which adopted it ».

Among the scholars, for a comparative research, CORLETTO, *Provvedimenti di secondo grado e tutela dell'affidamento*, in *I procedimenti di secondo grado e tutela dell'affidamento in Europa*, edited by CORLETTO, Padova, 2007, 1.

On the principle of so called "vertical equivalency", i.e. on the fact that it seems disputable the request, from EU side, of a stricter regime of self-annulment in relation to domestic administrative acts than in relation to EU administrative acts, see GRECO, *Illegittimità*, and, fully in line with the former, DEL SIGNORE, *op. cit.*

rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) »[10]. This with the consequence that « in relation to the principle of equivalence, this requires that all the rules applicable to appeals, including the prescribed time-limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law. It follows that, if the national rules applicable to appeals impose an obligation to withdraw an administrative act that is unlawful under domestic law, even though that act has become final, where to uphold that act would be 'downright intolerable', the same obligation to withdraw must exist under equivalent conditions in the case of an administrative act which does not comply with Community law»[11].

3. THE ITALIAN JURISPRUDENCE: FROM THE UNDERESTIMATION OF PROCEDURAL AUTONOMY TO THE UNDERESTIMATION OF THE PRINCIPLE OF EQUIVALENCY

The Council of State has already expressed its opinion on the possible peculiarity, and, in particular, compulsory character, of the self-annulment of administrative acts for EU violations.

Two positions in the sense of a reinforced regime for the safeguard of the EU legality seem specifically identifiable.

[10]ECJ, 19 September 2006, point 57.

[11] ECJ, 19 September 2006, points 62-63.

According to the first one, the administrative act in violation of EU law should always be self-annulled, on the basis of the supremacy and primacy of EU law on national law. The contrast with EU law would be «sufficient to create a concrete and current public interest and to exclude that a the private interest to preserve the act may prevail»[12]. In fact, «in the light of the necessity to fulfill EU obligations, any other interests, either public or private, may be sacrificed », also because, in relation to «acts or orders released in application of a norm to be disapplied», it should be declared «their annulment in consideration of the recognized ineffectiveness of the legal provisions on which they were based»[13]. In sum, «the administrative consequences » of the disapplication would represent a «fulfillment of an international obligation of the State…such to justify the sacrifice of any other interests, either public or private»[14].

In reality, such jurisprudence (that dates back to the 90s of the XX century) seems based on an extreme view of the EU law supremacy, deemed as such to directly affect the stability of administrative acts in violation of EU law (in terms of either their disapplication, or their compulsory self-annulment). This perspective, that appears in a way consistent with (although not necessarily descendent from) the regime of the normative acts[15] in contrast with EU law has been nonetheless rejected (after a first, apparent, support offered by the Ciola case in 1999[16]) by the same European Court of Justice. The European

[12]Council of State, IV, 5 June 1998, n. 918, in *Urb. e app.*, 1998, 1343 ss.

[13]Council of State, IV, 18 Jannuary 1996, n. 54, in *Riv. it. dir. pubbl. com.*, 1997, 177

[14]Council of State, 54/1996, cit.

[15] Among them, administrative regulations, that according to domestic law, are still administrative acts.

[16] ECJ, 29 April 1999, case C-224/97, *Ciola*: «A prohibition which is contrary to the freedom to provide services, laid down before the accession of a Member State to the European Union not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date of accession ».

Court has not only clarified the full acceptability of the preclusion to appeal administrative acts, once expired the time-limit to appeal, but, above all, in the already mentioned jurisprudence on self-annulments or revocations, has recognized great importance to principles like the procedural autonomy and the certainty of law, that, in its opinion, shall prevail, in relation to the self-annulment of administrative acts, on EU law supremacy.

According to the second position, the compulsory character of self-annulment is grounded on more traditional arguments: it is not *per se* the EU law supremacy such to justify the removal of the act in violation of EU law; but, more indirectly, this compulsory character of the self-annulment descends from the negative consequences for the State triggered by the failure to fulfill the EU obligations. In fact, such failure may eventually result in a fine (pursuant to art. art. 260, par. TFUE[17]). Thus, based on the traditional idea of the compulsory character of the self-annulment of administrative acts that risk to create (and not necessarily directly create) economic losses for the administration, the self-annulment is necessary and compulsory (as opposed to being just admissible, to the extent that all other preconditions of public interests exist; in other words, as opposed to be a discretional decision). In this connection, for example, the Council of State noted that «the public interest, very evident, consists not in the simple restoration of the violated legal order, but in the purpose of avoiding a future condemnation, and, meanwhile, the diminution of prestige for our country abroad, resulting from the well-founded accusation of having breached the treaty»[18].

[17] « If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. ».

Previously, an equivalent provision was laid down by art. 228, par. 1, of the EU Treaty.

[18]Council of State, V, 18 April 1996, n. 447.

These two positions seem, therefore, partially similar, as both based on the awareness of the specific compulsory character of the EU obligations and the seriousness of the relative sanctions (to be applied to the State). However, the first position seems to have overestimated the current stage of evolution of EU law, as clearly emerging, now, from the ECJ jurisprudence. The second position starts from an objective fact (the EU sanctions against the State), to derive from them well known consequences, as descending from national law (the necessity of avoiding economic losses for the State, by exercising of the power of self-annulment). In such a way, it seems more in line with the current EU law jurisprudence on internal review of administrative acts, that, as noted, seems based on the principle of equivalency (rather than on the principle of supremacy of EU law).

More recently, the administrative jurisprudence has, on the contrary, demonstrated a clear refusal of recognizing any peculiarity to the self-annulment of administrative acts in breach of EU law. In fact, the self-annulment should be «deemed subject, also in these cases, to the general principles governing the lawfulness of the relative acts, i.e. the simultaneous presence of preeminent reasons of public interest to remove the act»[19]. In other terms, the «principle of consolidation of acts not appealed and of the compulsory character of the self-annulment» would not be derogated where a violation of EU law is claimed as a reason of unlawfulness»[20]. This line of jurisprudence additionally observes that «Even in the EU legal system, the mere unlawfulness of the administrative act is not a sufficient element to justify the removal of the act by the Administration, as being necessary a careful balancing of the other involved interests, including that of the recipient who relied on the unlawful act»[21]. As we will immediately see, in such a way, there has

[19]Council of State, V, 8 September 2008, no. 4263.

[20]In the same exact terms,, Regional Administrative Court of Veneto, I, 28 February 2008, no. 493.

[21]Council of State, VI, 22 November 2006, no. 6831.

In the same sense, Council of State, VI, 3 March 2006, no. 1023 and Administrative Court of Appeal for Sicily, 21 April 2010, no. 553.

been a shift between two equally unbalanced positions: from a probably too enthusiastic view, by which the supremacy of EU law has been overestimated (without recognizing adequate significance to the procedural autonomy), to a view that, by contrast, underestimate the principle of equivalency.

4. THE PRINCIPLE OF EQUIVALENCY AND THE FINANCIAL BURDEN DESCENDING FROM FAILURE TO FULFILL EU OBLIGATIONS: ART. 1, PAR. 136, OF LAW NO. 311 OF 2004 (AND ITS INTERPRETATION) AND ART. 16 BIS OF LAW NO. 11 OF 2005

According to a by now traditional line of jurisprudence of the Council of State, in particular inaugurated by the judgment Fiori of 1976[22] (in which it was mentioned the existence of a « *in re ipsa* public interest to self-annul… », wherever «the enforcement of the administrative act would have caused current or future expenditures of public money, whose lawfulness appear disputable»), the concrete and current interest to annul an act which entails an unlawful payment, even future, of public money is *in re ips*a, in the sense that it does not require any justification). In other terms, it is sufficient to mention as a reason of in the self-annulment the circumstance of the possible expenditures of public money, to justify the annulment, without any further need of giving reasons addressing the other involved interests..

It could be discussed whether such line of jurisprudence may, *per se*, justify the application of the principle of equivalence to the issue of the self-annulment of administrative acts in breach of EU law.

[22] 2 March 1976, no. 124, in *Cons. St.*, 1976, I, 373 ss..

In particular, one could doubt about such application based on two considerations: at first because we are talking about a line of jurisprudence, that, as such, may always mutate; secondly, because this doctrine presents certain intrinsic limits, as being developed in very specific cases essentially related to the career moves of civil servants: such moves are directly (and not only possibly) such to produce an expenditure of public money (as a result of the increased salary). On the contrary, administrative acts in violation of EU law, ordinarily, create only a possibility of financial exposure for the State, excepts where the failure to comply with EU law has been already ascertained by the ECJ.

However, in reality, not only jurisprudential positions may be mentioned in national law.

In 2004, a new legislative intervention took place, perhaps suggested by a 2000 ruling of the Constitutional Court, according to which the discretionality of the Administration in the field of self-annulment can well be consumed by the legislator, as such discretionality does not enjoy any constitutional coverage, but, on the contrary, the self-annulment represents «a corollary of the principle of legality, that is intended, among other purposes, to avoid the consolidation of situations *contra legem*»[23]. In particular, art. 1, co. 136, of law no. 311 del 2004, states that «with the purpose of realizing savings or avoiding financial costs for public administrations, the self-annulment of unlawful administrative acts can always been decided, even if the act is under enforcement». The second paragraph makes it clear that this type of self-annulment «in relation to administrative acts affecting contractual or conventional relationships with private parties, shall keep harmless the private parties from the possible deriving economic prejudices, and,

[23]Constitutional Court, 22 March 2000, no. 75, in *Giur. cost.*, 2000, 810, with comment by SCOCA, *Una ipotesi di autotutela amministrativa impropria*.

in any case, shall not be decided more than three years later from the entrance in force of the administrative act, even where the relative enforcement is still in progress »[24].

As well emerging form the legislative wording, this provision is not only of a general nature, but, most f all, does not distinguish between acts that just hypothetically might create economic burdens, and, respectively, the ones that, directly and immediately, create such burdens. Put it in a different way, no distinction is established between acts that generically might produce economic consequences, and, respectively, acts that certainly (as a result of their unlawfulness) such consequences are due to produce.

The jurisprudence has sometimes offered an interpretation of this legal provision restrictive, if not abrogative. For example, in 2009, the Council of State held that «with respect to the provisions of art. 1, par. 136, law no. 311 of 2004 (Budget law for 2005) ….they are intended to restrict the so called consolidation of subjective positions of the citizen deriving from unlawful administrative acts, allowing the self-annulment regardless the time-period passed from the releasing of the act, but, as made it manifest by the use of the term "can" preceding the attribution of the power of deciding the self-annulment, it does not remove the very discretionary nature of this power, whose exercise cannot be claimed by the recipient of the act or by a third interested party »[25].

This reading - probably explainable in relation to the fear that public administrations are overflowed by requests of, allegedly compulsory, self-annulments - does not seem persuasive. On the contrary, the use of the term «can» seems simply intended to indicate that a certain administrative power has been conferred. Such a power (and this represents a real novelty) is not conditioned (unlike it normally happens) to the

[24]On this legal provision, see GIOVAGNOLI *Autotutela e risparmio di spesa nella finanziaria 2005*, in *Urb. App.*, 2005, 395 and CASSATELLA, *La nuova disciplina dell'annullamento d'ufficio al vaglio della giurisprudenza amministrativa*, in *Foro amm. TAR* 2006, 2186.

[25]Council of State, VI, 18 September 2009, no. 5621.

ascertainment of a public interest different from, and additional to, the safeguard of the lawfulness, wherever the Administration may face economic burdens as a result of this unlawfulness. This is confirmed by the fact that the term «always», cannot have, contrary to opinion of the Council of State, a merely temporal meaning: in the second part of the same paragraph, in applying to a specific case (administrative acts affecting contractual relationships) the same rule of the first part of the paragraph, a three years time-limit is introduced; this time-limit is logically incompatible with the use of the term «always» in a temporal meaning. As a result, the term «always» seem to be referred to preconditions of objective (as opposed to temporal) nature. In other words, the adverb «always» relates to whether it is necessary to take in count interests different from the one to save public money.

The same Council of State, however, in 2010 seems to have construed the 2004 legal provision differently, by expressly recognizing that «par. 136 has introduced the only case of self-annulment for *in re ipsa* reasons of public interest, with exclusion of any other case previously admitted by the jurisprudence, not connected with the savings of public money or the reduction of economic burdens for the Administration»[26]. Similarly, in 2012, the Administrative Court of Appeal for Sicily has defined the self-annulment at stake as characterized by the fact that a given public interest (the objective of saving public money) would *ex lege* prevail on any other public interests. This appears just as a different way to express the same concept: this type of self-annulment is not discretional, as exclusively based on a *in re ipsa* public interest[27].

If this reading of the legislative provisions is correct, and, if, as a result, Italian law system is to be interpreted in the sense that self-annulment of unlawful acts such to generically cause economic burdens for the Administration is compulsory, then the same

[26] Council of State, V, 7 April 2010, no. 1946.

[27] Administrative Court of Appeals for Sicily, 1 February 2012, no. 110

rule should find application also in relation to administrative acts in violation of EU law. These latter, in fact, are always at risk to generate expenditures for the State, in relation both to EU penalties and the request of compensation that the citizen could raise against the State, if directly affected by the violation of EU law). We can even conclude that, pursuant to the EU principle of equivalency, this application seems to emerge as imposed by the EU law.

On the other side, it cannot be forgotten that a strict connection between violation of EU law and (sufficiently) probable – and in any case *ex lege* recognized as such and therefore *per se* material - economic burdens for the State and the other public bodies is by now clearly expressed by the legislative provisions at stake. In particular, it is exactly to avoid such economic burdens that, reflecting a provision originally (significantly) laid down by the Budget law for 2007[28], art. 16 *bis*, par. 1, of law no. 11 of 2005 states that «in order to prevent the commencement of infringement procedure under art. 226 and following of the EC Treaty or to stop them, regions, autonomous provinces of Trento and Bolzano, local authorities and other public bodies and subjects equivalent to them shall adopt any necessary measure to promptly correct any violation imputable to them of the obligations descending from EU law to member states. Such authorities are required to promptly comply with judgments released by the European Court of Justice, pursuant to art. 228, par. 1, of the Treaty». The main sanction provided in case of violation of the mentioned par. 1, is, pursuant to the subsequent par. 4, a financial one: «the State can claim compensation vis-à-vis the subjects responsible of the violation to the obligations established by par. 1, in relation to the financial burdens descended by the condemnation judgments released by the European Court of Justice, pursuant to art. 228, par. 2, of EC Treaty».

An hypothetical interpretation according to which such legislative intervention would not require a compulsory self-annulment of administrative acts in breach of EU law (or in contrast with the European Convention of human rights, as art. 16 *bis* , par. 5

[28] Art. 1, pars. 1216-1219, of law. no. 296 of 2006.

mentions also the economic burdens descending from judgments of the European Court of human rights) and so such to expose the State to financial penalties would mean not only assuming a position inconsistent with the traditional doctrine, as we have seen codified in 2004, according to which the self-annulment intended to prevent economic burdens for the State is compulsory (with the consequence of violating the EU principle of equivalency). It would also imply a refusal to recognize any effective significance (and content) to the duty - clearly and even emphatically expressed by the legislative provisions - of adopting «any measure necessary to promptly correct any violation of the obligations descending to the member states from EU law…».

This point has been well understood by a 2007 judgment of the Regional Administrative Court of Sicily, which has recalled, based on the mentioned law provisions, that a self-annulment of administrative acts in violation of EU law, would be compulsory not just generically «in force of the obligations of cooperation pursuant to art. 10 EC Treaty», but also «in relation to the need of avoiding that administrative action in violation of EC law affects from a financial standpoint local communities, as a result of the possible compensation action brought by the State, as responsible entity, according to the international law, of the failure to fulfill EC obligations, pursuant to art. 1, par. 1215, of law no. 296 of 2006»[29].

5. THE CONSTITUTIONAL REFORM OF ART. 97 OF CONSTITUTION

Constitutional Law 20 April 2012, no. 1, just introduced a new par. 1 in art. 97 of Constitution, according to which «Public Administrations, in coherence with the EU law system, ensure an equilibrated balance sheet and the sustainability of public debt».

[29]Regional administrative Court of Sicily, Palermo, II, 28 September 2007, no. 2047.

Traditionally, art. 97 has represented probably the most important constitutional parameter for all the administrative action. In fact, the main principles governing the organization and the action of the public administrations have been identified and developed by the jurisprudence and the legal scholars on the basis of, and in relation to, art. 97.

The circumstance that, as a result of the last constitutional reform, the first principle laid down by art. 97 is now represented by the need of avoiding unjustified expenditures of public money is likely to influence the topic of self-annulment of administrative acts. The traditional position according to which the self-annulment may be compulsory, wherever intended to prevent unlawful costs for the Administration, seems in fact clearly reinforced. No need to say that, in this connection, also the opinion expressed in this article about the specific compulsoriness of the acts in violation of EU law should be equally strengthened. This conclusion may find support also in the specific wording of the new art. 97, par. 1, that expressly mentions the obligation of acting in «coherence with the EU law system». In other words, a specific connection between EU obligations and the financial interest of the State and so the sustainability of the public debt may even be said to be directly suggested by the constitutional provision at stake.

6. CONCLUSIONS

In conclusion, art. 1, par. 136, of law no. 311 of 2004, especially in the light of art. 16 *bis*, of law no. 11 of 2005 and, most o all, of the just passed constitutional reform of art. 97 of Constitution, opens the way (from a domestic, as well as EU law, perspectives) for a compulsory self-annulment of administrative acts, in violation of EU law. The same can be said in relation to administrative acts in violation of the European convention of human rights (although exclusively from a domestic law standpoint, not be applicable, in this case, any principle correspondent to the EU one of equivalency).

This conclusion is not directly and mostly imposed only by the EU law. It is not, in other terms, an external imposition, such to put in discussion basic principles of the

domestic administrative law. Rather, it is a matter of consistent application of domestic legislative choices, from which all the due consequences are to be derived, in harmony with the principle (this one a really EU one) of equivalency.

Obviously, legislative choices, once fully appreciated as to all their consequences, may also appear disproportional and to be better balanced: for example, it is easy to appreciate the difference among an act (or a contract[30]) already definitively recognized as unlawful by the EU authorities (and so to be annulled, in order to avoid almost certain financial consequences for the State) and, respectively, a possible reason of unlawfulness that, just hypothetically, might be ascertained by EU authorities, and, eventually, trigger a fine.

[30] See ECJ, 18 July 2007, case C-503/04, *Commissione* c. *Germania*, in *Riv. it. dir. publ. com.*, 2009, 431 ss., with a dissenting comment by GRECO, *Superprimato del diritto europeo: le direttive sui mezzi di ricorso vincolano tutti, ma non la Commissione e la Corte di giustizia*, and in *Dir. Proc. Amm*., 2009, 112 ss. with comment by GOISIS, *Ordinamento comunitario e sorte del contratto, una volta annullata l'aggiudicazione*. According to the judgment (point 29), « The adverse effect on the freedom to provide services arising from the disregard of the provisions of Directive 92/50 subsists throughout the entire performance of the contracts concluded in breach thereof (Joined Cases C-20/01 and C-28/01 Commission v Germany, paragraph 36). Furthermore, at that date, the failure to fulfill obligations was to continue for decades, given the long period for which the contract in question had been concluded. ».

Lastly, consistent with the principle established by ECJ, 18 July 2007, ECJ, 21 December 2011, C-465/10, point 57: « In respect of such a breach of the tendering rules laid down by Directive 92/50, which was adopted in order to eliminate barriers to the freedom to provide services and to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 32), it should be recalled that the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach of the directive (see Joined Cases C-20/01 and C-28/01 Commission v Germany [2003] ECR I-3609, paragraph 36, and Case C-503/04 Commission v Germany [2007] ECR I-6153, paragraph 29).».

However, given, from one side, the attention for the safeguard of public finances in administrative action that, with increasing intensity, emerges from the domestic legislation and now, expressly, even from art. 97, par. 1, of Constitution, and, from the other side, the special consideration for the respect of EU obligations that is manifested by the Constitution in relation to both the legislative activity (art. 117, par. 1[31]) and the administrative one (art. 120, par. 2[32]), a compulsory nature in a strict an proper sense for the self-annulment of administrative acts in breach of EU law frankly does not appear an unreasonable conclusion.

[31] «The legislative powers are exercised by the State and the Regions in compliance with the obligations descending from EC law and the International law».

[32] According to which the Government is empowered to exercise substitutive administrative powers against the Regions and the Local Authorities, among other reasons, in case of violation of European law.