

**THE MULTILEVEL LEGAL REGIME OF PUBLIC SERVICE  
CONCESSIONS**

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**1. THE IMPORTANCE OF CONCESSIONS IN THE SCIENTIFIC DEBATE ON THE EVOLUTION OF ITALIAN ADMINISTRATIVE LAW**

The study of concessions in the Italian legal system has always constituted a privileged field to analyse the evolution of the “*public/private divide*” in administrative

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law<sup>1</sup>. Particularly in the Twentieth century, the issue of the legal nature of administrative concessions has indeed taken on a paradigmatic value within the more general scientific debate on the distinction between public law and private law<sup>2</sup>. In fact, the various definitions of “administrative act”<sup>3</sup> and of “public law contract” (or “contract with a public object”)<sup>4</sup> have been elaborated taking into consideration administrative concessions.

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<sup>1</sup> Also for this reason the issue of administrative concessions has marked the history of Italian administrative law. See in particular: O. Ranelletti, *Teoria generale delle autorizzazioni e concessioni amministrative*, pt. I, *Concetto e natura delle autorizzazioni e concessioni amministrative*, in *Giur. it.*, XLVI, 1894, IV, p. 7-83; pt. II, *Capacità e volontà nelle autorizzazioni e concessioni amministrative*, in *Riv. it. sc. giur.*, 1894, 3-100, p. 315-372; pt. III, *Facoltà create dalle autorizzazioni e concessioni amministrative*, ibidem, XIX, 1895, p. 3-107; ibidem, XX, 255-337; ibidem, XXI, 1896, p. 77-172, p. 350-379; ibidem, XXII, 1896, p. 177-277 (now in *Scritti giuridici scelti*, edited by E. Ferrari-B. Sordi, III, Naples, 1992, p. 35 et seq.); U. Forti, *Natura giuridica delle concessioni amministrative*, in *Giur. it.*, 1900, pt. IV, p. 369 et seq. (and Id., *Studi di diritto pubblico*, Rome, 1937, I, p. 360 et seq.); F. Cammeo, *Le concessioni per l'illuminazione pubblica*, in *Giur. it.*, 1903, I, p. 473 et seq.; L. Galateria, *Il negozio di concessione amministrativa*, Milan, 1942; C. Vitta, *Concessioni*, in *Nss.D.I.*, III, 1959, p. 919 et seq.; E. Silvestri, *Concessione amministrativa*, in *Enc. dir.*, Milan, 1961, VII, p. 370 et seq.; F. Gullo, *Provvedimento e contratto nelle concessioni amministrative*, Padua, 1965; M. D'Alberti, *Le concessioni amministrative. Aspetti della contrattualità delle pubbliche amministrazioni*, Naples, 1981; M. D'Alberti, *Concessioni amministrative*, in *Enc. giur. Treccani*, Rome, 1988, VII; D. Sorace - C. Marzuoli, *Concessioni amministrative*, in *Digesto disc. pubbl.*, III, Turin, 1989, p. 280 et seq.; F. Fracchia, *Concessione amministrativa*, in *Enc. dir.*, Annali, I, Milan, 2007, p. 250 et seq.

<sup>2</sup> The importance of the debate on the role of administrative concessions in the construction of the so-called “administrative law system” is underlined by B. Sordi, *Pubblica amministrazione, negozio, contratto: universi e categorie ottocentesche a confronto*, in *Dir. amm.*, 1995, p. 509, asserting that «public service concession represented a particularly difficult and contradictory dogmatic issue», which «made the public-private dichotomy difficult to clarify, as long as said dichotomy was based, on the one hand, on the authority and the imperium and, on the other hand, on the consensus and the agreement».

<sup>3</sup> It is very interesting from this point of view Ranelletti's theory (O. Ranelletti, *Concetto e natura delle autorizzazioni e concessioni amministrative*, in *Giur. it.*, 1894, IV). According to Ranelletti the importance of the contract diminishes and administrative authorizations and concessions become the main focus to build the general theory on the acts of the public administration. Ranelletti's aim is to systematize all administrative acts in the same way as private law contracts (p. 11). In particular Ranelletti states that where a public interest is present, public authorities have the power to act unilaterally, and any private situation can be characterized only by a “legitimate interest” which is to be put exclusively under the administrative jurisdiction. This set of rules which is built also around concessions is adopted from a general point of view to define a set of principles applicable to all administrative acts.

<sup>4</sup> See also D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 290, affirming that administrative concessions represent the main factor of crises of the concept of *imperium* and, consequently, of the administrative measure. The issue of the nature of administrative concessions has in fact come across the debate on the public law contract and has been included in the studies on the administrative contract. In particular, for what concerns the idea of concession as public law contract, see A. De Valles, *I servizi pubblici*, in V.E. Orlando (edited by), *Primo trattato completo di diritto amministrativo*, vol. VI, pt. I, Milan, 1930, spec. 417 et seq. See also G. Miele, *La*

From this point of view, administrative concessions have been conceived in different ways according to the different phases of development of the administrative law system and of the legal science, and also taking into consideration political, economic and social changes. While in the Nineteenth-century State administrative concessions were usually regarded by the jurisprudence and the first legal science as contracts of the public administration regulating the relationship between public administration and private companies as far as public goods and services were concerned, at the end of the same century the need to build a “system of administrative law” – which was particularly felt by the Italian School of Public Law under the direction of Vittorio Emanuele Orlando – encouraged the reconstruction of concessions as typical example of administrative acts<sup>5</sup>. In particular, Oreste Ranelletti has elaborated a theory considering administrative concessions as expression of discretionary power and characterized by the presence of “self-remedy” powers on the side of the public administration (resembling the “*clauses exorbitantes du droit commun*” of the French tradition)<sup>6</sup>.

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*manifestazione di volontà del privato nel diritto amministrativo*, Rome, 1931; M. Gallo, *I rapporti contrattuali nel diritto amministrativo*, Padua, 1936; C. Cammeo, *I contratti della pubblica amministrazione*, Rome, 1939; M.S. Giannini, *L'attività amministrativa*, Rome, 1962, p. 26 et seq.; F. Ledda, *Il problema del contratto nel diritto amministrativo*, Turin, 1965; G. Falcon, *Le convenzioni pubblicistiche*, Milan, 1984.

<sup>5</sup> As underlined by M. D'Alberti, *Concessioni amministrative*, cit., 1 et seq., concessions were first considered as private law instruments because of «metajuridical reasons, related to the economic and political importance of the contracting parties». Moreover, the transformation of many contractual relationships from a unilateral point of view has been a general tendency affecting the reconstruction of the Italian administrative law system at the end of the Nineteenth century: on this point see, B. Sordi, *Pubblica amministrazione, negozio, contratto*, cit., p. 505 et seq. On the role of the legal science in the construction of the Italian administrative law, see A. Sandulli, *Costruire lo Stato. La scienza del diritto amministrativo in Italia (1800-1945)*, Milan, 2009.

<sup>6</sup> O. Ranelletti, *Concetto e natura delle autorizzazioni e concessioni amministrative*, pt. I, cit., p. 16 et seq., stating that as far as a concession is an act adopted in a situation where a private person is involved, it «can only be unilateral, as far as a private person is not endowed with the power to act *iure imperii*, since this person is not a public authority» (79). Ranelletti stresses that public interest and public authority are indissolubly connected in the establishment and control phases of the contract: in particular, the public interest prevails «before the concession is granted, that is to say until its birth» and «afterward, that is to say throughout its life» (O. Ranelletti, *Facoltà create dalle autorizzazioni e concessioni amministrative*, pt. III, cit., p. 257). On this point see also R. Caranta, *I contratti pubblici*, Turin, 2012, p. 11, which explains the reasons why a concession must be considered as an administrative act, mainly because it must grant the public administration the power of termination if the public interest changes. More generally, for the historical analysis of the evolution and construction of the concept of administrative act in Twentieth century legal science, see B.G. Mattarella, *L'imperatività del provvedimento amministrativo. Saggio critico*, Milan, 2001.

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However this idea of concession was not fully accepted because, on the one hand, it hindered the great support and collaboration from private parties in providing public services and, on the other hand, because it did not fully explain the fundamental role which was played by the mutual assent between public administration and private parties<sup>7</sup>.

For this reason in 1913 the Italian Court of Cassation elaborated the “concession-contract” theory<sup>8</sup> with the aim to overcome the contrast between the formalist approach of the traditional legal doctrine and the concrete development of the administrative practice. According to this theory, the concession relationship was founded on a “two level” structure: an administrative act followed by the contract. Through the first one the public administration granted privates with the powers to exercise or manage public goods or utilities<sup>9</sup>, while the contract regulated the economic aspects of the relationship. This theory, notwithstanding the initial opposition of some scholars<sup>10</sup>, was accepted by the predominant jurisprudence and legal science, above all in the second half of the Twentieth century<sup>11</sup>. A compromise was in this way reached between the necessity of preserving the “*clauses exorbitantes du droit commun*” and the need to maintain a room for the mutual assent. Moreover, a more coherent distinction of jurisdiction between the Council of State

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<sup>7</sup> At the beginning of the Twentieth Century Ugo Forti, making a distinction between public service concessions and public works concessions, in which works are not always carried out by private operators, underlined the contractual structure of public service concessions, because private companies may be granted the execution of public interest activities (U. Forti, *Natura giuridica delle concessioni amministrative*, cit., p. 396).

<sup>8</sup> Judgement of the Court of Cassation dated 12 January 1910, in *Riv. dir. comm.*, 1910, p. 248, concerning maritime state property areas to be exploited for industrial uses, analysed by M. D’Alberti, *Le concessioni amministrative*, cit., particularly 187 et seq. See also judgment of the Court of Cassation dated 27 September 1915, in *Foro it.*, 1915, I, p. 1379.

<sup>9</sup> From this point of view the “core” of the concession instrument coincides above all with the delegation or the transfer of public law powers: see G. Zanobini, *L’esercizio privato delle funzioni pubbliche e dei servizi pubblici*, in V.E. Orlando (edited by), *Primo Trattato completo di diritto amministrativo*, vol. II, pt. 3, Milan, 1935, p. 419.

<sup>10</sup> See, for example, M. Gallo, *I rapporti contrattuali nel diritto amministrativo*, Padua, 1936; A. Amorth, *Osservazioni sui limiti dell’attività amministrativa di diritto privato*, in *Arc. dir. pubbl.*, 1938, p. 455 et seq.

<sup>11</sup> See in particular F. Ledda, *Il problema del contratto nel diritto amministrativo*, cit., p. 116 et seq.; E. Silvestri, *Concessioni amministrative*, cit., *passim*.

(pronouncing on the administrative act) and the Civil Courts (pronouncing on the execution of the contract) was achieved<sup>12</sup>.

But this interpretation was not sufficient to fully clarify links and interferences between the administrative act and the contract, especially in case of invalidity or annulment of the former<sup>13</sup>. In fact, the validity and effectiveness of the contract depended completely on the administrative act: the revocation of the administrative act would have also caused the revocation of the contract, without any kind of protection being assured to the private party. But, above all, the interpretation at the basis of the “concession-contract” theory was for some aspects far from the concrete administrative practice: in some cases it was not possible to clearly distinguish the administrative act from the contract, while in other cases it was even difficult to identify the prior administrative act<sup>14</sup>.

Also for this reason, at the end of the Twentieth century legal scholars tried to elaborate new different theories. Starting from the analysis of the administrative practice, some scholars regarded the whole concession relationship between public administration and privates as a contract<sup>15</sup>. Other scholars tried to conceive the relationship referring to a single tool, but without renouncing to the “*clauses exorbitantes du droit commun*”: this led to the elaboration of the “administrative contract” theory, essentially based on the German “*Verwaltungsvertrag*”<sup>16</sup>. Lastly, other scholars, even if they did not abandon the idea of concessions as administrative acts, affirmed that concessions were not *jure imperii* acts and introduced the category of the non-authoritative administrative act, which granted privates

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<sup>12</sup> As underlined by M. D’Alberti, *Le concessioni amministrative*, cit., spec. 190 et seq., the “concession-contract” theory aimed at clarifying in a better and more coherent way the problem of the distinction of jurisdiction between administrative Courts and civil Courts, the first ones pronouncing on issues concerning the administrative act, the second ones on issues (mainly having economic nature) relating to the contract.

<sup>13</sup> On the lack of autonomy of the two acts, see G. Falcon, *Le convenzioni pubblicistiche*, cit., p. 290 et seq.

<sup>14</sup> M. D’Alberti, *Le concessioni amministrative*, cit., p. 294 et seq.

<sup>15</sup> M. D’Alberti, *Le concessioni amministrative*, cit., p. 316 et seq.

<sup>16</sup> G. Falcon, *Le convenzioni pubblicistiche*, cit., p. 290 et seq.

the possibility to enter the agreement<sup>17</sup>. Notwithstanding this, the “concession-contract” theory continued to predominate in the jurisprudence through the following decades<sup>18</sup>.

## **2. THE “CONTRACTUALIZATION” OF CONCESSIONS UNDER THE EU LAW: THE “SERVICES CONCESSION CONTRACT” IN THE NEW LEGAL FRAMEWORK.**

Over the last years the study of administrative concessions (and more generally of the contracts of the public administration) has been enriched by new elements introduced by the EU law. In particular, with the aim of implementing the principles of free market and competition, the EU law has strengthened the contractual aspects of services concessions and public works concessions, making their discipline similar to the one regulating public contracts<sup>19</sup>.

The Commission interpretative Communication on concessions under Community law of 12 April 2000<sup>20</sup> has already provided public administration with the possibility of entrusting «to a third party, by means of a contractual act or a unilateral act with the prior consent of the third party, the total or partial management of services for which that

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<sup>17</sup> D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 285 et seq.

<sup>18</sup> See A. Romano, *Profili della concessione di pubblici servizi*, in *Dir. amm.*, 1994, p. 519, who underlines how the concession-contract grants autonomous juridical importance to the two acts which constitute the public service concession: the administrative act and the contract (or, better, the “agreement”). From both these acts derives the «program» of the public service concession which binds the private operator.

<sup>19</sup> On services concessions under the EU Law, see R. Caranta, *I contratti pubblici*, Turin, 2012, p. 161 et seq.; F. Mastragostino, *Le concessioni di servizi*, in M.A. Sandulli - R. De Nictolis - R. Garofoli (directed by), *Trattato sui contratti pubblici*, vol. I, Milan, 2008, p. 97 et seq.; B. Raganelli, *Le concessioni di lavori e servizi*, in C. Franchini (edited by), *I contratti con la pubblica amministrazione*, Turin, 2007, p. 1006 et seq.; G. Calderoni, *La “nuova” concessione di servizi*, in F. Mastragostino (edited by), *La collaborazione pubblico-privato e l’ordinamento amministrativo*, Turin, 2011, p. 213 et seq.

<sup>20</sup> Official Journal of the European Union 121/5 of 29 April 2000.

authority would normally be responsible and for which the third party assumes the risk»<sup>21</sup>. Therefore, contrary to the centenary tradition of the Italian legal system, what characterizes concessions is no longer the legal nature or the legal regime of the “constitutive act” – which could also have a private law nature – but the economic aspects of the relationship, particularly the fact that the private party assumes the economic risks following the management of the entrusted services<sup>22</sup>.

This approach, which has been also approved by the jurisprudence<sup>23</sup>, can be fully found in the Directives on public procurement 2004/17/EC and 2004/18/EC, defining not only public contracts but also «public works concessions» and «services concessions». In particular, services concession has been defined as «a contract *of the same type as a public service contract* except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment»<sup>24</sup>. As a consequence, according to the EU law, the main feature distinguishing public service contracts from services concessions is the way in which the provision of services is remunerated. In services concessions, in fact, the risk connected to the economic management of the service (a risk which depends on the uncertainties of the market) weighs completely or mainly on the private concessionaire<sup>25</sup>, who is the unique responsible, unlike the service contractor, for the economic failure and the loss of the invested money<sup>26</sup>.

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<sup>21</sup> Point 2.4. of the Communication.

<sup>22</sup> According to the Commission, «there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form» (para. 2.2). As a consequence, in services concessions there is «a transfer of the responsibility of exploitation».

<sup>23</sup> See in particular EU Court of Justice, 10 November 1998, case C-360/1998, in *Foro amm.*, 1999, 1675 and 10 April 2003, cases C-20/01 and C-28/01.

<sup>24</sup> Art. 1, para. 4, of Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union no. 134 of 30 April 2004).

<sup>25</sup> On this point see also judgment of the Court of Justice of 10 March 2011, case C- 274/09, stating that «where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with



But these Directives do not introduce any innovations as to the proper legal regime of the awarding of service concession contracts: in fact, unlike public procurements and public works concessions, the award of services concessions with a cross-border interest continues to be subject only to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular to the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency<sup>27</sup>.

Also to overcome this situation of uncertainty in the award of service concession contracts, a specific EU Directive on the award of concession contracts (Dir. 2014/23/EU) has been recently adopted<sup>28</sup>. The first aim of this Directive is to create a much clearer legislative framework in the award of concession contracts in order to «ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen»<sup>29</sup>.

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the principles laid down by national law, that contract must be classified as a ‘service concession’ within the meaning of Article 1(4) of Directive 2004/18».

<sup>26</sup> On the issue of the risks connected to concessions see EU Court of Justice, case C-458/03 of 13 October 2005, *Parking Brixen*.

<sup>27</sup> On this point, see UE Court of Justice, 10 March 2011, no. 274, stating that «It should be added that while, as European Union law now stands, service concession contracts are not governed by any of the directives by which the European Union legislature has regulated the field of public procurement, the public authorities concluding them are bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union, including Articles 49 TFEU and 56 TFEU, and with the consequent obligation of transparency, where – that being a matter for the referring court to determine – the contract concerned has a certain transnational dimension».

<sup>28</sup> As underlined in whereas no. 4 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, «There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts. A uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles is necessary at Union level in order to eliminate persisting distortions of the internal market». On the problematic implementation of these principles by national Courts, see A. Moliterni, *L'affidamento delle concessioni di servizi tra principi generali e regole di dettaglio*, in “*Munus – Rivista giuridica dei servizi pubblici*”, 2013, n. 3, pp. 669-719.

<sup>29</sup> As affirmed in whereas no. 1, «The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in



Anyway the Directive dwells deeply on the notion of “concession contract”, clarifying that «concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators»<sup>30</sup>. So the EU, highlighting the «pecuniary interest that characterizes this contract, clearly reveals the different supranational perspective in the study of concession contracts that seems to overcome the traditional national one based on the myth of “public interest”»<sup>31</sup>.

In this perspective, according to art. 5, “services concession” means only a «contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works (...) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment»<sup>32</sup>. Therefore services concession is an ordinary contract, whose object consists in the procurement of services, which is characterized only by a peculiar kind of consideration<sup>33</sup>: for this reason, the uncertainty of the consideration is an essential feature of this type of contract<sup>34</sup>.

From this perspective the Directive contributes to better define the concept of “operating risk” which is a risk of «economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the

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the functioning of the internal market». For this reason, the rules of this framework «should be clear and simple» and they «should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy» (whereas n. 2)

<sup>30</sup> See whereas no. 11.

<sup>31</sup> This point has been underlined also by R. Caranta, *I contratti pubblici*, cit., p. 167.

<sup>32</sup> See art. 5, par. 1, lett. b).

<sup>33</sup> See whereas no. 11.

<sup>34</sup> Therefore, the Directive underlines that «Contracts not involving payments to the contractor and where the contractor is remunerated on the basis of the regulated tariffs, calculated so as to cover all costs and investments borne by the contractor for providing the service, should not be covered by this Directive» (whereas no. 17).

contracting authority or contracting entity»<sup>35</sup>. So the risk is related to the exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk; and it does not occur if the public bodies are entitled to cover the loss or to guarantee some minimal revenue<sup>36</sup>.

In terms of the legal regime in the awarding of these contracts, the aim of the Directive is to reach a “minimum coordination of national procedures” based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. In particular, the contracting authorities have the freedom to organize the procedure for the choice of the concessionaire in compliance with the rules and principles established in the Directive.

First of all, art. 3 sets forth the duty to «treat economic operators equally and without discrimination» and to «act in a transparent and proportionate manner», which means that information cannot be provided in a discriminatory manner<sup>37</sup>. For this reason the Directive provides for a strict discipline concerning concession notices and indicates the specific essential information that they should contain<sup>38</sup>. In order to guarantee the same need of transparency, the Directive imposes the duty to publish a concession award notice on the results of the concession award procedure<sup>39</sup>. Both for the notices and for the award

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<sup>35</sup> See, art. 5 and, in particular, whereas no. 18 of the Directive.

<sup>36</sup> See whereas no. 18: «if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract»; on the contrary «certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset». Besides, according to whereas no. 19, «where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive».

<sup>37</sup> An actualization of this principle is established in art. 30, par. 2: «In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others».

<sup>38</sup> See art. 31, par. 2, that recalls Annex V.

<sup>39</sup> See art. 32.

notice, the Directive sets forth the specific standards of publicity and drafting<sup>40</sup> and imposes to the contracting authorities and entities to respect a minimum time limit for the receipt of applications and tenders in order to ensure the wider participation and openness<sup>41</sup>.

As for the procedural guarantees, the Directive pays great attention to the discipline of technical and functional requirements and to the criteria for the selection and qualitative assessment of the candidates in order to encourage the greater possible participation of economic operators and avoid any undue restriction to the number of candidates<sup>42</sup>. From this perspective the Directive regulates the possibilities for an economic operator to rely on the capacities of other subjects<sup>43</sup> and carefully specifies the exclusion causes of candidates for illicit behavior or for violation of law<sup>44</sup>.

Finally, great attention is paid to the award criteria, since «their application to economic operators is crucial for the operators' effective access to the economic opportunities related to concessions»<sup>45</sup>. In fact, the predetermination of clear award criteria is essential in order to limit the freedom of choice of the contracting authority<sup>46</sup>. In particular, these criteria must be proportionate and non-discriminatory in order to ensure an effective competition<sup>47</sup>.

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<sup>40</sup> See art. 33.

<sup>41</sup> See art. 39 and whereas no. 62.

<sup>42</sup> For this reason, according to art. 36, par. 2, «technical and functional requirements shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products». Anyway, according to art. 37, par. 3 «The contracting authority or contracting entity may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition».

<sup>43</sup> See art. 38, parr. 1-3.

<sup>44</sup> These cases are precisely indicated in art. 39, par. 4-10.

<sup>45</sup> See whereas no. 63.

<sup>46</sup> See in particular art. 41, par. 3

<sup>47</sup> Moreover they «should be disclosed in advance to all potential candidates or tenderers, be related to the subject-matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice»: see whereas no. 73.

This substantial discipline is completed by the provision of an adequate system of judicial protection. In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, the Directive establishes that Council Directive 89/665/EEC and Council Directive 92/13/EEC should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities<sup>48</sup>.

But one of the most relevant innovations concerns the rules on the performances of concessions<sup>49</sup>: this discipline is crucial since concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances.

From this perspective, the Directive firstly regulates the duration of these contracts, which «should be limited in order to avoid market foreclosure and restriction of competition»; instead, a long duration should be justified only in order to obtain a return on the invested capital<sup>50</sup>. Moreover great attention is paid to the discipline concerning the subcontracting, that aims at imposing to the contracting authorities as well to the applicants duties of transparency and disclosure, in order to limit any distortion of competition<sup>51</sup>.

But, above all, the Directive has provided for a complete discipline concerning the contracting authorities' powers of intervention during the execution of contracts<sup>52</sup>. In fact a certain level of flexibility should be ensured to allow contracting authorities and contracting entities to cope with external circumstances that they could not foresee when they awarded the concession.

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<sup>48</sup> See art. 46-47.

<sup>49</sup> See Title III of the Directive.

<sup>50</sup> For this reason «for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users» (whereas no. 52).

<sup>51</sup> See art. 42

<sup>52</sup> See artt. 43-44.

First of all, the Directive regulates the power of modification of contracts during their terms, establishing that this power has to be provided clearly in advance «in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options»<sup>53</sup>. Moreover it is possible to modify some clauses of the concession contracts whereas it appears essential to assign additional services or to cope with unpredictable circumstances occurred<sup>54</sup>. Besides, contracting authorities may introduce some modifications if these are not substantial: in particular, taking into account the relevant case-law of the Court of Justice of the European Union, the Directive underlines that the duty to carry out a new award procedure is required when new conditions are introduced that, if known in advance, could have encouraged the participation of other candidates, or that could modify the economic balance of the concession or that could extend its scope<sup>55</sup>. But, at the same time, the Directive states that «contracting authorities and contracting entities should have the possibility to provide for modifications to a concession by way of review or option clauses, but such clauses should not give them unlimited discretion»<sup>56</sup>.

Furthermore, the Directive regulates the power of termination of the contract<sup>57</sup>. In particular, Member States should «ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by national law, to terminate a

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<sup>53</sup> See art. 43, par. 1, let. a).

<sup>54</sup> See art. 43, par. 1, let. c). In particular the notion of “unforeseeable circumstances” is defined, referring to «circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value»; anyway, also in this case the modification cannot justify an alteration of the nature of the overall concession (see whereas no. 76).

<sup>55</sup> On this point see art. 43, par. 43. See also whereas no. 75, according to which a new concession procedure is required in the case of «material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties» that «demonstrate the parties’ intention to renegotiate essential terms or conditions of that concession».

<sup>56</sup> Whereas no. 78.

<sup>57</sup> See art. 44.

concession during its term if so required by Union law»<sup>58</sup>. But according to art. 43, this power of termination can be exercised only when a substantial modification of the concession has taken place, or when the concessionaire has been excluded from the concession award procedure, or, finally, when the Court of Justice of the European Union finds, according to art. 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties and this Directive<sup>59</sup>.

Finally, the main rules regulating “public works concessions” have been extended to services concessions. In this way the discretionary powers of contracting authorities have been strongly limited, in order to ensure maximum transparency in the awarding procedure, but also in the execution of the concession, with regard to subcontracts and to the modification or termination of the contract. This complete discipline contributes to fully include service concession contracts in the general framework of public contracts.

### **3. THE PERSISTENCE OF TENDENCIES RECONSTRUCTING PUBLIC SERVICE CONCESSIONS AS PUBLIC LAW INSTRUMENTS AT NATIONAL LEVEL: AMBIGUITIES AND UNCERTAINTIES**

Notwithstanding the “contractualization” process to which service concessions have been subject in the last decade<sup>60</sup>, part of the Italian jurisprudence and doctrine have continued to reject the idea of considering public service concessions like contracts.

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<sup>58</sup> See whereas no. 80.

<sup>59</sup> See art. 44.

<sup>60</sup> See V. Ricciuto - A. Nervi, *Il contratto*, cit., p. 38 et seq.; R. Caranta, *I contratti pubblici*, cit., p. 165.

According to some scholars, in fact, EU law, while extending to the maximum degree public procurement regulation, has not taken into consideration the qualification of the concession instrument, which is provided only at national level<sup>61</sup>. Therefore, the formal reference to the word “contract” does not compromise the exclusive faculty of national legal systems to define the legal regime of concessions<sup>62</sup>.

But above all, some argue that – even if the contractual nature of “services concessions” is recognized – these contracts are something distinct from the traditional institution of public service concessions<sup>63</sup>. According to some scholars, in fact, the presence of a *public object* – that is to say the public service – makes the contractual instrument, regulated by the public procurement rules, largely unsuitable to satisfy the public interest, also assuming the transfer of public law powers and responsibilities<sup>64</sup>. In particular, since public services and public goods are “unmerchantable goods”<sup>65</sup>, the contract should be also

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<sup>61</sup> See R. Villata, *Pubblici servizi. Discussioni e problemi*, Milan, 2008, p. 106 et seq., affirming that «art. 3 of the Public Procurement Code expressly considers services concessions as contracts, but this information does not seem to be relevant, because (...) the identification of said category with the granting of public services is uncertain, and because the EU legislator’s aim was that of drawing a line between public contracts and services concessions and not to provide for a general concept and to affect the organizational faculty of Member States».

<sup>62</sup> See F. Fracchia, *Concessioni amministrative*, cit., p. 267 et seq.

<sup>63</sup> See F. Mastragostino, *Le concessioni di servizio*, cit., p. 99 et seq. On this point see also F. Fracchia, *Concessioni amministrative*, cit., p. 260, who affirms that the concept of service concession contained in the Civil Code cannot be referred to the services provided to the public. From this point of view it has been underlined that the relation between services concessions and public service concessions is of the kind *genus ad speciem*, following the distinction at EU level between services defined by art. 57 TFEU and services of general economic interest defined by art. 106: see L. Bertozzi - R. Villata, *Servizi di interesse economico generale*, in M.P. Chiti-G. Greco, *Trattato di diritto amministrativo europeo. Parte speciale*, cit., p. 1857, assuming that «there are service concessions which cannot be considered as public service concessions, since they have not as object services of general interest directed to the community».

<sup>64</sup> See G. Calderoni, *La ‘nuova’ concessione di servizi*, cit., p. 268. In particular, on public service concessions see F. Roversi Monaco (edited by), *Le concessioni di pubblici servizi*, Rimini, 1988; A. Romano, *Profili della concessione di pubblici servizi*, cit., p. 459 et seq.; R. Cavallo Perin, *Riflessioni sull’oggetto e sugli effetti giuridici della concessione di servizio pubblico*, in *Dir. amm.*, 1994, p. 113 et seq.; A. Romano - G. Pericu - F. Roversi Monaco (edited by), *La Concessione di servizio pubblico*, Milan, 1995 and *ivi*, in particular, G. Pericu, *Il rapporto di concessione di pubblico servizio*, p. 83 et seq.; R. Cavallo Perin, *La struttura delle concessioni di servizio pubblico locale*, Turin, 1998; G. Greco, *Le concessioni di pubblici servizi tra provvedimento e contratto*, cit., p. 381 et seq.; R. Villata, *Pubblici servizi*, cit., p. 106 et seq.

<sup>65</sup> For this old reconstruction see F. Cammeo, *Le concessioni per l’illuminazione pubblica*, cit., p. 473 et seq.; G. Zanobini, *Corso di diritto amministrativo, I, Principi generali*, Milan, 1938, p. 223; F. Ledda, *Il problema del contratto del diritto amministrativo*, cit., p. 116 et seq.; G. Falcon, *Convenzioni e accordi amministrativi*, in *Enc. Giur. Treccani*, Rome, 1988, p. 3; G. Greco, *Le concessioni di pubblico servizio*, cit., p. 384, who underlines «the



regulated by public law and put under the jurisdiction of Administrative Courts for what concerns its execution and management. In order to assure said public law “shelter”, legal scholars sometimes continue to refer to the “two level structure” of the concession-contract<sup>66</sup>; other times, the contract regulating public service concessions is reconstructed as a public law contract (the so called “administrative contract”)<sup>67</sup>.

In particular, analyzing this last approach, it should be underlined that with law no. 241 of 1990 on the administrative proceeding the Italian legislator has provided public administration with the possibility of entering with the private party into “administrative contracts” in the exercise of discretionary powers (art. 11)<sup>68</sup>. Public administrations can conclude, during an administrative proceeding, an agreement which integrates or substitutes an administrative act. Nevertheless, this agreement is disciplined only by the general principles of the Civil Code regulating obligations and contracts and is “protected” by a series of public law guarantees: first of all, it is subject to the same controls of the

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temporary transfer of duties reserved to the public administration » as well as the main feature of the object consisting of «activities removed from the ordinary juridical circulation».

<sup>66</sup> In particular, for the two level theory of the “concession-contract” and for the distinction from “public law contracts” see also G. Pericu, *L'attività consensuale dell'amministrazione pubblica*, in L. Mazzaroli - G. Pericu - A. Romano - F.A. Roversi Monaco - F.G. Scoca (edited by), *Diritto amministrativo*, Bologna, 2005, spec. p. 306 et seq., and, more recently, A. Massera, *Lo Stato che contratta*, cit., p. 567, affirming that the contract must “implement” the administrative act. Other scholars, instead, underline the unilateral nature of the relationship: see F.G. Scoca, *La teoria del provvedimento dalla sua formulazione alla legge sul procedimento*, in *Dir. amm.*, 1995, p. 14 et seq.; in the same sense A. Romano, *Profili della concessione di pubblici servizi*, cit, p. 459 et seq., stating that at the basis of the agreement there can be only a unilateral public act, which makes the contractual instrument unsuitable for the purpose (p. 512).

<sup>67</sup> See G. Greco, *Gli accordi amministrativi*, cit., p. 162; S. Giacchetti, *Gli accordi dell'art.11 della legge n. 241 del 1990 tra realtà virtuale e realtà reale*, in *Dir. proc. amm.*, 1997, p. 519; in the same direction, A. Pioggia, *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato. Un nuovo modello per uno strumento antico*, in *Dir. pubbl.*, 1995, p. 567 et seq., affirming that the agreement between the contracting authority and the concessionaire is the «place where public interest is defined; it is the agreement concluded with the persons concerned in order to define the content of the final discretionary measure» (p. 611).

<sup>68</sup> From the point of view of the legal science, among the many contributions on administrative contracts which have followed the implementation of art. 11 of law no. 241 of 1990 we can recall: E. Sticchi Damiani, *Attività amministrativa consensuale e accordi di programma*, Milan, 1992; E. Bruti Liberati, *Consenso e funzione nei contratti di diritto pubblico*, cit.; S. Civitarese Matteucci, *Contributo allo studio del principio contrattuale nell'attività amministrativa*, Turin, 1997; F. Fracchia, *L'accordo sostitutivo: studio sul consenso disciplinato dal diritto amministrativo in funzione sostitutiva rispetto agli strumenti unilaterali di esercizio del potere*, Padua, 1998; P.L. Portaluri, *Potere amministrativo e procedimenti consensuali*, cit.; G. Manfredi, *Accordi e azione amministrativa*, Turin, 2001; G. Greco, *Accordi amministrativi tra provvedimento e contratto*, cit.; F. Cancelli, *Potere discrezionale e fattispecie consensuali*, Milan, 2004.

administrative act which it replaces; secondly, the public administration is granted a general power to terminate the contract for causes of public interest; lastly, all the facts relating to the agreement are put under the jurisdiction of Administrative Courts.

For all these features some scholars have considered the “administrative contract” as a general legal category which can reconcile public interest and contractual regulation: in this sense art. 11 would essentially introduce the “public law contract” in the Italian legal system, which, already existing in Germany, is different from the administrative act as well as the private law contract<sup>69</sup>.

In particular, reference to the administrative contract allows us to consider the concession as a unique relationship, without turning to the two-level “concession-contract” theory, and without renouncing to public law prerogatives<sup>70</sup>. Therefore, with art. 11 a private law relationship coexists with a public law relationship in a single legal instrument, so that the “two level” construction can be avoided<sup>71</sup>. Concessions are in this way subject to the private law rules which regulate ordinary contracts only to the extent to which said rules are “compatible” with the public law rules which guarantee the satisfaction of the public

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<sup>69</sup> As affirmed by some prominent scholars (G. Greco, *Gli accordi amministrativi*, p. 159), today in art. 11 should be included also the so called «typical necessary agreements», that is to say all the «agreements and contracts already classified by their respective disciplines and which do not substitute the administrative acts». In the same sense also P.L. Portaluri, *Potere amministrativo e procedimenti consensuali (studi sui rapporti a collaborazione necessaria)*, Milan, 1998 and A. Pioggia *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato*, cit., p. 622 et seq., stating that art. 11 includes «all consensual agreements to which public administration takes part, without taking advantage of its private autonomy and exercising a public power aiming at pursuing the public interest provided by the law». Lastly A. Massera, *Lo Stato che contratta e che si accorda*, cit., p. 560, defines the nature of the provisions contained in art. 11 as «general provisions on administrative contracts».

<sup>70</sup> On this point, A. Pioggia, *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato*, cit., p. 623, underlining the importance of art. 11 to grant public service concessions «that uniqueness which legal scholars have always considered as necessary» and which, on the other hand, «provides for a satisfying solution to the uncertain relationship between the destiny of the administrative act and the survival of the contract». For the jurisprudence, see judgment of the Council of State no. 1327 dated 13 March 2000.

<sup>71</sup> According to F. Merusi, *Il coordinamento e la collaborazione di interessi pubblici e privati dopo le recenti riforme*, in *Dir. amm.*, 1993, p. 36, art. 11 of law no. 241 of 1990 marks the end of the “two level construction”, since there is no longer reason for «looking for different legal situations referring to the different phases of the agreement»: the legal relationship is unitary.

interest<sup>72</sup>. Furthermore, since the establishment, the interpretation and the execution of administrative contracts are put under the exclusive jurisdiction of Administrative Courts, the analysis of this instrument also allows to overcome the traditional conflicts of jurisdiction between Civil Courts and Administrative Courts for the decision of legal disputes<sup>73</sup>.

In the same direction, also public service contracts (so called “contratti di servizio”) are often considered as administrative contracts by the legal doctrine and the jurisprudence<sup>74</sup>. In fact, since they are «contracts with a public object», they «could be included in the same category of the agreements which substitute an administrative act, since they replace the former concession contract which was regulating the relationship between Public Administration and operator»<sup>75</sup>. Within the same consensual relationship public administration is granted with a public law power «converging toward and laying near the contractual autonomy of the party involved»<sup>76</sup>.

By the way, the theories which reject the possibility of considering concessions as real contracts underline the necessity that the instrument with which public administration grants the performance of a public service shall be subject to the discipline of the

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<sup>72</sup> In particular, E. Bruti Liberati, *Consenso e funzione nei contratti di diritto pubblico*, Milan, 1996, p. 237 et seq.

<sup>73</sup> Conflicts which, as underlined by M. D’Alberti, *Le concessioni amministrative*, cit., p. 255 et seq., have largely influenced the different theories on concessions.

<sup>74</sup> It is well known that the concept of public service contracts traces back in the EU legal system to EEC Regulation no. 1893 of 1991 on transport by rail, road and inland waterway. On the nature of public services contracts see D.U. Galetta - M. Giovinazzi, *Trasporti terrestri*, in M.P. Chiti - G. Greco, *Trattato di diritto amministrativo europeo. Parte speciale*, IV, Milan, 2007, II ed., p. 2227 et seq.; lastly, the contractual nature of public services contracts is recognized by A. Mozzati, *Contributo allo studio del contratto di servizio*, Turin, 2010. As far as the jurisprudence, the interpretation relating service contracts to service agreements prevails: see judgment no. 2750 dated 10 June 2010 of the Regional Administrative Court of Piedmont, analyzed by M.P. Genesin, in *Foro Amm. Tar*, 2010, p. 3081 et seq.

<sup>75</sup> See judgment no. 2750 of 2010 of the Regional Administrative Court of Piedmont stating that public administration is entitled to stipulate also «administrative contracts»; these administrative contracts – which are different from the ordinary ones – replace the concession (regarded as an administrative act), but they remain an expression of public authority.

<sup>76</sup> Judgment no. 1750 of 2010 of the Regional Administrative Court of Piedmont.

«administrative function» (so called «funzione amministrativa»)<sup>77</sup>. Today, nobody considers concessions as authoritative or *juri imperii* acts<sup>78</sup>. But many believe that private law cannot guarantee an adequate satisfaction of the public interest and cannot deeply control the exercise of the granted powers<sup>79</sup>.

Traditionally, in order to enhance the performance of the public service, public administration has been entitled to exert “*clauses exorbitantes du droit commun*”, other than those explicitly provided for by the law, among which: the power to stop the supply of the service for serious public interest reasons<sup>80</sup>; the power to dismiss the failing concessionaire<sup>81</sup>; and, above all, the power to revoke a concession for public interest reasons<sup>82</sup>. And still today the refusal to use private law contracts to regulate public service relationships is justified by the necessity to provide for a series of exorbitant powers and faculties in order to control that concessions contracts are properly executed and, as a consequence, that the activity performed by the private operator satisfies the public

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<sup>77</sup> On this point see E. Bruti Liberati, *Consenso e funzione*, cit., who gives major importance in the study of public law contracts to the issue of the “public function”, which today does not relate only to unilateral instruments but can be found also with regard to public law consensual instruments.

<sup>78</sup> Clearly rejected also in public law reconstructions: it is sufficient to look at the analysis of D. Sorace - C. Marzuoli, *Concessione amministrativa*, cit., p. 295 et seq. It is also rejected, even if in unilateralist reconstructions of administrative concessions, for instance, by F.G. Scoca, *La teoria del provvedimento*, cit., p. 24.

<sup>79</sup> On this point B.G. Mattarella, *L'imperatività del provvedimento*, cit., p. 339, states that authoritative elements can be found in the pursuit of public interests, as well as in the subsequent control of the proper exercise of the granted powers. On the necessary “functionalization” to the public interest and discretion which should characterize concessions see, A. Pioggia *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato*, cit., p. 622 et seq.

<sup>80</sup> See judgment no. 21, dated 18 January 1983, of Regional Administrative Court of Emilia Romagna, Bologna, in *TAR*, 1983, I, p. 925.

<sup>81</sup> A power recognized since the Twenties of the last century: Court of Appeal of Florence, 7 April 1925, in *Giur. it.*, 1925, I, 2, 404; Council of State, section IV, 17 February 1942, in *Giur. it.*, 1942, III, 106. More recently, Council of State, section IV, 29 December 1987, n. 836, in *Cons. Stato*, 1987, I, p. 1771.

<sup>82</sup> On the importance of the authoritative reconstruction to legitimate the power of revocation see B.G. Mattarella, *L'imperatività*, cit., p. 341. The revocation has been regarded by the jurisprudence as the exercise of a discretionary power, characterized by evaluations of opportunities in the pursuit of public interests: *ex multis*, Supreme Court of Cassation, United Sections, 10 May 1979, in *Giur. it.*, 1980, I, 1, 275; Supreme Court of Cassation, section I, 8 September 1983, n. 5527, in *Foro it.*, 1983; Regional Administrative Court of Lombardia, Milan, section II, 20 October 1994, n. 611, in *TAR*, 1994, I, p. 4396. It should be underlined that the administrative judge has gradually strengthened the jurisdictional control also on the substantial reasons which legitimate the use of this power: see, for instance, judgment of the Council of State, section VI, no. 1051, dated 18 December 1963, in *Cons. Stato*, 1963, I, 2010 and, more recently, judgment no. 1230, dated 19 December 1991.

interest<sup>83</sup>. And thus, for instance, the existence of a power of revocation which falls under the jurisdiction of Administrative Courts is justified<sup>84</sup>; a power to declare forfeiture distinct from the power of revocation with regard to prerequisites and the duty of justification is legitimized<sup>85</sup>; a special power of termination for public interest reasons provided for all administrative contracts by art. 11, para. 4, of law no. 241 of 1990 can be used, beyond all explicit provisions contained in the contract<sup>86</sup>. These are powers which are usually subject to the jurisdiction of Administrative Courts – in compliance with art. 133, para. 1, lett. c) of the Code of administrative procedure (regulating the jurisdiction on public service concessions) or, sometimes, in compliance with art. 133, para. 1, lett. a) (regulating the jurisdiction on administrative contracts) – which should guarantee, also from a judicial perspective, a greater protection of the public interest.

Anyway, the aforementioned theories maintained by the legal science and the administrative jurisprudence are, for some aspects, ambiguous and uncertain.

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<sup>83</sup> From this point of view Ranelletti's words do not appear so distant. Referring to the «life of the concession», he underlines the necessity to provide «public administration with a power to supervise continuously the private operator in the exercise of the granted power, and with a right to issue all the measures deemed necessary to pursue that harmony *in the satisfaction of public interest and of private law*» (emphasis added: O. Ranelletti, *Facoltà create dalle autorizzazioni e concessioni amministrative*, pt. III, cit., p. 256 et seq.). In particular, «the administrative authority, aiming at satisfying public objectives, must do everything which is necessary to achieve said objectives, and, consequently, in our field it shall modify, stop or revoke, depending on the situation, the concession, whether or not the fault of the concessionaire is recognized» (p. 283).

<sup>84</sup> See judgment of the Regional Administrative Court for Sardinia, section I, no. 124, dated 6 February 2008, stating that: «the administrative judge is competent for the dispute on the revocation of a public service concession (with subsequent termination of the agreement) issued by the local authority for public interest reasons (in this case the necessity to adopt a new form of waste management, considered as a public interest, through the implementation of the separate collection of rubbish and a new determination of the tax amount); the dispute is concerned, in fact, with the legitimacy of the public law powers exercised by the local authority, with regard to which the plaintiff holds a position of legitimate interest».

<sup>85</sup> According to judgment no. 5235, dated 3 October 2000 of the Council of State (section IV), the act declaring the “forfeiture” of the concessionaire should be limited to «verify the existence of the conditions provided for by the law which cause the loss of the benefit previously granted», while the revocation should relate to the «evaluation of the reason of public interest».

<sup>86</sup> Even if referring to a concession agreement on public goods (mines) which is related to art. 11 of law 241 of 1990, see judgment no. 2077, dated 30 December 2011, section II, of the Regional Administrative Court of Tuscany, Florence, stating that public administration is entitled to terminate the administrative contract, using the special power of termination provided for by art. 11, para. 4, of law no. 241 of 1990.

First of all, the reconstruction of a public service concession as an “administrative contract” is not persuasive. The provision contained in the Italian law on the administrative proceeding (art. 11, law no. 241 of 1990) relates to the existence of an administrative procedure and, above all, assumes the participation of a private party before the exercise of a discretionary power on the part of the public authority<sup>87</sup>. Therefore, it has nothing to do with the object of the concession, which consists of the acquisition on the market of a specific service at the best qualitative and economic conditions<sup>88</sup>.

But, above all, reference to the administrative contract does not clarify the concrete legal regime which can be applied to concessions, considering that private law rules are “intertwined” with the rules regulating the exercise of the public authority<sup>89</sup>. This very aspect constitutes one of the more important differences between Italian “administrative contracts” and the other “public law contracts” existing in France and Germany, with which the Italian ones are often compared. In fact, these instruments refer to a precise legal regime which is clearly different from the administrative act and the ordinary contract. German public law contracts (“*Verwaltungsvertrag*”), unlike Italian “administrative contracts”, have a distinct and autonomous discipline relating to all the aspects and the facts of the relationship: we can think, for instance, of the invalidity regime and the third party protection<sup>90</sup>. With regard to the French “*contrat administratif*”, the jurisprudence of the

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<sup>87</sup> From this point of view it is very difficult to overcome the normative element: first of all, art. 11 of law no. 241 of 1990 is part of chapter III on the «Participation to the administrative proceeding»; but above all, the agreement can be concluded, in compliance with para. 1 of the same article, «when accepting observations or proposals» presented by the private parties that are entitled to participate to the proceeding.

<sup>88</sup> See A. Massera, *Lo Stato che contratta*, cit., p. 563, which underlines the diversity of powers, objects and purposes between “administrative contracts” and “private law contracts”.

<sup>89</sup> It is no coincidence that the same doctrine which had first and decisively stated that public service concessions fall into the category of the administrative contract has admitted the difficulty in establishing if this contract could be “nullified” by a subsequent administrative act: G. Greco, *Le concessioni di pubblici servizi tra provvedimento e contratto*, cit., p. 383.

<sup>90</sup> After the general law on the procedure entered into force in 1976 (*Verwaltungsverfahrensgesetz, VwVfG*), public law contracts (*Verwaltungsvertrag*) have been meticulously disciplined, especially with regard to the regime governing invalidity, the third party protection and the relationship with the Civil Code (par. 54 et seq.). On this issue see also, following the entry into force of said law, W. Henke, *Allgemeine Fragen des öffentlichen Vertragsrechts*, in *JZ*, 1984, p. 441; H. Maurer, *Der Verwaltungsvertrag - Problemen und Möglichkeiten*, in *DVBl*,



*Conseil d'Etat* has established, from the Thirties of the last century, a real public law “contractual” system with precise rules which differ from private law provisions<sup>91</sup>. But this has not happened with regard to Italian administrative contracts. Even if twenty years have passed since the Italian law on administrative proceeding has entered into force, these instruments remain something “hybrid” between public law and private law, since the administrative jurisprudence has not adequately filled in the normative gaps<sup>92</sup>.

For this reason, said uncertainties on the legal regime applicable suggest to rigorously limit reference to art. 11 only to the hypothesis where private parties intend to “negotiate”, within an administrative procedure, the exercise of the discretionary power<sup>93</sup>. All attempts to interpret this instrument as a “general type” which includes all different administrative contracts risk weakening, on the one hand, the potential innovative charge

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1989, p. 789; W. Hofling – G. Krings, *Der verwaltungsrechtliche Vertrag: Begriff, Typologie Fehlerlehre*, in *JuS*, 2000, p. 505; M. Werner, *Allgemeine Fehlerfolgenlehre für den Verwaltungsvertrag*, Baden-Baden, 2008; W. Hoffmann-Riem - E. Schmidt-Aßmann - A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, München, 2008; H. Maurer, *Allgemeines Verwaltungsrecht*, München, 2010. With regard to the debate on the “admissibility” of public law contracts see above all: P. Laband, *Das Staatsrecht des Deutschen Reiches*, Tübingen, 1876; O. Mayer, *Zur Lehre von öffentlichrechtlichen Verträge*, in *Archiv für Öffentliches Recht*, 1888; G. Jellinek, *System der subjektiven öffentlichen Rechte*, Freiburg, 1892; W. Apelt, *Der Verwaltungsrechtliche Vertrag*, Leipzig, 1920; F. Fleiner, *Institutionen des deutsche Verwaltungsrechts*, Tübingen, 1928; K. Stern, *Zur Grundlegung einer Lehre des öffentlich-rechtlichen Vertrag*, in *Verw. Arch.*, 1958; Bullinger, *Vertrag und Verwaltungakt*, Stuttgart, 1962. For the Italian doctrine see A. Masucci, *Trasformazioni dell'amministrazione e moduli convenzionali. Il contratto di diritto pubblico*, Naples, 1988.

<sup>91</sup> The bibliography on the *contrat administratif* is very rich: apart from general dissertations on administrative law, where the issue is given, by the way, a central position, it is worth mentioning G. Jeze, *Les contrats administratifs de l'État, des départements, des communes et des établissements publics*, 3 vol., Paris, 1927-1934; G. Péquignot, *Théorie générale du contrat administratif*, Montpellier, 1945; A. de Laubadere - F. Moderne - P. Devolvè, *Traité des contrats administratifs*, 2 vols., Paris, 1983; S. Flogaitis, *Les contrats administratifs*, London, 1988; R. Drago, *Le contrat administratif aujourd'hui*, in *Le contrat, Droits*, n. 12, 1990, p. 117 ss.; F. Lichère, *Droits des contrats publics*, 2005; F. Lombard, *La cause dans le contrat administratif*, Paris, 2008; J. Martin, *Les sources de droit privé du droit des contrats administratifs*, 2 vol., Paris, 2008; L. Richer, *Droit des contrats administratifs*, Paris, 2010; C. Guettier, *Droit des contrats administratifs*, Paris, 2011.

<sup>92</sup> Most of the times the jurisprudence has simply underlined that administrative agreements cannot be considered as private law contracts, even if it has never clarified, from the point of view of the legal regime, said difference. See on this point M. D'Alberti, *Lezioni di diritto amministrativo*, Turin, 2012, p. 272-273, who affirms that the jurisprudence should play a central role in the definition of the legal regime of administrative agreements, also taking into consideration the experience of the French administrative contracts, where the judge is «*maître de sa jurisprudence*» as far as the use of private law to define the legal regime of these instruments.

<sup>93</sup> In this sense, V. Cerulli Irelli, *Relazione conclusiva*, in *Annuario AIPDA 2011. L'atto autoritativo. Convergenze e divergenze tra ordinamenti*, Naples, 2012, p. 389, stating that administrative agreements are «expressions of the administrative power, they are not negotiations, they constitute *an alternative way to close the administrative proceeding*» (emphasis added).



which this institute must still display within the administrative law field; on the other hand, they risk making art. 11 a mere formal reference deprived of a meaningful juridical and legal connotation<sup>94</sup>.

But, besides referring to the administrative agreement, the refusal to fully extend private law rules leads to a problematic “overlapping” between private law rules and public law ones, especially in the execution phase of the concession relationship. In fact, although different administrative judgments state that in the execution phase of the concession relationship «civil law rules on the non compliance of obligations must be fully and completely enforced» and that said relationship must be subject to «the civil law rules on the fulfillment of duties and on the good faith of the parties involved (art. 1375 of the Civil Code)»<sup>95</sup>, the jurisprudence still legitimates, in the execution phase, the presence of “*clauses exorbitantes du droit commun*” in favor of the public administration.

In particular, even when the public administration seems to exercise common rights and bargaining powers to assure the proper fulfillment of the concession, the jurisprudence tends to classify concessions as administrative acts, above all to justify the jurisdiction of the Administrative Courts. And thus, for instance, the power to terminate a concession because the concessionaire fails to fulfill his obligations is regarded as exercise of administrative discretion, even if this same power consists in a mere technical assessment of the proper fulfillment of the conditions established in the contract<sup>96</sup>. Or the act with which the public administration inflicts a penalty for late or irregular fulfillment is considered as discretionary power<sup>97</sup>: as a consequence, even if the penalty is issued because

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<sup>94</sup> For a critical analysis on «the emphasis with which the juridical relevance of the administrative contracts provided for by art. 11 is too often underlined» see A. Romano, *Riflessioni dal convegno: autoritarietà, consenso e ordinamento generale*, in *Annuario AIPDA 2011*, cit., p. 380.

<sup>95</sup> Judgment of the Council of State no. 9347 of 2010, cit.

<sup>96</sup> On the reconstruction of the power of termination in authoritative-discretionary terms (even if referring to a concession of goods), see judgment no. 519, dated 14 April 2011, of the Regional Administrative Court of Calabria, Catanzaro.

<sup>97</sup> The Council of State, expressing its opinion on the scheme of a concession for the exercise of legal games (Council of State, section III, 13 November and 4 December 2007, advice no. 3926), has affirmed that the penalty clause provided for in the agreement in favor of the “Amministrazione dei Monopoli di Stato” for non-fulfillment or delay in the execution of the contract, far from being a pecuniary sanction, cannot by the way «be equaled to the

of the non-fulfillment of the contract, its enforcement is considered as expression of a discretionary power exercised to protect public interests<sup>98</sup>.

Nonetheless, the reconstruction of these faculties as administrative discretionary powers is not convincing<sup>99</sup>. If the termination measure aims essentially at verifying the failure of the concessionaire, there is not (and there must not be) place for discretionary evaluations<sup>100</sup>; and if the revocation order is sometimes issued on the basis of the delay in the execution of the service<sup>101</sup>, as a consequence, the revocation measure cannot be considered as an administrative power, since it resembles an ordinary resolution clause; and lastly, if to issue a penalty also the public administration must give evidence of the non-fulfillment of the obligations, as it happens for contracts between private parties, then we are not in front of an administrative power<sup>102</sup>. In conclusion, if it must be verified that the contract clauses are respected, as well as the provisions on the fulfillment of obligations, there can be no room for the exercise of an administrative power and, at the same time, there can be no jurisdiction of Administrative Courts.

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penalty clauses of private law relationships (...) but takes on only an indirect coercive function, since it is not connected to the presence of a real damage, and becomes effective only in case of actual non-fulfillment».

<sup>98</sup> See judgment of the Council of State no. 3023 of 2011, cit.

<sup>99</sup> On the issue of the juridical nature and the regime which can be applied to the administrative acts which affect negotiations, see G. Greco, *I contratti della pubblica amministrazione tra diritto comune e diritto privato. I contratti ad evidenza pubblica*, Milan, 1986, p. 89 et seq., who makes a distinction between administrative measures and «administrative negotiations», which are defined as «acts with an administrative regime, producing civil law effects and with a negotiation content» (p. 98). On this point see also F.G. Scoca, *La teoria del provvedimento*, cit., spec. p. 20.

<sup>100</sup> On the distinction between discretionary evaluation and technical verification it is insuperable M.S. Giannini, *Il potere discrezionale della pubblica amministrazione*, Milan, 1939.

<sup>101</sup> See judgment no. 1230, dated 6 July 2009, of the Regional Administrative Court for Sicily, Catania, which, given a concession which relates the revocation to the proper execution and fulfillment of the agreement, defines the revocation measure as a real «explicit resolute clause».

<sup>102</sup> From this point of view, therefore, there is no reason to define the act which implements a penalty as an administrative act, and to refer to the categories of the “*excès de pouvoir*”, in the forms of reasonableness and proportionality, if this act is subsequently evaluated from the point of view of the fulfillment of the contractual obligations.

#### 4. THE ISSUE OF THE USE OF PRIVATE LAW FOR THE REGULATION OF PUBLIC SERVICES

The (national) diffidence in using private law for contractual relationships having as object public services and public goods has been traditionally connected to the idea of legitimating “*clauses exorbitantes du droit commun*” in favor of the public administration when public objects which must be managed in the interest of the community are involved<sup>103</sup>. In particular, public services – which are fundamental to assure the full exercise of the social and civil rights of the citizens<sup>104</sup> – should be managed using an instrument which can closely respond to the public interest<sup>105</sup>.

Furthermore, the issue of the “public object” has often been connected to (and confused with) the issue of the activities reserved to the State and, above all, to a

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<sup>103</sup> The relation between necessities of “functionalization” to the public interest and the “*clause exorbitante du droit commun*” is underlined by E. Bruti Liberati, *Le vicende del rapporto di concessione*, cit, p. 165.

<sup>104</sup> On the theory of the “*service public*” are fundamental M. Hauriou, *La gestion administrative. Étude théorique de droit administratif*, Paris 1899, vol. I, p. VII; L. Duguit, *Les transformations du droit public*, Paris 1913, p. XIX. For the Italian legal science, see U. Pototshnig, *I pubblici servizi*, Padua, 1964; F. Merusi, *Servizio pubblico*, in *Novissimo Digesto Italiano*, Turin, 1970; M.S. Giannini, *Diritto pubblico dell'economia*, Bologna, 1995, p. 141 ss. More recently, on the transformation of the Italian concept of public service following the influence of EU law, see, N. Rangone, *I servizi pubblici*, Bologna, 1999; G. Napolitano, *Servizi pubblici e rapporti di utenza*, Padua, 2001; L.R. Perfetti, *Contributo ad una teoria dei pubblici servizi*, Padua, 2001; F. Merusi, *La nuova disciplina dei servizi pubblici*, in *Annuario AIPDA 2001*, Milan, 2002, p. 63 et seq.; G. Corso, *La nuova disciplina dei servizi pubblici*, in *Riv. quad. serv. pubbl.*, 2002, n. 12, p. 9 et seq.; G. Cartei, *Il servizio universale*, Milan, 2002; E. Scotti, *Il pubblico servizio. Tra tradizione nazionale e prospettive europee*, Padua, 2003; G. Napolitano, *Regole e mercato nei servizi pubblici*, Bologna, 2005.

<sup>105</sup> From this point of view it has been underlined that the relationship between services concessions and public service concessions is of the kind *genus ad speciem*, following the EU distinction between services under art. 57 TFEU and services of general economic interest (SGEI) under art. 106 TFEU: in this sense L. Bertonazzi - R. Villata, *Servizi di interesse economico generale*, in M.P. Chiti-G. Greco, *Trattato di diritto amministrativo europeo. Parte speciale*, cit., p. 1857, affirming that «the relationship between services concessions and public service concessions is similar to the one *genus ad speciem*, since all public service concessions are services concessions, whereas there are services concessions which cannot be considered as public service concessions, since they do not have as object services of general interest directed to the community». For the discipline of SGEI see, in particular, D. Gallo, *I servizi di interesse economico generale*, Milan, 2010.

“subjective” notion of public service<sup>106</sup>. In his *Principii di diritto amministrativo italiano*, Santi Romano affirms that the right to exercise a public service «is entitled only to the public administration», whereas «it can be exercised by private operators only if the public authority awards said right to them» through a concession<sup>107</sup>. And also more recently, the theories which have considered concessions from a public law perspective continue to underline the fact that the concession instrument brings about «a temporary transfer of duties entitled to the public administration» and concerns «unmerchantable goods»<sup>108</sup>.

But, by the way, can we say that the effects of a concession contract on a “public object” – as it is the case for public services – prevent the reconstruction of the concession relationship as a private law relationship?

First of all, it should be underlined that the EU law has prompted a transformation of the concept of public service which, since it does not necessarily entail activities *a priori* “reserved” to the Government, cannot be considered *per se* as a “public object”, taken away from private subjects. In particular, the entry into force of articles 41 and 43 of the Italian Constitution<sup>109</sup>, and, subsequently, the European integration process and the markets liberalization process (also through the diffusion of the notion of “*Services of general economic interest*” ratified by art. 106 TFEU)<sup>110</sup> have encouraged the abandonment of a

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<sup>106</sup> See F. Merusi, *Servizio pubblico*, cit., p. 219 et seq., who underlines the importance of the moment in which a public administration “undertakes” an activity and, consequently, of the variability of the notion of “public service” depending on the changes in the society.

<sup>107</sup> S. Romano, *Principii di diritto amministrativo italiano*, II ed., Milan, 1906, p. 180.

<sup>108</sup> G. Greco, *Le concessioni di pubblici servizi*, cit., p. 384 and, in the same sense, G. Falcon, *Convenzioni e accordi amministrativi*, in *Enc. Giur.*, cit, p. 3, and, more recently, F. Fracchia, *Concessione amministrativa*, cit., p. 257 et seq.

<sup>109</sup> Reference is to M.S. Giannini, *Lezioni di diritto amministrativo*, Milan, 1950, p. 171 et seq., and, more completely, to U. Pototschnig, *I pubblici servizi*, Padua, 1964. Both refer to the constitutional provisions to underline that public service is characterized by the fact that a particular economic activity is subject to the programs and controls provided for by art. 41, para. 3, of the Italian Constitution, and that, above all, said public service remains such also if its management is awarded to private operators. On this point also M. D’Alberti, *Lezioni di diritto amministrativo*, cit., p. 136-137, affirming that the objective notion of public service has been fostered in Italy on the basis of art. 43 of the Constitution.

<sup>110</sup> On the liberalization process in the field of public services see S. Cassese (edited by), *La nuova costituzione economica*, Rome-Bari, 2011; M. D’Alberti, *Poteri pubblici, mercati e globalizzazione*, cit. Especially in the liberalized markets (such as Telecommunication and Energy), traditional concession instruments have been

“subjective” notion of public service, to the advantage of an “objective” one<sup>111</sup>: also by virtue of a clearer separation between the actual supply of the service and its regulation and control – on the basis of the Anglo-Saxon experience of the *public utilities*<sup>112</sup> – the public service cannot any longer be considered as an activity which is necessarily managed by public bodies, but rather as a set of economic activities which are characterized by the fact that they are subject to a specific regulation in order to guarantee the interests of citizens<sup>113</sup>.

Therefore, in the absence of activities actually reserved to the Government, as provided by art. 43 of the Italian Constitution, it is no longer necessary to use public law instruments<sup>114</sup>. Since public service is an economic activity performed essentially as an entrepreneurial business, it is founded first of all on the principle of economic freedom and, consequently, it can be carried out according to the free market principle, with the

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replaced by non-discretionary licenses and permissions: on this point N. Rangone, *I servizi pubblici*, cit., p. 265 ss.; F. Fracchia, *Concessione amministrativa*, cit., p. 263.

<sup>111</sup> On the reconstruction of the concept of public service from an “objective perspective”, see judgment no. 4870, dated 19 June 2012, of the Council of State, section VI, stating that the notion of public service is intrinsically connected to the presence of a «legislative provision which, alternatively, attributes its establishment and organization to the [Public] Administration», beyond the juridical nature of the operator performing the service. Beside the public nature of the provisions, it is also necessary that the benefits deriving from the exercise of said activity «are directed to the advantage of a more or less wide number of users (in case of indivisible services) or, in any case, of third party beneficiaries (in case of indivisible services)».

<sup>112</sup> See T. Prosser, *Public Service Law: Privatization's Unexpected Offspring*, in *Law and Contemporary Problems*, 2000, p. 63 et seq.

<sup>113</sup> As underlined by the legal doctrine, public services are mainly private activities, sometimes performed within a competitive system, which are subject to special rules and obligations: G. Napolitano, *Regole e mercato nei servizi pubblici*, cit., p. 147. Furthermore, to confirm the fact that we can consider as public services private activities performed within a competitive system, Directive 2006/123/EC on services in the internal market provides that also services of general economic interest are subject to the rules on the freedom of establishment like private services: as underlined, the directive on services is formally applied also to SGEI, since the hypothesis of a «general derogation on social politics» has not been accepted (D. Gallo, *I servizi di interesse economico generale*, cit., p. 441).

<sup>114</sup> On this point M. D'Alberti (edited by), *Concessioni e concorrenza*, Rome, 1998, p. 162, who underlines that the great use of concessions, not only for reserved activities but also for free activities in our legal system, cannot at all be accepted; he states that «the reasons connected to the universality of the service and the reason founded on the controls to be made for social purposes as provided for by art. 41 of the Constitution are not sufficient to justify the use of administrative concessions»; and that «only the exception justifies the use of concessions», whereas in all the other cases concessions should be replaced with «common law instruments». On art. 43 of the Italian Constitution see, in particular, S. Cassese, *Legge di riserva e articolo 43 della Costituzione*, in *Giur. cost.*, 1960, p. 1344 et seq., and F. Galgano - S. Rodotà, *Rapporti economici (art- 41-44)*, in *Commentario alla Costituzione a cura di G. Branca*, Bologna, 1982.

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exception that it must respect public service obligations<sup>115</sup>. And when, in case of market failure, it is necessary to grant a special or exclusive right to a private operator, public law can help in selecting with transparency and without discrimination the best offerer (public tender), while private law can regulate the contractual relationship.

Secondly, as to the discipline applicable to the award of concession contracts, at European level there is not a clear and relevant distinction between public services and other services, especially after the European Directive on concession contracts has been adopted.

In fact, it is true that art. 4 of the new Directive sets forth «the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to»: so the Directive allows Member States to freely define, in compliance with the principles of the TFEU on equal treatment, non-discrimination, transparency and the free movement of persons, which activities can be considered public services, their scope and the characteristics of the services to be provided, including any conditions regarding the quality of said services, in order to pursue their public policy objectives<sup>116</sup>.

Nevertheless, these principles do not entail a general exclusion of public service concessions from the scope of the Directive. In fact, even if some judgments of the European Court of Justice (ECJ) seem to legitimate a sort of general exclusion of public service activities from the application of the framework concerning public contracts, with

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<sup>115</sup> On this point see D. Sorace, *Servizi pubblici e servizi (economici)*, cit., p. 407. The concept of public service is related to art. 41 of the Constitution, which ratifies the principles of “economic freedom” and “freedom of contract”, also by R. Cavallo Perin, *Riflessione sull’oggetto e sugli effetti giuridici della concessione di pubblico servizio*, cit., p. 115, who, however, affirms that concessions realize «the transfer of the economic and juridical situation of the public administration with reference to a specific public service (substitution)». On this point also F. Merusi, *Servizio pubblico*, cit., p. 221, who underlines that in public service concessions «the service is simply an economic activity “planned” through a particular administrative regime (...), founded on art. 41, para. 3, of the Constitution». In the same sense, F. Trimarchi Banfi, *Organizzazione economica ad iniziativa privata e organizzazione economica ad iniziativa riservata negli artt. 41 e 43 della Costituzione*, in *Pol. dir.*, 1992, p. 3 et seq., stating that, from a general and theoretical point of view, everyone can carry out free economic activities according to art. 41 of the Constitution.

<sup>116</sup> On this point, see whereas no. 6.

the exception of the application of the principle of transparency<sup>117</sup>, the Directive expressly excludes only some (limited) kind of public services: first of all, the «non-economic services of general interest»<sup>118</sup>; secondly, the public services characterized by the presence of specific regulations, such as air transport services<sup>119</sup>, electronic communications services<sup>120</sup>, the water sector<sup>121</sup>, concessions in the fields of defence and security which are governed by specific procedural rules<sup>122</sup>, the operation of gambling and betting<sup>123</sup>, or the emergency services provided by non-profit subjects<sup>124</sup>; thirdly, certain social, health, or educational services are subject only to the general principles of this Directive, but are

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<sup>117</sup> See ECJ, Fourth Ch., 14 November 2013, case C-388/12, *Comune di Ancona*, affirming that «public service concessions are not governed by any legislation at EU level», precisising later that «in the absence of legislation, the law applicable to service concessions must be assessed in the light of primary law and, more specifically, the fundamental freedoms laid down in the Treaty on the Functioning of the European Union (see case C 324/98 *Telaustria and Telefonadress* [2000] ECR I 10745, paragraph 60)» (par. 45). For this reason even if «EU law does not preclude the award, without a call for tenders, of a public service concession relating to works», on the other side «the principles of equal treatment and of non-discrimination on grounds of nationality impose, particularly on the contracting authority, a duty of transparency, consisting in the duty to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the award procedure to be opened up to competition and the impartiality of that procedure to be reviewed, without necessarily implying an obligation to call for tenders (Case C 260/04 *Commission v Italy* [2007] ECR I 7083, paragraph 24, and Case C 324/07 *Coditel Brabant* [2008] ECR I 8457, paragraph 25)» (par. 46).

<sup>118</sup> See art. 4, par. 2: «Non-economic services of general interest shall fall outside the scope of this Directive».

<sup>119</sup> According to art. 10, par. 3, «This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council (22) or to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007».

<sup>120</sup> See art. 11.

<sup>121</sup> See art. 12, according to which «This Directive shall not apply to concessions awarded to: (a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; (b) supply drinking water to such networks». In fact, concessions in the water sector which are «often subject to specific and complex arrangements which require a particular consideration»: see whereas no. 40.

<sup>122</sup> As referred to in Directive 2009/81/EC: see art. 10, par. 5.

<sup>123</sup> See whereas no. 35.

<sup>124</sup> See whereas no. 36.



excluded from the application of its rules since they have a “limited cross-border dimension”<sup>125</sup>.

Anyway apart from these exclusions, the other services of general economic interest – that are not directly exposed to competition on markets in the Member State concerned<sup>126</sup> – fall within the scope of the Directive. In confirmation of this, the Directive explicitly mentions some typical public service sectors – such as energy, transport and postal services – where it is necessary to introduce some coordination provisions in order to ensure «a real opening up of the market and a fair balance in the application of concession award rules»<sup>127</sup>.

Furthermore, the general exclusion from the scope of the Directive of the services whose value is lower than a certain threshold – and that for this reason do not reflect the clear cross-border interest of concessions to economic operators located in other Member States – is applicable, according to the Directive, both to the public services and to the other services<sup>128</sup>. In any case, according to the European jurisprudence, the principles of equal treatment and non-discrimination will apply also to these concession contracts on grounds

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<sup>125</sup> In fact, these services are provided within a particular context that varies widely amongst Member States and that is related to the different cultural traditions: for this reason it is sufficient to impose at European level only the obligation to publish a prior information notice and a concession award notice: see art. 19 and whereas no. 53. Besides, whereas no. 54 establishes that «Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate».

<sup>126</sup> See art. 16. On this point whereas no. 33 specifies that «this Directive should not apply to concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex II if, in the Member State in which that activity is carried out, it is directly exposed to competition on markets to which access is not limited, as established following a procedure provided for to this purpose in Directive 2014/25/EU of the European Parliament and of the Council».

<sup>127</sup> See whereas no. 24, affirming that «Certain coordination provisions should also be introduced for the award of works and services concessions in the energy, transport and postal services sectors, given that national authorities may influence the behavior of entities operating in those sectors, and taking into account the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the services concerned». For these sectors, only whereas the services concessions are awarded on the basis of a preexistent exclusive right which that operator enjoys under national law and in accordance with European Union, it will be possible to avoid the application of the Directive rules «since such exclusive right makes it impossible to follow a competitive procedure for the award» (whereas no. 3). But in this case there is already a “preexistent exclusive right” granted to the private party in compliance with EU Law.

<sup>128</sup> See art. 8, par. 1 which affirms that «This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 186 000».

of nationality, thus imposing a duty of transparency and a sufficient degree of publicity by the public authorities<sup>129</sup>.

Therefore, the current European legal framework surely recognizes the freedom of Member States in defining public service activities: but once an activity has been recognized as public service, the discipline applicable for the awarding of the concessions is the same that is applicable to the other service concessions. This confirms the fact that public service concessions represent only a specific kind of services concession contracts and that they fall within the general (European) discipline of these tools which are clearly understood as ordinary contracts. From this point of view, the national tendency to provide for a different (public) regime for public service concessions – in consideration of the specific public interests involved – does not appear justifiable, since Member States are free only to choose which activities can be considered as public services.

Thirdly, especially at local level, many national public services are already awarded through ordinary public procurement procedures and tenders<sup>130</sup>: in fact, local authorities are substituting traditional administrative concessions with ordinary contracts to award the management of local public services<sup>131</sup>. In particular, public contracts are used when the private operator is remunerated by the public body and does not assume any economic risk: therefore, the instrument to be used is not chosen on the basis of the “social purpose” of the activity, but on the basis of the economic operation to be carried out<sup>132</sup>. For

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<sup>129</sup> On this point see ECJ, Fourth Ch., judgment of 13 September 2007, Case C-260/04, *Commission vs Italy*, par. 24; ECJ, Third Ch., judgment of 13 November 2008, Case C-324/07, *Coditel Brabant*, par. 25; ECJ, Fourth Ch., judgment of 14 November 2013, Case C-388/12, *Comune di Ancona*, par. 45-46.

<sup>130</sup> Actually it is the “privileged” solution in the Italian legal system, especially with the aim of limiting the direct supply of services by public administration through the “in house providing” mechanism. On the reform of the awarding discipline of local public services, see G. Di Gaspare, *I servizi pubblici locali in trasformazione*, Padua, 2010; C. De Vincenti - A. Vigneri, *I servizi pubblici locali tra riforma e referendum*, Rimini, 2011; with particular reference to the effects following the abrogative referendum of 12–13 June 2011, see A. Moliterni, *L’Acqua, i servizi pubblici locali e lo strumento referendario*, in [www.treccani.it](http://www.treccani.it), 2011.

<sup>131</sup> On this point, F. Fracchia, *Concessione amministrativa*, cit., p. 255.

<sup>132</sup> From this point of view see A. Massera, *Lo Stato che contratta e che si accorda*, Pisa, 2011, p. 75, stating that concessions (also public service concessions) are similar to administrative contracts, and underlining that «once less attention is paid to the importance of the moment relating to the specific aim of the economic activity, also the distinctive feature of the concession as main way to award public activities to private operators could not remain unaltered».

example, the service of garbage disposal – which is clearly a public service – has been considered as an ordinary public procurement contract, since its users do not pay directly the private operator<sup>133</sup>. In the same sense, the supply of home assistance services, even if considered as «performance of a public service» by the Council of State, has been regulated through a private law contract since the remuneration for the performance is paid directly by the health administration<sup>134</sup>.

All these arguments confirm the fact that – as already understood by Massimo Severo Giannini – the presence of a “public object” does not prevent *per se* the reconstruction of the concession relationship as a contract<sup>135</sup>.

Of course the presence of a public service as particular object of the contract imposes some cautions in the construction of the contractual regulation in order to better protect the public interest. In fact, the necessity to ensure the enjoyment of civil and social rights has important consequences for what concerns public service obligations – such as transparency, non-discrimination, low price, regularity and continuity in the supply of the service<sup>136</sup> – which the private operator must perform and which could be scarcely fulfilled only by his spontaneous “entrepreneurial spirit”. Furthermore, the awarding of a public service to an operator which does not belong to the public administration clearly has important consequences for what concerns the responsibility of the public authority, which

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<sup>133</sup> See ordinance of the Court of Cassation, United Sections, no. 17829, dated 22 August 2007, where the legal relationship is considered as a public procurement contract and not as a public services concession, since there is no transfer of powers from the Municipality to the private party, who, furthermore, cannot claim payment from the users for the service rendered.

<sup>134</sup> This also because «in this particular case the remuneration for the supply of home assistance services consists in a sum to be paid by the health administration for each service rendered»: judgment no. 1623, dated 19 March 2009, of the Council of State, section V.

<sup>135</sup> On this point it is fundamental the teaching of Massimo Severo Giannini who, rejecting the category of the «public law contract», introduces the concept of «contracts with a public object»: M.S. Giannini, *L'attività amministrativa*, cit., p. 87 et seq., and, more recently, Id., *Diritto amministrativo*, cit., vol. II, p. 426. But, by the way, also according to Giannini these contracts, having as object “unmerchantable goods”, must be preceded by an administrative act which makes said objects “merchantable”.

<sup>136</sup> See M. D’Alberti, *Lezioni di diritto amministrativo*, cit., p. 132, also for the origin of the concept of *service public*. These are obligations which, as underlined, affect the “special duty” of the concessionaire which is the distinctive feature of the public service (see A. Romano, *Profili della concessione di pubblici servizi*, cit., p. 478).

remains accountable for the way in which the service is supplied to the community and, consequently, for its performance. These very reasons have traditionally legitimated the provision of “*clauses exorbitantes du droit commun*” and other special public rules in order to assure an in-depth control on the proper execution of the contract by the concessionaire and in order to legitimate the possibility to terminate the relationship ahead of time for public interest reasons<sup>137</sup>.

Now, given that public interest reasons implied in the exercise of said special powers cannot be renounced, is it really necessary to refer to the categories of public power and administrative discretion to guarantee that the activity performed by the private operator observes the rules contained in a contractual regulation? And, more generally, are the contract and the bargaining powers provided for by private law really inadequate to protect the public interest also during the execution of a contract, as affirmed by predominant scholars when they talk about the necessity to “functionalize” the private law of public administration and, therefore, to “modify” it according to the public interest<sup>138</sup>?

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<sup>137</sup> As a matter of fact, the public service should affect also the execution phase of the concession relationship and should confer special powers to the public administration during the control phase, even if these powers are not provided for by the contract: see on this point G. Greco, *La concessione di pubblici servizi*, cit., p. 394. As underlined by M. D’Alberti, *Concessioni amministrative*, cit., p. 11, the reconstruction of the concessions from a “public law perspective” has always served the purpose of recognizing a public law power of revocation which can affect the agreement. In the same sense, G. Pericu, *La concessione*, cit., p. 84 et seq., sees in the revocation the key instrument to define the nature of the agreement. The importance of the issue concerning said powers in the control phase is also recognized by M. Ramajoli, *Orientamenti giurisprudenziali in materia di rapporto concessorio*, in A. Romano - G. Pericu - F. Roversi Monaco (edited by), *La concessione di servizio pubblico*, cit., p. 357 et seq. It is telling that also the doctrine which has reconstructed concessions as contracts has by no means excluded the possibility of a power of revocation which would “precipitate” on the contract as a «*factum principis*»: M. D’Alberti, *Le concessioni amministrative*, cit., p. 354, who, after reconstructing concessions in contractual terms, and rejecting the idea of the concession-contract, does not exclude the possibility for an «implicit clause of revocation», or for a unilateral act affecting the contract: according to M. D’Alberti, in particular, «the revocation measure could be considered as “*factum principis*”».

<sup>138</sup> The issue of the necessity to “functionalize” the private law used by public administration to the public interest is fundamental in the most recent studies on the private law of the public administration: M. Dugato, *Atipicità e funzionalizzazione nell’attività amministrativa per contratti*, Milan, 1996; E. Bruti Liberati, *Consenso e funzione*, cit.; S. Civitarese Matteucci, *Contributo allo studio del principio contrattuale*, cit.; A. Benedetti, *I contratti della pubblica amministrazione tra specialità e diritto comune*, Turin, 1999; S. Vinti, *Limiti funzionali all’autonomia negoziale della pubblica amministrazione nell’appalto di opere pubbliche*, Padua, 2008. *Contra* these opinions, which risk to distort the meaning and the reason of using private law by public bodies, see C. Marzuoli, *Principio di legalità e attività di diritto privato della pubblica amministrazione*, Milano, 1982, p. 133 et seq.; and more recently, C. Cudia, *Funzione amministrativa e soggettività della tutela*, Milano, 2008, p. 178 et seq.

Actually, also during the execution of a public service concession it is not so much a matter of *public interest*, rather the issue concerns the interest of the *public party*<sup>139</sup>: once the public administration has consensually defined the interests at stake, what matters is only the proper fulfillment of the public service obligations consensually assumed by the parties<sup>140</sup>. This is confirmed by the fact that the jurisprudence, even when excluding the possibility of considering concessions as contracts, continues to refer to the consensual discipline established by the parties and to the one provided by the Italian Civil Code<sup>141</sup>. In fact, many administrative judgments state that also the execution phase of the concession relationship must be subject to «the ordinary civil law rules on the performance of obligations and the good faith of the parties involved (art. 1375 of the Italian Civil Code)»<sup>142</sup>.

In substance, if the relationship is essentially governed by the rules of the Italian Civil Code on obligations and contracts, the main interest of the public administration – and, consequently, of the citizens – is that the private operator fulfills the contract, in compliance with the principles of fairness and good faith. But this interest – even if relevant from a “public” point of view – cannot modify the contract and, consequently, cannot justify the presence of “*clauses exorbitantes du droit commun*” in favor of the public administration<sup>143</sup>. The public administration can assure the proper fulfillment of the contract through all the bargaining powers already provided for by private law to the parties

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<sup>139</sup> In this sense clearly, F. Ledda, *Il problema del contratto*, cit., p. 112 et seq. Similarly also C. Marzuoli, *Principio di legalità*, cit., p. 135.

<sup>140</sup> G. Falcon, *Le convenzioni pubblicistiche*, cit., p. 216.

<sup>141</sup> See on this point judgment no. 9347, dated 23 December 2010, of the Council of State, section IV, on the execution of a public service concession on the establishment and maintenance of legal gaming machines.

<sup>142</sup> See judgment no. 9347 of 2010 of the Council of State, cit. See also judgment no. 2568, dated 4 May 2010, of the Council of State, section IV, where it is stated that in concession relationships «the judge can and must apply the rules on the non-fulfillment of the contract, when one of the parties claims non-fulfillment of obligations».

<sup>143</sup> As already underlined by D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., spec. 293 et seq., in presence of a “continuing contract” the possibility of a general legitimation of the public law power of self-protection on the part of the public administration which affects the contract should be excluded.

with the aim of strengthening the contractual relationship. From this perspective, therefore, it seems that private law already grants the public administration with the legal instruments which can guarantee, during the execution of a continuing contract, that the interests of the parties are pursued in the best way, also when one of them is the public administration<sup>144</sup>.

Therefore, beyond the *nomen iuris* used by the parties, in a long-term contract founded on the exchange of rights and obligations, the hypothesis of terminating the contract ahead of time on the part of the administration should in any case be considered as exercise of bargaining powers<sup>145</sup>: also private law, in fact, fully legitimates the presence of unilateral powers allowing the breach of the contract in advance<sup>146</sup>. Nevertheless, unlike public law powers, these are unilateral powers that should not be exercised in case of new assessment of the public interest, but only in case of serious infringements on the part of the private operator which prevents the continuation of the relationship. These powers should be regarded as ordinary instruments used to allocate contractual risks to the parties<sup>147</sup>, considering that, after the mutual assent, the public administration is no longer in a position of supremacy: the contractual relationship constitutes a limit to the exercise of bargaining powers<sup>148</sup>. Public law self-remedies could be legitimated, if anything, only to remove

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<sup>144</sup> On private law as set of rules common to public authorities and private operators and, more generally, on the full legitimation of the public authorities – as parties usually provided with full “capacity to make contracts” – to make use of all private law instruments to pursue public aims, see M.S. Giannini, *Lezioni di diritto amministrativo*, cit., p. 16. More recently, N. Irti, *Prefazione a V. Cerulli Irelli, Amministrazione pubblica e diritto privato*, cit., p. IX.

<sup>145</sup> In this sense D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 297. On the same point see also judgment no. 1230, dated 6 July 2009, of the Regional Administrative Court of Sicily, Catania, which, given a conventional provision which connects the revocation to the proper fulfillment of the contractual relationship, considers the power of revocation as a real «explicit resolutive clause». On this point it is worth mentioning also a (isolated) case law (judgment no. 1327, dated 13 March 2000, of the Council of State, section V) which has underlined that also the unilateral power of termination of the concession can be considered as typical expression of bargaining powers.

<sup>146</sup> As underlined by G. De Nova, *Recesso*, in *Dig. disc. priv.*, Turin, 1997, XVI, p. 315, the unilateral termination of a contract, contrary to what is provided for by art. 1372 of the Civil Code, has become the basic rule of the contract regulation: and this not only in case of expressed rescission clause provided in the contract, but also by virtue of the analogic implementation made by the jurisprudence.

<sup>147</sup> For this reconstruction of the bargaining powers in “continuing contracts”, see F. Galgano, *Diritto civile e commerciale*, vol. II, *Le obbligazioni e i contratti*, t. 1, p. 63 et seq.

<sup>148</sup> G. Greco, *Le concessioni di lavori e di servizi nel quadro dei contratti di diritto pubblico*, in *Riv. it. dir. pubbl. comunit.*, 2000, n. 5, p. 993 et seq.

invalidity or irregularity in the choice of the service supplier, but not to exercise a *ius poenitendi*<sup>149</sup>.

Similarly, also the power to inflict a penalty cannot be regarded as an exercise of administrative discretionary power, but should be considered as an exercise of a bargaining power provided for also by the Italian Civil Code (art. 1382)<sup>150</sup>. It is an instrument provided for by the contract with the aim of strengthening the contractual relationship: and the decision to inflict the penalty can be taken by all parties during the execution of the contract and cannot be considered as an exercise of administrative discretion only because it is taken by the public administration<sup>151</sup>.

Nonetheless, these and other instruments which strengthen the position of the public administration in the control phase, far from being implicitly attributed to the public party, must be provided by the law or by the contract and, as a consequence, must operate «within the same contract, like private law self-remedy instruments»<sup>152</sup>: by the way these

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<sup>149</sup> Instead, the administrative judge admits the possibility of the administration “to change idea” during the execution of a long-duration contract if there are economic difficulties (judgment no. 4116, dated 11 July 2012, of the Council of State, section III), or the necessity to change in advance the public service management (judgment dated 6 February 2008, of the Regional Administrative Court for Sardinia, Cagliari).

<sup>150</sup> Said provision, in fact, allows the parties to introduce a penalty clause not only to compel the execution of the contract, but also to define the compensation in advance. See in this sense, *ex multis*, judgments no. 6561, dated 10 June 1991, section II, of the Court of Cassation, and no. 11204, dated 6 November 1998, section III, stating that the penalty clause strengthens the contractual bond. These two aims have been recognized also by the legal doctrine which, sometimes, has underlined the sanctioning-punitive feature of this institution, which must guarantee the fulfillment of the contract: A. Magazzù, *Clausola penale*, in *Enc. dir.*, VII, Milan, 1960, p. 186 et seq. (spec. p. 188); A. Marini, *La clausola penale*, Naples, 1984; Id., *Clausola penale*, in *Enc. giur.*, VI, Rome, 1990, p. 3; G. De Nova, *Clausola penale*, in *Dig. disc. priv.*, II, Turin, 1989, 378; judgment no. 9295, dated 26 June 2002, section III, of the Court of Cassation, in *Giur. it.*, 2003, 450. Other scholars pay attention more to the compensatory aspect: F. Gazzoni, *Manuale di diritto privato*, Naples, 2007, XIII ed., p. 648; see also C.M. Bianca, *Dell'inadempimento delle obbligazioni (art. 1218-1229)*, in *Commentario del Codice civile a cura di Scialoja e Branca*, Rome-Bologna, 1979, p. 222; judgment no. 2941, dated 3 November 1999, of the Court of Cassation, section III, in *Giust. civ.*, 2000, I, 1118.

<sup>151</sup> With regard to penalties, see M.S. Giannini, *L'attività amministrativa*, cit., p. 52, who, referring to public contracts, argues that also the penalty clauses used by public administration belong to private law and they are not administrative acts.

<sup>152</sup> See A. Massera, *Lo Stato che contratta*, cit. p. 453.



tools must be the result of the exercise of contractual autonomy, considered as a power of “self-regulation”<sup>153</sup>.

All this is clearly confirmed also by the examination of the recent Directive on concession contracts which has introduced an important discipline concerning the performance of concession contracts and in particular concerning the exercise of the powers of modification and termination<sup>154</sup>. For example, art. 43 establishes that the power of modification of contracts during their term has to be provided clearly in advance «in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options»<sup>155</sup>: this provision explicitly reveals the “contractual” nature of these powers that have to be known in advance by the private parties and, therefore, spontaneously accepted. Furthermore the Directive strictly sets forth the conditions and the limits to modify the concession-contract which bind all the contracting authorities within the European Union<sup>156</sup>: so it is a special power that is based on a legislative provision, rather than on the supremacy of the public party within the relationship. In the same direction, the power of termination of the contract<sup>157</sup> can be

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<sup>153</sup> On the transformation of the principle of “freedom of contract” from a subjective perspective (free will) to an objective one (self-regulation of interests) see Salv. Romano, *Autonomia privata (appunti)*, Milan, 1957, spec. p. 62. See also P. Barcellona, *Diritto privato e società moderna*, cit., p. 326 ss., stating that private contractual autonomy is the principle which ratifies the self-regulation power of private parties.

<sup>154</sup> See Title III of the Directive and, in particular, artt. 43-44.

<sup>155</sup> See art. 43, par. 1, let. a).

<sup>156</sup> See art. 43, par. 1, let. c). In particular the notion of “unforeseeable circumstances” is defined, referring to «circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value»; anyway also in this case the modification cannot justify an alteration of the nature of the overall concession (see whereas no. 76).

<sup>157</sup> See art. 44.

exercised only for the substantial and serious conditions which are strictly established by the European Union<sup>158</sup>.

Therefore, the Directive has rigorously disciplined the exercise of special powers for the better pursue of the public interest in a long-term contract in order to allow a certain level of flexibility. But these powers are precisely defined and regulated by the law and the conditions and requirements for their exercise are strictly settled at legislative level too, and do not depend on the discretion of the public administration concerned. Furthermore they do not seem to modify the economic balance of the contracts or to undermine the economic interest of the private party that, instead, is taken into adequate consideration. For these reasons they cannot be understood as “*clauses exorbitantes du droit commun*” in favor of the public administration, since they do not attribute a position of supremacy to the public administration: they are ordinary bargaining powers that allow public administration to cope with changing external circumstances, which cannot be foreseen in advance.

Also the analysis of this discipline demonstrates that the use of a contract to award a public service does not deprive *ex se* the public administration of the powers of surveillance and control on the proper execution of the contract. The necessities of a greater flexibility and a more efficacious control on the actual compliance of the private activity to the public interest can be satisfied by those powers which are already provided by private law, in order to share the risks between the parties: annulment, dissolution, modification powers, termination clauses, and penalty clauses can equally be used by public administration to satisfy the public interest<sup>159</sup>. However, these bargaining powers do not

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<sup>158</sup> In particular, according to art. 44, when a substantial modification of the concession has taken place, or when the concessionaire has been excluded from the concession award procedure, or, finally, when the Court of Justice of the European Union finds, according to art. 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties and this Directive.

<sup>159</sup> From this point of view it is telling what affirmed by D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 296, who, after rejecting a general principle of revocation, state that this «cannot be considered as an unacceptable limitation of the necessary powers which allow the Government to pursue adequately the “public interest”», since «the power of unilateral termination of the contract (...) can always be determined by mutual assent».

undermine the “core” of the contract, because they are provided for by the law or by mutual assent<sup>160</sup>.

To conclude, we have seen that the presence of a public service does not impose *ex se* a public regulation of the relationship, since public service activities are ordinary entrepreneurial activities that can be carried out by private subjects with private law instruments. Furthermore, the European discipline concerning services concessions – that clearly understands concessions as contracts – is applicable for every kind of services provided by a concessionaire that assumes an “operating risk”, also when public services are involved. However, this does not mean renouncing to a better protection of public interests and public needs that are necessarily involved in the performance of these concessions. In fact, the necessity to better protect public interests during the performance of public service concessions could be satisfied also by private law which, since it is a general category of the legal system<sup>161</sup>, can be used to *regulate* private economic activities *performed to fulfill* public interests<sup>162</sup>. Once the best supplier has been identified through administrative procedures which guarantee transparency and equal treatment, the relationship between public administration and private operator – and, consequently, the «public service program»<sup>163</sup> – can be regulated with a contract which may oblige the

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<sup>160</sup> As properly affirmed by D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 297, once the power of unilateral termination of the contract (revocation or termination) has been referred to a specific provision, or to an agreement between the parties, «there is no reason to make a distinction between concession-contracts and the other contracts of the public administration by defining the first ones as public law contracts or contracts with a public object (...) and the other ones as private law contracts». On this point, even if with regard to public contracts, see A. Giannelli, *Esecuzione e rinegoziazione*, cit., p. 51 et seq., who stresses the decrease of a general power of revocation affecting the contract, in favor of a power of termination which seems to be today the only instrument able to «terminate the contract in advance because of the unilateral initiative of the public contracting authority» (p. 52).

<sup>161</sup> As underlined, public administration can use «general legal institutions» (G. Miele, *La manifestazione del privato*, cit., p. 31) provided that said forms are neutral with regard to public and private parties (like the contractual scheme) and, therefore, institutions which do not belong to private law but to common law. In this sense also M. Santilli, *Il diritto civile dello Stato*, Milan, 1985, p. 241 et seq., who affirms that private law is a system which can be extended to fill in the gaps of the public law system.

<sup>162</sup> On this point see F. Merusi, *Servizio pubblico*, cit., p. 220, according to whom, public service concessions are used to «regulate private economic activities». More recently A. Massera, *Lo Stato che contratta e che si accorda*, cit., p. 25, has stressed the “regulatory function” of these concessions.

<sup>163</sup> See A. Romano, *Profili della concessione di pubblici servizi*, cit., p. 479.

concessionaire to respect public services obligations<sup>164</sup>. From this perspective, as demonstrated by the debate which characterizes many foreign legal systems – especially the common law ones – the private law contract can be conceived as an instrument which can be used to regulate economic activities with public and social aims, as services of general economic interest definitely are<sup>165</sup>.

## 5. THE FUTURE OF CONCESSION CONTRACTS IN A “MULTILEVEL CONTEXT” BETWEEN THE PRIMACY OF EU LAW AND THE PRINCIPLE OF “FREE ADMINISTRATION”.

The study of concessions continues to be at the center of the fundamental legal issues concerning the transformation of the administrative law system and, above all, of the “public–private divide”<sup>166</sup>. But nowadays this debate is mainly influenced by the process of supranational integration in a “multilevel” system that contributes to create new “tensions”

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<sup>164</sup> As underlined by D. Sorace, *Servizi pubblici e servizi (economici)*, cit., p. 413, the respect of public service obligations can be assured also using contracts.

<sup>165</sup> On the «*Regulation by contract*» see the fundamental contribution by T. Daintith, *Regulation by Contract: a New Prerogative?*, in *Current Legal Problems*, 1979, p. 41 et seq.; more recently see H. Collins, *Regulating contracts*, Oxford, 1999; R. Boschek, *The Nature of Regulatory Contracts*, in *World Competition*, 2003, 25(3), p. 203 et seq.; P.V. Jones, *The New Public Contracting. Regulation, Responsiveness, Relationality*, Oxford, 2006; on the regulation by contract in the field of environment see E.W. Orts – K. Deketelaere (edited by), *Environmental Contracts*, London, 2001.

<sup>166</sup> On the transformation of the “public–private divide” and on the subsequent changes in the administrative law discipline see: M. Taggart, *The Province of Administrative Law Determined?* and A. Aman, jr., *Administrative Law for a New Century*, both in M. Taggart (edited by), *The Province of Administrative Law*, Oxford, 1997; J.B. Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif*, in *Actualité Juridique – Droit Administratif*, 2001, p. 911 et seq.; G. Napolitano, *Pubblico e privato nel diritto amministrativo*, Milan, 2003; R. Stewart, *Il diritto amministrativo nel XXI secolo*, in *Riv. trim. dir. pubbl.*, 2004, 1, p. 1 et seq.; V. Cerulli Irelli, *Amministrazione pubblica e diritto privato*, Turin, 2011; S. Cassese, *New paths for administrative law. A manifesto*, in *International Journal of Constitutional Law*, 2012, 10, p. 603 et seq.

and “niggles” between the European legal order and the national ones in regulating concessions<sup>167</sup>.

As we have seen, in the last century administrative concessions have represented a privileged field for the progressive construction of a public law system by the Italian jurisprudence and the legal science. In fact, at national level the concession has been understood as the *paradigma* of the public power, of the administrative act and of the exercise of administrative discretion; and also when the bilateral structure of the relationship between public body and private party in the administrative practice was evident, this relationship has remained mostly linked to the public law “domain” and has encouraged the emergence of the theory of the so called “public law contract”. Actually, especially when a public service to be provided was involved, it was essential to legitimate from a public law perspective the existence of special powers of termination, modification or annulment granted to the public administration, that were inconsistent with the possibility to understand the concession as an ordinary contract. Furthermore, the incidence of these tools on public service activities, that were essential for the development of the Welfare States, has contributed to justify the national prerogative in regulating public service concessions.

Nevertheless, today Member States are losing their grasp on the discipline regulating concessions, since said discipline is understood as a fundamental instrument to promote competition within the European legal order and, consequently, to strengthen the single market<sup>168</sup>. As we know, the aim of the Directive on the award of concession contracts is to reach a «minimum coordination of national procedures» based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty<sup>169</sup>. This is necessary in order to provide for basic and common guarantees as to the

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<sup>167</sup> On the general issue concerning the relationship between European legal order and national administrative law, see G. della Cananea – C. Franchini, *I principi dell'amministrazione europea*, Turin, 2010, p. 37 et seq.

<sup>168</sup> On this point, A. Massera, *Lo Stato che contratta*, cit., p. 79.; R. Caranta, *I Contratti pubblici*, cit., 167.

<sup>169</sup> See whereas no. 8.

awarding process, with the aim of ensuring equal treatment and transparency within the European legal order throughout the awarding process<sup>170</sup>.

It is true that this supranational coordination should preserve the «principle of free administration by national, regional and local authorities» provided by art. 2 of the same Directive, that recognizes the right granted to national authorities to «decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services»; in fact, since «the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit (...) contracting authorities and contracting entities should be allowed considerable flexibility to define and organize the procedure leading to the choice of concessionaire»<sup>171</sup>.

Nevertheless, according to the same Directive, Member States should exercise this freedom «in conformity with national and Union law»<sup>172</sup>. Thus, the same article that introduces the principle of “free administration” implicitly reaffirms the supremacy of the European Union in the regulation of these contracts in order to strengthen the single market. From this perspective, Member States are entitled only to «complete and develop» the Directive provisions with a «certain degree of flexibility»<sup>173</sup>, but they cannot overcome the European law, considering also that it is the duty of the European Commission to monitor the fulfillment of the Directive by Member States according to art. 45 of the same Directive.

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<sup>170</sup> In fact, «Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain concession procedures cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective» (whereas n. 87)

<sup>171</sup> See whereas no. 68.

<sup>172</sup> See art. 2.

<sup>173</sup> See whereas no. 8.

Therefore the European Union appears nowadays as the main legal order entitled to define what a services concession is, which rules and principles are applicable to the awarding procedure and to the performance phase, what level of judicial protection has to be assured to the economic operators involved: from this perspective, there is no longer room for Member States in defining an autonomous discipline governing services concessions, since these tools are fully integrated in the general European framework governing public contracts.

Neither the presence of a public service, as specific object of the concession, allows Member States to overcome the European discipline of concession contracts in order to establish a “domestic” one. Member States have a certain freedom in defining which activities can be considered as services of general economic interest within the national legal order, but the regime of public service concessions has to fulfill the rules established at European level for every kind of concession contracts. From this perspective, the new legal framework provided by the Directive expressly excludes only those (few) public services which do not have an economic interest or that are governed by autonomous rules for the awarding procedure, or that are directly exposed to competition: but apart from these limited exceptions, the ordinary services of general economic interest are subject to the new legal regime when public authorities use concession contracts to grant the activity concerned.

Therefore, European Union has provided for a unique discipline concerning concession contracts – that is applicable for public services as well as other services –, which are characterized only by the particular economic operation that is involved<sup>174</sup>. According to this discipline, services concession contracts are ordinary contracts, characterized only by a special form of consideration, consisting either solely in the right to

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<sup>174</sup> See V. Ricciuto - A. Nervi, *Il contratto della pubblica amministrazione*, Naples, 2010, p. 38, affirming that the current legislation provides for two types of contract which can be used by public administration (the public contract and the concession), which differ only because of the different «economic substance of the operation». See also A. Massera, *Lo Stato che contratta e che si accorda*, cit., 79, affirming that the differences between «service activities bound to public administration» and «service activities bound to citizens» has decreased from a «finalistic» point of view; the main difference between these two kind of services is only the «trilateral structure» of the legal relationship when also citizens are involved and, subsequently, the fact that, in this case, the service is “paid” by the market. But beyond this aspect, both concession contracts and public contracts are governed by the same principles which regulate the public procurement field.



exploit the services that are the subject of the contract or in that right together with payment<sup>175</sup>. Moreover, the contractual nature of these tools is not denied by the provision of special powers of modification and termination by the side of public administration, since these powers can be understood as ordinary bargaining powers provided by the European law, which strictly sets forth the conditions that allow contracting authorities to exercise them in order to eliminate any room for the use of administrative discretion. Besides, these provisions take into great consideration the pecuniary interest of the economic operator, as well as the need to preserve the economic balance of the contractual relation and, as a consequence, help ensuring competition also during the performance phase.

This new European perspective in the study of concession contracts should encourage a transformation in the traditional approach held at national level by the legal science. Indeed, the idea of the administrative concession as a discretionary administrative act or, however, as an expression of public powers<sup>176</sup>, could be easily replaced by the category of the “*concession relationship*” that finds in the contractual negotiation the main source of the regulation of those private economic activities which are essential for the development of the Welfare State<sup>177</sup>. From this point of view, also at national level, public service concession contract can be considered as a special contract to pursue public goals,

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<sup>175</sup> From this point of view, public service concessions can be considered as particular contracts which allow public administration to award the management of public services to private operators, also entailing the transfer of the economic risk and the responsibility for the proper performance of the activity: in this sense A. Massera, *Lo Stato che contratta*, cit., p. 79.

<sup>176</sup> See the definition of concession provided by G. Zanobini, *Corso di diritto amministrativo*, vol. I, *Principi generali*, Milan, 1958, p. 261, stating that the «common feature of these measures is the granting to one or more individuals who do not belong to public administration of new faculties or powers and rights».

<sup>177</sup> Expression which can be already found in judgment no. 226, dated 19 June 1998, of the Italian Constitutional Court, where it is stated that it is not possible «to ignore that, beyond the debate on the general definition of this institution, also public services concession is subject to a so-called *contractual regulation* of the object of the activity granted to the private entrepreneur». On this point see also V. Ricciuto - A. Nervi, *Il contratto della pubblica*, cit., p. 47, affirming that the definition of concession in contractual terms «makes concession an instrument used by public authority, who remains responsible for the protection of social interests, to regulate the performance of activities aimed at satisfying said interests following an entrepreneurial logic».

that is characterized only by the transfer to the private concessionaire of the economic risk<sup>178</sup>.

From this point of view, the “*mystic*” idea elaborated by the classical legal science<sup>179</sup> of the transfer of public powers to the private operator should give way to an approach which pays much more attention to the *economic and functional* dimension of the relationship and which considers concession contracts as privileged instruments used by the public authority to regulate economic activities which are not sufficiently guaranteed by the market, nor can be directly offered by the public administration, but which must, by the way, be necessarily provided to the community, also through a greater use of private resources, funds and potentialities<sup>180</sup>. These very features show that the “regulatory function” in the field of public services cannot be exercised unilaterally and with *command and control* instruments<sup>181</sup>, since, on the contrary, the collaboration and the negotiation

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<sup>178</sup> Therefore, if the public authority wishes to transfer the economic risk of the organization and management of public activities to the private party, it will use the “public service concession contract”; on the contrary, the public authority will use a “public service contract” if it wishes to grant only the performance of an activity (also concerning public services), keeping, in this way, the responsibility for the organization and management of said activity: see V. Ricciuto - A. Nervi, *Il contratto della pubblica amministrazione*, cit., p. 39; R. Caranta, *I contratti pubblici*, cit., 192.

<sup>179</sup> To use the expression of R. Caranta, *I Contratti pubblici*, cit., 167, stating that «EU law does not consider the aspect, for sure *mystic* but cherished by the Italian doctrine, but also by the French one, and by the Spanish one, of the transfer of public powers from the contracting authority to the concessionaire».

<sup>180</sup> The concession contract «regulatory function» of private economic activities is underlined by M. D’Alberti, *Concessioni amministrative*, in *Enc. giur.*, cit., p. 8; V. Ricciuto – A. Nervi, *Il contratto della pubblica amministrazione*, cit., p. 44, stressing that the public service contract represents the operating instrument used by the local authority to regulate the supply of a particular service to the citizens. On the concept of regulation, see A. Ogus, *Regulation. Legal Form and Economic Theory*, Oxford, 1994; T. Daintith, *Regulation*, in *International Encyclopedia of Comparative Law*, vol. XVII, *State and Economy*, Tübingen, 1997; G. Tesaro - M. D’Alberti (edited by), *Regolazione e concorrenza*, Bologna, 2001; B. Du Marais, *Droit Public de la Régulation économique*, Paris, 2004; M. D’Alberti, *Poteri pubblici, mercati e globalizzazione*, cit.; R. Baldwin - M. Cave, *Understanding Regulation: Theory, Strategy, and Practice*, II ed., Oxford, 2011. In particular on public services regulation, see also E. Bruti Liberati - F. Donati (edited by), *La regolazione dei servizi di interesse economico generale*, Turin, 2010; L. De Lucia, *La regolazione amministrativa dei servizi di pubblica utilità*, Turin, 2003.

<sup>181</sup> For the conflict between the logic of “free market”, especially with regard to the supply of goods and services, and the traditional logic of “command”, see A. Massera, *Lo Stato che contratta e che si accorda*, p. 15.

which characterize exchange mechanisms are needed<sup>182</sup>. The public service concession “program” is necessarily “shared” between public authorities and private operators<sup>183</sup>: and in this context, the private law contract could help to overcome the conflict of interest which arises between the contracting authority (accountable for the performance of public services) and the concessionaire, who, on the contrary, aims at maximizing the profit deriving from said services<sup>184</sup>.

This approach however, far from undermine the foundations of the “Administrative Law” system, can be considered consistent with it. Indeed, once the idea of the “conflict of values” implied in the “public-private dichotomy”<sup>185</sup> has been definitively overcome also at national level – since the Italian legislator has expressly authorized public administrations to use private law when it is not necessary to use authoritative powers and

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<sup>182</sup> As stated by G. Berti, *Il principio contrattuale nell’attività amministrativa*, in *Scritti in onore di M.S. Giannini*, Milan, 1988, II, p. 49 «in a world dominated by exchange (...) it would be absurd to think that public administration should, on the contrary, withdraw in monastic-like exile, to jealously guard the icons of the imperative power, of the unilateral act, and so on». The issue of the “regulatory negotiation” has long been at the center of the debate of the American legal science: in particular see P.J. Harter, *Negotiating Regulations: A Cure for Malaise*, in *Georgetown Law Journal*, 1982, 71, p. 42 et seq.; S. Rose-Ackerman, *Consensus versus incentives: a skeptical look at regulatory negotiation*, in *Duke Law Journal*, 1994, 43, p. 1206 et seq.; W. Funk, *Bargaining toward the new millennium: regulatory negotiation and the subversion of the public interest*, in *Duke Law Journal*, 1997, 46, p. 1351 et seq.; A. Shapiro, *Outsourcing Government Regulation*, in *Duke Law Journal*, 2003, 53, p. 389 et seq.

<sup>183</sup> See on this point the considerations of G. Pericu, *Il rapporto di concessione di pubblico servizio*, cit., p. 91, recognizing «a form of collaboration between public power and private enterprise which does not develop through a confusion of roles, but through the definition of a substantially consensual relationship, founded on a clear distinction of responsibilities deriving from different goals».

<sup>184</sup> The function of cooperation or exchange played by contracts also in the field of public law is stressed by F. Ledda, *Il problema del contratto*, cit., p. 109. On the conflict of interest between the (public) owner of a service and the (private) operator see A. Romano, *Profili della concessione*, p. 497; on this issue see also G. Pericu, *Il rapporto di concessione di pubblico servizio*, cit., p. 91.

<sup>185</sup> The public-private dichotomy is very well stressed by G. Napolitano, *Pubblico e privato nel diritto amministrativo*, cit., p. 27 et seq., especially with regard to the contrast between A.V. Dicey’s liberal thinking and M. Hauriou’s theory of supremacy. As for the analysis of the distinction between private law rules and public law rules see H. Kelsen, *Diritto pubblico e diritto privato*, in *Riv. int. fil. dir.*, 1924, p. 340 et seq.; on the issue of the «great dichotomy» in the general theory of law see N. Bobbio, *La grande dicotomia: pubblico/privato*, (1980-1982), now in *Id., Stato, governo, società. Per una teoria generale della politica*, Turin, 1985, p. 3 et seq.

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when the use of public law is not explicitly imposed by the law<sup>186</sup> – the categories of private law and public law shall be understood as “neutral techniques” that can be used for the pursuit of every kind of interest (also public) that has been recognized<sup>187</sup>; and this, without referring *a priori* to the categories of the *public interest* and of the *public object* in order to justify the use of public tools<sup>188</sup>.

Ultimately, the clear emergence of a “contractualistic” notion of concession contracts at European level imposes, also at national level, to “rethink” the role played by public law and private law in today’s administrative law<sup>189</sup>. This is essential not only in order to better pursue the economic integration within the single market – since concession

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<sup>186</sup> See art. 1, para. 1-*bis*, of law no. 241 of 1990 providing that «when adopting measures that are not authoritative, the public administration shall act in accordance with the rules of private law save where the law provides differently». On this point see N. Paolantonio, *Articolo 1, comma 1 bis: Principi generali dell’attività amministrativa*, in N. Paolantonio - A. Police - A. Zito (edited by), *La pubblica amministrazione e la sua azione*, Turin, 2005; F. Trimarchi Banfi, *L’art. 1, comma 1 bis della l. n. 241 del 1990*, in *Foro amm.- Cons. St.*, 2005, p. 947; D. De Pretis, *L’attività contrattuale della p.a. e l’articolo 1 “bis” della legge n. 241 del 1990: l’attività non autoritativa secondo le regole del diritto privato e il principio di specialità*, in F. Mastragostino (edited by), *Tipicità e atipicità nei contratti pubblici*, Bologna, 2007. Therefore the Italian legislator has excluded all theoretical incompatibility between the use of the contract and the presence of a public object: on the fields where the use of public law instruments is necessary, and on the conditions and requirements to prefer the use of private law instruments, see V. Cerulli Irelli, *Diritto privato dell’amministrazione pubblica*, cit., p. 239 et seq.

<sup>187</sup> The *neutrality* of private or public law techniques for the pursuit of public or private interests is underlined by N. Irti, *Prefazione*, in V. Cerulli Irelli, *Amministrazione pubblica*, cit., p. X. Similarly F. Benvenuti, *Suggerimenti in tema di contratto tra diritto privato e pubblico*, in *Diritto e processo amministrativo*, 2007, p. 9, has shown, in an unpublished work of 1998, the *neutrality* of the concept of juridical capacity even when referring to public powers.

<sup>188</sup> See A. Orsi Battaglini - C. Marzuoli, *Unità e pluralità della giurisdizione: un altro secolo di giudice speciale per l’amministrazione*, cit., p. 904, affirming that «from no point of view there are in administrative law particular reasons qualitatively different from the ones which are valid for the other branches of law»; and the administrative judge has to merely apply the law, without «showing any sensitivity to the public interest». See also judgment no. 1327, dated 13 March 2000, of the Council of State, section V, with regard to the reconstruction of the juridical nature of the termination measure of a concession contract underlines that «the *aim* of the measure, and the intensity of the teleological link with the best performance of the service are not relevant to define its nature».

<sup>189</sup> On the influence of public law and common law on the evolution of administrative law see the fundamental pages of M.S. Giannini, *Diritto amministrativo*, in *Enc. dir.*, XII, Milan, 1964. From a civil law point of view see R. Nicolò, *Diritto civile*, in *Enc. dir.*, XII, Milan, 1964 and M. Giorgianni, *Il diritto privato e i suoi attuali confini*, in *Riv. trim. dir. proc. civ.*, 1961, p. 2 et seq. On this issue see also M. D’Alberti, *Attività amministrativa e diritto comune*, in U. Allegretti - A. Orsi Battaglini - D. Sorace (edited by), *Diritto amministrativo e giustizia amministrativa nel bilancio di un decennio di giurisprudenza*, Rimini, 1988, p. 433 et seq., who sees the advent of a «law founded on common law general principles, above all in the field of obligations and contracts». On the tendency to the development of a «new common law» see also G. Rossi, *Diritto pubblico e diritto privato nell’attività della pubblica amministrazione alla ricerca della tutela degli interessi*, cit., p. 692 et seq.

contracts firstly represent a fundamental instrument to promote competition<sup>190</sup> –, but especially in order to widely harmonize the different legal traditions of Member States in a real “multilevel context”<sup>191</sup> and, therefore, to contribute to the construction of an actual European administrative system<sup>192</sup>.

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<sup>190</sup> As underlined by Directive 2014/23/EU, «concession contracts represent important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition within the internal market, making it possible to benefit from private sector expertise and helping to achieve efficiency and innovation» (whereas no. 3).

<sup>191</sup> On this point see J. Schwarze, *The Convergence of the Administrative Law of the EU Member States*, in *European Public Law*, 1998, p. 191 et seq. On the specific harmonization of public procurements systems, see E. Picozza, *I contratti con la pubblica amministrazione tra diritto comunitario e diritto nazionale*, in C. Franchini (edited by), *I contratti con la pubblica amministrazione*, vol. I, Turin, 2007, spec. p. 17 et seq., who, with regard to the issue of the harmonization of the EU legal categories of public procurement law, refers to a «substantial harmonization» which affects the reconstruction of legal categories at national level.

<sup>192</sup> On the difficulty of establishing a European administrative system see J.B. Auby - J. Dutheil de la Rochère, *Droit Administratif Européen*, Bruxelles, 2007; P. Craig, *European Administrative Law*, Oxford, 2006; J. Schwarze, *European Administrative Law*, London, 2006.; M. P. Chiti, *Diritto amministrativo europeo*, Milan, 2011; G. della Cananea - C. Franchini, *I principi dell'amministrazione europea*, Turin, 2010; E. Picozza, *Diritto amministrativo e diritto comunitario*, Turin, 2004. More generally, on the transformations of the study method and of public law categories, also with regard to EU law, see S. Cassese, *Il sorriso del gatto, ovvero dei metodi dello studio del diritto pubblico*, in *Riv. trim. dir. pubbl.*, 2006, n. 3, p. 597 et seq., now in Id., *Il diritto amministrativo: storie e prospettive*, Milan, 2010, p. 516 et seq., affirming that European law represents the «new common law which obliges legal systems to debate and legal scholars to come out of their shell. The legal positivism finds itself in difficulty in a so-called multilevel system, with many competitive sources. Theoretical analysis, if not abandoned, should at least be included in legal systems which allow the “choice of the law” ».