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Index

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EFFECTIVE LAW, MULTILEVEL GOVERNMENT AND THE PANDEMIC TEST: A LOOK AT THE HEALTH CRISIS FROM AN ITALIAN PERSPECTIVE.

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INDEX

1. INTRODUCTION

Constitutional democracies have been challenged by the current pandemic which - during these months - has made manifest some evidence: that regulation and regulatory

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enforcement are at the heart of the response to Covid-19; that rules must be effective in order to ensure prevention and protection from risks; and that regulation is the way to balance different public interests such as health, economic freedoms and fundamental rights.

On the other hand, not everything has worked as planned and/or hoped, in European countries and elsewhere: criticisms have been connected to public health care systems; tensions have sometimes characterized the relationships between national Parliaments and Governments; other dysfunctions have affected multi-level decision-making. In this last regard, State and subnational actors (such as *Länder, Regions, Communidades autonomas* as well as local authorities and municipalities) have sometimes developed a dialogue marked by frictions; the same applies to relationships between member States and the EU.

In other words, the pandemic has represented a real trial by fire for regulatory effectiveness and (more in general) a stress test of the quality of legal and institutional systems and of multi-level governance. This is true especially in Italy, where in the middle of the health crisis (in February 2021) there was also a political crisis with a changing of the guard in the Government, now headed by Mario Draghi - former President of the European Central Bank – who has assumed the responsibility to lead the nation with a large parliamentary majority.

The present contribution is intended to be a short analysis of the Covid19 crisis from an Italian point of view by adopting a regulatory perspective. After a first introductory glance (sec. 2), the question will be analyzed by considering if quality of regulation has been ensured over this period (sec. 3), if regulatory delivery (and the contributions of different kinds of administrations) may be considered adequate (sec. 4) and if regulatory effectiveness (to be intended as compliance with rules associated with the impact of rules consistent with their objectives, without undesired effects) has been achieved (sec. 5). The article will mention a specific recent case of constitutional litigation regarding multi-level governance in the fight against the pandemic (sec. 6) by drawing some conclusive remarks about cooperation and trust as crucial for the response to the pandemic (sec. 6) and about contents and perspective of the Italian National Recovery and Resilience Plan, recently adopted (sec. 7).

2. THE ITALIAN RESPONSE TO THE PANDEMIC AT A GLANCE.

In March 2020, Italy was the first European country and the first constitutional democracy to face the pandemic. From the beginning, it has been clear that regulation is "*at the heart of the response to Covid-19*"[2].

The Italian response was described nearly as a structured model[3]. However, last March, Italy was a sort of frontline where people together with their multi-level Government experienced a hectic and stressed regulatory balance between competing values[4]. There is no doubt that the equation was (and continues to be) complex – a real conundrum. In fact, public decision-making requires consideration, balance and necessarily combining health *vs* business solutions and many other fundamental rights[5], variables which are not relevant in

[2] OECD, *Tackling Coronavirus (Covid-19). Contributing to a global effort, Regulatory Quality and COVID-19: Managing the Risks and Supporting the Recovery*, Note by the Secretariat in consultation with the Chairs and the Bureaus of the Regulatory Policy Committee and the Network of Economic Regulators, 2020, p. 2, in http://www.oecd.org/regreform/regulatory-policy/Regulatory-Quality-and-Coronavirus%20-(COVID-19)-web.pdf, See also National Conference of State Legislatures, *State Action on Coronavirus (COVID-19)*, Database, in https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx.

[3] F.G. Nicola, *Exporting the Italian Model to Fight COVID-19*, in "The Regulatory Review", April 3, 2020, in https://www.theregreview.org/2020/04/23/nicola-exporting-italian-model-fight-covid-19/.

[4] See M. De Benedetto, *Regulating in time of tragic choices*, in "The Regulatory Review", May 6, 2020, in https://www.theregreview.org/2020/05/06/de-benedetto-regulating-times-tragic-choices/.

[5] On this point, see D.M. Studdert and M.A. Hall, J.D., *Disease Control, Civil Liberties, and Mass Testing — Calibrating Restrictions during the Covid-19 Pandemic*, in "The New England Journal of Medicine", April 9, 2020. On this point, see also J. Grace, *UK Human Rights Challenges in the Time of Covid-19*, in *Ius Publicum Network Review*, Issue no. 1/2020, available at: http://www.ius-publicum.com/repository/uploads/29_04_2021_10_55-J_Grace_UK_human_rights_challenges_in_the_time_of_COVID.pdf

the same way in all parts of the world. The consequence was a strong influence on adopted solutions, for instance by necessitating legitimate and proportionate imposition of social distancing measures (SDMs) or data protection for smart tracking controls[6] (e.g. in the app named *Immuni*)[7].

All of this is of great interest from a regulatory perspective because Italy was the first institutional Laboratory to experience responses to the pandemic which had to be respectful of fundamental rights, as far as possible. They may be grouped in two different categories.

The first type of responses regards the *health care* area. In this framework, it is possible to distinguish at least three levels: the *strict health care response*, which has been given by hospitals and by family doctors (via home care assistance) and which can be considered, at the end of the day, a good performance, implemented by a "world-class health system"[8]; the *health care prevention via tracing* and other health care system activities,

[6] On this point, see T. Lattisi, H. Kyeong Hwang, E. Talin, editing and input provided by F Blanc, *Blockchain and Self-Sovereign Identity: how to fight covid-19 without sacrificing privacy*, in medium.com, March 27, 2020, in https://medium.com/@tizianolattisi/tracing-contamination-through-mobile-phone- locations-balancing-effectiveness-with-privacy-and-1ca4b6c9a7b6.

[7] See, *Coronavirus: Italian government reveals plans to use tracking app*, in "The Local", April 17, 2020, in https://www.thelocal.it/20200417/coronavirus-italian-government-reveals-plans-to-use-tracking-app.

[8] D. Chow and E. Saliba, *Italy has a world-class health system. The coronavirus has pushed it to the breaking point*, in "NBCnews.com", March 18, 2020, in https://www.nbcnews.com/health/health-news/italy-has-world-class-health-system-coronavirus-has-pushed-it-n1162786. On the other hand, see the proposals in matter of health system for the Annual Competition Law 2021 coming from the Italian Competition Authority AGCM in the *Report to the Government dated 22 March 2021* (Segnalazione AS1730, *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza - anno 2021*, 22 marzo 2021), available at: https://www.agcm.it/dotcmsdoc/allegati-news/S4143%20-%20LEGGE%20ANNUALE%20CONCORRENZA.pdf. On National Health Systems in EU, see also, European

developed by the Ministry of Health together with other competent Ministries, Expert Committees and the Regions[9], which have presented a number of criticalities, starting from the failure of the app, *Immuni*[10]; finally, the *health care prevention via social distancing measures*, such as the lockdown and other measures imposed to limit business and social activity (especially schools and universities) with the purpose of reducing physical contacts among people. These measures have been implemented and enforced by administrations different from the National Health Care System (*Servizio Sanitario Nazionale*)[11] and were sufficiently effective for the most part.

Court of Auditors, *Public health - Audit reports published between 2014 and 2019*, December 2019, available at: https://op.europa.eu/it/publication-detail/-/publication/5a0bdba9-db7e-11ea-adf7-01aa75ed71a1/language-it.

[9] M. Paolo, *Immuni: Does the Italian app against coronavirus work?*, in "Italicsmag.com", July 7, 2020, in https://italicsmag.com/2020/07/07/immuni-does-the-italian-app-against-coronavirus-work/. However, not only the Italian tracing system has failed, see in this regard, M. Burgess, *Why the NHS Covid-19 contact tracing app failed. Test, track and trace – just not with the NHS app*, in "Wired.co.uk", June 19, 2020, in https://www.wired.co.uk/article/nhs-tracing-app-scrapped-apple-google-uk.

[10] On this aspect see, *Il flop della App Immuni: ecco perché non funziona*, 24/11/2020, in https://www.ofcs.it/cyber/il-flop-della-app-immuni-ecco-perche-non-funziona/#gsc.tab=0, as reported in English language by Vogon.Today: *The Immuni flop: that is, digitization is useless if managed by Conte and Speranza (thanks OFCS.report)*, 24/11/2020, in https://www.vogon.today/economic-scenarios/the-immuni-flop-that-is-digitization-is-useless-if-managed-by-conte-and-speranza-thanks-ofcs-report/2020/11/26/: "But the real problem with Immuni is not the app, but the process that is around it and that some enlightened mind has concocted. Every digital innovation, which is not just an IT application, first of all involves a process that involves actors, systems, procedures and functions. In Immuni, much emphasis has been placed on the technological, security, and privacy aspects, but very little on the process that governs digital contact tracing. In this process, a fundamental role is played by the Local Health Authorities which, in the face of a positive person in possession of the Immuni app, request the code provided by them and actually activate the procedure of automatic Immuni notifications".

[11] On this point, see G. Briscese, N. Lacetera, M. Macis, and M. Tonin, *Compliance with COVID-19 Social-Distancing Measures in Italy: The Role of Expectations and Duration*, in National Bureau of Economic Research - NBER Working paper 26916, in https://www.nber.org/papers/w26916 .

The second type of response is the *economic response* to the pandemic. In this regard, there are three main different fields of intervention which have to be included: measures adopted to face the *social emergency* and increasing poverty[12]; prescriptions designed to restore financial losses for *business activities*, both as free grants or as payment suspensions[13]; and finally, measures adopted to *support the economic system* and to promote business restart, from the specific fiscal deduction called 110% 'ecobonus' and 'earthquake bonus'[14] to the National Recovery and Resilience Plan in the more general framework of the Next Generation EU[15].

3. HAS QUALITY OF MULTI- LEVEL REGULATION BEEN ENSURED?

[12] M. Natili and M. Raitano, *Coping with the pandemic: The new Emergency Income in Italy*, in "European Social Policy Network – ESPN", Flash Report 2020/67, Dec. 2020, in ec.europa.eu/social/BlobServlet?docId=23308&langId=hr

[13] Regarding recent measures, see D. Figureoa, *Italy: Miscellany of Measures Enacted to Fight Covid-19 Pandemic*, in "Library of Congress Global Legal Monitor", Jan 28, 2021, in https://www.loc.gov/law/foreign-news/article/italy-miscellany-of-measures-enacted-to-fight-covid-19-pandemic/.

[14] On this point see https://www.mef.gov.it/en/covid-19/The-measures-introduced-by-the-Italian-government-to-support-families-00001/ : "the Relaunch Decree introduced a 110% tax deduction for costs incurred to improve energy performance and/or earthquake protection work, with the possibility of transferring the relative tax credit. This applies to expenses incurred from 1 July 2020 to 31 December 2021 for thermal insulation work and other measures to improve energy efficiency. Any work to reduce the earthquake risk is also included ('earthquake bonus') as is work to install photovoltaic systems and columns to charge electric vehicles".

[15] The National Plan is available at https://www.governo.it/sites/governo.it/files/PNRR_0.pdf. A focus on the NRRP is available at https://www.mef.gov.it/en/focus/The-Recovery-and-Resilience-Plan-Next-Generation-Italia/.

As we know, *quality of regulation* requires not only drafting activities but also specific regulatory evaluation (Impact Assessment or Regulatory Impact Analysis) in the law-making and rule-making process, in order to ensure that a specific piece of legislation and/or regulation will be clear, consistent, comprehensible (from a formal perspective)[16] and will meet its objectives without producing undesirable side-effects (from a substantial perspective)[17]. In this context, the regulatory process is presupposed to be evidence-based and must include objectives and indicators, consultation with stakeholders, regulatory options, evaluation of the preferred regulatory option, and all of this must be consistent with good quality regulation standards established by guidelines, circulars, executive orders, manuals, directives or regulations adopted in different legal systems[18].

According to a number of OECD Reports[19], Italy has probably not been considered the best example among countries engaged in the use of quality of regulation tools; rather,

[16] Regarding legislation and drafting, see U. Karpen and H. Xanthaki (eds.), *Legislation in Europe: A Comprehensive Guide For Scholars and Practitioners*, Hart, 2017 and U. Karpen and H. Xanthaki (eds.), *Legislation in Europe: A country by country guide*, Hart, 2020.

[17] C.M. Radaelli and O. Fritsch, *Measuring Regulatory Performance, Evaluating Regulatory Management Tools and Programs*, OECD Expert Papers n. 2, 2012; C. Coglianese, *Measuring Regulatory Performance, Evaluating the Impact of Regulation and Regulatory Policy*, OECD Expert Paper n. 1, 2012.

[18] C.M. Radaelli, *The diffusion of Regulatory Impact Analysis in OECD countries: best practices or lesson-drawing?*, in "European Journal of Political Research", Vol. 43, issue 5, 2004, p. 723; J.-B. Auby and T. Perroud (eds.), *Regulatory Impact Assessment/La evaluación de impacto regulatorio*, Global Law Press/Inap, 2013; N. Rangone, *The Quality of Regulation. The Myth and Reality of Good Regulation Tools*, in *Italian Journal of Public Law*, Vol. 4, Issue 1, 2012.

[19] OECD, *Italy: ensuring regulatory quality across levels of government*, OECD Publishing, 2007; OECD *Reviews of Regulatory Reform - Italy: Better Regulation to Strengthen Market Dynamics*, OECD 2010, Executive summary, p. 23: "The experience of Italy with RIA still leaves scope for improvement. Recent steps to rejuvenate RIA might help, but mechanisms for quality control still need to be consolidated. The methods of RIA should be more explicit and more precise. The Ministry of Public Administration is making bold attempts to professionalise public services, but further investment in staffing and RIA training will be necessary to enable the ministries to conduct analysis

the Italian system has long been characterized by legislative inflation (as in every inflationary process, the greater the quantity of legislation, the less the quality) and also by regulatory failures[20]. If this is true in ordinary times, one might expect that it would be even more true under extraordinary circumstances, such as the pandemic. During last year, three different factors seem to have influenced quality of regulation.

The first factor is the *primacy of the Government over the Parliament*, with special regard to the role of the President of the Council, especially in the first period of the pandemic. As a consequence, government regulation has been prevalent: **"**the Italian response to coronavirus was led by prominent use of governmental legal instruments in the form of decree-laws, prime ministerial decrees and ministerial orders. While this legal architecture, built in a very short timeframe under an extreme emergency situation, was sometimes criticised for lack of legal certainty and the suspicion of abuse of government prerogatives to the detriment of Parliament"[21]. In any case, as a matter of fact, quality of regulation is not easily achieved for rules resulting from a layered series of urgent laws and decrees[22].

sufficient to compare options and understand the consequences of their actions before they act. Finally, a targeted approach of "proportional analysis" would help build skills and support over time"; OECD, *Better Regulation in Europe: Italy 2012: Revised edition, June 2013*, Better Regulation in Europe, OECD Publishing, 2013.

[20] On this point see N. Rangone, *Italy's Complex Legislative Framework Impairs its COVID-19 Response*, in "The Regulatory Review", June 8, 2020, in https://www.theregreview.org/2020/06/08/rangone-italy-complex-legislative-framework-impairs-covid-19-response/.

[21] See K. Binder, M. Diaz Crego, G. Eckert, S. Kotanidis, R. Manko and M. Del Monte, *States of emergency in response to the coronavirus crisis: Situation in certain Member States*, European Parliament, Members' Research Service, June 2020, p. 8.

[22] See R. Cavallo Perin, *2020 Pandemic: Emergency decrees and ordinances*, in *Ius Publicum Network Review*, Issue no. 2/2019, available at: http://www.ius-publicum.com/repository/uploads/30_06_2020_20_35-IusPublicum_RCavalloPerindef.pdf. A complete analysis of the Covid19 statutory provisions in Italy is in S.

The second factor regards the *role of experts in regulation*[23]. The Italian Government have regulated according to a special a Committee of experts operating within the Presidency of the Council of Ministers, the Technical and Scientific Committee-*Comitato tecnico-scientifico*[24] and to the emergency administration (*Protezione Civile*). This might imply greater gathering of evidence in the regulatory process and also regulation focused on indicators intended to allow monitoring and steering of collective behaviours. From a regulatory perspective, one of the most interesting things in the Italian pandemic experience is just this increasing recourse to sets of indicators developed by experts as a way to allow decision-making to be as objective and reactive as possible in the presence of changing evidence, as in the case of the monitored trend of the pandemic curve which influences the mechanism of changing "colour" for Regions (red, orange, yellow and white, corresponding to specific restrictive regimes[25]).

Civitarese Matteucci, A. Pioggia, G. Repetto, D. Tega, M. Pignataro, M. Celepija, entry *Italy: Legal Response to Covid-19*, in Oxford Constitutions, Oxford University Press, 2021, in https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e11; see also https://www.theregreview.org/2020/04/23/nicola-exporting-italian-model-fight-covid-19/. Regarding the Austrian case, see P. Bußjäger, M. Eller, A. Meier, *Central or Regional Corona-Management? A Journey Through Time in The Jungle of Ordinances*, in *Ius Publicum Network Review*, Issue no. 1/2020, available at: http://www.ius-publicum.com/repository/uploads/29_04_2021_11_21_Bussjager_Eller_Meier_IusPub_Report_Central_regional_corona_management.pdf.

[23] A. Lavazza and M. Farina, *The Role of Experts in the Covid-19 Pandemic and the Limits of Their Epistemic Authority*, in "Democracy, in Frontiers in Public Health", Vol. 8, 2020, p. 356.

[24] In particular, the National Health Institute/*Istituto Superiore di Sanità*-ISS, in http://old.iss.it/chis/index.php?lang=2&tipo=9 .

[25] "Regions and Autonomous Provinces are classified into four areas - red, orange, yellow and white - corresponding to three risk scenarios, for which specific restrictive measures are foreseen. The classification is based on ordinances issued by the Ministry of Health", in

The third and last factor consists in the *ambiguous role of evidence* in the regulatory process. As already mentioned, some prescriptions have been adopted on the basis of evidence being evaluated by experts. Other prescriptions have constituted limitations of constitutional freedoms and rights assisted only by limited rationales and weak justifications. Let us consider the regulatory measures adopted to limit the spread of the virus among students, especially those prescriptions devoted to high-schools which have resulted in a serious compression of the education of students in the age group 14-18 years: no evidence (or only vague reasons) was related to these limitative measures, while it would have been better to provide a much stronger rationale about the consequences of school attendance on the pandemic curve[26].

However, all these factors have on some occasions contributed to strengthening, and on others to weakening quality of regulation but, in any case, they have operated in a context characterized from the beginning of the pandemic by problems of data quality (for instance, few diagnostic tests), misalignments of statistical measurements (the mortality rate in Italy has included people with comorbidity, where death is due to the severity of the consequences of the Covid-19) and, more generally, by limited knowledge about the Coronavirus[27]. And this, of course, has definitely undermined the quality of regulation in a country in which regulation quality has never been too high.

http://www.salute.gov.it/portale/nuovocoronavirus/dettaglioContenutiNuovoCoronavirus.jsp?id=5367&area=nuovoCoronavirus&menu=vuoto.

[26] On this point, see European Centre for Disease Prevention and Control, *COVID-19 in children and the role of school settings in transmission* - first update, Stockholm, 2020, in https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-in-children-and-the-role-of-school-settings-in-transmission-first-update_0.pdf.

[27] See G.P. Pisano, R. Sadun and M. Zanini, *Lessons from Italy's Response to Coronavirus*, in "Harvard Business Review", March 27, 2020, in https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus.

4. MAY REGULATORY DELIVERY BE CONSIDERED ADEQUATE?

As everybody knows, once approved, rules are implemented and also enforced via controls and sanctions: the whole set of administrative activities designed to achieve and/or support compliance with rules has been defined "regulatory delivery"[28].

The pandemic has resulted in an incredible deployment of resources, human resources above all, in order to implement services and to ensure compliance and enforcement with public measures.

Alongside the incredible effort in facing the dramatic medical emergency via healthcare personnels, enforcement officers operating in local and national police have been in charge of *regulatory enforcement* tasks, especially to ensure Social Distancing Measures-SDM (also Social and Physical Distancing Measures-SPDM)[29].

In fact, Italian regulation has adopted an integrated approach by combining trusting in people and public enforcement: on the one side, this has involved self-limitation of free movement, mandatory self-quarantine and self-certification about the reasons for moving and travelling[30]; on the other side, a certain number of controls have been carried out, by

[28] G. Russell and C. Hodges, *Regulatory Delivery*, Hart/Beck, 2019.

[29] European Centre for Disease Prevention and Control, *Considerations relating to social distancing measures in response to COVID-19* – second update, 23 Mar 2020, in https://www.ecdc.europa.eu/en/publications-data/considerations-relating-social-distancing-measures-response-covid-19-second.

[30] See Imperial College, COVID-19 Response Team, Report *Estimating the number of infections and the impact of non-pharmaceutical interventions on COVID-19 in 11 European countries*, 30 March 2020, p. 30 (Data sources and

implementing strict enforcement via police controls and sometimes even via drones[31]. In this regard, research about the response to different kinds of restrictions and limitations has reported "a remarkable level of confidence about both knowledge of the rules and the self-reported extent of their compliance"[32].

This integrated approach indicates that the Italian Government has pragmatically considered compliance with SPDR very relevant to contain the spread of the pandemic[33] and this is the reason why rules were rapidly and consistently enforced, in order to result in unambiguous prescriptive messages[34]. In fact, communication has been confirmed to be part of the regulatory game[35]: during the lockdown, every day the Ministry of the Interior made

Timeline of Interventions), in http://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-13-europe-npi-impact/.

[31] M. Holroyd, *Coronavirus: Italy approves use of drones to monitor social distancing*, in "Euronews", March 23, 2020, in https://www.euronews.com/2020/03/23/coronavirus-italy-approves-use-of-drones-to-monitor-social-distancing.

[32] S. Civitarese Matteucci, A. Pioggia, G. Repetto, D. Tega, M. Pignataro, M. Celepija, entry *Italy: Legal Response to Covid*-19 cit.

[33] M. Molinari, *Coronavirus has taught Italy hard lessons. Other countries must learn from us*, in "The Guardian", March 20, 2020, in https://www.theguardian.com/commentisfree/2020/mar/20/coronavirus-italy-lessons-countries-crisis-information.

[34] J. Horowitz, E. Bubola, E. Povoledo, *Italy, pandemic's new epicenter has lessons for the whole world*, in "New York Times", March 21, 2020, in https://www.nytimes.com/2020/03/21/world/europe/italy-coronavirus-center-lessons.html.

[35] L.M. Friedman, *Impact. How Law Affects Behaviour*, Harvard University Press, 2016.

information public about police controls and infringements regarding social distancing regulation[36].

5. HAS REGULATORY EFFECTIVENESS BEEN ACHIEVED?

Quality of regulation, compliance, enforcement and regulatory delivery (in general) are relevant because they represent determinants of *regulatory effectiveness*: this concept expresses "the idea […] that a rule can be considered effective when desired results are effectively achieved and the public interest which justifies the rule has been safeguarded"[37]. In a wider sense, regulation may be considered effective when it "consists not only of rules which are valid, enforceable and possibly applied (legal normativity); not only of rules characterized by high rates of compliance and few costs of enforcement (theories of compliance); nor only of the results of rules which are consistent with regulatory objectives (outcomes). Effective [regulation] is all of these things together and implies complex and integrated administrative management in order to be achieved"[38].

The pandemic has represented an incredible, unique and (in a certain way) irreproducible condition in which to monitor and check the effectiveness of regulation. For instance, as never before, compliance with SPDM has been directly related to the objectives of restrictive regulation and to its outcome – the trend of the pandemic curve – even though the data set of controls regarding SDMs has seemed not to be sufficiently specific for

[36] https://www.interno.gov.it/it/coronavirus-i-dati-dei-servizi-controllo.

[37] M. De Benedetto, *Effective law from a regulatory and administrative law perspective*, in "European Journal of Risk Regulation", 9, 2018, p. 395-396

[38] *Ibid*., p. 396

conclusive insights in this regard[39]. In any case, Italian Covid19 regulation – with special regard to the first period of the pandemic – has been considered substantially effective[40]: an Imperial College Report estimated that at the date of 30th March lockdown and SDMs have already averted 38,000 deaths[41]. On the other hand, an Italian research has provided insights to public authorities on the best way to announce limitations and restrictive measures (as lockdown) and on the way in which managing people's expectations: in fact, where compliance has "collective benefits but full enforcement is costly and controversial, communication and persuasion" [42] (in other words, cooperative enforcement) have a fundamental role.

As a matter of fact, not everything has worked perfectly[43].

First of all, there have been problems regarding *specific decisions*, such as when the lockdown was declared and massive groups of people moved from Northern Italy to the

[39] On this point, see F. Blanc and M. De Benedetto, *Do social distancing rules work: looking at enforcement and mobility data*, April 20, 2020, in https://medium.com/@florentinblanc/do-social-distancing-rules-work-looking-at-enforcement-and-mobility-data-58d219a3ec38.

[40] http://www.protezionecivile.gov.it/media-communication/press-release.

[41] Imperial College, COVID-19 Response Team, Report *Estimating the number of infections and the impact of non-pharmaceutical interventions on COVID-19 in 11 European countries* cit., p. 11

[42] G. Briscese, N. Lacetera, M. Macis, and M. Tonin, *Compliance with COVID-19 Social-Distancing Measures in Italy: The Role of Expectations and Duration* cit.

[43] M. Molinari, *Coronavirus has taught Italy hard lessons. Other countries must learn from us* cit.

South: in this occasion, the worst was feared because the SDMs were observed in the Southern Regions but there are no doubts that the resulting situation was critical[44].

Furthermore, in the early phase of the pandemic, many criticisms were related to the *Italian public health care system* (*Servizio Sanitario Nazionale*-SSN), which was not designed to face a large-scale epidemic. Overall, delays in separating Covid-19 and non Covid-19 pathologies [45] in hospital emergency departments contributed to the diffusion of the pandemic, similarly to what has happened in residential care facilities for the elderly. However, despite an initial shock, the SSN productive capacity reacted positively and was incredibly strengthened[46].

Moreover, controversial opinions have characterised the difficult work of the Extraordinary Commissioner for the Covid-19 (*Commissario straordinario per l'attuazione e il coordinamento delle misure occorrenti per il contenimento e contrasto dell' emergenza epidemiologica Covid-19*)[47], in charge of a number of tasks to face the health emergency (among others management of human and instrumental resources, purchasing and distribution of medicines, medical and personal protective equipment and devices, together

[44] *Which Italian regions will be first to beat the coronavirus?*, in "The Local", April 20, 2020, in https://www.thelocal.it/20200420/which-italian-regions-will-be-first-to-beat-the-coronavirus.

[45] G.P. Pisano, R. Sadun and M. Zanini, *Lessons from Italy's Response to Coronavirus*, cit.

[46] L. Aimone Gigio, L. Citino, D. Depalo, M. Francese and A Petrella, *Tackling Tackling the emergency. The scaling up of productive capacity in the Italian health system: progress overview*, in "Banca d'Italia, Covid-19 Note", 21 April 2020, in https://www.bancaditalia.it/media/notizia/tackling-the-emergency-the-scaling-up-of-productive-capacity-in-the-italian-health-system-progress-overview/.

[47] On this point, see S. Civitarese Matteucci, A. Pioggia, G. Repetto, D. Tega, M. Pignataro, M. Celepija, entry *Italy: Legal Response to Covid-19* cit.

with the Chief of the Civil Protection Department) so complex that at a one point the Commissioner was involved in a judicial investigation and was replaced[48].

Other dysfunctions have constantly affected *multi-level decision-making*: the relationship between State and Regions – as already mentioned – has developed in a "fragmented chain of command"[49] and stressed dialogue. The same tension has characterized the relationships between Italy and the EU, especially in the early phase of the crisis[50] when there was great uncertainty about the European institutions' economic response[51] to the pandemic[52].

The question was relevant also at international level: the World Health Organisation-WHO in particular has been criticised not only with regard to the late declaration of pandemic but also for its ineffective monitoring of international levels of

[48] See *Chinese masks, the former commissioner Domenico Arcuri investigated for embezzlement*, in https://www.italy24news.com/News/15171.html.

[49] J. Horowitz, E. Bubola and E. Povoledo, *Italy, pandemic's new epicenter has lessons for the whole world* cit.

[50] J. Gill, *EU Commission President offers 'heartfelt apology' to Italy, as MEPs debate coronavirus response*, in "Euronews", 26 April, 2020, in https://www.euronews.com/2020/04/16/eu-commission-president-offers-heartfelt-apology-to-italy.

[51] D. Boffey, *Italy criticises EU for being slow to help over coronavirus epidemic*, in "The Guardian", 11 March, 2020, in https://www.theguardian.com/world/2020/mar/11/italy-criticises-eu-being-slow-help-coronavirus-epidemic.

[52] M. Johnson, S. Fleming and G. Chazan, *Coronavirus: Is Europe losing Italy?*, in "Financial Times", April 6, 2020, in https://www.ft.com/content/f21cf708-759e-11ea-ad98-044200cb277f

pandemic preparedness[53], as in the case of the outdated Italian pandemic plan which could have contributed to thousands of Covid-19 deaths[54].

The problem of regulatory effectiveness will also influence the extraordinary set of economic measures adopted (and of those in course of adoption) to face huge and widespread unemployment and poverty produced by the pandemic. Regulation must be effective for the simple reason that it represents matters of life or death, both if we consider health care, psychological suffering for social deprivation or economic measures to provide financial support for the loss of work, for the closure of businesses and for emerging new poverty among large sectors of the population.

6. COMBATING THE PANDEMIC: HEALTH PROTECTION OR INTERNATIONAL PROPHYLAXIS?

Italian scholars and academics have observed that during these months many tensions and dysfunctions between levels of government in the fight against the pandemic, have been occasioned upstream, by uncertainty regarding the qualification of interested powers and related institutional competences[55]. In other words, Regions have considered to

[53] A. Giuffrida, *WHO accused of conspiring with Italy to remove damning Covid report*, 11 Dec., 2020, in https://www.theguardian.com/world/2020/dec/11/who-accused-conspiring-italy-remove-damning-covid-report. See also A. von Bogdandy and P. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, March 26, 2020, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-07.

[54] A. Giuffrida and S. Boseley, *Italy's pandemic plan 'old and inadequate', Covid report finds. Outdated guidelines and lack of protocols may have led to thousands of extra deaths*, 13 Aug 2020, in https://www.theguardian.com/world/2020/aug/13/italy-pandemic-plan-was-old-and-inadequate-covid-report-finds.

[55] On this point, see S. Cassese, *Cassese: dal governo basta forzature si torni alla normalità. Il giurista: ecco il perché del mio intervento al convegno in Senato*, in "Corriere della sera", 28 July 2020. See also B. Caravita, *La*

be in charge of full competences, in the framework of their concurring legislative competence, with special concern for "health protection"[56]; while the proper category for allocating and distributing competences in the presence of pandemics would be the exclusive legislative power of the State, defined as "international prophylaxis" (art. 117.2, q) of the Italian Constitution)[57].

In this regard, the Italian Constitutional Court, in its decisions n. 37/2021[58] declared the unconstitutionality of a regional law by which the Valle d'Aosta established several measures to contain the pandemic[59]. In other words, the Constitutional Court reaffirmed the full legitimacy of the State power to adopt legislation and coordinate activities related to the

sentenza della Corte sulla Valle d'Aosta: come un bisturi nel burro delle competenze (legislative) regionali, in "Federalismi", 21 April 2021; M. Bordignon and G. Turati, *Chi comanda in pandemia*, in "Lavoce.info", 2 March 2021. In general, see E. Alber, *Action and reaction: What Covid-19 can teach us about Italian regionalism*, 29 May 2020, in https://uacesterrpol.wordpress.com/2020/05/29/action-and-reaction-what-covid-19-can-teach-us-about-italian-regionalism/ and E. Lamarque and L. Giacomelli, *The Italian Constitutional Court and the Pandemic. A National and Comparative Perspective*, in E. Hondius, M. Santos Silva, C. Wendehorst, P. Coderch, A. Nicolussi and F. Zoll (eds.), *Coronavirus and the Law in Europe*, 2020, Intersentia.

[56] Art. 117.3: "Concurring legislation applies to the following subject matters: […] health protection […] In the subject matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation".

[57] The Italian Constitution in English is available on the site of the Italian Presidency of the Republic https://www.quirinale.it/allegati_statici/en/costituzione_inglese.pdf.

[58] Corte Costituzionale, sentenza 24 February 2021, n. 37, available at https://www.cortecostituzionale.it/actionPronuncia.do.

[59] Regional Law Valle d'Aosta, 9 December 2020, n. 11, *Misure di contenimento della diffusione del virus SARS-COV-2 nelle attività sociali ed economiche della Regione autonoma Valle d'Aosta in relazione allo stato di emergenza.*

management of the pandemic, even when this would imply limitations in fields of otherwise regional competences.

The recourse of the Italian Government to the Constitutional Court was motivated with reference to a number of constitutional provisions; art. 117.2(q) (which indicates, as already mentioned, the exclusive legislative power of the State in matter of "international prophylaxis"); art. 117.2(m) (which indicates the exclusive legislative power of the State in matters of "determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory"); art. 117.3 (which gives to the State – in the framework of the concurring legislation – the competence on "determination of the fundamental principles"); and finally, art. 118 Cost. (which establishes the principles of subsidiarity by requiring that administrative functions are carried out at the most immediate level that is consistent with their resolution, it depends on the interested level of government).

Moreover, the Italian Government has also complained about a violation of the principle of loyal co-operation[60] between levels of government (art. 120.2 Italian Constitution): the regional law would have encroached upon competences of the State related to the sole management of the crisis by adopting its own measures intended to tackle the pandemic.

After an *interim* measure[61], the Constitutional Court ruled that in the matter of the contested regional Law, there is a legislative and exclusive competence of the State, with special reference to the mentioned "international prophylaxis", which includes any measures

[60] See, on a related aspect, G. Falcon and D. de Pretis, *'Loyal Cooperation': Italian Regions and the Creation and Implementation of European Law*, in R. Scully and R.W. Jones (eds), *Europe, Regions and European Regionalism*, Palgrave Studies in European Union Politics, 2010, Palgrave Macmillan.

[61] Corte Costituzionale, ordinanza 14 January 2021, n. 4 del 2021, at https://dait.interno.gov.it/territorio-e-autonomie-locali/legittimita-costituzionale/legge-regionale-valle-daosta-del-9-dicembre

to combat or prevent an ongoing health pandemic[62], also with regard to the WHO declaration of the *Public Health Emergency* dated 30th January, 2020.

At this point, a couple of remarks may be conclusively made.

Firstly, there is no doubt that regional performances in matters of health protection in Italy are and have been characterized by relevant inequalities[63] by exacerbating during the pandemic the structural asymmetry which comes from the National Health System itself. On the other hand, the pandemic has expressed unpredictable impacts, as in the case of the excellent regional health system of Lombardy, which has expressed all its fragility[64]. This has produced a context in which the sole management of the fight against the pandemic is really crucial as well as complex: let us think, in this regard, to the whole chain of activities related to the vaccination campaign.

Secondly, despite the clarity and the relevance of the Constitutional Court decision, it is reasonable to assume that the matter will continue to be sensitive and critical, far from being solved: Governors of the Italian Regions are politicians strongly dependent by political communication and the pandemic represents a too relevant opportunity, in the light of political consensus, for them to stay out of the game. In this perspective, the system may be viewed as affected by internal conflict and misalignements. There are too many political

[62] Corte Costituzionale, sentenza 24 February 2021, n. 37 cit., considerando 7: "ogni misura atta a contrastare una pandemia sanitaria in corso, ovvero a prevenirla".

[63] On this aspect see the VIII Report Cittadinanzattiva, Osservatorio civico sul federalismo in sanità, *Disuguaglianze regionali su prevenzione, assistenza ospedaliera e territoriale*, 8 December 2020, available at https://www.insalutenews.it/in-salute/disuguaglianze-regionali-su-prevenzione-assistenza-ospedaliera-e-territoriale-report-di-cittadinanzattiva/.

[64] P.S. Goodman and G. Pianigiani, *Why Covid Caused Such Suffering in Italy's Wealthiest Region. Lombardy has been overwhelmed by the pandemic, in part because of a poorly executed medical privatization program*, Nov 10, 2020, in https://www.nytimes.com/2020/11/19/business/lombardy-italy-coronavirus-doctors.html.

incentives to intervene and adopt regional measures in the presence of constitutional and practical conditions which would require the primacy of the State and central decision-making.

7. COOPERATION AND TRUST AT THE HEART OF THE RESPONSE TO THE PANDEMIC.

Current times may be considered times of "tragic choices"[65]. A first aspect of this tragedy concerns regulation and decision-making which are based on limited and uncertain knowledge. A second aspect regards rules and decisions which must be made in a short time in order to be timely.

All areas of administration are interested in the tragedy, though some more than others. In health care, the choice may be prioritising patients with the best chance of survival[66] or using restricted diagnostic or serological testing[67] possibilities[68] or, even, defining priorities in the vaccination campaign. In business regulation, the decision may involve

[65] G. Calabresi, P. Bobbit, *Tragic choices*, Norton & co., 1978.

[66] A. Remuzzi and G. Remuzzi, *COVID-19 and Italy: what next?*, in "The Lancet", March 13, 2020, in https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30627-9/fulltext.

[67] Imperial College COVID-19 response team, *Report 16: Role of testing in COVID-19 control*, 23 April 2020, in http://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-16-testing/.

[68] OECD, *Tackling Coronavirus (Covid-19). Contributing to a global effort, Regulatory Quality and COVID-19: Managing the Risks and Supporting the Recovery*, Note by the Secretariat in consultation with the Chairs and the Bureaus of the Regulatory Policy Committee and the Network of Economic Regulators, 2020, p. 4, in http://www.oecd.org/regreform/regulatory-policy/Regulatory-Quality-and-Coronavirus%20-(COVID-19)-web.pdf.

restrictive regulation[69] by defining which factories (or when factories) can reopen. In social regulation, decisions regard limiting freedoms of movement and economic activities[70] or addressing subsidies for one social category over others or, even, how long restrictions on high school attendance must remain in place.

In this "tragic" situation an intangible factor may increase the effectiveness of rules as well as possibly protecting and supporting businesses and social categories: this factor is trust, to be intended (firstly) as trust in institutions.

In fact, *trust in institutions*[71] is normally associated with higher degrees of compliant behaviour[72] and a discourse on quality of regulation, enforcement and effectiveness of rules adopted to fight the pandemic includes necessarily trust. Trust, in other words, is an intangible but incredibly relevant factor for regulatory effectiveness.

In April 2020 a survey showed that Italians were more trusting of national institutions today than in the past, while ever less so of European ones[73]. This really was bad

[69] C. Coglianese, *Obligation Alleviation During the COVID-19 Crisis*, in "The Regulatory Review", April 20, 2020, in https://www.theregreview.org/2020/04/20/coglianese-obligation-alleviation-during-covid-19-crisis/.

[70] D.M. Studdert and M.A. Hall, *Disease Control, Civil Liberties, and Mass Testing. Calibrating Restrictions during the Covid-19 Pandemic* cit.

[71] See J. Domenicucci, *Trusting Institutions*, in "Rivista di estetica", n. 68, 3, 2018.

[72] See, for example, European Commission Communication on *Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness*, IP/12/220, 2012. On this point see J. Braithwaite and T. Makkai, *Trust and compliance*, "Policing & Society", 4, 1, 1994 and C. Hodges and R. Steinholtz, *Ethical Business Practice and Regulation. A Behavioural and Values-Based Approach to Compliance and Enforcement*, Hart/Beck, 2018, p. 77-78.

[73] Demopolis, *Italy in time of Covid19*, 14-15 April 2020, in https://www.demopolis.it/?p=7381.

news[74] because trust is at the centre of the Covid19 "war-like mobilization"[75]. The problem has affected Governments trusting experts[76] and the private sectors[77]; people trusting Governments and experts[78]; trust between regulators at different level of government[79] and so on.

Of particular relevance is trust in the case of vaccination campaigns, which really is a "hot topic" for health care systems in Europe[80]. In Italy, public confidence in vaccines has seemed to increase compared to the past[81]: in September 2020 the Vaccine Confidence

[74] G. Dominioni, A. Quintavalla and A. Romano, *Trust spillovers among national and European institutions*, in "European Union Politics", 2020, in https://journals.sagepub.com/doi/full/10.1177/1465116519897835.

[75] G.P. Pisano, R. Sadun and M. Zanini, *Lessons from Italy's Response to Coronavirus*, cit.

[76] T. Yates, *Why is the government relying on nudge theory to fight coronavirus?*, in "The guardian", March 13, 2020, in https://www.theguardian.com/commentisfree/2020/mar/13/why-is-the-government-relying-on-nudge-theory-to-tackle-coronavirus.

[77] Edelman Trust Barometer, *Special Report on Covid-19, Trust and the Coronavirus,* 2020, in https://www.edelman.com/research/edelman-trust-covid-19-demonstrates-essential-role-of-private-sector.

[78] T. Peck, *Just a day after Johnson told us to keep calm, we've gone into self-imposed lockdown. Was that the plan all along?*, in "Independent", March 13, 2020, in https://www.independent.co.uk/voices/coronavirus-uk-boris-johnson-chris-whitty-lockdown-travel-restrictions-a9400461.html.

[79] E. Golberg, *Regulatory Cooperation to Combat Public Health Crises*, in "The Regulatory Review", April 27, 2020, in https://www.theregreview.org/2020/04/27/golberg-regulatory-cooperation-combat-public-health-crises/.

[80] World Health Organization, *Vaccination and Trust*, 2017. See also E. Lalumera, *Trust in health care and vaccine hesitancy*, "Rivista di estetica", n. 68, 105, 2018.

[81] A. de Figueiredo et al., *Mapping global trends in vaccine confidence and investigating barriers to vaccine uptake: a large scale retrospective temporal modelling study*, in "The Lancet", September 11, 2020: "However, confidence in vaccine safety is increasing in several countries, including Finland, France, Italy, and Ireland (as well as the UK)", in https://medicalxpress.com/news/2020-09-largest-global-vaccine-confidence-survey.html.

Project reported[82] that 77.4% of Italians "would use a Covid19 vaccine". On the other hand, the most recent public sentiment about vaccination indicates that a large majority of Italians think that vaccines deserve confidence but also that problems are related to lack of clarity in communication regarding vaccines (with special concern to the Astra Zeneca vaccine)[83]. This risk of decline in confidence suggests that communication and good information are essential to tackling a pandemic[84].

7. THE NATIONAL RECOVERY AND RESILIENCE PLAN AND BEYOND.

Following a first version presented by the former Government, at the end of April 2021 the Italian Government approved the Recovery and Resilience Plan which defines the integrated set of investments and reforms necessary to overcome the economic and social impact of the pandemic. The Plan mobilizes funds coming from EU Next Generation program which will be complemented by other funds, part of which are earmarked for

[82] *Issues in ensuring COVID-19 vaccine compliance*, 16 September 2020, in https://www.smokefreeworld.org/issues-in-ensuring-covid-19-vaccine-compliance/: "whether people's willingness to use a COVID-19 vaccine and adopt other preventive healthcare measures was associated with trust […] With the exception of China, India, and Indonesia, most respondents had relatively low levels of trust in their national government, but most of the respondents said they trusted the medical profession. Trust in both entities, but especially in the medical profession, was generally higher among those who said they would get vaccinated".

[83] WHO, *Vaccination and trust. How concerns arise and the role of communication in mitigating crises*, 2017. See also E. Rodriguez Mega, *Trust in COVID vaccines is growing. Survey spanning several countries finds encouraging trends, but researchers warn vaccine hesitancy could slow pandemic recovery*, 10 February 2021, in https://www.nature.com/articles/d41586-021-00368-6.

[84] The Full Fact Report 2021, Fighting a pandemic needs good information, January 2021, in https://fullfact.org/media/uploads/full-fact-report-2021.pdf. See also M. Scott, *Trust in AstraZeneca vaccine wanes across EU, survey finds*, March 22, 2021, in https://www.politico.eu/article/trust-oxford-astrazeneca-coronavirus-vaccine-wanes-europe-survey/.

Southern Italy, intended "to unleash Italian growth potential, to generate a strong upturn in employment, to improve the quality of work and services for citizens and territorial cohesion and to promote the ecological transition"[85].

The Plan is articulated in investments and reforms aiming "to strengthen competitiveness, reduce bureaucratic burdens and remove constraints that have slowed down investments or reduced their productivity"[86].

The NRRP consists in 6 missions, which in turn group 16 components and 48 lines of intervention. In particular, the six missions are: *Digitisation, Innovation, Competitiveness and Culture*[87]*; Green Revolution and Ecological Transition; Infrastructure for sustainable mobility; Education and research; Inclusion and Cohesion; Healthcare system*.

There is large agreement on the fact that the most critical aspect of the Plan regards the administrative factors and that this will strongly influence the success of different missions (and of the plan itself). In this regard, the NPRR has an entire chapter dedicated to administrative reforms, the real Italian way to respond to the pandemic crisis. Four reform priorities are indicated, some being "horizontal" administrative reforms (public administration and justice), others as "enabling reforms" (simplification of legislation and competition promotion).

Several kinds of simplification are considered in the plan: simplification of legislation and simplification of regulation in matters of: public procurement, environment,

[85] This part is related to the previous version of the plan, https://www.mef.gov.it/en/focus/The-Recovery-and-Resilience-Plan-Next-Generation-Italia/, February 9, 2021.

[86] https://www.mef.gov.it/en/focus/The-Recovery-and-Resilience-Plan-Next-Generation-Italia/.

[87] Ibid.: "modernisation objectives through a digital revolution in Public Administration and the production system, systemic reforms (Justice system and Public Administration) and investments in tourism and culture".

building, urban planning and urban regeneration, investments in Southern Italy by establishing also the governance of simplification; on quality of regulation. Moreover, the plan introduce a relevant objective of regulatory anticorruption[88] by requiring the reform or the abrogation of rules which incentivize cases of corruption, a very important aspect, even still underestimated. Furthermore, the plan aims at strengthening the administrative capability to manage all the administrative steps related to the expenditure of the recovery funds. Finally, according to the usual and frequently repeated OECD recommendations, a specific section of the reform chapter is dedicated to the promotion of competition, with special regard to the annual law for competition.

The Plan is ready, its governance is in course of definition, money is coming from the EU. In this context, is Italy (un)prepared to manage the challenge[89]?

[88] On this point see M. D'Alberti, *Combattere la corruzione. Analisi e proposte*, Rubbettino, 2016, p. 12; M. De Benedetto, *Understanding and preventing corruption: a regulatory approach*, in A. Cerrillo-i-Martínez, J. Ponce (eds.), *Preventing Corruption and Promoting good Government and Public Integrity*, Bruylant, 2017; see also M. De Benedetto, *Corruption from a regulatory perspective*, Hart Publishing, forthcoming.

[89] I. Bosa, A. Castelli, M. Castelli, O. Ciani, A. Compagni, M. Galizzi, M. Vainieri, *Response to COVID-19: Was Italy (un)prepared?*, in "Health Economics, Policy and Law", 2021, p. 1, in https://www.cambridge.org/core/journals/health-economics-policy-and-law/article/response-to-covid19-was-italy-unprepared/7946552DE995F34E06F426BCBEF494A5.

The problem, once again, may be configured in terms of trust which only will make possible the indispensable cooperation: without trust it will be very difficult (or much more complicated) to achieve compliance with reforms and results[90].

However, Italian administrations have long been stuck in their procedures, by combining different kinds of fear, i.e. of financial responsibility, regarding anticorruption regulation, of possible reputational damages, and fear of litigation. They are blocked by a climate of suspicion and behave according to defensive administration[91].

Changing these widespread administrative behaviours includes repairing trust in public officers, in citizens, in businesses and finally, restoring confidence among public officers themselves, at every level of government. This would mean taking off the handbrake

[90] Let's give an example regarding a research project intended to verify the use of health care information system based on the Health Card which collects for each citizen medical prescriptions regarding medicins, diagnostic testing and specialist visits. The Health Card system has been introduced as a tool for monitoring health care expenditure. However, these available data may be very interesting as an informative source to monitor *ex ante* and predict events via early warning, maybe as the pandemic itself. Alert indicators may contribute to develop administrative recommendations. The research project was developed by a University Department in the context of a cooperation with the OECD project RAC (Rating Audit Control). The problem in developing the project has been the impossibility to access to relevant data which are managed by the General Accounting Department (*Ragioneria Generale dello Stato*) in the Italian Ministry of Economic Affairs. The research has been blocked.

[91] On defensive decision-making see F. Artinger, S. Artinger and G. Gigerenzer, *C. Y. A.: frequency and causes of defensive decisions in public administration*, in "Business Research", 10, 2018: defensive decisions "occur when professionals opt for the second-best option rather than (what they believe to be) the best option for their organization or client in order to protect themselves from potential negative consequences in the future". See also B.E. Ashforth and R.T. Lee, *Defensive behavior in organizations. A preliminary model*, in "Human Relations", 43, 7, 1990, p. 621. Regarding the Italian case, see S. Battini and F. Decarolis, *L'amministrazione si difende*, in "Rivista Trimestrale di Diritto Pubblico", 1, 2019, p. 293.

and starting the process. This must be the first decisive step towards Italian recovery and resilience, and is clearly preferable to mere spending money.

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THE PRINCIPLE OF PROPORTIONALITY ON PUBLIC PROCUREMENT

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INDEX

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1. INTRODUCTION

The principle of proportionality is one of the most ancient principles that operate in the field of Administrative law. According to Braibant, it is no more than the application of a rule of common sense to the Public Administration.[2] Traditionally it has been used as an instrument to control the discretionary powers of public authorities, assessing that their actions do not involve excessive harm for the citizens.[3] One of the most characteristic features of the principle of proportionality, which makes it special in comparison with other general principles, is the existence of an internal structure composed of three sub-principles or levels of scrutiny (suitability, necessity, and proportionality *stricto sensu*). They apply in a successive and staggered manner, so that the measure at issue should pass each level of scrutiny before it can move on to the next.

[2] Braibant, G. (1974) "Le principe de proportionnalité". In *Le Juge et le Droit Public. Mélanges offerts a Marcel Waline*, vol. II, Paris, p. 298.

[3] Barnes, J. (1994) "Introducción al principio de proporcionalidad en el Derecho comparado y comunitario". *Revista de Administración Pública*, 135, pp. 495-538; Galetta, D. (2015) "General Principles of EU Law as Evidence of the Development of a Common European Legal Thinking: The Example of the Proportionality Principle (from the Italian Perspective)". In *Common European Legal Thinking: Essays in Honour of Albrecht Weber* (Dir. Hermann-Josef Blanke; Pedro Cruz Villalón; Tonio Klein; Jacques Ziller), Switzerland: Springer, pp. 221-242.

To begin with, any measure that involves a restriction of the citizens' rights and interests should be suitable to achieve the pursued objective (*suitability test*). If the measure is suitable, then it is time to examine whether it is also necessary given that there is no other alternative solution that is less harmful to the citizen and equally suitable to achieve that objective (*necessity test*). In the event that it also complies with this second requirement, it will be subject to a balancing exercise under the proportionality *stricto sensu* test to verify whether it entails more benefits for the public interest than rights' restrictions for the citizens.[4]

On this basis, this paper aims to analyse the role of the principle of proportionality on public procurement. This sector is particularly favourable for the application of this parameter since most of the decisions adopted within the procurement procedure result from the exercise of discretionary powers by contracting authorities. The competitive nature of public tendering implies that public sector entities' actions may have harmful effects on tenderers. Besides, the multiple objectives and interests involved in public procurement, both at the European and national levels, demand the use of this principle to achieve a proper balance between them. This is particularly relevant when including environmental, social, and innovation-related policies as goals of the procurement.

Considering the essential features of the principle of proportionality, it can be claimed that it applies when a decision made by a contracting authority entails a real prejudice to one or more economic operators within a procurement procedure. Furthermore, the evolution of general principles in the last decades supports the use of this parameter as a guideline that should be observed by contracting authorities at the different stages of the procedure, contributing to a more rational public action.[5] Despite its relevance in protecting economic

[4] Schlink, B. (2012) "Proportionality (1)". In *The Oxford Handbook of Comparative Constitutional Law* (Eds. Michel Rosenfeld; András Sajó), Oxford: Oxford University Press, pp. 718-737.

[5] Hoffmann-Riem, W., Schmidt-Assmann, E. (2006) *Grundlagen des Verwaltungsrechts*. Vol. I, München: C.H. Beck, pp. 691-692.

operators and conciliating general principles and objectives, the role of the principle in this arena has not been sufficiently explored in the literature. We aim to provide a general overview of the requirements of this principle and its impact on the various stages of a public contract.

In doing so, we will first examine the origin of the principle of proportionality in EU primary law and its use by the CJEU as a mechanism to assess whether a restriction of the freedoms of the TFEU is legally admissible. In the second section, we will reflect on the consolidation of this principle in Article 18(1) of Directive 2014/24,[6] and in this regard we will suggest three main arguments that might justify its explicit recognition on public procurement law and explore the implications for public authorities (both legislator and contracting entities). In the subsequent section, we will focus on the main expressions of the principle in the different stages of the procurement procedure, which requires an interpretation of the mentioned Directive and the practice of contracting authorities. The paper will end with a set of conclusions and recommendations for an effective application of the principle.

2. THE PRINCIPLE OF PROPORTIONALITY AS A LIMIT TO RESTRICTIONS OF THE FREEDOMS OF THE TFEU

The principle of proportionality, as a general principle of EU law, plays a prominent role in the interpretation of the Public Procurement Directives.[7] Rooted in the Treaty on the

[6] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJEU L94, 28.3.2014).

[7] Moreno Molina, J.A. (2006) *Los principios generales de la contratación de las Administraciones Públicas*. Albacete: Ed. Bomarzo, p. 19; Esteves De Oliveira, R. (2010) "Os princípios gerais da contratação pública". In *Estudos de Contratação Pública I* (Dir. Pedro Gonçalves), Coimbra: Centro de Estudos de Direito Público e Regulação, p. 51.

Functioning of the European Union (TFEU)[8], it operates as a shield to protect the principles and freedoms on which it is based and avoid any restriction thereof by the Member States which go beyond what is necessary to satisfy the legitimate reason that justifies it.[9]
From its earlier decisions, the Court of Justice of the European Union (CJEU) has held that any restriction to the freedoms of the TFEU should be for a legitimate reason and meet the requirements of the principle of proportionality.[10] Although this demand is not expressly outlined in the provisions of the Treaty, it has been deduced from the last sentence of Article 36, which states that such restrictions 'shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'[11] This provision provided a basis for an extensive body of case-law, which has evolved to place our principle as 'the most important general principle of the communitarian law.'[12]

[8] Consolidated version of the Treaty on the Functioning of the European Union [OJEU C 202, 7 June de 2016].

[9] Schwarze, J. (1991) *European Administrative Law*, London: Office for Official Publications of the European Communities, p. 773.

[10] Trybus, M. (2010) "Public contracts in European Union internal market law: Foundations and requirements". In *Droit compare des Contracts Publics* (Dir. Rozen Noguellou; Ulrich Stelkens), Brussels: Bruylant, pp. 91-92.

[11] Craig, P. (2006) *EU Administrative Law*. Oxford: Oxford University Press, p. 688; Harbo, T. (2015) *The function of proportionality analysis in European Law*. Leiden: Brill Nijhoff, pp. 21-22.

[12] Gündisch, J. (1983) "Allgemeine Rechtsgrundsätze in der Rechtsprechung des Europäischen Gerichtshofs". In *Das Wirtschaftsrecht des Gemeinsamen Marktes in der aktuellen Rechtsentwicklung* (Dir. Jürgen Schwarze), Baden-Baden: Nomos, pp. 97 et seq.; Schlink, B. (1976) *Abwägung im Verfassungsrecht*. Berlin: Duncker und Humblot, p. 459.

The CJEU has assumed the internal structure of the principle of proportionality,[13] so that – at least from a theoretical perspective – those restrictions should comply with the three sub-principles: suitability, necessity, and proportionality *stricto sensu*. In practice, however, the Court applies this principle in a flexible manner, giving greater or lesser importance to each of these tests depending on the circumstances of the case.[14] When it comes to assessing the conformity of national measures with the provisions of the TFEU, the Court generally structures the proportionality analysis around the suitability and necessity tests, saving the proportionality *stricto sensu* for those cases that require a higher level of control.

In the first instance, the CJEU assesses whether the national measure is suitable for securing the attainment of the pursued objective. Although there are not many cases in which the declaration of disproportionality of the measure is based on the application of the suitability test, its effectiveness was confirmed in *Contse*.[15] In this case, the Court declared two of the criteria for the supply of services of home respiratory treatments and other assisted breathing

[13] The internal structure of the principle of proportionality can be clearly perceived in the Judgement of the CJEU of 13 November 1990, *Fedesa*, case C-331/88, ECLI:EU:C:1990:391, which states that: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued" (at 13).

[14] Harbo, n. 11, p. 22.

[15] Judgment of the CJEU of 27 October 2005, *Contse*, case C-234/03 ECLI:EU:C:2005:644, at 53 et seq. In the same line, Judgement of the CJEU of 27 October 2005, *Commission v Spain*, case C-158/03, ECLI:EU:C:2005:642, at 67 et seq.

techniques in the Spanish provinces of Cáceres and Badajoz to be disproportionate. It understood that an admission condition requiring an economic operator, at the time the tender is submitted, to have an office open to the public is clearly disproportionate. This condition was irrelevant to achieve the objective of better ensuring the protection of the life and health of patients. The same conclusion was reached in relation to an evaluation criterion that awarded extra points for the existence, at the time the tender is submitted, of oxygen production in plants situated within 1.000 kilometres of the province where the service will be provided.

Then, the Court focus on the core element of the proportionality analysis in EU law: the necessity test, also known as the "less restrictive alternative test".[16] According to this test, the national measures will only be justified if the interest pursued cannot be protected by less restrictive means for the common market. In other words, if a Member State can choose between various means which are equally suitable to achieve the goal, it has to opt for the one which is less harmful to the community interests.[17] The existence of less restrictive measures is not always assessed in a visible manner but, in most cases, the CJEU merely notes that the measure is not necessary or – in its own words – goes 'beyond what is necessary' to achieve a specific objective.[18]

[16] Tridimas, T. (1996) "The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration". *Irish Jurist*, 31, p. 85.

[17] See, among many others, Judgment of the CJEU of 10 November 1982, *Walter Rau Lebensmittelwerke v De Smedt PVBA*, case 261/81, ECLI:EU:C:1982:382, at 12; and Judgment of 14 July 1988, *Glocken and Others v USL Centro-Sud and Others*, case 407/85, ECLI:EU:C:1988:401, at 10. On the field of public procurement, see Judgment of 11 September 2008, *Commission v Germany*, case C-141/07, ECLI:EU:C:2008:492, at 50; and Judgement of 8 June 2017, *Medisanus*, case C-296/15, ECLI:EU:C:2017:431, at 94.

[18] Judgment of the CJEU of 19 May 2009, *Assitur*, case C-538/07, ECLI:EU:C:2009:317, at 23; Judgement of 22 October 2015, *Impresa Edilux*, case C-425/14, ECLI:EU:C:2015:721,

When it carries out this analysis explicitly, usually takes as alternatives the options provided by the parties or even by the Advocate General in his or her Opinion. For instance, in *Borta* the Court claimed that a provision banning the subcontracting of those works qualified as "main works" by the contracting authority, which applies regardless of the economic sector concerned and does not allow for an assessment on a case-by-case basis, is unnecessary for the proper execution of the works.[19] In order to justify this decision, it brought up the existence of a less restrictive measure that was suggested by the Advocate General in her Opinion.[20] It consists of requiring tenderers to specify in the tender the part of the contract which they intend to subcontract, as well identifying proposed subcontractors and demonstrating that those subcontractors are suitable for carrying out the tasks.

The fact that the European case-law focuses on the sub-principles of suitability and necessity does not preclude that, in particularly complex cases, it carries out a balancing exercise that reminds us of the subprinciple of proportionality *stricto sensu*. This was the case in *Medipac*[21], where the award procedure for the supply of surgical sutures was suspended to apply the safeguard procedure provided for by Articles 8 and 18 of Directive 93/42 concerning medical devices bearing the CE marking. The contracting authority had doubts concerning the technical reliability of the sutures proposed by the company Medipac and considered that, despite bearing the CE marking, their use might pose risks for patients.

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at 29; and Judgement of 28 February 2018, *MA.T.I.*, joined cases C-523/16 and C-536/16, ECLI:EU:C:2018:122, at 53.

[19] Judgment of the CJEU of 5 April 2017, *Borta*, case C-298/15, ECLI:EU:C:2017:266, at 53-58.

[20] Opinion of AG Eleanor Sharpston delivered on 1 December 2016 in *Borta*, ECLI:EU:C:2016:921, at 51.

[21] Judgment of the CJEU of 14 June 2007, *Medipac*, case C-6/05, ECLI:EU:C:2007:337, at 60-62.

The CJEU, being aware of the severe consequences of a lack of supply during the period of the suspension, allowed the adoption of such measures that were necessary to ensure the proper running of the hospital, even if they restrict the free movement of goods. Although in this case it did not carry out an explicit proportionality analysis given the absence of a specific national measure, it assessed the potential costs and benefits before deciding in favour of protecting public health. To reach that point, the Court followed the proposal of the Advocate General of using direct negotiations to procure a limited interim supply of essential medical devices.[22] As in this situation, in most cases where the Court uses this sub-principle, it is necessary to read between the lines to find the balancing of the conflicting interests.

3. THE CODIFICATION OF THE PRINCIPLE OF PROPORTIONALITY IN DIRECTIVE 2014/24

The consolidation of the principle of proportionality as a cornerstone of the public procurement system has been a slow process that culminated in its recognition in the latest generation of Directives. Article 18(1) of Directive 2014/24 states the duty of contracting authorities to '*act in a … proportionate manner*'. Although the previous Directives in the field did not expressly mention this principle, the idea of giving a proportionate treatment to economic operators has been embedded in the European case-law. In this vein, the CJEU has considered that this principle was latent in Directive 2004/18[23] and was to be applied, in a

[22] Opinion of AG Eleanor Sharpston delivered on 21 November 2006 in *Medipac*, ECLI:EU:C:2006:724, at 118-119.

[23] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJEU L134, 30.04.2004).

general way, to procurement award procedures.[24] Indeed, it has frequently used this principle to verify that the action of the Member States does not go beyond what is necessary to achieve the aim pursued, in relation with such significant aspects as the exclusion of tenderers,[25] the criteria for qualitative selection[26] or the evaluation of tenders.[27]

A clear example of the application of the principle of proportionality, even prior to 2014, was the judgment of the CJEU in *Michaniki.*[28] In this case, the Court analysed the compliance

[24] Judgment of the CJEU of 14 December 2016, *Connexxion Taxi*, case C-171/15, ECLI:EU:C:2016:948, at 32. See also Arrowsmith, S. (2014) *The Law of Public and Utilities Procuremen*t. Vol. I, 3rd Ed., London: Sweet & Maxwell, pp. 631-632; Steinicke, M., Vesterdorf, P. L. (2018) *EU Public Procurement Law*. Baden-Baden: Nomos, pp. 326-328.

[25] Judgment of the CJEU of 23 December 2009, *Serrantoni*, case C-376/08, ECLI:EU:C:2009:808; Judgement of 10 July 2014, *Consorzio Stabile*, case C-358/12, ECLI:EU:C:2014:2063; Judgement of 22 October 2015, *Impresa Edilux*, case C-425/14, ECLI:EU:C:2015:721; and Judgement of 8 February 2018, *Lloyd's of London*, case C-144/17, ECLI:EU:C:2018:78.

[26] Judgment of the CJEU of 18 October 2012, *Észak-dunántúli*, case C-218/11, ECLI:EU:C:2012:643; Judgement of 2 June 2016, *Pippo Pizzo*, case C-27/15, ECLI:EU:C:2016:404; Judgement of 7 July 2016, *Ambisig*, case C-46/15, ECLI:EU:C:2016:530; and Judgement of 8 September 2016, *Domenico Politanò*, case C-225/15, ECLI:EU:C:2016:645. See also Judgement of the General Court of 10 November 2017, *Jema Energy*, case T-668/15, ECLI:EU:T:2017:796.

[27] Judgment of the CJEU *Commission v Spain*, n. 15; Judgement *Contse*, n. 15; and Judgement of 20 September 2018, *Montte*, case C-546/16, ECLI:EU:C:2018:752.

[28] Judgement of the CJEU of 16 December 2008, *Michaniki AE*, case C-213/07, ECLI:EU:C:2008:731.

with European law – particularly with Directive 93/37/EEC[29] – of a Greek provision which established a system of general incompatibility between the public works sector and the media sector, so that people involved in the latter as owner, main shareholder, partner or management executive should be excluded from the procedure. This provision was justified by the need to avoiding risks of interference of the media in procedures for the award of public contracts, as well as preventing fraud and corruption.[30]

After recognising the discretion of the Member States to take action to preserve the principles of equal treatment and transparency, the Court claimed that these measures would only be valid if they meet the requirements of the principle of proportionality.[31] In its opinion, the provision at issue was disproportionate because it had the consequence of excluding from the award procedure to a whole business sector without giving the economic operators the possibility of proving that there was no real risk of compromising the mentioned principles.[32]

The increasing use of the principle of proportionality in the interpretation and application of public procurement law, where it operates as a boundary to the discretion of the Member States and their contracting authorities when it has harmful consequences for economic operators, made it necessary to give it more visibility at the legislative level. Several arguments might explain the decision of the European legislator to incorporate this principle in Directive 2014/24, but ultimately all of them point in the same direction: protecting the right of economic operators to participate in the procurement procedure.

The first argument in favour of codifying this principle is the willingness to *strengthen its role in the field of public procurement*. The presence of the principle in the body of the

[29] Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJEU L 199, 09.08.1993).

[30] STJUE *Michaniki*, n. 28, at 58.

[31] STJUE *Michaniki*, n. 28, at 61.

[32] STJUE *Michaniki*, n. 28, at 63.

Directive 2014/24 serves as a reminder to contracting authorities of their duty to act in a proportionate manner and, at the same time, increases its visibility. This regulation includes a number of innovations that clearly result from the application of the principle of proportionality and were implied prior to its approval.[33] Therefore, it can be claimed that the recognition of this principle confirms a tendency or line of thought that began years ago and is now consolidated by including it in the list of basic principles of public procurement. The reform of the public procurement system at the European level demands giving more prominence to such a ductile parameter, so that contracting authorities can have a wider range of options available to meet their needs without losing sight of the consequences that their decisions may have for tenderers' rights.

A second reason would be the function of the principle of proportionality as a *protective shield of the principle of competition against unjustified restrictions*. The simultaneous inclusion of both principles in the European regulation was not a mere coincidence, but rather an evidence of the close relationship that exists between them. An exam of the Directive's provisions shows that in most cases in which the principle of proportionality comes into play, it does so to ensure an effective competition between tenderers. In other words, it aims to prevent any restriction of the competition in the market that is not absolutely necessary to

[33] In 2011, the European Commission mentioned the convenience of setting a ceiling on the economic and financial standing required to economic operators in order to ensure the proportionality of the selection criteria and facilitate the access of SMEs to the market. Moreover, it criticised that Directive 2004/18 did not regulate self-cleaning measures that allow economic operators to remedy a negative situation that prevent them from contracting with the public sector, advocating for taking these measures into account to reach a balance between the grounds for exclusion and the observance of the principles of proportionality and equal treatment. It also rejected the automatic exclusion of companies that participated in the preparation of the contract because it is clearly disproportionate. See *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, 27 January 2011 (COM(2011) 15 final).

safeguard the other principles that discipline this field. In particular, the development of effective competition on public procurement is closely linked to the principle of equal treatment.[34] Giving equal treatment to economic operators is essential to ensure their access to the market under fair conditions and avoid eventual distortions of the competition. However, there are situations in which these principles conflict with each other and one of them should be limited for the realisation of the other. Then, the principle of proportionality intervenes to protect the weaker principle (generally the principle of competition) and prevent it from being so severely restricted as to be emptied out. In this scenario, the contracting authority should carry out a balancing exercise to determine which principle should prevail in the specific situation.

One situation where a conflict between the principles of competition and equal treatment may arise is the automatic exclusion of tenderers due to their participation in the preparatory works of the contract. On the basis of the principle of equal treatment, the economic operators that have assisted the contracting authority in the preparation of the contract should be excluded since they might have some information unknown to the other participants and take advantage of the situation to become a contractor. However, the application of the principle of proportionality reveals the existence of another measure that can likewise satisfy the principle of equal treatment and involves less harm for economic operators: giving the concerned tenderer the possibility of proving that the experience or knowledge acquired do not give him an advantage over its competitors.[35]

[34] Sanchez-Graells, A. (2015) *Public Procurement and the EU Competition Rules*. 2nd Ed., Oxford: Hart Publishing, pp. 227 et seq.; S. N. Inês, P.D.; (2018) *Os princípios da contratação pública: o princípio da concorrência*. Publicações CEDIPRE Online, 34, Coimbra, pp. 32-33.

[35] Judgement of the CJEU of 3 March 2005, *Fabricom*, joined cases C-21/03 and C-34/03, ECLI:EU:C:2005:127, at 23-36; and Judgement of the General Court of 27 April 2016,

The adoption of proportionate decisions during the procedure makes participation more appealing for economic operators (especially SMEs). This rise in competition allows contracting authorities to better meet their needs by getting better products at a lower price and contributes to achieving one of the main objectives of the Directives, i.e. the efficiency of public spending. Ultimately, an efficient spending results in a greater satisfaction of public interests.

The above reasoning leads to the third argument that supports the express recognition of the principle of proportionality: its status as an *instrument for reconciling the various objectives pursued by European public procurement law*. One of the main objectives of the 2014 Directives, along with ensuring the efficiency of public spending through effective competition, is to promote the strategic use of public procurement to support social, environmental or innovation-related policies. The inclusion of these "secondary or horizontal policies"[36] in the different stages of the procurement procedure enables contracting authorities to use their buying power to acquire goods and services with social value, such as the promotion of gender equality or the consideration of minorities, as well as steering economic operators' behaviour towards more sustainable and socially responsible business models. However, this strategic vision of public procurement shall observe the principle of competition and cannot constate a barrier to market access for SMEs.

The inclusion of social or environmental considerations generally demands the adoption of costly measures that might discourage companies to participate in the procurement procedure. A clear example of this is the implementation of an environmental management system to identify and control in an organised manner the impact of business activities on the

European Dynamics Luxembourg and Others, case T-556/11, ECLI:EU:T:2016:248, at 43-46.

[36] About this issue, Arrowsmith, S. (2010) "Horizontal Policies in Public Procurement: A Taxonomy". *Journal of Public Procurement*, 10(2), pp. 149-150.

environment.[37] This system implies starting up a range of measures, from using renewable energies or environmentally-friendly production processes to buying ecological office supplies, that might not be affordable for a significant number of companies. Contracting authorities may require economic operators to indicate the environmental management measures to be applied during the performance of the contract, as a mean to prove their technical abilities as referred to in Article 58 of Directive 2014/24 (see Annex XII, Part II, section g). In doing so, contracting authorities should carry out a proportionality analysis in order to verify whether the satisfaction of the specific horizontal police justifies an eventual distortion of competition in the market.[38] The aim is to verify that the requirements imposed do not go beyond the scope of the procurement procedure itself and/or entail such a restriction of competition that cannot be offset by the benefits derived from the satisfaction of these horizontal policies.

The principle of proportionality included in the public procurement Directives is a particularisation of the more general principle of proportionality which applies in EU law. It conditions the elaboration and subsequent application of the law by all public authorities. In the first place, it is the European legislator who must observe this principle when regulating the essential aspects of public procurement. On one hand, ensuring that the regulation does not go beyond what is necessary to achieve the proper functioning of the internal market. The

[37] Valcárcel Fernández, P., Gomez-Fariñas, B. (2018) "Criterios de solvencia y exigibilidad de certificados de gestión ambiental". In *Compra Pública Verde* (Dir. Ximena Lazo Vitoria). Barcelona: Atelier, pp. 79-101.

[38] Sanchez-Graells, A. (2016) "Truly Competitive Public Procurement as a *Europe 2020* Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?". *European Public Law*, 22(2), pp. 377-394. See also Andrecka, M. (2019) "Contracting Authorities and Strategic Goals of Public Procurement –A Relationship Defined by Discretion?". In *Discretion in EU Public Procurement Law* (Dir. Sanja Bogojević; Xavier Groussot; Jörgen Hettne), Oxford: Hart Publishing, pp. 117-137.

potential negative effects that the harmonisation of procurement procedures may have on the different Member States are countered by a "tool box" approach, allowing national authorities a maximum of flexibility in adapting the procedures and tools to their specific situation.[39] On the other hand, writing the provisions of the Directives in such a way that they are fully respectful with the principle of proportionality and make their application simple for contracting authorities. At the same time, national legislators have to take this principle into account when transposing the European provisions into their legal systems.[40] The national regulation on public procurement has to internalise the diverse expressions of the principle of proportionality established in the Directives, as well as designing a set of general criteria to support its effective realisation and combating those practices that may result in its violation.

At the application level, contracting authorities have to observe the expressions of the principle included in the Directives and interpret the regulatory provisions in line with the proportionality requirements.[41]. It is in this dimension where the principle reaches its climax, turning away from the abstract regulation and having the support of the concrete circumstances of the case. In other words, *the regulation on public procurement must be interpreted and applied according to the principle of proportionality*, so that award-related decisions do not hide actions that are excessively damaging to economic operators. To give

[39] European Commission (2011) *Proposal for a Directive of the European Parliament and of the Council on public procurement*. Brussels, 20.12.2011 (COM(2011) 896 final), p. 7.

[40] Jans, J.H. (2000) "Proportionality Revisited". *Legal Issues of Economic Integration*, 27(3), 2000, pp. 242-243.

[41] Barnes, J. (1998) "El principio de proporcionalidad. Estudio preliminar". *Cuadernos de Derecho Público*, 5, p. 28; Philippe, X. (1990 *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*. Marseille: Ed. Economica, pp. 82-87.

an example, in case that a contracting authority requires economic operators to have a minimum yearly turnover to prove their economic and financial standing, as a general rule this requirement cannot exceed two times the estimated contract value (Article 58.3 Directive 2014/24). Otherwise, the decision will be deemed as disproportionate. However, authorities shall also take into account the complexity and scope of the contract when determining the specific level of suitability in order to ensure that it is proportionate. It is important to point out that there is not a one-size-fits-all solution and the circumstances of the case play a key role when adopting the correct measure or imposing a specific requirement.

Traditionally the principle of proportionality has been conceived as a parameter used by the courts to control the discretion of public authorities and expel from the legal system those decisions that are absolutely disproportionate (negative dimension or "prohibition of excess"). It verifies that the decisions of contracting authorities do not result in such an intense restriction of the economic operators' rights that cannot be compensated with the advantages for the public interest. As a minimum standard, it does not seek to ensure that every company participating or wishing to participate in the procedure for the award of a public contract receive the most lenient treatment, but simply to disqualify those acts which do not meet the minimum level of proportionality required to be acceptable.

On the positive dimension, the principle of proportionality does look for the decision that best satisfies the public interest. It guides contracting authorities when writing up the contract specifications so that each of them individually considered results proportionate. At the same time, it is important to examine the clauses as a whole to ensure that the sum of all of them is not disproportionate because it imposes an excessive burden on economic operators, or favours one or more of them over the others. Indeed, the inclusion of disproportionate conditions in the tender documentation is one of the more frequent deficiencies when preparing the contract and it can jeopardise the success of the procedure. Furthermore, it also conditions the specific application of those clauses to each economic operator in view of the relevant circumstances.

4. THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY IN THE DIFFERENT STAGES OF THE PROCUREMENT PROCEDURE

The principle of proportionality, just like any other general principle of EU law, has a transversal character.[42] This means that contracting authorities must observe the requirements of this principle in all stages of the procurement procedure (preparation, award, and performance of the contract) in order to avoid any unnecessary restriction of the economic operators' rights. The various measures aimed at formalising the contract and ensuring its correct performance have to be consistent and under no circumstances can go beyond what is necessary to satisfy the public interest. This reasoning leads to an understanding of the procurement procedure as a *decision-making mechanism* that guides public entities towards a more rational performance and ensures that each decision is the most proportionate.[43]

This view of the procedure as a sequence of stages that follow one another over time is relevant to understand the impact of the principle of proportionality at the different moments in the life of a public contract. It will be greater or lesser depending on the intensity with which the action of the contracting authorities affect the rights of economic operators and, where appropriate, of the citizens as final users of the contracted service. In the following pages, we will focus on those aspects of the procurement procedure that are most controversial in practice since they may lead to disproportionate decisions. Concerning each of them, we will analyse the incidence of the principle of proportionality and how it has shaped the EU regulation on public procurement.

[42] Judgement of the CJEU of 12 December 2002, *Universale-Bau AG*, case C-470/99, ECLI:EU:C:2002:746, at 93; Judgement of 10 April 2003, *Commission v Germany*, joined cases C-20/01 and C-28/01, ECLI:EU:C:2003:220, at 36; and Judgement of 21 December 2011, *Chambre de commerce et d'industrie de l'Indre*, case C-465/10, ECLI:EU:C:2011:867, at 56.

[43] Barnes, J. (2008) "The meaning of the principle of proportionality for the administration". In *Constitutional Principles in Europe*, Societas Iuris Publici Europaei, Fourth Congress, Göttingen (Germany), p. 247.

4.1. Division of the contract into lots

One of the main problems for economic operators that want to participate in the award of a public contract is the excessive size of the contract, either due to the wide scope of the subject-matter or the duration. This circumstance makes it difficult for many companies (especially SMEs) to participate in the award procedure as they are not capable of submitting an offer for the whole contract, resulting in a considerable limitation of competition in the market.[44] While in some cases this negative effect on market dynamics is inherent to the nature of the good or service, in others we are facing a case of disproportionality of the public contract itself.

When analysing this issue, we should bear in mind that contracting authorities have a significant degree of discretion to design the subject matter of the contract according to their needs and in a manner that best serves the public interest. A public contract can be awarded to meet different purposes, from the satisfaction of public entities' basic needs (for instance, the supply of office equipment) to carrying out projects of great complexity and magnitude (such as building a new airport). For that reason, there is not a unique solution and the correctness of the contract should be analysed on a case-by-case basis. The decision of tendering a public contract as an indivisible unit or splitting it into several lots involves a component of technical discretion that must necessarily take into account the characteristics of the contract and the current market situation.

[44] European Commission (2008) *European code of Best practices facilitating access by SMEs to public procurement contracts*. Brussels, 25 June 2008 (SEC(2008) 2193), p. 7. In the literature, Trybus, M. (2014) "The promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?". In *Modernising public procurement: the new Directive* (Francois Lichere; Roberto Caranta; Steen Treumer), Copenhagen: DJØF Publishing, p. 262.

Given the consequences of this resolution for economic operators, contracting authorities should observe the principle of proportionality when using their discretion to determine whether the contract should be divided into lots.[45] As stated above, the larger the size of the contract, the fewer the number of companies that are qualified for its performance, which might dramatically constraint the range of options available to contracting authorities to meet their needs. From the supplier's perspective, it generally implies an important restriction of their right to bid for a public contract and become a contractor. It is worth noting, however, that the principle of proportionality does not pretend to guarantee that all companies have access to the public procurement market, which will depend to a large extent on their business approach, but simply that their right to participate in the tendering process is not limited beyond what is strictly necessary. In this vein, the contracting authority's decision concerning the scope of the contract may well be in line with the principle of proportionality even if it means that smaller companies are excluded from the market in that particular case. Whether it chooses to tender a large contract to take advantage of scale economies and achieve greater efficiency, or to divide it into smaller portions in order to increase the competition in the market, this decision must entail a benefit for general interests that can compensate for the harm caused to those economic operators whose expectations of access to the market have been frustrated.

Article 46(1) of Directive 2014/24 empowers contracting authorities to decide to award a contract in the form of separate lots and determine the size and subject-matter of such lots. Although this possibility already existed under Directive 2004/18, the current legislation mentions it expressly and regulates the conditions for using it. If the contracting authority decides not to divide the contract, it will need to explain main reasons in favour of that decision. This possibility of departing from the general rule is known as "divide or explain" [46], which means that public authorities have to follow the provision of the Directive unless

[45] Sanchez-Graells, n. 34, p. 264.

[46] This rule is an expression of the principle "comply or explain", according to which contracting authorities have the duty to comply with the general rule set in the law but, at the

they have good reasons not to do so.[47] It grants a convenient degree of flexibility to adapt the public action to the factual circumstances and the features of the specific contract.

From the perspective of the principle of proportionality, it can be claimed that in many cases the division of the contract into lots represents a *perfectly valid alternative* to the tendering of the entire contract as an indivisible unit, since it is less restrictive of the competition. This happens when the division into lots achieves the objective of satisfying the public need in an optimal manner, providing that it is possible in view of the nature of the good, work or service to be awarded and does not compromise the correct performance of the contract. In those cases, tendering such a large contract that results in the exclusion of most of the companies usually operating on the market is considered unnecessary and therefore disproportionate.

This principle also plays a relevant role in the design of the lots. The goal of ensuring a fair level of competition in the market without unduly sacrificing procurement efficiency

same time, have certain flexibility to depart from it when there are reason that justify so. This principle is frequently used, for example, in the British and Dutch legal systems. See Hebly, J.M., Meesters, J. (2014) "The proportionality principle in the Dutch Public Procurement Act". *European Procurement & Public Private Partnership Law Review*, 9(4), p. 268; Trybus, M., Andrecka, M. (2017) "Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?". *Public Procurement Law Review*, 3, p. 229.

[47] Assis Raimundo, M. (2018) "Aiming at the market you want: a critical analysis of the duties on division into lots under Directive 2014/24/EU". *Public Procurement Law Review*, 167, pp. 175-177. See also Anchustegui, I. (2016) "Division into lots and demand aggregation –extremes looking for the correct balance". In *Reformation or Deformation of the EU Public Procurement Rules* (Dir. Grith Skovgaard Ølykke; Albert Sanchez-Graells), Cheltenham: Edward Elgar Publishing, pp. 133-135

presuppose an adequate design of the lots.[48] It can be argued that the division of the contract into lots that are too large is not appropriate and may even distort the very nature of this figure, unless it is not feasible to divide it into smaller parts. On the other hand, it would be equally inappropriate to divide the subject matter of the contract into an excessive number of lots or lots of insignificant size if there is no reasonable justification to do so, as this could make it difficult to manage them separately and discourage economic operators from participating in the tendering procedure given the low profitability of the contract. It would lead to such a level of inefficiency that it could not be compensated by the increase in competition, and it may even be the case that companies would choose to increase the prices as a compensatory measure or that some lots would remain unawarded. This problem can be avoided if, from the beginning, the contracting authority carries out a suitable design of the lots in view of the features of the contract and market conditions.

4.2. Qualitative selection of tenderers

As a general rule, participation in award procedures is open to all economic operators who have legal capacity. Nevertheless, contracting authorities has the power to select the tenderers by considering their individual situation, so that only those who meet specific requirements (both positive and negative) will be able to celebrate a contract with the public sector. The "positive requirements" take into account companies' capacity, economic and financial situation, technical knowledge or professional competence. At the same time, public procurement law demands that the economic operator is not involved in certain situations that call into question his good reputation, such as criminal offences, dishonest practices, or other reprehensible circumstances ("negative requirements"). The aim is to ensure the

[48] Trybus, M. (2018) "The division of public contracts into lots under Directive 2014/24: minimum harmonisation and impact on SMEs in public procurement?". *European Law Review*, vol. 43(3), pp. 313-342.

contractor's suitability to take on the obligations arising from the contract, while at the same time avoiding contracting with unreliable or dishonest persons.

The non-compliance with any of the previous requirements has a clear consequence for economic operators: the exclusion of the award procedure. It means that they will neither be able to participate in this procedure nor submit their tenders. The exclusionary nature of the qualitative selection of tenderers makes it a favourable scenario for the application of the principle of proportionality since the decisions taken at this stage will have a direct impact on the economic operators' right to participate in the procedure.

In practice, contracting authorities show a disturbing tendency to include unnecessary or overly demanding selection criteria in the contract documents, with the consequently restrictive effects on competition.[49] Obviously the argument of pursuing a high level of competition is not enough on its own to justify contracting with companies that do not deserve the trust of the public authorities, but such a restriction on the access to the public procurement market should not go beyond what is strictly necessary to ensure the proper performance of the contract.[50] Indeed, this deficiency has been identified as one of the main barriers to SMEs participation in award procedures,[51] sometimes as a consequence of an

[49] Treumer, S. (2016) "Exclusion, Qualification and Selection of Candidates and Tenderers in EU Procurement". In *Qualification, Selection and Exclusion in EU Procurements* (Ed. Martin Burgi; Martin Trybus; Steen Treumer), Copenhagen: DJØF Publishing, pp. 15-16.

[50] Sanchez-Graells, n. 34, p. 247.

[51] Fana, M., Piga, G. (2013) "SMEs and public contracts. An EU based perspective". In *The Applied Law and Economics of Public Procurement* (Eds. Gustavo Piga; Steen Treumer), Oxon: Routledge, pp. 280 et seq. The European Commission has also highlighted this problem in various communications and working papers, such as *Public Procurement in the European Union*, 11 March 1998 (COM (98) 143 final), pp. 19-20; *European code of Best practices facilitating access by SMEs to public procurement contracts*, 25 June 2008 (SEC(2008) 2193), pp. 16-18; *Green Paper on the modernisation of EU public procurement*

inadequate configuration of the subject-matter of the contract but other times due to the contracting authority's eagerness to cover its own back against a possible breach by the contractor.

Exclusion of tenderers. Article 57 of Directive 2014/24 provides for specific situations that can lead to the exclusion of economic operators from the procurement procedure, distinguishing between mandatory and discretionary grounds for exclusion. In the first case, contracting authorities shall exclude an economic operator who has been convicted by final judgement for one of the offences mentioned in Art. 57(1). This mandatory nature involves that the Member States have to include them into their national legislation, in order to reinforce European policies against crime. [52] In the case of discretionary grounds for exclusion, contracting authorities may exclude any economic operator in any of the situations set in Art. 57(4) if, after analysing the seriousness of the conduct in the concrete case, this measure is proportionate.

As a general principle of EU law, the principle of proportionality applies to all exclusion decisions and serves as a corrective standard to assess the legality of authorities' actions.[53] Recital No. 101 expressly mentions this principle in relation to discretionary grounds for exclusion. It states that contracting authorities should pay particular attention to the principle of proportionality, clarifying that "minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator." Another example of its

policy. Towards a more efficient European Procurement Market, 27 January 2011 (COM(2011) 15 final), pp. 31-32; and *Public procurement guidance for practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*, February 2018.

[52] Arrowsmith, n. 24, pp. 1275-1276.

[53] Priess, H. (2014) "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive". *Public Procurement Law Review*, 23 (3), p. 113.

relevance at this stage can be found in Art. 57(3), which provides an exemption to the mandatory ground for exclusion based on non-payment of taxes or social security contributions where this measure would be *clearly disproportionate* given the unpaid amount, or because the economic operator was informed of the exact amount due at such time that it could not remedy the situation before the expiration of the deadline for requesting participation or submitting its tender.

Once the contracting authority has decided that is necessary to exclude an economic operator, the principle of proportionality should still be applied to determine the duration of the exclusion. Art. 57(7) specifies the maximum period of exclusion for the case that it has not been set by final judgment (five years from the date of the conviction by final judgment) and for discretionary exclusions (three years from the date of the relevant event). However, the maximum period cannot be applied automatically but should be set on a case-by-case basis for the time absolutely necessary to avoid a breach of integrity.

Self-cleaning measures. The clearest expression of the principle of proportionality is the possibility that economic operators affected by a ground for exclusion adopt measures to avoid that consequence.[54] The self-cleaning measures can be defined as corrective actions implemented by companies in order to restore their reliability and remedy the negative consequences derived from their behaviour, as well as adopting effective measures to prevent such behaviour from happening again in the future. Although this figure has been regulated for the first time by Directive 2014/24, it was already used prior to 2014 in countries such as

[54] The close relationship between the principle of proportionality and self-cleaning measures has been highlighted by the CJEU in the Judgement of 20 January 2020, *Tim SpA*, case C-395/18, ECLI:EU:C:2020:58, at 49. See also Steinicke, M. (2015) "Qualification and Shortlisting". In *EU Public Contract Law. Public Procurement and Beyond* (Eds. Martin Trybus; Roberto Caranta; Gunilla Edelstam), 3ª Ed., Brussels: Bruylant, pp. 105-123; Williams-Elegbe, S. (2012) *Fighting corruption in public procurement: a comparative analysis of disqualification or debarment measures*. Oxford: Hart, pp. 248-249.

Germany, Austria, The Netherlands or Italy.[55] Now, Article 57(6) of the Directive recognises the economic operator's right to prove that it has taken sufficient measures to demonstrate its reliability despite the existence of a relevant ground for exclusion. The concrete measures to be adopted are three: (i) paying or committing to pay compensation of damages caused by the criminal offence or misconduct, (ii) clarifying the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and (iii) taking concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

At the same time, contracting authorities have to evaluate the evidence provided by the economic operator in relation to the implemented measures, considering the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are sufficient, the economic operator shall not be excluded from the procurement procedure. It can be argued that the efforts to repair any damage and regain the confidence of public authorities mean that there is no longer an advantage over their competitors and there is no reason for their exclusion. In a way, the costs of implementing these measures compensate for the advantages they could have obtained in the past as a result of their dishonest conduct.[56] In fact, these operators may enjoy greater credibility than other participants in the competition who have not taken any preventive measures.[57]

[55] These measures were also recognised in other countries, such as France and Greece, but in practice contracting authorities do not take into consideration the actions of the economic operators. In this regard, Arrowsmith, S., Priess, H. and Friton, P. (2009) "Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?". *Public Procurement Law Review*, 6, pp. 257-282.

[56] Arrowsmith et al., n. 55, pp. 47-49.

[57] Hjelmeng, E., Søreide, T. (2014) "Debarment in Public Procurement: Rationales and Realization". In *Integrity and efficiency in sustainable public contracts. Balancing Corruption Concerns in Public Procurement Internationally* (Dir. Gabriella Racca;

If the measures are insufficient, they do not operate as an alternative to the exclusion and the contracting authority should ban the economic operator from the procedure. Likewise, those economic operators excluded by final judgment from participating in award procedures are not entitled to use this possibility (Art. 57(6)). But, even in these cases, the principle of proportionality should be observed to adjust the length of the exclusion.

Selection criteria. According to Article 58(1) of Directive 2014/24, contracting authorities may only impose requirements that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. These requirements should be related and proportionate to the subject-matter of the contract. The qualifying nature of this step involves that all candidates or tenderers who do not meet the minimum level of solvency required will be directly excluded from the competition. The principle of proportionality aims to prevent the exclusion of economic operators who are fully capable of performing the contract due to excessive solvency requirements. It is essential to set these requirements in a suitable manner by taking into account the technical complexity of the contract and its economic dimension, given that the lack of proportionality to any of these factors would lead to an undue restriction of competition.

The requirement of a minimum level of *economic and financial standing* aims to ensure that economic operators have sufficient resources to remain in the market for the duration of the contract and deal with any liability that may arise.[58] Article 58(3) mentions various means to prove this point, such as having a minimum yearly turnover, providing information on annual accounts, or an appropriate level of professional risk indemnity insurance. It is for contracting

Christopher Yukins), Brussels: Bruylant, pp. 226-227. In this regard, see also Pünder, H. (2009) "Self-Cleaning: A Comparative Analysis". In *Self-Cleaning in Public Procurement Law* (Dir. Hermann Pünder; Hans-Joachim Priess; Sue Arrowsmith), Köln: Heymann, pp. 187-205.

[58] Arrowsmith, n. 24, p. 1190.

authorities to decide whether to require one or more of these means, as well as to determine the specific amount that will operate as a minimum threshold in each case. For this purpose, they must carry out an adequate assessment of the risks inherent to the performance of the contract, so that the economic standing required from tenderers is sufficient to cover them and is proportionate to the magnitude of the contract. As concluded by the CJEU in *Édukövízig*,[59] the requirement of a minimum level constitutes a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, but it cannot go beyond what is reasonably necessary for that purpose.

One example of the application of the principle of proportionality is the legal limitation of contracting authorities' discretion to demand a minimum yearly turnover. Except in duly justified cases where there are special risks linked to the nature of the works, services or supplies, this requirement shall not exceed two times the estimated contract value. If the contract is divided into lots, that limit will apply in relation to each individual lot, or group of lots in the event that the successful tenderer is awarded several lots to be executed at the same time. Once again, the existence of a maximum limit that – as a general rule – cannot be exceed by the contracting authority does not mean that it can be used by default. On the contrary, it should examine in each situation whether the amounts indicated in the tender specifications are objectively admissible because they are proportionate to the subject matter of the contract, without being possible to establish in abstract terms a percentage or amount that is always proportionate.

The *technical and professional ability*, on the other hand, aims to ensure that the economic operator possesses the necessary human and technical resources and experience to perform the contract to an appropriate quality standard (Art. 58(4)). Contracting authorities shall only require those skills that are absolutely essential to perform the contract. The demand of other competences that are not relevant or are very specific could result in a disproportionate action. In particular, they may require that economic operators have a sufficient level of

[59] Judgement of the CJEU of 18 October 2012, *Édukövízig*, case C-218/11, ECLI:EU:C:2012:643, at 29.

experience demonstrated by suitable references from contracts performed in the past. In addition to the time limits established in the Directive 2014/24,[60] the principle of proportionality is relevant to determine the number of references of the works carries out, or the supplies or services delivered or performed, that should be submitted by the economic operator. This number should be proportionate to the subject-matter of the contract and cannot go beyond what is necessary to prove the ability of the company. As a general rule, it would be disproportionate to request more than one reference for each relevant competence, except in cases where the particularities of the contract require so.[61]

Finally, it should be noted that the use of previous experience as the only way to prove technical and professional ability is contrary to the principle of proportionality.[62] Provided that many economic operators have difficulties in demonstrating their abilities by using this mean, they should be given the possibility of using alternative means of proof.

4.3. Award criteria and non-compliant tenders

At this stage of the procedure, the principle of proportionality conditions the design and subsequent application of criteria used to award the contract to the most economically advantageous tender.[63] Contracting authorities should ensure the proportionate nature of their action when choosing the most suitable criteria and the relative weighting to be given to each

[60] Annex XII, Part II (a).

[61] Instituut Voor Bouwrecht (2019) *Gids Proportionaliteit*, IBR Publications, The Netherlands, p. 45.

[62] Sanchez-Graells, n. 34, p. 311.

[63] Bordalo Faustino, P. (2014) "Award Criteria in the New EU Directive on Public Procurement". *Public Procurement Law Review*, 23, pp. 124-133.

of them. This duty is particularly relevant when including *environmental, social, or innovation-related goals as award criteria* since the strategic dimension of public procurement needs to be conciliated with other key objectives, such as equal treatment, a fair level of competition, and efficiency of public spending.[64] In this case, the application of the principle of proportionality results in a duty to guarantee that the strategic award criterion has not an excessively high weight compared with the other criteria.[65]

The weight given to each award criterion determines the influence it has in the final evaluation of tenders. Generally, the contracting authority is free to decide what weight to give to strategic criteria, as long as this decision is proportionate. When doing so, it has to consider how important are those goals for the contract compared with other considerations (eg. cost or quality of the tender) and how many points can be allocated to them given the nature of the product or service and the market conditions. For instance, if there is a low degree of variation in the price of the product but the environmental performance varies significantly, then it makes sense to allocate more points to assess environmental characteristics.[66]

[64] Doménech Pascual, G. (2012) "La valoración de las ofertas en el Derecho de los contratos públicos". *Revista General de Derecho Administrativo*, 30, 2012, pp. 42-43; Gallego Córcoles, I. (2017) "La integración de cláusulas sociales, ambientales y de innovación en la contratación pública". *Revista Documentación Administrativa. Nueva Época*, 4, pp. 102-104.

[65] Gallego Córcoles, I. (2019) "Posibilidades y límites generales de las cláusulas sociales y medioambientales como criterios de adjudicación y desempate". In *Inclusión de cláusulas sociales y medioambientales en los pliegos de los contratos públicos* (Dir. María Magnolia Pardo López; Alfonso Sánchez García), Cizur Menor: Aranzadi-Thomson Reuters, p. 117.

[66] European Commission (2016) *Buying green! A handbook on green public procurement*. 3rd Ed., Luxembourg: Publications Office of the European Union, p. 54

In *EVN Wienstrom*, the CJEU ruled that the application of a weighting of 45% to an environmental award criterion concerning the production of a defined amount of electricity from renewable energy sources is not incompatible with the EU legislation on public procurement,[67] provided that it does not violate the basic principles of this arena and the contracting authority is capable of verifying whether the tenders satisfy that criterion.[68]
On the other hand, the principle of proportionality also applies to those tenders that do not comply with the award specifications, include minor errors, or are incomplete or unclear (*non-compliant tenders*). At first glance, the consequence of submitting a non-compliant tender would be its rejection without carrying out a further assessment. This solution is endorsed by the principle of equal treatment, which demands that all the tenders comply with the award conditions in order to ensure an objective comparison between them.[69] However, Directive 2014/24 provides contracting authorities with the possibility of requesting the economic operators concerned "to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency" (Art. 56(3)).[70] This power had already been recognised by the CJEU in *Slovensko* for exceptional

[67] Judgement of the CJEU of 4 December 2003, *EVN Wienstrom*, case C-448/01, ECLI:EU:C:2003:651, at 43.

[68] *EVN Wienstrom*, at 44 et seq.

[69] Judgement of the CJEU of 22 June 1993, *Commission v Denmark* [*Storebaelt*], case C-243/89, ECLI:EU:C:1993:257, at 37-38.

[70] This provision was included in the proposal of the European Council when the fourth generation of Directives was being discussed in May 2012. Initially it was suggested that the request for clarification should be a *duty* for contracting authorities, but after a period of negotiations with the Member States it was decided to introduce it as a voluntary measure. On the process of including the possibility of rectifying non-compliant tenders, see Risvig

situations where it is clear that the tender requires a mere clarification or the correction of obvious material errors, as long as such amendment does not lead in practice to the submission of a new tender.[71]

The choice of one option or another will be the result of a case-by-case analysis that considers, for instance, the nature of the error or omission and the time passed since the expiration of the deadline for submission of tenders.[72] From the perspective of the principle of proportionality, the correction of tenders is a valid alternative to the rejection as long as the principle of equal treatment is not unduly affected.[73] It can be even argued that there are situations where contracting authorities have a *duty* to give economic operators this

Hamer, C. (2016) "Requesting additional information – increase flexibility and competition?". In *Reformation or Deformation of the EU Public Procurement Rules* (Dir. Grith Skovgaard Ølykke; Albert Sanchez-Graells), Cheltenham: Edward Elgar Publishing, pp. 235-252.

[71] Judgement of the CJEU of 29 March 2012, *Slovensko*, case C-599/10, ECLI:EU:C:2012:191, at 40-44. See also Judgement of the CJEU of 10 October 2013, *Manova*, case C‑336/12, ECLI:EU:C:2013:647; and Judgement of 7 April 2016, *PARTNER Apelski Dariusz*, case C-324/14, ECLI:EU:C:2016:214.

[72] Brown, A. (2014) "The Court of Justice rules that a contracting authority may accept the late submission of a bidder's balance sheet, subject to certain conditions: Case C-336/12 Danish Ministry of Science, Innovation and Higher Education v Manova A/S". *Public Procurement Law Review*, 1, pp. 1-3.

[73] Codina García-Andrade, X. (2015) "Why Manova is not Slovensko: a new balance between equal treatment of tenderers and competition". *Public Procurement Law Review*, 4, pp. 109-117; Dekel, O. (2008) "The Legal Theory of Competitive Bidding for Government Contracts". *Public Contract Law Journal*, 37(2), pp. 237-239.

possibility, for instance when the correct content can be easily deduced from the terms of the offer or the circumstances of the case, provided that significant factors of the tender, such as price or quality aspects serving as a basis to determine the most advantageous tender, are not affected.[74]

4.4. Modification of the contract

The spirit of moderation inherent in the principle of proportionality goes beyond the award of the contract and extends to its performance. Although the impact of this principle on the execution of the contract is lower than in the previous stages, given that the contracting authority only deals with the contractor, it is still relevant when the former wants to amend one or more of the conditions that discipline the contractual relationship. Any change in the contract conditions might not only be prejudicial for the contractor, but also affects the principles of equal treatment and transparency since the terms governing the award of the contract, as originally laid down, would be distorted.[75]

As the CJEU noted in *Pressetext*, the modification of a public contract during the execution is incompatible with EU law when it constitutes a new award. It happens when the amendments are materially different in character from the original contract and demonstrate

[74] Judgement of the General Court of 10 December 2009, *Antwerpse Bouwwerken NV*, case T-195/08, ECLI:EU:T:2009:491, at 56. This position had already been upheld by the GC in its earlier Judgement of 27 September 2002, *Tideland Signal*, case T-211/02, ECLI:EU:T:2002:232, at 43.

[75] Judgement of the CJEU of 29 April 2004, *CAS Succhi di Frutta SpA*, case C-496/99 P, ECLI:EU:C:2004:236, at 118-120.

the intention of the parties to renegotiate the essential terms of that contract.[76] In this vein, the Court states that an amendment 'may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted'[77], or when it extends the scope of the contract considerably to encompass services not initially covered.[78]

Article 72 of Directive 2014/24 enumerates a number of situations where a public contract can be amended without a new procurement procedure. The first provision refers to a case where the modifications have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses (Art. 72(1)(a)). Given that these documents meant to discipline any step of the contract, the eventual disproportion in their configuration would be a case of *lack of proportionality in the law*. The principle of proportionality operates here in its positive dimension, as a guideline that should be followed by public authorities when writing up the conditions that will apply during the performance of the contract. When doing so, they should foresee potentially objective circumstances that would justify an alteration of the contract conditions and reflect them in the procurement documents, after balancing the various interests concerned.

In the other situations, where the modifications have not been included in the documents, we are facing a case of *lack of proportionality in the application of the law*. According to this principle, contracting authorities should only carry out such amendments of the contract that are strictly necessary to satisfy the reason that requires them. Directive 2014/24 mentions the "necessity" of the amendment on various occasions. Firstly, Article 72(1)(b) provides

[76] Judgement of the CJEU of 19 June 2008, *Pressetext*, case C-454/06, ECLI:EU:C:2008:351, at 34.

[77] *Pressetext*, at 35.

[78] *Pressetext*, at 36-37.

contracting authorities with the possibility of modifying the contract for the completion by the original contractor of additional works, services or supplies that have become necessary and were not included in the initial procurement. However, this measure will only be proportionate if there is no other option that fully ensures compliance with the principles of equal treatment and transparency. In this line, the provision limits this possibility to those cases where a change of contractor is not possible for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations, and it would cause significant inconvenience or substantial duplication of costs for the contracting authority. In any case, the amendment cannot exceed 50% of the value of the original contract.

Secondly, Article 72(1)(c)) contemplates the amendment of the contract as a response to unforeseeable circumstances that could have not been predicted by a diligent contracting authority when preparing the initial award. As in the previous case, the adoption of this measure should be limited to specific cases in which the situation cannot be addressed by other means. Even in these cases, the amendment has to meet the maximum limit of 50% of the value of the original contract and cannot alter the overall nature of the contract.

The application of the principle of proportionality to contract modifications is characterised by a clear primacy of the necessity test. However, the proportionality *stricto sensu* test also plays a relevant role when deciding about this issue due to the need to conciliate multiple interests. Contracting authorities should balance the consequences of amending the contract against the effects of a possible termination, taking into account – among other factors – the complexity of the work, supply or service, and the time period needed to perform it;[79] the longer this period or the greater the difficulties inherent to the performance of the contract, the stronger the arguments in favour of the modification.

[79] Bogdanowicz, P. (2016) "The application of the principle of proportionality to modifications of public contracts". *European Procurement & Public Private Partnership Law Review*, 11(3), pp. 194-204.

5. CONCLUSIONS

In such a complex scenario as public procurement law, the principle of proportionality has proven to be an extraordinary instrument to conciliate the rights of the economic operators with the successful execution of the contract. At the same time, it has a ductile nature that allows contracting authorities to optimise the different goals embedded in the procurement and, in particular, to ensure efficiency when including strategic policies for a common good. The Directive 2014/24 provides a legal framework that pursues diverse objectives that can conflict with the basic purpose of the procurement, i.e. buying the products or services needed in the most advantageous conditions in terms of price and quality, and the principle of proportionality plays a key role in reaching a balance among them.

The consolidation of this principle in the 2014 Directives makes it explicit the duty of contracting authorities to treat economic operators in a proportionate manner, following the posture held by the CJEU for many years. As stated above, this parameter operates from the preparation of the contract to its complete execution, ensuring that the discretionary decisions of contracting authorities do not go beyond what is necessary to satisfy public interests. Disproportionate decisions not only limit market competition and constitute an unfair barrier for SMEs, but also prevent public entities from obtaining the best purchasing conditions. Ultimately, it may affect the quality of the services that will be delivered to the citizens.

The study of the impact of the principle of proportionality throughout the procurement procedure has allowed us to reach two main conclusions. First, in most cases, it aims to avoid excessive restrictions of the competition in situations where the principle of equal treatment might be affected. In this regard, the EU public procurement law introduces several mechanisms to optimise both principles that are rooted in the idea of proportionality. Second, the positive dimension of this principle, which operates as a guideline that directs the action of contracting authorities to the most proportionate decision in each case, has a prominent role in this field. Public entities have to ensure that their performance is proportionate when designing the subject-matter of the contract, writing up the contract specifications, in particular the selection and award criteria, and applying those conditions to the diverse situations that may arise in practice. Even during the performance of the contract, they should ensure the proportionality of the decisions and the observance of the other general principles.

Furthermore, the fact that the intensity of application of this principle decreases as contracting authorities move forward through the procedure shows the close relationship with the principle of competition. It can be argued that the greater the risk of competition restrictions, the more intense the role of the principle of proportionality. In essence, it contributes to a fairer and more efficient procedure that takes into account the interest of all parties and optimises them in the best possible manner.

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LE JUGE NATIONAL ET LES PROCEDURES ADMINISTRATIVES EUROPEENNES COMPOSITES EN MATIERE DE CONTROLE DES CONCENTRATIONS : NOTE SUR L'ORDONNANCE DE REFERE DU CONSEIL D'ETAT FRANÇAIS DU 1ER AVRIL 2021, *GRAIL/ILLUMINA*

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INDEX

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1. INTRODUCTION

La progression de l'intégration européenne a conduit à développer des formes d'administration composée favorisant la multiplication des relations entre administrations européenne et nationale. Face à ce phénomène, les juridictions nationales modèlent les contours de leur office en tenant compte de la répartition des pouvoirs entre les autorités nationales et les institutions, organes et organismes de l'Union européenne. Tel est le rôle que s'est assigné le Conseil d'État français dans son ordonnance de référé du 1er avril 2021[2], à l'occasion de laquelle il s'est prononcé, pour la première fois, sur sa compétence pour contrôler la légalité d'une demande de renvoi de l'examen du contrôle d'une concentration, fondée sur l'article 22 du règlement 139/2004 (ci-après le « règlement concentration »)[3], par l'Autorité française de la concurrence à la Commission européenne (ci-après « la Commission »).

À titre préliminaire, il n'est superflu pour comprendre les tenants et aboutissants de cette affaire de rappeler les procédures et les règles qui encadrent le contrôle des concentrations. Une concentration est une opération par laquelle plusieurs entreprises fusionnent pour donner

[2] Conseil d'État, Juge des référés, 1er avril 2021, 450878, ECLI:FR:CEORD:2021:450878.20210401.

[3] Règlement (CE) n° 139/2004 du Conseil, du 20 janvier 2004, relatif au contrôle des concentrations entre entreprises, *JOUE* 29 janvier 2004, L 24/1 ; ce règlement constitue aujourd'hui « le siège du dispositif européen de contrôle des opérations de concentration » ; v. N. Petit, *Droit européen de la concurrence*, 3ème éd., Paris, LGDJ, 2020, p. 502.

naissance à une nouvelle entreprise (fusion), à celle par laquelle une entreprise en rachète une autre (acquisition), ou à celle dans laquelle deux entreprises créent une entreprise commune. Les concentrations d'entreprises ne sont pas interdites hormis lorsqu'elles ont pour effet de fausser la concurrence sur le marché en créant ou en renforçant une position dominante. Or, lorsque tel risque se présente, l'architecture générale du contrôle des concentrations sur le territoire de l'Union européenne s'effectue au niveau national et au niveau européen. La répartition du pouvoir de contrôle se fait conformément au principe de « guichet unique », selon lequel relève du contrôle exclusif de la Commission les opérations de concentration revêtant une « dimension communautaire », c'est-à-dire dont le chiffre d'affaires des entreprises concernées dépasse les seuils maintenus par le règlement concentration. Dans ce cas, les autorités nationales sont automatiquement dessaisies et l'opération est soustraite du champ d'application des règles nationales du droit de la concurrence. *A contrario*, à défaut de dimension communautaire, la compétence de contrôle appartient aux autorités nationales lesquelles appliquent le droit national de la concurrence. Le contrôle des concentrations est ainsi effectué, conformément au principe de subsidiarité, à l'échelon le plus pertinent.

Néanmoins, le règlement concentration prévoit quelques soupapes de flexibilité dans l'application du principe du guichet unique. Parmi elles, l'article 22 de ce règlement, dit « clause hollandaise »[4], prévoit une procédure permettant à un État membre de renvoyer à la

[4] Il existe depuis le premier règlement relatif au contrôle de concentration, mais au fur et à mesure des années, les justifications de son utilisation ont évolué : à l'origine, il était le moyen de remédier à l'absence de dispositif national de contrôle des concentrations aux Pays-Bas, ce qui lui a valu le surnom de « clause hollandaise ». Par la suite, il a permis de rationaliser la procédure de contrôle des concentrations en évitant la multiplication des notifications aux autorités nationales lorsqu'une concentration pouvait faire l'objet d'un contrôle devant plusieurs autorités nationales. Aujourd'hui, il permet en plus à la Commission de contrôler des concentrations nationales dites « hors seuils ».

Commission une opération de concentration qui n'est pas de dimension communautaire[5], mais qui affecte le commerce entre États membres et menace d'affecter de manière significative la concurrence sur le territoire du ou des États membres qui formulent cette demande. La Commission intervient alors pour le compte du ou des États membres ayant sollicité son intervention et examine les effets de la concentration à l'intérieur du territoire du ou des États membres en question, en appliquant les règles de droit de l'Union européenne, ceci « indépendamment des seuils de contrôle nationaux ».

L'intérêt de l'utilisation de la clause hollandaise a été mis en lumière depuis avril 2021. La Commission a fait de cette procédure un instrument de lutte contre les pratiques des acquisitions prédatrices ou consolidantes (*Killer acquisitions*)[6]. Ces dernières consistent pour une grande entreprise à acquérir des entreprises innovantes avant qu'elles n'aient valorisé leur création, afin soit de brider leur innovation pour qu'elles ne deviennent pas un concurrent sur le marché (acquisition prédatrice), soit d'en profiter pour renforcer leur position sur le marché (acquisition consolidante). Ces pratiques se développent de plus en plus, notamment dans les secteurs du numérique, pharmaceutique et biotechnologique. Jusqu'ici, ces concentrations échappaient aux règles nationales et européennes du droit de la concurrence, dans la mesure où les entreprises cibles n'atteignaient pas les seuils de chiffre d'affaires

[5] Sont considérées de dimension communautaire les concentrations d'entreprises dont le chiffre d'affaires mondial cumulé des entreprises concernées dépasse 5 milliards d'euros et que le chiffre d'affaires réalisé dans l'UE par au moins deux des entreprises concernées dépasse 250 millions d'euros.

[6] « *We need to calibrate our merger rules regularly, to make sure they stay focused in the right place* ». M. Vestager, « The Future of EU merger control », discours du 11 septembre 2020 à l'occasion de la 24e conférence annuelle de l'International Bar Association, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control

suffisant pour entrer dans le champ d'application des opérations soumises à un contrôle. Mais, la situation a changé depuis que la Commission a adopté une lecture renouvelée de l'article 22 du règlement concentration[7]. Alors que cette dernière refusait d'utiliser la clause hollandaise pour des concentrations qui n'atteignaient pas les seuils nationaux de controlabilité, elle accepte désormais de le faire[8]. L'intérêt de ce renvoi s'inscrit dans la dynamique d'une politique plus générale de la Commission qui se compose d'un ensemble de mesures prises pour renforcer ses pouvoirs de contrôle du marché intérieur, dans le but d'assurer le libre jeu de la concurrence, mais aussi, en creux, celui de protéger les intérêts économiques de l'Union européenne en luttant contre l'acquisition d'actifs et d'entreprises

[7] Jusqu'à récemment, afin d'éviter que des opérations de concentrations puissent faire l'objet d'un contrôle par la Commission alors même qu'elles n'atteignaient ni les seuils de contrôlabilité nationaux et *a fortiori* les seuils communautaires, l'institution restreignait le champ d'application du mécanisme en acceptant le renvoi d'opérations qui franchissaient les seuils de notification au niveau national d'au moins un État membre. Mais, depuis la mi-2021, la Commission accepte de recevoir les renvois opérés par des autorités nationales de la concurrence concernant des opérations de concentration qui méritent d'être examinées au niveau de l'Union européenne, même lorsque les concentrations en cause sont en dessous des seuils nationaux de contrôlabilité. Plus encore, la Commission encourage les autorités nationales à lui renvoyer les opérations pour lesquelles elle n'est pas, par principe, compétente. La Commission fait ainsi du renforcement de la coopération avec les autorités nationales l'arme privilégiée contre la pratique des acquisitions prédatrices ou consolidantes.

[8] V. Orientations de la Commission concernant l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires 2021/C 113/01 ; communication consolidée sur la compétence de la Commission en vertu du règlement (CE) n° 139/2004 du Conseil relatif au contrôle des opérations de concentration entre entreprises, *JOUE* C 43/10.

européens stratégiques[9]. Cette volonté est d'ailleurs renforcée avec la survenance de la crise de la Covid-19 qui a mis en lumière la nécessité de renforcer l'autonomie économique et stratégique de l'Union européenne.

Or, cette nouvelle utilisation de la clause hollandaise n'est pas sans effets juridiques sur les entreprises : en précisant que la procédure de renvoi d'une opération de concentration à la Commission est ouverte à tout État membre indépendamment des seuils de contrôle nationaux, cette procédure réintroduit la possibilité d'exercer un contrôle sur une opération qui n'atteignant pas les seuils nationaux de contrôlabilité aurait échappé à tout contrôle. Dès lors, il était prévisible que les entreprises dont les opérations faisaient l'objet d'un tel renvoi contesteraient l'utilisation de cette procédure.

Tel fut le cas dans l'affaire *Grail/Illuma*, à l'occasion de laquelle des entreprises parties à une concentration ont saisi le juge administratif français pour contester le renvoi de l'examen de leur opération de concentration à la Commission. L'entreprise américaine Illumina, *leader* mondial du séquençage génomique souhaite acquérir l'entreprise de biotechnologie Grail, laquelle développe des tests innovants dans le dépistage du cancer. Après une analyse

[9] S. Robert-Cuendet, « Lutte contre les « killer acquisitions » de start-up » : la Commission européenne renforce le droit européen de la concurrence », *blog du Club des juristes*, https://blog.leclubdesjuristes.com/lutte-contre-les-killer-acquisitions-de-start-up-la-commission-europeenne-renforce-le-droit-europeen-de-la-concurrence/: « Il s'agit pour la Commission européenne de rompre avec le libéralisme naïf dont se défendait déjà l'ancien président Juncker […] L'adoption en 2019 du Règlement établissant un cadre pour le filtrage des investissements directs étrangers dans l'Union afin de lutter contre les « acquisitions prédatrices » d'actifs européens stratégiques et plus récemment le projet de règlement sur les subventions étrangères ayant un effet de distorsion sur le marché intérieur (mai 2021) participent, avec la nouvelle politique relative aux concentrations, à la transition vers un libéralisme maîtrisé ».

préliminaire, l'Autorité française de la concurrence a demandé à la Commission d'examiner le dossier, considérant que les critères de l'affectation du commerce entre États membres et l'affectation significative de la concurrence sur le territoire français étaient remplis[10]. Illumina et Grail ont alors formé un recours en référé-suspension devant le Conseil d'État français, faisant valoir, entre autre, que ce renvoi méconnaissait le principe du contradictoire, les droits de la défense et le principe de sécurité juridique.

Avant de se prononcer sur le fond de l'affaire, le Conseil d'État français devait se poser la question de savoir si le juge administratif français était compétent pour se prononcer sur la légalité de la demande de renvoi de l'Autorité de la concurrence. La difficulté de la situation tient à ce que le mécanisme de la clause hollandaise relève d'une procédure complexe de coadministration entre les institutions européennes et les autorités nationales qui s'inscrit dans la catégorie des procédures dites « composites »[11]. Il s'agit d'hypothèses dans lesquelles des autorités nationales et européennes participent étroitement à l'adoption d'un acte soit national, soit de l'Union européenne, par exemple lorsqu'une décision est adoptée par une

[10]En particulier, « l'Autorité a constaté qu'Illumina était active en Europe, où elle commercialise des séquenceurs génomiques de nouvelle génération, qui sont largement utilisés, notamment par des laboratoires de recherche. Or ces produits constituent un matériel nécessaire pour permettre à Grail et à ses concurrents de développer leur activité dans le secteur des tests de détection du cancer. L'Autorité a estimé qu'à l'issue de l'opération Illumina pourrait rendre l'accès à ses séquenceurs plus complexes pour les concurrents de Grail sur le secteur, en augmentant leur prix ou en dégradant leur qualité ». V. Communiqué de presse de l'Autorité de la concurrence, « La Commission européenne ouvre une procédure d'examen du rachat de Grail par Illumina fondée sur la procédure de l'article 22 du règlement concentrations de 2004 », https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/la-commission-europeenne-ouvre-une-procedure-dexamen-du-rachat-de-grail-par

[11] L. Feilhès, « Le concept d'opération complexe : Perspectives croisées de droit administratif et de droit de l'Union européenne », *RFDA*, 2020, p. 39 ; S. ALONSO DE LEON, *Composite Administrative Procedures in the European Union*, Madrid, Iustel, 2017, 430.

institution de l'Union européenne au terme d'une procédure qui nécessite l'adoption d'un acte par une autorité nationale. Tel est le cas en l'espèce, la Commission ne pouvant adopter une décision s'agissant de la conformité d'une concentration qu'après que l'État membre ait décidé de lui renvoyer l'examen de l'opération en question.

Dans ce cadre, l'entremêlement procédural et normatif qui caractérise l'adoption de l'acte final rend complexe la détermination de la compétence contentieuse pour se prononcer sur la légalité de la décision intermédiaire : cette compétence appartient-elle au juge national ou au juge de l'Union européenne ? La réponse à cette question n'est pas évidente dans la mesure où, en principe, le juge national est compétent pour se prononcer sur la légalité des actes nationaux. Exclure sa compétence aurait donc pour conséquence de restreindre l'office du juge national. Cependant, ce faisant, le juge national serait en conformité avec la jurisprudence de la Cour de justice de l'Union européenne, selon laquelle lorsqu'un acte national, quelle que soit sa qualification en droit interne, s'insère dans une « procédure administrative composite », l'effectivité du droit de l'Union européenne implique un contrôle uniforme de la légalité, lequel ne peut être effectué que par la Cour de justice de l'Union européenne[12].

Le cœur de l'affaire présentée au Conseil d'État français porte donc sur la définition des frontières de l'office du juge national lorsqu'il est confronté au droit de l'Union européenne. Il traite ainsi de l'influence de ce droit sur le contrôle juridictionnel national. En ce sens, l'intérêt de l'étude de cette ordonnance dépasse le cadre français, dans la mesure où tous les juges nationaux des États membres peuvent être confrontés à des situations semblables, d'autant plus que les procédures dites composites ont tendance à se multiplier. S'agissant du contexte spécifique du contrôle des concentrations et de l'utilisation de la procédure de la clause hollandaise, des affaires semblables à celle présentée devant le Conseil d'État français

[12] CJUE, 19 décembre 2018, *Silvio Berlusconi*, aff. C-219/17, , ECLI:EU:C:2018:1023.

risquent d'arriver devant les prétoires des juridictions des autres États membres de l'Union européenne. En effet, la pratique des acquisitions prédatrices est un phénomène sans frontière auquel sont confrontés tous les systèmes nationaux de contrôle des concentrations[13]. Le mécanisme de l'article 22 constitue un instrument qui dispose de la flexibilité nécessaire pour cibler les opérations prédatrices et consolidantes auxquelles les États membres auront sûrement recours. Preuve en est, la Belgique, la Grèce, l'Islande, les Pays-Bas et la Norvège se sont joints à la demande de renvoi de l'autorité française de la concurrence s'agissant de la concentration entre les sociétés Grail et Illumina. Dès lors, la décision du Conseil d'État français constitue une première décision des juridictions nationales relative à la compétence de ces dernières s'agissant du contrôle de la légalité de cette procédure. Son étude a pour but d'expliquer et d'éclairer les règles qui régissent la répartition des compétences juridictionnelles entre les juges nationaux et la Cour de justice de l'Union européenne dans le cadre des procédures administratives composites et plus spécifiquement dans celle de la clause hollandaise.

Dans son ordonnance d'irrecevabilité, le Conseil d'État français considère que « le juge administratif national n'est pas compétent pour connaître d'un recours contre la décision de l'Autorité de la concurrence de renvoyer à la Commission une opération de concentration en dessous des seuils, et ce, quels que soient les effets d'un tel renvoi pour les entreprises concernées ». La décision du Conseil d'État montre que le droit de l'Union européenne peut être un facteur d'affaiblissement du contrôle juridictionnel de l'Union européenne. Ce dernier découle du statut européen de l'acte national, indépendamment de la prise en considération

[13] Document de travail des services de la Commission sur les conclusions de l'évaluation des aspects procéduraux et juridictionnels du contrôle des concentrations de l'UE, du 23 mars 2021, (SWD(2021) 67 final, https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf

des effets juridiques de ce dernier sur les entreprises (**I**) et, de la compétence de contrôle qui en découle qui ne peut être exercée que par les institutions européennes (**II**).

2. LE STATUT EUROPEEN DE L'ACTE NATIONAL DE RENVOI DETERMINE INDEPENDAMMENT DE SES EFFETS JURIDIQUES

Le Conseil d'État fonde son incompétence pour se prononcer sur la suspension de la demande de renvoi sur le caractère non détachable de l'acte de renvoi par rapport à la procédure de la clause hollandaise (**A**), tout en soulignant l'absence de prise en considération des effets juridiques d'un tel renvoi (**B**).

1.1 Le caractère non détachable d'une procédure européenne composite

Le motif principal de l'incompétence du juge administratif repose sur le caractère non détachable de la procédure d'examen de cette opération. À quoi fait référence cette notion d'acte non détachable ?

La Cour de justice, à maintes reprises, à précisé le rôle respectif des juridictions nationales et de la juridiction de l'Union européenne dans le cadre des procédures composites. Le statut de l'acte national découle de son lien avec la décision finale européenne et du partage des pouvoirs entre les autorités nationales et européennes dans l'adoption de cette dernière[14]. Plus précisément, le caractère détachable ou non détachable de l'acte national est déterminé en

[14] L. Feilhès, « Le concept d'opération complexe : perspectives croisées de droit administratif et de droit de l'Union européenne », *RFDA*, 2020, p. 39.

fonction de la marge d'appréciation dont dispose l'autorité européenne pour adopter la décision finale. La Cour de justice distingue deux situations : la première dans laquelle les autorités européennes ne peuvent vérifier ou corriger l'acte national intermédiaire ou déterminer le sens de la décision finale sans lui. Dans ce cas, le juge national est compétent pour se prononcer sur la légalité de l'acte national intermédiaire[15]. À l'inverse, la seconde situation est celle dans laquelle la décision nationale ne lie pas les autorités de l'Union européenne qui peuvent opérer un contrôle cette dernière. L'arrêt *Berlusconi*, illustre cette hypothèse puisque la Cour de justice reconnaît sa compétente pour contrôler de manière incidente la légalité des actes préparatoires adoptés par les autorités nationales dans le cadre du Mécanisme de surveillance unique[16], la déniant corollairement aux juridictions nationales.

[15] Cette hypothèse est notamment présentée dans l'arrêt *Borelli*[15], à l'occasion duquel la Cour de justice rappelle son incompétence pour statuer sur la légalité d'un acte pris par une autorité nationale, dès lors « qu'il résulte clairement de la répartition des compétences opérée dans le domaine considéré, entre les autorités nationales et les institutions communautaires, que l'acte pris par l'autorité nationale lie l'instance communautaire de décision et détermine, par conséquent, les termes de la décision communautaire à venir ». CJCE 3 décembre 1992, *Oleificio Borelli c/Commission*, aff. C-97/91, *Rec*. p. I-6313, , ECLI:EU:C:1992:491, point 52.

[16] Plus précisément, il s'agit des procédures d'octroi et de retrait d'agréments bancaires et des participations qualifiées caractéristiques du système européen de supervision bancaire. V. CJUE, 19 décembre 2018, *Silvio Berlusconi*, aff. C-219/17, , ECLI:EU:C:2018:1023, J.-P. Kovar et J. Lasserre Capdeville, « MSU et contrôle des acquisitions de participation qualifiée », *Revue Banque*, février 2019, n° 829, pp. 90-92 ; S. Lefevre, M. Prek, « Le contentieux de la surveillance prudentielle des établissements de crédit devant le tribunal de l'Union européenne », *JDE*, 2019, vol 3, n° 257, pp. 99-106 ; D. Simon, « Compétences respectives de la CJUE et des juridictions nationales », *Europe*, n° 2, février 2019, comm. 68 ; J. Rondu, « Le contrôle juridictionnel des décisions adoptées à l'issue d'une procédure administrative composite : Réflexions sur l'arrêt de grande chambre Silvio Berlusconi »,

L'acte national est alors considéré comme non détachable de la procédure européenne en ce qu'il constitue une « étape nécessaire d'une procédure d'adoption d'un acte de l'Union »[17].

Le Conseil d'État a développé une jurisprudence en adéquation avec celle de la Cour de justice, notamment dans le contentieux des aides d'État. Le juge administratif français affirme son incompétence pour contrôler la légalité d'une décision de notification d'une aide d'État à la Commission en se fondant sur son caractère « non détachable » de la procédure d'examen menée par la Commission[18]. Dans cet arrêt, le Conseil d'État distingue l'acte par lequel une autorité nationale décide de notifier une aide d'État et celui par lequel elle décide de ne pas renvoyer l'examen d'une telle aide à la Commission. Dans le premier cas, l'acte ne peut faire l'objet d'un contrôle de légalité par le juge administratif, l'État membre ne disposant pas du pouvoir décisionnel final. *A contrario*, dans le second cas, le Conseil d'État est compétent pour contrôler l'acte national, car l'État membre dispose d'un pouvoir décisionnel. Le Conseil d'État précise alors que : « la décision par laquelle le Premier ministre ou un ministre refuse de notifier un texte au titre de la réglementation communautaire des aides d'État se rattache à l'exercice par le Gouvernement d'un pouvoir

RTD eur., octobre-décembre 2019, n° 4, pp. 853-867 ; A. Rouaud, « Recours contre les actes pris par les autorités nationales dans le cadre du MSU », *RISF-IJFS*, 2019, n° 1, pp. 64-67 ; G. Hardy, *L'européanisation de la surveillance bancaire,* Thèse, Paris 2, 2021, 277 et suiv., p. 183.

[17] CJUE, Grd. ch., 19 déc. 2018, *Silvio Berlusconi, op. cit.*, point 43. V. également dans le même sens CJUE, 18 décembre 2007, *Suède c/Commission*, aff. C-64/05, P, *Rec*. p. I -11389, ECLI:EU:C:2007:802, points 93 et 94, *AJDA* 2008. 240, chron. E. Broussy, F. Donnat et C. Lambert.

[18] CE, ass. 7 novembre 2008, *Comité national des interprofessions des vins à appellations d'origine e. a., AJDA* 2008 2484, chron. E. Geffray et S.-J. Liéber.

qu'il détient seul aux fins d'assurer l'application du droit communautaire et le respect des exigences inhérentes à la hiérarchie des normes »[19]. Le juge administratif a ainsi recours à la notion d'« acte de gouvernement », laquelle fait référence à un acte édicté par une administration qui bénéficie d'une totale immunité juridictionnelle pour des raisons essentiellement d'opportunité politique ou diplomatique. Ici, la décision de renvoi ayant pour effet de déclencher une procédure européenne de contrôle des concentrations, l'utilisation de cette notion doit être comprise comme permettant d'assurer le respect des engagements européens de la France « en comblant tout angle mort contentieux qui pourrait conduire à leur méconnaissance »[20]. Il ne s'agirait pas qu'un juge national puisse entraver la procédure européenne en remettant en cause la validité de l'acte national intermédiaire.

En l'espèce, le raisonnement du Conseil d'État est le même. L'acte national de renvoi de l'examen d'une concentration à la Commission sur le fondement de l'article 22 du règlement concentration s'inscrit dans le cadre de l'hypothèse où l'autorité nationale ne dispose pas de pouvoir pour adopter la décision finale, ce qui lui vaut le qualificatif d'acte non détachable. En effet, dans le cadre de la procédure de la clause hollandaise, la Commission n'est pas liée par la décision nationale de renvoi, elle peut toujours la refuser. Il lui appartient d'ailleurs de vérifier si ces conditions sont remplies[21]. Dans ce cadre, l'État membre n'a qu'un pouvoir de participation à la décision européenne, il ne fait que déclencher la procédure de renvoi, laquelle ne lie la Commission ni s'agissant de l'exercice de son pouvoir de contrôle, ni *a*

[19] *Ibid.*

[20] J. Sirinelli, « La soumission élargie de l'action des pouvoirs publics au respect de la légalité », *in* M. Blanquet, J. Teyssedre, *Cohérence et pluralité du contentieux administratif européen,* Cahiers Jean Monnet, n° 9, Editions des presses de l'université de Toulouse, 2021, p. 43.

[21] Voir *supra*, le 3.1 de cet article.

fortiori, sur la décision finale concernant la conformité de l'opération de concentration. Ce pouvoir limité de l'État membre est accru en l'espèce par le fait que la Commission avait formulé une requête invitant les États membres, sur le fondement du paragraphe 5 de l'article 22 du règlement de concentrations, à lui présenter une demande d'examen de l'opération d'acquisition de la société Grail par la société Illumina[22]. Néanmoins, même indépendamment d'une telle requête, le caractère non détachable aurait selon nous été reconnu dans la mesure où il découle d'un critère objectif unique, celui du pouvoir discrétionnaire des autorités européennes pour adopter l'acte final.

Précisons que le recours à la notion d'acte de gouvernement est en partie trompeur[23]. Il cache une réalité que l'on retrouve dans l'ordre juridique interne et qui dépasse ceux engagés par l'intégration européenne et les rapports de systèmes. Le Conseil d'État a recours dans d'autres occasions à la notion d'acte détachable pour justifier son incompétence, notamment en matière de saisine par les autorités administratives de l'autorité judiciaire ou pour les actions engagées auprès des autorités administratives indépendantes telle que l'autorité de la concurrence. Par exemple, s'agissant de la saisine du Conseil de la concurrence par le ministre chargé de l'Économie, le Conseil d'État reconnaît qu'il ne s'agit que d'un élément de la procédure qui permet aux autorités compétentes soit d'interdire l'opération de concentration, soit de l'autoriser et dès lors qu'elle a le « caractère d'un acte préparatoire et ne constitue pas par elle-même une décision susceptible de faire l'objet d'un recours pour excès de pouvoir »[24]. Il souligne ainsi l'absence d'effets juridiques pour justifier son

[22] Point 5 de l'ordonnance sous commentaire.

[23] V. P. Binczak, « Acte de gouvernement », *Répertoire de contentieux administratif*, avril 2004, mise à jour octobre 2014.

[24] CE, 9 juillet 2003, *Société générale de brasserie*, Lebon 690, *AJDA* 2003, note S. Nicinski, *RFDA* 2004, concl. F. Séners. V. C. Mondou, A. Potteau, « Le contrôle par le juge

incompétence. En l'espèce, la situation est en partie similaire. Dans le cadre d'une procédure composite, telle que celle en l'espèce, l'incompétence du juge administratif ne découle pas seulement du « caractère non détachable de la conduite des relations internationales de la France »[25] ou de la nature particulière entretenue entre le pouvoir exécutif et les autres pouvoirs constitutionnellement reconnus dans l'ordre interne[26], mais de ce que l'acte de renvoi n'est pas détachable de la procédure dont il constitue le premier acte et dont le contrôle relève des juridictions de l'Union européenne[27], indépendamment de la prise en considération

administratif du pouvoir de notifier les aides d'État à la Commission européenne », *RFDA*, 2009, p. 123.

[25] Cette catégorie d'acte de gouvernement regroupe les mesures et les comportements du gouvernement au cours de la négociation et, plus généralement, l'ensemble des actes considérés comme non détachables de la conduite des relations internationales de la France V. par exemple CE, Assemblée, 7 novembre 2008, *Comité national des interprofessions des vins à appellations d'origine (CNIVAO) et autres*, n° 282920, p. 399, s'agissant de la décision de notifier un acte au titre des aides d'État à la Commission européenne.

[26] Cette catégorie d'acte de gouvernement recouvre les actes du gouvernement dans ses rapports avec le Parlement, les actes du Président de la République dans ses rapports d'ordre constitutionnel avec le gouvernement et certains actes de l'exécutif dans ses rapports avec le Conseil constitutionnel

[27] V. sur ce point les conclusions du Commissaire du gouvernement Emmanuel Glaser sur l'affaire CE, Assemblée, 7 novembre 2008, *Comité national des interprofessions des vins à appellations d'origine (CNIVAO) et autres*, n° 282920, p. 399, s'agissant de la décision de notifier un acte au titre des aides d'État à la Commission européenne, point 4. V. par exemple : CE, ass. 7 novembre 2008, *Comité national des interprofessions des vins à appellations d'origine e. a., AJDA* 2008 2484, chron. E. Geffray et S.-J. Liéber ; CE, 9 juillet 2003, *Société générale de brasserie*, Lebon 690, *AJDA* 2003, note S. Nicinski, *RFDA* 2004,

de ses effets juridiques. À la différence des affaires qui relèvent exclusivement de l'ordre juridique interne, le juge administratif français ne dénie pas l'existence d'effet juridique que pourrait susciter le renvoi du contrôle d'une opération de concentration à la Commission, cependant, il décide délibérément de les ignorer au profit du respect de la répartition de la compétence juridictionnelle entre le juge national et la Cour de justice de l'Union européenne.

1.2 L'indifférence des effets juridiques propres à l'acte de renvoi

Derrière la notion d'acte non détachable, le Conseil d'État considère incidemment que l'acte national intermédiaire est un acte préparatoire, une décision qui se borne à marquer une étape dans un processus décisionnel et qui n'a pas d'autre effet juridique que d'ouvrir la voie à une décision à venir[28]. Il n'est pas susceptible d'un recours pour excès de pouvoir dès lors qu'il ne fait pas grief. Pourtant, l'État membre peut renvoyer de manière injustifiée l'examen de l'opération de concentration à la Commission, estimant à tort que cette dernière

concl. F. Séners ; C. Mondou, A. Potteau, « Le contrôle par le juge administratif du pouvoir de notifier les aides d'État à la Commission européenne », *RFDA*, 2009, p. 123.

[28] Dans le même sens v. CE, 9 juillet 2003, *Société générale de brasserie (Sogebra)*, Lebon 690, *AJDA* 2003, note S. Nicinski, *RFDA* 2004, concl. F. Séners. V. C. Mondou, A. Potteau, « Le contrôle par le juge administratif du pouvoir de notifier les aides d'État à la Commission européenne », *RFDA*, 2009, p. 123. La jurisprudence de la Cour de justice de l'Union européenne est similaire sur ce point, v. notamment : CJUE, 11 novembre 1981, *IBM c/Commission*, aff. 60/81, EU:C:1981:264, point 12 ; CJUE, 13 octobre 2011, *Deutsche Post et Allemagne c/Commission*, aff. jtes C-463/10 P et C-475/10 P, EU:C:2011:656 ; v. également les conclusions de l'Avocat général Manuel Campos Sanches-Bordona présentées le 27 juin 2018 sur l'affaire CJUE, Grd. ch., 19 déc. 2018, *Silvio Berlusconi*, aff. C-219/17, EU:C:2018:502, points 73 à 79.

affecte le commerce entre États membres et menace d'affecter de manière significative la concurrence sur le territoire du ou des États membres qui formulent cette demande. Or, les irrégularités de l'acte de renvoi risquent de porter atteinte aux droits des particuliers.

C'est ce que mettent en avant les entreprises requérantes au soutien de leur demande de référé-suspension : selon elles, l'acte de renvoi a des effets juridiques propres indépendants de la décision finale lesquels porteraient atteinte au principe de sécurité juridique[29], aux droits de la défense et au principe du contradictoire[30].

Le principal de ces effets porte sur la modification des conditions procédurales du contrôle des concentrations. Conformément aux dispositions du règlement concentration, les entreprises sont soumises à une obligation de notification de l'opération à la Commission lorsqu'elle est de dimension européenne[31]. La notification doit avoir lieu avant la réalisation

[29] Selon les requérantes : « le principe de sécurité juridique en demandant l'examen d'une opération n'atteignant pas les seuils en termes de chiffre d'affaires au seul motif que cette opération serait susceptible de produire des effets anticoncurrentiels, alors que le renvoi de telles opérations, qui échappaient jusqu'à présent à tout contrôle *a priori*, devrait en tout état de cause être réservé à des cas dans lesquels le risque d'atteinte à la concurrence est à la fois manifeste et d'une particulière gravité ».

[30] Selon les requérantes : « la décision a été prise au terme d'une procédure irrégulière en l'absence d'information préalable des parties et de recueil de leurs observations sur un éventuel renvoi, en méconnaissance du principe du contradictoire et des droits de la défense garantis par les dispositions de l'article L. 121-1 du code des relations entre le public et l'administration et du point 344 des lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations ».

[31] Article 4 § 1 du règlement concentration.

de l'opération et après la conclusion de l'accord, de sa publication, ou de l'acquisition d'une participation de contrôle. Toute opération de concentration de dimension européenne ne peut être réalisée ni avant d'avoir été notifiée ni avant d'avoir été déclarée compatible par la Commission[32]. Or, l'utilisation de la procédure de l'article 22 impose un contrôle de l'opération de concentration en dehors de ce cadre procédural. Tout d'abord, le renvoi de l'examen du contrôle est déclenché par un État membre sans que les entreprises ne soient obligatoirement associées à la discussion concernant l'opportunité de ce renvoi. La menace que fait peser ce contrôle sur l'opération de concentration est d'autant plus forte qu'il peut intervenir alors même que l'opération a déjà eu lieu, ce qui n'est pas sans soulever des questions sérieuses en termes de sécurité juridique[33]. Ces dernières sont accentuées par les orientations sur l'application du mécanisme de renvoi prévu à l'article 22 du règlement concentration[34], dans lesquelles la Commission annonce la possibilité d'examiner des opérations six mois après leur réalisation, voire même au-delà en l'absence de communication sur l'opération ou si la Commission considère qu'il s'agit d'un cas exceptionnel le justifiant. Certes, la Commission tiendra compte du temps écoulé depuis la clôture de l'opération pour accepter ou rejeter une demande de renvoi — elle affiche ainsi sa volonté de préserver le caractère *ex ante* du mécanisme — néanmoins, dans le cadre de son contrôle, elle pourra tout de même imposer des engagements comportementaux ou structurels

[32] *Ibid.* Article 7 § 1 du règlement 139/2004.

[33] A. Ronzano, « Renvoi : la Commission européenne publie ses orientations sur l'application du mécanisme de renvoi prévu à l'article 22 du règlement sur les concentrations et lance une première consultation sur l'élargissement de la procédure simplifiée », *Concurrences*, n° 2-2021, n° 99945.

[34] Comm. eur., 26 mars 2021, SWD(2021) 66 final, « Orientations de la Commission concernant l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires », point 21.

dans le cas des concentrations qui posent problème[35]. Plus encore, en cas de décision d'incompatibilité, les parties pourront être enjointes à prendre des mesures de déconcentration avec les conséquences économiques importantes qu'elles peuvent emporter.

Pour pallier ces difficultés, la Commission précise qu'en pratique les entreprises pourront volontairement fournir des informations sur les opérations qu'elles envisagent dans le cadre d'une « prénotification informelle »[36]. Le cas échéant, la Commission pourra leur indiquer rapidement qu'elle considère ou non que leur concentration constitue un « bon candidat » pour un renvoi au titre de l'article 22. Par ailleurs, dès qu'une demande de renvoi est envisagée, la Commission en informe les parties à l'opération, qui, dès lors, même si elles n'y sont pas tenues, sont instamment invitées à retarder la mise en œuvre de l'opération jusqu'à ce qu'il ait été décidé si une demande de renvoi sera faite[37]. Mais, malgré ces précisions, il est aisé de percevoir les conséquences importantes d'une décision de renvoi sur les droits des entreprises.

En outre, le renvoi de l'examen de la concentration à la Commission, en plus de dessaisir les autorités nationales, a pour effet de modifier le régime juridique applicable au contrôle de cette concentration. Ce ne sera pas le droit national de la concurrence qui sera appliqué, mais le droit européen, tel qu'il résulte du règlement concentration et de la jurisprudence de la Cour de justice de l'Union européenne. Bien que les droits nationaux de la concurrence sont largement inspirés du droit de l'Union européenne, « toutes les divergences aussi bien

[35] Article 8 du règlement concentration.

[36] Comm. eur., 26 mars 2021, SWD(2021) 66 final, « Orientations de la Commission concernant l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires », point 24.

[37] *Ibid.*, point 27.

minimes que majeures entre les régimes en question […] peuvent avoir un impact décisif pour les entreprises parties à la concentration »[38].

Malgré ces effets, le Conseil d'État s'en tient à l'orthodoxie du contentieux de la légalité en considérant que, « quels que soient les effets d'une telle demande pour les entreprises concernées, le juge administratif n'est pas compétent pour connaître d'une contestation dirigée contre cette demande de renvoi ».

Malgré ses défauts, l'ordonnance du Conseil d'État français a le mérite de tenir compte des exigences de la répartition des compétences entre les juridictions nationales et européennes[39]. Peut-on considérer qu'elle crée une carence de protection juridictionnelle effective préjudiciable aux entreprises ? Comme nous le verrons par la suite, la réponse est *a priori* négative : l'incompétence du juge administratif n'a pas pour effet de priver les entreprises de tout recours juridictionnel effectif, mais de le placer au niveau de l'Union européenne. Comme le rappelle le Conseil d'État, l'appréciation de la légalité de la procédure de la clause hollandaise appartient exclusivement aux institutions de l'Union européenne. Mais encore faut-il que la Commission et la Cour de justice puissent tenir compte des effets juridiques propres de la demande de renvoi, ce dont on peut douter.

[38] M. Behar-Touchain, F. Bien, D. Théophile, S. Vande Walle, J. Vidal, « Les mécanismes de renvoi », *in* Dossier : « Vers un réseau européen du contrôle des concentrations », *Concurrences,* n° 3/2020, p. 15.

[39] Conclusions de l'Avocat général Jean Mischo sur l'affaire CJCE 21 mars 2000, *Greenpeace France* c/*Ministère de l'Agriculture et de la Pêche*, aff. C-6/99, *Rec*. p. I -1651, ECLI:EU:C:1999:587, *AJDA* 2000. 448, note H. Legal, note R. Romi ; *D.* 2001. 1358, obs. J.-C. Galloux

3. LA COMPETENCE EXCLUSIVE DES INSTITUTIONS EUROPEENNES POUR CONTROLER L'ACTE DE RENVOI

Le Conseil d'État justifie son incompétence sur le constat selon lequel cette procédure de contrôle est menée par la Commission (**A**), sous le contrôle de la Cour de justice de l'Union européenne (**B**).

3.1 Une procédure menée par la Commission européenne

Suivant l'article 22 du règlement concentration, il appartient à la Commission de vérifier si les caractéristiques de l'opération nécessaires pour procéder au renvoi de son examen à la Commission sont remplies. Ces conditions sont fixées par le règlement concentration, complétées par les orientations adoptées le 31 mars 2021, relatives à l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires[40].

Suivant ces derniers, une demande de renvoi peut être formulée par un État membre dans les quinze jours après que l'opération a été portée à la connaissance de l'État membre concerné, si cette opération affecte le commerce entre États membres et qu'elle menace d'affecter de manière significative la concurrence sur le territoire du ou des États membres qui formulent cette demande[41].

[40] Orientations de la Commission concernant l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires (2021/C 113/01), *JOUE* C 113/1, du 31 mars 2021.

[41] *Ibid.*

La première condition qui pourrait faire l'objet d'un examen porte sur les personnes susceptibles d'opérer le renvoi. À l'occasion du référé-suspension devant le Conseil d'État français, les entreprises requérantes ont contesté la compétence de l'Autorité de la concurrence pour procéder au renvoi de l'examen de l'opération de concentration au moyen que cette autorité ne pouvait être considérée comme un « État membre ». Bien que le juge administratif ne réponde pas à cet argument, une réponse doit être trouvée dans la jurisprudence du Tribunal de première instance des Communautés européennes. Il a précisé que pouvait être considéré comme émanant d'un État membre, la demande provenant d'un gouvernement, d'un ministère ou encore des autorités nationales de concurrence[42]. Il en résulte que ce point ne devrait pas faire polémique.

Une fois la demande formulée, la Commission informe les autres États membres « sans délai », afin qu'ils puissent se joindre au renvoi. La Commission dispose alors d'un délai de dix jours ouvrables pour décider d'examiner ou non la concentration[43].

S'agissant des conditions du bien-fondé du renvoi, la Commission précise dans ses orientations la manière dont doivent être interprétées ces conditions en soulignant que ces critères garantissent que l'opération a un lien suffisant avec l'Union et le ou les États membres requérants. Le critère de l'affectation du commerce entre États membres doit être considéré comme rempli si la concentration envisagée a une influence perceptible sur les courants d'échanges entre États membres[44]. Quant au critère de l'affectation de la

[42] TPICE, 15 décembre 1999, *Kesko Oy c/Commission*, aff. T 22/97, ECLI:EU:T:1999:327, point 3.

[43] Article 22 § 3 du règlement concentration.

[44] *Ibid.*, § 14 : « En ce qui concerne le premier critère, la communication sur le renvoi des affaires explique qu'une concentration remplit cette condition lorsqu'elle est susceptible d'avoir une influence perceptible sur les courants d'échange entre États membres. La notion

concurrence sur le territoire du ou des États membres formulant la demande, il exige que l'État fournisse une analyse préliminaire démontrant qu'il existe un risque réel que l'opération ait une incidence négative significative sur la concurrence. Cette analyse peut inclure les considérations suivantes : la création ou le renforcement d'une position dominante de l'une des entreprises concernées, l'élimination d'une force concurrentielle importante du marché, y compris l'élimination d'un nouvel entrant ou d'un entrant futur ou la fusion entre deux innovateurs importants, la réduction de la capacité et/ou de l'incitation des concurrents à se faire concurrence, y compris en rendant leur entrée ou développement plus difficiles ou en entravant leur accès aux approvisionnements ou à certains marchés, la capacité et l'incitation à profiter d'une position de force sur un marché donné vers un autre marché, au moyen de ventes liées ou groupées ou d'autres pratiques d'éviction[45]. La Commission européenne précise en outre les autres facteurs qui devraient être pris en considération par la Commission et les États membres pour apprécier l'opportunité du renvoi. Elle explique que les cas qui devraient « normalement » faire l'objet d'un renvoi fondé sur l'article 22 sont ceux

d'« échanges » recouvre toutes les activités économiques transfrontières et englobe les cas dans lesquels l'opération affecte la structure concurrentielle du marché. La Commission appréciera en particulier si l'opération est susceptible d'avoir une influence, directe ou indirecte, réelle ou potentielle, sur les courants d'échanges entre États membres. Parmi les facteurs spécifiques qui pourraient entrer en ligne de compte figurent la localisation des clients (potentiels), la disponibilité et l'offre des produits ou services en cause, la collecte de données dans plusieurs États membres, ou le développement et la mise en œuvre de projets de R&D dont les résultats, y compris les droits de propriété intellectuelle, pourraient, en cas de succès, être commercialisés dans plus d'un État membre.

[45] Orientations de la Commission concernant l'application du mécanisme de renvoi établi à l'article 22 du règlement sur les concentrations à certaines catégories d'affaires (2021/C 113/01), *JOUE* C 113/1, du 31 mars 2021, §§ 15 et 16.

dans lesquels le chiffre d'affaires d'au moins une des entreprises concernées ne reflète pas son « potentiel » concurrentiel actuel ou futur sur le marché.

S'agissant du renvoi de la concentration en cause dans l'affaire sous commentaire, la Commission a accepté la requête formulée par l'Autorité française de la concurrence[46] en se fondant sur certains de ces éléments. La Commission a souligné qu'Illumina était disposée à payer plus de sept milliards de dollars pour une entreprise qui n'avait pas encore généré de chiffre d'affaires. Selon elle, cela indiquait que l'importance concurrentielle de l'opération ne se reflétait pas dans les revenus de la cible. La Commission a conclu également que l'acquisition pourrait permettre à Illumina de restreindre l'accès ou d'augmenter les prix de la prochaine génération de séquenceurs ou de réactifs utilisés dans les tests de dépistage du cancer[47]. La concentration en cause entre donc dans la cible de la nouvelle politique de contrôle des concentrations de la Commission dans son discours du 11 septembre 2020 « *The future of EU merger control* ». À cette occasion, la commissaire européenne en charge de la politique de la concurrence admettant « qu'il existait chaque année une poignée d'opérations de concentration susceptible d'affecter sérieusement la concurrence, mais qui ne font pas l'objet d'un contrôle de la Commission parce qu'elles ne franchissent pas les seuils de contrôle européens, »[48] a pris à bras le corps le problème des acquisitions prédatrices ou consolidantes, ignoré jusqu'ici.

[46] La Commission a accepté d'examiner l'opération de concentration le 21 avril 2021. Plusieurs États membres de l'Espace économique européen (Belgique, Grèce, Islande, Pays-Bas et Norvège) se sont joints à cette demande.

[47] « Mergers: Commission to assess proposed acquisition of GRAIL by Illumina » ; Communiqué de presse de la Commission européenne, 20 avril 2021, https://ec.europa.eu/commission/presscorner/detail/fr/MEX_21_1846

[48] A. Ronzano, « Réforme : la Commission européenne examine la question du contrôle des opérations d'acquisitions d'entreprises innovantes à haute valeur mais ne franchissant pas les

Face à la dimension supranationale du contrôle qui vient d'être présentée, le rôle des autorités nationales de la concurrence est restreint, l'idée même étant que le niveau le plus approprié pour contrôler ce type de concentration est supranational[49]. Enfin, il découle automatiquement du caractère européen du contrôle de l'opération, la compétence juridictionnelle de la Cour de justice de l'Union européenne.

3.2 Une procédure menée sous le contrôle de la Cour de justice de l'Union européenne

Conformément à l'article 19, paragraphe 1du traité FUE, la Cour de justice est chargée d'assurer « le respect du droit dans l'interprétation et l'application des traités ». La Cour de justice de l'Union européenne est la seule compétente pour constater l'invalidité d'une disposition du droit de l'Union ce qui implique corollairement que les juridictions nationales ne sont pas habilitées à déclarer invalides des actes du droit de l'Union européenne[50]. Cette compétence exclusive découle directement de l'interprétation de l'article 263 et 267 du traité FUE qui confère à la Cour de justice de l'Union européenne la compétence pour connaître des recours en annulation contre les actes des institutions qui

seuils de contrôle européens en raison d'un faible chiffre d'affaires », *Concurrences*, n° 4/2020.

[49]Un parallèle peut ici être fait avec le droit des pratiques anticoncurrentielles (*antitrust*) dans le cadre du réseau européen de concurrence.

[50] CJCE, 22, octobre 1987, *Foto-Frost*, aff. 314/85, *Rec.* p. 4199, EU:C:1987:452, point 14.

produisent des effets juridiques contraignants et des renvois préjudiciels en appréciation de validité[51].

Cette compétence est justifiée par la nécessité de préserver l'unité et la cohérence du système juridique de l'Union européenne en évitant qu'un même acte fasse l'objet de décisions différentes lorsque sa validité est contestée devant plusieurs juridictions nationales[52]. Plus précisément, l'intérêt de l'application du droit de l'Union dans la situation où plusieurs autorités, nationales et européennes, interviennent dans un même processus, est d'attribuer un régime juridique cohérent aux actes qui le compose dans la mesure où « il appartient exclusivement à la Cour de justice de contrôler la légalité des décisions adoptées par [l'autorité européenne] ainsi que des actes des [autorités nationales] qui concourent à cette procédure administrative composite »[53]. La coexistence de voies de recours nationales à l'encontre des actes préparatoires des autorités des États membres comporterait le risque d'une divergence d'appréciation dans une même procédure, étant donné que le contrôle de la légalité de l'acte final des institutions relève du juge de l'Union européenne[54]. Dès lors, le principe de coopération loyale implique d'interpréter les dispositions du traité FUE relatif au contrôle de la légalité des actes de l'Union européenne[55] en ce sens qu'ils font obstacle à ce

[51] *Ibid.*

[52] *Ibid.*

[53]Conclusions de l'Avocat général M. Campos Sánchez-Bordona, présentées le 9 juillet. 2019 sur l'affaire dans CJUE, 3 décembre 2019, *Iccrea Banca*, aff. C-414/18, EU:C:2019:574, point 55.

[54] F. Lagarge, E. Neframi, M. Mangemot, « Chronique de l'administration européenne », 2019, 1, n° 169, p. 280.

[55] Notamment l'article 263 TFUE.

que les juridictions nationales exercent un contrôle de légalité sur les actes d'ouverture, préparatoires ou de proposition non contraignante adoptés par les autorités nationales dans le cadre de procédures composites[56].

Comment la Cour de justice contrôle-t-elle les actes nationaux intermédiaires dans le cadre d'une procédure composite ? Dans sa jurisprudence, la Cour de justice a précisé que le contrôle des actes s'inscrivant dans des procédures semblables à celle de la clause hollandaise « suppose nécessairement un contrôle juridictionnel unique, qui ne soit exercé, par les seules juridictions de l'Union, qu'une fois prise la décision de l'institution de l'Union mettant fin à la procédure administrative, décision qui seule est susceptible de produire des effets de droit obligatoires de nature à affecter les intérêts du requérant, en modifiant de façon caractérisée sa situation juridique »[57]. *A priori*, le recours en annulation contre l'acte national de renvoi ne devrait pas être recevable.

Quid de la décision de la Commission d'examiner l'opération de concentration renvoyée. Dans le cadre de l'affaire *Grail/Illumina*, l'entreprise Illumina a formé un recours en annulation contre la décision de la Commission d'accepter le renvoi de l'examen de l'opération de concentration à la Commission[58]. On peut douter de la recevabilité d'une telle requête. En droit de l'Union européenne, sont considérés comme des « actes attaquables » au sens de l'article 263 du traité FUE, « toutes dispositions adoptées par les institutions de l'Union, quelle qu'en soit la forme, qui visent à produire des effets de droit obligatoires »[59]. La Cour de justice de l'Union européenne considère qu'un « acte intermédiaire ou

[56] CJUE, 19 décembre 2018, *Silvio Berlusconi*, *op. cit.*, point 59.

[57] *Ibid.* point 49.

[58] Trib. UE, *Illumina c/Commission*, aff. T-227/21, affaire pendante.

[59] CJUE, Grd. Ch., 20 février 2018, aff. C-16/16 P, précitée, point 47.

préparatoire n'est pas susceptible de faire l'objet d'un recours en annulation […] dès lors qu'un tel acte ne produit pas des effets juridiques obligatoires de nature à affecter les intérêts des requérants, en modifiant de façon caractérisée leur situation juridique »[60]. Plus encore, lorsque l'adoption d'un acte s'effectue en plusieurs phases, ce qui est le cas dans de la procédure du contrôle des concentrations prévue à l'article 22 du règlement concentration, « seules constituent, en principe, des actes attaquables les mesures fixant définitivement la position de l'institution au terme de la procédure, à l'exclusion des mesures intermédiaires dont l'objectif est de préparer la décision finale »[61].

Par exception, la Cour de justice a reconnu le principe de la recevabilité d'un recours en annulation formé contre un acte préparatoire qui aurait des « effets juridiques autonomes »[62]. Ce principe a été développé dans le domaine particulier des aides d'États, dans lequel, la décision d'ouverture de la procédure formelle d'examen à l'égard d'une mesure en cours d'exécution et qualifiée d'aide nouvelle par la Commission modifie la situation juridique des entreprises qui en sont bénéficiaires, notamment en ce qui concerne la poursuite de la mise en œuvre de cette mesure. Dans le cadre de la procédure de l'article 22, à la différence du droit des aides d'État, aucune mesure suspensive de l'opération ne peut être imposée, néanmoins, l'ouverture formelle de l'examen de l'opération devant la Commission fragilise

[60] Trib. UE, 7 septembre 2010, *Norilsk Nickel Harjavalta et Umicore c/Commission*, aff. T-532/08, *Rec*. p. II-3959, ECLI:EU:T:2010:35, points 93 et 94 ; Trib. UE, 11 juillet 2019, *BP/FRA*, aff. T-888/16, ECLI:EU:T:2019:493, point 215.

[61] CJCE, 11 novembre 1981, *IBM c/Commission*, aff. 60/81, EU:C:1981:264, point 10 ; Trib. UE, 27 novembre 2017, *Schwenk Zement c/Commission*, aff. T-907/16, ECLI:EU:T:2017:858, point 14.

[62] CJUE, 8 décembre 2011, *Deutsche Post c/Commission*, aff. T-421/07, *Rec.* p. II-8105, ECLI:EU:T:2015:65, points 49.

la situation juridique et financière des entreprises et par là même pourrait éventuellement constituer un effet juridique conduisant à reconnaître le caractère attaquable de la décision de la Commission d'examiner l'opération de concentration. Néanmoins, au vu de la jurisprudence actuelle, on peut douter que le Tribunal de l'Union européenne retienne une telle appréciation.

Ainsi, seule la décision finale sur la conformité de la concentration devrait pouvoir faire l'objet d'un recours. La Cour de justice précise d'ailleurs que « le recours introduit contre la décision mettant fin à la procédure assurera une protection juridictionnelle suffisante »[63]. Les éventuelles illégalités entachant un tel acte préparatoire doivent être invoquées à l'appui d'un recours dirigé contre l'acte définitif dont il constitue un stade d'élaboration[64]. Dès lors, la légalité de cette décision n'est susceptible d'être remise en cause que de façon incidente, à l'appui d'un recours dirigé contre les actes ayant mis fin à la procédure.

L'on peut douter de l'intérêt pour les entreprises de la reconnaissance *a posteriori* de l'illégalité du renvoi, notamment par rapport aux effets juridiques qu'elles contestent. Si ce n'est que cette illégalité pourrait être invoquée dans le cadre d'un recours en indemnité. Néanmoins, la question de l'imputabilité du fait générateur du dommage n'ayant pas été réglée dans le cadre d'une procédure composite, la question se pose de savoir si la charge indemnisatrice pèserait ici sur les États membres ou sur la Commission et par là même quel

[63] Trib. UE, 27 novembre 2017, *Schwenk Zement c/Commission*, aff. T-907/16, ECLI:EU:T:2017:858, point 17

[64] CJCE, 11 novembre 1981, *IBM c/Commission*, aff. 60/81, EU:C:1981:264, point 12 : « il y a lieu d'observer que si des mesures de nature purement préparatoire ne peuvent en tant que telles faire l'objet d'un recours en annulation, les illégalités éventuelles qui les entacheraient pourraient être invoquées à l'appui du recours dirigé contre l'acte définitif dont elles constituent un stade d'élaboration ».

serait le juge compétent pour se prononcer sur la possibilité pour une entreprise d'obtenir l'indemnisation des préjudices causés par la mise en œuvre de cette procédure de renvoi.

Comme on le voit, le régime contentieux des procédures composites n'a pas fini d'interroger la répartition des compétences juridictionnelles entre les juges nationaux et le juge de l'Union européenne, l'enjeu étant pour les juges de préserver les intérêts juridiques des particuliers tout en ne remettant en pas en cause la structure juridictionnelle de l'Union européenne.

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THE TRAJECTORY OF THE CIRCULAR ECONOMY UNDER THE EUROPEAN GREEN NEW DEAL

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INDEX

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1. INTRODUCTION

In the trajectory of the European Green New Deal[2], which focuses on the ecological and digital transition, it is crucial to determine which economic paradigm can ensure the competitiveness of the economic system and the sustainability of the ecosystem in the face of the global challenges of climate change and the recovery of Union after the health emergency.

Therefore, to achieve ecological transition[3], it is essential to move away from the linear development model, consistent with the 2018 package of directives on the circular economy; in particular with dir. 851/2018.

1 On the new European Green New Deal, v. Brussels, 11.12.2019 COM (2019) 640 final. See Piano Nazionale di Ripresa e Resilienza (PNRR) – Italia, 2021.

[3] The presentation of the new package of directives on the circular economy took place on 2 December 2015, during a plenary session of the European Parliament by Vice President Katainen. *The new package was composed of the Communication 'The Missing Link - Action Plan in the European Union for the circular economy'* (Bruxelles, 2.12.2015 COM (2015) 614 final) and accompanied by some legislative proposals for the revision of the EU directives on waste. The underlying logic of the design contained above all in Dir. 2018/851, art. 1, par. 1, point 10, is mainly expressed in the design and production of products that do not become waste or become waste only in the long term. More specifically, there is an obligation for States to adopt measures aimed at avoiding the production of waste which at least: a) promote and support sustainable production or consumption models; b) encourage the design, manufacture and use of resource efficient products; c) relate to products that contain critical raw materials to prevent them from becoming waste.

In this article, the methodological approach necessary to understand the new model of economic development will be investigated, the extent of the change it has given to the economic and institutional system will be clarified and the most appropriate environmental administrative law status will be questioned.

Finally, we will focus on the decision-making procedures and the necessary synergies between subjects and areas of intervention necessary for its affirmation and on the operational featuresin which this is most expressed.

The sketch outlined by the Green New Deal confirms the European conceptual framework of the circular economy, which is broader than mere waste management, as it is meant to become a fundamental part of the European industrial strategy, to generate value and attract investments[4]. This change was already evident in the opening words of the directive n.851/2018; the first recital hoped for the improvement and transformation of waste management into a «*sustainable management of materials to safeguard, protect and improve the quality of the environment, protect human health, guarantee a prudent, efficient and rationality of natural resources, promote the principles of the circular economy*».

See Commission Notice, Guidance on Innovation Procurement (2021/C 267/01) (GUCE 06.07.2021 EU Council Conclusions, "Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy" Brussels, 25 November 2020; COM(2018) 32, Communication on the implementation of the circular economy package: options to address the interface between chemical, product and waste legislation. COM(2018) 29 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a monitoring framework for a circular economy.

[4] On the New Industrial Strategy for Europe, Brussels, 10.3.2020 COM (2020) 102 final.

In fact, it is confirmed that the new model affects the entire industrial process of designing and producing goods and therefore theentire supply chain, right from the selection of raw materials, chosen by virtue of their possible reuse. In fact, the design of fully repairable and durable goods represents, upstream, the real the possibility ofof our Country to success in its implementation[5].

In this sense, the Ecodesign Directive[6] regulates adequately energy efficiency and certain circularity characteristics of energy-related products. Through an appropriate initiative of the Commission, the scope of this directive will have to extend to a wider range of products and services, far beyond those related to energy, so that through the phase design, circularity invests more extensively in the entire production system.

In the new European Industrial Strategy, which treats companies as guiding subjects of the transition towards the circular economy, the perspective is as broad as that adopted by the European legislator, as the intention is to «*revolutionize the way we design, transform, use and eliminate objects, encouraging European industry*».

The competitive advantage of Italy precisely in the field of industrial design justifies its ranking in first place in the Report for the circular economy also in 2021[7] and in the

[5] On this front, the approach followed by the National Resilience and Recovery Plan, which confines the circular economy mainly in the shadow of waste management with the aim of reducing its impact on the environment, is very reductive.

[6] Directive 2009/125 / EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (OJ L 285 of 31.10.2009, 10).

[7] The Report is prepared every year by the Circular Economy Network in collaboration with ENEA

GreenItaly 2020 report by Symbola and Unioncamere in the circular use of furnishing wood and in sustainable agriculture.

In this way, the most accredited definition of the circular economy, namely that of the Ellen Mac Arthur Foundation, receives confirmation and becomes tangible: «*the circular economy is a conceptually regenerative industrial economy that reproduces nature in actively improving and optimizing systems through which operates* ».

It is no coincidence that the Action Plan for the circular economy of March 2020 specifies that «*a progressive, but irreversible transition towards a sustainable economic system is an essential element of the new industrial strategy of the Union*» [8].

This conceptual framework apars essential to understand how a circular evolution of the economic system, facilitated and favored by the increase in connectivity generated by the digital transition, produces many changes in the traditional way of conceiving the relationship. Between the economy and the environment and to interpret the same evolution of our economic Constitution, at section 3 of art. 41.

2. THE APPROPRIATE METHODOLOGICAL APPROACH

The choice of the methodological approach is influenced by the new EU approach towards Circular Economy: starting from the Green New Deal and all along the adoption of policies to overcome the current health emergency, environmental issues are meant to lead the European Union towards a social and economic restart.

[8] See COM (2020) 98 final, *A new action plan for the circular economy. For a cleaner and more competitive Europe, of 11 March 2020*.

In fact, the achievement of the Next Generation EU requires that, in addition to the focus of digitization and ecological transition, all projects (none excluded) respect the «(Pareto) principle of green improvement» or the «do not substantial harm» (i.e. improve on at least one of the six environmental dimensions without worsening the others).

A method of «verification of sustainability» is also outlined, according to which the promoters of projects exceeding certain dimensions will be required to assess their environmental, climatic and social impact.

The policy-maker will therefore have to calculate the effects of European policies on the six environmental dimensions defined by the taxonomy of the European Union: climate adaptation and mitigation, air pollution, water use, circularity of the economic process and impact on biodiversity. it requires, on the part of the jurist, a necessary interdisciplinarity.

The study of the ecological transition will therefore require, on the part of the legal expert, the humility to go beyond one's own disciplinary boundaries and, at the same time, the daring to follow new paths. In fact, dealing with the circular economy means, for a legal scholar, to associate their specific legal and economic skills with a general knowledge on natural sciences, for what concerns the characteristics and nature of the different energy sources and the impact of the different choices of production and consumption on the ecosystem and the biosphere[9].

There is, however, an objective unity of knowledge, with respect to which all the various sciences are nothing other than the product of a single activity of the human intellect; in scientific research, however, alongside the increasingly accentuated diffusion of specialist

[9] Even the British government, now outside the EU, has entrusted one of the world's best-known economists, Parta Dasgupta, with the task of drafting a report where economic models and policy choices are completely redefined starting from the assumption of system integration economic in the ecosystem.

sectors, the need to integrate the various sectors of knowledge emerged at the same time in order to have a unified and comprehensive vision of the complex problems analyzed from multiple specialist points of view.

The necessary interdisciplinary projection of the methodological approach, however, does not in any way produce a marginalization of the science of administrative law and, more generally, of legal science in the analysis of these issues. GD Romagnosi wrote that «*all sciences join hands interchangeably*», adding that «*perhaps there is none in which the alliance should be greater than in that of law and social utility*»[10]. This minority appears to be averted above all due to the way the relationship between the rationality of economic science and that of legal science unfolds in the European regulation of circularity.

The separation between them that started from the second half of the 1980s had in fact generated a progressive domination of the methods and mechanisms of economic rationality, reinforced by the rigid and formalistic interpretation of European rules, on the financial constraints of Member states[11].

This dominance is gradually overcome, especially in the European regulation inherent in the framework of the Green New Deal, not so much by replacing the conceptual categories typical of economic science; some of these, in fact, such as those of efficient use of resources,

[10] GD ROMAGNOSI, *Opere, rearranged and illustrated* by A. DE GIORGI, vol. III, *Scritti sul diritto filosofico*, Milan, 1842, 107, where it is specified that "to say that the sciences join hands reciprocally, he is to say the same that all truths are interchangeably connected". The passage is recalled by F. GASPARI, *Città intelligenti e intervento pubblico*, in *Dir. dell'ec*., 2019, issue 1, p. 103.

[11] This dynamic was effectively highlighted by M. Goldmann, *The Great Recurrence. Karl Polanyi and the Crises of the European Union*, in *European Law Journal*, 2017, 272-289.

competitiveness and cost-benefit analysis, actually preserve their centrality in the new institutional design.

The novelty consists rather in their necessary projection towards the achievement of values of a solidarity and social nature. The ecological transition of the Union is in fact also called to be characterized as a just evolution, that is, fully consistent with the solidarity values of the European constitutional tradition[12]. In order to ensure fairness and justice of the transition, the allocation of investments for a sustainable Europe will have to take into account, for example, the ability of Member States to address environmental challenges based on their level of economic development. The previous conceptual and substantial domination of the categories of economic science over those of legal science is therefore overturned in a symmetrical balance of fruitful and reciprocal grafts. As the Commission itself states: 'It also aims to protect, conserve and improve the EU's natural capital and to protect the health and well-being of citizens from environmental risks and their consequences. At the same time, this transition must be just and inclusive".It was noted that the same principle of efficiency of administrative action is destined to have different meanings and valuesdepending on the context in which it is affirmed[13]. In the regulation of the circular economy, the principle of

[12] In this sense, allow me to refer to M. Cocconi, *La regolazione dell'economia circolare,* Milan, Franco Angeli, 2020. See R. Ferrara, *La tutela dell'ambiente e il principio di integrazione* in *Rivista giuridica di urbanistica*, 2021; n. 1; C. Feliziani, *Industria e ambiente. Il principio di integrazione dalla Rivoluzione Industriale all'economia circolare* in *Diritto Amministrativo*, 2020, 843 - L. Dawson, *Our Waste, Our Resources: A Strategy for England - switching to a circular economy through the use of extended producer responsibility*, in *Environmental Law Review*, 2019, 210-218; S. Thomas, *Law and the circular economy* in *Journal of Business Law*, 2019, 62-83.

[13] See. L. Torchia, *L'efficienza della Pubblica Amministrazione fra ipertropia legislativa e atrofia dei risultati*, Relazione tenuta il 64° Convegno di Studi amministrativi su Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie, Varenna, 20-21-22 settembre 2018.

efficiency, especially with regard to the use of resources, is not characterized as aimed at compressing the solidarity values of the constitutional tradition common to the European nations. Conversely, this connotes itself as specifically intended to realize these values.

3. ECONOMIC TRANSITION: FUNDAMENTALS AND FUTURE

The theme of the unsustainability of Linear Economy, characterized by the well-known sequence: «*Take, make, dispose*, is certainly not new, nor does the emphasis recently placed by an authoritative group of scholars on the consequent necessity to rethink the relationship between the economy and the environment appear entirely original.

Since the 1972 Report on «*The Limits to Development*», commissioned to the Massachussets Institute of Technology by the Club of Rome, the urgency to rethink the development model was based on the fear of an exhaustion of natural resources and the consequent need to preserve its minimum ecological levels. It was a proposal for revision which, while evoking the limits of the linear model, nevertheless moved within its own logic and rationality, which in reality was not completely disavowed.

A more marked approach to the conceptual paradigm of the circular economy, albeit with the use of the noun cyclical economy, occurs later with Walter Stahel's report «*Potential for substitution manpower for energy*» delivered in 1976 to the European Commission and subsequently published as volume.

Stahel proposes to extend the life cycle of products, to reconsider the value of waste, to extend the responsibility of companies also to the post-sales phase, to favor a transition towards an economy that offers services rather than products, promoting greater efficiency in use of resources, as well as an increase in employment[14].

[14] STAHEL W., *Jobs for Tomorrow: The Potential for Substituting Manpower for Energy*, Vantage Press Inc., New York, 1982

Shortly thereafter, the terms of «*Industrial Ecology*» and «*Industrial Symbiosis*» were coined by the American physicist Robert Ayres[15]: that is, it is understood that the industrial system (technosphere) is a factor in the metabolism of the biosphere and that every aspect of the technosphere has its counterpart in the biosphere.

In other words, the technosphere is called upon to imitate the functioning of the biosphere, capable of using energy and resources efficiently: the goal is the enhancement of resources with the creation of closed cycles that give life to waste transformed into new material[16].

The public debate on the necessary transition towards the circularity of the economic system is completely located in the path traced by Stahel which does not concern the limits to industrial development imposed by the environmental instance therefore configured as a cost; internally, the phase following the take and make is not actually the dispose but a possible reuse of the waste in the production process.

Consistent with this perspective is the "*decoupling oriented*" policy contained in Agenda 21 of 1998, aimed at separating growth from the use of materials and energy, increasing well-being and decreasing the use of resources: "*Factor for: doubling wealth, having, resource use* ".

Actually, studies are now unanimous in affirming that the risk of unsustainability of the system does not consist so much in the exhaustion of non-renewable natural resources, at least in the short term. The relative criticality consists, rather, in the pressure deriving from

[15] AYRES R. U., *Industrial Metabolism*, in *Technology and Environment*, 1989, 23-49.

[16] For an effective analysis of the evolution of the theorization on the circular economy v. M. Frey, *Genesi ed evoluzione dell'economia circolare*, in RQDA, n. 1/2020, 163-181.

the growing demand for raw materials, not balanced by the presence of easily accessible resources that do not pose problems on the geopolitical security side.

In fact, the Union largely depends on the import of raw materials to emerging economies with a consequent vulnerability, in terms of prices and market volatility, to geopolitical factors of third countries that undermine their independence and economic autonomy.

A greater availability of raw materials generated by waste would therefore allow national companies to obtain savings on spending on materials and increase employment.

Furthermore, the access to raw materials and the availability of energy resources represent a strategic security issue for Europe's ambition to achieve the Green Deal. Ensuring the supply of sustainable raw materials, in particular those essential for clean technologies and digital, space and defense applications, differentiating their offer from both primary and secondary sources, is therefore one of the fundamental conditions for the transition to take place. Ecological and energetic.

The perspective therefore is to question the way environment is perceived as a limit or alternative to industrial development. The issue of the exhaustion of natural capital is therefore overshadowed by the identification of technical solutions that allow it to be used without waste or dispersion.

In reality, the logic is that of a paradigm in which environmental issues, integrated in the redefinition of the industrial process itself, converge and are not opposed to those related to economic competitiveness and employment.

In this perspective, these do not constitute limits to industrial development but become real drivers of economic and social progress. The transition towards circularity is therefore characterized as a fundamental step towards eco-innovation of process and product, of new research and development programs, of an acceleration of technological progress.

As stated in the Communication on the new Industrial Strategy of the European Union: «This approach based on greater circularity will lead to a cleaner and more competitive industry by

mitigating the repercussions on the environment, easing competition for access to limited resources and reducing production costs. The economic motivation is as strong as the environmental and the moral imperative».

As noted[17], in this perspective the economic Constitution itself assumes an innovative meaning, where paragraph 3 of art. 41 of the Constitution, transforms the limits to economic initiative into propulsive and positive factors of its own productivity and efficiency through the orientation of public powers to companies towards a circular type production.hence, the economic Constitution itself is revitalized to some extent, specifically the third paragraph of art. 41 of the Constitution; a renewed area of industrial policy is affirmed green and the same freedom of economic initiative is consecrated as being able to achieve virtuous objectives in the environmental sphere through mercantile dynamics.

The limits to economic initiative, identified by art. 41, paragraph 3, of the Constitution thus become positive and virtuous objectives of the intervention of the public authorities aimed at orienting companies towards the production of eco-compatible and circular products.

The economic Constitution, instead of being connoted as incompatible with the fundamental freedoms of the European market and the protection of competition guaranteed within it, can therefore become an engine for the affirmation of the new European development paradigm.

The emergence of the new paradigm, in fact, is fueled by and can in turn increase the availability of more jobs. In fact, to implement the circular economy, high-intensity and highly skilled sectors are needed that will lead companies to increase the supply of work with a positive impact on employment both from a qualitative and quantitative point of view.

[17] F. De Leonardis, *Editoriale*, in *Dir. dell'economia,* n. 3/2019.

The new professions and skills green and circular, as shown in the aforementioned Report Greenitaly by Symbola-Unioncamere, were characterized in our country by a high educational and professional level of employees, as well as by a greater stability of the employment relationship compared to traditional occupations.

As emerges in the new European Industrial Strategy, in the global race for talent, Europe needs to invest more in skills and lifelong learning. This investment will require collective action from industry, Member States, social partners and other stakeholders through a new *'Skills Pact'* aimed at helping to enhance skills and retraining and unlocking public investment and private individuals in human capital.

Applying the principles of the circular economy in all sectors and industries could create 700 000 new jobs in the Union by 2030, many of them in SMEs.

This necessary synergy between environment/circularity and greater competitiveness of the European economic system is made very clear by the European Commission in the Europe 2020 Communication.

Here, in outlining the framework of the social market economy for the 21st century, the aim is to achieve economic model in which the more efficient use of resources and the reduction of the environmental impact of industrial waste must be combined with an increase in economic progress.

4. THE STATUS OF ADMINISTRATIVE ENVIRONMENTAL LAW IN THE CIRCULAR TRANSITION

In the European regulation of the circular economy, environmental administrative law plays an important role not so much for an innovation of its operational tools as for their contextual and joint use.

Above all, in the design of the Green New Deal we are witnessing a great change of pace, compared to the past, in the use of State intervention models. State intervention aimed at setting limits (command and control). Nowadays, the so-called adaptive management approach, which aims at orienting the market towards environmental sustainability, is coordinated and coherent with the systemic design of public policy.

In fact, the objective of reaching circularity requires a level of flexibility that only a system of incentives, although not used jointly but rather in support of public regulation, is able to achieve, rebalancing the rigidity of the recourse to authority measures alone.

The action of the public authorities is in fact flanked by that of private subjects by conditioning their activities, modifying their objectives, strengthening their technical capabilities, making available new investments conditional on the achievement of objectives established by public subjects. These aims are not only environmental but also affect the industrial strategy of the countries and the strengthening of their social cohesion.

The Investment Plan for a Sustainable Europe is the reference framework to make possible and support the initiatives of companies, third sector subjects and public administrations functional to increasing the transition towards a circular and climate-neutral economy.

The circular economy action plan will include, for example, as stated in the Communication on the Green New Deal 'measures to encourage businesses to offer, and enable consumers to choose, reusable products durable and repairable. It will analyze the need for a «*right to repair*» and counter the planned obsolescence of devices, «*especially electronic ones*».

The role of public authorities, in reality, will not be limited only to correcting market failures, but will mainly take a coherent direction to satisfy the same design of the Green New Deal, not only for promotion but also for innovation.

The pursuit of climate neutrality will require a deep restructuring of the economies of the states, structural changes in business models and the need for new skills, all profiles that require a significant investment in innovation.

As stated in the Communication on the new European Industrial Strategy, *«the circular economy today must necessarily be combined with technological innovation. Such a transformation must affect all sectors and innovation should be integrated into the process of developing European policies»*.

We could therefore speak of an innovative state as well as a promoter state.

Further tools are identified by the Commission in the reputational lever that derives from the experimentation of the *'environmental footprint of the product'*, a method capable of measuring the environmental performance of goods and communicating information on environmental matters. In the same direction, the Commission intends to increase the effectiveness and contribution to the circular economy of the EU Ecolabel, which identifies products with a reduced environmental impact over their entire life cycle.

The traditional tools of a reputational, economic and financial nature are flanked by joint tools, such as the public-private partnership for innovation and pedagogical tools, both in terms of training in the public sector and in raising awareness of private businesses.

5. FEATURES OF DECISION-MAKING PROCEDURES: INTERCONNECTION AND CIRCULARITY

The decision-making process prone to ecological transition takes on a circular dynamic and a strictly interconnected way of development. This path in fact originates from below, from the request of participation of civil society, and subsequently invests institutions at various levels, both in the supranational and in the subnational dimension, which welcome the impulses coming from citizens, and translate them into public policies.

The beginning of the circularity of economy is rooted ina pact between citizens, businesses, local and national institutions and European bodies, which generates the recovery that should spring from the European New Deal.

Furthermore, the progress made in European policies aimed at these goals must be constantly communicated to European citizens and civil society must be systematically involved in the governance and implementation of the objectives of the 2030 Agenda.

Consumers and businesses are not mere recipients of the new development paradigm but are called to take on an active role as protagonists of the ecological and industrial transition towards the circular economy. In the approach given to the European plan by the Commission, the active participation of consumers and the assumption of corporate social responsibility towards the transition and the confidence in its realization are fundamental elements of the path undertaken.

European consumer policy itself will acquire a fundamental role in guiding and empowering consumers to make responsible choices and to feel that they are active protagonists of the ecological transition.

The provision of reliable, comparable and verifiable information to consumers will support them in making informed choices and avoiding becoming easy prey to greenwashing. This information should affect the life span and availability of repair services, spare parts and repair manuals.

The Commission intends to propose a revision of the consumer protection legislation to strengthen its protection against premature obsolescence of goods and inauthentic ecologism. This discipline will also be responsible for setting minimum requirements for sustainability brands/logos and information tools.

More specifically, corporate social responsibility is an emblematic factor of the choral and systemic structure of the new development model. In this regard, the Communication on the Green New Deal hopes that sustainability should be more systematically integrated into corporate governance; this would prevent many companies from still concentrating excessively on short-term financial results at the expense of long-term development and sustainability profiles.

In the same vein, businesses and financial institutions will also need to improve the transparency of climate and environmental data, so that investors are fully informed about the sustainability of their investments.

The affirmation of the circular economy, within the design of the Green New Deal, passes also through the profound interconnection of actors, areas and processes.

Even this methodology is not new. Already in Agenda 21, approved at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, a social profile was introduced in the director of environmental sustainability; in fact, it was stated that «an indispensable requirement for sustainable development» is «*the elimination of poverty and greater equity in the distribution of resources among the peoples of the world*». The principle thus began to stand, from the outset, on three pillars, environmental, economic and social, to be considered mutually interdependent.

Furthermore, one of the specificities of the 2030 Agenda for sustainable development is precisely the integration of actions and objectives,in order to redefine the new development model. The global challenges that arise, in fact, require, also for the European Commission, the abandonment or insufficiency of sectoral policies and governance mechanisms, to the advantage of a more integrated and systemic approach.

Within the Green New Deal, the Commission acquires the objectives of the United Nations 2030 Agenda on sustainable development and includes them in the macroeconomic coordination of the European Semester. The inclusion and evocation of the objectives of the 2030 Agenda, within the ecological transition designed by the Green New Deal, is due to the global dimension of the challenges to be faced which inevitably require multilevel regulation.

In this perspective, we cannot fail to refer to the New Strategic Agenda of the European Union 2019-2024, which has identified among the EU priorities that of «*building a green, equitable, social and climate-neutral Europe*»[18].

It is a process of change that simultaneously affects the action of public authorities in the environmental, economic and social sphere, inwhich the exploitation of resources, the investment plan and the direction of technological development must take place in synergy.

The commitment of the many institutional and social actors which the legislator requires to take action to promote the realization of the new development model must therefore be cohesive.

This interconnection of actors and actions must be made possible by an implementation discipline that favors overall coherence; the action of the legislator, therefore, must make the collaboration between all the actors of the circular economy - public administrations, companies, research institutes - structural and at the same time, substantially, promote innovation and technology transfer.

The initiative developed by the various subjects, in a logic of interconnection, must also be based on solidarity both vertically, i.e. between different generations, in a manner consistent with the meaning of sustainable development contained in the Brutland Report, and horizontally, between Countries with different levels of development, in a logic of cohesion[19].

[18] Adopted by the European Council in Brussels on 19-20 June 2019.

[19] Allow me to refer to A. D'Aloia, *Prefazione. Economia circolare e diritto: alla ricerca die contenuti materiali della sostenibilità*, a M. Cocconi, *La regolazione dell'economia circolare*, cit. 9.

6. FROM THE PROTECTION OF COMPETITION TO SUSTAINABLE COMPETITION

The intervention of the public authorities does not actually follow, in this design, a logic that hinders the dynamics of competition in the market.

This happened, for example, in the context of green procurement, which can become, thanks to the life cycle clauses, in Articles 95 and 96, and the obligation to comply with the minimum environmental criteria, a driving factor of a more sustainable way of designing and producing artifacts and, therefore, of the circularity of the economic system.

Since public administrations are among the largest buyers of goods, up to about 14% of GDP, the choice of sustainable products by them could have a very significant impact towards the effective take-off of internal circularity of the industrial process. Their significant role as buyers of products would be able to move large economic flows and therefore would have a domino effect on the relative production of environmentally friendly goods. With the clarification, in art. 34, paragraph 3, of the new Code (Legislative Decree 18 April 2016, n. 50) of «*the criteria of energy and environmental sustainability*», it introduces, in effect, the obligation to include in the project and tender documentation a minimum content consisting of the technical specifications and contractual clauses contained in the minimum environmental criteria. These criteria, as rewarding elements, are also considered for the purpose of drafting the tender documents for the application of the criterion of the most economically advantageous offer (Article 95, paragraph 6).

A central role, in orienting public contracts towards sustainability objectives, is also constituted by the award criteria, namely that of the economically advantageous offer (art. 96, paragraph 6) and the introduction of the so-called life cycle costs (Article 95, second paragraph and Article 96, first paragraph, letter b).

Through the new assessment approach based on the life cycle, which includes both internal costs and those attributable to environmental externalities, as long as they are monetized and controlled, the limits of competitiveness on the market for companies can in fact be exceeded, thus being able to investing in innovation to become more sustainable.

The use of this feature can also represent a precious opportunity to encourage private investments in innovative sectors which tend to be less attractive. Given that the fundamental characteristics of environmentally friendly products must be repairability and durability, traceability of the product life cycle will also be necessary, made possible by digital innovation and the public-private partnership for innovation[20]

This innovation presents, as often happens, risks and opportunities. On one hand, in fact, the use of the new award criteria will allow the contracting authorities to offer substance to the legal reserve contained in art. 30 of the new Italian Public Procurement Code for which the criterion of affordability can be subordinated to the environmental criteria. At the same time, these criteria should be applied as objective and non-discriminatory as possible in order to avoid possible distortions of competition. On the other hand, the use of several indeterminate legal concepts significantly expands the margin of technical discretion entrusted to the Contracting Authorities throughout the course of the procedure, without the possibility of anchoring to binding precepts, with all the risks associated with this. extension without the presence of adequate counterweights.

The actual achievement of environmental policies and the impetus offered to the circularity of the production system can also be favored by the use, during the tender, of certifications established by third parties for the purchase of products and services covered by the contract. The use of these certifications, which have been established regarding the effective existence of the minimum environmental criteria, actually makes them a guarantee for the achievement of the expected result from green procurement with regard to the activation of a real circularity of industrial production processes. Their use, offering greater certainty about the existence of these criteria, contrasts the grafting of distortionary dynamics of competition and contributes, vice versa, to an optimal functioning of the market.

The European energy policy was also geared towards combating climate change through an initiative to promote renewable energy and energy efficiency which aimed at favoring

[20] In this sense, v. F. Fracchia, S. Vernile, *I contratti pubblici come strumento di sviluppo ambientale*, in *Dir. Ec.*, n. 2 of 2020.

economic progress by dissociating it from the use of conventional energy; the same Directive n. 28 of 2009 but, more recently, the Energy 2020 Communication and the Green New Deal itself aim to favor the functioning of the integrated energy market pervaded by the direction of a decisive energy transition towards renewable sources.

In the European initiative aimed at promoting renewable sources, the pursuit of environmental objectives and security of supply will have to be strictly combined with those of strengthening competition and integrating the energy market at European level. This initiative must in fact develop in such a way as to boost the construction of an integrated European energy market of which renewable sources are destined to constitute a driving segment.

In this initiative, the green economy can happily be combined with the circular economy in the fight against climate change, questioning the relationship between the use of conventional energy and economic and social progress.

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RETHINKING THE CITY STARTING FROM THE CANADIAN 'TAXPAYER TOWN HALLS': TOWARDS THE INVOLVEMENT OF A NEW CONSTITUTIONAL SPACE BEYOND DIGITAL DIALOGUE?

Giovanna TIEGHI[1]

INDEX

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3. USING FORUMS FOR INTERGOVERNMENTAL INTERACTION: FIRST STEPS OF A NEW CITIES' CONSTITUTIONAL SPACE
4. CHALLENGING PRACTICES IN ACTION AND THEIR COMPARATIVE LAW VALUE: INSPIRATION FOR AN UPDATED CITY-ORIENTED DISCOURSE?

1. GLOBAL LEGAL CHALLENGES AND THE 'CITY ARGUMENT'

How to deal with today's city-driven society[2] is a concrete question for legal scholars. In addition to – and, day by day, versus - traditional state-centered thinking[3],

[2] Ex multis: since the beginning, L. Mumford, *The Culture of Cities,* (San Diego: Harcourt Brace, 1938); M.P. Smith (ed.), *Cities in Transformation,* (Newbory Park, CA: Sage,1984); E. Frug Gerald, *The City as a Legal Concept* (1980), in Harvard Law Review 93(6): 1053-1154; M. Loughlin, *Local Government in the Modern State,* (London: Sweet&Maxwell, 1986); W. Magnusson, *Metropolitan Reform in the Capitalist City,* (1981) 14:557-85, in Canadian J. of Pol. Sc.; W. Magnusson, *The Search for Political Space: Globalization, Social Movements and the Urban Political Experience,* (Toronto: University of Toronto Press, 1996). Lately: C. Poli, *Città flessibili. Una rivoluzione nel governo urbano,* Torino: instar Libri, 2009); F. Pizzolato, A. Scalone & F. Corvaja (ed.), *La città e la partecipazione tra diritto e politica,* (Torino: Giappichelli, 2019); G. F. Ferrari (ed.), *La prossima città,* (Milano: Mimesis, 2018); S. Bertuglia & F. Vaio, *Il fenomeno urbano e la complessità,* (Torino: Bollati Boringhieri, 2019).

[3] For a critique to the state-centered outlook, see, ex multis: J. Bartelson, *The Critique of the State* (Cambridge: Cambridge University Press, 2001).

contemporary academics, government officials, ombudsmen, as well as lawyers, are requested to embrace a new intellectual skill and attitude useful, on the one hand, to better match the 'city argument' with law[4] and, on the other hand, to constructively debate the future of an updated citizen-centered legal approach in the constitutional law field.

Considering global legal challenges, the role of the city needs to be evaluated in a distinctive comparative law perspective[5]: a stimulating, legal empirical way to face the ongoing debate about a target model of balanced Citizen-City/State relationship giving response, through the exploration of the untapped potentialities for local democracy, to the State-Local dichotomy[6] and to 'right to the city' competing conceptions[7]. The ongoing process of reconsidering the

[4] Recently, on the matter, and for a compelling outlook on "The programme of reflection: the city, the new frontier of administrative law", see J.B. Auby, *La città, nuova frontiera del diritto amministrativo,* in F. Pizzolato, A. Scalone & F. Corvaja, (ed.), *La città e la partecipazione tra diritto e politica,* quot., 10 and from 19. More specifically, on the city as a legal concept and dimension, see F. Pizzolato, *La città come dimensione del diritto e della democrazia,* in F. Pizzolato, A. Scalone & F. Corvaja, (ed.), *La città e la partecipazione tra diritto e politica,* quot., 31-43. For future updated scenarios, see F. Pizzolato, G. Rivosecchi & A. Scalone, *La città oltre lo Stato,* (Torino: Giappichelli) upcoming ed.

[5] "In other words, how can the comparatist reconcile the strongly national attitude of constitutional law with the end of boundaries fostered by globalization?": A. Baraggia, *Challenges in Comparative Constitutional Law Studies: Between Globalization and Constitutional Tradition,* Special Issue – in Comparative Law, Law and Method, October 2017, 8.

[6] From a state-local government perspective: R. Briffault, *Our Localism, Part II – Localism and Legal Theory,* (1990) 90:346-454, in Columbia Law Review.

[7] H. Lefebvre, *Le Droit à la Ville,* (Parigi: Anthropos, 1968). Lefebvre conceived the *right to the city* as the right "to habitat and to inhabit. The right to the oeuvre, to participation

local scenario is presently emerging worldwide[8]. Specifically, in the context of an ongoing conceptualization of "smartness in government"[9] a recent challenging alternative is to be evaluated as in the current digital era: not in opposition to different levels of government, but with the aim to construct an updated, bottom-up *legal paradigm* including the citizen – in its crucial role as taxpayer - and the effective value of his/her rights from a constitutional law perspective[10]. A changing path towards new constitutional forms of protections of local needs[11], preferences and, even, resources. A city-based oriented approach[12] clearly

and appropriation (clearly distinct from the right to property)", in H. Lefebvre, *Writing on Cities*, (Oxford: Blackwell, 1996), 173-174. For the updated version on the outlook of the cities to be considered equivalent to the one related with the legal functioning of the whole society: J.B. Auby, *Droit de la ville. Du fonctionnement juridique des villes au droit à la ville*, (LexisNexis, 2013).

[8] R. Hirschl, *City, State. Constitutionalism and the Megacity*, (New York: Oxford University Press, 2020).

[9] J. R. Gil-Garcia, J. Zhang, G. Puron-Cid, *Conceptualizing Smartness in Government: An Integrative and Multidimensional View*, in Government Information Quarterly, 33(3)/2016.

[10] G. Tieghi, *Taxpayer Rights: A Constitutional Perspective*, (2019) 3 Federalism.it 1-39.

[11] Recently, R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, from 431, in J. B. Auby (directed by), *Le Futur du Droit Administratif/The Future of Administrative Law*, (Lexis Nexis, 2019).

[12] P. Van Waart, I. Mulder, C. De Bont, *A Participatory Approach for Envisioning a Smart City*, in Creativity and Innovation Management, 23(2)/2014.

recognized, today, in the constitutional traditions mentioned in the preamble of the Charter of Fundamental Rights of the European Union[13], so as to include the *smartness*[14] *paradigm* in the local constitutional outlook and practices.

The fundamental assumption proposed is, thus, that the issue must be globally faced as it ranges across topics such as local government – with the dawn of smart city law[15] - , democratic theory, governmentality and constitutional comparative law[16]. That means,

[13] On the matter, from an administrative law perspective: R. Cavallo, G. M. Racca, *The Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, in D. Sorace, L. Ferrara & I. Piazza (ed.), *The Changing Administrative Law of an EU Member State*, (Cham: Springer; Torino: Giappichelli, 2021).

[14] "The word 'smart' implies choosing between at least two possible meanings. Actually, being 'smart' either means finding rational and optimal solutions or discovering the different types of intelligence existing in a given context. In this second perspective, it is clear that the adjective 'smart' qualifies the noun 'city' as a clever attempt to identify the intelligences which, within the context in question, can be systematised in a certain order": R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 431.

[15] For significant, updated insights and a multifaced perspective see the variety of papers in J. B. Auby (directed by), *Le Futur du Droit Administratif/The Future of Administrative Law*, quot., within the Chapter entitled *Villes (Intelligente)/ (Smart) Cities*, 325-342.

[16] Burchell, Grajam, C. Gordon & P. Miller, *The Foucault Effect: Studies in Governmentality*, (Chicago: University Chicago Press, 1991); D. Mitchell, *Governmentality: Power and Rule in Modern Society*, (London: Sage, 1999).

primarily, considering the citizen – and the place where he/she lives[17] - as a crucial part of the so-called *glocal* process[18]; secondly, in terms of citizen's liberty, which "depends on taxes"[19].

In the context, no doubt legal and tax experts are to face a further issue in the present technology-driven society. Contemporary lawyers, government officials, ombudsman and taxpayer advocates, as well as academics, are requested to embrace a new skill useful, on the one hand, to better match digital technology with law and, on the other hand, to debate the future of legal approach in the tax field. And cities are involved as well, being the citizens the ITC users: they are the recipients of the city services and can thus positively contribute to the improvement of governance exploiting increasingly updated and effective tools.

[17] Dreier, Peter, J. Mollenkopf & T. Swanstrom, *Place Matters: Metropolitics for the Twenty-First Century*, 2nd ed (Lawrence: University Press of Kansas, 2001).

[18] As to the expression "glocalization*",* by Z. Bauman, *Globalizzazione e glocalizzazione*, (Roma: Armando ed., 2005). On the matter, also, G. Tieghi, *Città, diritti umani e tutela glocal*, (2019) 2 federalismi.it – *Focus* Human Rights; M. Shamsuddoha, *Globalization to Glocalization: A Conceptual Analysis*, (December 29, 2008), available at SSRN: https://ssrn.com/abstract=1321662 or http://dx.doi.org/10.2139/ssrn.1321662 .

[19] "Public policy decisions should not be made on the basis of some imaginary hostility between freedom and the tax collector, for if these two were genuinely at odds, all of our basic liberties would be candidates for abolition": S Holmes & Cass R. Sunstein, *The Costs of Rights. Why Liberty Depends on Taxes*, (NY-London: W.W. Norton & Company, 1999), 31; G Tieghi, *Fiscalità e diritti nello Stato costituzionale contemporaneo. Il contribuente partner*, (Napoli: Jovene, 2012).

What kind of implication for the democratic theory[20]? How about the role of the city and the topic of urban citizenship as issues of deliberative participation[21]? How to consider the need – and risks - of interaction[22] between contemporary States and their urban civil societies?

1.1. "Money Matters". Starting from the Bottom: People Matter

A recent debate on the topic *Cities, Regionalism, Fiscal Responsibilities, and Intergovernmental Arrangements* started from a crucial assumption: "Money matters"[23]. But we should add: People matter. And each dimension – specifically the foundational fiscal

[20] The debate on the matter is particularly deep and offers interesting insights on democratic legitimacy: "(…) The democratic legitimacy of municipalities requires redesigning the participatory processes in order to foster community engagement and make citizenry the architect of collective life. Within such a process, the smart city can contribute offering one of the most striking examples of data processing to be undertaken as an ordinary and necessary activity while developing a bottom-up process that has to be transparent", in R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 434.

[21] G. Tieghi, *Autonomia e partecipazione: 'laboratori di democrazia' per un rinnovato 'right to experiment'?,* (2019) 3 Rivista AIC, 485.

[22] J. Morison, *Citizen Participation: A Critical look at the Democratic Adequacy of Government Consultations,* in Oxford Journal of Legal Studies, 2017, 37 (3).

[23] Massey Cities Summit, Session no. 5: "*Cities, Regionalism, Fiscal Responsibilities, and Intergovernmental Arrangements*" (at https://www.masseycitiessummit.ca/conference-recap-day-2).

policy[24] - contributes to the understanding and the development of *smart governments*. "What is evident", has been recently underlined, "is that we urgently need to bridge the gap between smart city discourses and the reality of everyday life in cities for millions of people"[25].
This paper adopts a comparative perspective starting from the Canadian case: concentrating on the role of cities (as drivers of change), with a peculiar focus on the role of the citizen, the people and their connections with the institutional/fiscal arrangements and responsibilities, the proposal is for a citizen-centered outlook. It reveals a potential spot of other perspectives primarily centered on policy structure: the citizen has thus to be conceived as a crucial part of the *glocal* process especially in terms of the citizen's liberty, which "depends on taxes"[26]. As such, emphasizing the relationship between democracy and fiscal policy: in other words, revitalizing the importance of democratic deliberation in municipal fiscal policy also as a standard of updated smartness. "If we, as citizens, are included in the data flows of contemporary cities, but", and that's the point, "excluded from shaping, questioning or

[24] G. Tieghi, *A Human Rights-based Model Enhancing Comparative Law Methodology in the Tax Field,* in DPTI, n. 2/2018, Vol. XV; *Taxpayer and Human Rights*: *The Taxpayer Advocate and the Challenge of Contemporary Democracies Towards New Constitutional Forms,* in Dir. pubb. comp.eur., n. 4/2014.

[25] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, in Etica & Politica/ Ethics & politics, XXII, 2020, 2, 34.

[26] The main issue is to start evaluating the foundational role of financial resources and their link with constitutional values: "Liberty has little value if those who ostensibly possess it lack the resources to make their rights effective. (…) Only liberties that are valuable in practice lend legitimacy to a liberal political order", in S. Holmes & Cass R. Sunstein, *The Costs of Rights. Why Liberty Depends on Taxes*, quot., 20. And again: "To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money", quot. at 15.

critiquing them, or if we have no understanding of how the production logics and techniques of data driven optimization and prediction work, or if we have no say in the decisions controlling what is optimized and who it is the optimized for, are we in fact losing control of our data, being disempowered and socially excluded?"[27] The question is crucial.

The democratic side of municipal fiscal policy, indeed, as properly underlined, retrospectively raises issues about the theme of equalization policy[28]. Issues precisely related to some sort of 'models of equalization' that could better support the recognition of regional or national interdependencies. Target of municipal autonomy and exploration of alternative avenues in current intergovernmental arrangements can be pursued to protect cites' ability to carry out their functions in an effective – and smart – way, dealing with potential solutions to the existing fiscal imbalances. To readdress the issue two premises can be suggested: on the one hand, the concept of 'Equalization' to be investigated not just in connection with

[27] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 36.

[28] I deeply thank prof. Daniel Béland, Director of the McGill Institute for the Study of Canada, Department of Political Science, McGill University for his precious comments, insights and productive suggestions, special guest of the Session no. 5. Especially, as regards some confrontational and provocative questions shared during the conference: "Is democracy necessarily favorable to horizontal fiscal redistribution or can citizens living in wealthier areas of the city or the country use deliberative mechanism to reduce such redistribution to their advantage? In the municipal context, is more democracy necessarily favorable to redistribution?". Not last, his foundational work on the matter, D. Béland & A. Lecours, *Canada's Equalization Policy in Comparative Public Perspective,* IRPP Insight 9 (Sept. 2016). Montreal: Institute for research on Public policy.

shared-cost programs[29] or shared prosperity[30] but, rather, as a shared accountability path, a fiscal exchange where local autonomy, participation and fiscal fairness are balanced; on the other hand, a shift from the '*cities' equalization'*, based on financial solidarity, to the '*cities' valorization'* (i.e. citizens' valorization') in the way it includes pluralism and a realistic view – aimed to combine unity, autonomy and participation. In this direction recent efforts of the Italian Constitutional Court[31] have clearly highlighted the positive value of differences.

While local government practices have the potential to transform the action of National Governments and the way academics think and teach, experimental studies focus on the impact of the foundation of taxpayer rights in human rights. Which means questioning the use of indicators and standard-setting processes to measure the effective protection of the

[29] See, specifically, on the matter, the interesting study of M. Janigan, *Cities and Equalization*, Presentation and research like *The Art of Sharing: The Richer versus the Poorer Provinces since Confederation* (Montreal & Kingston: McGill- Queen's University Press, 2020).

[30] See R. Poirot and his studies on the metropolitan equalization schemes and implications.

[31] About cities – not just states – as laboratories of democracies, and for an effective attempt to revitalize the nexus between unity and pluralism to face not just different level of autonomy but, rather, territorial economic asymmetries, see the Italian constitutional court decision June 25, 2015, no. 118 which recognizes the consultive referendum consistent with the constitutional principles and with the prerogatives of the national State. A way to include the citizen-taxpayer in the devolution issues concerning the recognition of specific – i.e. differential – forms of autonomy for a Region, Veneto, and its cities, demanding to apply their constitutional prerogatives starting from their financial status. On the matter, see: M. Bertolissi (ed.), *Regione Veneto 1970-2020. Il futuro estratto dai fatti*, (Marsilio, Venezia), 2020.

citizen-taxpayer's rights. What is crucial on a constitutional law ground, is that those international studies are simultaneously decisive, more broadly, to provide a citizen-oriented policy based on democratic principles which can support the City-thinking as a special habitat, basically, for human rights[32].

These studies have a remarkable impact and an incredibly incisive influence for the construction of a city-centered thinking aimed to localize democracy properly. And that is specifically emphasized especially in times of crises. A Rights-based approach applied to the tax field has become epidemic and expanding since the last decades of last century with the enactment of the first Taxpayer Rights Legislations and Charters all over the world (civil-common law jurisdictions). What today is considered as "undeniable", like "the relationship between Human Rights and Taxation"[33], is the outcome of very recent trends and studies aimed to recognize the influence of human rights on tax relationship[34]. New best practices and challenging platforms to monitor developments concerning the effective protection of citizen-taxpayers' fundamental rights in the world (i.e., lately, the Observatory on the Protection of Taxpayers' Rights, IBFD[35]) have served to take a turn in this direction: the turn now has to be implemented looking at cities as the modern, effective local environment where democratic practices can help to reinforce, through the revitalization of the old ideal of town

[32] G. Tieghi, *Human Rights Cities: lo Human Rights-Based Approach per la Governance locale*, (2019) 3 *DPCE Online*. 1933; M. Bertolissi, *L'habitat della democrazia*, in F. Pizzolato, A. Scalone & F. Corvaja, *La città e la partecipazione tra diritto e politica*, quot., 21-30.

[33] IBFD Report, April 2018, 4.

[34] G. Tieghi, *A Human Rights-based Model Enhancing Comparative Law Methodology in the Tax Field*, in DPTI (2018) 2 Vol. XV, 408.

[35] OPTR, at https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights.

meeting as a touchstone, the conception of contemporary democracies as republican models of authentical institutional dialogue[36].

This paper examines that further step forward, questioning the effective application of the citizen's human freedom and dignity in the constitutional field as a new paradigm of comparative law methodology, including the challenges of the city comparative law perspective, even considering the implementation of technological tools. While digital technologies have the potential to transform the way public authorities operate and take their decisions (more often on algorithmic processing of digital data[37]), experimental studies focus on the impact of the foundation of taxpayer rights in human rights including the new technological scenario[38]. That implies the questioning of the use of indicators and standard-setting processes to measure the effective protection of taxpayer rights – valorizing the municipal perspective - and to provide a customer-oriented policy.

[36] G. Tieghi, *Ripensare la Repubblica tra partecipazione e dibattito pubblico locale: 'If we can keep it'*, in M. Bertolissi (ed.), *Regione Veneto 1970-2020. Il futuro estratto dai fatti*, quot., 499.

[37] On the "'algorithm government'" and its critical implications on the need of consultations and even politics "or, in other words, a government without politics", see R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 433-434.

[38] On the matter, see the *4th International Conference on Taxpayer Rights, Center for Taxpayer Rights,* on *Taxpayer Rights in the Digital Age: Implications for Transparency, Certainty, and Privacy*, Minneapolis, Minnesota, USA, May 23-24, 2019, at https://www.taxpayerrightsconference.com/2019-archive/2019-conference-materials-minneapolis-minnesota-usa/.

Will that prove a fundamental good local governance reform to bridge the citizen's rights from fundamental (Human) rights indicators to an updated set of rights useful to come to terms with the top-down command-and-control[39] uniformity and steer clear of sovereign solutions? How to overcome the unquestionable weak points inherent to the current shift from the traditional state-centered approach to a city-tailored method of democratic performance? Is that a matter of application of theoretical assumptions or of a long-term institutional approach? And, for the purpose: how about the Canadian experience within the framework defined? Are there any recent inputs and practices which lead to rethink the city's rights and responsibilities in the modern, digital era and can also have a comparative law value or, at their best, can prove the reflection of other foreign democracies' theoretical and/or experimental studies?

2. FROM RIGHTS AND FREEDOM TO THE CANADIAN TAXPAYER'S RIGHTS: ATTEMPTS FOR UPDATED INTERGOVERNMENTAL ARRANGEMENTS?

[39] On "The distinction between control and consent" and its importance "to several recent incentives towards the creation of smart cities" see the interesting analysis which affirms that "pervasive interlinking of surveillance, computational processing, and virtual databases into the physical structure of cities (…) is only legitimate if citizens can, both politically and in individual encounters, can be said to have 'consented' to it. (…)": R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 433, footnote no. 13.

Within the general framework of the rights discourse, the Canadian official set of rights (from the 1977 Canadian Human Rights Act[40] and the Canadian Constitution Act with the 1982 Charter of Rights and Freedom[41], to the 1985 Declaration of Taxpayer Rights[42] released by the Canadian Revenue Agency - CRA) and, above all, the operational role of the Canadian Taxpayers' Ombudsman (Office of Taxpayer's Ombudsman - OTO)[43] have started contributing to a renewed public debate maximizing the local component and, consequently, emphasizing the governors-governed democratic nexus. Contemporary attempts to shift the institutional state-centered paradigm towards a constitutional space for cities starting from a dialogical/dialectic constitutionalism?

The need to amend the worldwide institutional paths of communication calls for the development of an updated theoretical framework for the new nexus between cities and national governments, including the smartness perspective. However, some compelling questions are emerging: in the global era, where international networks seem to drive economic and legal markets, is the institutional dimension to include or exclude the human-

[40] The Canadian Human Rights Act R.S.C., 1985, c. H-6, at https://laws-lois.justice.gc.ca/eng/acts/h-6/page-1.html. K Kirkup, "The Canadian Human rights Act" (2018), https://www.thecanadianencyclopedia.ca/en/article/canadian-human-rights-act.

[41] Official version at https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/.

[42] As regards the official text of the Canadian Taxpayer Bill of Rights, see https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/taxpayer-bill-rights.html. For a relevant analysis on the matter: L. Jinyan, *Taxpayers' Rights in Canada*, in D. Bentley (eds.), *Taxpayers' Rights. An International Perspective,* (Adelaide: Hyde Park Press, 1998), 89; SA. Butler, *Charter Challenges to Income Tax provisions, The report of Proceedings of the Forty-Sixth Conference, 1994 Conference report* (Canadian Tax Foundation, 1995).

[43] OTO, at https://www.canada.ca/en/taxpayers-ombudsperson.html.

behavioral pattern as part of a democratic process? In other words, how about the complex area of communication related to personal emotions, feelings and citizens' rights and expectations?

The field outlines the potentialities of institutional dialogue and supports the removal of the rational assumption from the law. Can we really assume the dialectic feature of the legal conversation to be totally substituted by technology or national data interpreting the vital differences as a useful and reliable source of legal certainty? How about the role of citizens' needs and preferences - and their link with the real local context they live - in legal discourse?

This paper includes the above questions and assumptions as basic premises to provoke a more concrete discussion on the crucial issue of the role of *dialogue as an experimental source of law* for contemporary democracies. Not just considering the constitutional justice ground as a privileged perspective of judicial constitutionalism[44] but, even – and more empirically - the broader institutional environment of federal and regional jurisdictions with their historical efforts to appropriately balance pluralism with unity[45].

The proposed founding theoretical justifications are, on one hand, the so-called theory of the '*invenzione* del diritto' (from the Latin word *inventio* which means "invention" or "discovery"), a method pursuing the substantial value of the law flowing directly from the society, to investigate bringing out the "constitutional dimension of coexistence" - as explained by Paolo Grossi, the former Chief Justice in the Italian Constitutional Court[46] -; on the other hand, the theory of communicative action supporting the constitutional discourse

[44] G. Tieghi, *Diritto, esperienze comunicative*, Questioning: *nuovi itinerari di Giustizia costituzionale?*, (2020) 14 *Federalismi.it*.

[45] As regards Canada: Tindal, C. Richard & S. N. Tindal, *Local Government in Canada*, sixth ed. (Torornto: Nelson Thomson, 2004); Young, I. Marion, *Justice and the Politics of Difference*, (Princeton Nj: Princeton University Press, 1990).

[46] P. Grossi, *L'* invenzione *del diritto*, (Bari-Roma: Laterza, 2017), 71.

theory by J. Habermas[47]. Both are emphasized by a diachronic comparative citizen-centered outlook which finds its roots in the Roman tradition[48] where the community is *civis*-oriented for the common interest.

These substantive constitutional approaches find an unexpected modern application at international, comparative level and reveal the contemporary institutional attempt to overcome the gap between norms and facts in the specific field of the relationship between State and citizens, especially if we look from the fiscal responsibility perspective.

They enhance the chances to disclose the potentialities of the communicative power giving strength – and normative effectiveness - to a more updated comparative, constitutional outlook where the global environment appears, for itself – and even if just from a merely formal, legal and fiscal approach to be the proper answer to manage daily conflicts among current institutional actors.

[47] J. Habermas, *Teoria dell'agire comunicativo,* (Bologna: il Mulino, 1986); J. Habermas, *Etica del discorso,* (Roma-Bari: Laterza, 2009); J. Habermas, *Solidarietà tra estranei. Interventi su "Fatti e norme",* (Milano: Guerini e Associati, 1997).

[48] For an interesting analysis on the republican tradition and its Roman origin and character (...) see P. Pettit, *Il repubblicanesimo. Una teoria della libertà e del governo* (Milano: Feltrinelli, 2000), from 334. The author explains that the three fundamental ideas of this Roman tradition are: a conception of freedom as a non-domain; the idea that freedom as a non-domain requires a constitution that directs the political community towards the common good; and the conviction that certain institutional forms – namely those characteristically Roman – must in some way be part of such a constitution. Freedom in this specific sense is the condition enjoyed by an individual when no one imposes himself as a master (...). On the matter, also U. Vincenti, *Law Roman,* translated by Glenn W. Most, in A. Grafton, G. W. Most & S. Settis (ed.), *The Classical Tradition* (Cambridge, Massachusetts, and London, England: The Belknap Press of Harvard University Press, 2010).

Looking at real experiences in contemporary democracies, some risks and limits have to be underlined especially as regards the hardship in balancing rights and responsibilities.

2.1. Cities' Responsibilities through the Citizen-Taxpayer's Involvement: The Canadian 'Taxpayer Town Halls'

Using the ancient idea of town meeting as a touchstone, the Canadian OTO has recently emphasized the potentialities of cities focusing on transparent and public dialogue. The basic constitutional statement appears to be the process of reciprocal improvement and learning – which took modern features with the historical British 1647 Putney debates[49] - to realize an effective 'democratic self-government'[50]. This is a concept, investigated by the current literature with a new outlook[51], to capture the workings of these local actors considering that "the change itself does not happen on international level, but on local

[49] M. Bertolissi, *Fiscalità Diritti Libertà. Carte storiche e ambiti del diritto costituzionale*, (Napoli: Jovene, 2015, 39).

[50] It is the logic according to which "institutions must be created that make self-government possible and stable, and that tend to produce for citizens lives worthy of being lived": C.R. Sunstein, *A cosa servono le Costituzioni. Dissenso politico e democrazia deliberativa* (Bologna: il Mulino, 2009), ix, (Italian version of *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001)).

[51] Especially, on the matter, W. Magnusson, *Local Self-Government and the Right to the City*, (Montreal: McGill Queens Univ, 2015). And before, by the same author: *Protecting the Right of Local Self-Government* (2005) Can. J. Pol. Sc./ Revue Canadienne de Science Politique, 879.

level"[52]: that turns out to be the so-called *regulatory conversations*. Introduced some years ago, regulatory conversations are proposed "as a tool to understand the workings of local regulation, the area where both convergence and divergence are evident"[53].

Their application in the tax field is supported by the *responsive regulation* theory[54]. The impact of the *responsiveness* tool – as a democratic ideal[55] - on the constitutional role of cities has a double, significant implication: on one hand, it fosters a compelling "conversation about what is being done to that person and why it is being done"[56]; on the other hand, it creates a link with the *circular theory of democratic accountability* aimed to focus on "building one another's capacity to responsively serve human needs"[57] which means "responsiveness to the

[52] U. Larsson-Olaison, *The Convergence and Divergence Debate: A Regulatory Conversations Perspective*, (2011) 8,4, *Corporate Ownership &Control*, 320.

[53] U. Larsson-Olaison, *The Convergence and Divergence Debate: A Regulatory Conversations Perspective*, quot.

[54] V. Braithwaite, *Responsive Regulation and Taxation: Introduction*, (2007) vol.29, no.1, Law & Policy 1.

[55] And, thus, as an effectiveness ideal, see J. Braithwaite, *Responsive Regulation and Developing Countries* (World Development, Elsevier Ltd., 2006) vol. 34, no.5.

[56] N. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due process in Tax Collection* (2010) Westlaw, Tax Lawyer vol. 63, American Bar association, 2.

[57] "If we believe that democracy is fundamentally an attribute of states, when we live in a tyrannous state or a state with limited effective capacity to govern, we are disabled from building democracy – we are simply shot when we try to, or we waste our breath demanding state responses that it does not have the capacity to provide. But when our vision of democracy is messy – of circles of deliberative circles", and that's the point, "there are many

complex texture of social life"[58]. The basic common ground is the idea that governments ought to be "responsive to the conduct of those they seek to regulate in deciding where a more or less interventionist response is needed"[59].

This perspective considers the values and the potentialities of the citizen-oriented conception of law – to be included in the Charters of Rights and even Taxpayer's Rights Declaration - "as a 'constitution' which enables the life world to more effectively deliberate solutions to problems that are responsive to citizens"[60]. The recent Canadian 'Taxpayer Town Halls' seem to attempt to embrace that challenge, also beyond the law, testing the constitutional status of the single citizen (as well as the non-technological citizen) as the crucial and effective representative of the municipal community.

kinds of circles we can join that we believe actually matter in building democracy". On these premises, the author underlines democracy is not "something we lobby for as distant utopia when the tyrant is displaced by free elections"; it is "something we start building as soon as we join the NGO, practice responsively as a lawyer, establish business self-regulatory responses to demands (…), educate our children to be democratic citizens (...)": J. Braithwaite, *Responsive Regulation and Developing Countries*, quot., 886.

[58] P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community*, (CA: University of California Press, 1992), 470.

[59] I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: oxford University Press, 1992), 20.

[60] J. Habermas, *The Theory of Communicative Action*, vol.2, *Lifeworld and System: A Critique of Functionalist Reason* (Boston: Beacon Press, 1987).

For the 10th anniversary of the institution of the Canadian Taxpayer Ombudsman the former TO – before the appointment of the new Taxpayers' Ombudsperson last October[61] - required a number of taxpayer town halls[62] to provide information on taxpayers' rights and to discuss Canada Revenue Agency service issues with taxpayers. Four Town halls meetings with more than ten communities, starting from Ottawa, invited local residents, elected officials and community leaders to address tax related issues. An "open and respectful dialogue" "up against the wall" [63] and the OTO commitment "to continuing to create opportunities to meet with individuals and groups across the country to get a firsthand account of service-related tax issues and to share information on service rights and the resources available when they face these issues with the CRA"[64].

In arguing for an interpretative responsibility for effective and taxpayer-tailored tax administration, the local town halls experience seems to explore challenging practices in action which can pragmatically support, through a proper use of places and methods of communication, a new paradigm of intervention by institutional actors and, specifically, by TAs, in their role of 'voice of the citizens-taxpayers'[65]. The aim is to define a new

[61] Canada Revenue Agencies, *New release:* Oct. 1, 2020, *The Minister of National Revenue announces the appointment of a new Taxpayers' Ombudsperson,* at https://www.canada.ca/en/revenue-agency/news/2020/09.

[62] The Canadian Bar Association, *Taxpayers invited to discuss CRA service issues with the Ombudsman*, August 22, 2018, at https://www.cba.org.

[63] OTO Annual report 2018-2019, *Breaking Down Barriers to Service*, 10.

[64] OTO Annual report 2018-2019, *Breaking Down Barriers to Service*, 12.

[65] G. Tieghi, *Taxpayer and Human Rights: The Taxpayer Advocate and the Challenge of Contemporary Democracies towards New Constitutional Forms*, (2014) IV Dir. Pubb. Comp. Eur. ederalism.it, 1475-1488.

institutional/fiscal-exchange pattern between tax agency and the taxpayer with broader implications on the constitutional ground: it serves to overcome the inadequacies of contemporary democracies – most of them caused by an inappropriate command and control approach, instead of a cooperative one in the sense of (tax) compliance – and to include the local dimension within the legal discourse. The mission of "Listening to those we serve"[66] and the rethinking of the "right to be heard" have to be contextualized facing "Transformation through Disruption"[67]. Again, through "Meetings", beyond memos.

The limit is clear especially in times of crisis, when aiming to converge good governance and legal remedies, with the citizen's demands and expectations: they have to be placed in the context of solutions to the nodes of institutional disfunction - and their operational implications considering the decision-making level - within a human- constitutional context. The Canadian city forums, benefiting from the advanced previous US experience of the 'Special Public Forums on Taxpayer Needs and Preferences'[68], reflect the worldwide ongoing process of localizing democracy[69] trying to face two specific challenges: to better

[66] OTO Annual report 2018-2019, *Breaking down Barriers to Service,* from 11.

[67] In line with the title of the OTO Annual report 2019-2020, *Transformation Through Disruption,* delivered last June 2020.

[68] The *Special Public Forums on Taxpayer Needs and Preferences* planned in 2016 by the former U.S. Taxpayer Advocate (NTA), Nina Olson. "I and my small team*",* she underlined, in the Preface of the *NTA Fiscal Year 2017- Objectives Report to Congress – Volume One,* June 2016, "have been welcomed into communities large and small; our Congressional co-hosts were actively engaged in the planning and promotion of the Forums as well attending and participating in them", at www.taxpayeradvocate.irs.org/Media/Default/Documents/2017-JRC/Preface.pdf, 1.

[69] G. Tieghi, *Ripensare la Repubblica tra partecipazione e dibattito pubblico locale: 'If We Can Keep it',* quot.

reply to citizen's demands and to foster cooperative measures to facilitate communication and government-citizen interaction[70].

Can dialogue be considered an experimental source of law helpful to define a new cities' constitutional space and, even, to build a city smart network inside - and beyond - the State? To be taken into consideration is the objective assumption that "(…) while cities may be planned from above, they are experiences and lived from below, from the interactions of citizens, from the interplay of formal and informal structures and a myriad of practices"[71]. Practices, where the dialogue is shaped.

3. USING FORUMS FOR INTERGOVERNMENTAL INTERACTION: FIRST STEPS OF A NEW CITIES' CONSTITUTIONAL SPACE

Revitalizing old democratic practices in the emphasis of the *discourse* element as the key paradigm to reinsert the *moral discourse* into the institutional process, multiple implications (theoretical and operational) have to be considered and investigated from a 'glocal' perspective: the contribution of the communicative action supporting the

[70] "Municipality delegitimization requires redesigning participatory processes and making them more appealing in order to foster community engagement while counteracting a decline in trust in the public administration. That way", the authors underline, "citizens may become the makers of their collective life, thus transcend ordinary roles in society": R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 435.

[71] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 35.

constitutional discourse theory by Habermas[72], the attempt to build dynamic Human Rights Cities (Goal 11, 2030 Sustainable Development Agenda – UN 2015)[73], the revisited nexus between taxation and the Sustainable Development Agenda[74], the renewed role of the Ombudsman as the crucial actor of an "open Government" (OECD Recommendations 2018)[75] and the Declaration of Cities Coalition for Digital Rights "to protect and uphold human rights on the internet at the local and global level"[76].

The final aim involving cities as the relevant subjects in the institutional arrangement is to promote the relationship between participatory democracy and human rights, as well as between rights and resources[77]. The new belief is connected with the idea that "human rights

[72] From a constitutional justice perspective, see G. Tieghi, *Diritto, esperienze comunicative, Questioning: nuovi itinerari di Giustizia costituzionale ?*, quot.

[73] G. Tieghi, *Human Rights Cities: lo Human Rights-Based Approach per la Governance locale*, quot.

[74] The first Global Conference on the issue "relationship between taxation and the achievement of the UN's Sustainable Development Goals (SDGs)" took place in New York: Taxation&SDGs, *First Global Conference of the Platform for Collaboration on Tax,* February 14-16, 2018, NY Conference Report, at https://www.oecd.org/tax/tax-global/first-global-conference-of-the-platform-for-collaboration-on-tax-february-2018.pdf.

[75] OECD Working Paper on Public Governance, No. 29, *The Role of Ombudsman Institutions in Open Government*, at https://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.pdf.

[76] *Declaration of Cities Coalition for Digital Rights*, Premises, at https://citiesfordigitalrights.org/assets/Declaration_Cities_for_Digital_Rights.pdf.

[77] That is from the core meaning of human rights (HR) and taxpayer rights (TR), and

principles such as privacy, freedom of expression and democracy must be incorporated by design into digital platforms starting with locally-controlled digital infrastructures and services"[78]. Specifically, article 4 on Participatory Democracy, Diversity and Inclusion states a principle to be considered as a relevant trend: "(…) everyone should have the opportunities to participate in shaping local digital infrastructures and services and, more generally, city policy-making for the common good". The "*participation in shaping* local (..) services" creates a crucial stimulus for enhancing the effective smartness of a local government in the perspective here supported: the one including the social dimension of cities within the smart city paradigm[79]. A way to avoid the risks of the emptying of the civic empowerment[80] which is a key tool of updated participatory trends for smart cities?

aims to define how to assure "the core principle of *respect* for taxpayer rights" with a service-oriented approach towards the taxpayer as a person: U.S. NTA, *Written Testimony, Statement (May 19, 2017),* retrieved at https://www.irs.gov/pub/tas/nta_written_testimony_irs_reform_nta_perspectives_5_19_2017.pdf, 4 and 7.

[78] *Declaration of Cities Coalition for Digital Rights*, quot., 2.

[79] S. Bolognini, *Dalla "Smart City" alla "Human Smart City" e oltre,* (Giuffrè, Milano, 2017).

[80] "The development of smart cities is related to civic engagement, empowerment, and participation (…). In this sense, cities play a vital role as drivers of (open) innovation and entrepreneurship": AA.VV., *Crowdfunding for the development of smart cities,* in *Business Horizons,* Vol. 61, Issue 4, July-August 2018.

"Attempts at public participation in the design of smart cities are often tokenistic and give little opportunity to co-produce the design of smart city projects"[81]. Moreover, even though the English Magna Charta encouraged the citizen's institutional incorporation - historically experienced by the Italian medieval City-States[82] and nowadays by contemporary technological Info-States like Singapore[83] -, as well as understandings of the relationship among liberties, rights and fiscal policy, the Canadian recent focus on the right to be heard stands as the road to overcome the worldwide critical, top-down shortcomings of institutional legal systems. The attempt to foster a turning point appears to be related to a globally changing nature of the law that is bridging the transition so as to encompass the foundational core of the local institutions within the constitutional law ground. The latter, to be assumed and conceived as an effective "common ground"[84].

This approach implies a deep consideration of the assumption reminding that "(…) many smart city and social media technologies result in a paradox whereby digital inclusion for the

[81] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 36.

[82] R. Putnam, *Making Democracy Work. Civic Traditions in Modern Italy*, (Princeton: Princeton University Press, 1994).

[83] G. Tieghi, *Info/City States: la città 'oltre lo Stato'. Dalla Connectivity alla City Diplomacy*, (2020) 2 DPCE Online.

[84] "(…) understanding the data shared between the citizen and the city" – i.e. institutions – "as the common ground for a dialogue directs our attention to the range of constraints placed on mutual understanding by current structures and the lack of voice afforded to citizens and inhabitants. Without common ground, and mutual understanding,", suggests the author, "the citizen is repositioned as the object of surveillance and an inhabitant in a panopticon, as distinct from a participant in a dialogue": J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 39.

purposes of service provision also results in a marginalization and disempowerment of citizens"[85]. The tax field, more than others, provides a clear evidence of the challenges to tax administration in the digital era, of the impact of the digital economy and big data on vulnerable taxpayer populations[86] and, lastly, of the "*Quality Tax Audits and the Protection of Taxpayer Rights"* as an effective platform of (digital and no-digital) exchange between tax agency and taxpayer. Specifically, on the related topic which drastically challenges the smartness of the interaction between the citizen-taxpayer and the tax agency: the conduct of tax audits and the intersection with taxpayer rights and the impact of audits on future compliance[87].

Some case studies on tax audits show the relevant and risky gap between legal principles and their fictional or weak empirical application[88]. Many factors stand on the reconsideration of

[85] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 33.

[86] Main topic discussed during the *4th International Conference on Taxpayer Rights, Center for Taxpayer Rights,* on *Taxpayer Rights in the Digital Age: Implications for Transparency, Certainty, and Privacy,* quot.

[87] On the matter, I delivered my remarks from a comparative perspective as invited lecturer at the *5h International Conference on Taxpayer Rights*, Center for taxpayer Rights University of Athens, School of Law, IBFD, on May 27-28 2021, (at https://taxpayer-rights.org/wp-content/uploads/2021/05/5th-ICTR-2021-Agenda-05-21-21.pdf), within Panel 2, on the topic: "*Audit Practices: The Formalistic Temptation Over the Substantial Protection of TR".*

[88] Lastly, at international level, the *IBFD Yearbook on taxpayers' Rights 2020,* by the Observatory on the Protection of Taxpayers' Rights, at https://www.ibfd.org/sites/ibfd.org/files/content/pdf/2020%20IBFD%20Yearbook%20on%

a new turning point in the audit policy. A part of the audit procedure and principles explicitly provided by Taxpayer's Charters, by constitutional principles, and by operational guidelines from administrative agencies, the ongoing arduous process towards the taxpayer- (local) tax agency cooperation is complicated by the serious lack of financial resources. The aim is to combine the enhancement of tax compliance programs with the AI procedure of automatization ("data lake" platform; Network Analysis (Sna), risk evaluation of no compliant) to be implemented in a way to efficiently direct the tax audit to the recovery of the financial resources uncollected, often – it is the case of Italy - for the high rate of tax evasion. Meanwhile, the human component of legal tax provisions (i.e. constitutional principles, the TBORs, the case law and the multiple City Charters and Declarations) and the related taxpayer's behavioral studies are going, however, to be almost completely dismissed.
Some specific issues are at the forefront. The digitalization of the various tax agencies (and their local personnel) all over the world, presently emerging as a touchstone of new trends of conduct of tax audits, is actually reducing the intersection with taxpayer's rights to a mere bureaucratic step from a variety of perspectives: considering the dialogue with the taxpayer and his/her right to be heard, and its critical recognition; the interconnection between the tax agency's access and audit, their final report and the time to let the taxpayer set his/her remarks; the way the formal observation has to be structured and its link with the judicial stage (the controversial ability to challenge and the difficulties connected with the Agency explanation and the right to be informed); the controversial role of the formal justification to be provided by the tax agency; the attempts for mediation and the weak relevance of the invitation to a meeting, which is connected with the risk of a public financial damage for the tax agency itself in case or self-defense and, finally, the role of amicable agreements.
Finally, considering the global institutional and administrative context, persistently struggling to balance the authoritative tax power with the participatory rights, a recent alternative is becoming increasingly relevant: not the attitude of opposition to the different

20Taxpayers%27%20Rights.pdf. Concerning the tax audit and, specifically, the Canadian practices (on Normal Audit, More intensive Audits), see from page 62.

interests linked to the tax audit (the City/State's public interest for revenue and the protection of the taxpayer's rights), rather of resolution to construct an updated, bottom-up legal paradigm including the role of the taxpayer-citizen and the effective constitutional legal value of his/her rights (specifically, right to be heard and right of information) during tax audits. Within the general framework of the rights discourse, the official set of taxpayers' rights on audits reveals a continuous tension between a command-and-control and a cooperative compliance approach.

The pandemic has revealed the authenticity of that critical tension and has contributed to a renewed public debate maximizing the fight against tax evasion in view to operationally face the dangerous 'tax gap' and its connections with the 'compliance gap'. The global debate on the "quality of the tax audit", embraces that challenge. Strategic foresights to inspire an updated citizen-taxpayer-oriented tax audit or, broadly, dialogue evaluating the place where the citizen-taxpayer lives?

The thesis here proposed, starting from the recent Canadian experience, points out that, differently from a static approach to law, strictly connected with the public interest of raising revenue to fund the state budget, the constitutional participatory values embracing the city's potentialities should have the specific role to guide the process of exploration of rules designed towards a cooperative stage where dialogue among institutional actors is the pro-active requirement, beyond – or, just through – a digital support. The smartness to be conceived as the constant search for the "common ground": a concept to be included in the legal perspective, while coming from the communication theory. "When common ground is deployed in the smart city context it prompts us to reimagine data services as an ongoing dialogue between peers, to rethink citizen participation in terms of capabilities and empowerment, and to focus on clear lines of accountability and equality of citizen outcomes"[89].

[89] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 33.

The aim is the transparency of the pragmatic implication of dialectic, updated constitutionalism for society and its lack of resources. Moreover, it "ensures a likewise modern view of human rights" in the specific meaning that "includes the economic dimension of fundamental rights of individuals and other persons"[90] and that goes "beyond current solutions to user empowerment that focus on technical solutions, citizen centric design and ethics guidelines"[91].

That leads to the persuasion of the relevance of a research study on the city's fundamental rights in line with the legal systematics of fundamental rights in general. This study, questioning the challenge of the operational city's rights *protection* through its relationship with the core concept of *justice*, suggests a path in line with the so-called transformative constitutionalism. Presently, actual demands for a local culture consideration are strongly rising to meet the new city's needs. The empiric practices suggested by the Canadian local debate pass through the illuminating study of the taxpayer's rights comparative literature, its constitutional framework and its historical combination of common law-statute law models.

4. CHALLENGING PRACTICES IN ACTION AND THEIR COMPARATIVE LAW VALUE: INSPIRATION FOR AN UPDATED CITY-ORIENTED DISCOURSE?

[90] *Preface*, in G. W. Kofler, M. Poiares Maduro, P. Pistone, *Human Rights and Taxation in Europe and the World*, in *IBFD*, 2011, Online books IBFD.

[91] "We borrow from models of dialogues to propose that smart city initiatives that involve city inhabitants need to create a common ground and build capabilities attuned to the specifics of localities if they are to protect public values and maintain the trust of urban inhabitants and city administrators. Only then can we reimagine a more symmetrical economy of contribution and greater citizen empowerment in real city contexts": J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 36.

In arguing for a 'city responsibility' of new forms of the citizen-taxpayer's democracy through the city, this study, starting from the challenging practices in action, highlights that cities – in their potential ability to become Human Smart Cities"[92]– can support a new paradigm of interventions. The assumption is aimed to overcome the traditional State's structural inadequacies[93] and to foster an unprecedented institutional dialogical argument[94].

[92] S. Bolognini, *Dalla "Smart City" alla "Human Smart City" e oltre*, quot. It is an emerging concept that returns a vision of the Smart City – currently dominated by technological infrastructure – from the point of view of citizens and the community. It has multiple implications: "Neglecting the human component is by far the worst mistake that an aspiring smart city can do. If these future smart cities aim for efficiency, they just cannot be planned without the community": C. Harrouk, *Designing Smart Cities: A Human-Centered Approach*, 2020, at https://www.archdaily.com/934186/designing-smart-cities-a-human-centered-approach.

[93] " (…) administrative law was the product of the State. Now it has become dependent on other powers of transnational, global, and local dimensions": S. Cassese, *The current state of administrative law*, in J. B. Auby (directed by), *Le Futur du Droit Administratif/The Future of Administrative Law*, quot., 5.

[94] Aimed to, specifically, overtake and dissolve "(…) the lack of 'Functional legitimacy', including the absence of ideas or authority in politics": R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 433.

That paradigm, linking democracy with human rights, finds in the city context[95], in the conceptualization of the human smartness[96] of the "smart city&community"[97] and in the

[95] "The degree of self-government enjoyed by local authorities can be regarded as a key element of genuine democracy. In this regard, political, fiscal and administrative decentralization is essential for localizing democracy and human rights. It should be borne in mind that democracy is not possible without respect for human rights and no human right can be achieved without democracy": Human Right Council, *Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee*, A/HRC/30/49, August 7, 2015, UN General Assembly, in www.uclg.org/sites/default/files/2015_report_en_role_of_local_government_in_the_promotion_and_protection_of_human_rights.pdf, 4.

[96] "Smartness in cities comes from people understanding what's important to them and what problems they are experiencing": John Harlow, a smart city research specialist, pointed out a new approach fostering community involvement in smart cities. Therefore, a city cannot be considered smart if it doesn't revolve around humans, their needs, preferences, human expectations and even resources. On the matter, see K. Barret, *How to Prioritize People over Tech when planning Smart Cities*, 2019, at https://www.smartcitiesdice.com.

[97] S. Bolognini, *Dalla "Smart City" alla "Human Smart City" e oltre,* quot., from 106. On the evolution of the legitimacy dialectic within smart cites and the paradigm-shift towards the collective dimension to be essential and prevailing, see R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 437.

common ground of the new paradigm[98] for reframing the citizen/taxpayer-city relationship[99], the authentical constitutional space the Canadian Constitution provides for what the Canadian Supreme Court defined a "continuous *process of discussion* and evolution"[100]. That is what today can be reached through "a reimagining of the citizen-city interaction as a dialogue between equals" which "may provide a useful starting point for addressing some of the serious ethical, social, political and environmental problems with current smart city designs and implementations"[101].

That is a matter of comparative law in a constitutional context to be addressed, now and in the near future, to identify which practical purposes the comparative constitutional law

[98] "It is worth wondering how the relationships between cities may develop following a particular logic of representation, administration and fluxes – as opposed to the more traditional and homogeneous territorial logic, going from the small to the big scale – and therefore based on a new paradigm of mutual influence": R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 436.

[99] "If we are to build 'common ground' between citizens and civic infrastructures and start to approach the ideal of freedom to attain human flourishing and well-being, then digital inclusion and public engagement initiatives need to go beyond platitudes, freedom to choose between services and skill building for the few. The citizen-city relationship needs to be reframed as one of peer-to-peer communication where citizen is empowered to understand their digital footprint, the city works to collaboratively ground and make intelligibly transparent the data it has collected and used, and both can monitor the differential impact of these activities on the economic, social and environmental life of the city": J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 61.

[100] *Refence re Secession of Quebec*, 1998 2 S.C.R. 217, 150.

[101] J.D. Kelleher, A. Kerr, *Finding the Common Ground for Citizen Empowerment in the Smart City*, quot., 59.

serves; furthermore "to go some way towards correcting the often oppressive and sometimes incompetent behavior of governments"[102] and, as underlined by the Court within that 1998 landmark Reference - which had a global impact -, to rethink the constitutional principles[103] with a precise orientation. "The Constitution", explained the Court, "is not a straitjacket. Even a brief review of our constitutional history", it emphasized, "demonstrates periods of momentous and dramatic change. Our democratic institutions" – further recalled by the Canadian Supreme Court - "necessarily accommodate a *continuous process of discussion and evolution*, which is reflected", and that's the point even for a city-oriented discourse, "in the constitutional *right of each participant in the federation to initiate constitutional change*". That cue for change, today, has a specific function to be considered properly to define a current constitutional space for cities: "this right" - as the Court underlined - "implies a reciprocal duty on the other participants to *engage in discussions to address any legitimate initiative*".

Initiative to "change the constitutional order", of course. But, even, to include dialogue as a driver of change in its role of fostering the classic image of competing ideas and robust debate which dates back to English philosophers John Milton and John Stuart Mill, passed through

[102] A. Harding & P. Layland, *Comparative Law in Constitutional Contexts,* in E. Orucu & D. Nelken (eds) *Comparative Law: A Handbook* (2007), 313.

[103] "The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities (…)": *Refence re Secession of Quebec,* 1998, quot.

the jurisprudence of the US Supreme Court and still shapes[104] – better than anywhere - the Canadian constitutional arrangement defined since 1998 as the "marketplace of ideas"[105]. Within that marketplace, Canadian current cities can now have a privileged scenario: they can provide strategic foresights able to inspire an updated city-oriented, human-smart discourse[106]. They can implement and reinvent their crucial role of contemporary actors of change being the effective "glocal defenders of rights"[107] properly because "no one has the monopoly on truth". Thus, the step forward made by the Court in 1998 seems now, more than

[104] The ability to express oneself helps create a healthy democracy, the Supreme Court of Canada said Sept. 2020 in setting out rules for deciding when a lawsuit has merit or is intended simply to quell participation in matters of public interest: J. Bronskill, *Supreme Court Touts Role of Free Expression in Democracy As It Sets Out Guidance*, Sept. 10, 2020, at https://www.thestar.com/news/canada/2020/09/10/supreme-court-of-canada-says-doctors-libel-action-over-email-comments-can-proceed.html.

[105] The first reference to the "free trade in ideas" within "the competition of the market" appears in Justice Oliver Wendell Holmes Jr's dissent in *Abrams v United States*, 250 U.S. 616, 630 (1919). The actual phrase "marketplace of ideas" first appears in a concurring opinion by Justice W. O. Douglas in the Supreme Court decision United States v Rumely in 1953. For an interesting investigation, see I. Stanley, *The Marketplace of Ideas: A Legitimizing Myth*, (1984) 1:3 Duke Law Journal.

[106] For a community-oriented perspective: "Smartness thus implies that each individual has to renounce to the 'paradox of excessive freedom' and accept some restriction", in R. Cavallo Perin, G. M. Racca, *Smart Cities for an Intelligent Way of Meeting Social Needs*, quot., 437.

[107] B. Barber, *Cities as Glocal Defenders of Rights*, in *The Future of Human Rights in a Urban World: Exploring Opportunities, Threats and Challenges*, (Netherlands (2014), 101.

ever, to be the decisive constitutional background to be revitalized in a city-oriented perspective: because the Canadian system, better than others, "is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top".

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LOCAL E-GOVERNANCE AND LAW: THINKING ABOUT THE PORTUGUESE CHARTER FOR SMART CITIES

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INDEX

1. INTRODUCTION: OLD ISSUES, NEW IDEAS, AMAZING CHALLENGES

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The urban population continues to increase, and it is said that currently, more than 60% of the world's population lives grouped around urban centers, whether they are called cities or agglomerations, and forecasts indicate that it will reach almost 70% in 2050. Cities have a great impact on the economic and social development of countries and are beginning to occupy an untapped place on the world scene, counting on economic, political and technological power. They constitute true ecosystems where people live and work, where companies develop their activity and in which numerous services are provided. They are also great centers of resource consumption. It is estimated that they are currently responsible for 75% of the world's energy consumption and the production of 80% of the gases responsible for the greenhouse effect.

The Smart City concept emerged two decades ago to address the problems of sustainability and efficient resource management, fundamentally linked to energy efficiency and the reduction of carbon emissions. It is important to Ethics and Law to foresee solutions to the problems and challenges that cities are already facing[2].

[2] According to a study published by Ericson, which corresponds to the 23rd edition of its 2015 Sustainability and Corporate Responsibility Report, it is configurable that the use of Information and Communication Technologies can contribute to the reduction of CO2 by 15% by 2030, allowing the achievement of several of the 17 United Nations Sustainable Development Goals, including the 11th and 13th ("action against global climate change"). On the subject, it is important to highlight The New Urban Agenda (NAU), Quito Declaration on Sustainable Cities and Urban Agglomerations for All. It was approved in 2016 at the United Nations Conference on Housing and Sustainable Development (Habitat III): "the right to the city". In addition to Agenda 2030, the NAU is part of other international agreements, such as the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development. See “Mapping Smart Cities in the EU”, Study, Directorate-General for International Policies, Policy Department Economic and Scientific Policy, 2014. See also, FONSECA, I. C., *Estudos de Direito das Autonomias Locais*, Coimbra, Gestlegal, 2020; FONSECA, I. C./PRATA,

There is no single agreed definition of what a smart city should be. On the contrary, the notion of smart city is intrinsically related to different dimensions of the right to live with quality of life in the city, and it depends on multiple factors, including the availability of ICTs, demographic, geographic and cultural aspects of the city, as well as on the political choices for the city.

Today the concept of Smart City is mainly associated with technology and innovation. The new intelligent city, impacting on its structures and procedures Information and Communication Technologies, makes use of software, algorithms and tools of artificial intelligence, leading us to foresee what is called algorithmic governance, Open & linked Government Data (O&LGD) [3] or digital governance.

The digital transition process has been gaining speed. It is a priority for Europe and for Portugal and it must also be the priority of Regions and Local Governments. In Europe, Portugal and Local Governments the goal is the same: Effective eGovernment can provide a wide variety of benefits including more efficiency and savings for governments and businesses, increased transparency and greater participation of citizens in political life, and contribute to the decarbonization and significant improvement of the environment[4].

A. R., "Smart cities vs. smart(er) governance: cidades inteligentes, melhor governação (ou não)", Questões Atuais de Direito Local, n.º 24, 2019, 19-39.

[3] See more: https://ec.europa.eu/futurium/en/content/open-government-what-value-and-what-are-barriers-and-drivers-2.

[4] See FONSECA, I. C., "Governação Pública (Local) Digital: notas breves sobre a aceleração da transição digital", in: *Direito Administrativo e Tecnologia*, Coord. FLAMÍNIO, Artur, Almedina, Coimbra, 2021, 27-57.

New technologies, digitalization, population aging, reinforcement of environmental awareness, a new culture of mobility and communication are trends that require new answers[5].

As we rely more and more on information and communication technology, cybersecurity becomes both essential and problematic to our societies. On the one hand, cybersecurity is essential to prevent cyber threats from undermining citizens' trust and confidence not only in the digital infrastructure but in policy makers and state authorities as well. On the other hand, cybersecurity is problematic because enforcing it may endanger fundamental values like equality, fairness, autonomy, or privacy[6].

This is the main purpose of this text. It aims to make known the need to design a Global Plan for the Digital Transition of Local Governments, starting from the empirical study of the intelligent cities, seeking to achieve the global definition on e.governance, open connectivity and free movement of data, respecting ethics, law and cyber security[7].

[5] On the impact of these phenomena on Administrative Law, see, AA.VV, *Le Futur du Droit Administratif /The Future of Administrative Law*, sous la direction de AUBY, J.-B., avec la collaboration de CHEVALIER, É./SLAUTSKY, E., LexNexis, Paris, 2019. See especially, C.H. HOFMANN, H., *Digitalisation and european Public Law of information* (13-27); CRAIG, P., *Challenges for Administrative Law* (77-81).

[6] For further developments, see FONSECA, I. C., "Governação Pública Digital e a Proteção de Dados Pessoais: notas breves sobre as dificuldades de harmonização", in: *Estudos de E. Governação, Transparência e Proteção de Dados*, Almedina, Coimbra, 2021, 9-35.

[7] Within the framework of mapping sources of international law in which these concerns are heeded, it is important to highlight: The UN General Assembly resolutions of 2002, 2003 and 2009 on the creation of a global culture of cybersecurity (A/RES/57/239, A/RES/58/199, A/RES/64/211), and of 2013 on the right to privacy in the digital age (A/RES/68/167). The OECD recommendations on risk management (Recommendation of the Council on Digital Security Risk Management for Economic and Social Prosperity), 2015, and on digital security of critical sectors (Recommendation of the Council on Digital Security of Critical Activities), 2020. In the European Union context, consider for example, Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on the

2. CONTEXTUALIZATION: THE ACCELERATION OF THE DIGITAL TRANSITION IS A EUROPE AND PORTUGUESE PRIORITY

Pur Digitization is a priority for Europe and Portugal. It is in this framework that this text proposes to intends to justify the need to conceive the Digital Transition Plan for Local Governance.

European Union Agency for Cybersecurity (ENISA) and cybersecurity certification of information and communication technologies and repealing Regulation (EU) 526/2013 (Cybersecurity Regulation). Within the framework of mapping sources of portuguese law in which these concerns are heeded, it is important to highlight: the RGPD Enforcement Law, Law no. 58/2019, of 08.08, which ensures the enforcement in the national legal system of the RGPD and republishes Law no. 43/2004, of 18.08, which regulates the organization and operation of the National Data Protection Commission (CNPD), as the personal status of its members). To add also Law no. 46/2018, of 13 August, which establishes the legal regime of cyberspace security; Law no. 59/2019, of 8 August, which approves the rules regarding the processing of personal data for the purpose of prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; Regulation no. 24/98, of 8 August, which approves the rules regarding the processing of personal data for the purpose of prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties; Regulation no. 24/98, of 8 August, which approves the rules regarding the processing of personal data for the purpose of prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties. No. 303/2019, of April 1, concerning the security and integrity of electronic communications networks and services; Law No. 109/2009, of September 15, which approved the Cybercrime Law; Law No. 5/2004, of February 10, which approved the Electronic Communications Law; National Strategy for Cyberspace Security 2019-2023, approved by Council of Ministers Resolution No. 92/2019, of June 5. LADA, Law on Access to Administrative Documents (Law No. 25/2016 of 22.08).

"Imagine for a moment what life would be like in this pandemic without the digital in our lives," Ursula Von der Leyen, President of the European Commission, began by saying when she addressed the topic of technology and digital in the State of the Union on September 16, 2020 (It.insight, 27.10.2020). Assuming that "we are reaching the limit of what we can do in an analog way," it is necessary to create "a common plan for digital Europe with clearly defined goals for 2030. These goals include connectivity, digital public services, following "clear principles" such as "the right to privacy and connectivity, freedom of expression, free movement of data, and cyber security". The President of the European Commission identifies 3 areas that need focus: data, artificial intelligence and finally infrastructure.

In Europe, the Digital Single Market was conceived as an absolute priority and there are several strategies adopted. As part of the Digital Single Market objective, the European Commission has presented a series of measures including the European Action Plan (2016-2020) for e-government: accelerating the digital transformation of public administration (eGovernment & Digital Public Services), designing the unique digital platform and implementing the European cloud as part of the NextGenerationEU model. And multiple are the benefits to be achieved, it is said.

In the European context, there has been strong investment in the digital field: i) in the creation of programmes and strategies to boost the digital and economic competitiveness of businesses; ii) supporting initiatives aimed at empowering citizens with the necessary skills for the digital world and labour market and promoting the closing of the gap in participation between women and men; iii) the institutionalization of a regulatory and economic environment conducive to the use and creation of new technologies, with particular focus on the well-being and prosperity of citizens; iv) the development of a digital infrastructure that allows citizens to take advantage of the new opportunities offered by technologies. And in particular in initiatives to promote e-Government, responsible State innovation based on new technologies, the co-creation and experimentation of digital public services, the implementation of Open Administration principles and the creation of partnerships between innovation actors.

If we wanted to present a list of international and European legislation that provides solutions for the implementation of the intelligent city we would have to start with the

Agenda 2030: "Leaving no one behind" is the motto of Agenda 2030 was adopted in 2015 by the United Nations General Assembly and is structured in 17 sustainable development goals (SDS). Among them is the 11th objective to make cities and urban settlements more inclusive, safe, resilient and sustainable. Next: The New Urban Agenda (NAU), Quito's declaration on Sustainable Cities and Urban Conglomerates for All was approved in 2016 at the United Nations Conference on Housing and Sustainable Development (Habitat III): "the right to the city. In addition to Agenda 2030, the NAU integrates other international agreements such as the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) and the Addis Ababa Agenda for Action of the Third International Conference on Financing for Development.

The acceleration of the digital transition process is also a commitment of the Portuguese authorities. The Action Plan for the Digital Transition (Resolution of the Council of Ministers no. 30/2020, of 21.04:2020) was approved, with the purpose of accelerating Portugal, without leaving anyone behind, and projecting the country in the world, aiming at convergence with Europe, in the digital domain. This Action Plan for the digital transition is based on 3 pillars: empowerment and digital inclusion, the digital transformation of the business fabric and the digitalization of the State (and central and local public administrations).

This Digital Transition Action Plan is based on 3 pillars: empowerment and digital inclusion, the digital transformation of the business fabric and the digitalization of the State (and central and local public administrations). And it translates, in fact, another stage in the journey of administrative modernization and simplification, the strengthening of digital public services and the achievement of connectivity and openness of data held by Public Administrations[8].

[8] The Strategy for Innovation and Modernization of the State and Public Administration 2020 -2023 (Resolution of the Council of Ministers No. 55/2020 of 31.07.2020) develops around 4 axes and 14 strategic objectives: Investing in people, with three strategic objectives: i) developing and renewing leadership; ii) mobilizing and training workers, and iii) involving workers in cultural change; Develop management, with four strategic objectives: i) strengthen performance management to improve the

Precisely, the digitalization of the State is the third pillar of the Action Plan for the Digital Transition of Portugal. At this level, the Plan includes three measures, among which instituting a connected and open Regional and Local Administration is only briefly listed.
Therefore, it is important to continue to develop the study of the Local Government digital transition process, to which the Action Plan for the digital transition of Portugal will soon be referred, and to conceive in this research project the Definition and Implementation of the Global Strategy of Smart Cities: From Smart Cities to Smart Nation, to Smart EU.

Scanning is also a priority for Portugal. And this is proven by the Digital Transition Plan for the Nation, which is in line with the European strategy. The Portuguese Digital Transition Plan presupposes strategic action on three main focuses: people, companies and Public Administrations.
Naturally, at the level of people's empowerment, the strategy goes through Digital Education, Professional Training, requalification and inclusion and digital literacy. The Plan aims to develop and implement the INCoDe.2030 program, as an inter-ministerial initiative that aims to respond to three major challenges: ensuring digital literacy and inclusion for the exercise of citizenship; stimulating specialization in digital technologies and applications for the qualification of employment and producing new knowledge in international cooperation.

quality of public services; ii) plan human resources in an integrated manner; iii) invest in administrative simplification, and iv) promote innovation in public management; To exploit technology, with three strategic objectives: i) to strengthen the global governance of technology; ii) to improve interoperability and service integration, and iii) to manage the data ecosystem with security and transparency; (IV) Strengthen proximity, with four strategic objectives: i) promote integration and inclusion in the service; ii) encourage citizen participation; iii) deepen the decentralization of competencies to local authorities, and iv) strengthen proximity public services, namely through the deconcentration of public services to the regional level.

From the point of view of the transformation of companies, the national strategy involves entrepreneurship and investment attraction, focuses on the business fabric, focusing on SMEs, and the transfer of scientific and technological knowledge to the economy.

Finally, pay attention now to how to achieve State digitalization. It goes through the digital public services, it goes through the whole Public Administration of the State, seeking to achieve, an agile and open central administration, and includes the Regional and Local Public Administration. This has to be connected and open. Therefore, the digitalization of the State is the third level of action for the digital transition. And it translates, on one hand, the continuity of programs for simplification and dematerialization of procedures (continuing the Simplex and TIC 2020 programs) and aims at instituting connected and open Public Administration (to include Local Governance).

Thus, as for public services, the Digital Transition Plan considers that facilitating citizens' access to public services and simplifying and dematerializing administrative procedures continue to be identified as ways for the State to better serve citizens, thus ensuring the reconversion of processes to the digital universe, their multi-lingual translation, as well as investing in training and valuing workers in information technology and digitalization.

The Digital Transition Plan aims to expand the supply of digitized public services, with 25 online procedures and the promotion of public services connected to each other and open, in the sense that they have reusable information. The Cloud Measure for Public Administration is one of the most measured measures, following the proposal of the Cloud Strategy for Public Administration, in 2019, by the Council for Information and Communication Technologies in Public Administration.

All measures, included in the XXII Constitutional Government Program, aim to ensure simplification and online access to at least the 25 most used administrative services, ensuring their dematerialization and that everyone has access to public digital services. Pay attention to the expected benefits: this measure will actively contribute to the reduction of bureaucratic obstacles in public services, optimize other channels of contact at a distance with the Public Administration and contribute to the decarbonization and significant improvement of the environment.

Finally, regarding the connected and open regional and local Administration, the strategy to which the Digital Transfer Plan summarily refers is the definition and implementation of the

National Strategy of Smart Cities (From Smart Cities to Smart Nation) and the Inventory and streamlining of the territory coordination through the initiative of the Single Building Counter.

For years now, the public sector in Portugal has been changing its operating model, adapting to new technological realities and the challenges of the so-called e-government[9]. For example, the Simplex+ Program, launched in 2006, already includes more than a thousand administrative and legislative simplification measures to make life easier for citizens and companies in their relationship with the Administration, as well as to contribute to increase the internal efficiency of public services. Reinforced in 2016, the Program

[9] LabX - Public Administration Experimentation Laboratory, created in 2017, with the purpose of designing innovative solutions for public services based on citizens' needs. Designed to design and test new solutions that improve public services and the daily lives of citizens and businesses, LabX is an open space that works in collaboration with service users, public administration officials and leaders, and the scientific and business community; The ICT2020 Strategy, Strategy for Digital Transformation in Public Administration, published in 2017 by the Resolution of the Council of Ministers No. 108/2017, has contributed to strengthen the transparency of the public sector and the participation of citizens, consolidating the use of ICT as a central tool for the process of modernization of the State, presenting a series of measures grouped into three axes of action: integration and interoperability; innovation and competitiveness; sharing of resources. Know The Agency for Administrative Modernization, which is the public institution responsible for the promotion and development of administrative modernization in Portugal, promoted, in May 2018, the creation of the National Open Administration Network. With regard to the circular economy of data, the First Action Plan of the National Open Administration Network (RNAA) is structured on four main axes, namely: Open Data, promoting the availability and reuse of information generated by the Public Administration; Transparency, promoting access to public information and administrative documents from the public sector; Use of Information and Communication Technologies and Digital Inclusion, disseminating new relationship channels between the Public Administration and citizens/companies and standards of accessibility and assisted access to public services; and Public Participation, stimulating the use of processes of public consultation and participatory democracy.

includes 255 measures of administrative and legislative simplification and modernization of public services.

The entry into force of the Public Procurement Code in 2008, which placed Portugal at the forefront of public procurement through exclusively electronic means, it is also possible to consult online all contracts resulting from the public procurement process through the Public Procurement Portal (Portal BASE), managed by the Institute for Public Markets and Construction (IMPIC). Subsequently, in 2009, it was established the obligation of electronic public procurement as well as the creation of a private market of certified service providers of public procurement platforms, two pioneering and innovative solutions worldwide.

The e-procurement system adopted by the Portuguese Government is based on the promotion of a private market for e-procurement services, by companies under a regulated competition regime, managing the corresponding electronic platforms[10]. In 2015, Law no. 96/2015 of 17.08.2015 updated the legal regime for electronic procurement platforms in Portugal, having transposed article 29 of Directive 2014/23/EU, article 22 and Annex IV of Directive 2014/24/EU and article 40 and Annex V of Directive 2014/25/EU. This diploma contains, namely, the rules regarding the use and availability of electronic platforms, as well as all the conditions to which they must be subject, including the obligation of interoperability with the Public Procurement Portal and also with other systems of public entities. In general terms, the new legal framework has brought three major innovations: 1. licensing requirements for the activity of management and operation of electronic platforms and other requirements to

[10] Currently, and according to the information available on the BASE portal, five electronic platforms are licensed: ACINGOV (Academia de Informática, Lda.), ANOGOV (ano - Sistemas de Informática e Serviços, Lda.), Electronic Platform for Public Procurement COMPRASPT (Miroma - Serviços e Gestão de Participações, Lda.), SAPHETYGOV (Saphety Level - Trusted Services, S.A.) and VORTALGOV (Vortal, Comércio Electrónico Consultadoria e Multimédia, S.A.).

the managing entities, namely greater duties and functional, technical and security requirements; 2. Interoperability and compatibility requirements; 3. introduction of a penalty system.

The electronic public procurement platforms thus constitute a fundamental and indispensable instrument in the dematerialisation of public procurement procedures, and the contracting entity must make available there the following elements: the procedure notice: tender notice or invitation; the tender documents, of which the tender specifications are an example; the clarifications and rectifications of the procedure documents, lists of errors and omissions identified by the competitors in those documents, as well as the decision that will fall on them; the competitors' proposals; the qualification documents of the successful bidder; the list of competitors and the list of candidates; the preliminary and final reports and the drafts and the respective contracts.

The creation of the National Public Administration Open Data Portal, launched in 2011 and reformulated in 2018, which aggregates, references and hosts open data from different bodies and sectors of the Public Administration, being the central catalog of open data in Portugal. This portal allows citizens and companies to access, study and (re)use the data produced by the State. The data.gov is an open portal, i.e. any user can create an account and upload data to be shared with the community under open licenses.

Reference should also be made to the recent amendment to the Administrative Procedure Code (approved by Decree-Law No. 4/2015 of January 7), which introduced important novelties in this field, consecrating, from the outset, the principle of "electronic administration", with a view to reinforcing procedural simplification and respective digitalization, including in procedures in which local authorities are involved.

The Portuguese Participatory Budget (OPP), launched in 2016, is a paradigmatic case of participative democracy powered by technology. The OPP is a deliberative democratic process, through which people present investment proposals and choose, through voting, which projects should be implemented in different areas of governance. The implementation of the OPP aims to build a citizen participation project that brings people closer to politics and promotes greater connection and integration between territories through nationwide projects.

3. THE (NEW) SMART CITY CONCEPT

In this time of accelerated digital transition, designing the smart city is a challenge. It is a challenge for the policy maker in the international community and especially in Europe and is an ongoing task for the State and Local Governments. In particular, it is a strategic issue of strengthening the power of Regions in Europe and the autonomy of Local Government.
And by All it has in fact been welcomed as the greatest contribution to the achievement of the United Nations' 11th Sustainable Development Goal (SDS): "to make cities and urban settlements more inclusive, safe, resilient and sustainable" and the 13th ODS: Action Against Global Climate Change[11].
In fact, according to a study, the use of Information and Communication Technologies contributes significantly to the reduction of CO2, being expected to be reduced by 15% by 2030. Ericsson published the 23rd edition of its Sustainability and Corporate Responsibility Report 2015, which details the company's performance in three areas: business responsibility, energy, environment and climate change and communication for all. The report also highlights how Information and Communication Technologies (ICT) can enable the United Nations' 17 Sustainable Development Goals, and explains their potential as an accelerator to achieving them.
The new Smart City, impacting on its structures and procedures Information and Communication Technologies (ICT), and making use of software, algorithms and tools of artificial intelligence, makes us believe that the new Algorithmic Governance or local digital governance will be environmentally friendly.
It is certain that today there is less consensus on the definition of what Smart City should be. On the contrary, the notion of smart city is intrinsically related to the available technology, demographic and geographic aspects of the city, local cultural aspects and the policies primarily accepted for the city. It should be noted that it is common in the speech to make

[11] See ORGANIZATION OF THE UNITED NATIONS. 17 UN Sustainable Development Goals. 2015. Available at: https://nacoesunidas.org/conheca-os-novos-17-objetivos-dedesenvolvimento-sustainable- (last access on: 16.10.2020).

references to multiple dimensions of Smart City, being very diversified the projects that allow their implementation. Thus, there is talk of smart economy, smart living, smart environment, smart mobility, smart buildings, among other possibilities. Because it is a transversal phenomenon, the concept has been achieved through dialogue between the various branches of knowledge and science[12].

Today, that concept has been evidenced associating Smart City to Intelligent Governance, whose decision is based on more updated information, in the sense that it is faster and more direct, i.e. efficient, being able to attract companies, create more jobs and allow human development, being, at bottom, synonymous with productivity, competitiveness and quality

[12] For further developments, see GÓMEZ JIMÉNEZ, M. L.., "Smart cities: inexistencia de una definición jurídica", in VIII Congreso Internacional de Ordenación del Territorio, de Derecho Urbanístico: Nuevos tiempos, nuevos objetivos, Asociación Canaria de Derecho Urbanístico, 2016. GÓMEZ JIMENÉZ, M. L., "Smart cities vs. Smart governance: dos paradigmas de interrelación administrativa no resueltos aún?", Parte I, in Revista de Derecho Urbanístico y Medio Ambiente, número monográfico sobre Smart Cities, ano XLIX, n.º 300, septiembre-octubre 2015, pp. 53 e segs.; GÓMEZ JIMENÉZ, M. L., "«Smart cities»: una aproximación desde la gobernanza pública y la innovación social", in Políticas Locales de clima y energía: teoría e práctica, GALERA RODRIGO, S./GÓMEZ ZAMORA, M. (EDS.), Instituto Nacional de Administración Pública, Madrid, 2018. GIL-GARCIA, J. R./ PARDO, Th. A/NAM, T., "What makes a city smart? Identifying core components and proposing an integrative and comprehensive conceptualization", In: Information Polity 20, 2015, pp. 61–87 61.

of life[13]. For this reason, the document drafted by the European Parliament advocates a minimum concept of an intelligent city[14].

Thus, "the idea of Smart Cities is rooted in the creation and connection of human capital, social capital and information and Communication technology (ICT) infrastructure in order to generate greater and more sustainable economic development and a better quality of life"[15]. In a certain sense, Smart City is the one whose government is able to collect data, plan and decide based on them, direct and supervise in real time through Information and Communication Technologies and Big Data, through the Cloud software and algorithms[16].

[13] For further developments, see CAVALLO PERIN, R./RACCA, G. M., „Smart Cities for an Intelligent Way of Meeting Social Needs", in: *Le Futur du Droit Administratif /The Future of Administrative Law*, sous la direction de AUBY, J.-B., avec la collaboration de CHEVALIER, É./SLAUTSKY, E., LexNexis, Paris, 2019, 431-439.

[14] European Union. Mapping Smart Cities In The EU. Policy department: A Economic and Scientific Policy. Bruxelas: 2014, p. 18. Available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/507480/IPOL-ITRE_ET(2014)507480_EN.pdf (last access on 16.10.2020).

[15] On this subject, for further developments, see RANCHORDAS, S., "Nudging Citizens through Technology in Smart Cities*", University of Groningen Faculty of Law Legal Studies Research Paper Series*, No. 1/2019 1-44. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333111 (last access on 18.04.2019). See DIREÇÃO GERAL DO TERRITÓRIO (DGT). Portugal. Cidades analíticas. Acelerar o desenvolvimento das cidades inteligentes em Portugal. DGT:2015, p. 27. https://www.dgterritorio.gov.pt/sites/default/files/publicacoes/Cidades_Analiticas_2015.pdf.
OLIVEIRA, A./CAMPOLARGO, M., "From smart cities to human smart cities", *48th Hawaii International Conference on System Sciences* (HICSS), Washington, DC: IEEE Computer Science, 2005, p. 2336– 2344.

[16] As KITCHIN, R., says: "big data consists of massive, dynamic, varied, detailed, inter-related, low cost datasets that can be connected and utilised in diverse ways, thus offering the possibility of studies shifting from: data-scarce to data-rich; static snapshots to dynamic unfoldings; coarse aggregation to

In short, smart city is the result of the application of science and technology in local governance, allowing to solve the problems of cities in the XXI Century, such as the rationalization in the use of resources, the neutralization of environmental externalities and the mitigation of risk factors of climate change, providing services with an undeniable added value, allowing human development and social inclusion[17].

The city government is currently confronted with a challenging reality that the pandemic has vitally highlighted: the concept of "urban resilience"[18]. A "resilient city" is one that "has a competent, inclusive and transparent local government that is concerned with sustainable urbanization and invests the necessary resources for capacity building for municipal management and organization before, during and after an adverse event or natural threat[19].

high resolution; relatively simple hypotheses and models to more complex, sophisticated simulations and theories". KITCHIN, R. (2013, p.5). "The Real-Time City? Big Data and Smart Urbanism". 1-20. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289141 (last access on 16.04.2019).

[17] For further developments, see MORISON, John, „ Understanding the Smart City:Framing the challenges for law and good governance", in: *Le Futur du Droit Administratif /The Future of Administrative Law*, sous la direction de AUBY, Jean-Bernard, avec la collaboration de CHEVALIER, Émilie/SLAUTSKY, Emmanuel, LexNexis, Paris, 2019, 377-391.

[18] See SCHWAB, K., *A quarta revolução industrial. Portugal*: Levoir, 2017, p. 66. And see also AYRES, Ian; BRAITHWAITE, J., Responsive Regulation. Transcending the Deregulation Debate. New York: Oxford University Press, 1992. See also about "smart regulation", GUNNINGHAM, N.; GRABOSKY, P.; SINCLAIR, D. *Smart Regulation: Designing Environmental Policy*, Oxford: Oxford University Press, 1998; BALDWIN, R./ BLACK, J., "Really responsive regulation", In: Modern Law Review, 71 (1), 2008.

[19] See United Nations Office for Disaster Risk Reduction (UN ORGANIZATION, 2013, p. 11. Available at: https://www.unisdr.org/files/26462_guiagestorespublicosweb.pdf (last accessed on: 16.10.2020).

The digital transition is not only bringing about the 4th Industrial Revolution, or also known as Industry 4.0, corresponding to the automation and exchange of data in production processes through the implementation of cyberphysical systems ("CPS"), it is also being requested by citizens or consumers.

Thus, from a technocratic perspective of Smart City (although without forgetting the Rights), Smart Local Governance must offer itself to its citizens on digital platforms, so that, much like commercial platforms — Apple Itunes or Google Play, which allow immediate contact between applications and their respective consumers —, be able to provide information, allow connection with other National and European digital platforms, offer digital tools for the exercise of participatory citizenship, allow the most widely used procedures to be activated online to reach quick decisions in certain specific areas of the exercise of public powers, according to their own conditions of use, within the privacy and security rules of their infrastructures.

The Smart City concept must take into account the evolution towards an increasingly inclusive and democratic digital society, endowed with public services that better serve communication accessibilities, providing everyone, and in particular people with disabilities, conditions to access the opportunities that are created by new digital technologies[20].

At the heart of the scientific issue is the need to address connectivity and openness of data in local governments, to prepare public officials for the application of Open Data and Data Protection law, in particular with regard to the protection of personal data and Cyber Security. In this scenario, the new IoT products, the current Information and Communication Technology tools and the access to Big Data (or set of data and information of great volume and variety that the Local Government may have in its possession) demand the Ethics and

[20] For further developments, see CAPORALE, M./MORCILLO MORENO, J., „Smart Cities and disability: digital accessibility as a precondition“, in: *Le Futur du Droit Administratif /The Future of Administrative Law*, sous la direction de AUBY, J.-B., avec la collaboration de CHEVALIER, É./SLAUTSKY, E., LexNexis, Paris, 2019, 391-411.

Law regulation of the administrative structure that will make the appropriate use of its functionalities and procedures foreseen or yet to be conceived for this purpose.

Considering this panorama, we understand that it is the University's role to foster ethical reflection and debate on current and challenging topics, with an impact on several branches of knowledge, especially in the legal universe, promoting economic and social development, with consequent improvement in the quality of life in cities, through knowledge[21].

It is a fact that the first demands and challenges that smart cities and the digital transition have been calling for concern the law, and are focused on solving three types of problems: 1. The adoption of digital technologies in the management of public organizations, a process that is often referred to as the digital transition; 2. The promotion of intelligent cities, that is, cities where technologies are an integral part of the urban fabric and social practices, including matters concerning public bodies and labour relations between them and their employees[22]; 3. The solution of problems related to the treatment of data, in a logic of difficult balance between the opening (or circular economy of data) and the protection of citizens' privacy and secrets[23].

[21] By following SCHUURMAN, D., BACCAENE, B., DE MAREZ, L., and MECHANT, P.," Smart ideas for smart cities: investigating crowdsourcing for generating and selecting ideas for ICT innovation in a City context" (2012), journal of theoretical and applied electronic commerce research. 7(3). p.49-62; VEECKMAN, C./GRAAF, S. VAN DER, "The City as Living Laboratory: Empowering Citizens with the Citadel Toolkit", Technology Innovation Management Review, mar. 2015, v. 5, n. 3, p. 6–17; GIL-GARCIA, J. R./ PARDO, T. A./ NAM, T., "What makes a city smart? Identifying core components and proposing an integrative and comprehensive conceptualization", Information Polity, 2015, v. 20, n. 1, p. 61–87.

[22] LÓPEZ FOLGUES, A. ET AL. (2017, 24): "La innovación social digital colectiva y la administración en el entorno de la Ciudad Inteligente". GAPP. Nueva Época, 18, 23-42.

[23] See FONSECA, I. C. (2020): "E.governação, transparência e protecção de dados: a caótica perspectiva portuguesa (rectius europeia)", in: *Cidades Inteligentes, humanas e sustentáveis: II*

That is why the scientific issue begins by thinking about the Ethics and Law that serves as an "umbrella" for city governance, covering the various domains of smart cities, in particular smart mobility (of people, goods and data), since in the future, urban mobility will be dematerialized in terms of data, multimodal, electrical, shared and autonomous, in terms of people and things[24].

This reflection exercise does not ignore the complex theme of urban planning models (municipal master plans) that currently do not integrate the concepts of smart cities, including the theme of mobility of people (through public electric transport and other low-carbon fuels, or through other active modes such as walking and cycling, and individual transport (here there is more and more immediate space for autonomous cars). Nor does it ignore urban micrologistics and access to urban centers, the supply of businesses, commercial and catering services and consumer traffic, urban waste (separating and reusing), promoting circular

Encontro de Direito Administrativo Contemporâneo e os Desafios de Sustentabilidade, Cood. PIRES, L. R. G. M., Belo Horizonte, Arraes Editores, 2020, pp. 45 ss.

[24] On the challenges of local public procurement and the digital transition, it is important to follow FERRARI, G. F., „ Smartness and cities“, in *Joint Public Procurement and Innovation. Lessons Across Borders*, Collection Droit Administratif -Administrative Law, 27, Eds. RACCA, G. M./ YUKINS, Ch. R., Bruylant, 2019, 173-187.

economy[25], according to sustainable solutions[26]. We are also talking about the form of regulation itself, i.e. the new intelligent cities will demand intelligent regulation.

But there is no doubt that the main idea of this scientific article is to reveal that one Strategy for the Global Digital Transition of Cities needs to be conceived, fulfilling the specific scientific objectives: 1. Promotion, through the study, of a regulatory environment that allows the exploitation of the potential of Information and Communication Technologies and the circular economy of data, respecting principles of ethics, privacy and cyber security[27]; 2. With regard to the circular economy of data, promotion through the study, the possibility of reducing legislative and bureaucratic barriers to the free flow of data, without prejudice to the provisions in force concerning information subject to special security measures, including classified information, in line with Regulation (EU) 2018/1807 of the European Parliament and of the Council, or in line with the European Directive 2019/1024 on open data and reuse of public sector information and on this subject the Law on Access to Administrative Documents; 3. With regard to Regulation, Privacy, Cyber-security and Cyber-defense,

[25] On BIM methodologies and their benefits from the point of view of public works and local public procurement, allowing to embrace the principles of sustainability and efficiency, see DI GIUDA, G. M/RACCA, G. M, „ From Works Contracts to Collaborative Contracts: the challenges of Building Information Modeling (BIM) in public procurement“, in *Joint Public Procurement and Innovation. Lessons Across Borders*, Collection Droit Administratif - Administrative Law, 27, Eds. RACCA, G. M./YUKINS, Ch. R., Bruylant, 2019, 223-271.

[26] See WALKER, J. et. Al., “Citizen centric services for Smart cities. University of Southampton”, in. http://smartcityinnovation.eu/wp-content/uploads/2019/06/7389-Final-Smarter-Cities-web-B.pdf (16.10.2020)

[27] By following VALERO TORRIJOS, J. (2017, 1025-1026): “El acceso y la reutilización de la información del sector público desde la perspectiva de la reforma de la administración electrónica”, in: MARTÍN DELGADO, I. (dir.), La reforma de la Administración electrónica: Una oportunidad para la innovación desde el Derecho, 443-458.

promotion, through the study, the modes of training and organizational adjustment of the local Data Protection Officer structure, in order to ensure the protection of personal data and the preservation of privacy of citizens, in accordance with the European Regulation on Personal Data Protection and the Portuguese Law on Enforcement of the Regulation. Finally, it is important to think about the digitization of the 5 local public services most used by citizens and companies, one that presupposes a previous empirical analysis of the most frequent services and the mapping of the observations made by those. 4. In this context, it is important to promote and boost the creation of local collaborative platforms and encourage the use by small local economic operators of public procurement platforms[28].

4. SOME IDEAS JUSTIFYING THE DRAFTING OF A PROPOSED PORTUGUESE CHARTER FOR SMART CITIES: CHALLENGES

In this context, it is important to configure the Smart City Charta, which recognises the National Digital Transition Plan, the Strategy for Innovation and Modernisation of the State and Public Administration 2020-2023, the National Urban Development Policy, EU Urban Agenda (Amsterdam Pact) and New Urban Agenda of the United Nations. It can only be stated that the Charter should support the implementation of the national and European Sustainability Strategies and the achievement of the Sustainability Goals of the United Nations Agenda 2030 (Sustainable Development Goals).

[28] On the challenges of local public procurement and the digital transition, it is important to follow FERRARI, G. F., „ Smartness and cities“, AUBY, J.-B., „Public Contracts and Smart Cities“, in *Joint Public Procurement and Innovation. Lessons Across Borders,* Collection Droit Administratif -Administrative Law, 27, Eds. RACCA, G. M/YUKINS, Ch. R., Bruylant, 2019, 187-195.

This Charter should be preceded by a broad process of dialogue between representatives of the State (through the Agency for Administrative Modernisation, I.P, the General Directorate of Local Authorities, the North Regional Coordination and Development Commission, the Council for Information and Communication Technologies in the Public Administration), Municipalities (through the National Association of Portuguese Municipalities), the Intermunicipal Communities, and the Parishes. Besides these, representatives of several scientific, business and social organisations and local associations will be invited to participate.

A public platform for dialogue should be created, since we only conceived the creation of the Portuguese Smart City Charter in the framework of a lot of idea sharing, inter-diciplinary dialogues and after a lot of participation of the different public and private actors as well as the civil society. It would aim to develop normative guidelines for the digital transformation of municipalities action recommendations for the implementation of these guidelines.

We are following the German model, Smart City Charta model (Digitale Transformation in den Kommunen nachhaltig gestalten), adopted by the German Government (Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB), in 2017.

The Charter for the Smart City should come to set the normative standard for a forward-looking smart city. According to this framework, a Smart City is:

i) liveable - puts people's needs at the centre of actions, supporting local initiatives

ii) diverse and open - uses digitalisation to increase the power of integration, offset demographic challenges, social and economic imbalances and exclusion. It aims to ensure the functioning of democratic structures and processes.

iii) participatory and inclusive - realises integrative models for the participation of all in social life, facilitating their access to digital offerings

iv) adopts the goals of climate neutrality and efficiency in the use of resources, encouraging ecological concepts of mobility, energy, thermal, sanitation and waste, thus contributing to the municipality being CO2 neutral, green and healthy.

v) competitive and prosperous - uses digitalisation in a targeted way, aiming to strengthen the local economy and the new processes of value aggregation, making available adequate infrastructure options. As can be concluded, digital transformation - the transition of cities to

Smart Cities - means pursuing the goals of sustainable European cities by applying the resources of digitalisation.

vi) Open and innovative - develops solutions that ensure compliance with municipal obligations, reacts quickly to processes of change and elaborates, in a participatory manner, innovative local solutions.

vii) responsive and sensitive - uses sensor technology, data acquisition and processing, new forms of interaction in order to achieve constant improvement of community processes and services.

viii) secure and freedom preserving - provides citizens with secure digital spaces, private and public, where everyone can move around without their right to freedom being usurped by surveillance methods.

In this process, the following four guidelines that are essential:

1. digital transformation requires goals, strategies and structures, seeking to integrate digitalisation into urban development, identify application areas and adapt the organisational structures of the municipality

2. digital transformation requires transparency, participation and democracy, ensuring digital participation, integration and inclusion at the level of empowering people and companies

3. digital transformation requires infrastructure, data and services, making it necessary to ensure access to digital infrastructure and to collect and process data responsibly

4. digital transformation requires resources, skills and cooperation, requiring the necessary resources in municipal administration, developing digital skills and promoting lifelong learning.

As can be concluded, the digital transformation of cities - id est: the transition from cities to Smart Cities - means pursuing the goals of sustainable European cities, applying the resources of digitalisation to Local Governance[29].

[29] *Smart City Charta, Digitale Transformation in den Kommunen nachhaltig gestalten,* Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit (BMUB), Bonn, 2017.