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CONTRATS PUBLICS TRANSNATIONAUX : UNE PERSPECTIVE COMPLEXE

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1. DIFFERENTES DEFINITIONS DES "CONTRATS PUBLICS TRANSNATIONAUX"

La perspective transnationale des marchés publics et des contrats publics permet de mettre en évidence différentes approches dans leur analyse. Il ne semble en effet pas possible de proposer une définition unique et générale du "contrat public transnational" pas plus que du "droit transnational", du "droit administratif transnational" et plus généralement des "situations administratives transnationales"[2]. Si le terme "droit transnational" peut se référer à différents ordres juridiques ou systèmes de lois, il a également été qualifié de "méthodologie"[3]. Il semble impliquer une pluralité de sources, de sujets et de processus juridiques. Une approche juridique transnationale se réfère à "la manière dont les acteurs et

[2] Comme on le sait, en 1956, Philip Jessup (P. C. JESSUP, *Transnational Law*, 1956) a théorisé l'expression "droit transnational", l'utilisant pour désigner « tout droit qui régit des actions ou des événements qui transcendent les frontières nationales. Le droit international public et le droit international privé sont inclus, ainsi que d'autres règles qui n'entrent pas entièrement dans ces catégories standard ». Jessup a proposé que le "droit transnational" implique - et en même temps questionne - de multiples sources et acteurs juridiques au-delà des frontières et des régimes juridiques. Voy.: P. ZUMBANSEN, « Transnational Law », J.M. SMITS (eds.), *Elgar Encyclopedia of Comparative Law*, Elgar, Cheltenham, 2006, p. 738. C.f.: S. KALANTRY, R. HANCOCK, « Transnational law as a framework for law clinics », *Jindal Global Law Review* 11, 2020, pp. 251-270 ; L. BACKER, « The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders », *BYU Journal of Public Law*, 2016, Vol. 31 (1), pp. 1-53 ; M. AUDIT, S.W. SCHILL, « Transnational Law of Public Contracts: An Introduction », M. AUDIT et S.W. SCHILL (eds.), *Transnational Law of Public Contracts*, Bruylant, Bruxelles, 2016, pp. 3–20; S. W. SCHILL, « Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization », *Riv. Trim. Dir. Pub*., 1, 2014, pp. 1 ss; S.W. SCHILL, « Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization », *NYU Law School Jean Monnet Working Paper JMWP*, 5, 2013.

[3] Selon P. ZUMBANSEN, « Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism », 21 *Transnational Law & Contemporary Problems*, 2012, pp. 305 et seq.: « Transnational law constitutes a methodological shift in legal theory—an attempt to bridge the experience of legal pluralism in the nation-state with that of the emerging transnational space« Transnational Law ».

les instruments contribuent à mettre de l'ordre dans les relations sociales dans des contextes administratifs"[4].

Cette approche semble convenir lorsqu'on parle de "contrats transnationaux", dont le rôle et la notion couvrent un large éventail de phénomènes. Il a été noté que, contrairement aux contrats qui lient les parties au-delà de la juridiction d'un état, conventionnellement qualifiés de contrats "internationaux" et soumis au droit international privé et judiciaire, « les contrats transnationaux et leur droit s'abstraient des références nationales dans une mesure encore plus grande », ou nous pourrions dire plus exactement dans une mesure différente[5].

Un effort transnational peut naître d'un projet d'harmonisation destiné à un usage transfrontalier, comme cela s'est produit, pour le droit privé et commercial, avec la Convention de Vienne sur la vente internationale[6], les Principes d'UNIDROIT[7] et les Principes du droit européen des contrats (PECL)[8]. La *lex mercatoria* a été considérée comme

[4] S.W. SCHILL, « Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization », op. cit., p. 23.

[5] K. HENDRIK ELLER, « *Transnational Contract Law* », P. ZUMBANSEN (eds.), *The Oxford Handbook of Transnational Law*, 2021, p. 519.

[6] La Convention des Nations Unies sur les contrats de vente internationale de marchandises (CVIM) a été adoptée par la Conférence des Nations Unies sur les contrats de vente internationale de marchandises, tenue à Vienne du 10 mars au 11 avril 1980.

[7] Les Principes d'UNIDROIT relatifs aux contrats du commerce international (PCIC) constituent une codification non contraignante de la partie générale du droit international des contrats, adaptée aux exigences particulières de la pratique commerciale internationale moderne. La dernière édition des Principes d'UNIDROIT publiée en 2016 se compose de 211 articles répartis en 11 chapitres, couvrant les sujets suivants : Dispositions générales, Formation et pouvoir des agents, Validité, Interprétation, Contenu, Droits et conditions des tiers, Exécution, Inexécution, Cession de droits, Transfert d'obligations, Cession de contrats, Délais de prescription, Pluralité d'obligés et de bénéficiaires. Voy. : les Principes d'UNIDROIT relatifs aux contrats du commerce international (2016) Page web.

[8] Les Principes du droit européen des contrats (PECL) ont été rédigés par une commission internationale présidée par Ole Lando, Voy. : O. LANDO, « European Contract Law », *American Journal of Comparative Law*, 31, 1983, p. 653.

le représentant le plus sophistiqué de ce développement "transnational"[9], avec d'autres régimes qui ont récemment fait leur apparition, notamment la *lex sportiva*[10], *la lex digitalis* [11]et la *lex financiaria*[12].

Comme nous l'avons vu, l'étude des contrats transnationaux dans le cadre du droit administratif va plus loin que la définition classique du droit transnational, qui consiste à réglementer « les actions ou les événements qui transcendent les frontières nationales » [13]. La "transnationalisation" du droit administratif[14], dans le sens d'une science largement régulatrice[15], explique l'importance croissante de la coopération public-privé et des contrats publics comme forme de gouvernance globale[16]. L'examen du rôle des acteurs et des instruments du droit des contrats publics dans le cadre d'une approche juridique transnationale fournit un cadre permettant de comprendre comment ce domaine de la

[9] K. Hendrik Eller, « Transnational Contract Law », op. cit., p. 520

[10] A. DUVAL, « Lex Sportiva: a playground for transnational law », *European Law Journal*, 19, 2013, pp. 822-842.

[11] L. VIELLECHNER, « Responsive legal pluralism, the emergence of transnational conflicts law », *Transnational Legal Theory*, 6, 2015, 312-332.

[12] K. HENDRIK ELLER, « Transnational Contract Law », op. cit., pp. 513-530.

[13] P.C. JESSUP, *Transnational Law*, op. cit., p. 2.

[14] P. ZUMBANSEN, « Transnational Law », op. cit., p. 743.

[15] Voy.: A. AMAN, *The Democracy Deficit*, New York University Press, 2004.

[16] S.W. SCHILL, « Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization », op. cit., p. 24, selon lequel le droit transnational de la sphère administrative « does not only cover trans-border aspects of administrative relations, such as the involvement of foreign interests or foreign laws, but encompasses administrative law and administrative relations in an all-encompassing way, including where no trans-border element is obvious, but is present in how a specific domestic legal norm came about or is applied, for example, by borrowing from a foreign legal system ».

gouvernance administrative « se défait de ses liens domestiques et s'ouvre à des influences normatives dépassant les conceptions étatiques du droit public »[17].

En outre, l'impact des accords commerciaux internationaux et les règles relatives aux marchés et contrats publics, ainsi que le droit interne des contrats, montrent comment les instruments et les règles non étatiques visent à surmonter les limites territoriales des marchés publics[18]. Ils ne se contentent pas d'"internationaliser" la phase de passation des marchés publics, mais jouent également un rôle important dans le renforcement de l'impact de ces règles et principes internationaux capables d'affecter à la fois « la phase d'exécution des marchés publics et les droits et procédures des parties aux marchés publics » [19].

Deuxièmement, les engagements contraignants du droit international public ne sont pas les seuls à avoir un impact sur les marchés publics dans les marchés transnationaux. Les marchés publics semblent exposés à un nombre croissant d'instruments de droit souple, dont l'impact n'est pas moins transformateur que les engagements internationaux contraignants, tels que la Commission des Nations Unies pour le droit commercial international (CNUDCI) ou, dans une perspective différente, la loi type sur les marchés publics[20].

En ce qui concerne les marchés publics et le domaine des contrats publics, il est nécessaire de considérer l'impact des principes et des Directives de l'Union européenne sur les marchés publics ainsi que de la jurisprudence de la Cour de justice en la matière, tous

[17] M. AUDIT et S.W. SCHILL, « Transnational Law of Public Contracts: An Introduction », op. cit., p. 9.

[18] L. FOLLIOT-LALLIOT, « From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems », in M. AUDIT et S.W. SCHILL (eds.), *Transnational Law of Public Contracts*, Bruylant, Bruxelles, 2016, pp. 23-44; J. I. SCHWARTZ, « International Protection of Foreign Bidders Under GATT/WTO Law: Plurilateral Liberalization of Trade in the Public Procurement Sector and Global Propagation of Best Procurement Practices », in M. AUDIT etS.W. SCHILL (eds.), *Transnational Law of Public Contracts*, Bruylant, Bruxelles, 2016, pp. 79 – 106.

[19] M. AUDIT et S.W. SCHILL, « Transnational Law of Public Contracts: An Introduction », op. cit., p. 10.

[20] *Ibid.*, p. 12.

poursuivant l'objectif de l'intégration européenne[21]. Comme déjà souligné, l'une des différences entre les système juridique européen des contrats publics et les autres réside, en effet, dans l'objectif poursuivi d'intégrer les marchés concernés[22]. Les marchés publics transfrontaliers (et transnationaux) conjoints dans l'Union européenne reçoivent le soutien des institutions européennes, car une telle coopération peut contribuer au développement du marché intérieur et à l'intégration des États membres européens - l'objectif ultime de la politique de l'UE[23]. Aux États-Unis, en revanche, les achats coopératifs entre différents États se sont développés comme un moyen de réduire les coûts et d'améliorer les résultats des marchés publics ; il n'y a pratiquement aucun objectif global d'intégration de l'économie américaine par le biais des achats coopératifs[24]. Dans tous les cas, des effets transnationaux peuvent se produire, induisant des traitements différents dans chaque système juridique.

En effet, tous les États membres de l'UE n'attribuent pas la même signification au terme "contrat public". Lorsque ce terme est utilisé comme synonyme de "contrat administratif" ou, plus largement, de "contrat de droit public", la jurisprudence de la Cour de justice de l'Union européenne peut servir à combler les lacunes et à guider l'interprétation aussi des contrats publics transfrontaliers[25].

[21] M. RACCA etC. R. YUKINS (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, *Droit Administratif / Administrative Law Collection*, Bruylant, Bruxelles, 2019. Voy.: C. VAJDA, « Law as a Tool to Build Cross-Border Markets: The Experience of the Court of Justice of the EU in Opening Up Government Contracts », *Public Contract Law Journal*, 2018, vol 47(3), pp. 357 et s.

[22] G.M. RACCA et C. R. YUKINS, « Introduction. The Promise and Perils of Innovation in Cross-Border Procurement », in G. M. RACCA et C. R. YUKINS (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, *Droit Administratif / Administrative Law Collection*, Bruylant, Bruxelles, 2019, pp. 1-27.

[23] Commission européenne, *Recommandation sur la professionnalisation des marchés publics : Construire une architecture pour la professionnalisation des marchés publics*, C(2017) 6654 final, octobre 2017.

[24] G.M. RACCA et C. R. YUKINS, « Introduction. The Promise and Perils of Innovation in Cross-Border Procurement », op. cit., p. 17.

[25] Les difficultés à trouver une définition commune du "contrat public" sont examinées par M. AMILHAT, « Classification of public contracts in the context of national laws », *Ius Publicum Network Review*, 2/2019.

De plus, la notion de contrat administratif transnational exige d'être distinguée des traités internationaux et de ceux qui pourraient constituer des accords entre gouvernements. Les formes de coopération donnant lieu à des marchés publics ayant des effets transnationaux sont fondées sur des coopérations horizontales entre pouvoirs adjudicateurs ou au moins un organisme public et un organisme privé.

Un exemple de coopération où le pouvoir de l'opérateur économique privé a affecté le contenu du marché public en obtenant une dérogation à la réglementation semble intéressant.

En fait, normalement, les opérateurs économiques ne disposent pas d'un pouvoir de négociation suffisant pour imposer les conditions d'un marché public, si ce n'est pour exercer une influence sur le contenu des marchés publics par le biais d'activités de lobbying ou d'efforts des organisations sectorielles ou de l'élaboration de contrats types. Néanmoins, il existe également des situations dans lesquelles les parties privées peuvent être en mesure de persuader le pouvoir adjudicateur de faire des concessions avantageuses, qui ne seraient généralement pas conformes à la politique du gouvernement.

L'exemple pourrait être l'affaire concernant la capacité de l'État français et des entités publiques à conclure valablement une convention d'arbitrage avec la société américaine Walt Disney dans les contrats liés à la construction du parc Euro Disney. L'investisseur américain a demandé l'insertion d'une clause d'arbitrage dans le contrat afin d'éviter le risque d'avoir des litiges devant les tribunaux français. En conséquence, le Parlement français a promulgué une loi spécifique pour autoriser la clause d'arbitrage pour le projet d'investissement, malgré le principe français qui empêche les organismes publics de soumettre leurs litiges à l'arbitrage, mais uniquement aux tribunaux nationaux. Il s'agit d'un exemple de contrat public transnational où la coopération concerne une autorité publique (l'État français) en relation avec une société privée ayant son siège social dans un autre pays (les États-Unis).

Les préoccupations liées à l'asymétrie entre les acteurs publics et les acteurs privés dans les contrats publics transnationaux ont une nouvelle fois émergé et remis en question

l'idée de "souveraineté technologique" par rapport aux investissements publics prévus par les plans de relance post-pandémie pour la numérisation des administrations publiques dans l'UE. Il est bien connu que les institutions publiques de l'UE dépendent encore largement de contrats non européens pour la fourniture de services numériques et d'infrastructures digitales, ce qui a un impact sur la possibilité pour l'Union de développer des infrastructures numériques autonomes et expose les citoyens au traitement et à l'utilisation de leurs données par une juridiction étrangère (par *exemple*, le Cloud Act aux États-Unis)[26]. La participation de consortiums entre entreprises nationales et étrangères aux appels d'offres nationaux pour l'attribution de services cloud nationaux pourrait entraîner des critiques dans les marchés publics "transnationaux" qui en résultent, en raison de l'application éventuelle de réglementations non nationales pour la gestion et le contrôle des données, comme mentionné ci-dessus[27]. Les défis liés à l'élaboration de stratégies d'autonomie numérique au niveau national dans une perspective transnationale pourraient être surmontés par l'autonomisation des initiatives européennes vers la convergence des modèles de gouvernance des données et du numérique afin de permettre la gestion, l'accès et le contrôle des données appartenant aux citoyens et aux entreprises de l'UE[28]. Comme on le verra plus loin, un autre exemple de ces préoccupations est fourni par le rôle des contrats transnationaux dans les nouveaux modèles d'organisation de la chaîne d'approvisionnement pour fournir des services et des biens aux

[26] La loi sur la clarification de l'utilisation licite des données à l'étranger ou Cloud Act (HR 4943) est une loi fédérale américaine adoptée en 2018 avec l'approbation du Consolidated Appropriations Act, 2018, PL 115-141, Division.

[27] En Italie, il convient de noter les partenariats entre Tim et Google, entre Amazon et Fincantieri (contrôlée à 71,6 % par Cassa Depositi e Prestiti, une banque d'investissement italienne sous contrôle public) et entre Microsoft et Leonardo (détenue à 30 % par le ministère de l'Économie) pour la participation aux appels d'offres de services « cloud » mentionnés.

[28] La Commission européenne a récemment proposé la naissance d'une initiative européenne en matière de cloud computing dans le cadre du deuxième pilier de la stratégie "Une stratégie européenne pour les données", parmi laquelle le projet "Gaia-X". Voy. : Commission européenne, *Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Une stratégie européenne pour les données*, Bruxelles, 19.2.2020, COM(2020) 66 final.

autorités publiques et à l'État, comme cela s'est produit dans les achats d'urgence liés à la pandémie de Covid-19.

Un autre contrat découlant d'un traité international peut être considéré comme une source d'obligations contractuelles affectant les positions juridiques transnationales. On peut se référer, par exemple, au cas du tunnel italo-autrichien du Brenner (BTT), du tunnel Euralpine Lyon-Turin (TELT) et du gazoduc Nord Stream 2. Le projet BTT, basé sur un accord international, a impliqué une procédure ouverte pour l'attribution d'un contrat à un opérateur économique unique (ou à un consortium) en utilisant des documents bilingues, italien et allemand. Rédigé en conformité avec la loi italienne sur les marchés publics, l'accord stipulait que les contestations devaient être déposées en vertu du droit italien[29].

Le projet TELT de construction de la section transfrontalière de la ligne de train à grande vitesse Turin-Lyon peut également être considéré comme un exemple de phénomène juridique transnational. La ligne est divisée en trois tronçons (correspondant à de territoires distincts) , chacun attribué à un partenaire différent : le segment italien, de Turin à Suse, a été confié à RFI (la société publique italienne propriétaire des chemins de fer italiens) ; le segment français, reliant Lyon à Saint-Jean-de-Maurienne, a été attribué à la SNCF, son homologue français ; le tronçon transfrontalier, de Suse à Saint-Jean-de-Maurienne, a été attribué à TELT (Tunnel Euralpin Lyon Turin). TELT est le promoteur public binational en charge de réaliser et d'exploiter la section transfrontalière de la ligne ferroviaire mixte. Il s'agit d'une société de droit français détenu à 50% par l'état français et par le 50% par l'état italien (par le biais du groupe *Ferrovie dello Stato*). La procédure étant toujours en cours,

[29] La première phase (1999-2003) a consisté en un avant-projet et une évaluation ; dans la deuxième phase (2003-2010), le projet a été finalisé et l'EIE réalisée ; la deuxième partie de la phase II (2007-2013) était la partie exploratoire ; la phase de construction a commencé en 2011. Les travaux de construction et l'équipement ferroviaire du tunnel de base du Brenner devraient être achevés en 2025. Après cela, il y aura une année d'exploitation test. Le tunnel sera pleinement opérationnel en décembre 2026. Voy.: Commission de l'UE, *Étude visant à permettre et à faciliter la préparation des projets de réseau central RTE-T Annexe 4 - Études de cas*, septembre 2016, 19. Commission de l'UE, *Soutien de la politique du marché intérieur en faveur de la croissance : Étude de faisabilité concernant la mise en œuvre effective d'une procédure commune de passation de marchés transfrontaliers par des acheteurs publics de différents États membres*, décembre 2016, p. 62.

le projet TELT confirme les avantages possibles de la coopération public-privé entre acteurs transnationaux[30].

Dans les cas susmentionnés, la relation de négociation sous-jacente impliquait deux États membres de l'UE, mais pas l'UE en tant que partie contractante. Dans une autre situation concernant le gazoduc Nord Stream 2, la relation transnationale se situait entre l'Union européenne et des pays tiers, avec plusieurs questions juridiques relatives à l'application de règles européennes et non européennes en relation avec la section de l'infrastructure à construire. La complexité réside également dans le fait que la partie européenne et la partie non européenne du projet sont juridiquement liées et que la réglementation d'une partie influence l'autre : en cas d'absence d'un accord international réglementant la question, la partie non européenne du gazoduc pourrait être soumise au droit communautaire par le biais d'une extension territoriale[31].

Néanmoins, la présente analyse des "contrats publics transnationaux" se concentrera sur la coopération horizontale et laissera de côté les traités et les accords gouvernementaux, car ils soulèvent des questions différentes.

Il est possible de maintenir ces cas en dehors de la définition plus stricte des marchés publics transnationaux afin de se concentrer sur les "situations administratives transnationales" horizontales liées aux contrats qui impliquent différents systèmes juridiques et formes de coopération. Cette coopération peut impliquer différents acteurs et le choix ou

[30] Voir les informations disponibles sur https://www.telt-sas.com/en/home-en/.

[31] Précisément, la partie européenne de l'infrastructure devrait suivre les règles du troisième paquet énergie et la partie non européenne du NS2 pourrait soit être soumise à la législation européenne par extension territoriale, soit être régie par un accord UE-Russie portant sur l'ensemble du pipeline. Ce dernier devrait être conforme aux traités de l'UE, qui imposent explicitement à l'UE l'obligation de garantir la sécurité de l'approvisionnement énergétique et le fonctionnement du marché de l'énergie. Voy.: J. DUDEK et A. PIEBALGS, *Nord Stream 2 and the EU Regulatory Framework. Challenges ahead*, European University Institute, 2017, pp. 12-15, available at: https://op.europa.eu/en/publication-detail/-/publication/14831fef-f4f2-11e7-be11-01aa75ed71a1/language-en.

la combinaison de différents types de sources réglementaires (contraignantes et non contraignantes).

Il y a de nombreuses années, le contrat public était un élément mineur dans le paysage du droit administratif dans de nombreux pays européens, qui n'avaient pas un régime juridique distinct pour ces contrats. Aujourd'hui, sous l'angle de l'"État contractant" moderne, il est possible de s'attarder sur le rôle des formes coopératives de l'action administrative au lieu des actes unilatéraux, où l'influence extérieure est depuis longtemps discutée sous le titre de l'internationalisation du droit administratif ou, plus précisément, de l'européanisation du droit administratif, en particulier dans le secteur des marchés publics, comme on l'a vu. Cette évolution contribue à définir la manière dont les contrats publics sont conclus, exécutés et contestés devant les tribunaux, européens et nationaux. Par conséquent, le droit transnational des contrats publics peut être considéré comme un modèle du processus de formation et d'information de la complexité des processus administratifs multicentriques autour de l'activité transnationale.

2. EFFETS TRANSNATIONAUX DES MARCHÉS PUBLICS ET DES CONTRATS PUBLICS

Une recherche sur les contrats publics transnationaux peut utilement mettre en lumière tous les aspects qui ne sont pas entièrement couverts par les dispositions des directives européennes sur les contrats publics[32], ce qui laisse la place pour les états de

[32] DIRECTIVE 2014/23/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 sur l'attribution de contrats de concession ; DIRECTIVE 2014/24/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE ; DIRECTIVE 2014/25/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 relative à la passation de marchés par des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des services postaux et abrogeant la directive 2004/17/CE.

réglementer les effets juridiques transfrontaliers des contrats publics selon leurs préférences / choix.

Comme on le sait, une directive européenne nécessite 27 mises en œuvre différentes dans les États membres. Les différents modèles de mise en œuvre (« *copy paste* », « *gold plating* ») déterminent les différentes approches adoptées par les systèmes nationaux des contrats publics.

Les directives sur les marché publics traitent principalement de la phase de passation des marchés, il est donc encore plus difficile de choisir ou de combiner différentes règles concernant la phase d'exécution des marchés publics[33]. Dans certains systèmes juridiques, l'exécution des marchés publics est régie par le droit public, dans d'autres par le droit privé, et les juridictions compétentes pour connaître des litiges sont également différentes. Ainsi, l'analyse des effets transnationaux est encore plus complexe dans la phase d'exécution que dans la phase d'attribution des contrats publics.

Il ne fait aucun doute que les marchés publics et les contrats publics sont des secteurs où les effets transnationaux peuvent être fréquents, en particulier dans les questions transfrontalières, que ce soit dans la phase d'attribution ou d'exécution.

L'une des innovations les plus ambitieuses de la directive européenne sur les marchés publics de 2014 était la "passation conjointe de marchés", que ce soit à l'intérieur d'un pays (en surmontant le cas traditionnel de l'entité adjudicatrice qui achète pour elle-même) ou, ce qui est encore plus difficile, lorsqu'elle est transfrontalière ou transnational. Cela implique une coopération (souvent entre des organismes de droit publics ou des

[33] G. M. RACCA, « The role of third parties in the execution of public contracts », in L. FOLLIOT-LALLIOT et S. TORRICELLI (eds.), *Controle et contentieux des contrats publics - Oversight and remedies in public contracts*, Bruylant, Bruxelles, 2017, pp. 415-448; G. M. RACCA, R. CAVALLO PERIN et G. L. ALBANO, « Competition in the execution phase of public procurement », *Public Contract Law Journal*, 2011, Vol. 41, n. 1, pp. 89 -108.

centrales d'achat) entre différents pays et les effets connexes dans différents systèmes juridiques.

Pourtant, une telle coopération transnationale avait déjà été envisagée, bien qu'implicitement, dans la directive 2004/18/CE sur les marchés publics et la Commission européenne avait financé quelques projets pilotes en ce domaine.

La directive sur les marchés publics de 2014 autorise explicitement les pouvoirs adjudicateurs de différentes états membres à coopérer dans le cadre de marchés publics transfrontaliers (et transnationaux) communs et interdit aux États membres d'interdire cette possibilité. Elle stipule explicitement que « Un État membre n'interdit pas à ses pouvoirs adjudicateurs de recourir à des activités d'achat centralisées proposées par des centrales d'achat situées dans un autre État membre »[34], indiquant que des dispositions nationales en contradiction avec ces dispositions seraient en infraction avec la directive[35].

Les marchés publics transfrontaliers et transnationaux ne doivent pas être utilisés dans le but d'éviter l'application des dispositions nationales obligatoires de droit public[36]. Cette disposition semble mettre en garde contre l'utilisation intentionnellement faussée des règles nationales qui mettent en œuvre la directive sur les marchés publics dans les différents États membres, mais elle peut présenter une limite à l'application possible de lois multiples dans la passation et l'exécution de marchés publics transnationaux.

[34] Art. 39, par. 2, DIRECTIVE 2014/24/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE.

[35] G.M. RACCA et C. R. YUKINS, « *Introduction. The Promise and Perils of Innovation in Cross-Border Procurement* » op. cit., pp. 1-27.

[36] A. SANCHEZ-GRAELLS, « Is joint cross-border public procurement legally feasible or simply commercially tolerated? A critical Assessment of the BBG-SKI JCBPP Feasibility Study », *E.P.P.P.P.L.R.*, 2017, p. 16. Voir art. 39, Directive 2014/24/UE, par. 1, II partie : « Les pouvoirs adjudicateurs ne recourent pas aux moyens prévus dans le présent article dans le but de se soustraire à l'application de dispositions obligatoires de droit public conformes au droit de l'Union auxquelles ils sont soumis dans leur État membre ».

Le choix des dispositions d'un État membre n'empêche pas d'ajouter d'autres dispositions régissant la sélection et l'attribution, en fonction du système juridique dans lequel le contrat sera exécuté (par exemple, le certificat *anti-mafia* qui n'est requis que par la législation italienne) pour éviter un détournement intentionnel de la coopération pour permettre la participation d'opérateurs économiques qui, autrement, ne pourraient pas participer en vertu des dispositions nationales[37]. Les stratégies conjointes de coopération en matière de marchés publics pourraient définir des modèles comprenant des clauses conformes aux différentes dispositions nationales et assurant la transparence pour la traçabilité et l'efficacité des dépenses publiques.

Les achats publics transfrontaliers et transnationaux permettent de consolider la demande publique dans plusieurs États, ce qui permet aux organismes publics de fournir des biens et services innovants et de meilleure qualité à leurs citoyens[38]. Ce domaine est considéré par la Commission européenne comme un outil stratégique pour renforcer le marché intérieur européen, promouvoir le renforcement des capacités des pouvoirs adjudicateurs et faire progresser les objectifs environnementaux et sociaux ainsi que la croissance des PME situées au-delà des frontières et dans différents États membres[39].

[37] Si tout cela devait être prouvé, il pourrait s'agir d'un cas d'évitement intentionnel de dispositions obligatoires de droit public et par conséquence de la nullité du contrat : R. CAVALLO PERIN et G. M. RACCA, « European Joint Cross-border Procurement and Innovation », in G. M. RACCA et C. R. YUKINS (eds.), *Public contracting and innovation: lessons across borders*, Droit Administratif / Administrative Law Collection (eds.), Bruxelles, Bruxelles, 2019, pp. 93-131. V. art. 1418 du code civil italien..

[38] R. CAVALLO PERIN, G. M. RACCA, « European Joint Cross-border Procurement and Innovation », op. cit., p. 119; G.M. RACCA et S. PONZIO, « La scelta del contraente come funzione pubblica: i modelli organizzativi per l'aggregazione dei contratti pubblici », *Dir. Amm.*, XXVII, 1, 2019, pp. 33-82.

[39] Commission de l'UE, *Recommandation sur la professionnalisation des marchés publics : Construire une architecture pour la professionnalisation des marchés publics*, C(2017) 6654 final, octobre 2017 ; G. M. RACCA, « Aggregate models of public procurements and secondary considerations », in R. CARANTA et M. TRYBUS (eds.), *The Law of Green and Social Procurement in Europe*, Djøf Publishing, Copenhagen, 2010, pp. 165-178.

L'un des principaux objectifs de l'Union, comme on l'a vu, est la promotion de son développement et récemment, dans la pandémie, il a été souligné l'importance d'une coopération entre états membres dans les achats du secteur sanitaire[40].

En particulier, l'Union vise à réduire les disparités entre les niveaux de développement des différentes zones et à améliorer les zones les moins favorisées, en accordant une attention particulière aux régions transfrontalières[41]. Bien que plusieurs mécanismes efficaces de coopération transfrontalière existent déjà au niveau intergouvernemental, régional et local, la Commission européenne considère que « les programmes peuvent difficilement venir à bout des obstacles juridiques (notamment ceux qui sont liés aux services de santé, à la réglementation du travail, à la fiscalité ou au développement des entreprises) et des obstacles liés aux différences entre les cultures administratives et les cadres juridiques nationaux, puisque ceux-ci exigent de prendre des décisions au-delà des programmes et des structures de gestion de projets » [42].

Cela a été démontré dans la récente proposition de règlement sur un mécanisme de résolution des obstacles juridiques et administratifs dans un contexte transfrontalier,[43] qui a souligné, à titre d'exemple, que les directives sur les marchés publics de 2014 contiennent 19 cas où les directives européennes ne prévoient que des normes minimales (par exemple pour la fixation de délais spécifiques), laissant la possibilité aux États de prévoir des normes

[40] L. FOLLIOT LALLIOT, et C. R. YUKINS, « COVID-19: Lessons learned in public procurement. Time for a new normal? », *Concurrences*, 2020, 3, pp. 46-58

[41] Article 174 du traité sur le fonctionnement de l'Union européenne.

[42] Commission de l'UE, *Proposition de règlement du Parlement européen et du Conseil relatif à un mécanisme de résolution des obstacles juridiques et administratifs dans un contexte transfrontalier*", COM/2018/373 final - 2018/0198.

[43] Commission de l'UE, *Proposition de règlement du Parlement européen et du Conseil relatif à un mécanisme de résolution des obstacles juridiques et administratifs dans un contexte transfrontalier*", COM/2018/373 final - 2018/0198. Sur ces aspects voire le chapitre sur la coopération transnationale municipale par S VAN GARSSE et L. VAN DER AUWERMEULEN dans le présent ouvrage collectif.

différentes et créant ainsi 19 occasions potentielles où les marchés publics transfrontaliers peuvent être particulièrement difficiles, car certains États membres appliqueront des délais plus longs que d'autres. La coopération entre plusieurs pouvoirs adjudicateurs de différents États membres pour la passation de marchés conjoints doit tenir en compte de ces aspects et réguler les effets avec le choix de la législation d'un pays ou réaliser une harmonisation qui combine deux réglementations en identifiant le plus petit dénominateur commun qui satisfait les deux.

La mise en œuvre différenciée des directives européennes dans chaque État membre est un exemple de barrières juridiques (qui peuvent avoir des effets sur les services de santé, la réglementation du travail, les taxes, le développement des entreprises) qui, avec les barrières liées aux différences de cultures administratives et de cadres juridiques nationaux, devraient être abordées. Une coopération systématique entre pouvoir adjudicateurs – notamment centrales d'achats - d'états membres différentes par le biais d'un réseau de compétences peuvent ouvrir la voie au développement de systèmes juridiques capables de surmonter le nationalisme administratif, en favorisant ainsi l'harmonisation au cas par cas[44]. En effet, la coopération transfrontalière (et transnational) dans le domaine de la demande publique peut aider à surmonter les obstacles juridiques découlant des « conflits entre les dispositions des différents pays »[45], ainsi que les obstacles pratiques liés barrières linguistiques. .

Malgré un certain nombre de financements (principalement *Interreg*) et d'instruments juridiques (principalement les GECT) pour la coopération transfrontalière au

[44] R. CAVALLO PERIN et G. M. RACCA, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, in *The Changing Administrative Law* (D. Sorace et L. Ferrara eds.), Giappichelli, Springer, 2021, 5-22.

[45] Voir Directive 2014/24/EU, considérant numéro 73.

niveau intergouvernemental, régional et local, jusqu'à présent, ils n'ont pas été suffisants pour résoudre les obstacles juridiques frontaliers dans toute l'Union.

Pour réduire la complexité, la durée et les coûts de l'interaction transfrontalière, la Commission européenne a proposé un mécanisme permettant d'appliquer, pour une région transfrontalière commune (*par exemple*, la France et l'Espagne), dans un État membre donné, la loi de l'État membre voisin (*par exemple*, la loi française) si l'application de sa propre loi (*par exemple*, la loi espagnole) présente un obstacle juridique à la mise en œuvre d'un projet commun (qui peut être une infrastructure ou un service d'intérêt économique général)[46].

Bien que le champ d'application du règlement proposé ne couvre que les régions frontalières communes, sur la base des éléments recueillis dans le cadre de l'expérience des frontières terrestres, ce modèle pourrait également être appliqué à une plus grande échelle, couvrant toute coopération possible - également en termes de contrat transnational - entre les États membres situés dans différentes régions de l'UE.

L'expérimentation de la conclusion de contrats administratifs ayant des effets transnationaux, dans les projets soutenus par la commission européenne (comme par exemple le projet *Happi*[47]), a pour effet de développer une procédure de sélection des contractants (et d'exécution des marches) compatible avec différents systèmes juridiques. Cela pourrait aussi favoriser le développement de plateformes numériques (pour l'*e-procurement*) qui intègrent ces normes et réglementent toutes les étapes au fin de simplifier la coopération et les marchés conjoints, notamment dans de secteurs stratégiques comme la santé.

[46] Commission de l'UE, *Proposition de règlement du Parlement européen et du Conseil relatif à un mécanisme de résolution des obstacles juridiques et administratifs dans un contexte transfrontalier*", COM/2018/373 final - 2018/0198.

[47] Voir le par. 2.1.

2.1. Les marchés publics transnationaux et la promotion de l'intégration : expériences pertinentes.

Comme on l'a vu, les effets transnationaux des marchés publics peuvent être notés surtout du point de vue de la coopération horizontale entre les organisations professionnelles, telles que les centrales d'achat (CPB), par le biais de marchés publics transnationaux. Ces organisations pourraient véritablement promouvoir la participation de soumissionnaires de différents pays et améliorer la qualité du processus de sélection et d'exécution des marchés publics transnationaux au profit des parties prenantes finales de tout système de passation de marchés, les citoyens.

Pour permettre aux pouvoirs adjudicateurs d'obtenir le maximum d'avantages au niveau transfrontalier, la coopération transnationale pourrait nécessiter la définition d'un ensemble de clauses communes applicables dans chaque pays, par exemple sur les motifs d'exclusion obligatoires, ce qui permettrait de renforcer l'harmonisation et d'exiger des conditions plus strictes ou de trouver le dénominateur commun minimal.

Les documents de passation de marché doivent prévoir les clauses de sélection, mais aussi les obligations contractuelles en cas de marchés publics transfrontaliers/transnationaux.

Le rôle de la coopération entre les pouvoirs adjudicateurs dans la conception de marchés publics transnationaux fonctionnels devient essentiel pour définir les responsabilités de chaque partie ainsi que les dispositions nationales pertinentes sur l'exécution des contrats et les lois européennes et/ou nationales applicables[48].

[48] Le considérant 73 de la directive sur les marchés publics indique que les règles prévues par cette même directive devraient déterminer les conditions d'utilisation transfrontalière des DPC (ceci est l'abréviation de quoi ? il serait utile de le préciser la première fois que le terme est utilisé svp) et désigner la législation applicable en matière de marchés publics, y compris la législation applicable en matière de recours, dans les cas de procédures conjointes transfrontalières, en complétant les règles de conflit de lois du règlement (CE) n° 593/2008 du Parlement européen et du Conseil (Rome I). Voy.: F. S. MENNITI, N. DIMITRI, L. GITTO, F. LICHERE et G. PIGA, « Joint Procurement and

Cette législation est complétée par les règles européennes de droit international privé sur les conflits de lois (Rome I) permettant le choix d'une loi différente à appliquer dans la phase d'exécution du contrat, ce qui dépasse le champ d'application des directives européennes[49]. Néanmoins, lorsqu'ils envisagent des situations transfrontalières, les États membres doivent définir les effets des contrats transnationaux, tels que les effets de la cession de créances aux tiers. L'incertitude actuelle quant à la loi applicable crée un risque juridique plus élevé dans les contrats publics transnationaux et transfrontaliers, et récemment, le risque d'incohérence dans le choix du forum national pour le règlement des litiges a conduit à reconsidérer l'objectif de promouvoir l'intégration entre les systèmes juridiques par le biais d'une "concurrence" dans le choix de la loi nationale applicable[50].

La prise en compte de tous ces aspects pourrait permettre d'éviter la concurrence entre les différents cadres juridiques et favoriser l'intégration juridique en harmonisant les documents d'appel d'offres et les clauses contractuelles de manière à définir les "termes et

the EU Perspective », in G. PIGA et T. TATRAI (eds.), *Law and Economics of Public Procurement Reforms*, Routledge, 2018, pp. 121-122.

[49] Règlement (CE) n° 593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles (le "règlement Rome I"). Voy.: R. CAVALLO PERIN et G. M. RACCA, « Administrative Cooperation in the Public Contracts and Service Sectors for the Progress of European Integration », in F. MERLONI et A. PIOGGIA (eds.), *European Democratic Institutions and Administrations*, Torino, Giappichelli, 2018, pp. 265-296.

[50] Le règlement Rome I ne couvrant pas la question des effets de tiers de la cession de créances, la Commission européenne a publié le 12 mars 2018 une proposition de nouveau règlement en la matière qui vise à réduire l'insécurité juridique existante par l'adoption de règles de conflit de lois uniformes à l'échelle de l'UE. La proposition permettrait de résoudre la question de la cession des créances également en cas de marchés publics transfrontaliers/transnationaux : même si, conformément aux principes d'égalité de traitement et de transparence, l'adjudicataire ne peut pas - sans remettre le marché en concurrence - transférer le marché ni les droits judiciaires y afférents à un autre opérateur, les simples réorganisations internes de l'adjudicataire, telles que les prises de contrôle, les fusions et acquisitions ou l'insolvabilité, ne nécessitent pas automatiquement de rétrocéder le marché (Dir. 24/2014/UE du 26 février 2014, considérant 110 et art. 72, par.1, let. d) ii) et peuvent en réalité poser la question des effets de tiers de la cession des créances judiciaires à l'encontre du pouvoir adjudicateur. Malheureusement, la proposition est toujours en cours. Voy. : Commission de l'UE, *Proposition de règlement du Parlement européen et du Conseil sur la loi applicable aux effets aux tiers des cessions de créances* Bruxelles, 12.3.2018, COM(2018) 96 final, 2018/0044 (COD), disponible à l'adresse : https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0096&from=EN.

conditions" parallèlement à l'exécution du contrat conformément aux lois nationales, ainsi que de promouvoir l'efficacité, la transparence, la responsabilité et l'intégrité des marchés publics grâce à l'interopérabilité transfrontalière et à l'échange de données dans l'exécution des marchés publics transnationaux[51].

Une expérience pertinente pour promouvoir l'agrégation de la demande dans différents États membres et les effets transnationaux d'un marché public commun transfrontalier a été fournie par le projet HAPPI (*Healthy Ageing - Public Procurement of Innovation Project* (HAPPI Project) [52]. Avant la mise en œuvre des directives européennes sur les marchés publics de 2014, le projet HAPPI (financé par la Commission Européen en 2011), un projet très innovant dans le secteur des soins de santé, a mis en œuvre et géré un accord de consortium entre des partenaires européens, des experts en marchés publics et des institutions universitaires, avec pour objectif de passer des marchés publics conjoints de l'UE portant sur des solutions innovantes pour les personnes vieillissantes actives et en bonne santé. Le choix du droit français pour le modèle organisationnel (le *Groupement de commandes*) a permis de surmonter la première difficulté de la coopération entre cinq pays. Le droit français a également été choisi pour la procédure d'attribution d'un accord-cadre avec différentes lots (avec un seul opérateur économique et toutes le conditions définies) et composé de différents lots. Le document contractuel prévoyait que le choix de la loi régissant l'exécution du contrat était laissé aux partenaires nationaux et chacun a décidé d'appliquer son propre système juridique national. Néanmoins, les effets de l'application d'un contrat attribué en vertu du droit français en Italie, par exemple, exigeaient de traiter les effets

[51] G. M. RACCA, « The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers », in D. DRAGOS etR. CARANTA (eds.), *Outside the EU Procurement Directives - Inside the Treaty?*, *European Procurement Law Series*, Vol 4, Djøf Publishing,, Copenhagen 2012, pp. 373-395.

[52] Voir les informations détaillées à l'adresse : http://www.masterseiic.it/happi/ ; Partenariat européen pour l'innovation, projet HAPPI : Appels d'offres transnationaux conjoints de l'UE, à l'adresse : https://ec.europa.eu/eip/ageing/public-procurement-platform/aha-innovative-solutions/5-happi-project-joint-transnational-eu-tenders_en. Le projet HAPPI a été financé par la DG Entreprises et industrie de la Commission européenne dans le cadre du programme-cadre pour l'innovation et la compétitivité (CIP) - réf. Appel ENT/CIP/ll/C/N02C011.

transnationaux pour éviter le risque de conflits de lois. Différentes situations ont dû être traitées : par exemple, l'obligation pour les soumissionnaires de se conformer aux différentes dispositions non obligatoires incluses dans les transpositions nationales des directives. Les dispositions françaises auraient pu conduire au choix d'un fournisseur non conforme aux règles italiennes. L'administration italienne aurait dû devrait alors recevoir une fourniture d'un fournisseur non conforme selon la loi nationale.

On peut également remarquer que l'accord à la base de la passation de marché conjointe a pu indiquer le droit français comme droit applicable a phase d'attribution du contrat (ainsi que aux recours) et les droits nationaux à la phase d'exécution du contrat. Cela a simplifié la procédure de passation mais a également fourni un grand effort d'harmonisation des dispositions nationales relatives à l'exécution.

De ce point de vue, le projet HAPPI pourrait être un exemple de "contrat public transnational", dans lequel la coopération administrative du côté de la demande et la collaboration public-privé du côté de l'offre font respecter et harmonisent les règles précontractuelles et contractuelles applicables au cas particulier, en prévoyant dans le droit français les clauses permettant de traiter les éventuels conflits de lois dans le choix de l'adjudicataire et dans l'exécution ultérieure[53]. La directive de 2014 sur les marchés publics transnationaux rappellent le principe de l'application du règlement Rome I en matière d''exécution des marchés publics , bien que dans le cas de HAPPI il ait été décidé d'appliquer des règles territoriales pour l'exécution[54].

[53] Le projet a été référencé dans l'*Étude de faisabilité concernant la mise en œuvre effective d'une procédure commune de passation de marchés transfrontaliers par des acheteurs publics de différents États membres* préparée pour la Commission de l'UE par le BBG, Ski et la Commission de l'UE, *Making Public Procurement Work in and for Europe*, 3.10.2017, COM (2017) 572 final : « in the HAPPI project, innovative solutions for healthy ageing have been procured jointly by contracting authorities in several Member States", recalling that "more than 20 healthcare organisations from France, Italy, Luxembourg, Belgium or Netherlands purchased HAPPI solutions ».

[54] Considérant 73 de la directive sur les marchés publics 24/2014.

En ce qui concerne les marchés publics transnationaux dans l'UE, il semble également possible de faire référence à la possibilité qu'une entité publique participe – en poursuivant l'intérêt public confié et sans préjudice pour le principe de concurrence - en tant que fournisseur (opérateur économique) à un marché public d'une entité publique d'un autre pays[55]. Dans cette cas les effets transnationaux peuvent être mis en évidence dans l'attribution et l'exécution du marché. Cette possibilité a été admise par la Cour de justice de l'Union européenne qui a permis la participation d'organismes publics aux appels d'offres[56]. Par conséquent, comme l'objectif principal du droit européen de contrats public est d'ouvrir le marché autant que possible dans le respect du principe de concurrence loyale, les contrats conclus entre plusieurs administrations publiques, ainsi qu'entre différents États membres, sont également envisageables.

Par exemple, les effets transnationaux d'un accord-cadre passé en France ou en Pologne et des marchés subséquents conclus dans un hôpital italien devraient répondre à des problématiques différentes comme dans le choix du fournisseur, ce qui pourrait être fait conformément au droit national sans aucun effort d'harmonisation. Ainsi, chaque fois que cela est prévu, la possibilité d'un effet direct serait l'acceptation de l'intégralité des règles de sélection, par exemple de la Pologne, en ce qui concerne les motifs de sélection. Cette possibilité pourrait ouvrir à un autre exemple d'effets transnationaux des marchés publics.

[55] Comme reconnu au niveau national par le Conseil d'état : Conseil d'État, Assemblée, 30/12/2014, 355563, Publié au recueil Lebon,

[56] Le droit communautaire définit la notion d'opérateur économique comme suit : « toute personne physique ou morale ou entité publique, ou tout groupement de ces personnes et/ou entités, y compris toute association temporaire d'entreprises, qui offre la réalisation de travaux et/ou d'ouvrages, la fourniture de produits ou la prestation de services sur le marché ». (Art. 2, par. 1, n° 10 de la directive Eu n° 24/2014). Toutes les entités, « les sociétés, les succursales, les filiales, les associations, les sociétés coopératives, les sociétés anonymes, les universités, qu'elles soient publiques ou privées, ainsi que d'autres formes d'entités que les personnes physiques, devraient toutes relever de la notion d'opérateur économique, qu'il s'agisse ou non de personnes morales en toutes circonstances ». (Considérant 14 de la directive européenne n° 24/2014).

Il serait possible pour une entité publique de participer à un appel d'offres d'un autre État membre pour fournir un service[57]. Cette possibilité pourrait constituer un autre exemple de l'effet transnational d'un contrat public[58].

D'autres exemples d'effets transnationaux dans les marchés publics sont apparus dans d'autres projets et ont conduit à la mise en place d'une équipe d'évaluation transfrontalière commune pour la formulation de spécifications techniques communes et de critères d'attribution[59], mais sans aucun marché public transfrontalier commun. Dans certains

[57] Voir l'affaire CoNisma : CJCE, arrêt de la Cour (quatrième chambre) du 23 décembre 2009, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche, affaire C-305/08. L'affaire concernait l'exclusion d'un consortium interuniversitaire (formé par plusieurs universités et ministères italiens) de l'appel d'offres lancé par la Région des Marches pour l'attribution d'un service portant sur l'acquisition de relevés stratigraphiques de sismicité marine, l'exécution de carottages et le prélèvement d'échantillons en mer. La juridiction de renvoi a demandé à la CJCE si les entités sans but lucratif qui ne sont pas nécessairement présentes sur le marché de manière régulière (*par exemple*, les universités et les instituts de recherche), ainsi que leurs groupements (ou consortiums), peuvent participer aux marchés publics et si une interprétation de la législation nationale, qui prévoit l'exclusion de ces entités d'une telle participation, est contraire à l'UE sur les marchés publics. Sur ce point, la CJCE a confirmé que les règles européennes permettent aux organismes de droit public (y compris les consortiums entre universités), relevant de la notion d'opérateur économique énoncée dans la directive, de participer aux appels d'offres en vue d'offrir des services sur le marché. CJCE, arrêt de la Cour (deuxième chambre) du 13 janvier 2005, Commission des Communautés européennes contre Royaume d'Espagne, affaire C-84/03. Selon la Cour, il n'est pas correct d'exclure les accords conclus entre les autorités publiques et d'autres organismes publics du champ d'application des directives européennes sur les marchés publics. La CJE a déclaré que pour qu'il y ait un marché public, il suffit que " le contrat ait été conclu entre une autorité locale et une personne juridiquement distincte de celle-ci ".

[58] Voir aussi : Conseil d'État, Assemblée, 30/12/2014, 355563, Publié au recueil Lebon, Concernant la possibilité pour les groupements de communes tels que, en droit français, les établissements publics de coopération intercommunale (EPCI) de participer et de se voir attribuer d'un marché public pour répondre aux besoins d'une autre personne publique (en l'espèce, le département de la Vendée) dès lors que le principe de concurrence est sauvegardé. En particulier, selon le Conseil d'État, le prix proposé par la collectivité territoriale ou l'établissement public de coopération doit être déterminé en prenant en compte l'ensemble des coûts directs et indirects concourant à sa formation, sans que la collectivité publique bénéficie, pour le déterminer, d'un avantage résultant des ressources ou des moyens qui lui sont alloués au titre de ses missions de service public et à condition qu'elle puisse, le cas échéant, en justifier par ses documents comptables ou tout autre moyen d'information approprié.

[59] Projet "Public Administration Procurement Innovation to Reach Ultimate Sustainability" (PAPIRUS). Voy.: P. VALCÁRCEL FERNÁNDEZ, « The Relevance of Promoting Collaborative and Joint Cross Border Procurement for Buying Innovative Solutions », in G. M. RACCA et C. R. YUKINS (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, in *Droit Administratif / Administrative Law Collection*, Bruylant, Bruxelles, 2019, pp. 133-169.

cas, un consortium a été mis en place avec les fournisseurs pour définir les solutions développées lors des marchés publics pré-commerciaux[60].

2.2 Groupement européen de coopération territoriale (GECT).

La possibilité de créer un Groupement européen de coopération territoriale (GECT)[61] parmi les organismes de droit public pourrait s'adapter à la coopération administrative aux fins de la passation conjointe de marchés transfrontaliers et de contrats transnationaux. La coopération pourrait être encore plus difficile, non seulement entre les entités adjudicatrices traditionnelles, mais plutôt entre les centrales d'achat situées dans différents États membres, comme le prévoient les directives sur les marchés publics[62]. Ça pourrait être la forme juridique de l'établissement d'une centrale d'achat européenne qui attribue des accords-cadres pour les différents États membres qui y participent. En période d'urgence, une expérience telle qu'un CPB aurait été d'une grande utilité.

Les GECT favorisent la coopération d'administrations publiques situées dans différents pays afin de répondre à des "intérêts économiques communs" qui peuvent également impliquer des contrats transnationaux. Selon le droit de l'Union européenne, le

[60] Projet sur le "Distributed European Community Individual Patient Healthcare Electronic Record" (DECIPHER). Voy.: VALCÁRCEL FERNÁNDEZ, « The Relevance of Promoting Collaborative and Joint Cross Border Procurement for Buying Innovative Solutions », op. cit., pp. 133-169.

[61] Art. 39, par. 5 DIRECTIVE 2014/24/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE ; voir aussi le RÈGLEMENT (UE) No 1302/2013 DU PARLEMENT EUROPÉEN ET DU CONSEIL du 17 décembre 2013, modifiant le règlement (CE) no 1082/2006 relatif à un groupement européen de cooperation territoriale (GECT) en ce qui concerne la clarification, la simplification et l'amélioration de la constitution et du fonctionnement de groupements de ce type.

[62] R. CAVALLO PERIN et G. M. RACCA, « *European Joint Cross-border Procurement and Innovation* », op. cit., p. 110.

GECT est doté de la personnalité juridique, créé pour promouvoir la coopération transfrontalière à un niveau transnational ou interrégional. Dans ce cas, « les pouvoirs adjudicateurs participants conviennent, par une décision de l'organe compétent de l'entité conjointe, que les règles nationales en matière de passation de marchés qui s'appliquent sont celles de l'un des États membres suivants: a) soit les dispositions nationales de l'État membre dans lequel se trouve le siège social de l'entité conjointe; b) soit les dispositions nationales de l'État membre dans lequel l'entité conjointe exerce ses activités »[63].

Néanmoins, les défis territoriaux et linguistiques liés à la diffusion de ces modèles coopératifs ont conduit à la création de cadres nationaux et régionaux hétérogènes et le degré de détail des règles nationales de mise en œuvre diffère encore considérablement[64].

L'intégration administrative entre les niveaux territoriaux transnationaux a été entravée par la complexité du cadre juridique national relatif à la création et à l'adhésion au GECT, et par la tendance des États membres à conserver leur souveraineté sur les politiques territoriales, ce qui en a limité l'application[65].

Comme l'indique une analyse récente de la Commission européenne, certaines législations nationales incluent des orientations extrêmement techniques telles que des

[63] Art. 39(5), Dir. 2014/24/EU. Toutes les autorités d'approbation ont adopté le règlement initial sur le GECT (CE) 1082/2006/CE du 5 juillet 2006, mais seules 23 des 54 autorités d'approbation auront adopté le règlement sur le GECT tel que modifié par le règlement (UE) 1302/2013 d'ici décembre 2017. Depuis l'introduction du GECT en 2006, 69 GECT ont été fondés dans l'UE avec diverses autorités locales, régionales et nationales ainsi que d'autres membres. Il y a actuellement 68 GECT, car l'un d'entre eux a été fermé en 2017. Voy.: Commission de l'UE, *Évaluation de l'application du règlement sur les GECT*, Rapport final, avril 2018, 2 ; Commission de l'UE, *Coopération territoriale européenne. Construire des passerelles entre les peuples*, 2011.

[64] R. CAVALLO PERIN et G. M. RACCA, « European Joint Cross-border Procurement and Innovation », op. cit., p. 119.

[65] Parlement européen, *Groupement européen de coopération territoriale en tant qu'instrument de promotion et d'amélioration de la coopération territoriale en Europe*, juillet 2015 ; Comité des régions, *Conclusions du Comité des régions sur la consultation conjointe. La révision du règlement (CE) 1082/2006 relatif au groupement européen de coopération territoriale*, 2010.

descriptions de tâches, des procédures d'approbation et des dispositions relatives au personnel des GECT, ou des procédures d'enregistrement dans leurs États membres. D'autres dispositions se concentrent sur des critères sélectifs pour aider les GECT à s'installer sur le territoire de l'autorité d'approbation. Ainsi, bien que la modification du règlement initial sur les GECT ait considérablement facilité l'activité de ces derniers, il est encore possible de clarifier davantage ces règles et d'en assurer la sécurité juridique[66].

Concernant l'Accord de coopération sanitaire transfrontalière signé par la France et l'Espagne pour la constitution du Groupement européen de coopération territoriale relatif à l'Hôpital de la Cerdagne, il est précisé que le droit applicable également pour la passation des marchés est le droit espagnol et le droit de la communauté autonome de Catalogne ; les règles et principes du droit français sont également applicables, le cas échéant, en ce qui concerne l'objet et les entités concernées [67].

3. LES MARCHES PUBLICS CONJOINTS ENTRE POUVOIRS ADJUDICATEURS DE DIFFERENTS ÉTATS MEMBRES. LA CHAINE D'APPROVISIONNEMENT TRANSNATIONALE.

[66] Commission européenne, *Évaluation de l'application du règlement GECT*, Rapport final, avril 2018, p. 10.

[67] Selon l'art. 9 de la convention relative à la coopération sanitaire transfrontalière et la constitution du groupement européen de coopération territoriale (GECT) de l'hôpital de Cerdagne: « Le droit applicable pour l'interprétation et l'application de la présente convention est le droit de l'État et de la communauté autonome espagnols , sans préjudice de l'interprétation herméneutique du droit communautaire applicable et du droit français quand son intégration est nécessaire en raison de la matière ou des sujets affectés ». Selon l'art. 1.3 des Statuts du GECT : « La passation des marchés publics de biens et de services est assujettie aux règles du droit espagnol qui réglementent la passation des marchés des groupements européens de coopération territoriale ainsi que , le cas échéant , aux reglements du droit communautaire ».

Les marchés publics conjoints transfrontaliers et transnationaux permettent aux acheteurs publics de diversifier leurs chaînes d'approvisionnement, ce qui réduit fortement le risque que ces chaînes d'approvisionnement s'effondrent - ou, concomitamment, que les prix deviennent incontrôlables - lorsque des urgences locales ou mondiales ou des catastrophes naturelles surviennent, comme cela arrive inévitablement[68]. La propagation de la pandémie de Covid-19 a nécessité non seulement des efforts nationaux pour gérer les marchés publics, mais, comme elle exige une réponse mondiale, elle a également constitué un "test de résistance" pour les relations interétatiques et la gestion de la chaîne d'approvisionnement, notamment par les organisations internationales régionales et mondiales[69].

Pendant l'urgence liée à l'épidémie de Covid-19, la gestion de la chaîne d'approvisionnement en équipements de protection individuelle (EPI) et en médicaments par le biais de contrats publics transnationaux, grâce auxquels les produits de première nécessité étaient rendus accessibles aux citoyens afin de protéger le droit à la santé de la communauté, a échoué en raison d'interruptions continues de l'approvisionnement en lits, médicaments, dispositifs médicaux et ressources humaines, ainsi qu'en raison de la mauvaise coordination et de la concurrence entre les acheteurs publics aux niveaux national, régional et mondial.[70] Certains ont insisté sur le fait que les États devraient être peu enclins à prendre des risques lorsqu'ils font des choix susceptibles d'affecter la mortalité et la morbidité de la population;

[68] G.M. RACCA et C. R. YUKINS, « Introduction. The Promise and Perils of Innovation in Cross-Border Procurement », op. cit., p. 15.

[69] S. VAN HECKE, H. FUHR et W. WOLFS, « The politics of crisis management by regional and international organizations in fighting against a global pandemic: the member states at a crossroads », *International Review of Administrative Sciences*, January 2021.

[70] L. FOLLIOT LALLIOT, et C. R. YUKINS, « COVID-19: Lessons learned in public procurement. Time for a new normal? », *Concurrences*, 2020, 3, pp. 46-58; G. L. ALBANO, « *Homo homini lupus: on the consequences of buyers' miscoordination in emergency procurement for the COVID-19 crisis in Italy* », *Public Procurement Law Review,* 2, 2020, pp. 213-219.

au contraire, l'urgence de la pandémie en cours appelle des solutions coûteuses et directes qui ont mis au défi le niveau de responsabilité démocratique[71].

La pandémie a mis en évidence les difficultés ainsi qu'une encore faible capacité de coopération entre états européens finalisé à la passation de marchés transnationaux conjoints. La première réaction à l'urgence avait été la fermeture des états et la concurrence entre eux, puis lentement dépassée par les institutions européennes[72]

L'Union européenne, en collaboration avec les États membres, a pris des mesures pour lutter contre l'impact destructeur de la chaîne d'approvisionnement dans le secteur des soins de santé grâce à l'initiative de l'accord de passation conjointe de marchés (*Joint Procurement Agreement - JPA*)[73]. Le JPA est un mécanisme de passation de marchés en collaboration entre la Commission européenne et les États membres pour l'achat conjoint de biens et d'équipements médicaux afin de répondre aux menaces sanitaires transfrontalières dans l'espace européen. Le JPA vise à éviter la duplication des procédures d'achat au niveau national et donc la concurrence entre les acheteurs pour l'approvisionnement en fournitures dont ils peuvent tous avoir besoin, mais en quantités différentes et à des moments différents. De tels mécanismes de coordination, correctement abordés et gérés par des équipes d'experts des centrales d'achat, permettent de faire face au dérèglement de la chaîne d'approvisionnement avec un approvisionnement public coordonné et des décisions

[71] S. ROSE-ACKERMAN, « La décision publique, l'expertise et le droit III. Time and Virus », in www.chemins-publics.org, 19/07/2021.

[72] L. FOLLIOT LALLIOT, etC. R. YUKINS, « COVID-19: Lessons learned in public procurement. Time for a new normal? », *Concurrences*, 2020, 3, pp. 46-58;

[73] Le JPA a été signé par l'Italie le 16 octobre 2014. Au 30 mars 2020, il a été signé par 27 pays de l'UE et le Royaume-Uni. Voy.: R. CAVALLO PERIN et G. M. RACCA, « European Joint Cross-border Procurement and Innovation », op. cit., p. 116; T. KOTSONIS, « EU procurement legislation in the time of COVID-19: fit for purpose? », *P.P.L.R.*, 2020, 4, pp. 199-212.

spécifiques au cas par cas par les autorités publiques sur la façon de distribuer les volumes pour ceux qui en ont le plus besoin, selon les principes de solidarité et de cohésion sociale[74].

L'accord n'est pas un traité international au sens de la Convention de Vienne[75], mais précisément un acte exécutif de prévisions budgétaires[76], en vue d'appliquer le droit de l'Union européenne et les principes communs aux États membres, en réservant tout litige à la compétence exclusive de la CJCE[77]. Il convient de noter que les règles financières de l'UE, applicables au *Joint Procurement Agreement (JPA)*, ne sont pas les mêmes que celles des directives européennes sur les marchés publics mais partagent leur approche de garantie pour protéger les principes de transparence, de proportionnalité, d'égalité de traitement et de non-discrimination[78].

[74] Sur ce sujet voir: G. SDANGANELLI, « Il modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica », *DPCE online,* 2, 2020, pp. 2323-2346.

[75] La Convention de Vienne sur le droit des traités est un traité relatif au droit international applicable aux relations négociées entre États souverains. La convention a été adoptée le 22 mai 1969.

[76] L'accord est fondé sur le règlement délégué (UE) n° 1268/2012 de la Commission du 29 octobre 2012 relatif aux modalités d'application du règlement (UE, Euratom) n° 966/2012 du Parlement européen et du Conseil relatif aux règles financières applicables au budget général de l'Union (désormais règlement (UE, Euratom) 2018/1046). Le JPA est un accord entre la Commission et les États membres participants qui met en œuvre une disposition d'un acte législatif, à savoir l'article 5 de la décision 1082/2013/UE.

[77] Les articles 272 et 273 du traité sur le fonctionnement de l'Union européenne (TFUE), qui prévoient explicitement la possibilité d'élire la juridiction de la Cour de justice pour les accords auxquels l'Union est partie ainsi que pour les litiges entre États membres concernant la matière des traités. Les principes du libre consentement et de la règle *pacta sunt servanda*, inclus dans le droit international coutumier, sont des sources du droit de l'Union et s'appliquent également dans l'ordre juridique européen. Ces principes incluent la liberté pour les parties à un accord de choisir une loi applicable et, comme le précise également la Convention de Vienne (art. 3), incluent la liberté pour les parties de conclure un accord non régi par le droit international et donc exclu du champ d'application de la Convention. Les Etats membres de l'Union ont donc la possibilité de choisir, dans le cadre d'un accord défini conventionnellement, la discipline matérielle et procédurale applicable, y compris la définition des règles de compétence. Sur ce point, voir : Commission de l'UE, *Considérations sur la base juridique et la nature juridique de l'accord de passation conjointe de marchés*, 10 avril 2014, disponible à l'adresse suivante :
https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_legal_nature_en.pdf.

[78] Article 160, règlement (UE, Euratom) 2018/1046. Il est exigé que les règles et principes applicables aux marchés publics passés par les institutions de l'Union, comme la Commission européenne dans le cas des

Pendant l'épidémie de coronavirus, la Commission européenne, au nom des États, a lancé plusieurs appels d'offres pour l'achat d'équipements et de fournitures médicales, même si la situation réelle concernant le calendrier, la quantité des achats et les résultats est encore incertaine[79]. Bien que le mécanisme du JPA ait été adopté par les 27 États membres, ce modèle et, en général, les marchés publics d'urgence ont fait l'objet d'un examen approfondi pendant la crise de Covid-19. Dans cette optique, la Commission européenne a récemment proposé de modifier le JPA afin de garantir une meilleure préparation et une meilleure réponse aux crises futures. Cette proposition vise à introduire une "clause d'exclusivité" afin de réduire le risque de concurrence interne entre l'UE et les États membres pour l'achat d'un même médicament ou vaccin par le biais de procédures ou de négociations parallèles. Il s'agit d'un changement important par rapport au JPA actuel, qui n'empêche pas les pays participants de négocier bilatéralement en parallèle à l'initiative conjointe et qui permet à plusieurs pays de former des alliances plaçant les intérêts nationaux avant l'intérêt commun de l'UE dans

marchés publics le JPA soient conformes aux règles énoncées dans la directive 2014/23/UE (considérant 96 ; article 161).

[79] Les procédures ont été menées conformément aux conditions strictes énoncées dans le règlement (UE, Euratom) 2018/1046. Le premier appel d'offres conjoint pour les EPI dans le cadre de le JPA a échoué. Le 12 mars 2020, un avis sur TED a été publié indiquant que le lot n° 1 (protection oculaire) et le lot n° 2 (protection respiratoire) n'ont pas été attribués car « no tenders or requests to participate were received or all were rejected ». Six pays ont apparemment choisi de ne pas participer : Bulgarie, Danemark, France, Lituanie et Portugal. Finlande. Le 17 mars 2020, la Commission a lancé un appel d'offres pour des catégories supplémentaires d'équipements de protection individuelle pour la protection oculaire et respiratoire, auquel 25 États membres ont participé. Les producteurs ont fait des offres couvrantes et même dépassant les quantités demandées par les États membres qui participent à l'appel d'offres. Le 17 mars 2020, la Commission a lancé un appel d'offres pour les ventilateurs et les équipements respiratoires auquel 25 États membres ont participé, tandis que le 18 mars, la Commission a lancé un nouveau marché public pour les kits de test des équipements de laboratoire auquel 19 États membres ont participé. Le 8 avril 2020, la Commission, DG Santé et sécurité alimentaire, a annoncé son intention d'attribuer un marché pour la fourniture d'équipements de laboratoire pour le diagnostic contenant 6 lots sur des écouvillons de prélèvement d'échantillons, des boîtes de transport d'échantillons, des kits de détection/extraction, des réactifs, des machines de laboratoire et d'autres équipements. Voir les informations et données disponibles sur https://ted.europa.eu/udl?uri=TED:NOTICE:119976-2020:HTML:IT:HTML&tabId=1&tabLang=en et https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523. Voy : S. SMITH, " COVID-19 and the EU joint procurement agreement on medical countermeasures ", *P.P.L.R.,* 4, 2020, pp. 124-128.

l'achat d'EPI et de médicaments. Quoi qu'il en soit, cette clause pourrait également être contre-productive, car elle pourrait décourager la participation de certains pays à l'APP, en particulier les pays ayant un pouvoir de levier élevé et la capacité d'obtenir des prix et des conditions avantageux sur le marché[80].

Le renforcement de la stratégie européenne en matière de vaccins Covid-19 a conduit à la conclusion d'accords d'achat anticipé (APA) entre la Commission européenne, au nom des États membres, et des entreprises de fabrication de vaccins de l'UE et de pays tiers qui, en tant qu'exemple de contrats publics transnationaux, devront permettre la réalisation effective des intérêts publics et privés des deux parties[81]. La question des effets de ces contrats dans les systèmes juridiques nationaux est encore en cours d'évaluation, notamment en ce qui concerne les limites de la possibilité de négociations parallèles en cas de pénurie de fournitures.

L'expérience transatlantique de Covid-19 a également mis en évidence les aspects critiques de la gestion de la chaîne d'approvisionnement mondiale. Aux États-Unis, les différents États ont réagi très différemment à la pandémie, en fonction notamment de leurs structures organisationnelles et de leurs préparatifs à la catastrophe. Pour aider les États à mieux se préparer, un "modèle de maturité" a été élaboré pour évaluer les systèmes d'approvisionnement des États, en prévision de futures catastrophes. Les résultats d'une étude récente suggèrent qu'une gouvernance et une coopération centralisées et accrues entre les

[80] Commission européenne, *Proposition de règlement du Parlement européen et du Conseil relatif aux menaces transfrontalières graves pour la santé et abrogeant la décision n° 1082/2013/UE*, Bruxelles, 11 novembre 2020 COM(2020) 727 final 2020/0322 (COD).

[81] La "Stratégie européenne en matière de vaccins" a été lancée par la Commission européenne le 17 juin 2020. Voir : https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1103. La Commission de l'UE supervise la gestion d'une procédure centrale unique de passation de marché au nom des États membres pour la signature d'accords préalables d'achat (Advance Purchase Agreements – APAs) avec les fabricants de vaccins retenus. Il est prévu que les APAs prévoient que l'accès aux doses de vaccin sera attribué aux États membres participants en fonction de la répartition de la population.

États fédéraux des États-Unis en matière d'achats pourraient permettre une meilleure réponse lors de futures perturbations de la chaîne d'approvisionnement. Les achats coopératifs, également dans les expériences passées, ont permis une coordination, une meilleure exploitation du volume du pouvoir d'achat de l'État et une application plus efficace de l'expertise en matière de passation de marchés dans une situation de marché difficile[82].

La pandémie de Covid-19 a montré comment les chaînes d'approvisionnement à grande échelle et multi-structurées, créées par des organisations privées, acquièrent de plus en plus un rôle transnational, en particulier lorsqu'elles visent à produire des biens et des services d'intérêt "public" devant être achetés conjointement par des acheteurs nationaux et régionaux, par exemple la chaîne d'approvisionnement en EPI pour les soins de santé pendant la pandémie, ou encore dans le domaine des services TIC pour la sphère publique[83]. Les

[82] National Associations of State Procurement Officials (NASPO), *Assessing State PPE Procurement During COVID-19: A RESEARCH REPORT*, mars 2021, disponible sur : https://www.naspo.org/wp-content/uploads/2021/03/2021_COVIDReport_FINAL.pdf. Pour plus de détails sur le débat, voir : https://publicprocurementinternational.com/2021/04/06/naspo-study-of-state-procurement-in-the-pandemic-key-lessons-learned/. L'étude s'est appuyée sur plus de 100 heures d'entretiens menés par l'équipe de recherche académique parmi lesquels : Les professeurs Robert Handfield (North Carolina State University), Zhaohui Wu (Oregon State University), Andrea Patrucco (Florida International University), Christopher Yukins (George Washington University) et Thomas Kull (Arizona State University), le personnel chargé des achats, les fournisseurs et les représentants des États. Pour une analyse complète du modèle NASPO, voir J.B. KAUFMAN, « Cooperative Purchasing: A US Perspective », in G.M. Racca et C.R. Yukins (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, in Droit Administratif/Administrative Law Collection (eds), Bruxelles, Bruylant, 2019, pp. 65–91.

[83] Aux États-Unis, les plateformes privées de commerce électronique comme Amazon.com ou Walmart.com entrent sur le marché des marchés publics de moindre valeur grâce à l'efficacité qu'elles assurent, même en période d'urgence. Voir : Précisément, le Congrès américain a inclus des dispositions pour permettre l'expérimentation d'une méthode d'achat innovante : l'"amendement Amazon" ou "Amazon.gov" ; la Section 846 de la « National Defense Authorization Act » (2018 NDAA) a établi des règles pour l'utilisation des portails électroniques pour l'achat d'articles commerciaux sur étagère (COTS) qui nécessitent un niveau avancé de personnalisation non disponible par le biais de solutions standard. Ils sont cependant évidents que les criticités liées à un tel choix. À cet égard, voir P. MCKEEN, « The Pursuit of Streamlined Purchasing: Commercial Items, E-Portals, and Amazon », in G. M. RACCA et C. R. YUKINS (eds.), *Joint Public Procurement and Innovation. Lessons Across Borders, Brussels*, 2019, pp. 373-386.

chaînes d'approvisionnement transnationales et transatlantiques pourraient faciliter les urgences futures et réduire les effets indésirables de crises sanitaires et/ou environnementales futures et plus graves.

Ces chaînes de nature privée rassemblent souvent de multiples fournisseurs dans des réseaux décentralisés administrés par la gouvernance contractuelle, qui constituent un paysage réglementaire qui ressemble presque à un ordre juridique[84]. Sur le plan fonctionnel, la gouvernance privée dans les régimes de chaînes d'approvisionnement "combine des éléments de pouvoir législatif, administratif et juridictionnel", de sorte que la qualification de "privée" devient « trop réducteur, non seulement parce que les chaînes de valeur ont des répercussions dans la vie réelle ("publique"), mais aussi parce que le contrat sert de forum à des valeurs et des discours concurrents allant au-delà de l'efficacité (considérations sociales, environnementales et d'intégrité)»[85].

En effet, comme l'une des critiques de l'approche juridique transnationale est qu'elle qui a accéléré l'effondrement de la dichotomie privé/public en faveur du premier, les contrats publics transnationaux et la sphère publique pourraient retrouver leur rôle de régulation de la chaîne d'approvisionnement privée qui, autrement, se transformerait en "pratique d'auto-validation" et créerait sa propre structure et ses propres sources de légitimité[86].

L'expérience de l'urgence a révélé la nécessité de développer la coopération européenne en matière de marchés publics transfrontaliers et de définir des procédures de

[84] G. GEREFFI, *Global value Chains and Development. Redefining the Contours of 21st Century Capitalism*, Cambridge University Press, 2018.

[85] K. HENDRIK ELLER, « Transnational Contract Law », op. cit., p. 522; J.M. SMITH, « Private Law in a post-national Society. From ex post to ex ante governance », in M. MADURO, K. TUORI et S SANKARI (eds.), *Transnational Law, Rethinking European Law and Legal Thinking*, Cambridge University Press, 2014, pp. 307-320.

[86] K. HENDRIK ELLER, « Transnational Contract Law », op. cit., 522.

sélection communes ou sur la base du règlement financier de la Commission pour des contrats passés par les institutions européennes. Toutefois, le moyen le plus efficace serait peut-être d'envisager une coopération entre les centrales d'achat de différentes états membres, qui mettraient en place une plateforme numérique commune avec des règles de sélection compatibles et transparentes et des règles simplifiées à mettre en œuvre dans les différents États membres (dans la phase d'exécution du contrat). Une telle plateforme numérique permettrait de faire face aux urgences et de faire participer de nombreuses entreprises européennes aux différents lots de fournitures de l'accord-cadre, dont les qualifications pourraient déjà être vérifiées à l'avance, évitant ainsi de fraudes de « fournisseurs improvisés » lorsqu'une urgence se présente.

4. CONCLUSIONS.

Bien que différentes catégories et types de contrats publics transnationaux puissent être reconnus, la difficulté d'enregistrer et d'acquérir systématiquement des effets transnationaux nouveaux et diversifiés peut représenter une limite à la possibilité même de dresser un inventaire exhaustif.

Elle est également utile pour souligner l'importance de la coopération horizontale entre les entités adjudicatrices de différents pays.

Les effets transnationaux peuvent être considérés entre les pays européens et non européens, comme cela sera bientôt défini dans les relations avec, par exemple, le Royaume-Uni post-Brexit.

Cependant, il semble très intéressant et d'actualité d'examiner les problèmes liés aux marchés publics entre pays européens en relation avec les effets transnationaux qu'ils peuvent avoir. En fait, on constate que la présence de directives européennes n'a pas résolu les problèmes car ce n'est que récemment que l'Union européenne a commencé à considérer et à encourager les achats groupés transnationaux comme une coopération publique horizontale

entre pouvoirs adjudicateurs, indépendamment des traités internationaux et des accords intergouvernementaux.

La perspective des effets transnationaux des contrats publics pour mettre en évidence les défis de l'intégration européen.

Le principe d'intégration de l'UE, tel qu'évoluant après l'urgence, pourrait devenir un levier pour augmenter les marchés publics et les contrats transnationaux conjoints pour l'Europe, passés par les institutions de l'UE, ou par un réseau d'entités adjudicatrices, principalement des CPB, qui pourraient connaître le marché et coordonner efficacement les activités d'achat, poursuivant également des objectifs communs de politique industrielle, au profit des citoyens.

Abstract. *The complex regulatory perspective of transnational public contracts is discussed in this article. Drafting, negotiation and execution within European Member States as well as worldwide. The perspectives and criticalities of transnational public contracts will be highlighted by referring to the current state of the legal framework or to case studies. The article aims at highlighting how the transnational effects of public contracts, also after the pandemic, can be a further driver to address the challenges and opportunities of European integration.*

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COMMON PRINCIPLES OF PUBLIC CONTRACTS IN THE UNITED STATES OF AMERICA

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1. INTRODUCTION

This essay is not an essay on comparative law. It is instead almost entirely devoted to the description of U.S. federal public procurement law, specifically its sources of authority and principles, to a foreign audience. And yet given that it written for inclusion in a volume mainly about various European nations' sources of authority and principles of procurement law, it seemed necessary to say a few words at the outset about how the U.S. system differs from the systems against which it will be juxtaposed.

1.1. Three Distinctions from European Public Procurement

The U.S. federal procurement regime, unlike the European Union (EU) system, is a domestic system. Its remit and objectives vary accordingly. Whereas international or supranational systems such as the EU's or the World Trade Organization's Agreement on Government Procurement (WTO GPA) are mainly devoted to ensuring access and equal treatment in procurement markets, domestic systems' goals are broader – operational as well as ordering.[3] As a WTO GPA signatory, the U.S. government must comply with the strictures of that agreement. But its procurement rules are far more detailed and cover far more subject matter than do the EU procurement directives or the WTO GPA.[4] Federal procurement's regulatory regime is in short a common code, not merely a framework.[5]

[3] P. TREPTE, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford, Oxford University Press, 2004, p. 317.

[4] See S. ARROWSMITH, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard, Int'l Comp. L.Q.*, 2004, pp. 17, 19 (contrasting international procurement regimes such the WTO GPA, which only "prohibit discrimination and establish a procedural framework," from domestic procurement system which are far more detailed).

[5] Compare S. ARROWSMITH, *The Past and Future EC Procurement Law: From Framework to Common Code?*, 35 *Pub. Cont. L.J.*, 2006, p. 337.

Another important distinction with the U.S. federal procurement system is that it covers only the federal government's internal purchases.[6] In this way, it serves much like the EU's Financial Regulations. Unlike the EU Treaties and the procurement directives, the federal statutes, FAR, and case law do not control how sub-central government procurements are conducted in the United States.[7] This essay thus considers only federal procurement, even though an estimated two-thirds of America's procurement occurs at the state and local level.[8] Each state and perhaps many municipalities too would require essays of their own for similar treatment.

Federal procurement law also differs from most systems in that it covers contract formation and administration within one seamless regulatory regime.[9] Because the EU procurement directives cover only the former, this essay is also limited to that stage. Yet from an U.S. perspective, it seems strange not also to include contract administration within

[6] D.I. GORDON AND G.M. RACCA, *Integrity Challenges in the EU and U.S. Procurement Systems*, in *Integrity and Efficiency in Sustainable Public Contracts* (G.M. Racca and C.R. Yukins eds.), Brussels, Bruylant, 2014, pp. 117–18 (observing that because the U.S. procurement system applies to only one country, it avoids the horizonal and vertical problems that beset public procurement regulation in the EU).

[7] M. STEINICKE, *Public Procurement and the Negotiated Procedure: A Lesson to Learn from US Law?*, *Euro. Comp. L. Rev.*, 2001, pp. 331, 334; W.A. WITTIG, *A Brief Survey of U.S. Procurement Reform in the EU Context*, *Pub. Proc. L. Rev*., 2002, pp. NA33, NA33–34.

[8] K. DAWAR, study prepared at the request of the European Parliament, Directorate-General for External Policies, Policy Department, *Openness of Public Procurement Markets in Key Third Countries*, 2017, p. 10.

[9] J.I. SCHWARTZ, *United States of America*, in *Droit Comparé des Contrats Publics* (R. Noguellou and U. Stelkens eds.) Brussels, Bruylant, 2010, pp. 613, 617–19 (describing the "unusual breadth" of U.S. procurement law's coverage).

the same system because the two are complementary, and one informs the other:[10] the clauses entered into during formation determine the terms of the contract and remedies that are available during the administration phase.[11]

1.2. First Principles and the Common Law Tradition

The American founders adopted British common law, not only its precedents but also its mode of discovering or finding the law when questions arise. Especially in the nineteenth century, federal judges let parties create their own "spontaneous order" and generally recognized only the sort of customary law rooted in longstanding commercial practice.[12] In this sense, federal law was bottom-up or decentralized.[13] Absent precedent or a statute on point, judges made commercial practices the law of the land.[14] Finding common law in this way was consistent with contemporary English jurists, most famously with Lord Mansfield.[15]

[10] See FAR Subparts B–F, which govern the award process, and FAR Subpart G, which covers contract administration.

[11] *Ibid.*, Subpart H.

[12] R. BRIDWELL AND R.U. WHITTEN, *The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism*, Lexington, Massachusetts, Lexington Books, 1977, pp. xiv., 4, 22, 66, 90, 114.

[13] R.D. COOTER, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, U. Penn. L. Rev.*, 1996, pp., 1643, 1645 (distinguishing top-down and bottom-up lawmaking).

[14] L. LESSIG, *Erie Effects of Volume 110: An Essay on Context in Interpretative Theory*, *Harv. L. Rev.*, 1997, pp. 1785, 1788–95 (arguing that in *Swift v. Tyson*, 41 U.S. 1 (1842) the Supreme Court applied the "law merchant", or the customary law "constituted by the ordinary understandings of the parties to a commercial transaction" and "ratified by long practice" and observing that the Uniform Commercial Code adopts the customs of industry in a similar fashion).

[15] COOTER, *Decentralized Law for a Complex Economy*, *op. cit.*, pp. 1748–49 (describing how Mansfield "scrutinized business transactions and tried to identify and enforce the best practice" and how the study of his "elegant solutions" soon became a mainstay of Anglo-American legal pedagogy).

Hence, "Judges must find common law,"[16] historically doing so by looking to business practices already in effect.[17]

The common law's spontaneous order contrasted sharply with the centralized approach to lawmaking that came to the fore under Napoleon.[18] His code attempted to uproot medieval practices and replace them with a more rational system, in which laws could be derived from first principles in a Cartesian fashion.[19] The Napoleonic influence is palpable in continental legal systems down to the present. In fact, this project's effort to link public contracts regulations back to a few common principles can perhaps be traced to an intellectual heritage that seeks to rationalize and systematize the law in this manner. This tendency is at odds with the American legal tradition, which inclines to be more ad hoc – to draw rules up from the marketplace, rather than down from higher principles.

1.3. The Failure to Locate Procurement's Own Set of Values

Since the United States' decentralized legal system is generally characterized by spontaneous order, it is unsurprising that little thought has been devoted to identifying the principles that underlie its federal procurement system. In fact, this observation extends well

[16] J. DAVIES, *Le Primer Report des Cases et Matters en Ley Resolues Et Adiudges en les Courts del Roy en Ireland* (1615), reprinted in David Wooton (ed.), *Divine Right and Democracy: An Anthology of Political Writings in Stuart England*, Indianapolis, Hackett, 1986, pp. 131–42 (describing the medieval tradition of finding the common law).

[17] American jurists' reliance on the "law merchant" corresponds with legal positivism, arguably the dominant legal of theory from the late nineteenth century down to the present. A.J. SEBOK, *Legal Positivism in American Jurisprudence*, Cambridge, Cambridge University Press, 1998, pp. 2–3, 32, 41–47, 114. Positivism is characterized by two theses: that what counts as law is a matter of social fact; and that what the law is and ought to be are separate questions. BRIAN LEITER, "Hard Positivism, and Conceptual Analysis", *Legal Theory*, 1998, pp. 533, 534–35.

[18] COOTER, *Decentralized Law for a Complex Economy*, *op. cit.*, pp. 1650–51.

[19] *Ibid.*, citing P. DAWSON, *Provincial Magistrates and Revolutionary Politics in France, 1789–1795*, Cambridge, Harvard University Press, 1972, pp. 241–74.

beyond U.S. procurement law.[20] Remarking on this gap in the literature, an article written in 1962 said, "The federal government has been making contracts for as long as it has existed, yet little attempt has been made to rationalize this phase of governmental activity in its relation to the functions of government and to the person and firms with whom contracts are made."[21] Four decades later, Schooner observed that "no biblical stone tablets proclaim the desiderata of the Federal procurement system" and that "the literature is strangely silent" as to the system's fundamental values.[22] During a symposium held in 2001 at the George Washington University on drafting procurement laws for developing nations, one U.S. participant remarked on the value of this conversation to U.S. practitioners:

> "Maybe our system depends more than we realise on subtle traditions and tacit assumptions. We take these so much for granted, they almost defy expression. Having to explain our system to outsiders forces us back to the basics, so it's an educational process for us, too."[23]

[20] A.C.L. DAVIES, *The Public Law of Contracts*, Oxford, Oxford University Press, 2008, pp. 124–25 (observing that although procurement is flourishing both in practice in and the academy and clearly "has its own set of values," "there has been no particular attempt to locate them within a public law context").

[21] J.M. WHELAN AND EDWIN C. PEARSON, *Underlying Values in Government Contracts*, *J. Pub. L.*, 1962, p. 298.

[22] S.L. SCHOONER, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, *Am. U. L. Rev.*, 2001, pp. 629, 675. Failure to examine first principles is not the only problem. Given the importance of federal procurement to the U.S. economy, scholarly work in general is in short supply. See R.C. MARSHALL, M.J. Meurer, and J.F. RICHARD, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, *Hofstra L. Rev.*, 1991, pp. 2, 3 (observing that public contract law has received little attention from law and economic scholars).

[23] S.L. SCHOONER, *Introduction: The Symposium 'Drafting a Government Procurement Law': Lessons Learned from the United States*, *Pub. Proc. L. Rev.*, 2002, pp. 99, 102 (quoting attorney Joseph Petrillo).

In the intervening years, the paucity of scholarly treatment has to some extent been remedied with several essays and articles and one book summarizing the federal system, mostly for foreign audiences.[24] Yet these efforts have mostly described the system's scope, the legal rules, and sources of authority. Efforts to identify, define, and explicate the desiderata have been few.[25] And, as we will see, scholars have yet to reach a general

[24] SCHWARTZ, *United States of America*, *op. cit.*; DAVIES, *The Public Law of Contracts*, *op. cit.*, pp. 58–62; K.D. CARAVELLA ROBINSON, *U.S. Federal Government Procurement: Organizational Structure, Process, and Current Issues*, in *International Handbook of Public Procurement* (K.V. Thai ed.), Boca Raton, CRC Press, 2009, pp. 291–05; R.B. CLIFFORD, Jr., A.E. SHIPLEY, and S. LOCKE, *United States*, in *The Government Procurement Review* (J. Davey and J. Falle eds.), London, Law Business Research, 2013, pp. 243–69; L.K. MILLER, *United States*, in *International Public Procurement* (D. Campbell ed), Eagan, Minnesota, Thomson Reuters, 2015, Chapter 45, pp. 1–44; E.L. TOOMEY, *Federal Government Contracts: Overview* in *Practical Law*, Thomson Reuters, 2017; C.R. YUKINS, *The U.S. Federal Procurement System: An Introduction*, *Upphandlingsrättslig Tidskrift*, 2017, pp. 69–93; C.R. YUKINS, *US Government Contracting in the Context of Global Public Procurement*, in *The Internationalization of Government Procurement Regulation* (A. Georgopoulos, B. Hoekman, and P.C. Mavroidis), Oxford, Oxford University Press, 2017, pp. 264–87; P.T. MCKEEN, *États Unis/United States: Discretion, Oversight, and the Culture of Compliance in the US*, in *Contrôle et Contentieux de Contrats Public*/*Oversight and Challenges of Public Contracts* (L. Folliot-Lalliot and S. Torricelli eds.), Brussels, Bruylant, 2018. Several other sources have also provided valuable summaries, but these are, to varying degrees, dated. See WHELAN AND PEARSON, *Underlying Values inf Government Contracts*, *op. cit.*; R.P. SHEALEY, *The Law of Government Contracts*, New York, Ronald Press, 1919; C.E. MACK, *Federal Procurement: A Manual for the Information of Federal Purchasing Officers*, Washington, U.S. Government Printing Office, 1943; F.W. LAURENT, *Legal Aspects of Defense Procurement*, Madison, University of Wisconsin Press, 1962; M.J. GOLUB AND S.L. FENSKE, *U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors*, *Geo. Wash. J. Int'l L. and Econ.*, 1987, pp. 567–97; J.M. WHELAN, "An Introduction to the United States Federal Government System of Contracting," *Pub. Proc. L. Rev.*, 1992, pp. 207–28. For the authoritative history of U.S. federal procurement, see J.F. NAGLE, *History of Government Contracting*, 2nd edn, Washington, George Washington University Press, 1999. For a valuable if idiosyncratic history of the seminal cases that created the modern U.S. procurement system, see C.D. DEES, *The Development of Modern Government Contract Law: A Personal Perspective*, Philadelphia, Wolters Kluwer, 2016.

[25] Some of the most interesting works on the fundamental values were written in the aughts in response to the 1990s' reforms. See SCHOONER, *Fear of Oversight*, *op. cit.*; T.F. BURKE and C.S. DEES, *The Impact of Multiple-Award Contracts on the Underlying Values of the Federal Procurement System*, *Gov't Contractor*, 2002, 431; S.L. SCHOONER, *Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice*, in *Public Procurement*, Vol. 1 (S. Arrowsmith and K. Hartley), Cheltenham, Elgar, 2002, pp. 137–69; S.L. SCHOONER, *Desiderata: Objectives for a System of Government Contract law*, *Pub. Proc. L. Rev.*, 2002, pp. 103, 104–09; L.A. PERLMAN, *Guarding the Government's Coffers: The Need for Competition Requirements to Safeguard Federal Procurement*, *Fordham L. Rev.*, 2008, pp. 3187–43; J.I. SCHWARTZ, *Perspectives on Public Procurement Reform in the United States*, in *Le Contrôle des Marches Publics* (G. Marcou, L. Folliot-Lalliot, D.I. Gordon, S.L. Schooner, and C. Yukins eds.), Paris, L'Institut de Recherche Juridique de la Sorbonne, 2009, pp. 99–124; S.L. SCHOONER, D.I. GORDON AND J.L. WHERRY, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (May 8, 2008), https://ssrn.com/abstract=1133234.

consensus about what these principles are.[26] Though we believe that such principles exist, as the passage quoted above suggests, they are taken for granted and have not been written down – much less subjected to thorough scholarly analysis. This is consistent with our more ad hoc common law tradition, but still leaves an unfortunate gap in our understanding about the reasons and purposes that underlie U.S. federal procurement's rules.

This essay attempts to address this gap. Section II. reviews the sources of law that comprise the U.S. federal procurement system. Section III. then describes the common principles that can be derived from these sources, and argues that, although they are not immutable, some enduring principles, which have stood the test of time, can be divined. This section also attempts to provide enough context so that the meaning and purpose of these principles can be appreciated.[27] And last, Section IV. will conclude with a few thoughts about the challenges with attempts to compare the seemingly common principles of U.S. and EU public contracts.

2. THE SOURCES OF U.S. FEDERAL PROCUREMENT LAW

Determining what, exactly, comprises U.S. government contracts law is a notoriously hard question.[28] Writing in 1993, Whelan observed that this system is "extraordinarily spacious," there is no "overall index", and "learning to make one's way about in it is . . .

[26] See below Section III.E.

[27] TREPTE, *Regulating Procurement*, *op. cit.*, pp., 3, 7 (arguing that the principles that animate procurement systems – e.g., efficiency, transparency, equal treatment, nondiscrimination – "merely describe the mechanisms used to achieve certain results but do not, in themselves, provide an adequate explanation of the precise results sought to be achieved in any given system of regulation" and that little work has been done examining objectives of such rules).

[28] J.W. WHELAN, *Understanding Federal Government Contracts*, Chicago, Commerce Clearing House, 1993, p. 60 (observing that "the issue of what *is* the federal [law] to be applied to federal contracts is not free of difficulty").

difficult."[29] Two decades later, Schwartz said that summarizing this unwieldy system presents a "profound challenge".[30] Its size, however, is not the only problem with describing the system's sources of legal authority.

U.S. federal contracts lie at the intersection of public and private law.[31] When operating in the market, the government has a "dual personality," as sovereign and mere buyer.[32] Confusingly, the Supreme Court has sometimes held that government contracts are governed by the very same law as private contracts.[33] But federal contracts occupy a middle ground between "congruence" with private commercial law and "exceptionalism," under which special rules apply to the sovereign.[34] The public/private dichotomy fails to capture the complexity of this hybrid legal system.[35]

[29] *Ibid.*, p. 16. See also MARSHALL, MEURER, AND RICHARD, *The Private Attorney General Meets Public Contract Law*, *op. cit*, p. 34 ("The procurement process is hedged by a dense thicket of statutes and regulations.").

[30] SCHWARTZ, *United States of America*, *op. cit.*, p. 613; *ibid.*, p. 614 (observing that because the system has evolved over two centuries, "any relatively brief account . . . inevitably will be significantly incomplete and risks misleading any relative newcomer to the study of the US system").

[31] J.I. SCHWARTZ, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, *Geo. Wash. L. Rev.*, 1996, pp. 633, 638.

[32] G.A. CUNEO, *Government Contracts Handbook*, Chicago, Machinery and Allied Products Institute, 1962, p. 252.

[33] For example, see *Lynch v. United States*, 292 U.S. 571, 579 (1832) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); *Union Pac. R.R. v. United States*, 99 U.S. 700, 719 (1878) ("The United States is as much bound by their contracts as are individuals.").

[34] SCHWARTZ, *Liability for Sovereign Acts*, *op. cit.*, pp. 638, 697–99; Schooner, "Commercial Purchasing", *op. cit.*, p. 158 (describing the "fundamental tension" between congruence and exceptionalism in U.S. federal procurement).

[35] C. TIEFER AND W.A. SHOOK, *Government Contract Law in the Twenty-First Century*, Durham, Carolina Academic Press, 2012, p. 3 (observing that government contracts law lies at the complex boundary between public and private law).

In this hybrid system, four sources of law govern. When a constitutional provision applies, that is the highest level of authority and of course trumps all else.[36] Next in line are the statutes, which as we will see are the foundation of most government contracts law yet are not comprehensive.[37] The Federal Acquisition Regulation (FAR) and its supplements are where most details are found, and these have the effect of law and stand behind only the Constitution and statutes in their authority.[38] Fourth is the "federal common law" of government contracts.[39]

An additional challenge with summarizing the sources of federal procurement law is that the relative weight of the various sources is often unclear. For example, statutes are numerous and their coverage is not comprehensive, whereas the FAR covers all federal purchases. Further, there is a tension between the system's extensive codification and its persistent reliance on the case law. Such tensions are explored in this section as we discuss these four sources of legal authority.

2.1. The U.S. Constitution

The power to contract goes unmentioned in the U.S. Constitution.[40] Yet case law established from early on that this capacity to enter into contracts is an inherent sovereign authority.[41] Further, a "small but significant portion" of federal procurement law originates

[36] SCHWARTZ, *United States of America*, *op. cit.*, p. 626.

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*, pp. 627–28.

[40] SCHWARTZ, *United States of America*, *op. cit.*, p. 623.

[41] *United States v. Maurice*, 26 F. Cas. 1211 (No. 15747) (C.C.D. Va. 1823); *United States v. Tingey*, 30 U.S. 115 (1831); *United States v. Corliss Steam-Engine Company*, 91 U.S. 321 (1875). See also CUNEO, *Government*

in the Constitution.[42] These provisions include the Due Process Clause of the Fifth Amendment,[43] the Equal Protection Clause also under the Fifth Amendment,[44] and the free speech guarantee under the First Amendment.[45] Because Schwartz has already written a good summary, we will not attempt another review here.[46]

Apart from these specific provisions, the overall *structure* of the government established in the Constitution also affects how the procurement system functions. In particular, the separation of powers divides the sovereign authority to contract between legislative and executive branches.[47] By design, this arrangement is an "invitation to struggle".[48] While Americans sometimes imagine that procurement is a purely mechanical function administered by rational, dispassionate agents using good business judgment to

Contracts Handbook, *op. cit.*, p. 3 (arguing that the government's authority to contract is traceable to the Constitution).

[42] SCHWARTZ, *United States of America*, *op. cit.*, p. 628.

[43] U.S. Const., amend. V.

[44] *Ibid.*

[45] *Ibid.*, amend. I.

[46] SCHWARTZ, *United States of America*, *op. cit.*, pp. 616–17 (describing the application of the Fifth Amendment Due Process Clause, Fifth Amendment Equal Protection Clause, and free speech under the First Amendment to government contracts in the federal case law).

[47] James Madison believed the nature of the federal government's purchasing function was both executive and judicial. J. GALES (ed), 1 *Annals of Congress*, 1789, p. 611.

[48] E.S. CORWIN, *The President Office and Powers*, New York, New York University Press, 1941, p. 200 (famously stating that "the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy"). This observation regarding a constitutionally grounded struggle also holds true for procurement, where the division of labor between the executive and legislature sows a similar institutional rivalry. J.W. WHELAN, *Reflections on Government Contracts Policy on the Occasion of the Twenty-fifth Anniversary of the Public Contract Law Section*, *Pub. Cont. L.J.*, 1990, pp. 1, 20 (noting that "what sticks out like sore thumb" about the U.S. federal procurement system are the "institutional confrontations" between the executive and legislative branches).

secure best value,[49] Congress has an outsized role throughout the process.[50] Its involvement ensures a close connection to popular opinion, which from a strictly technocratic standpoint has consequences both good and ill. For example, it is to the good that Congress serves as a watchdog and – consistent with Americans' deeply rooted attachment to anticorruption efforts[51] – seeks to eradicate fraud, waste, and abuse from government spending.[52] Of less certain value is Congress's tendency to interfere with the process by attempting to steer contracts to constituents and by pursuing various collateral objectives that sometimes stray far afield from the straightforward purchasing function.[53] Whatever one's opinion about the wisdom of Congress's involvement in government contracts (and we harbor some doubts, in some quarters), it is indisputable that such involvement was constitutionally ordained. And

[49] FAR 1.102(d) (establishing in a statement of guiding principles about U.S. federal procurement that buyers are "to exercise personal initiative and sound business judgment in providing the best value . . . to meet the customer's needs"). Compare S.L. Schooner, "Fear of Oversight: The Fundamental Failure of Businesslike Government", *Am. U.L. Rev*., 2001, pp. 627, 714–17 (addressing the myth that procurement is a purely administrative function that can be improved simply by modeling businesses practices from the private sector).

[50] SCHOONER, "Commercial Purchasing", *op. cit.*, p. 159 (observing that "legislative manipulation of the procurement process is a significant aspect or feature the system"); L.R.A. BUTLER, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market*, Cambridge, Cambridge University Press, 2017, pp. 62–63 (observing that "Congress exercises a significant impact on all aspects of procurement").

[51] See generally Z. TEACHOUT, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, Cambridge, Harvard University Press, 2014 (describing the demanding conception of government corruption that lies at the heart of the U.S. constitutional architecture and the nation's longstanding anticorruption efforts).

[52] M. CANCIAN, *Acquisition Reform: It's Not as Easy as It Seems*, *Acquisition Rev. Q.*, 1995, pp. 189, 191–92 (describing Americans' mistrust of military procurement and Congress's exercise of its fiduciary duties based on the popular belief that "without explicit guidance and close scrutiny the [Department of Defense] will waste money").

[53] DAVIES, *The Public Law of Contracts*, *op. cit.*, p. 60 (contrasting U.S. federal and English procurement systems and arguing that a distinguishing feature of the U.S. system is the "greater influence of pressure groups over the political process" and "the greater tendency to use procurement for political goals"); Cancian, *Acquisition Reform*, *op. cit.*, p. 191 (observing that the socioeconomic goals that often influence the procurement process "are often regarded as illegitimate by people inside the system because they have no direct bearing . . . on acquisition").

we note in passing that the academic treatment of such constitutional features is sorely lacking.[54]

2.2. Federal Procurement Statutes

Second only to the Constitution in terms of authority, federal procurement is also governed by a "constantly changing patchwork of statutes".[55] These statutes are the foundation of the whole federal procurement system.[56] The first of these was passed in 1792.[57] Procurement legislation accelerated during the Civil War,[58] and many of these statutes remained largely unchanged until the Second World War.[59] The basic framework for the modern system is established in the Armed Services Procurement Act of 1948 (ASPA)[60] and the Federal Property and Administrative Services Act of 1949 (FPASA).[61] The

[54] BUTLER, *Transatlantic Defence Procurement*, *op. cit.*, 317 (observing that constitutional features of the U.S. federal procurement system have not been considered in detail).

[55] Schooner, *Fear of Oversight*, *op. cit.*, p. 675.

[56] 1 Report of the Commission on Government Procurement, 1972, p. 15 ("Statutes provide the foundation for the whole framework of Government procurement.")

[57] MACK, *Federal Procurement*, *op. cit.*, p. 9, citing 1 Stat. 280, sec. 5, May 8, 1792 (reporting that this statute was the first law that Congress passed regulating federal purchases); 1 Commission on Government Procurement, *op. cit.*, p. 164 (likewise reporting that the first federal procurement statute was passed on May 8, 1792).

[58] NAGLE, *History of Government Contracting*, *op. cit.*, pp. 191–98.

[59] For example, see 4 Commission on Government Procurement, *op. cit.*, p. 164 (observing that the statute mandating the use of sealed bidding was passed in 1861 and remained in force for nearly a century).

[60] 10 U.S.C. §§ 2302–2339b.

[61] 41 U.S.C. §§ 3101–3106.

former is amended annually with the National Defense Authorization Act, but the latter is infrequently modified. While the two acts were briefly brought into alignment in 1984,[62] they have since diverged.[63] Another act with nearly government-wide application is the Office Federal Procurement Policy Act (OFFPA).[64] Yet these three statutes are but the tip of the iceberg.[65] The procurement function is affected by several statutes that control the federal agencies and define their organizational structures.[66] Other prominent statutes are listed in a footnote below.[67]

Strikingly for a statutory system, no integrated statute governs the whole. In 1986, the President's Blue Ribbon Commission recognized the problems presented by a system composed of such a hodgepodge of laws:

[62] Pub. L. No. 98-369.

[63] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, and the Clinger-Cohen Act of 1996, Pub. L. 104-106, brought the ASPA and FPASA into conformity. Since then, however, the two have continued to diverge. J. CIBINIC, JR., R.C. NASH, JR., AND C.R. YUKINS, *Formation of Government Contracts*, 4th edn, Riverwoods, Illinois, Wolter Kluwer, 2011, p. 27.

[64] 41 U.S.C §§ 1101, et seq.

[65] 1 Commission on Government Procurement, *op. cit.*, pp. 31, 33 (lamenting a "burdensome mass and maze" of both procurement and procurement-related statutes and regulations).

[66] For example, 5 U.S.C. § 101 defines the organizational elements for the executive departments (e.g., Departments of State, Treasury, and Defense); 5 U.S.C. § 102 does the same for the military departments (e.g., Departments of the Army, Navy, and Air Force); and 41 U.S.C. § 133 does the same for the executive agencies.

[67] The Anti-Deficiency Act, 31 U.S.C. § 1341; the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 551ff; Bribery, Graft and Conflicts of Interest, 18 U.S.C. §§ 201 *et seq.*; the Brook Act (Architect-Engineer Services), 40 U.S.C. §§ 541 *et seq.*; the Buy American Act, 41 U.S.C. §§ 8301–05; the Davis-Bacon Act, 40 U.S.C. §§ 276a–276a-5; the Defense Production Act, 50 U.S.C. §§ App. 2062ff; the False Claims Act, 31 U.S.C. §§ 3279 *et seq.*; the Procurement Integrity Act, 48 C.F.R. § 3.104-1 to -11; the Small Business Act, 15 U.S.C. §§ 631 et *seq.*; the Truth in Negotiations Act, 10 U.S.C. § 2306a, 41 U.S.C. § 254(d).

> Congress and DoD have tried to dictate management improvements in the form of ever more detailed and extensive laws and regulations. As a result, the legal regime for defense acquisition is today impossibly cumbersome. . . . For these reasons, *we recommend that Congress work with the Administration to recodify federal laws government procurement in a single, consistent, and greatly simplified procurement statute*.[68]

To date, however, no such consolidated statute has been enacted.[69] This is significant because, unlike private contracts, which were originally derived from common law, government contracts are primarily creatures of statute.[70] It is surprising that a system that is so reliant on statutes lacks a single, unified code – and also that the commentary has yet to provide a comprehensive index.[71] In sum, statutes are the authoritative and immutable law for U.S. procurement, but this regime is a confusing, incomprehensive mess – and locating all of the applicable statutes is no mean feat.

As we will see in the next section, the FAR is more detailed than the procurement statutes and is thus generally more relevant to the daily activities of agency officials operating

[68] President's Blue Ribbon Commission on Defense Management, *A Quest for Excellence – Final Report to the President*, June 1986, pp. 54–55, available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015014775566&view=1up &seq=11 (emphasis added). See also 1 Commission on Government Procurement, *op. cit.*, pp. 15–18 (recommending a merger of the ASPA and FPASA into a single statute, and noting that the "present statutory foundation is a welter of disparate and confusing restrictions and of grants of limited authority to avoid the restrictions").

[69] CIBINIC, Nash, and Yukins, *Formation of Government Contracts*, *op. cit.*, p. 27.

[70] 1 Commission on Government Procurement, *op. cit.*, p. 15.

[71] Whelan, *Understanding Federal Government Contracts*, *op. cit.*, p. 16.

in this field. We also will see in the next section that agencies may supplement the FAR and may issue individual and class deviations to the FAR.[72] This marks a crucial distinction between statutes and regulations. A statute is firmly and immutably the law unless Congress revokes or amends the statute, or by its own express terms the statute authorizes exceptions[73] or waivers.[74] Thus, if procurement statutes are incomplete in their coverage, when they do apply, their legal effect is manifest and conclusive.

[72] See below notes 81–87 and accompanying text.

[73] For example, see 41 U.S.C. § 10a(b)(4), which makes an exception to the Buy American Act for acquisitions made by the intelligence community.

[74] For example, there is a waiver provision in the Truth in Negotiations Act for "exceptional case[s]", but the head of the procuring activity must provide a written justification for the waiver. 10 U.S.C. § 2306(a)(1)(C). There are several waiver provisions contained in the Small Business Act: 15 U.S.C. 636(a)(32)(E)(ii) (granting that administrators may waive fees on covered energy efficiency loans); 15 U.S.C. 636(33)(E)(ii) (authorizing waiving fees for loan to small businesses owned by veterans or their surviving spouses); 15 U.S.C. 636(8)(B) (authorizing administrators to waive caps on disaster loans); 15 U.S.C. § 637(a)(17)(B)(iv) (granting authority to waive the rule that the small business reseller must purchase its wares from a small business manufacturer); 15 U.S.C. § 637(a)(21)(B) (allowing that administrators may waive the rule that small business concerns whose owners relinquish their ownership shall be terminated for convenience). And though the Department of Labor lacks authority to grant waivers to the Davis-Bacon Act's requirements regarding wage rates and conditions for construction contracts, the funding statutes for particular projects may provide for such waivers. See Department of Labor, *Field Operations Handbook*, Chapter 15, "Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act", p. 22, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf .

2.3. The Federal Acquisition Regulation and Its Supplements

Though a consolidated statute has yet to be enacted, Congress mandated the establishment of a *consolidated regulation* with passage of the OFFPA of 1974.[75] Such a unified regulation was eventually codified in the form of the FAR.[76] The Federal Acquisition Regulation implements the statutory provisions in the ASPA and FPASA, and establishes uniform policies and procedures for all executive agency acquisitions.[77] Thus, while procurement statutes constitute the foundation of most U.S. government contracts law, pertinent details necessary to the daily operations of the procurement function are found in the FAR.[78] Most of the controlling law in the U.S. system thus works on the basis of a complex relationship between myriad statutes that are dispositive but noncomprehensive and a single regulation (FAR) that is of general applicability but, as we will see in the next paragraph, subject to various deviations.[79]

[75] 41 U.S.C. § 405(a) (designating the FAR as "the single Government-wide procurement regulation"). See also S.W. Feldman, *Government Contract Guidebook*, 4th edn., Egan, Minnesota, Thomson Reuters, p. 16 (maintaining that "[g]overnment procurement is essentially procurement by regulation").

[76] GOLUB AND FENSKE, *Opportunities and Obstacles*, *op. cit.*, p. 568.

[77] See *15A Federal Procedure, Lawyer's Edition*, Egan, Minnesota, Thomson Reuters, 2020, § 39.1 (citing FAR 1.101); Tiefer and Shook, *Government Contract Law*, *op. cit.*, p. 3 (emphasizing the "overriding importance of statutes, regulations, and standard clauses").

[78] See DAVIES, *The Public Law of Contracts*, *op. cit.*, p. 58 (observing that although federal procurement is governed by two main statutes, "the main source of detailed rules governing procurement is the [FAR]").

[79] See GORDON AND RACCA, *Integrity Challenges*, *op. cit.*, p. 117, n.1 (observing that the U.S. procurement system is "based on a detailed statutory and regulatory scheme").

In 1974, the OFPP Act mandated promulgation of a comprehensive regulation that would encompass the procurement activities of all executive agencies – the FAR, which came into effect ten years later in 1984.[80] Yet the agencies are not without recourse when the FAR's policies and procedures are inappropriate to their unique requirements. Deviations are available under FAR Subpart 1.4, and those deviation can include adopting policies inconsistent with the FAR, omitting or modifying required clauses, and authorizing lesser or greater limitations on the use of solicitation provisions.[81] Such deviations are available for individual contract actions[82] and for whole classes of contract actions.[83] Further, the agencies may even create standard policies and procedures that vary somewhat from the FAR,[84] but only insofar as variations are necessary to specific agency needs.[85] Accordingly, each federal agency publishes its own FAR supplement.[86] However, the OFPP has the authority to strike down supplements that exceed the agencies' remit.[87]

[80] 41 U.S.C. § 1121 (b) (establishing that the OFPP may prescribe policies "in a single Government-wide procurement regulation called the Federal Acquisition Regulation").

[81] FAR 1.401.

[82] FAR 1.403.

[83] FAR 1.404.

[84] FAR Subpart 1.3.

[85] FAR 1.302. See also R.C. Nash, Jr., K.R. O'BRIEN-DEBAKEY, AND S.L. SCHOONER, *The Government Contracts Reference Book*, 4th edn., Riverwoods, Illinois, Wolters Kluwer, 2013, pp. 229–30 (explaining how the FAR and its supplements interact in the federal acquisition regulation system).

[86] CIBINIC, NASH, AND YUKINS, *Formation of Government Contracts*, *op. cit.*, pp. 36–37 (listing 31 "selected principal federal agency acquisition regulations").

[87] 41 U.S.C. § 1121(e).

If the FAR lacks the fully settled character of statutory law in that agencies may supplement and deviate from it in various ways, at the same time it also has the full "force and effect of law" as a properly promulgated substantive agency regulation.[88] This is another aspect of the complex relationship between the statutes and regulations that govern federal procurement. The FAR is more relevant to the practitioner because it is both more detailed and comprehensive, and – though not as firmly settled as statutory law – it is, by force and effect, *law* in its own right.[89]

2.4. Administrative and Judicial Case Law

Whereas review procedures were first introduced in several EU Member States following issuance of the classic Remedies Directive in 1989,[90] U.S. procurement has a long history with bid protests.[91] Though their origin is murky,[92] what may have been the first bid challenge went directly to the President in 1853.[93] Protests were later heard before the U.S.

[88] See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977)).

[89] Compare P.E. MORRIS, "Legal Regulation of Contract Compliance: An Anglo-American Comparison", *Anglo-Am. L. Rev.*, 1990, p. 87 (lamenting that the United Kingdom lacked a distinct law of government contracts to provide a framework to monitor compliance). There can be no doubt, however, that the U.S. system has such a common code in the form of the FAR.

[90] Directive 89/665/EEC, Article 1.

[91] GORDON AND RACCA, *Integrity Challenges*, *op. cit.*, p. 117, n.1.

[92] R.S. METZGER AND D.A. LYONS, "A Critical Reassessment of the GAO Bid-Protest Mechanism", *Wisconsin L. Rev.*, 2007, pp. 1225, 1228.

[93] 4 Commission on Government Procurement, *op. cit.*, p. 36, citing 6 Op. Att'y Gen. 226 (1853) (reporting that an 1853 complaint about a disputed Department of the Interior award was perhaps the first bid protest).

Court of Claims,[94] which was established in 1855[95] and a century and a half later was split into the U.S. Court of Appeals for the Federal Circuit (which inherited the Court of Claims' appellate function) and the U.S. Court of Federal Claims (COFC) (which inherited the trial function).[96] Yet protests in their modern form began not with a judicial forum but at the General Accounting Office (GAO).[97] The first GAO protest involved a procurement to support of the Panama Canal, and was decided in 1926.[98] The Court of Claims later asserted similar protest authority under the Tucker Act in 1956, and later the Court of Federal Claims' protest jurisdiction was regularized by the Administrative Dispute Resolution Act of 1996 (ADRA).[99] The U.S. Court of Appeals for the District of Columbia Circuit had ruled that bid protests could be brought in federal district courts under the Administrative Procedure Act in 1970,[100] but that jurisdiction "sunsetted" under Section 12 of the ADRA in 2001.[101] Since then protests have been heard before the agencies,[102] the GAO, and the COFC, the latter being

[94] *Schneider v. United States*, 19 Ct. Cl. 547 (1884); *United States v. Ellicott*, 223 U.S. 524 (1912); *Schillinger v. United States*, 24 Ct. Cl. 278 (1889).

[95] C.D. SWAN, "Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign", *J. Fed. Circ. Hist. Soc'y*, 2014, pp. 105, 107.

[96] 3 *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, 2019, p. 347.

[97] The GAO was established in 1921. The Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20, codified at 31 U.S.C. § 701. The GAO inherited the powers and duties of the Comptroller General, which until then resided in the Department of the Treasury. D.I. Gordon, *In the Beginning: The Earliest Bid Protests Filed with the U.S. General Accounting Office*, Pub. Proc. L. Rev., 2004, p. NA149. The GAO was renamed the General *Accountability* Office effective July 7, 2004. GAO Human Capital Reform Act of 2004, Pub. L. 108-271, 118 Stat. 811 (2004).

[98] *Letter to the Governor, the Panama Canal*, 5 Comp. Gen. Dec. 712, 713 (1926).

[99] *Heyer Products Co. v United States*, 140 F. Supp. 409 (Ct. Cl. 1956), modified, 177 F. Supp. 251 (Ct. Cl. 1959). The Administrative Dispute Resolution Act was enacted as Public Law No. 104-320.

[100] *Scanwell Laboratories, Inc. v Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

[101] The Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. §§ 571–84.

[102] Informal agency protests had long been available, but until the 1990s government-wide procedures were lacking. Such procedures are now found in FAR Part 33. See generally C.R. Yukins, "Agency-Level Protests",

the only remaining judicial forum. Decisions of the COFC may be appealed to the Federal Circuit, and from there potentially to the U.S. Supreme Court.

We have recounted this abridged history of U.S. protests to give a sense of the volume of precedent that has been generated. It is extensive.[103] Indeed, though government contracts are driven more by statute and regulation (unlike private contracts, which were at first creatures of the common law), an understanding of federal procurement would be incomplete without the case law.[104] As was noted in the leading treatise on the formation government contracts, "general rules of [government] contract law are most frequently found in the judicial decisions where fundamental contracts law issues are raised."[105] Not only are the general rules found there, but because federal procurement entails "an entirely different culture," it "requires the contextual richness of cases to effectively transmit understanding."[106] Case law is also perhaps the best resource for keeping abreast of developments in federal procurement.[107] Finally, suppliers who are inexperienced with the

https://publicprocurementinternational.com/agency-level-bid-protests/ (website gathering materials for a project on agency-level bid protests launched by the Administrative Conference of the United States).

[103] P. MCKEEN, *United States*, *op. cit.*, p. 349 (observing that there is an extensive body of case law reviewing agency actions throughout the acquisition cycle); SCHWARTZ, *United States of America*, *op. cit.*, p. 629 (stating that a "complex and highly articulated body of law governs the formation of federal procurement contracts"); Laurent, *Legal Aspects of Defense Procurement*, *op. cit.*, pp. 3, 114, 208-09 (describing a large and complex body of federal common law that bears on the formation of government contracts).

[104] SCHWARTZ, *United States of America*, *op. cit.*, pp. 621–22 (explaining that "important principles," that are derived from the case law, "govern U.S. federal government contracts" and that these judge-made rules "do not fit within the procurement contract regulatory system").

[105] CIBINIC, NASH, AND YUKINS, *Formation of Government Contracts*, *op. cit.*, p. 2.

[106] TIEFER AND SHOOK, *Government Contract Law*, *op. cit.*, p. 4.

[107] D.I. GORDON, *Dissecting the GAO's Bid Protest 'Effectiveness Rate'*, 56 *Gov't Contractor*, 2014, p. 1, available at https://ssrn.com/abstract=2387799.

U.S. system and lack specialized counsel will be in trouble if they are unaware of doctrines in the case law that are nowhere to be found in the statutes or regulations.[108]

Not only does the federal common law of contracts fill gaps where the statutes, regulations, and government contracts case law are silent.[109] When a *further* gap in the federal case law exists, precedent suggests that the federal courts borrow from the states' common law of contracts rather than creating a new rule from whole cloth.[110] Such borrowing is a rarity,[111] in part because the statutes, the FAR, and case law that is specific to government contracts have almost entirely exhausted the field.[112] Thus, if the common law of private contracts lay at the foundation of U.S. government contracts and still carries some sway,[113] its influence is waning.[114]

[108] See F.T. VOM BAUR, "Differences Between Commercial Contracts and Government Contracts", A.B.A. J., 1967, pp. 247, 249 (citing *G.L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963) (observing that the "Government contractor lands, like a man coming down in a parachute, in a foreign country of new and novel remedies that require specialized knowledge.").

[109] See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

[110] See *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 727–28 (1979).

[111] SCHWARTZ, *United States of America*, *op. cit.*, p. 627–28 (explaining that federal courts rarely borrow from state courts for *procurement* contracts, though they still sometimes do so for commercial, non-procurement contracts; thus, he concludes, "almost never does a federal court borrow state law to resolve a matter concerning federal government *procurement* contracts" (emphasis added)).

[112] *Ibid.*, p. 629 (observing that the ASPA, FPASA, and FAR, and case law interpreting these laws and regulations, "comprise the overwhelming bulk of US public procurement law" and that "they collectively blanketed the field of federal procurement law so that there is almost never a gap").

[113] DAVIES, *The Public Law of Contracts*, *op. cit.*, p. 54, 58–59 (suggesting that U.S. government contracts share with English government contracts law a similar reliance on the common law of private contracts); Laurent, *Legal Aspects of Defense Procurement*, *op. cit.*, pp. 208–09 (listing the states' common law of private contracts among the sources that comprise the federal common law of government contracts).

[114] WHELAN, *Understanding Federal Government Contracts*, *op. cit.*, pp. 63–64 (concluding from a review of the cases where federal courts have applied the Uniform Commercial Code of private contracts to government contracts

3. THE PRINCIPLES OF FEDERAL PROCUREMENT LAW

As we have seen, government contracts are unmentioned in the Constitution; to the extent that underlying principles exist, they have not been written down; and, partly due to its common law legacy, the U.S. procurement system tends to be more ad hoc than continental counterparts.[115] And there is an even more remarkable lacuna in the commentary.[116] To the extent that scholars have attempted to extrapolate from the available evidence and hypothesize about what such first principles may be, their conclusions have been tentative, conflicting, and ultimately incomplete.[117] This section, in particular, attempts to fill that gap.

3.1. "Unwritten" Principles of Federal Procurement Law

that the private law of contracts is at most persuasive authority). See also C.C. TURPIN AND J.W. WHELAN, *The London Transcript: A Comparative Look at Public Contracting in the United States and the United Kingdom*, Washington, DC, American Bar Association, Section of Public Contract Law, 1971, p. I-8 (explaining that "if there is not governing federal statute . . . then a court (or other interpreter) will follow the State law, including the Uniform Commercial Code as a guiding statement of law, but not a binding one").

[115] See 1 Commission on Government Procurement, *op. cit.*, p. 1 ("All too often, the attention has focused on individual abuses rather than on the overall system.").

[116] As noted above in Section I.C., there has been a marked failure to locate public procurement's own set of governing principles in the United States. See DAVIES, *The Public Law of Contracts*, pp. 124–25; WHELAN AND PEARSON, "Underlying Values in Government Contracts", *op. cit.* 298.

[117] For example, see P. BOURDON, *Le Contrat Administratif Illégal*, Dalloz, Nouvelle Bibliotheque de Thèsis, Vol. 131, 2014, pp. 183–84 (juxtaposing the various principles that U.S. government contracts scholars have proposed and demonstrating that no scholarly consensus has been reached).

In Charles Dickens's *Our Mutual Friend*, John Podsnap voiced a parochial Briton's opinion about the distinct virtues of English government to an unfortunate Frenchman dining with him: "We Englishmen are very proud of our constitution, sir. It was bestowed upon us by providence. No other country is so favored as this country."[118] We Americans have a similar tendency to this sort of podsnappery, and even feel ourselves slightly superior to our British cousins for having a constitution that is *written*.[119]

In the realm of federal government contracts, however, the U.S. Constitution is mostly silent. Unlike the European Union, where basic principles of public procurement derive from the Treaties, are expanded upon in the procurement directives, and are elucidated in the Court of Justice opinions, the principles that underlie U.S. government procurement – and we submit that they *do* exist – are "unwritten". They are not entirely unwritten, of course. They are written in, or least can be derived from, the statutes, regulations, and the case law that together compose the law of U.S. government contracts. They are unwritten in that they cannot be found on the centuries-old Constitution housed in the National Archives.

3.2. The Protean Nature of Federal Procurement's Principles

Ironically for a country so proud of its written Constitution, having an unwritten constitution in this field means that the principles and objectives of U.S. procurement are somewhat protean. It has been said that a defining feature of the British constitution is its

[118] C. DICKENS, *Our Mutual Friend*, London, Chapman and Hall, 1865, p. 101.

[119] See L.H. TRIBE, *The Invisible Constitution*, New York, Oxford University Press, 2008, p. 13 ("Much is made, and rightly so, of the United States having a single, uniquely identifiable, *written* Constitution. It's very writtenness makes our Constitution stand apart from what people mean when they speak, for instance, of 'the constitution' of a nation like the United Kingdom.").

plasticity, where parliament reigns supreme and government is adapted to the times, the prevailing circumstances and popular opinion.[120] U.S. federal procurement is similarly plastic. This is perhaps one of the main reasons that a consensus is still lacking among U.S. scholars about what the principles undergirding federal procurement are. Federal procurement is responsive to popular sentiment, and it has adapted to the exigencies of the times; a straight line cannot be drawn from 1789 to the present. Three examples illustrate this plasticity.

From colonial times, the United States has exhibited a longstanding commitment to the transparency and competition associated with open procedures, or what in U.S. parlance is called sealed bidding. Yet despite the rhetoric, use of sealed bidding ebbed and flowed for the first century and a half of the republic. In times of war, preference for sealed bidding gave way to necessity and expediency, and officials were allowed to use various procurement methods that were less competitive. And, ultimately, the U.S. government largely gave up on sealed bidding, in favor of the competitive negotiations that dominate modern federal procurement.[121]

Another protean principle is rooted in enforcement of the rule of law. Americans have long prided themselves in a culture of litigation, and this has extended to federal procurement, where disgruntled bidders' protests are the primary monitoring mechanism. Yet reforms in the 1990s sought to curb such litigation and instead to model government

[120] *Ibid.*, p. 14.

[121] See, e.g., C.R. YUKINS, *A Versatile Prism*, *op. cit.*, pp. 79–83.

procurement on best practices from the private sector – practices grounded in cooperation, not litigation.[122]

Yet another shifting principle has come in the U.S. commitment to open markets. Although the United States is fundamentally a free market economy and is sometimes unfairly caricatured as the home of a Darwinian form of *laissez faire* capitalism, the U.S. commitment to free trade in public procurement has been capricious.[123] Nowhere is this tendency so clearly on display as in defense, to which far more than half of federal procurement dollars are consistently devoted.[124] As early as the War of 1812, when the United States fought another bitter war with the United Kingdom as the young nation jockeyed to protect its sovereignty, the United States learned that it could not rely on foreign sources of supply in times of war; developing domestic sources was critical to survival.[125] That narrow exception to free trade principles, for "security of supply" in times of war, was radically exceeded in the twentieth century, for example with the Buy American Act of 1933 (which sought generally to protect jobs in the United States) and the Small Business Act (which was expanded to embrace an industrial policy of advancing small business). President Trump's"Buy American" initiative, grounded in economic nationalism, was an even more pronounced step away from the principles of free markets.

[122] See, e.g., C.R. YUKINS, *US Government Contracting in the Context of Global Public Procurement*, *op. cit.*, p. 271.

[123] Perhaps most famously, the Buy American Act of 1933 required the U.S. government to favor U.S.-made goods during the Great Depression. Pub. L. No. 72-428, codified at 41 U.S.C. §§ 8301–05.

[124] Spending analysis can be done at www.usaspending.gov, by agency and object class (e.g., contracts).

[125] Adam Smith anticipated this in "The Wealth of Nations" (1776), when he wrote that one of the rare "cases . . . in which it will generally be advantageous to lay some burden upon foreign, for the encouragement of domestic industry" is "when some particular sort of industry is necessary for the defence of the country."

These three examples clearly illustrate what one might charitably call the *flexibility* of the federal procurement system. One could argue that a willingness to abandon competition, transparency, and free markets exhibits a cavalier disregard for principle. Yet we submit that these policy shifts do not prove that the United States is completely without principles. Instead, we would argue that this is a confusion of the *objectives* of the U.S. procurement system with the *mechanisms* by which those objectives are carried out.[126] We will argue in the next section that although the U.S. public procurement system is characterized by considerable flexibility of execution, its bedrock principles, such as they are, stand unyielding.

3.3. Some (Nearly) Immutable Principles in Federal Procurement

Writing in 1972, Turpin asserted that although the UK system of public contracts lacked a fixed regulatory framework like the one that undergirds U.S. federal procurement, there nonetheless was a "series of settled administrative guidelines which are so entrenched and influential that they represent a de facto regulatory regime, albeit one lacking legal recognition."[127] We would argue that something similar can be said about the principles and objectives of U.S. federal procurement. Although the U.S. procurement system's desiderata and policy mechanisms have changed over time, certain bedrock principles "are so entrenched and influential" that they constitute the de facto objectives to which it is aligned. From a thorough review of the sources and the literature, we have identified three core objectives. The first two of these, we will argue, collapse into one, and this leaves us with two overriding objectives that have stood the test of time.

[126] See TREPTE, *Regulating Procurement*, *op. cit.*, pp., 3, 7, arguing the commonly expressed procurement desiderata – e.g., efficiency, transparency, equal treatment, nondiscrimination – are mechanisms, not objectives.

[127] C. TURPIN, *Government Contracts*, Harmondsworth, Penguin, 1972, pp. 72–73.

The first objective is best value. This has been called the "prime function" of the system.[128] Best value is the pursuit of the best quality for the money spent.[129] Often competition is listed as an objective in itself, but that is not the case. Competition is the handmaiden of best value – the solution for the intermediary purchasing official's indifference (as an agent) to procurement outcomes – rather than a goal with its own intrinsic value.[130] In the 1972 Report of the Commission on Government Procurement that provided many of the recommendations later adopted in the Competition in Contracting Act of 1984, the report offered a "concluding thought" about the *savings* to the taxpayer that would accrue from enacting its prescriptions.[131] Savings and value are central to the U.S. system.

[128] Whelan and Pearson, *Underlying Values in Government Contracts*, *op. cit.*, p. 302 (observing that the system is obviously designed to file one "prime function", namely that government contracts "are vehicles for the acquisition or disposal of property, performance of services or other governmental ends as may involve the use of promissory obligations").

[129] See FAR 1.102(a) ("The vision for the Federal Acquisition System is to deliver on a timely basis the value product or service to the customer, while maintaining the public's trust in fulfilling public policy objectives."); C.R. YUKINS, *Anti-Corruption Internationally: Challenges in Procurement Markets Abroad–Part I: Coordinating Compliance and Procurement Rules in a Shrinking World: The Case for a Transatlantic Dialogue*, in *West Government Contracts Year in Review Covering 2012, Conference Briefs*, Washington, West, 2013, pp. 2-1, 2-4–2-5 (contrasting America's emphasis on best value and ensuring tax dollars are spent wisely with the EU's procurement directives, where value for money is not an enumerated objective); M.K. LOVE, *Public v. Private Procurement: Your Tax Dollars at Work, American Bar Association Section of Public Contract Law Annual Meeting*, 1997, pp., 1, 2 (arguing the fundamental goal of federal procurement is "supplying best value for the procurement dollar").

[130] STEINICKE, *Public Procurement and the Negotiated Procedure*, *op. cit.*, p. 336 (contrasting the European system, where competition is the end, with the U.S. system where competition is only a means to an end and explaining that competition is favored in the United States primarily because it "produces better results for the purchasing authority"). See also SCHOONER, "Desiderata", *op. cit.*, p. 105 (explaining that the United States value competition because the government thereby "receives its best value in terms of price, quality, and contract terms and conditions"); YUKINS, "A Versatile Prism", *op cit.*, p. 68-69 (discussing principal-agent problem which undermines procurement outcomes, and benefit of competition to keep agent (procurement official) from straying from best value).

[131] 1 Commission on Government Procurement, *op. cit.*, p. 7.

The second objective is to eliminate fraud, waste, and abuse.[132] This has been called the hallmark of U.S. federal procurement – a persistent reminder that the United States see itself as a participatory democracy, in which every citizen-taxpayer has a voice and a stake.[133] Accountability and the right in challenge waste are said to be "[w]oven like heavy cable" throughout various procurement statutes and regulations.[134] In reality, however, anticorruption is not so much a separate objective as it is a complement or restatement of the first: fraud, waste, and abuse are *betrayals* of the federal government's fiduciary duty of best value to the taxpayer.[135] Thus, the system is designed to minimize corruption in order maximize best value to the taxpayer.

And the third objective is the pursuit of diverse collateral objectives. Not only do Americans mistrust their government generally, they are particularly skeptical about its

[132] J.L. MASHAW, *The Fear of Discretion in Government Procurement*, *Yale J. on Reg.*, 1991, pp. 511, 514 (describing the United States' particular aversion to fraud and waste in procurement and observing that the system concentrates on these types of corruption because "they reinforce a distrust of government operations that is so central to our constitutional heritage as to function almost as a civic religion"). See also GORDON AND RACCA, "Integrity Challenges", *op. cit.*, pp. 138–39 (explaining that transparency and accountability have deep roots in U.S. federal procurement going back two centuries); Schooner, "Desiderata", *op. cit.*, p. 104 (listing transparency and integrity among three pillars of the U.S. federal procurement system); Schooner, "Commercial Purchasing", *op. cit.*, p. 161 (also listing transparency and competition).

[133] S.L. SCHOONER and N.S. WHITEMAN, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency*, *Pub. Proc. L. Rev.*, 2000, p. 148, 160 (observing that "innumerable" laws and regulations seek to eliminate not only impropriety even the appearance of impropriety).

[134] See WHELAN, "Reflections on Government Contracts", *op. cit.*, p. 15.

[135] For example, a 1983 Senate Report neatly combined these two objectives, stating that the primary aim of procurement regulation requiring competition is "securing the most advantageous contract for the government and lessening the opportunity for favoritism." Senate Comm. on Governmental Affairs, Competition in Contract Act of 1983, S. Rep. No. 50, 98th Cong., 1st Sess., 1983, p. 2. Similarly, "avoidance of favoritism has been a central procurement objective since the 19th century" precisely because favoritism is associated with poor value for money. See A. MAYER, *Military Procurement: Basic Principles and Recent Developments*, *Geo. Wash. J. Int'l L. and Econ.*, 1987, pp. 165, 183. And procurement regulation insists upon competition to curtail collusion between government buyers and private sellers, and thus safeguard the public fisc. PERLMAN, "Guarding the Government's Coffers", *op. cit.*, p. 3187.

purchasing function.[136] That mistrust arguably spurs the socioeconomic requirements that are superimposed on the federal procurement system: much as Americans mistrust government officials to achieve best value in a narrowly economic sense, so too do Americans (and their representatives in Congress) doubt that purchasing officials will adequately account for broader social and economic goals (what Europeans might call "sustainability goals") when making purchases. To correct course – to ensure that procurement officials purchase "best value" in a broader sense, to include shared social and economic goals – U.S. society expects that the procurement regime will be freighted with extensive socioeconomic requirements.

The federal procurement system is designed consistent with the United States' constitutional order and national values.[137] The means imposed by the regulatory regime – the competition, anti-corruption and trade measures that can seem to swerve in contradictory directions – draw together behind Americans' deep beliefs in best value and accountability, beliefs grounded in U.S. values as a participatory democratic. Because these beliefs are more perspectives than principles, they do not lend themselves in an elegant, Cartesian sense to lawmaking – indeed, the raucous contradictions in U.S. procurement law over the centuries arguably prove that these "principles" provide little or no binding guidance for lawmaking. That said, by being rooted in a shared outlook as a participatory, accountable democracy, the

[136] J. BESSELMAN AND A.A. PATRICK LARKEY, *Buying in Businesslike Fashion – And Paying More?*, *Pub. Admin. Rev.*, 2000, pp. 421, 423 (calling procurement "the most reviled, reviewed, and reformed function" of the U.S. government).

[137] See CANCIAN, "Acquisition Reform", *op. cit.*, p. 189 (arguing that far from being "broken", "the current system is well-designed to accomplish the goals that the nation values"); MASHAW, "Fear of Discretion", *op. cit.*, pp. 511, 515 (arguing that "the procurement system we have is not some silly aberration brought about by the lack of bottom line accountability" but is instead "responsive both to our constitutional heritage and to the day to day politics of a system structured to produce continuous oversight").

U.S. federal procurement system remains an integral part of a constitutional democracy that is highly responsive to popular sentiment.[138]

4. CONCLUSION

Writing 30 years ago, the most prominent of a previous generation of scholars suggested that forming a grand theory of U.S. government procurement may be impossible.[139] We are more sanguine. We believe, following Trepte, that efforts by our colleagues to identify the principles that underlie U.S. federal government contracts have foundered on a simple confusion of the ends and means.[140] Listing the desiderata was a necessary first step.[141] But the desiderata are ephemeral because they are instrumental: because they are more means than a code of principles, Americans are prepared to discard them if they do not serve their purpose. We believe that the U.S. federal procurement system's first-order principles can be summarized as a pursuit of best value (which also entails anticorruption) and second as a readiness to subordinate best value to social policies that the body politic may dictate. The give and take of these two competing principles – the one immutable, the other ineluctably modal[142] – capture the essence of the last two and a half centuries of U.S. government procurement. The two are surely contradictory and cannot be reconciled, and we make no attempt to do so here. Thus U.S. federal procurement stands

[138] See H.L. MENCKEN, *A Little Book in C Major*, New York, John Lane Co., 1916, p. 19 ("Democracy is the theory that the common people know what they want, and deserve to get it good and hard.").

[139] R.C. NASH AND J. CIBINIC, *The Procurement System of the Future, Nash and Cibinic Report*, 1991, ¶9 ("Perhaps there's no single, dominant principle upon which we can hang the entire procurement process.").

[140] See TREPTE, *Regulating Procurement*, *op. cit.*, pp., 3, 7.

[141] SCHOONER, *Desiderata*, *op. cit.*, pp. 104–10, naming transparency, integrity, and competition.

[142] We adapted this from Stephen Dedalus's famous "ineluctable modality," or in plain language, *inescapable change*. See J. JOYCE, *Ulysses*, Oxford, Oxford University Press, first published 1922, 1992 edn. (J. Johnson, ed.), p. 37. *Ibid*, p. 783, noting that this phrase most likely comes from Joyce's translation of a passage from Aristotle.

equipoised between unstated and unwritten principles whose objective is to secure best value, and myriad laws and regulations that to some extent undermine that objective in pursuit of assorted socio-economic objectives.

Abstract. *U.S. federal public procurement law is governed by public law, and this separate body of procurement law diverges from private contract law in important ways. Though public procurement law goes unmentioned in the Constitution, some principles of public contracts derive from this highest form of national law. A patchwork of statutes constitutes the foundation, but no single statute governs the whole system. Instead, under the Office of Federal Procurement Policy Act, Congress designated the Federal Acquisition Regulation (FAR) as "the single Government-wide procurement regulation." The FAR thus has the force and effect of law. In the United States' common law system, case law plays an interpretative role, and procurement law is no exception. This intricate web of precedent includes protest litigation at the General Accountability Office (GAO) and the Court of Federal Claims (COFC), disputes before the various Boards of Contract Appeals (BCAs) and COFC, and also precedent developed over decades in forums whose jurisdiction Congress has since withdrawn. When all else fails, these forums may look to the law of private contracts as persuasive authority. None of this, of course, presents a common body of principles to govern U.S. procurement; if anything, this contradictory bundle of laws suggest a deeper truth, which is that the U.S. procurement system is defined less by classic principles and more by an abiding sense of the need for best value, integrity, and a very politicized accommodation of critical social and economic goals.*

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INTERNATIONAL SOFT LAW PRINCIPLES ON PUBLIC ACQUISITION CONTRACTS

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1. INTRODUCTION

Addressing the issue of principles in international soft law relating to public contracts implies accepting the polysemic meaning of « principles ». Set asides the discussion about the public contracts notion, here understood as public purchasing contracts[2] including both public procurement contracts and PPPs, this chapter must deal with a vocabulary that is extremely fluctuating, since the various terminology (« standards », « guidelines », « codes of conduct », « declarations of principles », « guiding principles ») and the substance of these « principles » evolve, and vary in space and time. Moreover, this plasticity is reinforced when the said « principles » are forged both at the international and domestic levels, alternatively or in parallel, either in public and/or private arenas. Ultimately, emblematic of the consecration of flexible law, some of these principles may precede, follow in, or even become hard law.

The recognition of soft law has been debated in international law, which some French Academics, like Prosper Weil[3], have seen threatened by its construction[4]. However, the autonomy of soft law has been more easily accepted in the field of international economic law[5]. It was precisely in this field that the technique of flexible law appeared and flourished.

[2] As a suggested translation for the French expression "Commande publique".

[3] P. WEIL, *Vers une normativité relative en droit international?*, Revue Générale de Droit International Public, 1982. In English: « Towards Relative Normativity in International Law? », American Journal of International Law (AJIL) 1983. « It is the second most cited article in AJIL's history », in K. KNOP, Introduction to the Symposium on Prosper Weil, « Towards Relative Normativity in International Law? » (March 2, 2020). 114 AJIL UNBOUND 67, 2020, Available at SSRN: https://ssrn.com/abstract=3547717.

[4] « By relative normativity in international law, Weil meant first the phenomenon of blurring the threshold between legal and non-legal norms, particularly by attributing a certain normative force to the acts of international organizations », K. KNOP. Op.cit.

[5] P-M DUPUY ET YANN KERBRAT, *Droit international public*, 13 éd, Dalloz. p.756.

Identified 45 years ago in a famous article by René-Jean Dupuis[6], it has today invaded all areas of law, both international and domestic.

Crossing the notion of principles with that of flexible law presents an obvious danger: that of redoubling uncertainty, since principles certainly produce norms, but the content of the principles is itself sometimes elusive, while flexible law without binding character may be difficult to grasp. However, and because these few lines cannot exhaust these questions, which come under the theory of international law[7], the subject of public purchasing contracts makes it possible to attempt to discover the principles in formation, when they are born of the synthesis of sometimes distant legal systems and before they are then transcribed into the binding obligations of hard law.

The programmatic, consensual, evolving, multidisciplinary character of international soft law, at a time when the boundaries between private and public law, between domestic, regional, and international levels, and even between legal systems, are becoming blurred, has proved to be particularly well adapted to the topic of transnational commercial relations[8]. The UN and some of its subsidiary bodies, but also universal institutions with a specialized vocation (e.g. FAO, ILO, WHO) as well as several regional organizations (OECD, EU, Council of Europe) were simultaneously seized from the 1960s onwards with all or part of the same problems, notably concerning economic development, trade, and, today, sustainable development including environmental protection. In turn, at the end of the

[6] R.-J. DUPUIS, *Droit déclaratoire et droit programmatoire : de la coutume sauvage à la soft law, in l'élaboration du Droit International Public*, colloque SFDI 1975.

[7] A. CASSESE, J. WEILER, *Change and Stability in International Law-Making*, 1986, pp. 66–101; OULEMI ELIAS AND CHIN LIM, *General principles of law', 'soft' law and the identification of international law*, Published online by Cambridge University Press, 2009.

[8] « Le droit transnational n'est donc ni du droit interne de l'Etat, ni du droit international, ni même du droit international privé ; c'est un droit mixte, un droit des confins qui se construit au moins en partie dans la zone de contact ou d'intersection de ces différentes branches du droit ». M. KAMTO, « *Les contrats d'Etat, une contribution au débat* », Rev. Arb., 2003, n°3, p. 743

70s' (1rts GPA) and even more in the 1990s (2nd GPA), the WTO became interested in questions of access to public procurement markets in promoting world trade. It is therefore not surprising that the field of public procurement, whose transnational dimension has been particularly accentuated in recent years, has also given rise to the emergence of standards and concepts of soft law in the field of international economic law. But this is not a linear process. Indeed, it must be emphasized from the outset that public procurement contracts and PPPs are today governed by standards of different legal force, public procurement contracts being now essentially subject to hard law or codified principles under international instruments (GPA, Trade agreements, EU Directives), while PPPs are still characterized by an abundance of soft law instruments[9], even if a turning point can already be detected with the European Directive on Concessions enacted in 2014.

One angle of research could be the interactions between EU Principles and International principles governing public acquisition contracts, but other chapters of this book are already thoroughly addressing this question. Hence, our perspective will focus on the supranational level, being understood as the supra-European level where soft law public purchasing principles have flourished in the recent decades. Forasmuch as the creation of principles in the context of flexible law is a privileged terrain for tackling the growing importance of international sources in the regulation of public purchasing contracts, it is not without raising questions about the scope, the function, and true nature of these principles. We will explore these questions through an overview of the international sources of soft procurement law instrument (2), enlightening their converging scopes and converging gaps (3), and potential explicit and implicit hierarchies (4), asking if soft law procurement « principles » are mainly driven by policies and objectives (5). Last, we will argue that we may be witnessing the slow but progressive construction of a *Lex mercatoria publica* based on both soft law principles and customary rules forged by international recognition (6).

[9] For example: European Bank for Reconstruction and Development, Core Principles for a Modern Concessions Law – selection and justification of principles prepared by the EBRD Legal Transition Team, 2005.

2. INTERNATIONAL SOURCES OF SOFT PROCUREMENT LAW INSTRUMENTS

International soft law principles are not only identified by their non-binding effect, something they share with domestic soft law instruments, but moreover by their origins. The diversity of their sources, which combines global, regional, domestic levels, may be understood as their main element of characterization. When considering international sources of the public contracts soft law category, one should notice the diversity of such sources, either public, private or mixed.

2.1. International Public sources

While the Statute of the International Court of Justice[10], in its Art. 38, identifies five sources of international public law:- (a) Conventions and Treaties between States; (b) International custom; (c) the « General principles of law recognized by civilized nations »; and, as subsidiary means for the determination of rules of international law: (d) Judicial decisions and the writings of « the most highly qualified publicists », international public soft law principles governing public purchasing contracts should pertain to the 3rd category. When it comes to the role of the supranational level in formulating these principles, it is interesting to discover a trend for specialization among international bodies operating in the area of public contracts, either working at the global level where the big 3 operate, or at the regional level with the EU as the most prominent example.

[10] Statute of the ICJ, 1945, https://www.icj-cij.org/en/statute.

Considering the global level, UNCITRAL[11] is a source that can be described as « primary » for the principles of international soft law in the field of public purchasing contracts[12]. This status could be recognized not only because of the anteriority of its intervention and the legitimacy of its action as a United Nations body specialized in International economic law topics, but also because of the medium in which its principles are formulated. UNCITRAL has been working on the issue of public purchasing contracts since the 80s' with the preparation of a first Model law on public procurement contracts adopted in 1993, then revised and updated with a new version published in 2011[13]. As a complement, the same UNCITRAL's Working Group turned to elaborate a Legislative Guide on Privately Financed Infrastructure Projects in 2000, the first ever synthesis on complex infrastructure contracts not yet called « PPPs »[14]. A new updated edition renamed « Legislative Guide on PPPs » was published in 2019, after a long battle among countries for and against the

[11] The United Nation Commission on International Trade Law (https://uncitral.un.org/) produces both International convention with biding effects (such as the United Convention Against Corruption – UNCAC https://www.unodc.org/unodc/en/corruption/uncac.html) and soft law instruments.

[12] L. MASTROMATTEO, *Internationalizing Public Contracts Through Model Laws: The Case of UNCITRAL Model Law on Public Procurement*, in S. Schill & M. Audit, *Transnational Law of Public Contracts*, Bruylant, Administrative Law coll., 2016, p. 407-435.

[13] UNCITRAL had a Working Group dedicated to Public procurement issues. It produced the Model Law on Procurement of Goods and Construction (1993), followed by the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) and its Guide to Enactment. They were updated by the UNCITRAL Model Law on Public Procurement (2011) (https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement) with reference to the UNCAC (entered into force in 2005), along with a Guide to Enactment (2012), a Guidance on Procurement Regulations (2013), which consolidates all provisions of the Model Law, and a Glossary (2013).

[14] As a matter of facts, in 1987, UNCITRAL published the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. After 8 years of work, in 2000, it adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (https://uncitral.un.org/en/texts/procurement/modelprovisions/privately_financed_infrastructure_projects) followed in 2003 by the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. For many years discussions were conducted among countries and International organizations about the opportunity to transform the Guide into a model law on PPPs. Finally in 2015, the Secretariat prepared a revision of the texts on infrastructure development. It led to the adoption by the Commission in 2019 of the UNCITRAL Legislative Guide on Public-Private Partnerships (https://uncitral.un.org/en/mlpppp) and the UNCITRAL Model Legislative Provisions on Public-Private Partnerships.

enactment of a Model Law on PPPs. Indeed, these ready-made soft law products, specially the model laws, attract the interests of many governments, most of them from developing countries lacking capacities and resources to prepare their customized public acquisition rules.

Then the OECD could be qualified as a concurrent source of international economic law since it has developed numerous instruments in the area of public purchasing, all of which falling into the category of soft law, with the notable exception of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[15]. Initially more focused on its members' needs, now the 35 whealthiest countries in the world, it tends to provide assistance in reforming public sectors in developing countries as well[16]. It has specialized itself, along the years, in elaborating public policy and governance guides, tools and other technical helps for Governments. PPPs are also covered by OECD work with the OECD Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships proclaiming « principles of good governance »[17].

In the financing institutions' category[18], the World Bank's Procurement rules and Guidelines, and its Standardized models of contracts, duplicated by fellow regional multilateral banks', must also be recognized as the main source of international « principles » governing the formation phase but also the performance phase. Interestingly the initial trigger of the WB procurement reform, (starting in 2012), was to get rid of the old WB

[15] https://www.oecd.org/corruption/OECDantibriberyconvention.htm

[16] In accordance with its founding convention (14 december 1960), art. 1 : https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm

[17] 2012, https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf

[18] SOPE WILLIAMS, *Public Procurement and Multilateral Development Banks: Law, Practice and Problems*, Bloomsbury, Hart, 2017.

Procurement Guidelines, with their complex procedures and red-tape to focus on a « principles-based » procurement system. However, such endeavor did not succeed since the WB ended up in 2016 with a pyramid of internal procurement norms in a construed order (Procurement Policy addressing Bank operations[19], Procurement Regulations for Borrowers[20], Procurement Directive in IPF[21], Procurement Procedure[22], and, so far, 28 Guidances[23]) and a longer list of principles. Seven «Core procurement principles » are now listed: Value for money, Economy, Integrity, Fit-for-Purpose (= proportionality), Efficiency, Transparency, Fairness. They are separated from « Governance », not specifically qualified as a principle, but which is divided into: Accountability, Conflict of Interest, Eligibility, Complaint and contract-related communications, Non-compliance. According to the risks assessment of the country and of the potential project it intends to finance, the WB must ensure that the core principles are duly implemented.

In search for efficiency and maybe legitimacy, international organizations may also regroup forces in creating common soft law tools such as benchmarking and assessment methodologies[24]. With a defined set of standards, or baseline indicators, these tools derive from an unwritten « model system » [25]. The initial Methodology for Assessing Public

[19] Bank Policy Procurement in IPF and Other Operational Procurement Matters, (7 p), November 2017.

[20] They have already been revised 4 times, showing that the area is under constant adaptation: The World Bank Procurement Regulations for IPF Borrowers, (142 p), Fourth Edition, November 2020.

[21] Bank Directive Procurement in IPF and Other Operational Procurement Matters (10 p), June 2021.

[22] Bank Procedure Procurement in IPF and Other Operational Procurement Matters (46 p), June 2021.

[23] Such as the WB Procurement Guidance on Project Procurement App Understanding how to use the World Bank Project Procurement Mobile Application, June 2019.

[24] See EBRD Public Private Partnership Assessment 2017/2018.

[25] L. FOLLIOT LALLIOT, *The harmonization process in developing countries*, in A. La Chimia & P. Trepte (eds), *Public Procurement and Aid Effectiveness. A Roadmap under Construction* (Oxford, Hart/Bloomsbury, 2019), Chap. 6, p. 97-118.

procurement System (MAPS) was actually drafted by the World Bank then endorsed by the DAC (Development Assistance Committee) with other international institutions, donors countries and finally by the OCDE which took the lead in preparing a second version of the MAPS, with the MAPS Initiative[26]. Today, the MAPS presents itself as being « universal », supporting « countries in implementing modern, efficient, sustainable and more inclusive public procurement systems, in line with the Sustainable Development Goals »[27]. What is interesting is that developed countries are also now taking advantage of such tool, with USA, New Zealand, or more recently Norway, assessed procurement systems. With this obvious impact, the MAPS proclaims several « principles » such as Value for money, Transparency, Fairness, and Governance (comprising integrity principles).

With an essentially regional vocation, some procurement principles have also been included in instruments that are only proclamatory (such as the 2006 APEC non-binding principles on public procurement[28]) or sometimes more (WEAMU Procurement Directives[29]) or less binding (Common Market Procurement regulation in East Africa[30]). Much more

[26] https://www.mapsinitiative.org/about/. Now it is available in English, French, Arabic, Spanich, Portuguese and Russian. Supplementary modules have been designed: Sustainable Public Procurement (2021), Professionalization, and other are forthcoming: E-procurement, Entity level assessment, PPPs and concessions, and Sector level assessment.

[27] MAPS User's Guide, Section 1, point 3, https://www.mapsinitiative.org/methodology/MAPS-user-guide.pdf

[28] Which are: « 1. Value for Money 2. Open and Effective Competition 3. Accountability and Due Process 4. Fair Dealing and 5. Non-Discrimination ». See as well, 2018 APEC Business Ethics for SMEs Forum – Guide to Facilitate Multi-Stakeholder Ethical Collaborations in the Medical Device and Biopharmaceutical Sectors, Asia-Pacific Economic Cooperation, (Port Moresby, Papua New Guinea 2018), http://mddb.apec.org/Documents/2018/SMEWG/SMEWG47/18_smewg47_014.pdf.

[29] BAKARY DRAMÉ, Droit comparé de la commande publique au sein de l'UEMOA, Coll. Etudes Africaines, L'Harmattan, 2021

[30] COMESA Public procurement regulation, 2009 : Article 4 « General Procurement Principles. A Member State shall, in its domestic legislation relating to public procurement ensure and in conducting public procurement apply, the principles of – (a) competition and openness in public procurement proceedings; (b) fairness; (c) transparency, including disclosure of all relevant information for participation in, and oversight over, public procurement; (d)

structured, the role of the EU could be analyzed as the main center of production of public purchasing rules and principles, although several are binding, with a guiding purpose underscored by Patricia Valcarcel in her chapter: « All the principles which underlie the EU regulations in this sector are aimed at safeguarding the same objective: to guarantee a real and effective opening of the public procurement markets in the member States, leading to the existence of a genuine single public procurement market. »

2.2. Private sources

Alongside these multilateral public sources, private sources are multiplying, with even greater recourse to flexible law, because for them, non-binding instruments remain the only available mean of regulation. International consulting and audit firms, often in the role of accompaniers to major projects or participating in arbitration processes, also contribute to the forging of a legal vulgate relating to transnational public contracts. As recognized by the former Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT), current UNCITRAL Principal Legal Officer and Head of the Legislative Branch of the International Trade Law Division, José Angelo Estrella Faria : « On the sources, stronger influence of private actors is illustrated by the evolution of privately conceived commercial rules and concepts through nongovernmental adjudication including arbitration. As an illustration of this complexity which may affect the harmonization process in public procurement, it is worth mentioning that harmonization of private commercial law is still itself under way with several initiatives but no binding results so far[31]. »

accountability; and (e) value for money ». See EY, *Overview of government procurement procedures in sub-Saharan Africa Angola*, Botswana, Namibia & South Africa April 2015.

[31] J.A.E. FARIA, *Future Directions of Legal Harmonisation and Law Reform : Stormy Seas or Prosperous Voyage ?*, Rev. dr. unif. 2009, p. 5.

Codes of good conduct, guides and Ethic instruments are flourishing, driven by the desire to ensure compliance with new obligations. Alongside companies' or banks' organizations producing ex-ante principles striving to prevent sanctions, Governmental organizations such as the OECD[32], or NGOs specialize in formulating integrity policies (e.g. Transparency International), protecting economic and social/human rights (e.g. OXFAM), and preserving the environment (e.g. IISD, International Institute for Sustainable Development) in order to defend employees and/or citizens' interests, and orchestrate good governance as a meta-objective. Today, all of them are united in a strategic vision of public procurement as a privileged vector for achieving the Sustainable Development Goals (SDGs), including but not limited[33] to SDG 12 on responsible consumption & production and its public procurement relevance[34].

2.3. Mixed sources

Finally, in the international regulation of public procurement's arena, « revelations » of principles are discussed in restricted circles where representatives of States, representatives of international financial organizations and identified experts gravitate. As an

[32] G20/OECD Principles of Corporate Governance, (2nd ed. 2015) First issued in 1999, the Principles have become the international benchmark in corporate governance and they have been endorsed by the G20 countries https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en

[33] Public procurement and PPPs can be mobilized to achieve almost all SDGs. This is one of the conclusions of the March 2021 Meeting of the OECD Council and Partners on the 2030 Agenda for Sustainable Development.

[34] « Ensure sustainable consumption and production patterns » through eleven different targets, one of which – target 12.7 – aims to « Promote public procurement practices that are sustainable, in accordance with national policies and priorities ». Accordingly, Indicator 12.7.1 – officially designated as the « Number of countries implementing Sustainable Public Procurement policies and action plans » – has been specifically set to measure the achievement towards this target ». https://www.unep.org/explore-topics/resource-efficiency/what-we-do/sustainable-public-procurement/sdg-127-target-and

example, at their 2014 Summit, the B20 called on G20 governments to apply best practice procurement processes in all large and/or publicly significant infrastructure projects. The B20 Anti-Corruption Task Force also established a work stream on Government Procurement. G20 countries committed to ensure they have in place « systems of procurement based on transparency, competition and objective criteria in decision-making to prevent corruption » and called on the OECD to develop the Compendium of Good Practices for Integrity in Public Procurement[35] approved by the G20. Containing counsels and recommendations, the Compendium pertains obviously to the soft law category, but nonetheless endorsing a prescribing purpose: « This Compendium supports G20 countries in mapping good practices and sharing lessons learned in order to shape the global debate and set example for fighting corruption and promoting integrity in public procurement while implementing national standards ».

As another example of mixed sources, the Open Contracting Global Principles[36] « reflecting norms and best practices worldwide » in using data to analyze and monitor public procurement, were developed in a collaborative process involving nearly 200 members from government, private sector, civil society, donor organizations, and international financing institutions. From a substantive approach it is more a list of proclamatory right to access information and mandatory disclosure in the area of public procurements such as : « Governments shall recognize the right of the public to participate in the oversight of the formation, award, execution, performance, and completion of public contracts ». However, more than 30 countries have decided to implement such principles, the latest being the UK with its post-Brexit new public procurement policy.

[35] OECD GOV/PGC/ETH(2014)2/REV1.

[36] https://www.open-contracting.org/what-is-open-contracting/global-principles/ access on May 2021.

3. CONVERGING SCOPES AND CONVERGING GAPS

3.1. Converging principles?

The simultaneous nature of the formulation of principles applicable to public procurement contracts under soft law requirements explains the observance of a relative substantial convergence emanating from different sources. Several typologies of principles can be drawn up, either by focusing on the criterion of their subject matter (substantive typologies) or by focusing on the geographical area of application of the principles (spatial typologies). With regard to the substantive criterion, flexible law, which is essentially non-binding, has the merit of being particularly well suited to the contractual universe which claims the freedom of the parties and the autonomy of obligations. In the more specific field of public procurement contracts, it preserves the sovereignty of the States, which can be inspired by it when it serves their interests

Based on a spatial taxonomy, one can separate principles intended to govern domestic public contracts and principles intended to govern transnational public contracts, principles with a bilateral vocation that must be applied between two States, or principles with a plurilateral vocation that will govern a limited circle of countries on the basis of the reciprocity principle.

Collateral objectives can also be added, leading to the incorporation of new principles. For many years, multilateral development Banks (MDBs) but also International Institutions involved in improving development and aid efficiency have promoted an agenda addressing corruption in public contracting. Part of this fight tends to rely on debarment process based

on established cases of fraud or collusion[37], with a more recent twist expanding the debarment effects. Expand it from an horizontal point of view, with several MDBs applying automatic debarment decisions when decided by another MDB but also a recent inventory of national debarment decisions to be centralized and published on the Word Bank website. Moreover, debarment is now also considered by the World Bank as a way to actively promote an anti-gender-based violence (GBV) policy through new cases of bidders disqualification[38].

Launched in January 2021, prevention and compliance in this specific field of human rights will rely on continuous independent monitoring of compliance with GBV related obligations in large works contracts rated high risk for sexual harassment, exploitation and abuse. Such requirements must be listed in the mandatory Code of conduct imposed by the World Bank on any Private contractor part of its financed projects since 2017.
According to the substantive typologies listing the covered topics, core principles may address the formation of contracts (Transparency and Competition. Although competition is more a meta-principle declined through sub-principle such as Equal access, Equal treatment, Non-discrimination, Fairness. Rarely, the international written framework provides for rules for interpretation in case of potential contradiction between principles[39].

[37] D. C. DRAGOS, *Sanctions Mechanisms of the World Bank on the Matter of International Corruption*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, Administrative Law coll., 2016, p. 879-904. See also: World Bank Procedure: Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects, 2016.

[38] The World Bank printed a guideline for its staff : Good Practice Note, Addressing Sexual Exploitation and Abuse and Sexual Harassment (SEA/SH) in Investment Project Financing involving Major Civil Works, 2020, 2nd ed.

[39] Interestingly, Article 21 of the Panamanian law (Ley de Panamá nº 22, de 27 de junio de 2006) includes important rules when it states that « in the interpretation of the rules on public contracts, of the procedures for the selection of contractors, of the cases of exception to the procedure for the selection of contractors and of the clauses and stipulations of the contracts, the public interests, the purposes and principles of this Law, as well as good faith, equality and balance between obligations and rights that characterize commutative contracts, shall be taken into consideration. » José Antonio Moreno Molina, Panorama comparado de la Contratación Pública en América Latina, 2015, available at http://www.obcp.es/opiniones/panorama-comparado-de-la-contratacion-publica-en-america-latina.

3.2. A lack of Soft law principles governing the grey zone of performance in public acquisition contracts?

There is a huge contrast between the over regulated area of procurement rules, subject to the influences of overlapping soft law « principles » and hard law rules, and the lack of both when it comes to frame the execution of these contracts.

International contractual principles for the performance of public purchasing contracts remained undefined, uncertain, and uncompleted when referring to international guidance and soft law instruments mentioned previously. Whilst the formation of public contracts and methods of procurement are heavily regulated by international (trade) public norms, the rules governing the performance of these contracts is still lagging behind. It reveals a parallel between domestic legal framework and international principles: the overregulated area of public contracts formation rules contrasts with the under-framed area of public contracts' administration. Such parallelism raises a question about the actual role of international soft law principles: they might complement existing domestic rules rather than anticipating such rules, and they may be more focused on regulating interstates relations (facilitating trade and access to foreign procurement markets) rather than addressing principles to be applied between the contractual parties.

Indeed, concerning the execution of transnational public contracts, there is no equivalent to the Unidroit Principles of International Commercial Contracts[40]. « The most important soft law instrument in the field of general contract law »[41], was first published in 1994 and are now in their fourth edition. Following the example of the US Restatements of the Law, the

[40]The 2016 UNIDROIT Principles of International Commercial contracts prepared by the International Institute for the Unification of Private Law. The 2016 edition of the UNIDROIT Principles covers virtually all the most important topics of general contract law: https://www.unidroit.org/fr/instruments/contrats-du-commerce/principes-d-unidroit-2016

[41] M. JOACHIM BONELL, *The law governing international commercial contracts and the actual role of the UNIDROIT Principles*, Uniform Law Review, Volume 23, Issue 1, March 2018, Pages 15–41, 20 March 2018.

current 2016 edition comprises, « a total of 211 articles divided into 11 chapters-each of which is accompanied by comments and by illustrations largely based on actual cases and intended to explain the reasons for the black-letter rule and the different ways in which it may operate in practice. » Thus the « 2016 UNIDROIT Principles now cover the performance of long term contracts, on the verge of issues encountered as well in public contracting including PPPs » [42]. However, lengthy discussion about expanding the scope of the Unidroit Principles in 2016 failed to cover long-term contracts, in particular to introduce a right of termination for « compelling reasons » [43].[44]

However, to fill this gap, there exist Standard Bidding Templates including standard clauses[45] for transnational public contracts. FIDIC forms and FIDIC related standards usually rely on principles of good faith, change/right to modification, right to termination, right for compensation, sanctity of the contract, and arbitration as the main way of settling contractual disputes. As soft law tools, contractual models with standard clauses designed to protect public or private interests, or both, are prepared by powerful transnational private bodies (e.g. FIDIC with its FIDIC Books[46]) or by networks of lawyers. All the WB Standard Procurement Documents have been initially drafted by FIDIC, with customized provisions adapting WB

[42] A. RILES, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, (2008). Cornell Law Faculty Publications. Paper 36. About transnational contracts, Gilles Lhuilier observers that « the private actors now « localise » themselves on singular « normative spaces » *in* « The Concept of « Normative Space » in Rethinking the Globalization of Law, p.67, and in his book: Le droit transnational, Dalloz, 2016.

[43] The suggested wording was rejected: « if, having regard to all the circumstances of the case it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship. » Cf. UNIDROIT 2016, Study L Doc. 135 rev., January 2016 Annex 10.

[44] M.J. BONELL, *The Law Governing International Commercial Contracts : Hard Law versus Soft Law* (Volume 388), Collected Courses of the Hague Academy of International Law, 2016.

[45] See the World Bank Standard Procurement Documents elaborated by FIDIC. Other Development agencies and MDBs have developed their own sets, based on the WB's models.

[46] B. DUPUIS & J.-B. MOREL, *The role of FIDIC in the Standardization of Infrastructures Model Contracts*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, 2016, p. 489- 519.

policies, such as non-discrimination among employees[47]. However, the World Bank has more recently revert to FIDIC Books, suppressing the Section on general conditions of contracts (GCC) in its model contracts. Countries and public contracting entities are thus required to use the original FIDIC GCC, an interesting outsourcing decision which forces the parties to use contractual stipulations that are not necessarily well adapted to the particular situation of large public contracts. In the mist of its deep procurement reform engaged in 2016, the WB has adopted a procurement Guidance addressing the performance phase of public contracts [48]. Although the detailed WB Standard Procurement Documents[49] have been, so far, duplicated and adapted by many international donors and MDBs, they remain exceptional in the landscape of freedom governing transnational public contracts. Understood as the area of contractual freedom, albeit framed by domestic law, the performance of transnational public contracts is still today either driven by domestic law, including mandatory conditions of contracts if apply, or by the *ad-hoc* contract negotiated by the parties.

[47] SPD Request for Proposals Works and Operation Service, Design, build and operation of *[water treatment plant (WTP)/ wastewater treatment plant (WWTP)]* (Two-Stage Request for Proposals, after Initial Selection) revised 2021, General conditions of contracts, Sub-clause 6.24, Non discrimination and equal opportunity : « the contractor shall not make decisions relating to the employment or treatment of Contractor's Personnel on the basis of personal characteristics unrelated to inherent job requirements. The Contractor shall base the employment of Contractor's Personnel on the principle of equal opportunity and fair treatment… »

[48] Procurement Guidance, Contract Management General Principles, September 2017, https://thedocs.worldbank.org/en/doc/531561507743080555 0290022017/original/ContractManagementGuidance2017.pdf

[49] Over 50 standards documents are available, addressing specific contracts and topics such as COVID emergency responses. https://projects.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework

Facing the lack of normative framework when it comes to solve transnational public contracts issues[50], arbitration law has been tempted to resort to investment law principles[51] or borrow somehow international business law principles, or the protective regime attached to the theory of State contracts[52], for resolving public contractual conflicts[53].

3.3. Towards the recognition of common contractual performance principles gathered in a Lex mercatoria publica?

As one case of international arbitration after another, the formation of a set of case-law principles to govern the performance of international public contracts must now be given attention. Several origins of this arbitration jurisprudence should be highlighted. On the one hand, standard models of infrastructure contracts and other international contracts largely refer to arbitration as a means of resolving disputes between the parties, thanks to the systematic insertion of an arbitration clause in these contractual models. Converging solutions are also being developed in the Investment arbitration area when an Investment treaty has been entered into by the Host State and the State of the foreign contractor. Despites

[50] However, principles governing the execution of major infrastructure projects have been thoroughly discussed, and timidly promoted, in the area of transnational PPPs, as in the 2000 UNCITRAL Legislative Guide mentioned above. Interestingly, the vast majority of international soft law instruments which took inspiration from the UNCITRAL Legislative Guide to produce several PPPs guidelines, did not tackle this area, never proclaiming any soft law principles governing the performance of public acquisition contracts.

[51] See Ph. COLEMAN, *Contrats publics et arbitrage d'investissements*, PHD Thesis, LGDJ, 2021, p. 566, n° 901.

[52] Ph. COLEMAN, op. cit. The author demonstrates how the theory of State contracts, which allowed many long term public purchasing contracts (as types of PPP) to be exceptionally subject to international law, has been progressively abandoned in favor of a domestic law regime. See also: A. de Nanteuil, Droit international de l'investissement, Pedone, 2014, p. 39, §42.

[53] R. BISMUTH, *Customary Principles Regarding Public Contracts Concluded With Foreigners*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, Administrative Law coll., 2016, pp. 323–352.

recurrent issues on how to determine the law to apply[54], Investment law and commercial law arbitration in the area tend to progressively sketch the same picture of transnational public contracts. Not only the International Center for the Settlement of Investment Disputes[55] but other international arbitral forum[56] have moved to align their case law on several common grounds.

We will argue that a customized concept of *Lex mercatoria*[57] *publica*[58] could reflect these *ad-hoc* principles protecting a specific regime governing international public contracts. Similarity could be here pointed at with the private international custom concept. The role of opinio juris in the formation of international custom and of the (private) *Lex mercatoria* in particular have already been extensively studied by specialists in international trade law. As P.M. Dupuis and Y. Kerbrat wrote: « this concordant accumulation may be indicative of the progressive emergence of a new rule. The repeated and close renegotiation and adoption of the same rules hammers and shapes mentalities, thus hastening the normative genesis. Each resolution thus contributes to the catalysis of custom ». Ph. Coleman suggested to refer to a Lex administrativa[59], but without elaborating on the idea. However, some of potential building principles might be borrowed from the international business law environment, such

[54]H. WEHLAND, *Competing Dispute Resolution Mechanisms in Public Contracts and International Investment Agreements*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, Administrative Law coll., 2016, p. 375-403.

[55]ICSID, 2020 Annual Report Excellence in Investment Dispute Resolution

[56] ICC Model Turnkey Contract for Major Projects, revised 2020.

[57] Indeed, the *lex mercatoria* traditionally understood is related to private international law governing only merchants and cannot be applied to international public contracts. See P. MAYER, *La neutralisation du pouvoir normatif de l'État en matière de contrats d'État* , JDI, 1986, p. 5 et s. reprinted in Choix d'articles de Pierre Mayer, LGDJ 2015, pp. 243 et s.

[58] Such proposal must be separate from the existing concept of Transnational or International Public Order.

[59] Ph. COLEMAN, states in his published version of his PDH Thesis, op. cit., p. 525, n. 835, : « more broadly, these principles undoubtedly form the heart of a *lex administrativa* which is detached from the rules applicable to transnational relations between private persons ».

as the principle of good faith, of Estoppel[60], the « superior governmental power » opening expropriation protection[61], but completed by public principles such as the invalidity of the contract in breach with administrative formation proceedings, or the, expanding, principle of invalidity of the corrupt international public contract[62]. In the field of Investment law, the concept of Transnational public order (ordre public transnational[63]) has been deployed to cover human rights and anti-corruption requirements. Moreover, such principles are not only elaborated during trial and arbitration cases (as customary principles, or principles borrowed from Investment law), but they are also shared by soft law instruments, such as model clauses[64], (eg see above the anti-corruption policy and human rights requirements[65]), contributing to the construction of a body of principles that could be referred to as *Lex Mercatoria Publica* shared by international public and private actors involved in transnational public contracts either as parties (States and companies) or as third parties such as financers, sub-contractors, NGOs representing employees, users, and civil society.

[60] After several years of performance, a party, even the public one, cannot argue that the contract is invalid or void due to non-compliance with the bidding requirements or other formation rules: such solution was applied to the concession of the construction and operation of an airport terminal to a German company in The Philippines (Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I), ICSID Case No. ARB/03/25), the concession of a railroad in Guatemala (Railroad Development Corporation v. Guatemala, ICSID Case No ARB/07/23, and 18 may 2010)..

[61] Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8: not every breach of a contract is capable of being considered a potential expropriation, but rather only those interferences made through the use of the host state's « superior governmental power ».

[62] World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7 ; Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8 : « this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy ».

[63] M. FORTEAU, *L'Ordre public Transnational' ou « réellement international - L'Ordre Public International face à l'enchevêtrement croissant du droit international privé et du droit international public* , Journal du droit international, 3, 2011, 138.

[64] ICC Model Turnkey Contract for Major Projects, revised 2020.

[65] World Bank Contract Management General Principles September 2017 deals with obligations for the public contracting entity such as following performance indicators.

4. EXPLICIT AND IMPLICIT HIERARCHIES AMONG THE SOFT LAW PRINCIPLES

4.1. Explicit hierarchy

In the Preamble to the 2011 Model Law on Public Procurement, the United Nations Commission on International Trade Law (UNCITRAL), states from the beginning a list of principles whose order reveals the choices made by the 66 states that participated in this consensual exercise. Following the wording of the first version of 1993, they placed efficiency and economy in first place, but transparency was listed last.[66]**.**

An interesting shift in priorities can also be observed in the World Bank's internally developed texts that are imposed on the operations that this multilateral bank finances in borrowing states. In 2016, the IMF's sister institution in Washington reformed its entire procurement policy by adopting a set of new rules, by such creating an autonomous internal hierarchy of norms. Under the new policy, set out in the WB Policy Document[67]**,** the Bank has established its « vision »[68] and the key principles to be associated with it, in this specific

[66] UNCITRAL Model Law on public procurement of goods, works, and services and the Guide for its implementation (1995) : « it is desirable to regulate procurement in order to promote the following objectives (a) To achieve maximum economy and efficiency in procurement; (b) To promote and encourage the participation of suppliers and contractors in procurement proceedings without distinction as to nationality, and thereby to promote international trade; (c) To promote competition among suppliers and contractors for the supply of the subject matter of the procurement; (d) To ensure the fair, equal and equitable treatment of all suppliers and contractors; (e) To promote the integrity of, and public confidence in, the procurement process; and (f) To ensure transparency in the procurement proceedings. »

[67] Bank Policy Procurement in IPF and Other Operational Procurement Matters (november 2017).

[68] Procurement in IPF operations supports Borrowers to achieve value for money with integrity in delivering sustainable development. To achieve this vision, the Bank seeks assurance from Borrowers that acceptable procurement arrangements are applied to the financial resources it provides to Borrowers, and supports Borrower countries in enhancing and implementing sound procurement systems and institutions. The Bank may support country capacity building at the level of the project or as part of the country dialogue, using a range of measures—

order: Value for Money, Economy, Integrity, Fit for Purpose, Efficiency, Transparency, and Fairness. Proclaiming principles displays a pedagogical virtue: it legitimizes a discourse that takes on the appearance of a mandatory legal framework. Fighting with the unformal vocabulary they have been using, some of these International bodies are thus trying to clarify the scope and purpose of these « rules ». As an illustration, the « Impact Standards for Financing Sustainable development », prepared by OECD and UNEP « seek to fill the gap between high-level principles and the impact measurement and management frameworks and tools that each organization independently choses to use »[69].

4.2. An implicit organic hierarchy of principles?

Beyond the, somehow, blurry procurement global law landscape, one can nevertheless detect an organic hierarchy based on the place and status of the institution that elaborates the soft law principle within the international legal order. This hierarchy resulting from the place of the body that formulated the principle remains essentially implicit and sometimes gives rise to discreet conflicts of influence. In this respect, the respective positions of the multilateral banks and the OECD with regard to the formulation of principles governing public procurement was an enlightening illustration. While the World Bank proclaimed in 2008 the existence of « International Standards » against which it, and most of the other multilateral banks, intended to assess the risks presented by national public procurement systems, this unilateral assertion was defaulted by the multiplication of procurement models promoted by different donors.

On their side, confronted with the deny of using their own procurement rules, even reformed, the borrowing countries started to vehemently contest the loan conditions coupled

funding, technical support, and hands-on expanded implementation support (in selected *cases)*— depending on the specific context of the country, sector, agency, or project.

[69] OECD-UNDP Impact Standards for Financing Sustainable Development, May 2021.

with an increasing complexity of procurement requirements. Between 2012 and 2016, the World Bank took advantage of the complete overhaul of its public procurement policy to carry out a Copernican revolution in order to align its procurement requirements with the principles that had begun to emerge in other international circles, including the EU and the GPA's arenas, *de facto* acknowledging the supremacy of international hard law procurement principles over MDBs soft law proclamations.

From a legal perspective, the principles forged by the OECD have had more impact, due to several factors. The first is the relatively homogeneous composition of the group of 35 OECD member states, developed countries with already advanced public procurement systems, similar in many respects. The second is due to the consensual and collaborative nature of the drafting method followed by the OECD[70], which is not unrelated to the one used by UNCITRAL. The third is the multiplication of initiatives taken by the OECD in the field of public procurement regulation. Various and converging efforts have been displayed by different OECD Directorates specializing in governance[71], anti-corruption (with the OECD Principles for Enhancing Integrity in Public Procurement[72]) and PPPs[73]. Called upon by its member countries to take an interest in cross-cutting issues[74], the OECD is mainly a forum

[70] « An extensive consultation was carried out in 2008 on the Principles and Checklist with various stakeholders. The consultation with representatives from international organisations confirmed that the Principles usefully complement international legal instruments », OECD Principles for Integrity in Public Procurement, 2009.

[71] Reflecting the unification of rules and issues regarding public acquisition contracts, the OCDE public procurement division and the PPPs division have recently merged.

[72] OECD Principles for Integrity in Public Procurement, 2009

[73] « The Principles also reflect the multi-disciplinary work of the OECD in analysing public procurement from the public governance, aid effectiveness, anti-bribery and competition perspectives ». OECD Principles for Integrity in Public Procurement, 2009.

[74] « At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, participants called for the creation of an international instrument in order to help policy makers reform public procurement systems and reinforce integrity and public trust in how public funds are managed. » OECD Principles for Integrity in Public Procurement, 2009.

for discussion between developed States, sharing similar legal/procurement background. In this context, the question of the legal nature of the principles elaborated is not particularly addressed by this institution, which sometimes qualifies them as « Policies », « Pillars »[75], or even Recommendations or statements within toolboxes[76]. Countries will be later on free to determine how and when they may implement the OECD's « principles » through written rules.

This picture also reflects the paradoxical ambiguity of international soft law principles in this domain: they flourish in legal areas that are already overregulated, such as the procedures attached to the formation of public acquisition contracts and their related challenge and protest mechanisms.

4.3. Hierarchy of principles or hierarchy of policy objectives?

These international soft law principles endorse different functions. In theory, the principles of soft law on public acquisition should be used to forge concepts and standards filling the gaps in international public contract law, but actually they also serve to interpret and complement national legislation on public procurement even when only domestic parties are involved. In commercial environment, and sometimes public contracts, parties to an international contract may include a reference to general principles, whether as supplementary to the domestic law chosen or as directly applicable to any possible dispute. Such principles provide flexible interpretative tools in both the domestic and the international order.

[75] « The Principles are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control in order to enhance integrity in public procurement. » OECD Principles for Integrity in Public Procurement, 2009

[76] Recommendation on Fighting Bid-rigging in Public Procurement (2012) OECD Recommendation on Improving the Environmental Performance of Public Procurement (2002); OECD Recommendation of the Council on Public Integrity (2017); High-Level Principles for integrity, transparency and effective control of major events and related infrastructures (2016)

In addition, some of these « principles » are in fact only objectives to be achieved, targets indicated to governments through international proclamations and recommendations. This feature is particularly notable in the case of the 10 OECD Principles for Enhancing Integrity in Public Procurement. Published in 2009, it presented five themes: « transparency », « good governance », « prevention of improper conduct, compliance with oversight rules », and « accountability », each divided into « Principles ». Thus, the theme of Transparency was articulated around Principle 1/ « Establish a degree of transparency at all stages of the procurement cycle to ensure fair and equitable treatment of suppliers », and Principle 2/ « Strive for maximum transparency in tendering and take precautionary measures to enhance integrity, particularly in the event of deviations from competitive bidding rules ». Clearly, without any interpretative function, these « principles » reflect objectives or means to be implemented by the public authority to ensure the effectiveness of transparency. Furthermore, the second part of the document, even more practical in its purpose, deals with the « implementation of the principles » and explores the detailed implementing phases as well as process for risks mapping.

Last, the policy dimension of the hierarchy of principles should be underlined. The ongoing debate about Sustainable Public procurement (SPP) is a topic illustrative example, accelerated by the COVID crisis, of the lead position taken by these international institutions or at least some of them[77]. For many years, environmental considerations, social goals or SMES empowerment had been considered as "secondary objectives" that could be reflected in « secondary criteria » during the award process. However, with SPP becoming a top priority on the international agenda, the official discourse tends to be recently shifting, with SPP « objectives »/ « goals » considered now to be « complementary » to the core principles such as Competition, transparency or equal access. In the circular movement of ideas, countries may go even faster than International Institutions in exploring that direction, as

[77] The World Bank seems to be more reluctant in leaving behind the primary role of the "best value for money"

shown by the UK Green Paper[78] which, as a main reform promoted in the mist of the Brexit process, recommends to put upfront the Social value of public procurement through the evaluation of the Most Advantageous Tender, dropping the « economically » dimension. « Public good » may become the first procurement principle, as it should support « the delivery of strategic national priorities including economic, social, ethical, environmental and public safety »[79].

In conclusion, the place of the principles of soft law in the formation of a universal law of public procurement contracts must be recognized, but also their evolving and protean nature. However, the very political nature of public purchasing, which is now perceived as a strategic instrument of direct intervention by governments in the economic and social context of their countries, makes the definition and identification of principles subject to a dialectical relationship with the public policy objectives. In this respect, one may wonder whether today the objective of opening up public contracts, which has been the basis of many written and informal principles of public procurement law for years, including, first and foremost, that of competition, is not in the process of giving way to the imperium of sustainable development[80], which would force a reconsideration of the list of principles traditionally attached to public contracts, as well as their order of priority[81].

[78] Cabinet Office, Green Paper: Transforming public procurement, submitted for comments from December 2020 to March 2021. A new law and legal framework should follow in the coming months.

[79] Green paper, p. 14.

[80] See the second edition May 2021 of European Commission's guidance: 'Buying social: A guide to taking account of social considerations in public procurement', https://ec.europa.eu/growth/content/new-practical-guidance-help-public-buyers-integrate-social-considerations-public-procurement_en

[81] As stated by the Buying social guidance (p. 11, ref. 30) : "This includes compliance with the obligations and principles established in the Treaty and in the Charter of Fundamental rights of the European Union, and with the ILO Declaration on Fundamental Principles and Rights at Work, the International Bill of Human Rights and the

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Abstract. *Soft law principles on public procurement focusing on the supra-European level and questioning the scope, function and true nature of these principles are discussed in this article. The investigation will be conducted through an overview of international sources, highlighting converging areas, gaps and potential explicit and implicit hierarchies as well as questioning whether soft law "principles" on procurement are driven by policies and objectives. A slow yet progressive construction of a Lex mercatoria publica based on both soft law principles and customary rules shaped by international recognition is highlighted.*

United Nations Declaration on the Rights of Indigenous Peoples". By contrast the traditional "core" procurement principles are qualified as "basic"(p. 54) : "basic Treaty principles of transparency and equal treatment".

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FROM SUSTAINABLE DEVELOPMENT TO GREEN NEW DEAL

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1. INTRODUCTION

The Green New Deal (GND) is an economic policy programme[2] launched some years ago, recently in great development and still in progress, with the aim of starting, enhancing and consolidating an economy that pursues growth through actions, which do not overcome a series of ecological limits[3]. It combines public interventionism and private initiatives to ensure that all economic and industrial choices are able to promote economic growth through safeguarding the environment. Hence, the GND aims to: reduce CO_2 emissions and global warming; protecting biodiversity and human, animal and plant health and, at the same time, promote socio-economic development; identify new areas of

[2] The expression recalls the "New Deal" enacted in the United States by the President Franklin Delano Roosevelt between 1933 and 1939 in order to find remedies to the effect of the economic crisis of 1929-1932. This was based on John Maynard Keynes' theories and on State intervention, in such a way not to compromise the fundamental principles of the capitalistic system. On the issue, see, among others, K.K. PATEL, *The New Deal: A Global History*, Princeton University, 2016; *Lessons from the New Seal. Hearing before the subcommittee on economic policy of the committee on banking, housing, and urban affairs united states senate one hundred eleventh congress. First session on what lessons can congress learn from the new deal that can help drive our economy today*, MARCH 31, 2009, Printed for the use of the Committee on Banking, Housing, and Urban Affairs, available at: *http://www.access.gpo.gov/congress/senate/senate05sh.html* and J. MILTON CARSON, *The Constitution and the New Deal: Address of James M. Carson of Miami, Florida, Before the Birmingham Forum, Birmingham, Alabama*, December 16, 1935, Together with a Transcript of Forum Proceedings Following Mr. Carson's Speech.

The reference to Roosvelt's programme unveils two of the primary features of the GND, which will then be discussed in the rest of the article: State intervention in the economy with a view to reviving it, that is to say to promote growth and development, and the need to identify a meeting point precisely between this economic growth and environmental protection. GND literature is already growing: J. RIFKIN, *The Green New Deal: Why the Fossil Fuel Civilization Will Collapse by 2028, and the Bold Economic Plan to Save Life on Earth*, St. Martin, 2019; N. CHOMSKY E R. POLLIN, *The Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet*, Verso Books, 2020; A. PETTIFOR, *The case for the Green New Deal*, Verso Books, 2020.

[3] "An economy that sustains life on earth will be a steady state economy and will not exceed the nine ecological boundaries: stratospheric ozone depletion; loss of biosphere integrity (biodiversity loss and extinctions); chemical pollution and the release of novel entities; climate change; ocean acidification; freshwater consumption and the global hydrological cycle; land system change; nitrogen and phosphorus flows to the biosphere and oceans; atmospheric aerosol loading", *Ibid*., p. 158. Se also Stockholm Resilience Centre - Stockholm Resilience Centre.

investment; increase wealth and general well-being. Notably, it does not follow these objectives by means of a compromise, but integrating and making interdependent the two pillars of growth and environmental sustainability.

The ability of the system to respect ecological limits without compromising development needs can only be considered possible through the use of legal and regulatory instruments, whether of incentive and promotional nature or arranging prohibitions and setting standards. Public policies and measures are necessary tools to bring the GND into force, converting numerous economic and social activities to environmental sustainability, combining the need to reduce pollution with that of fostering growth, limiting economic undertaken and at the same time encouraging it according to innovative aims and paths.
In order to draw the boundaries of public regulation aimed at pursuing the stated objectives and to identify its scope, its peculiar and most important features, as well as the problematic aspects, it is useful to make a comparison with a similar model, born a few decades ago, yet still current in its different evolutions and declinations: Sustainable Development (SD)[4].
The latter aims to protect the environment and at the same time promote social and economic development and has been defined as "the development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[5]. Recognized as a principle of international law with the Rio Declaration[6] and with the New

[4] World Commission On Environment and Development, *Our Common Future*, Oxford Paperbacks, 1990. In future decades the literature on the issue increased. For an idea see, among others, J.A. ELLIOTT, *An Introduction to Sustainable Development*, Routledge, 2013; J.D. SACHS, *The Age of Sustainable Development*, Columbia University Press, 2014; S. E. SAJA, *Systems Thinking for Sustainable Development. Climate Change and the Environment*, Springer, 2018; C. HENRY, J. ROCKSTRÖM, N. STERN, *Standing Up for a Sustainable World. Voices of Change*, Elgar, 2020; N. ROORDA, *Fundamentals of Sustainable Development*, Routledge, 3rd ed., 2020.

[5] World Commission on Environment and Development, WCED, "Brundtland Report" (Report of the World Commission on Environment and Development: Our Common Future), Transmitted to the General Assembly as an Annex to document A/42/427, 1987, *https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf*.

[6] UN General Assembly, *Report of the United Nations Conference on Environment and Development*, adopted by the United Nations International Conference on Environment and Development (UNCED) in 1992, A/CONF.151/26,

Delhi Declaration of Principles of International Law Relating to Sustainable Development[7], is a much-discussed institute, especially because of its difficult classification from a defining point of view and its actual legal effectivity[8]. Nevertheless, as evidenced by the "2030 Agenda for Sustainable Development" adopted in 2015 by the governments of the 193 Member States of the United Nations [9], this principle or guiding criterion of public policies is still of fundamental importance[10].

2. FROM SD TO GND: A COMPARISON

The reason for a comparison between Green New Deal and Sustainable Development arises from the many elements in common between the two approaches. Like the second, GND can be a principle of public administration, as it stands as a value and conceptual reference point for the adoption of certain public policies. Still in analogy with SD, activities descended with GND aim to achieve a balance between two objectives of general importance, often in conflict but potentially compatible: environmental protection and the promotion of economic and social development. Finally, both – although the Green

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

[7] International Law Association, *New Delhi Declaration of principles of international law relating to sustainable development*, (August 2002), UN Doc., A/57/329, *https://cisdl.org/public/docs/new_delhi_declaration.pdf*.

[8] A critical appraisal is to be found in E. Scotti, *Poteri pubblici, sviluppo sostenibile ed economia circolare*, in *Il diritto dell'economia*, n. 98 (1 2019), p. 495, who criticizes the axiological weakness of SD, its difficulty in finding a balance among social, economic and environmental values, as well as its inefficacy under the legal perspective.

[9] It is a programme of action for people, the planet and the prosperity, consistent of 17 Sustainable Development Goals, SDGs (*https://www.un.org/sustainabledevelopment/*), with 169 target. See then the commitments to reach such objective in the following 15 years: *https://unric.org/it/agenda-2030/*.

[10] SD appears in several legal acts, not only in international law, but also in domestic and EU law. As for the latter, see for instance all the EU Directives on the energy performance of buildings, such as the number 2010/31/UE.

New Deal with more original features, as will be said – involve a number of innovations in public regulation.

The scope of the GND is not a particular novelty in the field of public governance: the protection of the environment itself, since it has become a subject of regulation, is inevitably connected and balanced with other interests, above all of economic nature[11]. The environment is a complex, multidimensional and transversal legal institute: a system of relationship among several factors. Therefore, public intervention to protect the environment cannot ignore the necessity to balance the measures adopted with other needs of socio-economic nature (the development of agriculture and industry, the creation or safeguarding of jobs, the protection of the landscape and cultural heritage, the eradication or reduction of poverty, the protection of human, animal and plant health). Nevertheless, the creation of legal concepts as the ones at issue has sought to codify and prioritize the balance between the environment and economic growth, placing it at the heart of general public policies.

The aim of this work is thus to bring out the most interesting features and the most problematic profiles in the governance deriving from the aim to protect the environment through the promotion of growth; with the promise that the ecologic transition cannot prescind from public regulation. The enhancement of the two concepts is not spontaneous neither automatic, despite the new frontiers of gain in green economy, but develops only with

[11] In this sense, there is enough convergence in legal doctrine and science, but the assumption can be evinced even by empiric observation. As a confirmation, some decisions of the Italian Constitutional Court are quite emblematic, as they defined the environment as a transversal subject, which implies the protection of a plurality of public interests to be balanced together. See Italian Constitutional Court Decision n. 246/2006: "si deve sottolineare che, accanto al bene giuridico ambiente in senso unitario, possano coesistere altri beni giuridici, aventi ad oggetto componenti o aspetti del bene ambiente, ma concernenti interessi diversi giuridicamente tutelati. Si parla, in proposito, dell'ambiente come "materia trasversale", nel senso che sullo stesso oggetto insistono interessi diversi: quello alla conservazione dell'ambiente e quelli inerenti alle sue utilizzazioni". On the issue, Chiara Feliziani, *Industria e ambiente. Il principio di integrazione dalla rivoluzione industriale all'economia circolare*, in *Diritto Amministrativo*, 4, 2020, p. 849 has observed that in international relations the link between resources protection and economic development was noted already by scholars of the XVIII and XIX centuries, such as George Perkins Marsh (*The Earth as Modified by Human Action*, Andesite Press, Milano, 2017 rist.) as well as in some bilateral agreements of those times.

the intervention of public bodies, both beyond national borders – the environment being a subject, by definition, of global importance – and inside national States. In the transition from SD to GND, there are significant paradigm changes, useful to anticipate the challenges for future regulation. These new elements will be investigated, also thanks to the analysis of some case studies, and can be summarized as follows.

Firstly, environment and development are no longer seen in a dialectical conflict that tries to find a balance between the two, but the protection of the former – which plays a prominent and central role – constitutes the economic and legal ground for safeguarding and improving the conditions of the latter (§ 2.1).

Secondly, the GND has, to date, even less preceptive effect than SD, particularly in extra-national law. Nevertheless, it aims to establish itself precisely as a binding principle, at least for the regulatory authorities. In fact, in many legal systems – notably the EU – it develops as an action plan that gives rise to binding rules, supranational and national planning, policy and regulatory initiatives entrusted to the care of public authorities, and new limits for private individuals. If not a binding norm, the GND affirms as the main *rationale* for the adoption of binding regulatory policies (§ 2.2).

Thirdly, while the environment has become a subject of global governance in recent decades – albeit with little success from the point of view of the effectiveness of the public policies adopted – the GND is developing according to a multi-level pattern: Supranational norms, guidelines, directives and standards are surely global, but national measures constitute the central and crucial moment of the regulation in question, which sees States and local administrations as key players (§ 2.3).

Finally, the GND also preludes and inspires a new model of public governance of the economy, which combines various modes of intervention, of which three are particularly significant. The first one consists of the involvement of private actors, in addition to supranational, state and local authorities, with the former assuming a role of co-regulators in a context of horizontal subsidiarity. The second one sees public actors gaining powers to condition, direct and guide or even take place of the economic activities of private enterprises,

so contributing to the ecologic transition though a new kind of public economy. Finally, traditional regulatory functions – such as command and control measures – which recently left the way to market regulation, are increasingly used to restrict individual freedoms and rights in the name of a predominant common good (§ 3).

In the conclusions (§ 4) the sums of the analysis carried out will be drawn, trying to imagine the future perspectives of the outlined framework and identifying the possible advantages, critical elements and open questions of a regulation that aims to safeguard the planet by radically changing the production system through the completion of a third industrial revolution[12].

[12] On the idea of the third industrial revolution, based on the Green New Deal see J. RIFKIN, *The Green New Deal*, cit., p. 17 and ff.

2.1. Development and *the environment and development* through *the environment*

In recent years, there have been numerous regulatory initiatives to promote and develop the so-called "green economy"[13] and, more coherently with GND approach, the "*blue* economy", meant as circular economy[14].

[13] On *green economy* see the UNEP *Reports*, which launched the *Green economy Initiative* (*https://www.unsystem.org/content/greeneconomy-initiative-gei*) and *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, 2011 (*www.unep.org/greeneconomy*). In legal science literature it is to mention: E. RONCHI, *La transizione alla green economy*, Edizioni Ambiente, Milano, 2018; M. FREY, *La green economy come nuovo modello di sviluppo*, in *Impresa Progetto – Electronic Journal of Management*, 2013, 3 e J. GOODMAN-A. SALLEH, *The 'Green Economy': Class Hegemony and Counter-Hegemony*, in *Globalizations*, 2013, 10:3, pp. 411-424; A. MOLITERNI, *La sfida ambientale e il ruolo dei pubblici poteri in campo economico*, in *Rivista Quadrimestrale di Diritto dell'ambiente - Decennale della Rivista (2010-2020)*, n. 2, 2020, pp. 33 and ff.

[14] The EU Parliament defines it as following: "The circular economy is a model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible. In this way, the life cycle of products is extended. In practice, it implies reducing waste to a minimum. When a product reaches the end of its life, its materials are kept within the economy wherever possible. These can be productively used again and again, thereby creating further value. This is a departure from the traditional, linear economic model, which is based on a take-make-consume-throw away pattern. This model relies on large quantities of cheap, easily accessible materials and energy. Also part of this model is planned obsolescence, when a product has been designed to have a limited lifespan to encourage consumers to buy it again. The European Parliament has called for measures to tackle this practice" (*https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits*). On the issue, see for instance P. LACY, J. LONG, W. SPINDLER, *The Circular Economy Handbook. Realizing the Circular Advantage*, Springer, 2019; M. SILLANPÄÄ, C. NCIBI, *The Circular Economy. Case Studies about the Transition from the Linear Economy*, Elsevier, 2019; G. Pauli, *The Blue Economy 3.0: The marriage of science, innovation and entrepreneurship creates a new business model that transforms society*, Xlibris Corp, 2017. In Italian literature F. DE LEONARDIS, *Il diritto dell'economia circolare e l'art. 41 Cost.*, in *Rivista Quadrimestrale di Diritto dell'ambiente*, n. 1 – 2020, p. 64: "viene, quindi, ad essere superato il modello economico fondato sull'economia lineare ossia su produzione, utilizzo e alla fine abbandono dei beni, disinteressandosi del fine vita (che comporta un elevato spreco di risorse ed un forte impatto ambientale negativo) a favore di un modello diverso, di economia circolare appunto, in cui i materiali e l'energia utilizzati per fabbricare i prodotti mantengono il loro valore il più a lungo possibile, i rifiuti sono ridotti al minimo, si utilizzano quante meno risorse possibili e i prodotti vengono "disegnati" non solo per non inquinare ma addirittura per migliorare l'ambiente".

In this respect, an example of public intervention in order to produce a paradigm shift from linear to green and circular economy concerns subsidies for energy production. An International Monetary Fund Working Paper[15] reads that in 2017, global annual subsidies for fossil fuel extraction, production and trade amounted to $ 5.2 trillion, or 6.5% of the global economy. The latter are mostly indirect subsidies, such as taxation mechanisms by which States, by taking on part of the costs of fuels, allow consumers to pay less for petrol or gas for heating[16]; or environmental costs deriving from the production[17] that, being carried out by National States, are not charged on private actors operating in the sector.

It is easy to see that if the subsidies mentioned above were to be abolished or, better, if they were to move in favor of alternative energy sources – such as renewable ones – there would also be a revolution in energy production. The initial shock would be considerable, because petrol and heating would cost much more and many companies would face crisis; at the same time, however, if incentives for renewables were just as important, considering the

[15] D. COADY, I. PARRY, N-P. LE, AND B. SHANG, *IMF Working Paper: Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates*, May 2019, p. 4, *file:///C:/Users/Utente/Downloads/WPIEA2019089.pdf*.

[16] "It is helpful to distinguish two different notions of fossil fuel subsidies. One is a narrow measure, termed pre-tax subsidies, reflecting differences between the amount consumers actually pay for fuel use and the corresponding opportunity cost of supplying the fuel. In contrast, a broader measure, termed post-tax subsidies, reflects differences between actual consumer fuel prices and how much consumers would pay if prices fully reflected supply costs plus the taxes needed to reflect environmental costs and revenue requirements", *Ibid.*, pp. 7-8.

[17] "Global CO2 emissions from fossil fuel and other industrial sources were 34 billion (metric) tons in 2016.14 These heat-trapping gases accumulate in the atmosphere (with average residence times of around a century or longer) affecting the global climate system. Economic efficiency requires that individual fuel users are charged for the resulting costs. The most efficient instrument is a charge on fuel supply equal to the fuel's CO2 emissions factor (i.e., emissions per unit of fuel combustion) times a CO2 price—administratively, these charges would be a straightforward extension of (generally well established) fuel tax systems", *Ibid.*, p. 8. Accordingly, also G. Wagner, *Push Renewables to Spur Carbon Pricing*, in *Nature*, vol. 525, 3 September 2015, p. 27: "Pricing carbon creates broad incentive to cut emissions. Yet the current price of carbon remains much too low relative to the hidden environmental, health and societal costs fo burning a toone of coal or a barrel of oil".

development of technologies in this sector, the transition would take place without too much difficulty, with the active involvement of businesses, consumers and citizens.

Another concrete example of the ability to direct the ecological transition through public intervention aimed at changing business and industrial choices is to be found in the EU strategy to renew energy production for real estate, published by the Commission in 2020[18], following the initiatives foreseen by the European Green Deal (EGD)[19]. By this act, the Union finances and establishes the route and the objectives (§§ 2-3.6), giving priority to three areas: decarbonization of heating and cooling; combating energy poverty and inefficiency; renovation of public buildings such as schools, hospitals and offices. The Commission proposes to remove existing obstacles along the restructuring chain – from the design of the project to its financing to the completion of the work – with a series of policy measures, financing instruments and technical assistance arrangements[20].

[18] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives*, Brussels, 14.10.2020 COM(2020) 662 final, *https://ec.europa.eu/energy/sites/ener/files/eu_renovation_wave_strategy.pdf*.

[19] The EGD has been started with a Communication of the EU Commission: *Communication from the Commission to The European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of The Regions. The European Green Deal*, Bruxelles, 11.12.2019 COM(2019) 640 final. It is a programme of 116 points, which commits the EU Countries to "transform the EU into a modern, resource-efficient and competitive economy, ensuring: no net emissions of greenhouse gases by 2050; economic growth decoupled from resource use; no person and no place left behind. […].The European Green Deal provides an action plan to boost the efficient use of resources by moving to a clean, circular economy; restore biodiversity and cut pollution. The plan outlines investments needed and financing tools available. It explains how to ensure a just and inclusive transition. The EU aims to be climate neutral in 2050" (*https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en*). The single objectives are listed in a table attached to the Communication: *https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2*, p. 2.

[20] European Commission, *Communication […]. A Renovation Wave for Europe*, cit. The main actions included in this strategy consist of "not only reducing energy bills and cutting down emissions are at stake. Renovation can open up numerous possibilities and generate far-reaching social, environmental and economic benefits. With the same intervention, buildings can be made healthier, greener, interconnected within a neighborhood district, more accessible, resilient to extreme natural events, and equipped with recharging points for e-mobility and bike parking.

The examples are useful in showing both the key role played by the economic viability of some sectors – ecologically compatible – compared to others, and the weight of the public authorities in the choice in favor of this transition. Actually, the current energy production system is based on considerable support from the States, without which the sector would be in crisis, particularly if, in parallel, its energy resources become obsolete and no longer profitable, such as fossil fuel energy, which is becoming a stranded asset[21], while the renewable energy sources are rapidly enhancing their effectivity.

The path of GND is the inevitable result of economic and market dynamics: it is driven by the market and by the conveniences or losses of economic actors[22]. Nevertheless, in order for this transition to be carried out effectively – within the rapid time that the current environmental situation requires and with widespread benefits –, and in order to overcome

Smart buildings can provide essential privacy-compliant data for city planning and services. Deep renovation can reduce pressure for greenfield construction, helping preserve nature, biodiversity and fertile agricultural land".

[21] This is a fundamental issue. The narrative is no longer focused on whether fossil fuels are bad for health, which would also be an important topic, when you consider that a recent study showed a very high mortality rate due to fossil fuels: more than 8 million in 2018 alone (K. VOHRA, A. VODONOS, J. SCHWARTZ, E.A. MARAIS, M.P. SULPRIZIO, L.J. MICKLEY, *Global mortality from outdoor fine particle pollution generated by fossil fuel combustion: Results from GEOS-Chem*, *Environmental Research*, 2021, https://doi.org/10.1016/j.envres.2021.110754. (https://www.sciencedirect.com/science/article/pii/S0013935121000487), but on the fact that fossil fuels no longer convenes. On this, again J. Rifkin, *The Green New Deal*, cit., pp. 11, 55, 107 ff. and *passim*. This fact facilitates ecological transition but still requires public intervention: to inform; to incentivize; to support the economic and social repercussions of the transition (think of the many unemployed people from the fossil fuel sector, who will have to be reused in the renewable energy sector).

[22] The confirmation of the strategic importance of these interventions in terms of economic advantages can be found in an international report by the National Bureau of Economic Research in Massachusetts, which shows that a persistent increase in the global average temperature of 0.04 degrees per year, in the absence of mitigation policies, could reduce world GDP per capita by 7.22% in 2100. See M.E. KAHN - K. MOHADDES - R.N.C. NG - M. HASHEM PESARAN - M. JUI-CHUNG YANG, *Long-Term Macroeconomic Effects of Climate Change: A Cross-Country Analysis*, in *NBER Working Paper* No. 26167, August 2019. On the economic disadvantages in persisting with the "brown" economy, instead of a green one, United Nations Economists Network (UNEN), *Thematic Brief. A global green new deal for a sustainable recovery and a resilient future*, 2021, pp. 7-8 and 9-10. For what concerns the increasing cost of extraction for oil, after it reaches its peak, see also S. KOPITS, *Global Oil Market Forecasting: Main Approaches and Key Drivers*, 2014, available at https://www.energypolicy.columbia.edu/events-calendar/global-oil-market-forecasting-main-approaches-key-drivers.

ambiguities, risks and inefficiencies of the "green economy"[23], market forces and rules are not enough: There must be public intervention, called upon to promote, incentivize, direct, and correct the new economic approach[24].

This is where the core of the new ecological pact is rediscovered: an agreement between the public and private sectors, between limits and incentives to growth, between rules and economic freedoms in order to transform the current economic model – in its many and different sectors (energy, agriculture, construction, transport, etc.) – into a less polluting and environmentally friendly system. That is why GND is based on planning and regulation, but also on public incentives, market mechanisms, economic recovery and public/private

[23] The transition from the green to the blue economy aims to overcome the impasse for which in the former the environment is balanced and made to coexist with economic growth, as a cost, while in the second it becomes the tool through which to produce new wealth and new development. On this see what previously reported in footnotes n. 13 and 14.

[24] Other cases similar to that of incentives in the choice of fuels can be found in some national policies. For example, in Germany (but also in other European countries) a feed-in tariff for renewable sources has been introduced by the Federal Government, together with a plan for the elimination of coal with public funding of EUR 40 billion for coal regions. The tariff allows to receive, for green electricity that is resold on the grid, a price higher than the market price and has pushed companies, neighborhoods and individuals to install solar panels and wind turbines, so much so that already in 2018 renewable energy contributed 35.2% of Germany's total energy production. Of this, 25% was produced by small electrical cooperatives See K. APPUNN, Y. HAAS, J. WETTENGEL, *Germany's energy consumption and power mix in charts*, in https://www.cleanenergywire.org/factsheets/germanys-energy-consumption-and-power-mix-charts; R. Smith, *This is how people in Europe are helping lead the energy charge*, in https://www.weforum.org/agenda/2018/04/how-europe-s-energy-citizens-are-leading-the-way-to-100-renewable-power/; S. Amelang, B. Wehrmann e J. Wettengel, *Climate, energy and transport in Germany's coalition treaty*, in *https://www.cleanenergywire.org/factsheets/climate-and-energy-germanys-government-coalition-draft-treaty*.
Among the measures for the ecological conversion of economic activities, we can also mention the Italian Budget Law for 2020, which provides for numerous investments and incentives aimed at promoting economic activities based on the improvement of environmental conditions. In various provisions, this identifies a series of environmental measures, which mainly revolve around the establishment of a fund to implement a public investment plan for the development of an Italian Green New Deal. To this end, 4.2 billion is allocated for the three-year period. The provisions contained in the Budget Law have three fundamental characteristics: they are in line with the path of the GND, which aims to convert economic activities to environmental sustainability, combining the need to reduce pollution with that of promoting economic and social development; to provide for direct state intervention to boost the economy in certain sectors (it is public administrations – in some cases with the participation of private entities – which, taking advantage of the investment plan provided for by law, must relaunch growth while maintaining the objective of sustainable development); to protect the environment through economic instruments, incentives and investments.

investment. And, significantly, all its regulatory provisions do not merely recommend or even impose to make industrial production greener or less polluting, but intervene in order to transform it radically, in a way in which it can only be ecological-compatible.

These first considerations, on one of the hallmarks of the regulation that flows from the GND, allow a first comparison with sustainable development. In respect to the latter – established as a compromise between developed and developing countries in order not to deny them legitimate expectations of economic growth in front of the necessary actions to protect the environment[25] – the pre-eminence and centrality of environmental protection is recorded, as derived from its strategic functionality for the ecological conversion of economic activities[26]. For this reason, environmental protection becomes a shared aim of all institutional actors in the international community (not just for some OIs and economically more advanced States). Consistently, the "right to develop" is not recognized, *provided* that environmental protection requirements are safeguarded[27], but it must be carried out *through* actions to protect the environment, which therefore become instruments for creating new development, new economic growth, moreover in the urgency of the present and no longer only with a view to future generations.

[25] About the compromise between environmental protection and legitimate expectations of growth, above all for developing countries, see V. U. JAMES (ed.), *Sustainable Development in Third World Countries. Applied and Theoretical Perspectives*, Preager, 1996, *passim*; C.H. KIRKPATRICK, N. LEE (eds), *Sustainable Development in a Developing World. Integrating Socio-economic Appraisal and Environmental Assessment*, Edward Elgar Publ., 1997; J.A. ELLIOTT, *An Introduction to Sustainable Development*, cit., p. 302 and ff. In Italian literature see S. BATTINI, *Amministrazioni senza stato. Profili di diritto amministrativo internazionale*, Milano, Giuffré, 2003, p. 220 and ff. and S. NESPOR, *La scoperta dell'ambiente. Una rivoluzione culturale*, Roma, Laterza, 2020, p. 39 and ff. and p. 96 and ff.

[26] In the field of sustainable development, it should be noted that environmental policies only meet one of the three types of objectives set out in the 2030 Agenda, which also cover economic growth and the protection of human capital (combating poverty, gender equality, quality education). On the subject, see: *https://unric.org/en/united-nations-sustainable-development-goals/*..

[27] The third principle of the *Rio Declatation* of 1992 states: "the right to develop must be fulfilled so as to equitably meet developmental and environmental needs of present and future generation".

Environmental protection is no more just the aim of public policies, but is the means by which private and public actors can create new well-being. The principle of integration[28], the cornerstone of any environmental policy, does not fail, but rather reaches a new landing point: with the GND, the environment is not simply integrated – therefore made compatible, balanced and taken into account – in development activities, but is the necessary and fundamental prerequisite. Consistently, as anticipated, economic activity must not only be green, therefore integrating environmental issues as a cost, but circular, therefore able to produce wealth without consuming exhaustible energies, without producing non-recyclable or reusable waste, without negatively altering ecosystems, climate, biodiversity[29]. Therefore, the environment is no more a cost, but an opportunity: it is the environment *for* the development, as a synergy[30]. In this sense, with regard to SD, there is continuity, but also evolution and change: the environment and growth are integrated, but the former is not a cost to be balanced with the needs of the latter, but the instrument for enhancing the latter.

This first characteristic aspect of GND is not without critical points: one of the most relevant problems concerns the legal form and preceptive force of this concept, which to date

[28] The principle of integration is one of the main feature of legal protection of the environment, above in the view of sustainable development. In this regard, for instance, the EU Commission has affirmed that "Environmental integration means making sure that environmental concerns are fully considered in the decisions and activities of other sectors. Since 1997, it is a requirement under the EC Treaty. Article 6 of the Treaty states that 'environmental protection requirements must be integrated into the definition and implementation of the Community policies [.] in particular with a view to promoting sustainable development'. The importance of integration is reaffirmed in the Sixth Environment Action Programme which stipulates that 'integration of environmental concerns into other policies must be deepened" in order to move towards sustainable development'" (https://ec.europa.eu/environment/integration/integration.htm). As a confirmation, principle n. 4 of the Rio Declaration of 1992 states: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".

[29] In the path of environmental policies, compared to the previous stage, that of the composition of the interest in development with the environmental interest, then of sustainable development (composition phase), we are facing a new step. This consists of the blue or circular economy, which does not simply invest more in environment protection but goes beyond it through regeneration and seeing the environment as a driver for institutional and economic development. In this sense, F. DE LEONARDIS, *Il diritto dell'economia circolare*, cit., p. 65.

[30] *Ibidem*, p. 65.

is still seen only as an objective, a guideline to inspire public policies on the environment and economic recovery (therefore a "value" , more than a "matter"[31]) and still inherent in a certain vagueness, which makes it difficult, among other things, to measure and evaluate the actions taken to pursue its ends.

In this respect, it is not always clear whether a given public policy or measure will succeed in promoting new and lasting models of circular economy, whether it will actually succeed in reducing the impact on the environment or whether it will contribute to producing wealth as much or more as the previous models.

2.2. The binding force of two soft-law principles: the effectiveness of SD and GND in extra-national regulation

The European initiative called "20-20-20", approved by the EU Parliament in December 2008, consists of a package aimed at achieving a set of targets set for 2020[32], to date no longer in line with the new parameters, but useful to understand the rationale of the project: reduce greenhouse gas emissions by 20%, increase energy savings to 20% and increase the consumption of renewable sources to 20%.

The package includes measures on the emissions trading scheme and car emission limits. Specifically, these are six acts of a legislative nature combining market instruments,

[31] P. DELL'ANNO, *La tutela dell'ambiente come "materia" e come valore costituzionale di solidarietà e di elevata protezione*, in *Lexambiente*, 30 Novembre 2008, https://lexambiente.it/materie/ambiente-in-genere/188-dottrina188/4658-Ambiente%20in%20genere.%20Tutela%20dell'ambiente%20come%20materia%20e%20valore%20costituzionale.html, *passim*.

[32] *https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20081208BKG44004+0+DOC+XML+V0//EN*.

economic incentives or moral suasion mechanisms and financing with restrictive measures, which place limits and prohibitions on States or private operators[33].

On the European path to GND, the "20-20-20" proposal is one of the first steps, useful to show the shift from SD to GND. It has now been updated, with more ambitious objectives. In January 2021, in fact, the Commission presented the "Just Transition Fund"[34], part of the "Mechanism for a Just Transition"[35]: a new financial instrument within the framework of cohesion policy, which aims to provide support to States and territories facing serious socio-economic challenges arising from the transition towards climate neutrality[36].

In parallel with the actions mentioned above, at global level, the "Sustainable development Goals" initiative was launched. This, like the European Commission

[33] This is a series of legislative measures, all adopted on the same date as 23 April 2009, within the same regulatory package: Directive 2009/29/EC on greenhouse gas emission allowance trading; Decision No 406/2009/EC on Member States' efforts to reduce greenhouse gas emissions from sectors excluded from the emissions trading scheme by 10%; Directive 2009/31/EC establishing a legal framework for the eco-sustainable geological storage of carbon dioxide; Directive 2009/28/EC, which sets mandatory national targets for the consumption of energy from renewable sources; Regulation No 443/2009 setting the average level of CO2 emissions from new cars; Directive 2009/30/EC, which sets technical specifications for fuels and a target of a 6% reduction in greenhouse gas emissions produced during the life cycle of fuels.

[34] *https://www.europarl.europa.eu/factsheets/en/sheet/214/just-transition-fund-jtf-.* See also the *Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund*, COM_COM(2020)0022 / FULL / EN15/01/2020 (https://www.europarl.europa.eu/RegistreWeb/search/simple.htm?references=COM_COM(2020)0022&searchLanguages=EN&sortAndOrder=DATE_DOCU_DESC).

[35] *https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/actions-being-taken-eu/just-transition-mechanism_en*.

[36] Of the funds mentioned, EUR 10 billion should come from budgetary appropriations, while the remaining additional resources of EUR 40 billion, for the period 2021 to 2024, will constitute externally-targeting revenues from the European Recovery Instrument, European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund*, Bruxelles, 28.5.2020, COM(2020) 460 final, 2020/0006(COD). The money will come from existing European Structural Funds, state co-financing programmes, loans to interest payments to the European Investment Bank and part of the "InvestEU fund", a tool put in place by the European Commission to attract private investment(*https://europa.eu/investeu/home_en*).

Communication on the GDE[37], is a programme of action signed in September 2015 by all the UN Member States Governments. It lists and describes 17 Goals for SD[38] – that go beyond the mere environmental theme, including economic growth and human capital – divided and declined into a total of 169 "targets", to be achieved by 2030. It is an instrument of soft law, without sanctions, but with a decent persuasive force, due to the involvement of numerous actors and the effect of moral suasion linked to reputational accountability[39]. Macro-objectives are common but individual targets differ from country to country, depending on the specificities of the latter, and are measured and evaluated through indicators (quantitative and qualitative). It provides quite effective as a guide for domestic authority, but has the main flaw of not having a defined executive moment: the goals and targets are assigned and assessed, but their implementation – and the way this is performed – is left to the States.

The provisions briefly described are good examples to try to configure the preceptive force of principles, concepts or approaches, such as those of Sustainable Development and the Green New Deal. In both cases, in fact, the latter are mentioned in general guidelines, as shared objectives, or in action programmes, rather weak in terms of legal effectiveness, even if with a strong political value. The aim is to inform and guide the policies adopted by regulators, i.e. mainly national and local institutions. Nonetheless, there is a fairly wide margin of discretion and interpretation on behalf of the latter. Not so much in the objectives to be pursued, but in the choice of the type, the intensity, the methods and

[37] See above, footnote n. 18.

[38] *https://www.un.org/sustainabledevelopment/*

[39] "The category of public reputational accountability is meant to apply to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them", R.W. GRANT E R.O. KEOHANE, *Accountability and Abuses of Power*, IILJ Working Paper, 7 (Global Administrative Law Series) (*http://www.iilj.org/papers/2004/2004.7%20Grant%20Keohane.pdf*), p. 2 ss., ora in *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, Vol. 99, No. 1 February 2005, 37.

timing of implementation (with the exception of the long-term deadlines laid down at extra-national level), and the costs (in terms of public money used) of the measures.

However, what said seems to have a different development with regard to GND, particularly in the European-based one. Firstly, this translates into a more limiting supranational regulatory approach for domestic administrative powers, which are part of the implementation phase of policies decided on within the Union. Secondly, the legal force of these provisions is ensured by a significant economic factor, since most of these policies consist of incentives and public investments, and the European funding matrix makes it possible to impose a strict conditionality in order to take advantage of them. Finally, because communications and action programmes are only the starting point for regulatory pathways composed of binding texts, such as directives and regulations.

In this respect, taking up some of the considerations made in the previous paragraph and on the assumption that the principle of Sustainable Development has so far had little preceptive effect[40], the GND, although not formally recognized as a principle in any legislative text and instead assuming the form of political-regulatory objective – an objective of public policies – may aspire to achieve a greater binding force.

With regard to the latter, in fact, the European Union has not confined itself – as for SD – to including this concept as an objective or a value within legislative acts. On the opposite, it has translated it into a series of legislative and administrative actions with binding effect – for the EU institutions and for the Member States – which are descended only from

[40] On this see T. TARLOCK, *Ideas without Institutions: The Paradox of Sustainable Development*, in *Indiana Journal of Global Legal Studies*, vol. 9, 2001, p. 38: "critics suggest SD attempted to marry two incompatible ideas, environmental protection and development, the resulting formulation has no consequences". On SD as a principle, R. EMAS, *The Concept of Sustainable Development: Definition and Defining Principles*, Brief for GSDR 2015, p. 3, establishes a parallel with integration: "The key principle of sustainable development underlying all others is the integration of environmental, social, and economic concerns into all aspects of decision making. All other principles in the SD framework have integrated decision making at their core. It is this deeply fixed concept of integration that distinguishes sustainability from other forms of policy". See also C. VOIGT, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO Law*, Brill, 2008, pp. 145–186.

it[41]. In addition, in order to implement the planned activities, the Commission envisages a series of investments, and identifies ways of finding the funds to be used[42].

Secondly, GND seems destined to achieve greater luck than SD because, precisely for its ability to go beyond the mere balance between the environment and development, it permeates and conditions numerous heterogeneous public policies all over the world[43], which are going to influence with each other in a sort of horizontal exchange of regulatory models.

Finally, as environmental activities become the engine of economic growth and the latter is essential on the political agenda of all the States of the international community, the result is also a necessary public activity characterized by a significant ecological sensitivity. If the political decision to promote, develop and consolidate the circular economy is affirmed, it follows that the various provisions for this to occur will become binding and preceptive, translating the GND not only into incentive instruments, but also into binding rules and limits (for States and private entities).

In conclusion, in view of the growing and significant legal strength of the GND, the effectiveness of the policies adopted to pursue its two fundamental objectives (environment

[41] Among all the measures, some are to be listed: a long-term strategy that the EU will submit to the United Nations Framework Convention on Climate Change; the adoption of "the first European 'Climate Law'"; presenting "an impact assessed plan to increase the EU's greenhouse gas emission reductions target for 2030 to at least 50% and towards 55% compared with 1990 levels in a responsible way"; ensure that Member States present their revised energy and climate plans, assessed by the Commission; adopting an EU industrial strategy to address the twin challenge of the green and the digital transformation; a new circular economy action plan; engaging in a 'renovation wave' of public and private buildings based on renewable resources; enhance traceability in agri-food production; greening agriculture and protect biodiversity (EU Commission, *Communication […]. The European Green Deal*, cit., pp. 4-17).

[42] *Ibidem*, p. 17.

[43] For instance in USA and China, among others, as reported by J. RIFKIN, *The Green New Deal*, cit., pp. 68 and ff., 85-86, 130-131 and *passim* and A. CROSETTI, R. FERRARA, F. FRACCHIA, N. OLIVETTI RASON, *Introduzione al diritto dell'ambiente*, Roma, Laterza, 2018, p. 62.

protection and economic growth) is still a problematic factor. At time, indeed, such policies could only have an environmental façade – so-called "greenwashing" – and therefore be unable to protect the ecosystems; at the same time, while they are adequate in terms of environmental protection, they may be ineffective, if not harmful, with regard to socio-economic growth. The challenge of how to define and translate a concept that is still so broad and so strongly inherent in political visions and assessments, such as GND, remains open. This aspect also affects the methods of measuring and evaluating the action taken for its implementation that are not yet judicially claimable, and which can only be challenged from a political point of view.

2.3. From global to multi-level governance

The governance system at stance, aiming to balance economic growth, environmental protection and the spread of wealth, intercepts numerous regulatory activities. These relate to several interconnected sectors and can lead to conflicts between the different public interests at stake, exacerbating the problem of competences between the various levels of government involved (International Organizations; supranational bodies; national States; subnational authorities).

Sometimes the various levels are distinct or separate, according to a proper international model, in which national States make their decisions in autonomy, although confronting with the international community. While, at other times, the two levels appear fused together, composite, with national prerogatives strongly conditioned by international limits, with reduced or null discretionary powers. In such cases, the increased development of certain legal mechanisms or sectors related to the environment means that policies on these issues are properly globalized, with a fusion of national and extra-national activity that reduces the room for manoeuvre entrusted to the States.

This brief description confirms the current global disorder, in which at least two patterns coexist: some more properly globalized, therefore common[44], systems and others, based on multi-level governance, in which states cooperate with each other and with international organizations, but still have sufficient discretion in the choice of policies to be adopted[45]. In this sense, the case of GND seems to accentuate the latter: a multi-level governance, in which national States have greater regulatory powers in respect of global rulemaking.

A valid example is in the field of renovation of buildings. The European Committee of the Regions and the European Commission have entered into cooperation to accelerate the renovation and decarbonization of the EU's housing and estate sector. The partnership aims to support local and regional authorities and builds on the fact that this "renovation wave" of

[44] As noted in more occasions by Sabino Cassese, global administrative law presents in several respects more as a composite legal order, than as a multi-level system connecting a plurality of legal orders. Following this approach, organizational structure and decision-making procedure are not separated, but fused together, blurring the borders between domestic and global levels: "global regulatory regimes present many peculiar features. […] they are composite organizations, as they include global bodies, national authorities and personnel, representatives of civil society, transnational networks, members of epistemic communities, and various types of stakeholders, with no clear dividing line or hierarchy between the local and the global; in many ways, they can be compared to the European empires of the seventeenth to nineteenth centuries", S. CASSESE, *The Development of Global Administrative Law*, in Id. (a cura di), *Global Administrative Law Handbook*, Elgar, 2015, p. 9. To confirm this approach some specific sectors of regulation, structured as systems, show an advanced development in terms of global and composite governance, in respect of others, which preserve a multi-level structure. As an example, the sector of food safety is paradigmatic, for which see D. BEVILACQUA, *Introduction to Global Food Safety Law and Regulation*, Groningen, Europa Law Publishing, 2015.

[45] See, for instance, the premises n. 11 of the EU Commission, *Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030*, Brussels, 14.10.2020 COM(2020) 652 final 2020/0300 (COD), p. 9: "Environment policy being highly decentralised, action to achieve the priority objectives of the 8th EAP should be taken at different levels of governance, i.e. at the European, the national, the regional and the local level, with a collaborative approach to multi-level governance". On multi-level governance the literature is wide; among others, see: S. PIATTONI, *The theory of multi-level governance: Conceptual, empirical, and normative challenges*, Oxford University Press, 2010; G. MARKS, L. HOOGHE, & K. BLANK, *European integration from the 1980s: State-centric v. multi-level governance*, in *Journal of Common Market Studies*, 34(3), 1996, pp. 341-378; I. PERNICE, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-making revisited*, in *Common Market Law Review*, 1999, vol. 36, n. 4, pp. 703 ss. e Id., *Multilevel constitutionalism in the European Union*, in *European Law Review*, 2002, vol. 27, n. 5, pp. 511 e ss.

EU buildings is a key factor in contributing to the ecological transition project: Relaunching new investments, creating jobs, saving energy and reducing greenhouse gas emissions.

Following the relevant strategy published by the Commission[46] – not by chance contained in a non-binding text (a Communication) – the European Union finances and establishes the orientation, the objectives and the priorities (§§ 2-3.6) for removing existing obstacles along the restructuring chain, with a series of policy measures, financing instruments and technical assistance arrangements[47]. Then National Member States, together with local and regional authorities, actually carry out the activities of change, presenting projects to obtain the funds and implementing the supranational directives[48].

While sustainable development and environmental protection have generally been good reasons for promoting the integration and harmonization of national regulations to protect these goods, increasing and accelerating the process of global governance in this area[49], the GND seems to be following a different path. The scope and the objective remain

[46] European Commission, *Communication […]. A Renovation Wave for Europe*, cit.

[47] The levels indicators have been published in January 2021: *https://susproc.jrc.ec.europa.eu/product-bureau/product-groups/412/documents*. In the Communication, the Commission itself announces the adoption of binding legal texts in order to put in place the designed strategy: "Building on such good practices, the Commission will propose mandatory minimum energy performance standards as part of the revision of the Energy Performance of Buildings Directive (EPBD) by the end of 2021, following an impact assessment looking at the scope, timeline and phasing of a progressive implementation of such requirements, including the need for accompanying support policies. Such measures will facilitate linking specific national, regional and local incentives and support compliance with these minimum standards", European Commission, *Communication […]. A Renovation Wave for Europe*, cit., p. 8.

[48] Another example of multi-level action within the GND, involving supranational actors and subnational actors, can be found in the Regional legislative Act of Emilia-Romagna n. 16 of 2015, in support of the circular economy. This was adopted in implementation of Decision 1386/2013/EU on a general Union action programme on the environment until 2020 "Living well within the limits of our planet" and of art. 4 of Directive 2008/98/EC on waste, which promotes measures to reduce waste production and its recovery, reuse and recycling also as an energy source.

[49] In this regard, the affirmation of sustainable development, starting from the Seventies and Eighties of the last Century, initiates a series of intervention programs, of an international nature, aimed at encouraging development – especially in the poorest countries – without compromising the environment. This has fostered international

global or regional, in any case common, but their specific implementation sees the role of domestic administrations strengthened: At state level – where fundamental choices are made in terms of investments, incentives, planning and limits to enterprises –, and at local level – where numerous implementing measures are put in place to enable the GND to be actuated.

In this respect, in a globalized world, not only States are still the main actors in deliberation and execution[50], but also they gain greater autonomy in the core moment of decision-making. Indeed, despite being linked to common interests and common finalities (enhancing growth while protecting the environment), they are not merely the agents of supranational bodies, but enjoy full discretion, if not in establishing the main purposes, still for what concerns the contents and the procedures of their regulatory measures.

The various countries decide whether to act through investments or incentives, establishing their entities; whether or not to take command and control measures, ensuring their effectiveness and efficacy; whether and how to involve individuals or local authorities and to what extent to delegate functions and services to them. The GND governance system therefore appears more as a "layer cake" than as a "marble cake"[51].

What is more, this multi-level articulation is not only found in the dialectic between national and supranational policies, but also between States and subnational authorities, as well as in relations between institutions and members of civil society, when private legal entities assume an important role in active administration. Although the policies are part of a common design, the polity called upon to implement them in practice – with the most diverse regulatory measures – fragments vertically into a plurality of subjects (inter-state

cooperation, the emergence of international environmental principles ("the polluter pays"; "precaution"; and so on) and the birth of international organizations in the sector.

[50] S. CASSESE, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Milano, Einaudi, 2009, p. 5.

[51] *Ibid.*, p. 23, where the author uses the combination of the two definitions with the opposite approach in respect of the text, but referring to the general structure of global governance.

organizations; supranational institutions, national governments, regions, municipalities, civil society organizations, enterprises), often with different legal nature, powers and capacities.

The role of the State – here both regulator both promoter of new economic guidelines and plans – resumes with regard to the market dynamics of globalization. While regional and local institutions and communities as well regain particular importance, because the first condition for the success of the GND is its application by each individual citizen and in the territories.

The regulation that arises from the GND, while pursuing global objectives and while possessing a rationale and a vision common to the various systems, develops according to a predominantly multi-level articulation, in which the competences of the States are still strong, not only in terms of the implementation and enforcement of global measures, but also in terms of policy-making choices, whether they are shared, within the extra-national arena, or exclusive in domestic legal orders. Here, too, there is an evolution in respect of SD, with a significant emphasis on national prerogatives, which in the recent past have been absorbed into global ones, for example by means such as the Kyoto Protocol[52] or the Aarhus Convention[53].

[52] The Kyoto Protocol created an emission allowance market to keep the total amount of CO2 within certain limits worldwide. Although it provides for the involvement of states and is in fact ineffective because of the reluctance of some of them to take part, it has been conceived, structured and put in place as a properly global measure, with common rules, aimed at regulating a world-wide market, specially constituted and extended on a global scale. On the subject, see R.G. TARASOFSKY, S. OBERTHÜR, H.E. OTT, *The Kyoto Protocol. International Climate Policy for the 21st Century*, Springer Berlin Heidelberg, 2013; V. HEYVAERT, *Transnational Environmental Regulation and Governance. Purpose, Strategies and Principles*, Cambridge University Press, 2019, p. 59 and *passim*.

[53] *Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 25 June 1998 (entered into force on the 30th of October 2001). The Aarhus Convention – adopted in order to protect the environment, promote sustainable development and protect human rights –, while targeting the Member States, it identifies a number of common procedural guarantees (a right of access to information, a right of participation in the environmental decision-making process and a right of action of individuals' claims in the event of infringement of access rights and participation) extended to all and attributable to a judicial body also by private individuals. See S. CASSESE, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, 72 ss.; M. MACCHIA, *Legality: The Aarhus Convention and the Compliance Committee*, in S. Cassese

From this point of view, the regulatory structure that deals with GND reveals articulated, complex and fragmented. This, while not responding to an orderly organizational design and presenting the characteristics of the *adhocracy*[54], still reveals original and worthy features of attention. Moreover, in this differentiation and fragmentation, it seems particularly complex and delicate to find a further balance, in addition to that between the environment and economic growth: the one between global prerogatives and local interests and expectations, with the risk of conflicts between regulatory models with different quality and quantitative standards.

This, in fact, produces advantages and disadvantages because the most virtuous States will have fewer supranational limits for the pursuit of objectives useful to the entire global system; while the less virtuous ones, on the other hand, will use regained discretion and their internal sovereignty to operate forms of resistance to change, slowing down their path even beyond state borders. On the other hand, it is true that the ability to promote circular economy activities – producing growth without the cost of pollution or the supply of non-renewable energy – constitutes a competitive stimulus between the States themselves, which can therefore encourage a race to the top and the development of a horizontal accountability, disseminating good practices and intervention programs.

3. A NEW REGULATORY PARADIGM?

As anticipated, GND directly affects the models adopted for public regulation, opening the scenario to a paradigm shift that is based on three fundamental pillars: the widespread, varied and multifaceted involvement of private actors (such as individuals or

- B. Carotti - L. Casini - E. Cavalieri - E. Macdonald (a cura di), *Global administrative law*, cit., III.A.1., 13 ss. *http://www.irpa.eu/wp-content/uploads/2012/08/the-casebook-chapter-3.pdf*.

[54] On this subject it is to mention S. CASSESE, *Chi governa il mondo? La dimensione globale della democrazia*, Il Mulino, Bologna, 2013, p. 22

associations), who assume a role of co-regulators; the conditioning by public bodies of the choices that characterize the economic activities of companies; the parallel intensification of command and control regulatory powers in the hands of the administrative authorities.

Firstly, GND is based on the bottom-up contribution of private individuals since the beginning. Born from the influence of movements of opinion, lobbying and new visions of public intervention to protect the environment, such approach has been shared by the institutions – at various levels (local, national, supranational) –, which enacted a series of regulatory policies; finally it has gone back to civil society, to citizens involved in active participation[55].

The latter, in fact, are called to contribute actively, to become actors of change and co-regulators, to adapt their behaviors to make the ecological transition possible. In this sense, the GND stems as a paradigmatic and original model of "glocal" regulation: based on horizontal subsidiarity, it provides for rules and institutions operating at common and supranational level linked and integrated with rules and institutions operating at local and

[55] As early as 2008, a small group of professionals from various sectors created the *Green New Deal Group* (*https://greennewdealgroup.org/about-the-group/*), publishing the first manifesto of the movement: "*A Green New Deal: Joined-Up Policies to Solve the Triple Crunch of the Credit Crisis, Climate Change and High Oil Prices*", *https://neweconomics.org/uploads/files/8f737ea195fe56db2f_xbm6ihwb1.pdf*. This outlined the key elements and steps needed for the paradigm shift towards the third industrial revolution. Other civil organisations and actors have taken on the idea of GND, contributing to the definition of the concept and its dissemination as a public policy. In 2009, the Heinrich Böll Foundation, linked to the German Green Party, published a new document, entitled "*Toward a Transatlantic Green New Deal: Tackling the Climate and Economic Crisis*", *https://us.boell.org/sites/default/files/toward_a_transatlantic_green_new_deal.pdf*. The European Green Party put the GND the top of the agenda: *http://archive.gef.eu/fileadmin/user_upload/GEF_GND_for_Europe_publication_web.pdf*. The *United Nations Environment Programme* (UNEP) published a Report with the same view ("*Rethinking the Economic Recovery: A Global Green New Deal*", *https://www.cbd.int/development/doc/UNEP-global-green-new-deal.pdf*. Over the years, initiatives in this direction have multiplied: out of all, it is important to point out one, of particular strategic and symbolic importance, because it marks the entry of the GND into the US political agenda. In November 2018, some protesters broke into the US Congress, staging a sit-in calling for a national "Green New Deal", which led to the establishment of a Committee called upon to draw up an economic plan for the implementation of the GND and the presentation of a resolution to Congress, which has already obtained numerous supporters among US Deputies and Senators (*https://www.sunrisemovement.org/?ms=SunriseMovement*).

subnational level and with constituencies, called upon to play an active role, not as mere recipients, but as actors in the transition to a new way of producing goods and services.

For example, the EU Directive on the promotion of the use of energy from renewable sources[56], which enhance the energy efficiency of homes, shops or other buildings, allows and encourages the use of production facilities from renewable sources and does so above all by affecting the individual, who can become a "renewables self-consumer" (Art 2, par. 2, n. 14)[57].

The latter aspect shows how the ecological transition also passes from the choices of each citizen and that these are important both in the pursuit of objectives (reducing the anthropogenic impact on the planet, not polluting, recycling waste, etc.), and in the public management of such dynamics. For instance, as the installation of photovoltaic panels on a housing unit transforms the owner into an energy producer – who may alienate it to a default

[56] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018, *On the promotion of the use of energy from renewable sources*, in Official EU Journal L 328/82, 21.12.2018.

[57] "A final customer operating within its premises located within confined boundaries or, where permitted by a Member State, within other premises, who generates renewable electricity for its own consumption, and who may store or sell self-generated renewable electricity, provided that, for a non-household renewables self-consumer, those activities do not constitute its primary commercial or professional activity". More significantly in this sense, Art. 21 provides: "Member States shall ensure that consumers are entitled to become renewables self-consumers, subject to this Article. 2. Member States shall ensure that renewables self-consumers, individually or through aggregators, are entitled: (a) to generate renewable energy, including for their own consumption, store and sell their excess production of renewable electricity, including through renewables power purchase agreements, electricity suppliers and peer-to-peer trading arrangements, without being subject: (i) in relation to the electricity that they consume from or feed into the grid, to discriminatory or disproportionate procedures and charges, and to network charges that are not cost-reflective; (ii) in relation to their self-generated electricity from renewable sources remaining within their premises, to discriminatory or disproportionate procedures, and to any charges or fees; (b) to install and operate electricity storage systems combined with installations generating renewable electricity for self-consumption without liability for any double charge, including network charges, for stored electricity remaining within their premises; (c) to maintain their rights and obligations as final consumers; (d) to receive remuneration, including, where applicable, through support schemes, for the self-generated renewable electricity that they feed into the grid, which reflects the market value of that electricity and which may take into account its long-term value to the grid, the environment and society.".

buyer, share it with other people inside the building[58], or sell it in the market –, also the public regulation of this sector has to adapt, changing tools and approaches.

With Directive No. 2001 of 2018, the EU has defined the discipline to support the development of a national regulatory framework favorable to the new role of citizens gathered in "energy communities" in electricity production[59]. The latter, therefore, play a dual role as consumers and producers, and for both of them they enjoy separate rights and duties. At the same time, Member States are being asked to remove barriers that could slow down the local development of renewable energy communities and to ensure that they have non-discriminatory market access. It follows, therefore, that the public administration is also changing its approach to the phenomenon, having to provide a new regulatory framework to promote distributed energy generation, in a context oriented towards the development of renewable sources, self-consumption and the direct transfer of surplus energy.

The second important innovation that the GND brings to public regulation consists of the compromise between free market and State intervention. It provides for a change of paradigm in the approach followed in the last years: the public policies are not limited to

[58] The direct exchange of electricity produced in buildings between housing units of the same condominium allows to carry out energy efficiency interventions or the use of renewable sources more effective than interventions for individual homes. Allowing the users of a condominium to connect with each other through a private network such as a closed distribution system contributes to the achievement of the targets defined by the EU, increasing and optimizing self-consumption through the efficient use of resources. In addition, physical management would decongest the national network. However, this implies several changes to the legislation, including that relating to sub-concessions for the management of the condominium distribution network.

[59] "'Renewable energy community' means a legal entity: (a) which, in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity; (b) the shareholders or members of which are natural persons, SMEs or local authorities, including municipalities; (c) the primary purpose of which is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits" (Art 2, lett. 16, Directive 2018/2001).

banning, controlling and punishing, nor they step aside, leaving the market to regulate its actors, but go so far as to promote, encourage, and direct economic activities.

An element of distinction with the past (even recent) lies in the fact that the two moments – that of limits and that of incentives, both coming from the public authorities – are linked and coordinated, according to a shared and coherent plan. According to this, the administrative authorities do not retract to give way to economic and market dynamics, nor are they limited to prohibiting and punishing, but remain present, alongside private actors, conditioning their activities, modifying their objectives and favoring new investments, subordinate to the achievement of certain objectives established by public entities.

In this sense, by recalling what already noted above at paras. 2 and 3 about subsidies to renewable energies and programmes of incentive coming from the EU, the case of GND is emblematic to insist on the idea of a "promoting State"[60]. This is a regulatory model that goes beyond the mere guarantees of a fair market functioning and the formal respect of freedoms and fundamental rights[61], in which all public powers involved (supranational, national and subnational) embody an active role, affecting the economic world: promoting innovation[62], investing and funding in selected sectors, taking place of private enterprises, acting as risk-taker[63]. All in accordance to a vision for which a public economic entrepreneurship is able, if well driven, to produce more growth and *help* the market.

[60] See the *introduction* of the book ASTRID-IRPA, F. BASSANINI, G. NAPOLITANO, L. TORCHIA (eds) *Lo Stato promotore. Indagine sul mutamento degli strumenti di intervento pubblico nell'economia di fronte alle crisi e alle trasformazioni del XXI secolo*, il Mulino, Bologna, 2021 (https://images.irpa.eu/wp-content/uploads/2021/01/intro.-lo-stato-promotore-gn-lt-fbdef-_Irpa-Working-Paper-1.pdf).

[61] See W. ROPKE, *The Social Crisis of Our Time*, University of Chicago Press, 1950.

[62] On the issue, diffusedly M. MAZZUCATO, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths*, Anthem Press, 2013, *passim*.

[63] *Ibid*., p. 24 ff. and *passim*.

Therefore, also for the ecologic transition, it is for the public bodies – although together with private companies – to enhance and promote this new approach.

Finally, the task entrusted to the administrative powers to regulate, limit and control economic activities is regained in parallel. The "promoting State" does not take the place of the "censor State", but is flanked by it. In addition to economic incentives, public investment and public-private partnerships, authorizations, prohibitions, controls and sanctions are being strengthened – albeit with original forms of declension.

Examples include the adoption, dating back to May 2010, of the Directive on energy efficiency in buildings[64], which was amended in 2012 and 2018[65], by the European Union. The Commission has adopted a package of legislative measures (implemented by all Member States) which, among other things, require the adoption of an energy performance certificate to measure the efficiency of buildings and which binds the location or sell of buildings if they are below a certain standard[66].

Such a regulatory approach outlines an intrusive model, based on "*command and control*", albeit together with incentive measures, which is coherent with the GND *rationale*.

[64] *https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32010L0031&from=EN*.

[65] *https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32012L0027&from=EN* e *https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32018L0844&from=EN*.

[66] "Latterly, the most comprehensive approach can be seen in the European Union (EU). Following the 2010 EU Energy Performance of Building Directive, it is mandatory for all European properties to hold an Energy Performance Certificate and monitor their heating and air conditioning (all 28 Member States signed up to this directive). EPCs have a significant relationship with climate-related stranded assets in real estate. They are a key enabler of building improvement, as they influence decision making in real estate transactions and provide cost-optimal recommendations for energy performance improvement", K. MULDOON-SMITH, *Understanding climate-related stranded assets in the global real estate sector*, in B Caldecott (ed.), *Stranded Assets and the Environment: Risk, Resilience, and Opportunity*. Routledge Explorations in Environmental Studies, Taylor & Francis, 2018, p. 157. Sul tema si veda altresì l'apposito sito dell'Ue: *https://ec.europa.eu/energy/topics/energy-efficiency/energy-efficient-buildings/energy-performance-buildings-directive_en*.

What is more, it does not merely prohibit normal business activities (as with construction firms), but also affects individuals, who, if they wish to sell or let an apartment, will have to have an efficient energy system, with a certificate to prove it. The GND here not only promotes and incentivizes, but also prohibits and restricts the freedoms of its members, although always in the name of the public interest in reducing polluting emissions and protecting the environment.

This predominant role for the public authorities is not – or should not be – characterized by its authoritarian strength, but by a vision that we might call "social", where the authorities significantly restrict economic freedoms but only because they are justified by the protection of collective goods which, for a number of reasons, are now considered hierarchically superior to the others. These include, of course, the protection of the environment in all its forms. In the context of the GND, public administrations have the task of finding instruments capable of compressing, restricting and directing private freedom for the protection of superior legal assets, managing to legitimize them in a multinational arena, to make them effective in results and to give them binding force in the implementation phase.

The three elements characterizing the Green New Deal, just described, mark an evolution with respect to the idea of Sustainable Development, especially in the regulatory models adopted. These are no longer vertical and top-down, but circular and bottom-up, with the increasing involvement of private actors. Moreover, administrations are no longer merely the guarantors of the proper functioning of the market, but they enter the economic system: to direct and encourage it in some cases or to control and limit it in others, always placing environmental protection at the center, as the main and strategic purpose to create development.

4. CONCLUSIONS

The birth and affirmation of the Green New Deal is in continuum with the *rationale* of an existing approach, identified with the principle of Sustainable Development. Yet, as we have seen, the GND, although still in its embryonic phase, also marks a further novelty: a different model of regulation, which has a significant impact on all the sectors that are crossed and integrated by environmental matters[67].

For these reasons, as mentioned, the GND appears to be an evolution of SD, with which it has many common features. In this respect, both constitute the value and teleological basis for the action of public administrations in regulating economic activities and for the adoption of certain policies. Continuing with this analogy, each measure based on these principles aims to put together environmental protection and promotion of economic and social development. Finally, both involve a number of innovations in regulatory activity, at extra-national, national and local level.

Nevertheless, in the evolution from sustainable development to GND, new elements are also identified. First, environment and development are no longer seen in dialectical opposition in search of a balance, but the former acquires a prominent role and aspires to become the economic and legal driver for the protection and improvement of the latter.

[67] In this sense, the declination of the GND is consistent with the legal reconstruction that identifies the fundamental principle of solidarity as the constitutional legal basis for environmental protection. On this see F. FRACCHIA, *Sulla configurazione giuridica unitaria dell'ambiente: art. 2 Cost. e doveri di solidarietà ambientale*, in *Dir. ec*., 2002, pp. 215 and ff. and P. DELL'ANNO, *La tutela dell'ambiente come "materia"*, cit., *passim*. Similarly, the Green New Deal must also be placed among the duties of solidarity and is a prerequisite for the implementation of the constitutional programme relating to the development of the human person, which provides for obligations to be fulfilled and functions to be exercised and indicates a dutiful behavior of all subjects of the legal system, both public and private.

Secondly, the GND, although currently only a political programme, aims to establish itself as a binding principle, at least for regulatory authorities, with a perspective of becoming the main *rationale* of administrative activities.

Thirdly, despite the increasing force of GND and despite it is composed of common aims and approaches on a global scale, it reinforces the multi-level regulatory design. Therefore, supranational guidelines, directives and standards are linked to national and subnational measures, but the latter constitute the central and crucial moment of this regulation, which sees domestic administrations as the main actors.

Finally, a new model of public economic governance is gaining ground, involving private actors significantly, with a role of co-regulators; with greater powers for public actors to condition, target, guide or even take place of the economic activities of private enterprises; with an increase in administrative and regulatory functions that limit and compress rights of economic freedom.

All these features seems to have a red line in the gained role of the national State. It is the latter that promotes economic growth through the environment and it is still the State (although together to regional supranational organizations, as the EU) to make GND a binding principle for all regulating activities. Coherently, States regain decision-making power in respect of the market and of global governance, while national institutions are charged with a regulation that decides how much involving private subjects and how to alternate incentives and command and control measures.

The problems that may arise from these new aspects are numerous and can be summarized with a series of questions, which are currently destined to remain open, with the hope that they will be able to find adequate answers in the short term, with the development of GND legal discipline and thanks to new scientific research on the subject.

How much binding force does the GND have and what are the powers of public administrations to promote this economic and social model? What legal instruments, then, can help to affirm, develop and assess a development grounded on environment protection?

What role, weight and effectiveness can civil societies in the world have in the new regulation that is looming? Therefore, in parallel, how many functions remain on behalf of public institutions?

We are moving towards a model of "promoter" State/public authorities: does it have reason to be only at an early stage or will it be permanent? Will there be a balance between global prerogatives and national activities? Finally, what is the relationship between the governance of incentives/investments and that of command and control: harmony, integration, conflict or overlap?

Abstract. *The most interesting features and problematic profiles of governance resulting from the objective of protecting the environment by the promotion of growth are discussed in this article, the assumption being that the ecological transition cannot be achieved without public regulation. Starting from a comparison between Green New Deal and Sustainable Development, the articles focuses on future prospects of the framework outlined and its possible advantages. Critical elements and open questions about a set of rules meant to safeguard the planet by radically changing the production system through the completion of a third industrial revolution are also addressed.*

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LES PRINCIPES DE L'ÉCONOMIE CIRCULAIRE APPLIQUÉS AUX CONTRATS PUBLICS

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INDEX

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1. INTRODUCTION

Les préoccupations écologiques ont progressé de manière globale au sein de l'Union européenne, faisant écho à une prise de conscience ascendante mondiale[2]. Pourtant, on entend parler de la nécessité d'un « écologisme raisonné », rappelant ainsi que l'écologie doit être conciliée avec d'autres préoccupations, notamment, dans le cadre de l'Union européenne, des préoccupations économiques. C'est peut-être déjà cette approche que l'on observe dans le domaine des contrats publics, c'est-à-dire les contrats pour lesquels une personne publique est, directement ou indirectement, présente au contrat, à travers l'application des principes dits de « l'économie circulaire », notamment dans le domaine de la commande publique. La notion d'économie circulaire[3] désigne une économie « dans laquelle la valeur des produits, des matières et des ressources est maintenue dans l'économie aussi longtemps que possible et la production de déchets est réduite au minimum »[4].

Au niveau de l'Union européenne, c'est d'abord dans la jurisprudence de la Cour de justice que l'on trouve des mentions de ces externalités économiques, qu'elles soient

[2] En 2019, les écologistes ont en effet acquis une vingtaine de sièges supplémentaires aux élections du Parlement européen. Par ailleurs, la nouvelle présidente de la Commission européenne, Ursula Von der Leyen, a évoqué la réalisation d'un « green deal européen » dès les 100 premiers jours de son mandat. Elle a confirmé son soutien à la neutralité carbone en 2050 qui, dit-elle, sera inscrite dans la « première loi européenne sur le climat », et soutenu un objectif plus ambitieux de réduction des émissions de CO2, de 50 % en 2030, « voire de 55 % » Communication de la Commission au Parlement européen, au Conseil européen, au Conseil, au Comité économique et social européen et au comité des régions , *Le pacte vert pour l'Europe*, 11.12.2019 COM(2019) 640 final. Pour la mise en œuvre du Green Deal, voir, plus récemment: Commission européenne, *Le pacte vert pour l'Europe. la décennie décisive* , 14 juillet 2021.

[3] Apparue avec les travaux de Michael BRAUNGART et William MCDONOUGH, dans leur ouvrage Cradle to Cradle: Remaking the Way We Make Things, Perfection Learning Corporation, 2002.

[4] En France, l'art. L. 110-1-1 du code de l'environnement fait notamment référence à l'utilisation sobre et responsable des ressources, à l'allongement de la durée de cycle de vie des produits, à la commande publique durable, etc.

d'ailleurs environnementales ou sociales. Les premiers arrêts en ce sens datent en effet du début des années 2000, à travers la jurisprudence *Concordia Bus Finland* de la Cour de justice, arrêt dans lequel la Cour a reconnu la possibilité d'intégrer des critères environnementaux lors de la passation d'un marché public[5]. Dans cette affaire, la ville d'Helsinki avait lancé un appel d'offre concernant ses services d'autobus en spécifiant qu'un des critères d'attribution du marché prévoyait l'octroi de points supplémentaires aux sociétés soumissionnaires satisfaisant à certains niveaux d'émission d'oxyde d'azote et de bruit. Saisie par une entreprise concurrente de celle ayant remporté l'appel d'offre, la CJCE a considéré que le critère d'attribution portant sur le niveau de pollution et de bruit des autobus nécessaires au fonctionnement du service était lié à l'objet du contrat et, ce faisant, rendait l'appel d'offre valable. Cette position, déjà implicite dans l'affaire *Aher Waggon* du 14 juillet 1998[6], a été précisée dans l'affaire *Wienstrom* du 4 décembre 2003, concernant un appel d'offre en matière de fourniture d'électricité posant comme critère d'adjudication le recours à des sources d'énergies renouvelables[7]. Ce faisant, la Cour accueillait déjà positivement l'insertion de critères environnementaux d'attribution, à condition qu'ils restent liés à l'objet du marché, qu'ils soient publiés, qu'ils respectent les règles pertinentes du droit européen (transparence, égalité et libre concurrence), qu'ils restent spécifiques au marché concerné et qu'ils puissent être objectivement quantifiables.

Les principes de la commande publique ont ainsi pu être interprétés dans le sens d'une conciliation des exigences relatives à la concurrence et à l'environnement. On a pu observer, d'abord, dans le discours des institutions nationales et européennes, puis, dans les textes, l'émergence d'un principe global d'efficacité environnementale, mais aussi sociale, des contrats publics, de nature à justifier l'élargissement du recours aux clauses sociales et environnementales. En effet, la qualification figure désormais dans différents textes, même si ces textes disposent d'une valeur normative différenciée. La réglementation européenne en

[5] CJCE, 17 septembre 2002, Concordia Bus Finland, aff. C-513/99, Rec. p. I-7213.

[6] CJCE, 14 juillet 1998, Aher Waggon GmbH, aff. C-389/96, Rec. p. I-4473.

[7] CJCE, 4 décembre 2003, EVN et Wienstrom GmbH, aff.C- 448/01, Rec. p. I-14527.

matière de contrat public a pris en considération ce changement de perspective et les directives secteurs et unifiée du 31 mars 2004 ont cristallisé « la jurisprudence relative aux critères d'attribution, qui précise les possibilités pour les pouvoirs adjudicateurs de répondre aux besoins de la collectivité publique »[8]. Depuis lors, l'actuelle directive sur la passation des marchés publics[9] (article 18§2) et celle relative aux secteurs de l'eau, de l'énergie, des transports et des services postaux[10] (article 36§2) prévoient que « les États membres *prennent les mesures appropriées* pour veiller à ce que, dans l'exécution des marchés publics, les opérateurs économiques se conforment aux obligations applicables dans les domaines du droit environnemental, social et du travail établies par le droit de l'Union, le droit national, les conventions collectives ou par les dispositions internationales en matière de droit environnemental, social et du travail »[11]. Cependant, les directives prévoyaient une marge de manœuvre importante pour les États, une marge de manœuvre exploitée certes différemment, mais globalement largement, par les autorités nationales[12].

Pour les États membres de l'Union européenne, l'intégration des considérations sociales et environnementales constitue donc une préoccupation plutôt récente[13]. Les contrats publics sont ainsi de plus en plus utilisés comme des instruments pour assurer la mise en

[8] Cf., sur ce point, Patrick THIEFFRY, Droit de l'environnement de l'Union européenne. Éléments de droit comparé américain, chinois et indien, Bruxelles, Bruylant, 2008, pp. 689 et ss.

[9] Directive 2014/24/UE du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics, JOUE, 28 mars 2014.

[10] Directive 2014/25/UE relative à la passation de marchés par des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des services postaux, JOUE, 28 mars 2014.

[11] Nous soulignons. Les directives prévoient, par ailleurs, des mécanismes comme la labellisation environnementale (article 43 de la directive 2014/24/UE et article 61 de la directive 2014/25/UE).

[12] Voir infra II.

[13] Voir, par exemple, le rapport de Adela HAVLOVÁ, Martin RÁŽ, Jana PETROVÁ, Barbara FIKAROVÁ : « Initiatives have only fairly recently emerged seeking to cause public procurement procedures to place stronger emphasis on social responsibility, social aspects, environmental protection, and the like ». Nous soulignons. Voir, en France, l'arrêt du Conseil d'État du 23 novembre 2011CE, 23 novembre 2011, 351570, Communauté urbaine de Nice Côte d'Azur, Lebon, 2011, GADE, n° 13-14 qui témoigne de cette prise en compte nouvelle.

œuvre de politiques publiques dont le contenu est périphérique à l'objet principal du contrat[14]. Ces principes viennent désormais irriguer les contrats publics, notamment, la commande publique qui est considérée comme un véritable levier « décisif » et qui doit « tirer les innovations en faveur de l'économie circulaire »[15].

Les exigences environnementales s'inscrivent dans un modèle plus global et doivent ainsi être nécessairement conciliées avec l'économie : c'est d'ailleurs ce qui explique l'émergence de la notion d' « économie circulaire » : dans ce schéma global, il ne s'agit plus d'« extraire, fabriquer, consommer et jeter ». L'économie circulaire permet de « changer de paradigme par rapport à l'économie dite linéaire, en limitant le gaspillage des ressources et l'impact environnemental, et en augmentant l'efficacité à tous les stades de l'économie des produits »[16]. L'économie circulaire constitue un sujet indubitablement mobilisateur et on pourrait dire qu'il s'agit d'un thème qui a les faveurs des gouvernants et des acteurs de la commande publique depuis quelques années, mais il s'agit également, et notamment en Europe, d'un sujet d'actualité.

Si la Commission européenne avait évoqué l'économie circulaire dans le cadre de son programme « zéro déchet pour l'Europe »[17], c'est surtout sa communication de 2015, « Boucler la boucle - Un plan d'action de l'Union européenne en faveur de l'économie

[14] On peut évoquer la poursuite d' « objectifs collatéraux » plus larges, selon les termes utilisés par Schoni et Yukins, « much as Americans mistrust government officials to achieve best value in a narrowly economic sense, so too do Americans (and their representatives in Congress) doubt that purchasing officials will adequately account for broader social and economic goals (what Europeans might call « sustainability goals ») when making purchases.» V. Daniel I. GORDON and Gabriella M. RACCA, « Integrity Challenges in the EU and U.S. Procurement Systems », in Integrity and Efficiency in Sustainable Public Contracts (Gabriella M. RACCA and Christopher R. YUKINS eds.), Brussels, Bruylant, 2014.

[15] Feuille de route de l'économie circulaire, publiée par le gouvernement français en 2018, sp. p. 36.

[16] ADEME. Économie circulaire. Page internet : http://www.ademe.fr/expertises/economie-circulaire

[17]Communication de la commission au Parlement européen, au Conseil, au Comité économique et social européen et au comité des régions vers une économie circulaire : programme zéro déchet pour l'Europe, 2014/0398 final.

circulaire »[18] qui met l'accent sur les marchés publics. Ce premier « paquet » sur l'économie circulaire rappelle que cette dernière est fondée sur des mesures étroitement liées aux « priorités essentielles de l'Union, notamment l'emploi et la croissance, le programme en faveur de l'investissement, le climat et l'énergie, l'agenda social et l'innovation industrielle, et aux efforts mondiaux portant sur le développement durable »[19]. La Commission européenne insiste, dans cette communication, sur le rôle-clé des marchés publics écologiques qui représentaient presque 20% du PIB de l'Union européenne[20] - aujourd'hui plutôt 14%[21]- et les mesures à mettre en place à partir de 2016 : parmi ces mesures, sont évoquées une meilleure intégration des exigences de l'économie circulaire, un soutien à un recours plus important à ces marchés publics notamment par le biais de programmes de formation, une utilisation accrue de ces marchés dans les procédures de passation de la Commission et dans les fonds de l'Union européenne.
La Commission avait publié en ce sens, dès 2005, un guide de l'achat vert afin de préciser ces éléments[22]. Elle précise que les marchés peuvent « jouer un rôle clé dans l'économie circulaire et (elle) encouragera ce rôle dans le cadre de ses mesures concernant les marchés publics écologiques (MPE), où des critères sont élaborés au niveau de l'UE et utilisés ensuite par les pouvoirs publics sur une base volontaire »[23]. En 2018, ce premier ensemble de mesures a été complété par un deuxième train de mesures sur l'économie circulaire, comprenant la stratégie de l'Union sur les matières plastiques dans une économie circulaire, le cadre de suivi des indicateurs pour l'économie circulaire ainsi qu'une communication sur l'interface entre les textes législatifs relatifs aux substances chimiques,

[18] Bruxelles, le 2 décembre 2015 COM(2015) 614 final, Boucler la boucle - Un plan d'action de l'Union européenne en faveur de l'économie circulaire, dès la p. 3, la mention des « marchés publics ».
[19] Boucler la boucle - Un plan d'action de l'Union européenne en faveur de l'économie circulaire, p. 2.
[20] Ces marchés concernent par exemple l'achat d'ordinateurs éco-énergétiques, de mobiliers en matériau durable, de véhicules électriques etc.
[21] 14% dans le plan publié en mars 2020. « Public authorities' purchasing power represents 14% of EU GDP and can serve as a powerful driver of the demand for sustainable products».
[22] Voir le guide Acheter vert ! Un manuel sur les marchés publics écologiques, Guide de la Commission européenne pour l'achat vert, en 2005 :
https://environnement.brussels/sites/default/files/user_files/gid_achetervert_commissioneuropeenne_fr.pdf
La troisième édition date de 2016, voir https://ec.europa.eu/environment/gpp/pdf/handbook_fr.pdf
[23] COM(2015) 614 final, préc.

aux produits et aux déchets[24]. En mars 2020, la « nouvelle » Commission européenne, composée après les élections européennes[25] a réaffirmé son intérêt pour ces éléments et a adopté un nouveau plan d'action pour l'économie circulaire[26], qui constitue l'un des principaux éléments du Pacte vert pour l'Europe, le nouveau programme de croissance durable de l'Europe[27]. Ce nouveau plan d'action, qui prévoit des mesures à mettre en œuvre tout au long du cycle de vie des produits, vise à rendre l'économie européenne plus adaptée à un avenir vert, à renforcer la compétitivité tout en protégeant l'environnement et à donner de nouveaux droits aux consommateurs. S'appuyant sur le travail réalisé depuis 2015, le nouveau plan met l'accent sur la conception et la production dans la perspective de l'économie circulaire, dans le but de garantir que les ressources utilisées restent dans l'économie de l'Union européenne aussi longtemps que possible**.** Le plan d'action évoque d'ailleurs les marchés publics à plusieurs reprises[28].

On le voit, les éléments relatifs à l'économie circulaire sont des préoccupations nationale, européenne, mais aussi internationale[29], même si cette analyse va se concentrer sur les deux premiers niveaux[30].

[24] Il faut y ajouter la directive concernant les plastiques à usage unique et les engins de pêche – les deux principales sources de déchets plastiques marins en Europe, Directive (UE) 2019/904 du Parlement européen et du conseil, du 5 juin 2019 relative à la réduction de l'incidence de certains produits en plastique sur l'environnement.

[25] Il s'agit de la Commission VON DER LEYEN qui a pris ses fonctions le 1er décembre 2019.

[26]Voir le plan, https://ec.europa.eu/environment/circular-economy/. La Commission européenne et le comité économique et social européen ont également mis en place une plateforme d'échange et d'interaction pour les parties intéressées : https://circulareconomy.europa.eu/platform/en. COM(2020) 98 final.

[27] COM(2019) 640 final.

[28] Voir § 2. Un cadre d'action pour des produits durables, COM(2020) 98 final.

[29] L'agenda 2030 qui a été adopté par l'ONU en septembre 2015 définit un langage commun du développement durable pour les Nations Unies. Il regroupe 17 ODD, qui répondent aux objectifs généraux suivants : éradiquer la pauvreté, protéger la planète et garantir la prospérité pour tous. Parmi les 17 ODD, l'ODD 12 est consacré à l'établissement des modes de consommation et de production durables.

[30] La crise sanitaire provoquée par la pandémie de covid19 n'a pas remis en cause l'importance accordée à ces préoccupations, à tout le moins, au niveau des engagements. Voir infra, nos propos conclusifs.

Afin de se représenter l'importance de ces éléments dans les contrats publics, il faut probablement identifier en premier lieu quelle est véritablement la place de l'économie circulaire dans les contrats publics, c'est-à-dire identifier la normativité de ces éléments ainsi que le stade d'intervention des critères issus de l'économie circulaire au sein des systèmes juridiques de l'Union européenne et de ses États membres : on constatera qu'il existe une véritable hétérogénéité de la normativité et du stade d'intervention de ces critères, avant de mettre au jour les limites rencontrées dans la mise en œuvre, en pratique, des éléments de l'économie circulaire.

2. L'HETEROGENEITE DE LA NORMATIVITE ET DU STADE D'INTERVENTION DES CRITERES DE L'ECONOMIE CIRCULAIRE

La place des éléments de l'économie circulaire est étroitement liée à la valeur normative qui est reconnue à ses prescriptions au sein des ordres juridiques : or, on s'apercevra à cet égard, que l'on peut disqualifier l'unité « d'un principe » d'économie circulaire et plutôt constater une hétérogénéité de valeur normative relative à ces exigences[31] (2.1). Cette hétérogénéité est également éprouvée au stade d'intervention des composantes de l'économie circulaire, notamment dans les contrats de la commande publique : tantôt omniprésentes, tantôt cantonnées à des phases du marché en fonction des États considérés (2.2)

2.1. L'hétérogénéité de la normativité des composantes de l'économie circulaire

La place des éléments de l'économie circulaire est étroitement liée à la valeur normative qui est reconnue à ses prescriptions au sein des ordres juridiques : or, on s'apercevra à cet égard, que l'on peut disqualifier l'unité « d'un principe » d'économie

[31] C'est d'ailleurs ce qui justifie l'analyse de ces éléments au sein de la troisième partie de cet ouvrage.

circulaire et plutôt constater une hétérogénéité de valeur normative relative à ces exigences[32] . Cette hétérogénéité est également éprouvée au stade d'intervention des composantes de l'économie circulaire, notamment dans les contrats de la commande publique : tantôt omniprésentes, tantôt cantonnées à des phases du marché en fonction des États considérés.

On retrouve surtout ces principes dans les textes des directives relatives à la commande publique : ainsi, la directive 2014/24/UE et la directive 2014/25/UE mentionnent à plusieurs reprises la nécessité de prendre en compte les critères environnementaux, même si la formulation est une formulation permissive[33]. La jurisprudence de la Cour de justice a également permis de clarifier les conditions de mise en œuvre de ces critères : la prise en compte de la durabilité de l'achat et de la responsabilité sociale de l'entreprise dans le cadre d'une procédure de passation d'un marché public doit par exemple respecter les dispositions de la directive 2004/18 ainsi que le principe de transparence[34]. Dans l'affaire dite du *label Max Havelaar et Eko*, la Cour a précisé les conditions dans lesquelles le recours à des critères de durabilité par renvoi à des labels est possible : en tout état de cause, cela doit faire l'objet de précisions de la part du pouvoir adjudicateur, afin de ne pas limiter l'accès au marché de certains opérateurs[35]. En la matière, il faut préciser que certaines initiatives et textes

[32] C'est d'ailleurs ce qui justifie l'analyse de ces éléments au sein de la troisième partie de cet ouvrage.

[33] Voir la Directive 2014/24/UE du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE, JO L 94 du 28.3.2014, p. 65–242 : voir l'article 18 § 2 déjà cité et voir l'article 57 § 4 a) et voir la Directive 2014/25/UE du Parlement européen et du Conseil du 26 février 2014 relative à la passation de marchés par des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des services postaux et abrogeant la directive 2004/17/CE, JO L 94 du 28.3.2014, p. 243–374.

[34] CJUE, 10 mai 2012, aff. C-368/10 , Comm. CE c/ Pays-Bas, « Durabilité de l'achat et responsabilité sociale des entreprises et droit des marchés publics », Contrats et Marchés publics n° 7, Juillet 2012, comm. 209. Sophie ROBIN-OLIVIER, « Verdissement des marchés publics : des exigences environnementales, mais pas un écolabel particulier », Revue trimestrielle de droit européen, 2013 p. 410.

[35]CJUE, 10 mai 2012, aff. C-368/10, préc. La Cour a estimé qu'en définissant les produits qu'il entend acheter par référence aux deux labels visés dans les documents de la consultation, le pouvoir adjudicateur a établi une spécification technique incompatible avec l'article 23, paragraphe 6, de la directive 2004/18 en exigeant que certains produits à fournir soient munis d'un éco-label déterminé, plutôt que d'utiliser des spécifications détaillées et a établi des critères d'attribution incompatibles avec l'article 53, paragraphe 1, sous a), de cette directive en prévoyant que

européens ont porté sur la question de la durabilité : mais souvent, ces instruments sont cantonnés à une approche non obligatoire et volontaire[36].

le fait que certains produits à fournir soient munis de labels déterminés donnerait lieu à l'octroi d'un certain nombre de points dans le cadre du choix de l'offre économiquement la plus avantageuse, sans avoir énuméré les critères sous-jacents à ces labels ni autorisé que la preuve qu'un produit satisfaisait à ces critères sous-jacents soit apportée par tout moyen approprié. Il est donc possible de recourir à la durabilité de l'achat et à la RSE comme critères d'attribution concernant des caractéristiques environnementales et sociales mais ce ne peut être qu'à la condition que leur utilisation ne confère pas au pouvoir adjudicateur une liberté de choix inconditionnée. Les critères doivent être formulés de manière à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en connaître la portée exacte et de les interpréter de la même manière, ce qui n'était pas le cas en l'espèce, selon la Cour.

[36]De l'aveu même de la Commission « Les initiatives et la législation de l'UE couvrent déjà, dans une certaine mesure, les aspects des produits liés à la durabilité, que ce soit sur une base obligatoire ou volontaire. En particulier, la directive sur l'écoconception (Directive 2009/125/CE du Parlement européen et du Conseil du 21 octobre 2009 établissant un cadre pour la fixation d'exigences en matière d'écoconception applicables aux produits liés à l'énergie, JO L 285 du 31 octobre 2009, p. 10) régit avec succès l'efficacité énergétique et certaines caractéristiques des produits liés à l'énergie concernant la circularité. Dans le même temps, des instruments tels que le label écologique de l'UE (Règlement (CE) nº 66/2010 du Parlement européen et du Conseil du 25 novembre 2009 établissant le label écologique de l'UE, JO L 27 du 30 janvier 2010, p. 1) ou les critères des marchés publics verts de l'UE (https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm) ont une portée plus large, mais une incidence réduite en raison des limites que présentent les approches volontaires. En fait, il n'existe aucun ensemble complet d'exigences visant à garantir que tous les produits mis sur le marché de l'UE deviennent de plus en plus durables et remplissent les critères de l'économie circulaire ». COM(2020) 98 final, 11 mars 2020, Un nouveau plan d'action pour une économie circulaire, Pour une Europe plus propre et plus compétitive, Nous soulignons. Voir par exemple, la directive 2012/27/UE du Parlement européen et du Conseil, du 25 octobre 2012, relative à l'efficacité énergétique, modifiant les directives 2009/125/CE et 2010/30/UE et abrogeant les directives 2004/8/CE et 2006/32/CE, sp. considérant 19 « en ce qui concerne l'acquisition de certains produits et services ainsi que l'achat et la location de bâtiments, les gouvernements centraux qui passent des marchés publics de travaux, de fournitures ou de services devraient donner l'exemple et prendre des décisions d'achat efficaces d'un point de vue énergétique (…). En ce qui concerne les produits autres que ceux faisant l'objet d'exigences en matière d'efficacité énergétique à l'achat en vertu de la présente directive, les États membres devraient encourager les organismes publics à tenir compte de l'efficacité énergétique des produits à l'achat ».

De tels principes sont ainsi consacrés par le droit dérivé et la jurisprudence au niveau européen mais aussi, et le plus souvent, dans des documents dits de *soft law*.

Au niveau européen, on a mentionné le paquet économie circulaire de la Commission européenne[37].Toutefois, dans le nouveau plan de l'Union européenne sur l'économie circulaire, la Commission indique qu'elle proposera d'inclure des critères et des objectifs minimaux obligatoires relatifs aux marchés publics écologiques dans la législation sectorielle[38]. On constate donc un renforcement de la normativité des critères au niveau européen, prévue pour 2021.

Au niveau national, si certains États ont pleinement intégré ces notions dans leur législation, les autorités nationales renvoient le plus souvent à des incitations facultatives en la matière profitant parfois de l'absence de caractère impératif des dispositions relatives à l'économie circulaire dans le droit de l'Union européenne[39]. En France, la loi a intégré les notions qui ont trait à l'économie circulaire : ainsi, le code de l'environnement, art. L. 110-1-1[40] modifié par la loi du 17 août 2015 relative à la transition énergétique pour la croissance

[37] Voir les références citées supra.

[38] « La Commission proposera d'inclure des critères et des objectifs minimaux obligatoires relatifs aux marchés publics écologiques dans la législation sectorielle et rendra progressivement obligatoire l'établissement de rapports pour contrôler le recours aux marchés publics écologiques sans imposer une charge administrative injustifiée aux acheteurs publics. En outre, la Commission continuera de soutenir le renforcement des capacités au moyen d'orientations et de formations et par la diffusion des bonnes pratiques, ainsi qu'en encourageant les acheteurs publics à participer à l'initiative «Public Buyers for Climate and Environment» (acheteurs publics pour le climat et l'environnement), qui favorisera les échanges entre acheteurs engagés dans la mise en œuvre des marchés publics écologiques ». COM(2020) 98 final, 11 mars 2020, préc. 2.2. Pour les critères établis en la matière, voir :https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm. Voir 2.3 pour la circularité dans les processus de production.

[39] Voir le rapport de Pedro CERQUEIRA GOMES sur le Portugal.

[40] Selon l'article L. 110-1-1 du Code de l'environnement, Art. L. 110-1-1 – « La transition vers une économie circulaire vise à dépasser le modèle économique linéaire consistant à extraire, fabriquer, consommer et jeter en appelant à une consommation sobre et responsable des ressources naturelles et des matières premières primaires ainsi que, par ordre de priorité, la prévention de la production de déchets, notamment par le réemploi des produits,

verte, fait désormais référence à l'utilisation des ressources, à la consommation responsable, à la notion de cycle de vie. Si les principes « classiques » applicables en matière de contrats publics s'opposent aux atteintes à la concurrence et, partant, à la mise en place d'une forme de favoritisme dans un objectif de politique économique, les évolutions récentes ont conduit à assouplir l'interprétation qui était faite de ces principes dans certaines hypothèses. Les enjeux de développement durable et les principes qui guident l'économie circulaire ont permis que les principes de la commande publique soient interprétés dans le sens d'une conciliation de la concurrence et de l'environnement. Comme le précisent les auteurs du focus de l'Institut national de l'économie circulaire[41] « les enjeux d'innovation et de performance sociale et environnementale sont donc hissés au cœur de cette « nouvelle » commande publique, au niveau des grands principes que sont la transparence, l'équité et la libre-concurrence »[42]. Ils sont toutefois conçus comme des orientations fonctionnelles qui sont attendues ou associées aux contrats. Pour contribuer à la transition vers une économie circulaire, la loi de 2015 mobilise divers outils, dont « la commande publique durable »[43], qui est ainsi perçue comme un instrument de la prospérité de l'économie circulaire. En réalité, l'achat public devient de plus en plus un instrument de politique publique, permettant de

et, suivant la hiérarchie des modes de traitement des déchets, une réutilisation, un recyclage ou, à défaut, une valorisation des déchets. La promotion de l'écologie industrielle et territoriale et de la conception écologique des produits, l'utilisation de matériaux issus de ressources naturelles renouvelables gérées durablement et issus du recyclage, la commande publique durable, l'allongement de la durée du cycle de vie des produits, la prévention des déchets, la prévention, la réduction ou le contrôle du rejet, du dégagement, de l'écoulement ou de l'émission des polluants et des substances toxiques, le traitement des déchets en respectant la hiérarchie des modes de traitement, la coopération entre acteurs économiques à l'échelle territoriale pertinente dans le respect du principe de proximité et le développement des valeurs d'usage et de partage et de l'information sur leurs coûts écologique, économique et social contribuent à cette nouvelle prospérité. »

[41] Composé d'acteurs publics et privés, cet institut a pour objectif de promouvoir l'économie circulaire. Voir https://institut-economie-circulaire.fr. Focus, Vers une commande publique circulaire, 2017-07-28.

[42] Focus, préc. p. 5.

[43] Le nouveau « code de la commande publique » est entré en vigueur le 1er avril 2019.

satisfaire plusieurs objectifs[44]. L'ordonnance du 23 juillet 2015 relative aux marchés publics et son décret d'application ont pu prévoir la possibilité d'intégrer les objectifs de développement durable dans leurs dimensions économique, sociale et environnementale[45]. En outre, il s'agira de consommer sobre et responsable, de prévenir la production de déchets à travers le réemploi, la réutilisation et le recyclage, la valorisation. La loi 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire[46] prévoit par ailleurs que les collectivités doivent permettre « par contrat ou par convention, aux personnes morales relevant de l'économie sociale, solidaire et circulaire qui en font la demande d'utiliser les déchetteries communales comme lieux de récupération ponctuelle et de retraitement d'objets en bon état ou réparables »[47]. En outre, en matière de commande publique, les services de l'État ainsi que les collectivités territoriales et leurs groupements, lors de leurs achats publics et « dès que cela est possible », doivent, à compter du 1er janvier 2021, réduire la consommation de plastiques à usage unique, la production de déchets et à privilégier les biens issus de réemploi ou de matières recyclées en rédigeant des clauses utiles en ce sens dans leurs cahiers des charges[48]. On perçoit ici que ces éléments sont

[44] Ainsi, l'achat public permet de « courir plusieurs lièvres à la fois ». N. BOULOUIS, Revue française de droit administratif, 2014 p.617, « Le contrat public au service des politiques de développement durable : limites et perspectives ». Voir par exemple, les clauses « Molière » qui imposent l'usage de la langue française sur les chantiers. Voir TA Lyon 13 décembre 2017, Préfet de la région Auvergne-Rhône-Alpes, req. n° 1704697 ; CE 4 décembre 2017, Région Pays de la Loire, req. n° 413366. Si ces clauses n'ont pas été considérées comme valides, en revanche, les clauses d'interprétariat ont pu être validées par le Conseil d'État français, 4 décembre 2017.

[45] Elle « vise à dépasser le modèle économique linéaire consistant à extraire, fabriquer, consommer et jeter en appelant à une consommation sobre et responsable des ressources naturelles et des matières premières primaires ainsi que, par ordre de priorité, à la prévention de la production de déchets, notamment par le réemploi des produits, et, suivant la hiérarchie des modes de traitement des déchets, à une réutilisation, à un recyclage ou, à défaut, à une valorisation des déchets » Voir l'article L. 110-1 du code de l'environnement, modifié par la loi du 17 août 2015.

[46] Florian LINDITCH et Philippe BILLET, « La commande publique après la loi du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire », La Semaine Juridique Administrations et Collectivités territoriales n° 12, 23 Mars 2020, 2075.

[47] Article L. 2224-13 du CGCT alinéa 4.

[48] Loi n° 2020-105, art. 55

érigés en réflexe pour l'État et les collectivités territoriales, mais la valeur normative de ces dispositions oscille entre dispositif obligatoire et permissif : ainsi, on pourrait penser qu'il s'agit davantage d'incitations que d'obligations, comme l'expression « dès que cela est possible » semble l'indiquer. Toutefois, il existe des vraies obligations « d'acquérir des biens « issus du réemploi ou de la réutilisation ou intégrant des matières recyclées dans des proportions de 20 % à 100 % selon le type de produit » (art. 58-I) ; – l'incitation à réduire la consommation de plastiques à usage unique, la production de déchets et privilégient les biens issus du réemploi ou qui intègrent des matières recyclées en prévoyant des clauses et des critères utiles dans les cahiers des charges (art. 55) ; – la création d'un diagnostic obligatoire « relatif à la gestion des produits, matériaux et déchets issus de ces travaux » (art. 51)[49].

Mais la France n'est pas le seul État à avoir intégré ses éléments à sa commande publique. En Italie, les prévisions à cet égard intègrent et dépassent largement le droit européen sur ces éléments[50]. En Croatie, un plan national d'action pour une commande

[49] Pour Florian LINDITCH et Philippe BILLET, s'il s'agit d'un dispositif « permissif », il n'en reste pas moins que « Contrairement aux apparences, bien que formulée sur le mode incitatif, la disposition n'en instaure pas moins une véritable obligation de « réduire » « la consommation de plastiques à usage unique » et « la production de déchets », à laquelle s'ajoute celle de « privilégier les biens issus du réemploi ou qui intègrent des matières recyclées ». Les deux auteurs admettent cependant que « pour le reste, la disposition se veut particulièrement souple : le « dès que... possible » permet d'ouvrir la faculté de ne pas respecter le texte en apportant la démonstration, voire la preuve, d'une impossibilité que l'on peut d'ores et déjà envisager : absence de fournisseurs utilisant les matériaux considérés, absence de matériaux de remplacement, ou même tout simplement performances insuffisantes des matériaux de substitution. Le dispositif reste donc assez permissif, fondé sur une disponibilité relative dans le temps. Il sera en tout cas difficile de sanctionner une procédure qui intégrait bien ces données mais pour laquelle aucun fournisseur idoine n'a soumissionné ». Voir l'article préc.

[50] Voir le rapport de Matteo PIGNATTI, "The Italian legal framework provided by 2015, the mandatory aims for the public administrations to contribute to eco-innovation and drive the best value for money with green public procurement, a forecast that broadly incorporates and exceeds EU policies, reducing the environmental impacts of public administrations associated with the life cycle of goods and services, as well as of the works.

publique verte[51] a été adopté en 2015[52]. En République tchèque, on retrouve ces éléments dans les "public policy requirements"[53] : il s'agit donc ici d'instruments de « soft law », à travers le concept de la commande publique « responsable »[54], qui n'est pas définie dans la loi sur les marchés publics, mais dans la méthodologie édictée par le gouvernement qui en donne d'ailleurs une définition[55]. Au Portugal, il ne s'agit pas d'une contrainte qui consacre des principes strictement juridiques, mais d'une obligation globale de s'assurer que les opérateurs économiques respectent les normes dans ces domaines[56].

En outre, on retrouve souvent des guides nationaux qui viennent compléter les éléments fixés dans la législation nationale, soit par des acteurs publics, soit par des acteurs privés. En France, on relève ainsi les orientations stratégiques pour des marchés publics verts, introduites par la loi du 17 août 2015 ainsi que les achats publics durables[57]. En Slovénie, la commande publique verte est promue notamment par la Chambre de commerce

[51] http://mzoip.hr/doc/nacionalni_akcijski_plan_za_zelenu_javnu_nabavu.pdf, June 4, 2019.

[52] Nacionalni akcijski plan za zelenu javnu nabavu ou NAPZJN. V. le rapport de Marko TURUDIĆ : "The purpose of NAPZJN is the encouragement of conclusion of procurement contracts for products and services with a lower environmental impact. The NAPZJN is intended to help achieve 50% public procurement procedures in Croatia with the use of green selection criteria by 2020".

[53] Voir le rapport de Adéla HAVLOVÁ, Martin RÁŽ, Jana PETROVÁ, Barbara FIKAROVÁ: "Countless public policy requirements, stemming from various laws, regulations, decisions of the government or local administrations and other public policy sources, of which we will concentrate on good governance, social responsibility and environmental procurement principles".

[54] In the area of "soft law", environmental and social procurement, one issue we wish to highlight is the concept of "Responsible Public Procurement" promoted by the Czech Ministry of Labour and Social Affairs since 2014, rapport préc.

[55] Elle correspond à un "process whereby organisations meet their needs for goods, service, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits to society and the economy, whilst minimising damage to the environment". Pour les auteurs du rapport, il s'agit d'une « source tertiaire » de principes, d'ailleurs en lien étroit avec les fonds structurels européens où la "soft law" est souvent incluse dans les obligations juridiques du bénéficiaire de la subvention (c'est-à-dire d'un pouvoir adjudicateur).

[56] Voir l'article 1.º-A n.º 2 of PPPC, qui, selon Pedro CERQUEIRA GOMES, "is not rule that includes pure legal principles, but merely obligates contracting authorities to ensure that economic operators comply with other legal norms in those fields, during the award and execution phase".

[57] Des guides d'achats durables par types de produits sont également disponibles parmi les guides et recommandations des groupes d'étude des marchés (GEM) de la Direction des affaires juridiques (DAJ) du ministère de l'économie et des finances. On peut aussi évoquer la participation de l'Institut de l'économie circulaire en France.

et d'industrie qui évoque les critères environnementaux, qui vont d'ailleurs au-delà des obligations de la législation nationale, contenues dans un Décret gouvernemental[58]. En revanche, au Portugal, il n'existe pas de guides nationaux ou de codes de conduite ce qui explique peut-être l'utilisation assez rare de ces possibilités[59].

Enfin, on relève la constitution de réseaux européens et nationaux d'échanges de bonnes pratiques axés sur les marchés publics écologiques et durables *:* le programme européen Horizon 2020 finance ainsi le réseau « Procura + » qui vise à mettre en relations les acteurs de la commande publique durable. Le guide de la Commission européenne évoque plusieurs réseaux situés dans les États membres : ainsi, on mentionnera le partenariat pour les marchés publics écologiques au Danemark, qui permet aux acheteurs d'échanger leur expertise[60] ; en France, le « Reseco » a été créé depuis 2006[61].

S'il n'existe pas de principe unitaire de l'économie circulaire, mais des éléments disséminés au niveau normatif, il faut constater également que les éléments de l'économie circulaire interviennent à différents stades de la commande publique.

[58] "Common Principles of Public Contracts in Europe: Background and Milestones", Principles of Public Contracts in Slovenia, Boštjan FERK, Petra FERK, Katja HODOŠČEK.

[59] Voir le rapport de Pedro CERQUEIRA GOMES: "The absence of national guidelines, codes of conduct at national or local level and the complexity and legal uncertainty surrounding the legal rules at EU and national level on this matter may justified the rare use of these possibilities".

[60] (www.groenneindkoeb.dk) Le partenariat est constitué d'une coalition d'organes gouvernementaux : chaque membre présente un rapport annuel sur le niveau de réalisation des objectifs. Il s'agit donc de convaincre de en démontrant l'efficacité des MPE, p. 21 du guide de la Commission.

[61] Voir https://reseco.fr/reseco/.

2.2. L'intervention des principes de l'économie circulaire à différents stades de la commande publique

Si au Royaume-Uni on constate le cantonnement de ces principes au stade « *pre-procurement* »[62], dans d'autres États[63], mais aussi en droit de l'Union eurpéenne, on constatera plutôt une présence étendue des principes de l'économie circulaire, dès lors que ces principes interviennent à tous les stades de la commande publique. On évoquera l'intervention du paradigme de l'économie circulaire au stade de la détermination des besoins de l'autorité publique (2.2.1), mais également au moment de l'attribution et de l'exécution du marché (2.2.2).

2.2.1. L'économie circulaire dans la détermination des besoins de l'autorité publique

La Commission européenne évoque les critères élaborés au niveau de l'Union européenne et utilisés par les pouvoirs publics. On retrouve ces principes exprimés à travers la notion de durabilité ou de réparabilité lors de l'établissement ou de la révision des critères.

[62] Voir le rapport de Yseut MARIQUE, "The duty is limited to the pre-procurement stage : Public Service (Social Value) Act 2012 (shortened here in PS(SV) Act 2012) creates a duty for public authorities to consider economic, social and environmental well-being in the pre-procurement stage of services contracts. It establishes a procedural connection between procurement and the purposes for which public authorities exercise their discretion. This duty results from long hesitations about the articulations between collective interests and market logic. It embeds collective interests in contracting".

[63] Aux Pays-Bas, l'article 1.4 (2) prévoit que les autorités contractantes doivent avoir pour objectif de respecter les exigences relatives au développement durable à tous les stades de la procédure. Voir le rapport de Sarah SCHOENMAEKERS, "On the basis of Article 1.4(2) contracting authorities should aim to secure as much societal value as possible and the Procurement Act allows for sustainability requirements to be taken into account in al phase of the procedure".

Par exemple, en effectuant un « sourçage », les acheteurs peuvent établir des échanges avec les acteurs économiques pour mieux définir les besoins, afin de rationaliser l'achat. Il s'agit d'un instrument qui permet de recenser des produits durables. Les acheteurs peuvent aussi mutualiser les achats afin de réaliser des économies d'échelle[64].

Les objectifs de l'économie circulaire peuvent également être traduits dans l'objet du marché par différents instruments : ainsi, il est possible de traduire ces objectifs par le recours à des spécifications techniques décrivant ainsi « les caractéristiques requises des travaux, des services ou des fournitures qui font l'objet du marché public »[65]. En France, parmi ces spécifications techniques[66], figurent « les niveaux de performance environnementale et climatique »[67]. Selon le décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics, les spécifications techniques peuvent être exprimées par référence à des normes ou documents équivalents accessibles aux candidats, ou en termes de performances ou d'exigences fonctionnelles, soit en combinant les deux méthodes. Il peut s'agir de labels environnementaux ou sociaux pour la réalisation d'une prestation[68]. En Italie, on relève l'utilisation obligatoire dans les documents de passation des marchés, en tant que spécification technique, de critères environnementaux spécifiques liés à un certain nombre de biens, services et travaux, tels que définis par le ministère de l'Environnement par le biais

[64] En France, comme avec la Ville de Paris, qui, en 2010, a mis en place un groupement de commande pour fournir les repas à une dizaine de restaurants collectifs, ce qui lui a permis de choisir plus de 20 % de produits issus de l'agriculture biologique et en circuit court, sans augmentation significative des couts. Dans le reste de l'Union européenne, au Danemark, un groupement de commande incluant plus de soixante villes a procédé à l' achat de meubles comprenant 70 % de bois recyclé ou certifié durable avec un coût inférieur de 26 % au prix du marché.

[65] Article 42 de la directive 2014/24/Union européenne.

[66] Selon l'avis relatif à la nature et au contenu des spécifications techniques, qui remplace à compter du 1er avril 2019 l'avis relatif à la nature et au contenu des spécifications techniques dans les marchés publics - NOR: EINM1608199V (JORF n°0074 du 27 mars 2016)]
https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=EAB2B8D1FEBB719CB49357B5990B1BBC.tplgfr38s_3?cidTexte=JORFTEXT000038319259&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000038318056, JORF n°0077 du 31 mars 2019 - texte n° 84.

[67] Le décret relatif aux concessions n'a pas repris les conditions relatives aux clauses sociales et environnementales dans les spécifications techniques.

[68] L'acheteur est également invité à définir les caractéristiques attendues en se référant « au processus ou à la méthode spécifique de production ou de fourniture des travaux, des produits ou des services demandes » ou « à un processus propre à un autre stade de leur cycle de vie même lorsque ces facteurs ne font pas partie de leur contenu matériel, à condition qu'ils soient liés à l'objet du marché public et proportionnés à sa valeur et à ses objectifs ». Voir l'article 10 du décret de 2016.

d'actes spécifiques[69]. Il est également possible pour les pouvoirs adjudicateurs de demander des informations sur les mesures de gestion de la chaîne d'approvisionnement[70].

Les principes de l'économie circulaire s'expriment également lors de l'attribution et l'exécution du marché.

2.2.2 L'économie circulaire dans l'attribution et l'exécution du marché

Les considérations environnementales peuvent faire partie des critères d'attribution[71], mais elles doivent être en rapport avec l'objet du marché ou du contrat de concession. Ainsi, en Espagne, dans une affaire relative au marché de traitement des déchets du service andalous de santé, le choix s'était porté sur une usine de traitement des déchets dans la Communauté autonome d'Andalousie, notamment en se fondant sur l'argument de la minimisation du risque environnemental et pour la santé. Mais le tribunal administratif d'Andalousie a censuré ce choix, estimant que la distance entre les services et l'usine est accidentelle, et que ce critère n'était donc pas lié à l'objet du contrat[72]. En droit français, dès 2004, le code des marchés publics a autorisé les considérations environnementales comme critères d'attribution, à condition qu'elles soient en rapport avec l'objet du marché[73]. Cette

[69] Voir le rapport de Matteo PIGNATTI: « Italian rules provide for the mandatory use in procurement documents (as technical specification) of specific environmental criteria related to a number of goods, services and works, as defined by the Ministry of the Environment through specific acts ». Law 28 December 2015 no. 221. Voir la note de bas de page 57.

[70] Ainsi, en 2013, la ville de Turin, dans le cadre de ses marché de services de restauration scolaires des mesures et des critères visant à réduire l'empreinte carbone associée à ces services, a demandé aux fournisseurs de produire des données permettant de déterminer les parties de la chaîne d'approvisionnement qui présentaient le plus grand potentiel d'économie de CO2.

[71] Voir le rapport sur l'Allemagne, « GWB, Section 97 paragraph 3, the German legislator closed the political and legal debates on social and environmental aspects' role in the award procedure ».

[72] Voir le rapport sur l'Espagne, de Patricia VALCÁRCEL Fernández qui cite la Décision 410/2015 of the TACPJA.

[73] Les critères d'attribution directement liés aux performances environnementales, à la biodiversité, au développement des approvisionnements directs de produits de l'agriculture et même au bien-être animal sont

exigence figure désormais aux articles L 2112-2 pour les marchés et L 3111-1 du code de la commande publique pour les concessions, depuis l'entrée en vigueur du Code de la commande publique en avril 2019. Les réformes successives de la commande publique ont eu pour conséquence que le critère d'attribution du marché n'est plus uniquement le coût, mais le coût déterminé selon une approche globale : ce coût peut être « le coût du cycle de vie »[74] calculé selon une méthode parfois harmonisée[75]. La globalité intervient également dans la détermination de ce qu'est une « offre économiquement la plus avantageuse »[76]. L'article 62 du décret 2016-360 énumère un ensemble de « critères comprenant des aspects qualitatifs, environnementaux ou sociaux » qui peuvent être considérés parallèlement au prix

envisageables dès lors qu'ils présentent un lien avec l'objet du marché. Cette démarche a été étendue dans la version 2006 du code des marchés publics (abrogé au 1er avril 2016). Issue des travaux du groupe « achats publics durables » du Grenelle de l'environnement de 2007, la circulaire du premier ministre du 3 décembre 2008 relative à l'exemplarité de l'État au regard du développement durable définit les objectifs en matière d'achats courants et de responsabilité sociale, à l'aide d'une série de fiches techniques par type d'achats. Par ailleurs, le décret n° 2011-1000 du 25 août 2011 introduit la possibilité de conclure des contrats globaux de performance, dans lesquels le titulaire s'engage notamment en matière d'efficacité énergétique ou d'incidence écologique.

[74] Le coût de cycle de vie, critère d'attribution des marchés défini par l'article 63 du décret 2015-360, vise à intégrer l'ensemble des coûts directs et des externalités monétisables liés au cycle de vie du produit, service ou ouvrage fourni.

[75] Ainsi, l'Institut de l'économie circulaire mentionnait la directive 2009/33/CE relative à la promotion de véhicules de transport routier propres et économes en énergie comme méthode harmonisée de calcul des coûts du cycle de vie d'un produit : en effet, à l'article 6 de la directive, figure la méthodologie de calcul de ce coût. Directive 2009/33/CE du Parlement européen et du Conseil du 23 avril 2009 relative à la promotion de véhicules de transport routier propres et économes en énergie, JO L 120, 15.5.2009, p. 5–12.

[76] La qualité, y compris la valeur technique et les caractéristiques esthétiques ou fonctionnelles, l'accessibilité, l'apprentissage, la diversité, les conditions de production et de commercialisation, la garantie de la rémunération équitable des producteurs, le caractère innovant, les performances en matière de protection de l'environnement, de développement des approvisionnements directs de produits de l'agriculture, d'insertion professionnelle des publics en difficulté, la biodiversité, le bien-être animal ; b) Les délais d'exécution, les conditions de livraison, le service après-vente et l'assistance technique, la sécurité des approvisionnements, l'interopérabilité et les caractéristiques opérationnelles ;c) L'organisation, les qualifications et l'expérience du personnel assigné à l'exécution du marché public lorsque la qualité du personnel assigné peut avoir une influence significative sur le niveau d'exécution du marché public.

ou au coût des différentes propositions pour déterminer l'offre économiquement la plus avantageuse[77].

L'article 38, I de la directive permet également de faire des objectifs sociaux et environnementaux une condition d'exécution du marché. Dès lors, les contraintes découlant de l'économie circulaire peuvent également s'exprimer dans les conditions d'exécution du marché : ces conditions peuvent prendre en compte « des considérations relatives à l'économie, à l'innovation, à l'environnement, au domaine social ou à l'emploi, à condition qu'elles soient liées à l'objet du marché public »[78]. Il s'agit notamment de l'utilisation des modes de transport qui respectent l'environnement ou encore le fait de préciser le mode de fourniture des biens : ainsi, il peut s'agir d'une spécification dans le mode de livraison des biens[79].

Toutefois, ces critères ne doivent pas aller à l'encontre du principe d'égalité de traitement et de non-discrimination. Le lien avec l'objet du marché requis agit donc parfois comme un carcan dans la mise en œuvre des principes de l'économie circulaire[80]. Précisément, après avoir constaté l'hétérogénéité de la normativité des principes de l'économie circulaire, il faut envisager les limites à la mise en œuvre des critères de l'économie circulaire, car l'enjeu véritable est de transformer ces objectifs affichés en dispositions effectives et concrètes.

3. LES LIMITES DANS LA MISE EN ŒUVRE DES CRITERES DE L'ECONOMIE CIRCULAIRE

[77] Le décret 2016-360 a été abrogé par le Décret n°2018-1075 du 3 décembre 2018. Aujourd'hui ces dispositions figurent à l'article R2352-5 du Code de la commande publique.

[78] Article L. 2112-2 du Code de la commande publique.

[79] Cela peut aller de la précision quant à la quantité livrée (en une seule fois), cela peut être la livraison en dehors des heures de pointe ou encore l'obligation de réduire et/ou recycler les emballages.

[80] Voir infra II. B., les garde-fous dans la mise en œuvre des principes de l'économie circulaire : le lien avec l'objet du marché, mais aussi le principe de proportionnalité.

Il s'agit ici de déterminer comment ces initiatives se traduisent au-delà des simples prescriptions normatives (3.1). Il faut évidemment s'interroger sur les obstacles posés par cette mise en œuvre et sur les limites rencontrées, afin de déterminer si ces limites vont jusqu'à vider ces principes de leur substance (3.2).

3.1. La traduction concrète de l'économie circulaire dans la commande publique

Tant le droit européen que le droit national promeuvent une utilisation aussi large que possible des éléments de l'économie circulaire dans les procédures de passation de marchés. Cela prend différentes formes.

Au niveau européen, la Commission s'engage à encourager les pouvoirs publics à avoir davantage recours à ces critères et à réfléchir à la façon dont les marchés publics écologiques pourraient être utilisés plus largement au sein de l'UE, en particulier pour les produits ou les marchés qui revêtent une importance capitale pour l'économie circulaire. Elle a d'ailleurs mis en place un service d'assistance afin de diffuser des informations concernant les marchés publics écologiques et de répondre aux demandes d'information des acteurs concernés[81]. Elle rappelle surtout la nécessité d'exemplarité de l'Union européenne à cet égard, à travers la traduction de l'économie circulaire dans les marchés publics de l'Union européenne[82]. « Premièrement, la Commission veillera à ce qu'à l'avenir un accent particulier soit mis sur les aspects pertinents pour l'économie circulaire, tels que la durabilité et la réparabilité, lors de l'établissement ou de la révision des critères »[83]. Ainsi, la Commission européenne encourage les pouvoirs publics à avoir recours à ces critères, notamment « dans le cadre de programmes de formation ciblés ». Elle semble chiffrer le recours aux marchés publics

[81] http://ec.europa.eu/environment/gpp/helpdesk.htm. Voir également le site web des MPE. http://ec.europa.eu/environment/gpp/helpdesk.htm
[82] Enfin, la Commission « montrera l'exemple en veillant à ce que les marchés publics écologiques soient utilisés aussi largement que possible dans ses propres procédures de passation de marchés, et en renforçant l'utilisation de ces marchés dans le financement de l'Union européenne » Note 22 de la Communication de la Commission, Faire des marchés publics un outil efficace au service de l'Europe, 3 octobre 2017 COM(2017) 572 final.
[83] P. 9 de la Communication de 2015, préc.

écologiques à 93% de l'ensemble des contrats de ses services d'une valeur supérieure à 60 000 euros[84].

Au niveau national, il existe des plans nationaux d'action[85] pour les achats durables : en France, le plan a été mis en place en 2015, pour une période allant jusqu'à 2020[86]. La loi du 17 août 2015 relative à la transition énergétique et pour la croissance verte avait enrichi la loi du 31 juillet 2014 relative à l'économie sociale et solidaire qui avait institué les « schémas de promotion des achats publics socialement responsables » [87]. Ces schémas doivent promouvoir les achats responsables et contribuent à la promotion d'une économie circulaire. La loi du 17 août 2015 constitue d'ailleurs un texte « matriciel »[88] de la commande publique durable. Elle va plus loin que la loi de 2014 puisqu'elle soumet la commande publique à une logique de performance environnementale. La loi a autorisé les communes et leurs groupements à participer au capital d'une société anonyme ou société par actions simplifiée dont l'objet social est « la production d'énergies renouvelables par des installations situées sur leur territoire ou sur des territoires situés à proximité et participant à l'approvisionnement énergétique de leur territoire »[89]. En France, la loi de 2015 fonde d'autres dispositifs : en matière de transports, après avoir exposé d'une manière générale que « le développement et le déploiement des transports en commun à faibles émissions de gaz à effet de serre et de polluants atmosphériques constituent une priorité tant au regard des exigences de la transition énergétique que de la nécessité d'améliorer le maillage et l'accessibilité des territoires », le législateur prévoit pour ce qui concerne la commande publique, et quel que soit son objet,

[84] Voir le rapport de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, relatif à la mise en œuvre du plan d'action en faveur d'une économie circulaire COM(2019) 190 final , 4 mars 2019 : « Les services de la Commission à Bruxelles ont utilisé les critères applicables aux marchés publics écologiques dans 93 % de l'ensemble de leurs contrats d'une valeur supérieure à 60 000 EUR ». sp. p. 4.

[85] Les plans d'action nationaux (PAN) en faveur des MPE ou des MPD décrivent toute une série d'actions et de mesures d'aide en faveur des marchés publics écologiques ou durables .

[86] Le plan est disponible à l'adresse suivante : https://www.ecologique-solidaire.gouv.fr/sites/default/files/Plan_national_d_action_pour_les_achats_publics_durables_2015-2020.pdf.

[87] Grégory KALFLÈCHE, « Contractualisation et interventionnisme économique », RFDA, 2018 p. 214.

[88] Voir Guylain CLAMOUR, Contrats et Marchés publics n° 10, Octobre 2015, comm. 226.

[89] Voir l'article L. 2253-1 CGCT, modifié par la loi de 2015, préc.

que « lorsque les marchés publics impliquent pour leur réalisation que des opérations de transport de marchandises soient exécutées, la préférence, à égalité de prix ou à équivalence d'offres, peut se faire au profit des offres qui favorisent l'utilisation du transport ferroviaire, du transport fluvial ou de tout mode de transport non polluant »[90]. Pour l'État et les collectivités, c'est encore la diminution de 30 % de la consommation de papier bureautique et la mise en place d'un plan de prévention en ce sens : ainsi, cela se traduit pour les pouvoirs publics par l'achat de produits moins nocifs, comme les produits de nettoyage, ou encore les produits avec emballages réutilisables. Il faut également évoquer l'approvisionnement en nourriture « bio » pour les écoles et la lutte contre le gaspillage alimentaire[91] : on relève de nouvelles obligations pour la restauration collective, en termes de cycle de vie des produits ou denrées alimentaires[92] concernant les collectivités territoriales[93]. Les collectivités territoriales devront donc veiller à prendre en compte ces nouvelles dispositions dans le cadre de la commande publique. De manière spécifique, nombre de dispositions consacrées par le décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics, concourent à de réelles marges de manœuvre tant juridiques qu'économiques pour promouvoir un approvisionnement local.

Par ailleurs, il s'agit ici de dépasser les seules prescriptions normatives et de déterminer en pratique, quel taux de contrats publics est réellement soumis aux principes de l'économie circulaire. A cet égard, on s'aperçoit qu'en France, le Conseil économique social et environnemental, s'est plaint que les critères sociaux et environnementaux d'attribution des marchés publics soient en réalité peu utilisés : ainsi, seuls 12,2 % des marchés de l'État contenaient en 2016 une clause environnementale et seulement 4,4 % une clause sociale - et

[90] Article 36 de la loi de 2015.

[91] Voir l'article L. 541-15-3 du Code de l'environnement, crée par l'article 102 de la loi n° 2015-992, 17 août 2015.

[92] Ce sont les dispositions découlant de la loi « EGALIM ». La loi sur les états généraux de l'alimentation a été promulguée le 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine et durable.

[93]Les collectivités territoriales devront donc veiller à prendre en compte ces nouvelles dispositions dans le cadre de la commande publique.

n'aient pas l'effet de levier escompté, en particulier sur les entreprises de l'économie sociale et solidaires (ESS)[94]. L'imposition d'objectifs chiffrés dans la loi « économie circulaire » de 2020 cherche à remédier à ces lacunes en pratique[95].

Dans le reste de l'Europe, plusieurs exemples concrets d'achats « verts » sont présentés dans le guide de la Commission européenne[96] : à la fin de l'année 2011, l'Irlande a adopté son plan d'action en faveur des MPE, intitulé *Green tenders*[97]. Celui-ci a pour objectif d'atteindre 50 % de marchés publics écologiques dans huit groupes de produits et services[98]. En Italie, il existe des critères environnementaux définis pour la restauration collective et les achats de fourniture[99]. En République tchèque, environ 20 millions d'euros sont dépensés chaque année par les ministères en achats écolabelisés : les chaudières, l'équipement informatique et les articles de papeterie représentant la plus grande part des achats écolabelisés[100].

2.2. La nécessité de développement d'outils à la mise en œuvre de ces critères

[94] Pour un constat similaire en Croatie, sur les différences entre les ambitions affichées et la pratique : en effet, on a pu constater que depuis 2015, sur un total de 25000 procédures d'achat public, seules 1000 contenaient des critères de sélection environnementaux. Rapport de M. TURUDIĆ, préc. ; Voir également le constat opéré pour le Portugal, dans le rapport de Pedro CERQUEIRA GOMES, préc.

[95] Voir l'article 58 de la loi préc.

[96] Une centaine d'exemples a été recensée : le guide de la Commission renvoie à l'adresse suivante : http://ec.europa.eu/environment/gpp/case_en.html.

[97]https://www.dccae.gov.ie/en-ie/environment/publications/Documents/47/Green%20Tenders%20-%20Action%20Plan%20on%20Green%20Public%20Procurement.pdf

[98] Dans la dernière édition du guide, il est précisé qu' « En 2014, l'Agence pour la protection de l'environnement a publié un ensemble complet de critères et d'orientations afin d'aider les autorités à atteindre cet objectif. Les critères reposent sur ceux établis au niveau de l'Union européenne mais prennent en considération les habitudes d'achat et la structure de marché de l'Irlande ».

[99] Voir le rapport de Matteo PIGNATTI, qui fait référence à la loi italienne du 28 décembre 2015, no. 221. See also Environmental Ministry, Action plan for environmental sustainability of consumption in the public administration sector https://www.minambiente.it/sites/default/files/archivio/allegati/GPP/all.to_19_PAN_GPP_definitivo__21_12_2007.pdf.

[100] Voir le manuel sur les MPE, Acheter vert !, préc.

Les autorités nationales disposent de marges de manœuvre importantes : aucune sanction n'est prévue, laissant les acheteurs libres de les intégrer ou non dans leurs marchés[101]. La liberté est ainsi perçue au Danemark[102] ou encore en Slovénie, où il semble que la pratique des autorités contractantes incorpore des critères environnementaux, mais seulement dans la mesure strictement nécessaire à leur conformité avec le droit[103]. Au Royaume-Uni[104], le *Public Service (Social Value)* Act 2012, laisse une marge de manœuvre dans l'application de ces éléments. En effet, *The PS(SV) Act 2012* exige des autorités publiques qu'elles prennent en compte « comment ce qui est proposé pourrait améliorer le bien-être économique, social et environnemental » de leurs régions et « comment, dans la conduite du processus de passation des marchés, cela pourrait agir en vue d'assurer cette amélioration »[105]. Mais cette obligation est ainsi doublement limitée dans sa portée et sa force exécutoire[106].

La mise en œuvre de ces critères dépend surtout d'éléments qui jouent le rôle de garde-fou, permettant la distinction entre des contrats publics qui iraient à l'encontre des principes fondamentaux de la concurrence et ceux qui prendraient en compte les principes de l'économie circulaire, mais dans le respect de ces principes : on l'a dit[107], il s'agit de veiller

[101] Voir le rapport d'Yseut MARIQUE : « The outcome of these considerations and the integration of circular economy components in the contractual design, terms or performance is often left uncharted in the legislation ».

[102] Voir le rapport de Carina RISVIG HAMER, « Thus, the choice of taking into account such elements is left for the contracting authorities' discretion ».

[103] Voir le rapport de Boštjan FERK, Petra FERK, Katja HODOŠČEK, « It is evident from the practice of contracting authorities that most of them incorporate environmental criteria only to the extent strictly necessary for compliance with the rules of the regulation, and to this end (often inappropriate in the light of the subject of the contract) use examples of environmental requirements and criteria prepared by DJN ».

[104] Voir le rapport d'Yseut MARIQUE, préc.

[105] La question de impact du Brexit sur ces éléments peut toutefois être soulevée : « Assessing the impact of Brexit on sustainability, Environmental policies the UK adopted as part of the EU are at risk of being compromised, and many environmentalists have voiced concerns over the negative outcome Brexit will have on the progress of sustainability in the supply chain ». Voir https://www.procurementleaders.com/brexit/brexit-resources/assessing-the-impact-of-brexit-on-csr-sustainability#.Xr6mSC_pOnc

[106] V. le rapport d'Yseut MARIQUE, et le PS(SV) Act 2012 section 1(3)(a) and (b).

[107] Voir supra I. B.

à ce que tout ce qui est exigé des soumissionnaires potentiels et de leurs offres soit d'abord bien lié à l'objet du marché, ce qui peut parfois constituer un obstacle pour les autorités publiques, soucieuses d'éviter des recours potentiels. En outre, les principes de l'économie circulaire rencontrent la limite relative à la proportionnalité. Les autorités doivent ainsi prendre en compte ce qui est nécessaire pour la commande publique, mais cela ne doit pas s'étendre au-delà[108]. En effet, l'existence de ces critères, notamment les critères environnementaux, ne doit pas se substituer à l'obligation de création d'une véritable politique environnementale de l'entreprise[109].

Une autre limite que l'on rencontre dans plusieurs ordres juridiques des États membres est une limite très pragmatique : il s'agit de la formation des autorités publiques. Ainsi, comme on a pu le souligner[110], dans certains États, la préoccupation environnementale et sociale sont des tendances plutôt récentes : par conséquent, les autorités publiques ne sont pas formées à ces politiques et leur acceptation se fait de manière graduelle. En République tchèque, par exemple, la prise en considération a émergé de manière récente, même si, pour les spécialistes, il est raisonnable de penser que ces préoccupations vont progressivement prendre davantage d'importance[111]. En France, les pouvoirs adjudicateurs, notamment les

[108] V. le rapport d'Yseut MARIQUE, préc. Indeed, the authority only needs to take into account what is relevant to the procurement, and not overall economic, social or environmental well-being, voir le PS(SV) Act 2012 section 1(6). Aux Pays-Bas, c'est d'ailleurs dans le « Proportionality guide » que l'on retrouve les règles relatives aux conditions sociales et de durabilité. V. le rapport de S. SCHOENMAEKERS.

[109] On retrouve d'ailleurs la même logique pour les critères sociaux. Conseil d'État, 7ème - 2ème chambres réunies, 25 mai 2018, 417580, à propos d'un critère ayant pour objet de noter la « performance en matière de responsabilité sociale » des soumissionnaires. Le Conseil d'État estime que « ces critères à caractère social, relatifs notamment à l'emploi, aux conditions de travail ou à l'insertion professionnelle des personnes en difficulté, peuvent concerner toutes les activités des entreprises soumissionnaires, pour autant qu'elles concourent à la réalisation des prestations prévues par le marché ; ces dispositions n'ont, en revanche, ni pour objet ni pour effet de permettre l'utilisation d'un critère relatif à la politique générale de l'entreprise en matière sociale, apprécié au regard de l'ensemble de son activité et indistinctement applicable à l'ensemble des marchés de l'acheteur, indépendamment de l'objet ou des conditions d'exécution propres au marché en cause ».

[110] Voir supra, nos propos introductifs.

[111] V. les observations des auteurs du rapport, Adéla HAVLOVÁ, Martin RÁŽ, Jana PETROVÁ, Barbara FIKAROVÁ.

collectivités territoriales, ne sont pas complètement familiarisées avec cette nouvelle politique, en outre, les règles en matière de contrat public ont connu tellement de mutations ces dernières années qu'elles nécessitent une adaptation de la part des personnels travaillant au sein de ces collectivités. Certains auteurs évoquent de plus la nécessité pour les acheteurs publics d'acquérir une « culture de rationalisation économique préalable à l'achat »[112]. Au Danemark, même si les variations sont importantes d'une autorité à une autre, les tendances convergent vers une prise en compte accrue de ces critères[113].

Plus encore, certains critères sont assez difficiles à appréhender comme le coût du cycle de vie. Il n'existe pas toujours de méthode harmonisée de calcul. Le guide de l'achat vert préconisait alors de se concentrer sur des éléments « faciles à calculer » et dotés d'un « caractère économique évident »[114] : les économies en matière d'eau et d'énergie peuvent « facilement servir de critères d'attribution dans les procédures de marchés publics »[115]. Le

[112] Voir les remarques de Guillaume GAUCH et Samuel COUVREUR, https://www.seban-associes.avocat.fr/wp-content/uploads/2018/08/La-commande-publique-circulaire-Contrats-Publics-juillet-août-2018-SCC-GG.pdf

[113] Voir le rapport de Carina RISVIG HAMER, qui renvoie aux lignes directrices de l'autorité danoise de la concurrence et de la consommation. Guidelines from the Danish Competition and Consumer Authority can be found at: https://www.kfst.dk/udbud/vejledninger-og-analyser/.

[114] Guide « Acheter vert », 2005, p. 37.

[115] Ibid. Dans la dernière édition, les critères sont plus précis : il faut tenir compte de tous les coûts qui seront encourus pendant la durée de vie du produit, des travaux ou du service: - le prix d'achat et tous les frais connexes (livraison, installation, assurance, etc.); -les frais d'exploitation, dont la consommation d'énergie, de carburant et d'eau, et l'entretien; - les frais de fin de vie, tels que le déclassement ou l'élimination. Le guide de l'achat vert renvoie à une liste non exhaustive des outils disponibles pour calculer les coûts de cycle de vie : Calculateur de CCV de la Commission européenne pour les marches publics de véhicules http://ec.europa.eu/transport/themes/urban/vehicles/directive/ ; Méthode commune de calcul des CCV de la Commission européenne pour le bâtiment: http://ec.europa.eu/growth/sect ors/construction/support-tools- studies/index_en.htm ; Outil d'évaluation des CCV et des émissions de CO2 dans les marchés publics, mis au point dans le cadre du projet SMART-SPP: http://www.smart-spp.eu ; Outil de calcul des CCV produit par le Conseil de gestion environnementale suédois (SEMCo): http://www.upphandlingsmyndig heten.se/omraden/lcc/lcc-kalkyler/Outil de calcul des CCV mis au point dans le cadre du projet BUY SMART: http://www.buy- smart.info. On trouve quelques outils de calcul spécifiques à certains secteurs sur le site https://ec.europa.eu/environment/gpp/lcc.htm.

coût du cycle de vie peut également inclure le « coût des externalités », c'est-à-dire des couts pour la société de certaines incidences environnementales, tels que ceux liés au changement climatique ou à l'acidification du sol ou de l'eau ou encore à l'émission de gaz à effet de serre. Le droit européen impose alors que la méthode de calcul et les données demandées aux soumissionnaires soient indiquées dans le dossier d'appel d'offres[116]. Le critère, souvent négligé, du coût de l'élimination des déchets peut également facilement être pris en compte. Si certains États ont pu proposer des indicateurs objectifs de cette notion subjective[117], la notion de bien-être ou « *well being* » n'est pas facile à quantifier et il semble difficile de reprocher aux acteurs de la commande publique le fait d'avoir tendance à se réfugier sur des critères plus objectifs[118].

Le droit de l'Union européenne pourrait ici faciliter le travail des pouvoirs adjudicateurs en intégrant pleinement les labels écologiques qui intégreraient le coût du cycle de vie, car les conditions dans lesquelles le recours à ces labels est aujourd'hui admis apparaissent restrictives[119]. Certains estiment même qu'un tel encadrement permettrait d'objectiver ce critère permettant le dépassement du lien avec l'objet du marché[120]. De manière générale, le droit de l'Union pourrait être beaucoup plus incisif dans la formulation de ce qui est attendu de la part des États membres[121].

[116] Plus précisément, les directives de 2014 prévoient que, la méthode de calcul, se fonde sur des critères vérifiables de façon objective et non discriminatoires; soit accessible à toutes les parties intéressées ; et que les données requises puissent être fournies moyennant un effort raisonnable consenti par des opérateurs économiques normalement diligent.

[117] Voir Yseut MARIQUE, Well-being is a notion which may be difficult to quantify, although indicators are being developed by the Office for National Statistics (ONS) and Defra. EAC, Measuring Well–being and sustainable development: Sustainable development indicators: Government response to the committee's fifth report of session 2012–13 (139 HC 2013–14); ONS, Measuring national well-being: Life in the UK, 2012.

[118] Cette tendance est observée dans plusieurs États membres.

[119] Voir supra, l'affaire Max Havelaar, préc.

[120] SMART Project Report, Sustainability through public procurement: the way forward – Reform Proposals, sp. p. 38.

[121] Voir le SMART Project Report, préc., sp. p. 41-49.

4. CONCLUSION

Si l'on a pu disqualifier l'unité d'un « principe d'économie circulaire » et plutôt constater une hétérogénéité de valeur normative relative à ces exigences, en considérant la mise en œuvre du principe, il faut admettre qu'il est encore en construction. Ces éléments sont toutefois incontestablement en phase de consolidation tant au sein de l'ordre juridique de l'Union européenne que dans celui des États membres. La pandémie mondiale causée par le covid19 a-t-elle mis à bas cette construction ? La Commission européenne a adopté une communication sur l'utilisation des marchés publics dans la situation d'urgence liée à la crise de la Covid-19[122] : cette communication n'évoque pas l'économie circulaire, *per se*, mais elle rappelle la nécessité d'intégrer des exigences environnementales ou sociales. Ainsi, « l'interaction avec le marché pourrait constituer une excellente occasion de tenir compte également d'aspects stratégiques concernant les marchés publics, à savoir l'intégration, dans le processus de passation de marchés, d'exigences environnementales ou sociales ou en matière d'innovation »[123]. Le plan de relance français présenté en septembre 2020 consacre 30 milliards d'euros (représentant 30% du montant total) au « verdissement de l'économie » sur la période 2020-2022[124]. On ne peut toutefois s'empêcher de remarquer qu'en pratique, dans le cadre de la gestion urgente de la crise sanitaire, le réflexe n'a pas été d'insérer des dispositions accordant une priorité à ces considérations[125], ni dans les instruments juridiques

[122] Voir la communication, Orientations de la Commission européenne sur l'utilisation des marchés publics dans la situation d'urgence liée à la crise de la COVID-19, JOUE du 1er avril 2020).

[123] Voir la communication, préc. p. 2.

[124] Voir le rapport de l'Institut de l'économie circulaire, disponible en ligne : https://institut-economie-circulaire.fr/wp-content/uploads/2020/09/economie-circulaire-et-plan-de-relance_inec.pdf

[125] Voir par exemple, l'ordonnance n° 2020-319 du 15 mars 2020, en France, portant diverses mesures d'adaptation des règles de passation, de procédure ou d'exécution des contrats soumis au Code de la commande publique et des contrats publics qui n'en relèvent pas, qui ne mentionne pas de dispositions relatives aux exigences environnementales ou sociales. La loi portant diverses dispositions urgentes pour faire face aux conséquences de l'épidémie de covid19 a autorisé le report de nombreuses mesures législatives qui devaient entrer en vigueur, parmi

nationaux, ni même dans les marchés passés par les institutions européennes[126], confirmant encore une fois l'écart persistant parfois entre affirmation des principes et mise en œuvre en pratique de ces éléments.

Abstract. *In recent years, at national, European and international level, public contracts have been regarded as instruments to ensure the protection of social and environmental interests through the application of circular economy principles. In this article the principles of circular economy in regulating public contracts are identified since they are given different interpretations depending on their role within the legal systems of European directives and policies by each Member States. The article finally focuses on the consequences of the practical application of these principles, which are often only mentioned in legislation but still lack specific implementation tools at local level.*

lesquelles la loi sur l'économie circulaire. V. toutefois, le scepticisme et l'incertitude de certains acteurs : « la crise sanitaire du COVID-19 et ses conséquences économiques vont peut-être remettre en cause les ambitions du projet, les entreprises vont peut-être demander de relâcher la pression quand les collectivités au contraire vont souhaiter une stratégie plus affirmée sur la résilience par une relocalisation de l'économie et des modèles de développement moins soumis aux aléas, mieux maîtrisés par les élus locaux ». https://www.equilibredesenergies.org/21-04-2020-leconomie-circulaire-sera-au-centre-de-la-renaissance-apres-la-crise-du-covid-19/

[126] A titre d'illustration, une recherche rapide sur TED concernant un échantillon de cinquante avis de marché publiés par la Commission européenne elle-même entre mars 2020 et septembre 2020, relatifs à la fourniture de masques, de gants ou de gel hydro-alcoolique, moins de dix mentionnaient parmi les critères requis des exigences environnementales (critère de la réutilisation possible des fournitures), sur une trentaine d'avis de marchés consultés.

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GOVERNING WITH URBAN BIG DATA IN THE SMART CITY ENVIRONMENT: AN ITALIAN PERSPECTIVE

Francesco DUGHIERO, Andrea MICHIELI, Elisa SPILLER, Davide TESTA[1]

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[1] The work is the result of joint research. The paragraphs are to be attributed as follows: 1 and 2.1 to Elisa Spiller (PhD, Adjunct Professor at University of Padua); 2.2 and 3 to Davide Testa (Research Fellow at University of Padua); 4 to Francesco Dughiero (Research Fellow at University of Padua); 5 to Andrea Michieli (PhD, Research Fellow at University of Padua).

7. BIBLIOGRAPHY

1. SMART CITIES AND THEIR DATA: A BRIEF INTRODUCTION

The COVID-19 crisis has highlighted how cities and local communities can be stable and resilient human environments even in difficult times. Moreover, a considerable part of this resiliency is closely connected to the impressive technological components that permeate people's daily lives and the places they live and work; their private dwellings and public spaces. Working from home, distance learning, telemedicine, and e-health services are simply the most immediate examples of the technological face of the urban experience. Nevertheless, the list could continue for much longer to include the plethora of apps that are now an essential part of daily life.

Albeit in different conditions, this new version of our cities has been investigated over the past decade; here, the urban studies devoted to smart city models[2] have converged. The lessons taught by the pandemic, however, further demonstrate the necessarily multidimensional nature of this ideal. Technological innovation as well as the digitization process, alone, are not enough to make a city or any other human environment authentically 'smart'[3]. The smart city paradigm is built upon the economic, social, governmental, and

[2] R. CARLI, M. DOTOLI, R. PELLEGRINO AND L. RANIERI, *Measuring and Managing the Smartness of Cities: A Framework for Classifying Performance Indicators*, in *2013 IEEE International Conference on Systems, Man, and Cybernetics*, 2013, p. 1288-1293; A. CARAGLIU, C. DEL BO, *Smartness and European urban performance: assessing the local impacts of smart urban attributes*, in *Innovation: The European Journal of Social Science Research*, no. 25(2)/2012, p. 97-113; A. CARAGLIU, C. DEL BO, P. NIJKAMP, *Smart Cities in Europe*, in *Journal of Urban Technology*,18(2)/2011, p. 65-82; C. MARCIANO, *Smart city*. *Lo spazio sociale della convergenza*, Roma, Nuova Cultura, 2012; E. MOROZOV, F. BRIA, *Ripensare la Smart city*, Torino, Codice Ed., 2018; C. BUZZACCHI, *Le* smart cities *tra sicurezza delle tecnologie e incertezza dalla dimensione democratica*, in *Technopolis*. *La città sicura tra mediazione giuridica e profezia tecnologica* (C. Buzzacchi, P. Costa, F. Pizzolato, eds.) Milano, Giuffrè, 2019.

[3] G. F. FERRARI, *Smartness and the Cities*, in *Joint Public Procurement and Innovation - lessons across borders* (G.M. Racca, C.R. Yukins, eds.) Brussels, Bruylant 2019, p. 176-179.

environmental dimensions of the urban settlement and the lives and needs of its inhabitants and guests[4].

On these premises, the further smartification of cities' interactions over the last two years has shed more light on an intrinsic feature of this urban scenario. In this evolving civic environment, more than ever before, all the interactions that people have with each other and their own digital devices – and those provided by the locally available service – generate a constant and pervasive flow of data[5]. Thanks to these precious informative resources, private and public actors can meticulously map their city's life through digital platforms, profiling and predicting the trends and evolutions of their projects and policies. Several case studies offer solid evidence on the success achieved by delivery services, home or vehicle sharing apps, and intelligent, local surveillance or environmental e-monitoring projects[6]. Of course, a detailed representation of preferences and habits may support a more target-oriented development of local business and a more informed public decision-making process. However, the access to and use of these extensive datasets often suffer from unclear and uncertain legal conditions, precluding the best exploitation of these assets for the public good[7]. The conditions imposed by data protection regulations, which are still-developing and one-way sharing models provided by the open data discipline, and particularly the secrecy

[4] R. GIFFINGER, C. FERTNER, H. KRAMAR, N. PICHLER-MILANOVIC, E. MEIJERS, *Smart cities. Raking of European medium-sized cities*, Vienna, University of Technology, 2007; S. BOLOGNINI, *Dalla "smart city" alla "human smart city" e oltre*, Milano, Giuffrè, 2017, p. 54 ff.

[5] Beyond the general considerations of the Warsaw Declation on the 'appification' of the society (Warsaw, September 2012), see: E. VENTRELLA, *Privacy in emergency circumstances: data protection and the COVID-19 pandemic*, in *ERA Forum*, no. 21/2020, p. 379–393; A. ZWITTER, O.J. GSTREIN, *Big data, privacy and COVID-19 – learning from humanitarian expertise in data protection*, in *Int. J. Humanitarian Action*, no. 5(4)/2020.

[6] P. GORI, P.L. PARCU, M.L. STASI, *Smart Cities and Sharing Economy*, EUI Working Paper, RSCAS 2015/96, p. 5 ff.; E. MOROZOV, F. BRIA, *Ripensare la Smart city*, cit.

[7] D.U. GALETTA, J. G. CORVALAN, *Intelligenza Artificiale per una Pubblica Amministrazione 4.0? Potenzialità, rischi e sfide della rivoluzione tecnologica in atto*, in *federalismi.it*, no. 3/2019, 1-6; A. SALA, *Utilizzo di* big data *nelle decisioni pubbliche tra innovazione e tutela della privacy*, in *MediaLaws – Rivista di Diritto dei Media*, no. 3/2020, p. 197-217; M. FINCK, *Automated Decision-Making and Administrative Law*, in *Max Planck Institute for Innovation & Competition Research Paper* no. 19-10/2020, p. 2; G. CARULLO, *Big data e pubblica amministrazione*, in *Concorrenza e Mercato*, no 23/2016, p. 181-204.

and property safeguards on the public use of private-collected data, significantly limit a democratic use of these common assets[8]. In other words, even though data have critical importance in the smart city paradigm, the current legal framework about data's use underscores the multidimensional attitude of this model, focusing more on the economic and governmental dimensions than on the civic and participatory dimensions.

This paper aims to analytically approach this gap, introducing and using the concept of urban data as a context-related key to interpreting the current legal framework. Accordingly, the following section aims to present a contextual understanding of urban data, explaining the value of this concept in light of the current state of data regulation. The paper then continues with a twofold case study addressing the legal issues emerging in the use of urban data in practice. On the one hand, legal attention is focused on the risk of the imprudent utilization of facial recognition technologies to maintain privacy and ensure personal data protection. This paper considers, on the other hand, the position of private commercial platforms operating in the urban environment. In particular, the research focuses on the lessons learned by some medium- and small-size Italian smart city projects, highlighting the role platforms and intermediaries play in collecting, using, and sharing urban data, including for public interest initiatives.

2. URBAN DATA: A CONTEXTUAL UNDERSTANDING OF INFORMATIVE LOCAL ASSETS

2.1 Urban data as a hypothesis within the EU legal framework

[8] These concerns emerged over the EC consultations for the European strategy for data in 2020 (Brussels, 19.2.2020 COM(2020) 66 final) and, with a long term perspective, through the forthcoming Data Governance Act (Proposal for a regulation of the European Parliament and of the Council on European Data Governance).

Concepts and models of smart cities are deeply influenced by the cultural experiences of people around the world and the core values that inform the lives of urban communities [9]. Unlike the liberalistic vision developed outside of Europe, especially in the US, the European approach interprets smart city issues through a more holistic and regulatory vision, making fundamental rights and the public good the pillar of its digital single market strategy[10].

This explains why the EU data strategy is traditionally grounded in the protection of personal data, a cornerstone of the European fundamental rights tradition[11]. The evolution of this legislation diachronically shows how the primary goal of the EU and its member states is to protect data to protect people and their rights[12]. This is why the EU's data protection regulation (reg. UE 2016/679[13]) is a cornerstone in the normative architecture about data and provides such a broad and pervasive notion of personal data.

However, the legal qualification of the enormous flow of data constantly generated by the myriad of devices connected today through the internet is a very demanding task[14].

[9] E. MOROZOV, F. BRIA, *Ripensare la Smart city*, cit.

[10] C. BUZZACCHI, *Le* smart cities *tra sicurezza delle tecnologie e incertezza dalla dimensione democratica*, cit.; E. FERRERO, *Le smart city nell'ordinamento giuridico*, in *Il foro amministrativo*, no. 4/2015, p. 1267 ss.

[11] F.W. HONDIUS, *Emerging Data Protection in Europe*, Amsterdam, North-Holland Publishing Company, 1975; D.H. FLAHERTY, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada and the United States*, Chapel Hill, University of North Carolina Press, 1989; C.J. BENNETT, *Regulating Privacy. Data Protection and Public Policy in Europe and the United States*, Ithaca-Londra, Cornell University Press, 1992; G. GONZÁLEZ FUSTER, *The emergence of data protection as a fundamental right of EU*, Cham-Heidelberg-New York-Dordrecht-Londra, Springer, 2014.

[12] V. MAYER-SCHÖNBERGER, *Generational Development of Data Protection in Europe*, in *Technology and Privacy: The New Landscape* (P.E. Agree, M. Rotenberg eds.) Cambridge (MA), MIT Press, 1997, p. 224 ff.

[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[14] L.A. BYGRAVE, *Information Concepts in Law: Generic Dreams and Definitional Daylight,* in *Oxford Journal of Legal Studies,* 35(1)/2015, p. 102-104; N. PURTOVA, *The law of everything. Broad concept of personal data and future of EU data protection law,* in *Law, Innovation and Technology*, 2018, p. 49.

Laws struggle to keep pace with digital innovation. Although legislators usually aim for dynamic and flexible definitions and rules, fast-evolving data-intensive technologies dramatically challenge the stability of current legal frameworks. One of the immediate shortcomings of this situation is an inadequate perception, among a broad audience, of the practical function of personal data protection and the real potential of the digital revolution for governors and citizens, beyond businesses. On the one hand, data protection is often conceived as a host of demanding and (sometimes) impeding compliance practices rather than a necessary guarantee. On the other hand, the explosion of big data and the possibility of manipulating the nature of informative content make this discipline ineffective and unworkable[15].

All these barriers and misunderstandings, in practice, tend to preclude the best use of common informative resources. The most disadvantaged categories of subjects are citizens and civil society organizations that lack the necessary economic and computational resources and usually remain in the margins of the most common data-sharing practices.

Within this complex scenario, the EU, over time, is providing valuable guidelines to tackle the many problems mentioned[16]. Beyond prioritizing the free flow of non-personal data[17], the new open data directive[18], at first glance, describes the value of an alternative approach to the sharing and civic use of data. This guideline, in particular, focuses on the contextual significance of data for the public good, including in the scope of its goal both for-profit and non-profit initiatives. Lacking prejudice for privacy and personal data protection, this approach thus aims for the best exploitation of national and local public

[15] N. PURTOVA, *The law of everything*, cit., *passim*.

[16] For an overview about these issues see H.C.H. HOFMANN, *Digitalisation and European Public Law of Information*, in *Le Futur du Droit Administratif* (J.B. Auby, ed.), Paris, LexisNexis, 2019, p. 13-19.

[17] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

[18] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

informative assets to promote a beneficial sharing of data and a more democratic approach to data-driven economic and social innovation.

However, the openness and context-related paradigms are intended to be one-way, focusing on the government to business flow of data-sharing practices and rarely the opposite. Of course, the data owned by public administrations have an intrinsic civic value, and thus, should be shared with citizens and private businesses for the common good[19]. Nevertheless, commercial players – on national and local bases – greatly benefit from collecting and using urban datasets, basing their business strategies on the full exploitation of their informative assets. Typically organized by public authorities, these resources have a crucial descriptive and predictive value for an urban fabric and its inhabitants. Moreover, the many kinds of data available are generated by citizens through their interactions with these economic actors. Nevertheless, unlike public regimes, this process is subject to a proprietary regime that stands in opposition to the openness ideal.

In this regard, the new EU data strategy – and particularly the future *Data Governance Act* – promises to pay attention to these asymmetries in the market for data, striking new balances between private and public interests about the use of big data and the fostering of business-to-government data-sharing for the public good. The perspective initiatives are numerous and diversified – from notifications for data-sharing service providers to the mechanisms for data altruism and the basic principles that apply to the reuse of public sector data[20] – and these are all aimed at fostering a more accessible and horizontal regime for the reuse of specific data categories.

[19] D. GALETTA, *"Open Government", "Open Data" e azione amministrativa*, in *Istituzioni del Federalismo*, no. 3/2019, p. 663-683. G. CARULLO. *"Open Data" e partecipazione democratica*, in *Istituzioni del Federalismo*, no. 3/2019, p. 685-700; F. COSTANTINO, *Gli "open data" come strumento di legittimazione delle istituzioni pubbliche?*, in *Diritto e società*, no. 3/2019, p. 443-475.

[20] Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), Brussels, 25.11.2020 COM(2020) 767 final, p. 3.

However, this broad and innovative approach to data-sharing has to consider all the conditions and limitations imposed by the existing regulations about data (the GDPR, above all)[21]. Notoriously, the complexity of this normative framework is justified by the difficulties experienced in regulating and reconciling the many conflicting interests associated with the processing circle of data[22]. On the other hand, the increasing legal stratification in this field tends to marginalize the active participation of medium- and small-size organizations. Indeed, these subjects often lack the necessary technological, economic, and human resources required by existing data regulation[23]. This condition functions as a substantial obstacle to the full realization of a multidimensional and participative smart city experience.

Accordingly, a more tailored contextual approach, based on the characteristics and needs of these subjects, could substantially improve the participation and involvement of local actors in data-sharing practices and data-driven policy-making. The notion of urban data has been elaborated and used for these specific purposes.

2.2 Mapping the current definitions of urban data

Approaching the topic of data for the smart city, it could be a useful way to frame the subject to reconceptualize the wide field of big data in terms of urban data.

[21] *Ibidem*, *Recital* 3, p. 10 and Article 5.

[22] This is a recurrent issue in all data regulation, in Europe as well overseas. Although the legal basis of the EU law in this field usually focuses on the tasks specified by the article 114 TFEU – i.e., promoting the single market – a number of competing interests exist, such as fundamental rights, property assets, and public interests at large (public security, national economy, etc.). These considerations are a priority approached by the new proposal, even in light of the complexities related to technological and security issues (see *Data Governance Act Proposal*, p. 5). The proposal thus aims at including data protected on the bases of commercial confidentiality; statistical confidentiality; the protection of intellectual property rights of third parties; and the protection of personal data (article 3(1)).

[23] N. PURTOVA, *The law of everything*, cit., passim.

No proper definition of urban data exists at present; most of the limited references consist of examples or lists of the fundamental characteristics of this kind of data, which can be found mainly in the fields of technological and statistical research: some of these contributions, absolutely useful for identifying sources and possible achievements, will be further analysed, but first it is necessary to identify a juridic definition of urban data.

From this point of view, the main risk of adopting a descriptive definition is that of unduly limiting urban data's scope. Without any reference to further characteristics, we can define urban data simply as data collected or intended for use in the urban context.

The diriment characteristics of urban data, it could be observed, link data to the urban context, expressed not only in strictly spatial terms - while considering that a spatial bond, for almost all data collection, cannot be avoided - but also in functional terms.

Smart cities, which also lack a single definition, need to be considered as one with global cities: they are no longer simply local articulations of a national state; they have autonomous interests and connections beyond the state and thus, clearly, beyond the specific administrative boundaries and limited resources of a municipality.

The essential feature of an urban context, in conclusion, depends concretely on the specific needs of any singular urban environment, determined by social, economic and demographic matters, on which relies the possible use for urban data intended by public administrations and private actors.

A deeper understanding of the urban context, moreover, could be obtained by observing some examples of urban features and the facilities involved, as provided by certain studies: one of them, which offers a definition of urban data close to the one we are

proposing[24], discloses that, apart from the traditional characteristics of big data[25], "urban big data describes the real time status of various urban elements, including buildings, streets, pipelines, environments, enterprises, finance, commerce, products, markets, logistics, medicine, culture, education, traffic, public order, and population"[26].

According to another study, likewise, "the major research topics of big data-based UESS[27] research include urban mobility, urban land use and planning, environmental sustainability, public health and safety, social equity, tourism, resources and energy utilization, real estate, and retail, accommodation and catering"[28].

Given this broad scope of the various and wide-ranging topics included in the urban environment and to provide a more useful, but still accurate, definition of urban data, vis-a-vis the "strictly juridic one", to display their main and most common features, urban data can be described as an amount of static and dynamic data that is generated both from things and from human beings, processed by public or private subjects through information technologies within the urban environment.

[24] Y. PAN - Y. TIAN - X. LIU - D. GU - G. HUA, *Urban Big Data and the Development of City Intelligence*, Engineering, 2.2, 2016, p. 172, https://www.sciencedirect.com/science/article/pii/S2095809916309456: "Urban big data is a massive amount of dynamic and static data generated from the subjects and objects including various urban facilities, organizations, and individuals, which have been being collected and collated by city governments, public institutions, enterprises, and individuals using a new generation information technologies".

[25] IBIDEM: volume, velocity, variety, veracity, and value. Although, recent research works have pointed out further characteristics: cfr. F. X. DIEBOLD, *On the Origin(s) and Development of the Term 'Big Data'*, PIER Working Paper No. 12-037, 21/09/2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152421; P. GÉCZY, *Big Data Characteristics*, The Macrotheme Review, 3(6), 2014, https://macrotheme.com/yahoo_site_admin/assets/docs/8MR36Pe.97110806.pdf.

[26] IVI, p. 173. The authors categorize urban big data into five types: "sensor data on urban infrastructure and moving objects, user data on society and humans, governmental administration data, customer and transaction record data, and arts and humanities data".

[27] Urban Environment, Society, and Sustainability.

[28] L. KONG - Z. LIU - J. WU, *A systematic review of big data-based urban sustainability research: State-of-the-science and future directions*, Journal of Cleaner Production, 273, 2020, p. 1, https://www.sciencedirect.com/science/article/pii/S0959652620331875.

Such a definition highlights the importance of assessing a large quantity of data, identifying the technological distinction between dynamic and static data and their different sources - as it could be observed that not only personal data, although personal and especially behavioural data are the most important, but also the rising technology of IoT are included – and correctly processing the data - as defined, in the EU, by the GDPR[29] - both for public and private purposes and finally, again, the urban environment.

3. URBAN DATA FOR SOCIAL RIGHTS AND DEMOCRATIC PARTICIPATION: THE ROLE OF SMALL- AND MEDIUM-SIZED CITIES

Urban data are typically able to produce a public or private utility, at least in the context of a city: while not all data necessarily lend themselves to a commercial purpose, they collectively constitute an important information asset for the purpose of perfecting public policies.

"Big data - as referred to by Pan et al. - can be shared, integrated, analysed, and mined to give people a deeper understanding of the status of urban operations and help them make more informed decisions on urban administration with a more scientific approach, thereby optimizing the allocation of urban resources, reducing the operating costs of the

[29] Art. 4.2 of REGULATION 2016/679 EU: "'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

urban system, and promoting the safe, efficient, green, harmonious, and intelligent development of the cities as a whole"[30].

First, then, data are intended to be shared with a community, whereby citizens are able to participate in the decision-making process, both by the selections of and discussions with administrators and by directly promoting civic and popular initiatives.

Urban big data, furthermore - according to Kong, Ziu and Wu - "benefit UESS research by proving a people-oriented perspective, timely and real time information, and fine-resolution spatial dynamics"[31]. Apart from this research, a clearly identical utility is also offered by urban data to city administration: from the perspective of smart cities, research based on this kind of data is the most relevant to calibrate public actions on the real needs of people and territories.

Apart from the informative function of the data, which allows citizens to participate consciously in the public life of their city, urban data, in fact, make it possible to pursue the objectives that are the most important for a smart city[32].

The potential of urban data increases exponentially in critical situations such as the COVID-19 pandemic. Knowledge of a quantity of accurate and complete data relating to the use of public and private transport services, for example, as well as of every commercial

[30] Y. PAN - Y. TIAN - X. LIU - D. GU - G. HUA, *Urban Big Data and the Development of City Intelligence*, Engineering, cit., p. 172.

[31] L. KONG - Z. LIU - J. WU, *A systematic review of big data-based urban sustainability research: State-of-the-science and future directions*, cit., p. 1.

[32] According to R. CAVALLO PERIN – G. M. RACCA, *Smart Cities for an Intelligent Way of Meeting Social Needs*, in *Le Futur Du Droit Administratif* (J-B. Auby ed), Paris, Lexisnexis, 2019: "there are three main changing governance paradigms that shape the landscape of citizen-administration relationships. Firstly, the bureaucratic paradigm concerning the impartial application of rules and regulations by the public administration. Secondly, the consumerist paradigm related to the provisions on public services oriented to fulfilling the citizens' needs. Finally, the participation paradigm as a means of sharing responsibility between citizens and public administration for policy and service processes". Furthermore, with regard to the need of use the data for increasing democratic participation of citizens, the authors highlight that "the democratic legitimacy of municipalities requires redesigning the participatory processes in order to foster community engagement and make citizenry the architect of collective life".

establishment or category of exercise, could have allowed for the differentiated and likely less drastic management of the restrictive measures adopted to combat the pandemic.

The data in the possession of businesses, public administrations and private citizens - who, among other functions, through the GPS integrated in their smart phones are able to share their positions - are susceptible to be used by a public administration to detect and control the density and traffic of citizens in any place or time, and even to trace the movements of each citizen, as long as in compliance with the provisions of privacy legislation.

It is therefore understandable how similar mass tracking, available to any local public administration to promote improvements in common living, also thanks to appropriate digital platforms capable of acquiring data and, consequently, directing the flow of people and consumers to any service or commercial exercise, would have allowed for a more orderly, simple and open regulation of the freedom of movement of citizens.

Occasionally, private interests coincide or nearly intersect with the aims pursued by local public administrations: this is the case for most urban services - an example could be the management of urban transport services - the improvement of which, through the processing of data, brings benefits to citizens and to their urban community, on the one hand, and to businesses and companies, on the other.

The aim of an Italian city as part of a constitutional republic is not only to provide services - these are the outcomes of local and municipal policies - but instead to guarantee the fullness and, in cases of conflict, the balance, between constitutional rights, which in the Italian Constitution also include the fundamental principles[33].

[33] In the Italian Constitution the fundamental principles comprise the untouchable core of the constitution, to the point of being considered as limitations for constitutional revisions, together with the republican form of government, according to art. 139 (C. MORTATI, *La Costituzione in senso materiale*, Milano, Giuffrè, 1940). A notable reading stresses that the Italian Constitution would lose all validity if the fundamental values and the social

In other words, for the city and for its administrators, the role urban data plays is not a matters of simply offering and optimizing urban services, but rather a matter of welfare, and therefore urban data closely involve the entire system of social rights that need to be ensured[34]. The implementation, condivision and use of urban data, in fact, do not guarantee the best pursuit of the aforementioned rights on their own; conversely, the offers of goods and services provided by private companies through the market tend to be based only on the satisfaction of the most consumers. This tends to create two kinds of problems: first, social rights are not automatically guaranteed to every citizen, and neither are the services they need, but rather only those services involving the most consumers to produce the highest profits; second, through this shift a republic founded on work[35] and provided with a strong social constitution, akin to the Italian one, tends to witness the focus of constitutional rights move from the worker - and, therefore, from the citizen - to the consumer[36].

The construction of a smart city through the use of urban data that are handed over to companies operating based on the context and logic of the market risks creating an urban service system that may appear efficient but is unequal, oriented towards the companies' profits and limited to the needs and comforts of the majority[37]. It is necessary, consequently, that local administrations, having the access to data and the capacity to analyse and use them,

structure on which the state is founded were questioned by the dominant forces (L. CARLASSARE, *Conversazioni sulla Costituzione*, Padova, Cedam, 2013, pp. 20-21).

[34] F. PIZZOLATO, La città come dimensione del diritto e della democrazia, in La città e la partecipazione tra diritto e politica (F. Pizzolato - A. Scalone - F. Corvaja eds.), Torino, Giappichelli, 2019, p. 37: the technological evolution of cities, in fact, "requires to be governed in a democratic key" (unauthorized translation).

[35] Art. 1 of the Italian Constitution.

[36] R. BIN, *Lavoro e Costituzione: le radici comuni di una crisi*, in *Diritti e lavoro nell'Italia repubblicana* (G. G. Balandi - G. Cazzetta eds.), Milano, Giuffrè, 2008.

[37] P. COSTA, *La sicurezza della global city. Prassi globale e critica costituzionale*, Costituzionalismo.it, 2, 2018, p. 102: the global city, according to the author, "hardly tolerates any instance of social equity, unless perhaps in the aspiration to improve the quality of some public services, which, however, seems to be more properly placed in the logic of comfort" (unauthorized translation).

exploit the features of urban data to be adaptable to the actual needs of citizens and to develop better public welfare strategies.

To determine the relationship between the processing of urban data and privacy rules, besides, at least when the data are processed for public purposes, it is necessary to reconceptualize this connection in terms of social rights and the different rights related to the protection of personal data.

An obvious observation is that data protection and privacy laws are designed to limit the possibility of exploiting most features of urban data: it has been suggested, on the other hand, that "the bulk of the urban data will be the personal information of users (including city residents, workers, and visitors). Societies around the world have now established the principle that personal information can be entrusted to reliable organizations and individuals, which will use the data to identify ways to improve and optimize urban services. This principle has been put into practice with schemes such as personal information banks and personal data stores, but these schemes have met with difficulties. The reason they struggle is related to the irrecoverability of losses from personal information accidents, such as when the data are leaked. If we have technology that can enable organizations to use personal information without compromising data privacy, data principals will be much more inclined to give their consent to the use of their data, which will open up many new possibilities for using data"[38].

The quoted authors emphasize the technological factor; however, a political vision is also needed. Given the conflict, to some extent unavoidable, between urban data processing and privacy rules, the only solution is some form of balancing the rights involved. The amount of social rights connected to welfare policies has already been concretely exemplified but, on a more theoretical level, when connected to the provisions of the Constitution of the

[38] R. SHIBASAKI - S. HORI - S. KAWAMURA - S. TANI, *Integrating Urban Data with Urban Services*, in *Society 5.0. A People-centric Super-smart Society* (HITACHI-UTOKYO LABORATORY ed.), Tokyo, Springer Open, 2020, p. 71.

Italian Republic, the adequacy of living conditions in a city, including its housing solutions and working conditions, for the development of men and women, both as individuals and in social formations, should be evaluated[39] in addition to the principle of equality, which entails the removal of economic and social obstacles that prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country[40].

In an emergency situation akin to the COVID-19 pandemic, however, it is understood that even the personal rights traditionally connected to privacy, primarily personal freedoms, would benefit from a different approach to data management[41].

What is needed, therefore, is a new approach based on balancing the protection of privacy and freedom of citizens with the numerous and equally important social rights involved without pushing the protection of personal data to supersede important welfare policies[42].

Until now, moreover, digitalization and the monopoly of digital technologies have been in the hands of large, often transnational, private companies: they have been developed and used according to the logics of the market and profits; technological paradigms, it has been argued, could instead be used to balance emerging monopolies[43]. This entails a great

[39] Art. 2 of the Italian Constitution.

[40] Art. 3 of the Italian Constitution.

[41] *Infra*, see par. 4 about the possible utility of AI technologies for detecting social distancing and crowds in urban places during the Covid-19 pandemic.

[42] M. HILDEBRANDT, A vision of Ambient Law, in Regulating Technologies (R. Brownsword - K. Yeung eds.), London, Bloomsbury, 2008, p. 188. The author highlights the failure of data protection legislation, proposing instead to "reinvent the balance between [...] legal opacity tools and legal transparency tools". In transposing this vision to the local, we can also look at Nissembaum, according to whose theory of contextual integrity, "privacy prescriptions, now shaped to a significant degree by local factors, are likely to vary across culture, historical period, locale, and so on" (H. NISSEMBAUM, *Privacy as contextual integrity*, Washington Law Review, 79, 2004, p. 156). Fundamental to her theory is Michael Walzer's pluralist theory of justice, which, theorizing the distribution of social goods based on this context, is strongly oriented towards equity.

[43] M. HILDEBRANDT, *A vision of Ambient Law*, cit., p. 186.

responsibility of and, at the same time, offers an equally great opportunity to the cities where urban data can be applied, which, thanks to technologies based on the reuse of data, could discover innovative methods to pursue the well-being of their citizens; again, in contrast with the typical rules of mere profit.

"Facing life in a digitalised world," writes Hildebrandt, "in intelligent environments with hybrid multi-agent systems, with real time monitoring and real time adaptation to one's inferred preferences, legal normativity will have to be reinvented"[44]. This is true also and especially at a local level. Additionally, "[...] citizens who suffer or enjoy the effects of new technological infrastructures, like for instance Ambient Intelligence (AmI), should be able to influence decisions regarding the funding, designing and marketing of such emerging technologies. Instead of endorsing a paralysing technological determinism [...] civil society and its government should realize that technologies are neither good nor bad but never neutral, acknowledging that technologies can be constructed in different ways, with different normative implications"[45].

The technological development of cities and the availability of large sets of urban data, in fact, open up great possibilities for the development of smart cities capable of guaranteeing social rights in the best possible way and maximizing the participation of citizens, who must be protagonists, in every dimensional level: not only, therefore, in large cities which attract capital and innovative technologies but also and above all in small- and medium-sized cities, which equally demand equity, social justice and participation[46].

The state bears the responsibility for the realization of this ambitious plan to pursue a socially and constitutionally oriented perspective of city government through data: Italy, indeed, has already taken initiative through the programme Smarter Italy, born in 2019 with

[44] IVI, p. 185.

[45] IVI, p. 176.

[46] *Infra*, par. 4.4: as an example of this approach, the social platforms developed by the municipality of Turin could be considered.

the Decree of the Ministry of Economic Development[47] and made operational with the agreement between Mise[48] and AgID[49].

Smarter Italy, which is founded on the instrument of innovative procurements through which the state stimulates solutions based on emerging technologies to concretely respond to the needs of services expressed by urban and local realities, today comprises 23 selected municipalities, including 11 "smart cities" and 12 "villages of the future", which have between 3,000 and 60,000 inhabitants[50].

This initiative of the Italian government is part of the three-year Plan for information technology in the Public Administration 2020-2022 - which provides for the programme mentioned and its initial development in terms of intelligent mobility, cultural heritage and citizen well-being and health, offering a progressive extension into environments, infrastructures and education systems[51] - and is only a first step in the direction suggested in this contribution.

Most importantly, local governors ultimately select how to use urban data, which is also the decisive factor in assessing compliance with legislation and, from a renewed protective perspective, the balance of this use with the fundamental rights and the need for the democratic participation of citizens who must guide governors' commitments.

[47] Decree of the Ministry of Economic Development, January 31, 2019.

[48] Ministry of Economic Development.

[49] Agency for Digital Italy. In the spring of 2020, the Ministry of University and Research and the Minister for Technological Innovation and Digitization also became part of the Program.

[50] AGID, *Smarter Italy*, https://appaltinnovativi.gov.it/smarter-italy.

[51] AGID, *Plan for information technology in the Public Administration 2020-2022*, 49-50. About the advantages offered by Smarter Italy for recovery after the health emergency, with particular reference to the transport sector, see: G. RUGGIERO, *Appalti innovativi, la smart mobility per la ripresa dopo l'emergenza sanitaria*, Agenda Digitale, 23/06/2020, https://www.agendadigitale.eu/smart-city/appalti-innovativi-la-smart-mobility-per-la-ripresa-dopo-lemergenza-sanitaria/.

4. ARTIFICIAL FACIAL RECOGNITION AND IMAGE AND VIDEO ACQUISITION TECHNOLOGIES

In the smart city paradigm, the collection of urban data is essential: in this respect, image and video acquisition systems installed in a municipal territory, such as video surveillance, play a very significant role. These technologies can be employed for a variety of purposes, such as the protection of public property, traffic control, the monitoring of high-security risk areas, and the prevention of crime and vandalism, and can contribute to the creation of an efficient smart urban environment.

The rapid evolution of technology in recent years has enabled the development of sophisticated artificial intelligence algorithms, allowing for the extraction of useful information by public operators and law enforcement authorities.

Ostensible "loitering detection[52]", for example, facilitates the verification of suspicious behaviour carried out by persons or vehicles in specific, predetermined contexts[53]. There are also "digital signage" techniques, which allow for the detection and counting of individuals present in a specific area through a system called "face detection", for which the Italian Data Protection Authority has stated its support on several occasions[54]. Unlike face

[52] R.NAYAK ET AL., *Deep Learning based Loitering Detection System using Multi-camera Video Surveillance Network*, in 2019 IEEE International Symposium on Smart Electronic Systems: "Loitering can be defined as the act of staying in a sensitive or public place for a protracted duration or for a period of time longer than a given time threshold*",* p. 215.

[53] Italian Data Protection Authority, 22/02/2018, *Verifica Preliminare. Installazione di un Sistema di Videosorveglianza.*

[54] Italian Data Protection Authority, 21/12/2017, *Installazione di apparati promozionali del tipo "digital signage" (definiti anche Totem) presso una stazione ferroviaria;* Italian Data Protection Authority, 15/03/2018. *Verifica preliminare. Sistema di rilevazione delle immagini dotato di un software che permette il riconoscimento della persona (morfologia del volto).*

detection, "Artificial Face Recognition[55]" techniques are more invasive and can undermine the rights and freedoms of individuals. Face recognition consists of the automated processing of digital images containing people's faces, which enables the identity of one or more individuals to be uniquely tracked. This processing consists of several phases[56]:

- *image acquisition:* the digital capture and conversion of the face of an individual;
- *face identification:* the moment in which the presence of a face is distinguished within an image and isolated from the background;
- *normalization*: the process of attenuating variations within the facial regions due to, for instance, position or illumination;
- *feature extraction*: the process of isolating and extracting the distinctive and reproducible biometric features of a person's digital facial image;
- *registration*: the retention of the biometric image or pattern, which is stored for later comparison;
- *comparison*: the process of measuring similarities between the characteristics or biometric features of a reference model and other reference models already registered in the system.

AFR can be used for both one-to-one comparisons (e.g., Apple's Face ID) and one-to-many comparisons. The latter technique is used, for instance, by authorities to track down a wanted person and is precisely the one that creates the most problems, from the point of view of protecting the rights and fundamental freedoms of citizens.

[55] G. MOBILIO, *Tecnologie di Riconoscimento Facciale. Rischi per i diritti fondamentali e sfide regolative*, Napoli, Editoriale Scientifica, 2021.

[56] *IVI*, pp. 32-33

Indeed, from the standpoint of personal data protection, AFR falls within the definition of biometric data under Article 4.14 of the GDPR: “personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data” and, according to art. 9 of the GDPR, must be processed under a specific legal basis[57]. From the combined provisions of Art. 9 of the GDPR and Art. 7 of Legislative Decree 51/2018, the use of face recognition algorithms is only allowed if provided for by law in the presence of “*adequate safeguards for rights and freedoms of data subjects*" and "*if necessary to safeguard a vital interest of the data subject or of another natural person*". Additionally, enshrined in Article 8 of Legislative Decree 51/2018 is the prohibition to base, solely on automated processing, decisions that produce "adverse effects on the data subject, unless authorized by EU law or specific legal provisions”.

The leading player in this technology on the Italian scene is SARI[58], an AFR technology used by the police that operates in two variants: SARI Enterprise and SARI Real Time[59].

The former allows a police officer to compare an image with other images stored in an automated fingerprint identification system, which contains approximately ten million mugshots with related biographical and descriptive information. The latter allows for control operations within a territory during events; the images are compared in real time with watchlists created for the event in place, generating alerts in case of any possible matches.

[57] On 21 April 2021, the European Commission presented a draft Regulation on Artificial Intelligence, which articulates, in Article 5, a series of prohibitions on processing operations involving biometric data.

[58] Sistema Automatico Riconoscimento Immagini (Automatic Image Recognition System).

[59] G. MOBILIO, *Tecnologie di Riconoscimento Facciale. Rischi per i diritti fondamentali e sfide regolative*, Napoli, Editoriale Scientifica, 2021, pp. 240 ss.

SARI Enterprise has been judged to be in line with data protection legislation: the Italian Data Protection Authority[60] considers that under the numerous statutory provisions concerning the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal convictions, the conditions set out in Article 7 of Legislative Decree 51/2018 are met. In addition, the necessity of image processing, which is also set out in Article 7, is confirmed "because of the functionality of this system concerning the identification activities carried out by the police forces".

The Italian Data Protection Authority[61] has recently taken a different view regarding SARI Real Time: the technology is now considered too invasive since it could lead to the evolution of surveillance activity from the "targeted" to the "universal", with a non-negligible impact on the rights and freedoms of the data subjects.

Accordingly, the question arises as to how municipalities can install video surveillance and AFR systems in their territories in full compliance with current legislation. On the one hand, the use of this technology could lead to an improvement in citizens' quality of life: AFR could turn out to be essential in fighting crime and thus enable the renewal of certain neighbourhoods with high crime rates. On the other hand, if not properly used, AFR could be seriously invasive to citizens: for example, an eventuality where the algorithm mistakenly turns a stranger into a wanted person. Such risks are quite real since the algorithm can be biased: recent studies show that Black men and women are strongly underrepresented in the construction of datasets, to the extent that Black women give rise to facial recognition error rates of up to 34.7%, compared with White men at 0.8%[62]. Municipalities, therefore, have to be very cautious when installing and using these systems, both to avoid sanctions

[60] Italian Data Protection Authority, 26/07/2018, *Sistema automatico di ricerca dell'identità di un volto.*

[61] Italian Data Protection Authority, 25/03/2021, *Parere sul sistema SARI Real Time.*

[62] G. MOBILIO, *Tecnologie di Riconoscimento Facciale. Rischi per i diritti fondamentali e sfide regolative*, Napoli, Editoriale Scientifica, 2021, pp. 221

from the authorities and to avoid undermining the relationship of police and citizens, who may feel threatened by an improper use of AFR.

An emblematic use of an AFR system in Italy is the case of the municipality of Como, which in a programmatic document[63] referred to a project for the experimentation of innovative functions such as face recognition, loitering detection and the automatic detection of abandoned or stolen objects. This system, installed near Tokamakhi Park, close to a railway station, was judged non-compliant with the legislation by the Italian Data Protection Authority[64]. The authority's decision states that the functioning of this system, which processes biometric data, is not legitimate on any legal basis, ordering the municipality to comply with the law by deactivating the device.

At present, therefore, the use of AFR is subject to numerous and justified restrictions aimed at protecting the fundamental rights of citizens. On 28 January 2021, the Council of Europe pushed for the implementation of strict rules to protect the privacy and fundamental rights of data subjects. Secretary General Marija Pejčinović Burić stated that "at its best, facial recognition can be convenient, helping us to navigate obstacles in our everyday lives. At its worst, it threatens our essential human rights[...]"[65]. We are therefore still in the embryonic stage of the large-scale use of AFR technologies and their implementation in a smart city environment.

In contrast, face detection techniques are less invasive; indeed, they merely detect the presence of one or more human faces without identifying them. In Italy, there are numerous examples of the application of this technology: an illustrative case is the

[63] Comune di Como, *Documento Unico di programmazione per il triennio 2020/2022*, available here: https://www.comune.como.it/export/sites/default/it/comune/bilanci-documenti-piani/documento-unico-programmazione/DUP-2020-2022.pdf

[64] Italian Data Protection Authority, 26/02/2020, *Provvedimento del 26 febbraio 2020.*

[65] Council of Europe, Facial recognition: strict regulation is needed to prevent human rights violations, available at https://www.coe.int/en/web/tbilisi/council-of-europe-news/-/asset_publisher/zsGQOJsjjHjv/content/facial-recognition-strict-regulation-is-needed-to-prevent-human-rights-violations

installation of advertising totems at the Milano Centrale railway station. These totems can measure their audience of viewers, collecting information on age, gender, time spent in front of the screen, facial expressions and so on. The technology has been judged compliant with the data protection legislation[66]: although the system does not carry out a processing operation capable of uniquely identifying data subjects, there is nevertheless a processing of personal data, as images containing faces are recorded. Indeed, albeit for a few moments, the images are stored in the volatile memory of a device (RAM - Random Access Memory): the Italian Data Protection Authority considers that the processing is fully compliant because this storage takes place for a few tenths of seconds; only the time necessary for the algorithm to carry out the appropriate analysis. The images are then overwritten by subsequent ones.

This technology, which started out as a system for targeting advertising, has subsequently found new applications that are also useful for the development of a smart city: from a system for detecting social distancing and crowds in urban places[67], to systems capable of monitoring the flow of vehicles and generating reports on urban mobility[68].

However, even in this case, a further step must be taken to make GDPR compliant with the relevant processing operations: anonymization, which is a process by which certain techniques are applied to a set of personal data to irreversibly prevent the identification of data subjects. Anonymization techniques are described in Opinion 05/2014 of Article 29 Working Party, and they must be carried out by eliminating the risks of detection (the possibility of isolating some or all of the data identifying a person), correlation (the possibility of correlating at least two data items concerning the same person) and inference (the possibility of deducing, with a high degree of probability, the value of an attribute from

[66] Italian Data Protection Authority, 21/12/2017, *Installazione di apparati promozionali del tipo "digital signage" (definiti anche Totem) presso una stazione ferroviaria*.

[67] *Pininfarina con Blimp per misurare distanza sociale*, Ansa, 16 giugno 2020, https://www.ansa.it/osservatorio_intelligenza_artificiale/notizie/salute/2020/06/08/pininfarina-con-blimp-per-misurare-distanza-sociale_34b2a139-d897-4537-a405-bb002307b1b7.html

[68] Report Mobilità della Città Metropolitana di Milano, Blimp, https://blimp.ai/wp-content/uploads/2020/09/Blimp-Report-mobilità-di-Milano-e-Roma-01-07-2021.pdf

the values of a set of other attributes). These techniques can be divided into two groups: generalization, which consists of a series of techniques aimed at diluting or generalizing the attributes of data subjects by modifying their scales or orders of magnitude; and randomization, which modifies the veracity of data to eliminate the strong correlation that exists between them and data subjects. In light of the above, it is therefore clear that the role data protection plays is essential in the field of smart cities: it enables citizens to be protected from abuses and serious violations of their freedoms by public authorities.

5. THE PLATFORM ECONOMY AND THE SMART CITY

4.1 Smart cities in the service of the platform economy

Among the key elements of the smart city are platforms, both private and public. Platforms are now - and will increasingly be - the tools of urban economic exchanges. The world economy and capitalism have acquired a "new spirit" in the digital dimension[69]. Digital tools have enabled a rapid transformation of economic relations based on three main elements: the spatial redefinition of exchanges, the dematerialization of goods and the dematerialization of financial flows[70]. Digital capitalism became firmly established at the start of the new millennium, when some of the largest transnational platforms became widespread. Platforms represent a qualitative leap in the economy, conveyed through the internet and digital tools: through platforms, the internet enters into the daily reality of economic relations, filters them and orients them. Therefore, platforms create new

[69] È. CHIAPELLO, L. BOLTANSKI, *The New Spirit of Capitalism*, New York, Verso Books, 2007.

[70] N. SRNICEK, *Capitalismo digitale. Google, Facebook, Amazon e la nuova economia del web*, Roma, LUISS University Press, 2017, p. 11.

behaviours in the microeconomic dimension and are able to affect a territory constantly. This transformation is enabled by the digital tools that each person wears and uses.

Platforms operate in different market fields[71]. There are advertising platforms that create online marketplaces, search engines, social media, platforms for the collaborative economy and the distribution of applications, communication services, payment systems, and others that sell creative content[72]. There are also public platforms that innovate services for citizens, such as the ostensible enabling platforms, which make it possible to offer certain and accessible data to all citizens and a public administration (such as a digital registry where citizens' residence data are recorded). These platforms can facilitate the objective of good performance by a P.A. - which the Italian Constitution requires - and, moreover, at a local level, they can contribute to creating spaces for sharing and democracy from below as well as collaborative practices between public authorities and citizens[73].

Two types of platforms have the greatest impact on cities: product platforms, which provide goods or offer them for hire but treat them as services, and lean platforms, which are those offering a communication tool intended to be a mere interface between service providers and consumers (such as Uber or Airbnb). These platforms are able to create new markets, transform existing markets, replace public services, or even create services that are organized beyond city regulation. For example, the spread of COVID-19 ensured an unprecedented deployment of platforms to provide services without physical contact that were only possible through the intermediation of digital platforms.

Cities have been centres of information and exchange throughout human history. Thus, digital platforms, which base their success on the collection and processing of data,

[71] L. AMMANNATI, *Per una "nuova" regolazione delle piattaforme digitali*, Astrid Rassegna, 10/2021, in http://www.astrid-online.it/.

[72] EU Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288, May 2016.

[73] S. PROFETI, V. TARDITI, *Le pratiche collaborative per la co-produzione di beni e servizi: quale ruolo per gli Enti locali?*, Istituzioni del Federalismo, 4, 2019, p. 861 e ss.

have found cities to be the ideal places to expand. In particular, the smart city concept has encouraged the expansion of private platforms.

It is no coincidence that the most widespread private platforms have arisen in and spread through the United States, a country in which smart city innovation was created through a bottom-up process, with a retraction of public powers that promoted a regulatory framework favourable to new technologies, according to an "enabling state" model[74]. In this way, smart cities - conceived as cities comprising an ICT framework capable of offering services adapted to the needs of citizens in various fields (transport, waste management, health, welfare, etc.) - have become the prerequisite for the accumulation of data by private companies and for the ongoing expansion of platforms[75].

Accordingly, in the new millennium, smart cities have become the city paradigm of the new economic model of platforms and, in this context, private platforms have become widespread.

4.2 Regulating digital platforms

Given the impact (globally and locally) of digital platforms, the international debate today focuses on how to regulate them.

Regulation by European and national authorities has been carried out through soft law measures, encouraging forms of self-regulation. The first initiative of the EU was

[74] The European model is characterized by a different vision, where public authorities play a more active role in shaping development, innovation strategies and objectives: F. GASPERI, *Città intelligenti e intervento pubblico*, Il diritto dell'economia, 1, 2019, p. 76.

[75] S. SASSEN, *La città nell'economia globale*, Bologna, Il Mulino, 2010, p. 86.

launched in 2015 with the Communication on the "Strategy for the Digital Single Market"[76]. Subsequently, in 2016, the European Commission sent a Communication on "Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe"[77].

With these acts, the EU Commission intended to pursue a regulation with two characteristics. First, it pursued the self-regulation of platforms: platforms would have to take steps to self-regulate according to reputational, transparency and monitoring criteria. In addition, the commission advocated a centralized harmonization approach with a view to uniform and coordinated regulation by the EU. The commission's overall approach was intended to prevent state legislation from imposing overly rigid rules on innovation that would have prevented the expansion of the collaborative economy, which in Europe is less competitive than on other continents.

Recently, the Commission has profoundly revised its approach. First, by introducing transparency obligations for platforms with EU Regulation 2019/1150[78], then with a Communication on "Shaping Europe's digital future"[79]; through two proposals for regulations on digital services (Digital services act; proposal for a regulation COM(2020)825) and on digital markets (Digital market act) that will be discussed in the course of 2021, the EU intends to make the regulation of online services equal to that of offline services. The aim is to overcome the regime of competitive privilege that platforms have previously enjoyed. In addition, to clearly redefine the liability of digital intermediaries, the two newly proposed regulations invite state authorities to create ongoing supervision of the platform market and legitimise ex ante antitrust intervention.

[76] EU Commission, *A Digital Single Market Strategy for Europe*, COM(2015) 192, May 2015.

[77] EU Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288, May 2016.

[78] REGULATION (EU) 2019/1150, of the *European Parliament And Of The Council of 20 June 2019on promoting fairness and transparency for business users of online intermediation service*.

[79] EU Commission, *Shaping Europe's digital future*, COM(2020) 67, February 2020.

The limit of European regulation is the lack of involvement by local authorities in the effects of the platforms on the territories. This limitation of the perspective of European regulation is also present in Italian order. In fact, as discussed below, the matter of 'IT coordination' (article 117.2, l. r) has been entrusted exclusively to the Italian state. Thus, both the innovative projects for the development of the smart city and the possibility of regulating the platforms all pass through the Digital Italy Agency (Agenzia per l'Italia Digitale).

Indeed, as the European Committee of the Regions pointed out in March 2020, "the continuous development and expansion of economic activities where digital platforms are making inroads have an impact at local and regional level, and therefore also have to be regulated at the level of local and regional authorities, within the bounds of their powers, notably with regard to taxation and urban planning"[80].

4.3 Cities and platforms: The regulatory approach of Italian cities

In their initial expansion phase, platforms were welcomed by cities, with the aim of disseminating new collaborative services via an accumulation of data concerning urban life that administrations were unable to process. Local authorities recognized the potential of the internet and new digital technologies to increase the provision and quality of services and resorted to new public-private partnerships with strong emphases on the skills and technologies of private companies to set up new technical systems of urban governance[81].

[80] European Committee of the Regions, *Platform work – local and regional regulatory challenges*, C 79/36, March 2020.

[81] A. DI BELLA, *Smart city e geografie della mediazione aziendale*, Bollettino della Società Geografica Italiana, 8, 2015.

The intermediation of platforms in the urban context was, therefore, for a decade, a market in which demand, supply and mediation moved freely. The outcome of this decade of platform expansion was the consolidation of a few companies within certain sectors of city life to such an extent that they influenced urban change [82].

A group of European cities have promoted coordination to achieve a different regulatory approach to platforms: the result of this process was a document signed by more than fifty cities worldwide in 2018. With the Barcelona Declaration[83] - which has the nature of a charter of commitment - these cities, confronted by the attempts of some platforms to circumvent laws, advocated the right of citizens to determine the rules of urban life and the duty of platforms to respect them.

The declaration highlights how cities should have digital 'sovereignty' over private platforms that intermediate trade, goods and services in their territories. Regarding digital governance, cities asked to (a) establish negotiation frameworks between cities and platforms to ensure compliance with legality and local regulations; (b) ensure transparency of operations and transactions in relation to the transfer of data from platforms; (c) work together among cities to encourage changes in regulatory and framing policies in the digital sphere to facilitate compatible economic activity and protect users' rights; d) promote digital protocols to ensure compliance with the regulations of each city; e) share tools, mechanisms and techniques of control between cities; f) make digital platforms accountable for their infringements; g) require platforms to seek permission before operating in any city; and h) compel platforms to agree with a city on the appropriate way to operate in each context and involve district institutions. The declaration offers an articulated perspective of rethinking the relationship between cities and platforms, inspired by a movement of the re-appropriation of a territory as a space for pluralism. In particular, with regard to the regulation of platforms,

[82] F. ARTIOLI, *Digital platforms and cities: a literature review for urban research. Cities are back in town*, Sciences Po Urban School, Working Paper n. 1/2018, in http://blogs.sciences-po.fr/recherche-villes/

[83] *Sharing cities declaration: cities' common principles and commitments for city sovereignty regarding the platform economy*, Barcelona, 13/11/2018, in https://www.sharingcitiesaction.net/declaration/

the need is expressed for cities to have greater competences and administrative functions to manage the local impact of platforms according to a preventive regulatory model and not simply ex post containment.

In Italy, in particular, the most populous municipalities have chosen to pursue an inclusive and collaborative approach to policy design[84]: an approach that has been effective for social service platforms and has been made possible by public-private agreements[85]. Agreements have also been reached with commercial platforms, especially in the tourism sector, and for the promotion of agreed upon and fair rents. Three cases can be cited that highlight possible approaches to regulation and collaboration with digital platforms that have been tested in the urban context and could represent paradigms for the future.

The efforts of the metropolitan city of Rome to reach agreements with the major private platforms that have spread throughout the city should be underlined. Certainly, the largest agreement was with Airbnb since Rome is a city with heavy tourist flows. The agreement aims to regulate the economic-fiscal aspects of the platform's use within the framework of regional provisions on tourism. However, the agreement has serious shortcomings, including the absence of mechanisms for reporting illegal rentals, the lack of monitoring and inspection of abusive behaviour in cooperation with the tax agency, and, finally, the lack of data scraping mechanisms[86].

[84] I. PAIS, E. POLIZZI, T. VITALE, *Governare l'economia collaborativa per produrre inclusione: attori, strumenti, stili di relazione e problemi di implementazione* / *Governare Milano nel nuovo millennio* (A. Andreotti eds.), Bologna, Il Mulino, 2019, p. 222.

[85] IVI, 224 e ss.

[86] I. PAIS, E. POLIZZI, T. VITALE, *Governare l'economia collaborativa per produrre inclusione: attori, strumenti, stili di relazione e problemi di implementazione* / *Governare Milano nel nuovo millennio* (A. Andreotti eds.), Bologna, Il Mulino, 2019, p. 227.

The approach of the city of Turin has been different[87]. From the beginning, the smart city was designed around the needs of the most marginalized people. Therefore, several 'social' platforms were designed by the municipality in cooperation with private actors. An example is the MiraMap platform that has emerged for the detection and analysis of needs, programming of interventions, valorization of resources, designation of services and governance by the government[88]. The project was initiated by the Politecnico di Torino and focused on the Mirafiori Sud area. The citizens of that neighbourhood were involved - through interviews, assemblies and focus groups - and defined a number of essential actions to improve the life of the neighbourhood. Citizen involvement was made possible via the Ushaidi platform: a platform using free open source software, created in Kenya after the 2007 elections with the aim of activating the processes of popular participation. After the collection of recommendations from citizens on the interventions that the neighbourhood considered a priority, a stable dialogue was set up with the public administration: in this phase, a public-private partnership was created between the university, the municipality, and other cultural and social foundations. The most innovative element was the stable integration of MiraMap within the administrative procedures of the municipality; capable of creating a model of shared, effective and efficient administration.

Finally, the municipality of Milan has promoted agreements, adopting an approach of the gradual regulation of platforms, which began in 2014 with the Milano Sharing City guidelines: at first, the administration monitored platforms; then, it held co-design meetings and stakeholder hearings; finally, it adopted soft regulations through agreements. The city of Milan has also introduced the Catalogue of Collaborative Economy Services, which, at present, has the purpose of maintaining stable interactions between the subjects of the sharing economy but may instead become a stable register of platform activities.

[87] *L'amministrazione pubblica con i big data: da Torino un dibattito sull'intelligenza artificiale* (R. CAVALLO PERIN eds.), Torino, Università degli Studi di Torino, 2021.

[88] C. COSCIA, F. DE FILIPPI, *L'uso di piattaforme digitali collaborative nella prospettiva di un'amministrazione condivisa. Il progetto Miramap a Torino*, Territorio Italia, 2016.

4.4 A smart city capable of coordinating digital innovations

In recent years, as the cases of Milan, Turin and Rome show, cities have brought to light the phenomenon of platforms and created institutionalized spaces for dialogue.

From the Italian experiences presented and the Barcelona Declaration, it emerges that cities are calling for the coordination of the use of urban data for economic and social development. The digital sovereignty that cities are claiming and progressively exercising moves in four directions.

The first aspect concerns the division of competences between the supranational, national and local levels. In this sense, a division of competences that entrusts the European Union and states with the regulation of competition and taxation should be preferred. Cities, on the other hand, should be allowed to regulate the impact of platforms on their territories. As Article 5 of the Italian Constitution states, the distribution of competences - also in data governance - must be conceived "by adapting the principles and methods of legislation to the requirements of autonomy and decentralization".

Second, cities' interventions aim to distinguish between platforms that are truly 'collaborative' and have positive social effects and those that conceal essentially commercial interests. The Barcelona Declaration offers criteria for defining "collaborative" platforms, which must "predominantly host peer-to-peer relationships; based on fair economic and remuneration models". They must also "foster participatory community governance, openness and transparency of technology and data, and inclusion, providing equal services to different segments of the city's inhabitants and avoiding any discrimination"[89].

[89] *Sharing cities declaration: cities' common principles and commitments for city sovereignty regarding the platform economy*, Barcelona, 13/11/2018, in https://www.sharingcitiesaction.net/declaration/

Third, the forms of partnership and collaboration agreements between municipalities and platforms can certainly be tools for uncovering what drives digital economic relations. However, these instruments are not sufficient to establish effective control, which, given the very nature of platforms, will have to be increasingly preventive and authorization-based. Moreover, consolidating the Milanese experience of the municipal register of platforms could foster the approval of a general plan for the use and governance of data in a smart city; a genuine, flexible regulatory plan to be superimposed on urban planning changes that are imbued with technological devices[90]. A master plan or register of activities would make it possible to trace the ecosystems of the platforms and their impact on a territory; it would also make the smart city environment more integrated.

Finally, in addition to tracking, platforms should be required to return their information assets to cities. Indeed, as stated in the Barcelona Declaration, it is advisable to "ensure that cities are able to access a privacy-preserving manner relevant data from firms operating in their territories (such as information about transportation, safety, labour, and all potential public interest information)", thereby elevating these data to a "common good to solve urban challenges"[91].

These prospects for regulating data and platforms are a challenge to local democracy. Indeed, the lack of expertise in cities on the platform market - or at least on its territorial effects – implies the risk of increasingly weakening self-government, abandoning citizens to an unregulated market[92]. Indeed, platform mediation tends to replace social mediation and make the smart city an increasingly smaller community of users rather than of citizens. Local public decisions are becoming increasingly data-driven, based on and

[90] A. VENANZONI, *Smart cities e capitalismo di sorveglianza: una prospettiva costituzionale*, Forum di Quaderni costituzionali, 20/10/2019, p. 14.

[91] *Sharing cities declaration: cities' common principles and commitments for city sovereignty regarding the platform economy*, Barcelona, 13/11/2018, in https://www.sharingcitiesaction.net/declaration/

[92] F. PIZZOLATO, *Il consumatore, sovrano della technopolis* / *Technopolis. La città sicura tra mediazione giuridica e profezia tecnologica* (C. Buzzacchi, P. Costa, F. Pizzolato eds.) Milano, Giuffrè, 2019, p. 109.

influenced by the aggregation of data collected and processed by companies. Today, after the first wave of expansion of the large platforms, the methods for regulation of this new form of capitalism - which will increasingly develop globally with local spillovers - are in question. The method of regulation proposed by Italian cities, we suggest, aids conceiving of cities not simply as spaces in which platforms 'dig up' urban data but as institutions democratically legitimized to coordinate digital development.

5. CONCLUSION

The path followed by this research shows how the idea of a smart city is far more than a mere digital transformation of processes and services. The smartness paradigm substantially includes a multidimensional and democratic reading of the different models and experiments implemented. This approach to smart cities aims to include all of the many factors – technological or not – that can influence the evolution of these civic experiences and, above all, the availability of informative local resources.

In this connection, the existing legal framework about data in some cases risks excluding or marginalizing medium and small municipalities, imposing standards and conditions that could dissuade them from undertaking new smart experiments at the local level. However, a context-related reading of this legislation could foster a more realistic approach to the needs of local communities, facilitating their balancing of competing interests in their use of informative territorial assets. Data generated by public administrations, private and commercial platforms, and, above all, citizens can indeed be qualified not only with the personal-nonpersonal data dichotomy but also on the basis of a contextual understanding of their informative and social value.

The use of data in the urban context is multiple and moves along two contiguous trajectories: from administration to citizens - according to the already existing open data paradigm - and from citizens and businesses to public administration. By giving attention to the complex issues related to data security and reconsidering privacy as balanced with other constitutional rights, a local administration can draw powerful resources from urban data to foster better welfare policies and territorial governance, guaranteeing of social rights for citizens.

On the path to actualized smartness, it is the task of every city and even small villages to orient their policies in accordance with the constitutional principles and the core values of the constitutional charters. This is more important than ever in the case of constitutions with a very solid social structure such as the Italian one: every city actively participates in the aims pursued by the republic. It is up to them, therefore, on a local basis, to bring the protection of data and individual freedoms back into a correct balance with the prescribed social rights and to guide urban services through a logic of collective interest that can be achieved with the additional tool of urban data.

Even in light of AFR technologies, in regard to smart cities, the challenge is more than open. While on the one hand the use of AFR is limited to cases expressly provided for by law, it cannot be excluded that, in the near future, subject to due considerations of the risks, these cases may expand. The recent pronouncements of the Data Protection Authority highlight the fact that we are engaging with a new technology which, while awaiting a regulation by the legislators, must be used with all the necessary caution. This translates into special attention that municipalities must give to the implementation of these systems, such as the aforementioned crowd detection or traffic control systems. If it is true that the core element for the successful functioning of a smart city is data, these data must be "clean"; processed according to the GDPR standards and anonymized to interfere as little as possible with the rights and freedoms of citizens.

Finally, it has been highlighted how platforms are a key component for the use and connection of data in the smart city of the future. Indeed, platforms - both public and private - are the phenomena that produce and share the most urban data. However, there are some critical issues that stem mainly from two factors: the lack of a uniform regulatory framework and the absence of specific competencies within cities to manage platforms and their impact on the urban territories. Some Italian cities have taken steps to fill this lack of legislation and have introduced agreements with private platforms, set up public-private collaboration platforms for detecting and solving social problems, and created registers in which the platforms' intermediation services are made public. These regulatory tools have made it possible to return - at least in part - digital "sovereignty" to cities and ensure that citizens can determine - also via the urban data collected by the platforms - a more democratic governance of their smart cities.

In the near future, the use of urban data will change many city services and the ways citizens use them. The idea of the smart city helps guide efforts to create more sustainable urban environments and a dynamic relationship between public administrations and private actors aimed at promoting the economic and social development of cities. The most important challenge is to succeed in restoring to local self-governments the ability to rule "with" data and not be governed "by" them.

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Abstract. *A smart city is more than its mere technological components. From a legal standpoint, smartness means a civic-enabling regulatory environment, access to technological resources, and openness to the political decision-making process. No doubt, the core asset of this socio-technical revolution is the data generated within the urban contest. However, national and EU law does not provide a specific regulation for using this data. Indeed, the next EU data strategy, with the open data and non-personal data legislation and the forthcoming Data Act, aims to promote a more profitable use of urban and local big data. Nonetheless, at present, this latter still misses a consistent approach to this issue.*
A thorough understanding of the smart city requires, first of all, the reconceptualization of big data in terms of urban data. Existing definitions and studies about this topic converge on the metropolises of East Asia and, sometimes, the USA. Instead, we approach the issues experienced in medium-size cities, focusing on the main Italian ones. Especially in this specific urban environment, data can help provide better services, automatize administrations, and further democratization only if they are understood holistically - as urban data. Cities, moreover, are a comprehensive source of data themselves, both collected from citizens and urban things.
Among the various types of data that can be gathered, surveillance recordings play a crucial role. On the one hand, video surveillance is essential for many purposes, such as protecting public property, monitoring traffic, controlling high-security risk areas, and preventing crime and vandalism. From another standpoint, these systems can be invasive towards citizens' rights and freedoms: in this regard, urban data collected from video surveillance systems may be shared with public administrations or other interested entities, only afterward they have been anonymized. Even this process needs to be aligned with the transparency and participation values that inform the city's democracy. Thus, the

anonymization process must be fully compliant with data protection legislation, looking for the most appropriate legal basis and assessing all the possible sources of risks to the rights and freedoms of people (DPIA).
Urban data, indeed, is a matter of local democracy. The availability of data and the economy of platforms can significantly transform a city's services and geography as well as citizens' lifestyles. However, the participation of citizens to express their views on both the use of urban data for public policy and the regulation of the digital economy is still a challenge. The paper aims to analyze the projects of some Italian cities - including Milan, Rome, and Turin - which have tried to introduce participatory urban data management tools and to highlight the possible challenges of a democratic management of service platforms and data transfer for social and economic development.

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THE SMART CITIES MODEL: A MODERN WAY OF SATISFYING THE FUNDAMENTAL NEEDS OF THE CITIZENS THROUGH EFFICIENCY AND PARTICIPATION

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1. A MATTER OF EFFICIENCY

According to the European Commission, «*a smart city is a place where traditional networks and services are made more efficient with the use of digital solutions for the benefit of its inhabitants and business*»[2].

In the reported definition, the idea of smart cities refers, in the first place, to a matter of efficiency; it's not the only topic, of course, but it is the one to which - as we we'll try to demonstrate in this paper - all other issues concerning the model are, in a way or another, connected.

The «smart cities model» aims to improve the quality of the life of those who live in an urban context, in several respects (such as: sustainability, economic growth, access to public facilities and services, right balance between the private life and the working life of the citizens, participation in public decision-making processes, etc.) and through the setting of new tools, commodities and facilities or the implementation of the efficiency of the traditional ones.

In physics, the term "efficiency" indicates «*the difference between the amount of energy that is put into a machine in the form of fuel, effort, etc. and the amount that comes out of it in the form of movement*»[3]. In a more general way, the term refers to «*a situation in*

[2] For this quotation see: https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development/city-initiatives/smart-cities_en#:~:text=A%20smart%20city%20is%20a,of%20its%20inhabitants%20and%20business.&text=It%20means%20smarter%20urban%20transport,to%20light%20and%20heat%20buildings.

[3] Both the reported definitions are taken from the Online Cambridge Dictionary (https://dictionary.cambridge.org/dictionary/english/efficiency - «*Efficiency*»).

which a person, company, factory, etc. uses resources such as time, materials, or labour well, without wasting any».

As it is well known, in the italian legal system - and especially in the constitutional Chart - efficiency refers to Public Powers and, in a more specific way, to the Public Administration[4].

Efficiency is a part of the so called «*buon andamento*», which is one of the leading principles behind the organization and the activity of the Public Administration[5]; a principle which is specifically recognised by the Italian constitutional Chart[6] and which requires the Administration to be able to reach the goals set by the law, to use the minimum possible

[4] The improvement of the efficiency of the Public Administration is also an objective of the politics of the European Union. The eleventh thematic objective of the Cohesion Policy of the EU (for the period 2014-2020) concerns, specifically, that topic (see EU cohesion policy priorities 2014-2020: https://ec.europa.eu/regional_policy/en/policy/how/priorities/2014-2020/).

[5] For an essential bibliography on the «*buon andamento*» see A. MORRONE, *Verso un'amministrazione democratica. Sui principi di imparzialità, buon andamento e pareggio di bilancio*, in *Dir. Amm*., 2019, f. 2, 381 ss.; A. MARRA, L'Amministrazione imparziale, Torino, 2018; R. URSI, *Le stagioni dell'efficienza. I paradigmi giuridici della buona amministrazione*, Rimini, 2016; C. PINELLI, *Il «buon andamento» e l'«imparzialità» dell'amministrazione*, in *La Pubblica Amministrazione*, Commentario Cost. Branca–Pizzorusso, Bologna-Roma, 1994; U. ALLEGRETTI, *Imparzialità e buon andamento*, in *Dig. disc. pubbl.*, VIII, Torino, 1993; AA.VV., *Buon andamento della pubblica amministrazione e responsabilita degli amministratori: (convegno di studio, 4 e 5 maggio 1984)*, Milano, 1985; A. ANDREANI, *Il principio costituzionale di buon andamento della pubblica amministrazione*, Padova, 1979.

[6] And especially by article 97.

amount of money and resources in the making of its activity and to be, as we were saying, efficient[7].

So said, we can also add that the efficiency of the Public Administration - and the «*buon andamento*» itself - is connected to the rights and the freedoms of citizens, which (al least, some of them) need to be protected and improved by the Administration (and, broadly speaking, by the Public Powers.).

The modern concept of Public Administration is the one according to which the Administration itself is entitled with the task of guaranteeing services to citizens which have to be considered as fundamental[8].

As a matter of fact, considering that the Chart sets some specific issues and goals upon the Public Administration (such as actions to be taken in order to protect the environment and the artistic and historical heritage of the italian country or to provide for the health of the citizens) and the activity of this one is ruled by the principle of «*buon andamento*» (which we can simply translate as «*good administration*») we can say that efficiency is an instrument by which the goals set by the Chart upon the Public Administration are reached, and the rights and freedoms of citizens are effectively protected.

On the opposite, if the Administration is not efficient and is not able to effectively reach its goals, the risk for the rights of citizens not to be granted is very high.

[7] It has been observed that the efficiency and the effectiveness of the activity of the Public Administration are corollaries of the principle of «buon andamento» (T.A.R. Lecce, (Puglia) sec. I, 4th september 2018, n. 1321; Italian State Council, sec. V, 16th October 2017, no. 4787).

[8] On this topic see, among others, A. GIUFFRIDA, *Il "diritto" ad una buona amministrazione pubblica e profili sulla sua giustiziabilità*, Torino, 2012, 85, who states that the essential role the Italian Constitution attributes to the Public Administration is the one concerning the provisioning of services to citizens.

Just to make an example (one that the italian citizens can perfectly understand), in Italy the medical assistance is public and, mostly, free: everyone can have access to medical facilities; nonetheless, if the medical care, in addition to be free, is not also efficient, the right to health of citizens can easily be frustrated: consider, from this point of view, a medical examination scheduled seven, eights or nine months after the submission of the request… we cannot say that the right to health of the citizen who made the request had been completely guaranteed!

So said, we can state that the efficiency of the Public Administration is something which is clearly and directly connected with the fundamental rights of citizens, and so is the «smart cities model», which is focused - as we were saying - on the issue of efficiency.

In this scenario, considerations concerning economic and financial topics are central.

As a matter of fact, efficiency refers to the way by which money and resources are invested and spent in order to offer to citizens public services and access to facilities, or to make the Administration able to pursue its duties and to reach its goals. In fact, it refers to the whole activity of the Administration, which - in countries such as Italy or France - is very pervasive and needs to be financed by a huge percentage of the gross domestic product (GDP).

It's well known the debate concerning the role that the Public Powers should (or should not) play in the market and in the everyday life of the citizens; a lot of people and scholars (starting from the works of classical economists) think that the State and the Administration should play a small role in the dynamics of the economy and the life of the

market, while others think, on the contrary, that the presence of the Public Power has to be consistent and significant[9].

Anytime, it's something which refers to a common experience that the life of a modern citizen (and especially an italian one) is strongly connected with the activity of the Public Administration, and this is particularly true for citizens who live in a urban context: as a consequence, the sphere of Administration-citizens relations should be one of the main development path of the «smart cities model».

2. THE LIFE OF THE CITIZENS IN THE URBAN CONTEXT AND THE SMART CITIES MODEL

Nearly 68% of the world's population is projected to be urban by 2050. «*Projections show that urbanization, the gradual shift in residence of the human population from rural to urban areas, combined with the overall growth of the world's population could add another 2.5 billion people to urban areas by 2050, with close to 90% of this increase taking place in Asia and Africa, according to a new United Nations data set launched today*»[10].

This means that the urban context will become more and more relevant for the decisions to be taken concerning economic and demographic growth, the protection of the

[9] It's not possibile to enucleate a bibliography concerning the specific topic (to which a lot of issues, debates and discussions can be referred). Regarding the italian legal system, we can consider the two different models of «Stato dirigista (interventore)» and «Stato regolatore», the second one well described in the book A. LA SPINA - G. MAJONE, *Lo Stato regolatore*, Bologna, 2000. For a definition of the «dirigism» in the italian legal framework see, among others, V. SPAGNUOLO VIGORITA, *L'iniziativa economica privata nel diritto pubblico*, Napoli, 1959, in part. 27.

[10] United Nations - Department of Economic and Social Affairs, News about 2018 Revision of the World Urbanization Prospect (www.un.org).

environment and, in the end, the very survival of the world[11]. The urban context will also become the place in which the majority of the people will live their lives and try to satisfy their needs.

The connection between the issue of efficiency and the challenges set by the need to imagine and create an urban context in which citizens could live satisfactorily (and the economic growth is sustainable) leads naturally to the model of smart cities. Even if it is not possible to find an unique definition of "smart city"[12], we can state that the model is based upon some specific pillars, such as: digitalization[13], big data[14], sustainability, participation

[11] As it has been observed, «*the cities consume a large amount of energy, demanding more than 75% of world energy production and generating 80% of greenhouse gas emissions*» (G.C. LAZAROIU - M. ROSCIA, *Definition methodology for the smart cities model*, in *Energy. The international journal*, oct. 2012, 1).

[12] «*Facing myriad definitions and mission statements offering promissory yet vague descriptions of innovative urban environment, scholars use the term "nebulous" to describe the contemporary smart city*» (G. R. HALEGOUA, *Smart cities*, MIT Press, 2020, 1). About the different meanings of the term "smart city" see also A. COCCHIA, *Smart and Digital City: A Systematic Literature Review*, in R.P. DAMERI-C. ROSENTHAL-SABROUX (eds.), *Smart City. How to create Public and Economic Value with High Technology in Urban Space*, New York, 2014, 13 ss.

[13] About the topic of the «digitalization» of the activity of the Public Administration see G.M. RACCA, *La digitalizzazione necessaria dei contratti pubblici: per un'Amazon pubblica*, in *DPCE online*, 45, n. 4, 2021, 4669-4706; G.M. RACCA, *La digitalizzazione dei contratti pubblici*, in R. CAVALLO PERIN, D. U. GALETTA (eds.), *Il diritto dell'amministrazione pubblica digitale*, Torino, 2020; D.U. GALETTA, J.G. CORVALAN, *Intelligenza artificiale per una pubblica amministrazione 4.0?*, in *Federalismi.it*, n. 3/2019, 2; F. CARDARELLI, *L'incidenza del processo di innovazione tecnologica sull'attività contrattuale della pubblica amministrazione. Nuovi assetti organizzativi per la realizzazione e gestione dei sistemi informativi pubblici*, relazione tenuta al 5° congresso internazionale del CED della Suprema Corte di Cassazione sul tema "Informatica ed attività giuridica", Roma, 1993, "*Dalla giuritecnica all'informatica giuridica*", Studi in onore di V. Frosini, Roma, 1995.

[14] About big data see M. TRESCA, *Lo «Stato digitale»: big data, open data e algoritmi: i dati al servizio della Pubblica Amministrazione*, in *Riv. Trim. Dir. Pubb*., 2021, v. 2, 545 ss.; G. DE MINICO, *L'Amministrazione e la sfida die big data*, in AA.VV., *L'Amministrazione nell'assetto costituzionale dei poteri. Scritti per Vincenzo Cerulli Irelli*, Torino, 2021, 573 ss.; R. CAVALLO PERIN, *Pubblica amministrazione e data analysis*, in R. CAVALLO PERIN (eds.), *L'amministrazione pubblica con i big data: da Torino un dibattito sull'intelligenza artificiale,* Torino,

(and we are referring to the participation of citizens not just to the life of the town or city in which they live, but to the governance and the public decision-making process, through which they can influence the definition of the asset, the development and the growth of their city or town) and on the integration of different urban policies (such as transport policies or waste management) in order to guarantee access to public facilities to citizens and to increase the sustainability of the urban life (in particular, «*a major objective of smart cities is to achieve triple sustainability in social, economic and environmental issues*»[15]).

All the "goals" considered above need, in order to be reached, the existence of at least three conditions: a) ideas and plans set by politicians (or suggested to them by citizens, according to the «bottom up approach» about which we will talk later) in order to translate those "goals" in specific and defined actions and projects, according to the model set by the Italian constitutional Chart (which states that politicians set the goals and the Administration provides concrete action in order to reach those goals); b) an Administration made of persons who have the right skills to actuate the directives the politics send to them (in accordance with the model set by the Italian legal framework); c) resources and money to be invested in defined actions and projects.

All those things are, obviously, connected.

The kind and number of actions, plans and projects that can be undertaken depend on the amount of money and resources that can be invested on them; resources are also fundamental in order to increase the knowledge and the skills of the public employees… so, even from this point of view, we can affirm that the main topic concerns something which is related to efficiency, and especially to the task of an accurate and clever use of resources;

Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino, 2021, 11-18; B. RABAI, *Big Data in the digital ecosystem: between economic freedom and protection of rights*, *Amministrare*, 2017, 2, 405 ss.

[15] H. SONG, R. SRINIVASAN, T. SOOKOOR, S. JESCHKE, *Smart Cities. Foundations, Principles, and Applications*, John Wiley & Sons Inc., 2017, 2

resources which have to be invested in order to develop instruments and technologies which can improve the participation of the citizens to the life of their own town and to the decision-making process.

3. THE "PARTICIPATION ISSUE": SMART CITIES AS A «BOTTOM-UP» MODEL OF PUBLIC DECISION-MAKING PROCESSES

The effectiveness of the participation of citizens in the public decision-making process is strongly connected with the democratic principle, which is - as it is well known - the most important principle of the whole Italian constitutional Chart, the one around which everything is built, and especially the structure, the organization and the scopes of the Public Administration and Public Powers widely considered.

It's known that "the city" is a context in which the democratic principle is, more or less, effective: the italian model of Comuni (municipalities) - which, according to the Chart, are the Public Authorities to which public functions and public tasks have to be entrusted as a general rule[16] - is structured upon the direct election of the major and of an assembly (Consiglio) which directly represents the citizens.

Nevertheless, the model of smart cities can play a main role in the improvement of another kind of democratic participation: we are referring to direct participation of citizens in procedures that lead to public decisions, which can be strongly improved by the spread of technologies and the affirmation of the model of smart cities[17].

[16] See article 118 of the Italian constitutional Chart.

[17] About the relationship between participation of citizens and the spread of technologies see D. MORANA, *Lo «Stato digitale». Partiti e partecipazione politica nell'era digitale: la prospettiva costituzionale*, in *Riv. Trim. Dir. Pubb.*, 2021, 2, 489 ss.

It has been observed that the development path of smart cities is a «bottom-up» one[18].

The bottom-up approach - referred to a specific organization (such as a group, a company, a city, a society) - is the opposite of a «top-down» one.

The second kind of approach «*refers to a process that is fostered or lead by actors of an organizational upper level in a hierarchical structure and that is progressively diffused and implemented by involving actors of lower levels. Such an approach is likely to be based on a central authority and control. The process management is orchestrated by an actor with authority and risks not to take into account the plurality of all involved stakeholders*»[19].

A «bottom-up» perspective, on the contrary, is focused on the propulsive thrust which come from the citizens and - broadly speaking - from the members of the civil society.

Those are usually not part of the structure entitled with the task of making decisions which affect the whole community (or a part of it), so, on the ordinary, they can participate in the decision-making but cannot take part to the final part of that process.

A «bottom up» approach, instead, requires the definition of a new role for the citizens, definition made possible by the spreading of technologies and their diffusion within the public[20].

[18] Cf. R. P. DAMERI, *Searching for Smart City definition: a comprehensive proposal*, in *International Journal of Computers & Technology*, 2013 v. 11, n. 5, 2544 ss.

[19] M. ALVERTI, D. G. HADJIMITSIS, P. KYRIAKIDIS, K. SERRAOS, *Smart city planning from a bottom-up approach: local communities' intervention for a smarter urban environment*, Proc. SPIE 9688, Fourth International Conference on Remote Sensing and Geoinformation of the Environment (RSCy2016), 968819 (12 August 2016), 6.

[20] As remarkably observed by R. CAVALLO PERIN and G.M. RACCA (*Smart Cities for an Intelligent Way of Meeting Social Needs*, in J. B. AUBY (directed by), *Le Future du Droit Administratif/The Future of Administrative Law",*

We are not talking about a model (similar to the one of the ancient Athens) in which citizens make decisions by their own, bypassing the institutions; nonetheless, we are referring to an asset in which the presence of citizens in decision-making processes is real and effective, and cannot be ignored by institutions and Public Authorities (the term which express the concept the most is the one of «*open government*»[21]).

It's easy to predict that the definitive affirmation of the model of smart cities will lead to the development of modern models of participation of citizens in the decision-making process, such as the ones inspired to the «notice-and-comment»[22] or the so-called «arene deliberative»[23]: those models refer not just to the participation of citizens (into the decision-making process), but even to the "public decision" itself and, in fact, to the general government of the urban context (and the set of public policies concerning the city such as: urban development, mass transit, waste management, etc.). The development of those models

Lexis Nexis, 2019, 433, «*as providing objective information, big data and data analysis should enable us to identify rules and legitimate administrative solutions*».

[21] Cf. A. PAPA, *Smart city and open government data*, in G. OLIVIERI, V. FALCE (eds.), *Smart cities e diritto dell'innovazione*, Milano, 2016, 21 ss.

[22] About the «notice and comment» model in the italian legal system see, among others, G. SGUEO, *Le forme della partecipazione tra adjudication e rulemaking procedures*, in *Diritto.it*, 2008 e S. CASSESE, *Il procedimento amministrativo tra modello partecipativo e modello "neoclassico",* in L. TORCHIA (eds.), *Il procedimento amministrativo: profili comparati*, Padova, 1993, 1 ss.

[23] See V. MOLASCHI, *Le arene deliberative. Contributo allo studio delle nuove forme di partecipazione nei processi di decisione pubblica*, Napoli, 2018.

of participation of citizens should play a central role in the process of integration of communities, even at the european level[24].

This for the "main path" of the public decision-making, the one which is entrusted by the law and formally assigned to different Public Authorities (according to the "scheme" set by the Constitutional Chart).

In addition to that, we can state that the model of smart cities fits perfectly the provisions set by par. 5 of the article 118 of the italian Chart: we are talking about the so called «sussidiarietà orizzontale», a principle which set upon the Public Powers the task of promote the initiatives of the citizens concerning activity of interest for the whole community: according to this principle, Public Authorities and citizens (considered as single or as associations of citizens) should dialogue and collaborate for the achievement of purposes and goals which are of interest for both of them. Public Authorities should support citizens - even in a financial way - whom, with their initiatives, in some way can replace the role of the Authorities.

The model of smart cities is central for the development of a buttom-up approach and of a model in which citizens are part (in a more incisive way) of the public decision-making process, due to its specific characteristics: ICT made simple (to use), accessible and affordable to the citizens; the structure of the Internet itself - projected and built in order to be a "non hierarchical" and "free" space - and the issue of efficiency, applied to public services and facilities, which can promote the participation of the citizens to the life of the city.

[24] About the integration processes set at the italian and at the european level see R. CAVALLO PERIN - G.M. RACCA, *The Plurality and Diversity of Integration Models: the Italian Unification of 1865 and the European Union Ongoing Integration Process, in The changing administrative law of an EU member State*, Cham, Springer, Torino, Giappichelli, 2021, 5-22.

A concrete application of what we have just reported above can be found in the topic of the capacity of the citizens to have access to information, data and documents owned by the Public Administration[25].

4. THE ACCESS TO DATA AND INFORMATION AND THE PROBLEM OF THE «DIGITAL DIVIDE»

Access to data, documents and informations is the first component of the participation: no effective participation is possible if citizens don't have access to data, documents and information which can help them to become aware of the problems, projects and perspective of the place in which they live (the city or their neighbourhood) and allow them to think about innovative solutions.

In the recent years, we have developed important tools that can be used by citizens in order to obtain access to data and informations: we are talking about the so called FOIA («accesso civico generalizzato» in the Italian legal framework) and the implementation of ICT, due to which citizens can gain information on the internet or simply sending an e-mail to the Public Authority that own the requested information[26].

According to a notorious definition, «*smart cities are […] places where digital media are strategically integrated as infrastructure and software to collect, analyze, and share data to manage and inform decisions about urban environments and activities*»[27].

[25] G. R. HALEGOUA, *Smart cities*, cit., 10: «*urban system thinking from the 1960s imagined cities as series of complex, nonlinear, interactive systems in which urban activities could be thought of as information*».

[26] F. CARDARELLI, *L'accesso alle informazioni pubbliche attraverso sistemi informatici e telematici*, Lettera Ipaccri, 1993, n.3.

[27] G. R. HALEGOUA, *Smart cities*, cit., 8.

If the Information and Communication Technologies (ICT[28]) and the digital media should play a central role in the developing of the model of smart cities (considering that the range of human activities that are affected by digitalization increases every day) the first problem that has to be solved is the one connected with the so called "digital divide", which refers both to the skills of citizens concerning the use of the ICT and to the capacity of the citizens themselves to afford the bought of computers and an internet connection.

This issue had spread dramatically due to the pandemic, during which a lot of students were not able to participate properly to their classrooms on platforms such as zoom, teams, etc.

Those episodes offer a lesson worth learning: we cannot seriously think about the implementation of the smart cities model, which is based on the ICT, the use of the internet and the integration between infrastructures and software, without solving - one among others - the problem of the «digital divide» (described as the existing gap between those who have access to the Internet and those who don't[29]) and this is particularly true considering that another pillar of the model is represented by the participation of the citizens to the public decision making process: a city is considered "smart" if its inhabitants can take part to the mentioned process, and in order to reach that goal we need for technologies to spread, because only with the use of technologies we can imagine to set of new models of participation which are efficient and effective.

For this, it's fundamental that all citizens (the inhabitants of a specific town) can take part in the decision-making process; if this would not happen, the democratic principle would be frustrated, and the model of smart cities would become an instrument by which

[28] G. BAROZZI REGGIANI, *Le ICT, gli Open data e l'innovazione della P.A. alla luce della recente riforma del Codice dell'Amministrazione digitale*, in G. AVANZINI - G. MATUCCI (a cura), *L'informazione e le sue regole,* Napoli, 2016, 307 ss.

[29] L. SARTORI, *Il digital divide*, Bologna, 2006 and J. VAN DIJK, *The digital divide*, Cambridge, UK, 2020.

some citizens (the youngest, the richest and the ones with a high level of scholarship) prevail over others or, at least, make decision which affect the life of other citizens who are not part of the decision making process.

This is exactly the opposite of the goal the model of smart cities aims to reach, which is an idea of inclusion, participation and improvement of everyday life and working life of the citizens.

5. CONCLUDING REMARKS

When the described problems will be solved (and particularly the ones concerning the digital divide) we will be able to project properly the smart city of the future, whit the development of new features and tools which can make our life easier and more sustainable (such as the implementation of forms of smart working, which can positively affect the problem of pollution connected to mass transit).

In this task, an important role should be played by Public Powers: in order to make the smart cities model effective, we will have to invest on the training of the public employees and on the implementation of technologies (in terms of structures, hardwares and softwares) which represent, as we said, the mail pillar of the model.

Luckily, the Italian government choose to invest an important amount of money (we are talking about 5-6 billion euros) of the so called PNRR (Piano Nazionale di Resistenza e Resilienza) in the ICT, and this represent a very important chance for the smart cities model to be improved and, due to this, for the affirmation of an effective citizenship. In addition to that, we can mention an important initiative of the European Union concerning, specifically, the smart cities: we are talking about the «*The European Innovation Partnership for Smart Cities and Communities*» which is «*an initiative supported by the European Commission combining Information and Communication Technologies (ICT), energy management and*

transport management to come up with innovative solutions to the major environmental, societal and health challenges facing European cities today»[30].

The challenge is a hard one, and the development lines cannot be easily predicted.

The fact is that an effective implementation of the «smart cities model» would produce general effects upon the relationship between Public Powers and citizens, shaping new ways of participation (of citizens) in the public decision-making process.

The «bottom-up» approach can hardly be matched with the actual organization of the Public Administration, which is, in fact, a hierarchical one or, at least, correspondent to a model in which all the decision are taken by Public Authorities, while citizens can just take part to the procedures, with no real possibilities to influence effectively the decision-making process.

In this scenario, we have to consider another possible outcome of the development of the «smart cities model», an outcome which looks like a paradox.

In order to do that, we have to talk (again) about efficiency, cause - as it has clearly been observed - in the smart cities model efficiency is connected with an issue of legitimacy of the public decision-making processes. As it has been said, «*from the smart city point of view, inability to achieve results, thus failure in fulfill certain functions, leads to the loss of legitimacy* […] *In this scenario, data analysis-based solutions may lead to an "algorithm government" and perhaps bring the need of consultation and event politics to an end*»[31].

[30] https://e3p.jrc.ec.europa.eu/articles/european-innovation-partnership-smart-cities-and-communities.

[31] R. CAVALLO PERIN – G.M. RACCA, *Smart Cities for an Intelligent Way of Meeting Social Needs*, cit., 433. About the topic concerning algorithms and public decision-making processes see D. U. GALETTA, *Algoritmi, procedimento amministrativo e garanzie: brevi riflessioni, anche alla luce degli ultimi arresti giurisprudenziali in materia*, in *Riv. It. Dir. Pubb. Com.*, 2020, 3, 501 ss.; L. PREVITI, *Regulation issues of algorithmic administrative decisions: looking for an italian legislative model*, in *Ius Publicum Network Review*, 202, v. 1, ss.; G. AVANZINI, *Decisioni*

In fact, we are talking about the replacement of the traditional schemes of "representation" with a new one in which the legitimacy of the government of the city is ensured by the efficiency. A scheme in which technocrats will lead the government of the cities and the science-based decision will prevail on the one made by politics (who are the representatives of the people).

It's an "almost shocking" conclusion, but one which we have to take into account.

The evolution of technologies is unpredictable (just consider, as an example, the spread of the social media!) and so are the forms that the participation of citizens in the decision-making processes would assume; we cannot exclude that we will able to find a way of combine representation and the "science-based approach".

One thing is for sure: a lot of changes on the horizon are going to happen.

In this scenario, there is a single steady point: the central role that efficiency will play in the development of the «smart cities model».

Abstract. *The idea of smart cities implies the efficiency of public authorities and, more specifically, of public administration, which has the task of guaranteeing citizens' services that must be considered fundamental. The contribution aims to analyse the role played by smart cities in the direct participation of citizens in public decision-making, focusing on the issue of the right of access and the digital divide.*

amministrative e algoritmi informatici. Prederminazione analisi predittiva e nuove forme di intelligibilità, Napoli, 2019 and J. MORISON, *Algorithmic governance in the smart city: the end of politics and the beginning of a new governamentality? Workshop in the conference The future of administrative law*, Paris, June 21st and 22nd, 2018.