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EDUARDO GARCÍA DE ENTERRÍA per la ***Revista de Administración Pública***

Cara Direttrice del *Centro de Estudios Políticos y Constitucionales*,
Cari Colleghi, Direttori delle Riviste
"Diritto Amministrativo",
"Revue Française de Droit Administratif",
"Public Law" e
"Die Verwaltung"
Cari Colleghi, membri del Consiglio di Redazione della *Revista de Administración Pública*,
Amici, Amiche,

In nome di coloro che compongono la RAP desidero esprimervi la grande soddisfazione che suscita in noi la firma dell'Accordo con cui si costituisce il sito web *IUS PUBLICUM.*

Grazie, cara Direttrice, per aprirci le porte del Centro per celebrare quest'atto, e grazie ai Direttori delle Riviste che compongono *IUS PUBLICUM* per aver voluto che la firma dell'Accordo si tenesse qui, a Madrid, presso la sede della Revista de Administración Pública.

Assistiamo alla firma dell'Accordo nello stesso luogo in cui 60 anni fa nacque la RAP, in quello che un tempo si chiamava *Instituto de Estudios Políticos;* e lo facciamo in una data – aprile 2010 – nella quale la nostra Rivista pubblica il suo numero 181, coincidente con il primo quadrimestre dell'anno.

I

Della RAP, sono importanti, senza dubbio, gli effetti della sua storia all'esterno: ciò che ha rappresentato nella storia giuridica spagnola e, soprattutto, come ha potuto esercitare un'influenza nel fondare e nel far maturare un genuino Stato di Diritto in Spagna, tenendo conto, oltre tutto, che trascorse sotto la Dittatura i suoi primi 25 anni.

Però, a parte la sua storia all'esterno, la Rivista ha anche una storia interna che vale la pena raccontare: come e perché nacque, come poté mantenersi, nei suoi primi anni, quando ogni numero era un miracolo, sino a che, finalmente raggiunse la sua tranquilla velocità di crociera e il problema ad un tratto smise di essere il trovare, produrre o inventare originali, per finire con l'essere esattamente il contrario, selezionare dei lavori a fronte di un'abbondanza di offerte.

Vi racconterò, brevemente, questa storia interna della RAP, tale come l'ho vissuta io, sicché saranno inevitabili alcuni riferimento autobiografici, per i quali mi scuso sin da ora.

Questa storia comincia in una spiaggia della Spagna del nord, nella città asturiana di Llanes, dove ho vissuto e studiato tra il 1935 e il 1940 e dove ho continuato ad andare talvolta d'estate per vedere i vecchi amici. Nell'agosto del 1948, nella bella spiaggia di El Sablón, un'amica di infanzia, María Jesús de Saro, mi presentò suo marito, Javier Conde, Cattedratico di Diritto Politico a Madrid, che alcuni mesi prima, esattamente in maggio, era stato nominato Direttore dell'*Instituto de Estudios Políticos.* Javier Conde, che sapeva che un anno prima avevo vinto il concorso da *Letrado* al Consiglio di Stato, mi chiese che, il settembre successivo, lo visitassi nel suo ufficio *dell'Instituto de Estudios Políticos*, perché gli sarebbe piaciuto che collaborassi con lui nella Sezione di Amministrazione Pubblica dell'Istituto, che pensava funzionasse male; di più, che non funzionasse.

Alcune settimane dopo, entrambi già a Madrid, gli feci in effetti questa visita e da essa nacque, per entrambi inaspettatamente, l'idea della Rivista. Mi disse che mi avrebbe incorporato nella Sezione di Amministrazione Pubblica dell'Istituto e mi chiese che immaginassi qualcosa per trarla dalla sua condizione, visto che, secondo lui, come ho detto, la Sezione non funzionava. Senza nessuna idea precedente, mi venne in mente all'improvviso, in quel medesimo istante, dirgli che si poteva studiare la possibilità di fare una rivista. L'idea lo sorprese per la sua audacia, però gli piacque, e mi chiese se sarei stato capace di portare quest'impresa a compimento.

Gli chiesi tempo e una certa liberà per cercare possibili compagni e per parlare con loro della possibilità di avviarla e sostenerla. Acconsentì, con un gesto entusiasta e al contempo scettico, com'era perfettamente naturale.

I mesi successivi furono per me di ricerca e di incontri con le persone che mi sembrarono più adatte. Agii in due settori concreti: tra i miei colleghi *Letrados* del Consiglio di Stato, e più in particolare quelli della mia promozione con un'inquietudine universitaria (José Luis Villar Palasí, Jesús Fueyo, Manuel Alonso Olea e Ricardo Gómez Acebo), e il giovane gruppo che sapevo essersi formato presso la cattedra di Diritto Amministrativo di Segismundo Royo- Villanova, nella Facoltà creata di recente di Scienze Politiche ed Economiche (Fernando Garrido Falla, Jesús González Pérez, Juan Gascón Hernández e Enrique Serrano Guirado). Con queste persone si formò il primo Consiglio di Redazione della Rivista. I due gruppi sarebbero stati protagonisti dei primi anni della Rivista.

Nei suoi primi numeri, la RAP fu concepita e scritta quasi integralmente da questi due gruppi di giovani che ho citato: gli allievi di Royo-Villanova, che penso furono i primi ricercatori di Diritto Amministrativo nell'Università Spagnola, e i quattro giovani *Letrados* del Consiglio di Stato, animati da un'analoga inquietudine. Fummo noi che, in ripetute riunioni collettive, tracciammo la struttura della RAP, che mettemmo in comune, con un esempio di generosità che non è molto frequente, i (ristretti) mezzi di cui ciascuno di noi disponeva; che cercammo (nelle biblioteche del Consiglio di Stato, del Parlamento, e in quella dello stesso Istituto, che disponeva della biblioteca del vecchio Senato) materiale bibliografico per poter alimentare il nostro entusiasmo e il nostro proposito di stabilire un punto di partenza nuovo per il Diritto Amministrativo spagnolo, in quel momento ripetitivo e credo anche poco interessante. E fummo anche coloro che assunsero personalmente e con passione il compito di redigere quasi in esclusiva i primi numeri della Rivista.

Non eravamo un gruppo riconosciuto che potesse, per una presunta autorità personale, invitare qualcuno a lavorare; eravamo alcuni giovani assolutamente sconosciuti, della più bassa fanteria, che ci obbligammo ad un lavoro personale, senza alcuna esitazione; all'inizio ben colmi d'illusione.

Un giorno prospettai a Conde l'opportunità che uno dei cattedratici della Sezione di Amministrazione Pubblica dell'Istituto assumesse la posizione formale di Direttore, ma Conde si oppose espressamente a questa proposta. Disse che il Direttore della Rivista (come d'altra parte dell'Istituto) sarebbe stato lui stesso, come responsabile diretto della sua pubblicazione, e che io sarei stato il Segretario per prendere accordi direttamente e solamente con lui, senza intermediazione di alcuno.

Questa decisione si mantenne per i successivi Direttori dell'Istituto (tanto per una certa inerzia quanto, forse, perché era un sistema che funzionava efficacemente) e la mia immutabile condizione di Segretario fu quella di un Segretario esecutivo, che informava appena il Direttore dell'Istituto della successiva pubblicazione dei numeri. Solo nel gennaio del 1987 (con il numero 112 della Rivista) figurai formalmente come Direttore, anche se in fatto di tale carica esercitai le funzioni sin dal primo numero, insieme a tutto il piccolo gruppo promotore e, specialmente, con i successivi Segretari aggiunti.

Fu dunque così che cominciammo. Ad ogni numero ci animavamo ancora più nel nostro proposito, anche se riuscire a chiuderlo era quasi sempre un miracolo. La verità, senza falso compiacimento, è che i miracoli si andarono consolidando e, trascorsi due o tre anni, la RAP si ritrovò ormai definitivamente configurata e stabilita. Tutti i concorsi a cattedra tenutisi a partire dal 1951 fecero ormai della RAP il luogo obbligatorio del dibattito scientifico e della collaborazione ad essa un'innegabile dimostrazione di meriti scientifici.

II

Occorre ricordare che l'*Instituto de Estudios Políticos* non fu creato come ente statale, e così rimase fino all'epoca costituzionale quando fu trasformato vincolandolo alla Presidenza del Governo. Prima l'Istituto era ascritto alla Segreteria Generale del *Movimento Nazionale*, benché – occorre precisarlo – ciò non determinò mai una limitazione o condizionamento del contenuto della Rivista, che funzionò sempre con assoluta indipendenza e con l'obiettivo criterio scientifico che risplende innegabilmente nelle sue pagine, senza il minimo vincolo. Tutto l'Istituto, debbo sottolinearlo, funzionò sempre come un centro intellettuale e non come un organo di indottrinamento politico, com'è

perfettamente noto. Basterà ricordare che collaborò con la Rivista, lo stesso anno della sua fondazione, il 1950, anche il Professor Manuel García Pelayo, per il quale era stata richiesta la pena di morte in un Consiglio di Guerra, dopo la guerra civile, per la sua condizione di Capo di Stato Maggiore dell'Esercito Repubblicano dell'Extremadura.

Può essere segnalata una sola ingerenza del Movimento nella storia della Rivista: l'articolo apparso nel suo numero 27, del dicembre del 1958, che era intitolato *I Principi fondamentali del Movimento Nazionale e l'Amministrazione Pubblica*, e che glossava la Legge Fondamentale così rubricata, promulgata quell'anno. Ma quest'articolo compare senza firma dell'autore, come un'espressione più istituzionale che scientifica (io stesso ignoro chi lo redasse, ci arrivò in Direzione con l'ordine di pubblicarlo), e prima che fosse inaugurata la Sezione degli «Studi», che è la parte strettamente scientifica della Rivista. D'altro canto, mi permetterò di ricordare che un tentativo (uno solo, nel 1959) di inserire vere e proprie personalità politiche nel Consiglio di Redazione fu paralizzato con un mio semplice avvertimento che avrei immediatamente abbandonato tale Consiglio e la responsabilità della RAP se si fosse verificato un tale evento, per cercare presso un editore privato la continuità nel lavoro che stavamo svolgendo.

III

I primi numeri della RAP si può dire che furono virtualmente redatti in modo congiunto dalla squadra iniziale. L'un l'altro ci comunicavamo i temi sui quali stavamo lavorando o su cui ci sarebbe piaciuto lavorare; tutti discutevamo, portavamo del materiale, prestavamo i nostri libri e suggerivamo modifiche o sfumature alla redazione dei testi. Un buon esempio di ciò è il giustamente famoso articolo di José Luís Villar Palasí, *L'attività industriale dello Stato nel Diritto Amministrativo*, nel numero 3 della Rivista, nel quale una nota iniziale proclama questa consueta modalità di lavoro.

Quest'elaborazione congiunta assunse un particolare interesse per la bibliografia straniera, in un'epoca in cui le frontiere della Spagna erano virtualmente chiuse. Le riviste straniere, ottenute soprattutto attraverso gli scambi con la nostra, così come attraverso i nostri viaggi personali all'estero, alla ricerca incessante di materiale bibliografico nuovo, impedirono di fatto un nostro pericoloso isolamento.

Quest'elaborazione congiunta fu notevole soprattutto nella realizzazione di numeri monografici. Due di essi furono famosi e suscitarono un forte impatto generale: il numero 3, dedicato alle «Imprese pubbliche», che giustamente aprì Manuel García Pelayo, e il numero 6, sui «Problemi attuali dello Stato di Diritto», tema sorprendente per la Spagna del 1951.

Altri numeri straordinari comparvero lungo la storia della Rivista: quelli che commemorarono i cento primi numeri della RAP e quello che celebrò il suo cinquantesimo anniversario. Ancora in evidenza sono il numero che nel 1977 mi dedicarono, con nota esagerazione, colleghi e amici, e quelli che, in date recenti, abbiamo dedicato ai Professori Alejandro Nieto e Ramón Parada, in occasione del loro pensionamento.

IV

Il nome REVISTA DE ADMINISTRACIÓN PÚBLICA, e non Diritto Administrativo, è legato al fatto che noi fondatori pensammo ad una Rivista che avrebbe compreso anche studi sulle Scienze non giuridiche dell'Amministrazione: così è esplicitamente proclamato, d'altra parte, nella sobria pagina di prologo che fu inclusa nel numero 1. Si può dire che il proposito non fu realizzato, tranne poche eccezioni. Certo furono pubblicati sin dall'inizio, e abbiamo continuato a farlo, studi sui processi di riforma amministrativa e dell'organizzazione dell'Amministrazione realizzati in via normativa, o preparati da Commissioni di studio o di inchiesta, ma quelli di Scienza amministrativa o del *Management,* nel senso nordamericano del termine, furono immediatamente esclusi, salvo piccole eccezioni.

Non credo che l'inadempimento parziale del proposito iniziale debba in ultima analisi essere considerata una sfortuna: tra le scienze giuridiche e quelle non giuridiche dell'Amministrazione e del *management* vi è infatti un'eterogeneità essenziale. Nessuna rivista conosciuta di una certa importanza ha operato in altro modo, com'è facile dimostrare. La definitiva fisionomia della RAP è quella di una rivista giuridica, anche se non ha mai abbandonato le prospettive organizzative e politiche dell'Amministrazione come entità reale, il che sembra più che giustificato e sicuramente sono solite fare anche altre riviste giuridiche. Alla fine, dunque, questo titolo generico non è stato del tutto da

disapprovare e ha contribuito a dare il suo carattere proprio, e mai forzato, alla nostra pubblicazione.

Sotto questo titolo, la RAP, con i suoi 181 numeri pubblicati sino ad oggi, è andata scrivendo la storia del Diritto Amministrativo in Spagna. Una storia alla quale hanno contribuito non solo professori spagnoli, ma anche illustri professori stranieri, alcuni dei quali ci onorano oggi facendo parte del nostro Consiglio scientifico. A tutto ciò, rimane solo da aggiungere che durante tutti questi anni, e sin dal suo esordio in piena Dittatura franchista, la RAP è stata sempre il foro comune di tutti gli amministrativisti, senza alcuna limitazione, come traspare perfettamente dalle sue pagine.

V

Quando la Rivista ha compiuto ormai i suoi 60 anni, e grazie alla felice iniziativa del Prof. Alberto Romano (vecchio e caro amico, di cui ci impressionava non poco la sua condizione di nipote del Prof. Santi Romano, maestro indiscusso e ammirato del Diritto Pubblico dell'epoca; come altrettanto sono vecchi e ammirati amici Frank Moderne e Pierre Delvolvé, che dirigono la "*Revue française de Droit administratif*" così come Pierre Bon, che ha organizzato già molti anni fa un centro di cooperazione franco-spagnolo), ci è stato fatto il grande onore di condividere uno spazio comune con le migliori riviste europee di Diritto pubblico, in questo straordinario mezzo di diffusione della conoscenza che è Internet.

Con la firma di questo Accordo erigiamo oggi, simbolicamente, una casa comune, nella quale, da parte della RAP, contribuiremo con i nostri migliori sforzi, a continuare a migliorare il Diritto Amministrativo e, come orizzonte implicito però espresso, a camminare verso la costruzione di un Diritto Pubblico Comune Europeo.

Grazie molte!

Eduardo García de Enterría

PIERRE DELVOLVE per la ***Revue française de droit administratif***

La felice iniziativa dei Professori Alberto Romano e Roberto Cavallo Perin di costituire una rete, dal nome IUS PUBLICUM, che riunisca le riviste di diritto pubblico di diversi paesi, risponde ad una necessità.

Gli ordinamenti giuridici, specialmente in diritto pubblico, costituiscono l'oggetto di studi che sono propri principalmente degli Stati nei quali sono posti e si sviluppano. Non sono tuttavia ignorati quelli degli altri Stati. Il diritto comparato è studiato in diverse riviste e gli sono appositamente dedicate diverse istituzioni. Su alcuni temi particolari, le analisi possono essere illuminate da esempi tratti dall'estero. Sempre più, e in particolare in Francia, quando si progetta una riforma, la si fa precedere da rapporti che danno conto delle soluzioni adottate in altri paesi sulla stessa questione. Gli scambi universitari sempre più numerosi e frequenti permettono delle utili comparazioni. Sono state realizzate opere di diritto pubblico comparato. Non siamo dunque in presenza di un vuoto.

Ma non esiste una soluzione che unisca in modo permanente e sistematico i lavori dedicati al diritto rivolti a platee diverse. Ora, il bisogno è reale e la tecnologia moderna consente di provvedervi.

Quali che siano le specificità proprie di ogni ordinamento giuridico, non impediscono una comunanza di concetti e soluzioni ed anche una vera e propria unità. Il diritto pubblico è caratterizzato fondamentalmente dallo Stato intorno al quale si sviluppa. Certo, gli Stati possono assumere diverse forme e i regimi politici presentare una grande varietà. Ciò nondimeno nel cuore del diritto pubblico, quali che siano le forme di Stato e le specificità dei regimi politici, lo Stato nella sua essenza, oltre la sua esistenza, è concepito dappertutto, fondamentalmente, come un'istituzione che protegge e governa una comunità per rispondere a bisogni comuni utilizzando poteri che oltrepassano quelli dei singoli. L'autorità che detiene, i compiti che svolge, non possono essere ricondotti alle norme giuridiche che disciplinano i rapporti tra singoli: deve essere concepito e attuato un diritto che sia loro proprio. È il diritto pubblico. Lo si ritrova in tutti i sistemi giuridici.

Il suo contenuto può variare dall'uno all'altro. Le tradizioni storiche e la stessa concezione del diritto conducono non soltanto a soluzioni diversificate, ma anche, e più profondamente in alcuni casi, a uno spirito diverso. A tal proposito, è evidente che le concezioni anglosassoni differiscono sensibilmente da quelle romano-germaniche, e specialmente dalla concezione francese. Ma si assiste ad una convergenza. È innegabile a livello europeo, sia perché il diritto europeo modifica il contenuto dei diritti nazionali, specialmente in ambito amministrativo, sia perché si costituisce un diritto amministrativo europeo, e persino un diritto pubblico europeo, come hanno potuto mettere in evidenza alcune opere recenti. Anche oltre l'Europa si osserva una convergenza che risulta non dall'influenza di un diritto sopranazionale, ma da un approccio comune ai problemi e alle soluzioni.

Non si può più, perciò, comprendere l'ordinamento giuridico di ogni paese, anche per il diritto pubblico, senza far riferimento agli ordinamenti di altri paesi, non soltanto per fare delle comparazioni e cercare dei miglioramenti, ma per avere una visione d'insieme che metta in evidenza le linee di forza e faccia apparire, al di là delle varianti, l'unità dei concetti e delle soluzioni.

I giuristi di tutti i paesi ne sono perfettamente coscienti e, attraverso i loro contatti, le loro ricerche, le loro letture e i loro scritti, hanno già stabilito un sistema di relazioni intellettuali, personali e istituzionali che risponde al bisogno di scambi in tali settori.

Quando abbiamo fondato nel 1984-1985 la *Revue française de droit administratif*, eravamo perfettamente coscienti di tali bisogni. Se il diritto amministrativo è la materia centrale di tale rivista, abbiamo voluto sin dall'origine aprirla ad altri rami del diritto trattando temi in relazione con essa (diritto amministrativo e diritto costituzionale, diritto amministrativo e diritto privato, diritto amministrativo e diritto della previdenza, diritto amministrativo e finanza pubblica, diritto amministrativo e diritto comunitario ed europeo, diritto amministrativo e diritto internazionale) e prevedendo una rubrica dedicata al diritto amministrativo comparato e straniero oltre che, all'occorrenza, dossier su temi che hanno comportato analisi di differenti paesi. Ma è ancora soltanto una soluzione specifica ad una rivista.

Ormai bisogna andare più lontano : le nuove tecnologie dell'informazione consentono uno straordinario sviluppo delle possibilità di informazioni e scambi e la realizzazione di strutture che riuniscano diversi attori su un progetto comune.

È quanto hanno compreso perfettamente i Professori Alberto Romano e Roberto Cavallo Perin ideando e proponendo la creazione del network IUS PUBLICUM. Devo dire che quando ci è stata fatta una tal proposta, la *Revue française de droit administratif* è stata lusingata e onorata di essere identificata e considerata come la rivista che, in Francia, potesse partecipare al progetto, e abbiamo immediatamente espresso il nostro accordo poiché il progetto risponde perfettamente alle nostre preoccupazioni. Il progetto permetterà una cooperazione che sistematicamente porterà a conoscenza di un pubblico ampio le informazioni e le riflessioni sullo stato e lo sviluppo del diritto pubblico. Sarà una base contemporaneamente ricca e indispensabile per la conoscenza di un tal diritto.

Allo stesso tempo, il progetto è sufficientemente elastico per lasciare la sua autonomia ad ogni rivista; ma attraverso il contributo di ogni rivista al network IUS PUBLICUM, esso darà agli utenti un'informazione e una valutazione di carattere, se non universale, almeno molto ampia.

È sicuramente soltanto un inizio. Potremmo progettare l'organizzazione di convegni periodici su importanti temi. Il nostro progetto richiede uno sviluppo.

Già così com'è costituisce una sorta di atto di fede, non solo nella realizzazione di una comunità giuridica tra attori e autori del diritto pubblico, ma nell'esistenza e nello sviluppo di questo settore del diritto che costituisce un elemento essenziale dello Stato di diritto.

Pierre Delvolvé

ANDREW LE SUEUR e RICHARD CORNES per la rivista ***Public Law***

Ringrazio tutti voi per l'invito a partecipare a questo network tra le preminenti Riviste europee di diritto pubblico e diritto amministrativo.

Sono Richard Cornes, responsabile della Rassegna Internazionale (International Survey) della rivista *Public Law* e sono qui oggi in rappresentanza della medesima. La rivista è onorata di essere stata invitata a partecipare al network *Ius Publicum* e la direzione e il comitato scientifico della rivista sono impazienti di iniziare a collaborare con i colleghi nei prossimi anni.

In 55 anni di attività, *Public Law* è stata guidata da cinque Direttori: dal Professor John Griffith della London School of Economics (1956-1981); dal Professor Graham Zellick del Queen Mary, University of London (1981-86); dal Professor Tony Bradley dell'Edinburgh University (1986-92); dal Professor Dawn Oliver del University College London (1993-2002); e attualmente dal Professor Andrew Le Sueur del Queen Mary, University of London.

Il direttore è coadiuvato da un comitato di eminenti giuristi pubblicisti. Sono accademici, operatori del diritto e parlamentari: Sir Louis Blom-Cooper QC, Professor Paul Craig QC (Oxford University), Professor Terrence Daintith (University of London, emerito), Professor Gavin Drewry (Royal Holloway), Professor Evelyn Ellis (Birmingham, emerito), M. Roger Errera (come precedente membro del Conseil d'Etat, l'unico giudice ad essere presente nel consiglio scientifico), Lord Lester of Herne Hill QC, Mr Clive Lewis QC, Professor Aileen McColgan (Kings College, London), Professor Gillian Morris (Warwick), Professor Colin Munro (Edinburgh), Professor Danny Nicol (Westminster), Lord Pannick QC, Professor Adam Tomkins (Glasgow), Professor Maurice Sunkin (Essex), Mr Jo Eric Khushal Murkens (della London School of Economics), Mr Mario Mendez (del Queen Mary, University of London), Kyela Leakey (Queen Mary), oltre a me stesso.

La rivista è pubblicata trimestralmente, sia in formato cartaceo che on-line nella banca dati Westlaw. I nostri abbonati sono suddivisi, quasi in parti uguali, tra coloro che risiedono nel Regno Unito e coloro che appartengono ad altri ordinamenti giuridici. All'interno dell'Unione Europea il più ampio numero di lettori è in Italia, che è seguita da Spagna e Germania. Abbiamo inoltre molti lettori in Canada, Australia, Nuova Zelanda, Hong Kong e negli Stati Uniti d'America.

Scrivendo in occasione dell'edizione inaugurale del primo fascicolo nel 1956, il primo Direttore Professor Griffith ha individuato le seguenti finalità della *Public Law*:

"offrire un luogo dove i problemi giuridici e di governo tra loro connessi possano essere analizzati e discussi. Noi crediamo che questo potrà essere importante e utile e, focalizzando l'attenzione sulla relazione tra Stato e individuo, potrà essere d'interesse per i giuristi, i funzionari e per tutti coloro che, professionalmente o per altre ragioni, siano interessati ai meccanismi di governo e di amministrazione del diritto".

E il compito della rivista è di "pubblicare articoli di dottrina, recensioni e rassegne che analizzino e commentino le principali questioni del diritto amministrativo e costituzionale in Gran Bretagna e all'estero (specialmente in Europa, negli Stati Uniti d'America e nel Commonwealth)".

Fin dalla sua prima edizione, la rivista ha sempre cercato di raggiungere tali obiettivi. Essa è, tuttavia, più di un forum per dibattiti e analisi puramente accademici (sebbene ciò sia importante): la rivista si è anche ritagliata un riconosciuto ruolo nel consentire ai più prestigiosi membri della magistratura, del foro e dell'amministrazione pubblica di scrivere su questioni di pubblico interesse. Ciò è avvenuto in particolare con riferimento alle più importanti riforme introdotte nel Regno Unito, specialmente in occasione del recepimento dei diritti previsti dalla Convenzione Europea nello Human Rights Act del 1998, del riconoscimento di competenze amministrative e legislative a tre territori del Regno Unito (Scozia, Galles e Irlanda del Nord) e, nella generazione precedente, dell'adesione del Regno Unito a quella che oggi conosciamo come Unione Europea.

La rivista contribuisce all'evoluzione del diritto giurisprudenziale, processo vitale negli ordinamenti di *common law*. C'è un'influenza in entrambe le direzioni: le decisioni giurisprudenziali costituiscono il materiale grezzo per le analisi e i commenti accademici da pubblicare nella rivista; e tali analisi e commenti, da parte loro, influiscono sulle decisioni dei tribunali. Possono essere rintracciati nelle sentenze dei tribunali citazioni e riferimenti ad articoli pubblicati nel *Public Law* in tutto il Regno Unito e in altri ordinamenti giuridici di *common law*.

Public Law ha sempre cercato di essere una rivista aperta verso l'esterno. E siccome la costituzione e l'ordinamento giuridico del Regno Unito si sono progressivamente "Europeizzati" e "globalizzati", anche la rivista si è evoluta. Ogni fascicolo del *Public Law* adesso contiene rassegne e commenti sugli aspetti del diritto europeo, sulla Convenzione Europea dei Diritti dell'Uomo o sugli sviluppi degli ordinamenti giuridici nazionali europei.

Guardando oltre l'Europa, dal 2008 *Public Law* propone altresì una Rassegna Internazionale (International Survey) costruita sul lavoro di Roger Errera che per molti anni ha pubblicato relazioni sulle decisioni del Conseil d'Etat. La Rassegna Internazionale ha tuttavia una prospettiva più ampia e, grazie al contributo di prestigiosi accademici di tutto il mondo, fornisce aggiornamenti sulle questioni di diritto pubblico sia negli ordinamenti di *common law* che di *civil law* – l'ultima edizione conteneva rassegne da Argentina, Francia, Israele, Italia, e Nuova Zelanda.

La partecipazione al network *Ius Publicum* si adatta perfettamente a tale evoluzione. Tra le riviste fondatrici del network *Ius Publicum* noi rimaniamo certamente gli unici a far parte della famiglia degli ordinamenti giuridici di *common law* e regolarmente pubblichiamo contributi relativi al diritto costituzionale e amministrativo di altri paesi del Commonwealth britannico, negli ultimi anni specialmente dell'Australia e della Nuova Zelanda.

Noi speriamo, in quanto rivista che ha sede in Gran Bretagna, di essere capaci di fornire un peculiare contributo al network *Ius Publicum* e di consentire agli utenti del sito

web una più piena comprensione del contributo del *common law* nell'ambito del diritto pubblico e amministrativo europei.

Andrew Le Sueur e Richard Cornes

MATTHIAS RUFFERT e KATJA FREY per la rivista ***Die Verwaltung***

È un grande piacere per me vedere che „*Die Verwaltung*“ sia la rivista tedesca di diritto amministrativo prescelta per partecipare al network Ius Publicum. Vorrei innanzitutto esprimere la mia gratitudine per questa occasione a nome di tutti i membri del Consiglio di Direzione e a nome del nostro editore Dr. Simon della Duncker und Humblot di Berlino.

Se vogliamo approfondire i propositi che vorremmo realizzare all'interno del network, è oltremodo utile considerare il carattere e lo scopo della rivista "*Die Verwaltung*" che vorrei illustrare come rivista radicata nella tradizione e aperta a moderni sviluppi.

Radicata nella tradizione. La rivista è stata fondata nel 1968 da uno studioso della levatura di Ernst Forsthoff, che ne è stato direttore sino alla sua scomparsa nel 1974. Tutti noi ricordiamo il suo nome per una precisa tradizione, anche se già al tempo di Forsthoff la rivista si aprì dal diritto in senso stretto alla scienza dell'amministrazione o alla Verwaltungslehre come allora era definita in Germania.

Aperta a moderni sviluppi. La rivista da sempre è stata coerente con la tradizione interdisciplinare e tale indirizzo faceva intendere la sua capacità di sapersi aprire all'evoluzione europea nel contesto di ciò che era emerso come ius publicum europaeum.

Chiunque sia interessato al diritto amministrativo tedesco troverà – insieme ad articoli su argomenti attuali – approfondite analisi della giurisprudenza in settori del diritto amministrativo elaborate da un gruppo di eminenti studiosi che include professori (talvolta operatori del diritto) esterni al Consiglio di direzione. La rivista si propone di recensire tutte le più rilevanti pubblicazioni della dottrina amministrativistica tedesca. Se esaminiamo da vicino gli ultimi anni, dei libri censiti sono in costante crescita quelli editi in altri Paesi europei. Sono inoltre sempre più numerosi i brevi articoli scritti da (talvolta giovani) accademici di altri ordinamenti.

Vi è un ampio dibattito in Germania sulla riforma, trasformazione o modernizzazione del diritto amministrativo, e il Presidente della Corte Costituzionale Federale tedesca, Professor Andreas Voßkuhle, si è spinto così avanti da proclamare l'era del "Nuovo Diritto Amministrativo". Che si condivida o meno tale visione, siamo comunque tutti consapevoli dei profondi cambiamenti che la dottrina amministrativistica sta attualmente vivendo. Siamo sempre più convinti che il progetto di adeguare il diritto amministrativo alle necessità del nostro tempo richieda energici e continui studi comparativi. I membri del nostro Consiglio di direzione presiedono o partecipano in gruppi di ricerca europei multinazionali o binazionali. L'analisi comparata è metodo abituale del nostro lavoro. Abbiamo un forte interesse nel consolidare tale metodo nella nostra materia e così da parte nostra ci impegneremo al meglio nel garantire il successo del network Ius Publicum.

Matthias Ruffert e Katja Frey

ALBERTO ROMANO e ROBERTO CAVALLO PERIN per la rivista **Diritto Amministrativo**

Innanzi tutto un sincero e profondo ringraziamento ai Direttori delle riviste che hanno aderito all'iniziativa che ci vede qui riuniti.

1. Il *Diritto Amministrativo* (Rivista trimestrale) nasce nel 1993 da un gruppo di professori universitari della materia, alcuni dei quali coinvolti nei corsi per il Dottorato di ricerca nella medesima. L'origine definisce la natura della rivista: un luogo per esporre i risultati di ricerche, studi e di riflessioni che nell'Università trovano la sede di elezione, a cominciare dai cattedratici che danno maggiore autorevolezza, ma è ambizione del *Diritto amministrativo* continuare ad offrire ai giovani studiosi un luogo per presentarsi alla comunità scientifica pubblicando i loro primi studi, soprattutto di coloro di cui si intravedono i caratteri di brillanti studiosi e la soddisfazione è massima quando questi siano poi confermati dall'assegnazione di una cattedra.

Gli studiosi che collaborano al *Diritto amministrativo* sono molto attenti agli sviluppi del diritto positivo, ma il loro ruolo principale è tentare di riportare a sistema sia la giurisprudenza – soprattutto ove ritenuta creativa del diritto – sia la legislazione, specie quella di questi ultimi decenni che è stata ipertrofica, con capacità di risposta limitata alle sole necessità di breve periodo.

Si è perciò voluto in questi anni rilanciare un ruolo della scienza giuridica soprattutto del diritto pubblico che sapesse ridare importanza alla cultura istituzionale. Si ha la profonda convinzione che la valutazione delle modificazioni normative debba iscriversi in linee soprattutto evolutive e che la continua ricostruzione dell'ordinamento debba essere sviluppata senza che siano spezzati i legami con una tradizione di pensiero; che deve essere mantenuta attuale ma non per questo abbandonata.

La comprensione delle norme è un primo passo, certo indispensabile, per la conoscenza dell'insieme in cui esse si iscrivono: anzitutto degli ordinamenti giuridici nazionali cui appartengono, ma anche in misura sempre più forte per la relazione con altri ordinamenti

nazionali, sovranazionali ed internazionali, in ragione dei sempre più stretti legami che negli ultimi tempi si sono affermati in Europa e nel mondo.

Il riferimento è al maggiore fattore d'innovazione dei diritti nazionali europei degli ultimi anni: la graduale formazione dell'ordinamento comunitario e la progressiva sua influenza e penetrazione negli ordinamenti interni.

2. Perciò chi ha la direzione del *Diritto amministrativo* ora ha sentito fortemente l'esigenza dell'accordo che oggi ci accingiamo a stipulare con Riviste di altri Paesi soprattutto europei - ma in prospettiva non solo - verso le quali sentiamo di avere le maggiori affinità culturali.

Nelle ultime decadi dell'800 la cultura italiana del diritto pubblico in genere, del diritto amministrativo in specie, era già fortemente collegata con le altre culture nazionali, soprattutto con quella francese e tedesca, di cui è stata testimonianza l'impianto del *Primo Trattato Completo di Diritto Amministrativo italiano*, a cura di V. E. Orlando, cui contribuirono i migliori giuristi dell'epoca, ove il raffronto con le altre culture d'Europa fu sempre attento e puntuale.

A partire dalla prima guerra mondiale – ma certo il fenomeno non è stato solo italiano – si è avuto un ripiego sull'esperienza nazionale. In questi ultimi decenni in Europa – ma non solo - la circolazione internazionale delle idee e delle rispettive scienze o scuole di pensiero è ripresa vigorosamente, per l'impetuoso sviluppo di fattori sociali ed economici che operano ugualmente in gruppi di Paesi retti da regimi politici più affini, che quindi ne ravvicinano i diritti pubblici e la relativa cultura.

Interesse al confronto che si riafferma soprattutto come idea di una differenza tra diritti nazionali con i quali compararsi, anche per meglio definire una propria identità, ma che più di recente pare caratterizzarsi maggiormente come ricerca di ciò che accomuna gli ordinamenti nazionali, ancora più come elezione dei punti di convergenza delle culture giuridiche europee e dell'occidente cui riferirsi nel confronto con l'oriente e con le sue diverse culture.

Convergenza di culture che nella lunga evoluzione attraverso i secoli si afferma anche un po' come un ritorno alla forza delle origini, volendo idealmente proseguire sotto le insegne di quel simbolo d'unità culturale che ha rappresentato lo *jus publicum europeum*, da cui non casualmente è tratta la denominazione del network culturale che comincia con l'accostare e poi avvicinare scientificamente le nostre riviste.

La tecnologia più avanzata e l'ottimo *design* di cui gioviamo non possono togliere luce al progetto culturale che si è voluto tratteggiare in queste note, anzitutto in continuità con la migliore tradizione che dal passato vuole dipartire per innovare anche nel metodo delle relazioni tra studiosi. S'intende infatti affermare un rapporto sistematico tra comunità scientifiche che in quanto tali debbono avere valorizzazione, rafforzando di gran lunga i legami personali del passato con un collegamento stabile tra le nostre Riviste. Ius-publicum va inteso infatti come strumento per la scienza giuridica del diritto pubblico e del diritto amministrativo in particolare, come mezzo che deve essere capace di dare diffusione ai risultati delle ricerche delle comunità scientifiche, suscitando un proficuo confronto tra le diverse scuole di pensiero.

Se è fatale che l'iniziativa sia stata presa da cattedratici per così dire adulti, non vi è dubbio che la stessa sia stata pensata soprattutto per i nostri giovani che si vuole vedere crescere insieme, perché destinati ad essere i protagonisti di una nuova comunità scientifica, che a partire dall'originaria cultura europea e poi occidentale sappia selezionare le innovazioni utili a rivitalizzare gli ordinamenti che oggi sono ancora un necessario riferimento.

Radici che sappiamo comuni perché ci caratterizzano rispetto ad altre importanti tradizioni culturali che nel mondo hanno già saputo riportare le relative popolazioni a contendere il primato mondiale; giovani che così valorizzati debbono raccogliere la sfida, ricostituendo così quel doppio piano e quella doppia funzione, che, si è detto, definisce il nostro modo di intendere il diritto pubblico ed amministrativo.

Alberto Romano Roberto Cavallo Perin

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GERMAN ENVIRONMENTAL LAW IN A NUTSHELL

ANNUAL REPORT - 2011 - GERMANY

(March 2011)

Dr. Andreas GLASER

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1. CONSTITUTIONAL LAW

1.1 Environmental protection as a constitutional principle

German environmental law is strongly influenced by constitutional law. According to art. 20a of the German Federal Constitution environmental protection is a fundamental aim of state policy. All governmental and decentralized public bodies are legally bound to this constitutional guideline. However, Parliament has many possibilities to influence environmental policy. There is also no fundamental right to environmental protection which could be claimed before the courts. Neither the fundamental rights to the integrity of the person nor to property ensure a right to a healthy natural environment. Nevertheless art. 20a of the German Federal Constitution has an impact on statutory interpretation and serves as a substantial reason to justify limitations of fundamental rights, e.g. the right to property, the right to pursue an occupation, the freedom to conduct a business, the freedom of religion and the freedom of the arts and sciences.

1.2 Legislative competences

The German Federal Constitution divides legislative competences concerning environmental protection between the federal level (the Federal Republic) and the regional level ("Länder"). Since 2006, when an important reform of German federalism was enforced, all important areas of environmental law are attributed to the legislative power of the Federal Republic: air quality management, waste management, noise abatement, spatial planning, nature conservation, water pollution prevention, soil protection, hunting and coast protection.

In respect to spatial planning, nature conservation, water pollution prevention and hunting the "Länder" may deviate from federal legislation (Abweichungsgesetzgebung). Traditionally, federal law has priority over regional law. The recently introduced "deviating

legislation" changes that customary rule. From now on the lex-posterior-rule prevails in the branches of environmental law mentioned above and legislation of the "Länder" is not bound to the federal statutes any more. Nevertheless they have to observe federal constitutional law and EU-law.

Legal transparency however is disturbed by some derogations of the lex-posterior-rule. The "Länder" have no right to alter the fundamental principles of nature conservation, protection of species law, sea protection law, parts of the water pollution prevention law related to substances and installations as well as hunting licensing law. Severe problems of definition between federal and regional competences may arise in the future. Time will show how the German Constitutional Court will deal with these problems.

2. STATUTORY LAW

2.1 Federal laws

2.1.1 Material environmental law

2.1.1.1 Basics

All important subjects of environmental law are put down in federal laws. Most of these statutes were reviewed in the past few years, notably the Federal Immission Control Act (2002), the Federal Act on Nature Conservation and Landscape Management (2010), the Water Ressources Act (2010), the Closed Substance Cycle and Waste Management Act (in revision at present, entry into force of the new Closed Substance Cycle Act in 2011), the Town and Country Planning Act (2008), the Federal Soil Conservation Act (1998), the Federal Hunting Act (1976), the Animal Protection Act (2006) and the Gene Technology Act (1993). However, the attempt to create a complete Environmental Code including all specific statutes failed once again in 2008 due to political reasons. The separation of

German environmental law into many specialized statutes will thus be maintained in near future.

There has been a fast development of Environmental energy law in the past years. The Renewable Energy Sources Act (2004/2009) and the Act on the Promotion of Renewable Energies in the Heat Sector (2008) are the main regulations. The cross-section issue of environmental energy law concerns all other parts of environmental law. Primarily environmental energy law comprises the support of renewable energy sources through financial incentives. Main goal is to combat climate change. In Germany the most important renewable energy sources are wind power stations, biogas plants, solar equipments and in some regions hydroelectric power stations. Parallel to this development nuclear energy is to be abandoned step by step until 2024. This date was delayed meanwhile until approximately 2040. But the discussion on this subject is still in progress, especially after the incidents in the nuclear power plants in Japan which were damaged by the earthquake in the month of march 2011. Emission trading and energy-saving measures as well as compulsory connection and use in local government are other relevant branches of environmental energy law.

2.1.1.2 Activities and installations subjects to approval

A characteristic of German environmental law are the various types of approvals, licences and permissions to be issued. Besides building law procedures there are different kinds of authorisations allowing either to operate an installation, to put up a waste disposal site, to use a stretch of water, to intervene in nature and landscape or to release and sell genetically modified organisms. The attempt to combine all permission types into an integrated project approval (procedure) has not succeeded up to now. Therefore permission procedures and substantial conditions result from the corresponding special statute. Neither may for instance an air polluting factory cause harmful impact on environment nor may the use of water stretches be dangerous to water quality.

2.1.1.3 Legal duties of individuals and enterprises

Both individuals and enterprises are subject to many duties concerning environmental protection. Public authorities are empowered to impose appropriate measures. Anybody running an installation has to avoid deterioration of water quality and air pollution. Waste has to be disposed according to specific rules, depending on whether a substance or object fulfils the definition of waste for recovery or waste for disposal. Consequently the respective waste has to be recycled or to be left to the waste disposal authority. Contaminated soil must be cleaned up. Particular legal regulations authorize public authorities to enforce these obligations.

In addition to this and corresponding to the polluter pays principle responsible people have to pay damages according to the Environmental Liability Act (1990) and the Environmental Damage Act (2007). The burden of proof has been reduced, liability regardless of fault has been agreed upon and damages on biodiversity have to be compensated. At last the administrative rules are completed by fiscal incentives and penalty taxes, the most famous example being the eco-tax on mineral oil and electricity.

2.1.1.4 Planning instruments

Apart from compulsory means German environmental law also contains several planning instruments to conceive regional development planning, national parks, nature reserves, water protection areas and waste management plans. As an important element of town and country planning development plans for local real estate take place on a local level. They have to incorporate all environmental and ecological concerns.

The creation of nature reserves is of utmost importance for the implementation of European environmental law. This especially applies to the Directive on the conservation of natural habitats and of wild fauna and flora as well as to the Directive on the conservation of wild birds. After the composition of the coherent European ecological network (natura 2000) by the European Commission and the member states, German authorities implement a system of nature reserves. Due to this many legal conflicts may arise in the future because of land-owners fearing severe restrictions.

2.1.2 Procedural environmental law

The idea of procedural justice gained much terrain in German administrative law over the last years. The evolving procedural approach can be recognized first of all in environmental law. The most important step in this context was the promulgation of the Environmental Impact Assessment Act (1990). According to this act an environmental impact assessment must take place before projects evoking major effects on environment can be authorized. Public authorities dealing with an application for a corresponding project have to consider the results of the assessment as soon as possible. The Strategic Environmental Assessment is also to be mentioned regarding specific planning decisions. Other procedural regulations are the Environmental Audit Act (2002), the Environmental Information Act (2004) and the Environment Legal Remedies Act (2006).

The Environmental Information Act guarantees a right of free access to information concerning environment which is held by or for public authorities. Anybody may exercise this right without further authorisation. Limited exceptions are provided by law regarding public or private interests.

The Environment Legal Remedies Act authorizes environmental associations to appeal against certain administrative decisions regarding projects with presumed harmful impact on environment. This is a privileging exception to Section 42 § 2 of the Code of Administrative Court Procedure which states that an action is only appealable if the plaintiff claims a violation of his own rights. However the action can only be successful if the administrative decision is also an infringement of a regulation conferring rights to individuals. This conception is the item of a preliminary ruling procedure before the Court of Justice of the European Union (case C-115/09) at present. Advocate General Sharpston´s opinion is unequivocal: the German regulation violates the Public Participation Directive (2003/35/EC).

2.2 Law of the "Länder"

The significance of the environmental law of the "Länder" has perceptibly increased since the federalism reform has taken effect in 2006. This is for two reasons: The "Länder" have a substantial deviating legislative competence for environmental law at first. Secondly Federal legislation often uses opening clauses in favour of the "Länder" even though the Federal Republic has exclusive competences in some spheres. Several "Länder" already enacted specific provisions on nature conservation, water pollution prevention and hunting deviating from the federal model. It is therefore necessary to examine case by case whether the federal or the regional statute is applicable.

2.3 Administrative competences

Although environmental legislation mainly occurs on the federal level the "Länder" have the competence of the administration according to the Federal Constitution. They determine the responsible authority and the details of administrative procedure autonomously. Regional authorities are subject to little legal supervision by the Federal Republic while exercising environmental law. Control is consequently limited to questions

of lawfulness, not covering discretionary decisions. Nuclear Energy Law is an exception. Federal authorities have a discretionary power including the power to intervene.

3. EUROPEANISATION OF GERMAN ENVIRONMENTAL LAW

German environmental law is strongly influenced by European environmental law, e.g. implementation of Air Quality Maintenance Plans, creation of nature reserves in order to complete the natura 2000 network, definitions of waste, waste for disposal and waste for recovery, conditions for releasing into environment and placing on the market genetically modified organisms as well as requirements concerning protection of species trace back to European Directives or Regulations. Moreover, the entire environmental procedure law originates from EU-directives. The same applies to environmental liability. The Europeanisation of German environmental law therefore stands symbolically for the Europeanisation of German administrative law as a whole.

4. CONCLUSIONS

German environmental law is in a process of consolidation after the important federalism reform in 2006, as seen from internal perspective. The federal statutes are in good shape altogether. Concerning environmental law the federalism reform was successful. The failure of the Environmental Code as a prestige project of legal science does not affect the practicability of environmental law in Germany. It remains interesting to observe whether and to what extent the trend of re-federalisation will continue in the future. In any case, the first experiences with greater freedom for the "Länder" can be said to be positive ones. The formerly expressed concerns in this respect, such as a pretended depreciation of environmental protection did not come true. There is no race to the bottom, but soft competition between the "Länder". They are able to take into account the geographical and biological peculiarities of the single regions, even better than the federal legislator.

5. FORECAST

Transposition of European law remains the essential problem of German environmental law. Various directives authorize both individuals and associations to exercise procedural rights. The enforcement of those rights causes additional difficulties. The narrow interpretation of regulations about Air Quality Maintenance Plans by German jurisdiction, which had to be rectified by the Court of Justice in case C-237/07 is a recent example. The above mentioned Environmental Legal Remedies Act is another conflict between German environmental law and EU law. Problems in both cases arise from the conception of subjective rights in German administrative law, which has to be extended according to EU-directives. Some provisions of German procedural law about healing and irrelevance of formal irregularities in the administrative procedure are able to compromise effectiveness of EU-law at last. Therefore, application has to be suspended in the realm of implementing EU-law.

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ENVIRONMENTAL LAW

ANNUAL REPORT - 2010 - SPAIN

(January 2011)

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[*] Public Law Professor of the País Vasco University and Academic Advisor of Gómez-Acebo & Pombo law firm.

[**] Lawyer of Gómez-Acebo & Pombo law firm.

1.4. Royal Decree 367/2010, of 26 March, on the modification of several environmental regulations for their adaptation to the Law 17/2009, on free access to and exercise of service activities, and the Law 25/2009, on modification of several laws for their adaptation to the Law on free access to and exercise of service activities

1.5. Law 13/2010, of 5 July, modifying the Law 1/2005, of 9 March, on regulatory framework of greenhouse gases emissions trading, as to improve it and extend it to aviation activities

1.6. Royal Decree 943/2010, of 23 July, which modifies the Royal Decree 106/2008, of 1st February[t], on batteries and accumulators and the environmental management of their waste

1.7. Law 40/2010, of 29 December, on geological storage of carbon dioxide

1.8. Law 41/2010, of 29 December, on protection of marine environment

2. RELEVANT JURISPRUDENCE

2.1 Noise pollution: Supreme Court Decision, of 3 February 2010 (appeal n.º 202/2007, reporting judge Rafael Fernández Valverde)

2.2 Waste: National High Court Judicial Order, of 17 February 2010

2.3 Environmental Impact Assessment: Supreme Court Decision of 27 October 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

2.4 Environmental Impact Assessment: Supreme Court Decision of 25 May 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

3. BIBLIOGRAPHICAL REVIEW ON ENVIRONMENTAL NOVELTIES

1. MAIN LEGISLATIVE NOVELTIES

1.1 Order 143/2010 of the Ministry of the Environment, and Rural and Marine Affairs, of 25 January, on the establishment of an Integral Management Plan for the conservation of fishery resources in the Mediterranean

The main aim of this Order is to establish an Integral Management Plan deemed to regularize the fishing activities in the Spanish Mediterranean area, such as trawling, purse seine fishing, fixed and small fishing equipments and longline fisheries, as to preserve and improve fishery resources. The Plan will be applied until the 31st of December 2012, with the possibility to be prolonged.

The described regulation has the meaning to preserve some concrete species. As the Order's "Statement of Motives" declares, "several scientific reports have confirmed the worrying situation of these fishing species, and taking into consideration their commercial value, it is a fact that the Mediterranean fisheries, in a medium term, are in a grate danger".

The regulatory actions contained in this Plan concern Spanish flag vessels that aspire to carry out fishery activities in the Mediterranean area. Some of those actions refer to: **(i)** the establishment of temporary restrains regarding longline fisheries; **(ii)** the total prohibition of the bottom trawl fisheries beyond 1000 metres, in all the exterior waters of Spanish Mediterranean coastline; **(iii)** the total prohibition of trawling activities, dredges and seines, over the layer of some protected marine species; **(iv)** the total prohibition of trawling activities in marine areas marked by concrete coordinates; **(v)** restrain the total amount of Spanish vessels daily catch when purse seine fishing activities are being carried out.

1.2. Law 8/2010, of 31 March, on the establishment of the disciplinary regulatory framework foreseen in the UE Regulations on registering, evaluating, authorising and placing restrictions on chemical substances and mixtures (REACH) and on classification, packaging and labelling of chemicals and their mixtures (CLP) that modifies it

The aim of this Law is to establish the disciplinary regulatory framework applicable in case of infringement of the abovementioned UE Regulations (1907/2006 and 1272/2008, respectively), according to their own provisions (as they demand to the Member States to adopt "effective, proportionate and dissuasive" sanctions in case of infringement of their stipulations).

The Law regularizes infringements and sanctions, and establishes the basic legal framework to be applied to the responsible subjects, prescriptive right, concurrency of sanctions, provisional measures and damage reparation and indemnification actions (in case of environmental damages, the reparation process is the established upon the Law 26/2007, of 23 October, on Environmental Responsibility).

The Law recognizes the environmental legislative powers attributed to the Autonomous Communities regarding monitoring, inspection and control actions to be carried out in their own territories, as to guarantee the due accomplishment of the stipulations contained in the both UE Regulations, as well as to produce complementary regional legislation, to establish, if needed, additional protection legislation (because the Constitutional Court has allowed to the Autonomous Communities to establish a more restrictive sanctions in case of infringements) and to exercise their legislative authority as to impose sanctions (the competence for that will correspond to the regional competent entity in which territory the infringement took place; if the infringement is committed in more than one Autonomous Communities, the competence will correspond to the one that has observed the infringement first).

An interesting observation is the fact that besides the traditional classification between serious, major and minor infringements (the sanctions may ascend to 1.200.000 Euros, by the way), the Law classifies the sanctions upon their nature, depending if they are related to chemical substances or their mixtures. As for the rest, is being maintained the traditional proceeding of temporally (not exceeding a five years period of time), total or partial, closure of the responsible plants or the faculty of the competent entities to publically publish the definitive sanctions, the concurrent facts and the identity of the offender (s).

Stands out the preventive purpose of the Law, materialized by the faculty of the Administration to adopt provisional measures before the judicial procedure, and to subsidiary execute the preventive and corrective measures, at the expense of the responsible subject, when an imminent danger or already occurred damaged have been produced, if the subject itself is not willing to act properly or its actions are not sufficient.

1.3. Law 6/2010, of 24 March, regarding the modification of the Law on Environmental Impact Assessment of projects

This partial modification of the consolidated version of the Law on Environmental Evaluation of Projects (known as TRLEIA) is foreseen with the purpose to simplify and speed up the existent bureaucratic procedure, which was delaying excessively the beginning of the activities, as well as to adapt its provisions upon the Law 17/2009, of 23 November, on free access to and exercise of service activities (known as "Umbrella Law", in order to carry out a proper transposition of the Services Directive). The main novelties of this Law are the next ones:

1. The new regulatory framework specifies the actions to be implemented upon an Environmental Impact Assessment procedure (EIA in Spanish), composed by three phases: Phase 1: determination of the Study's on Environmental Impact achievements (the project promoter makes a formal requirement to the competent environmental body and this one determines the achievements of the Study); Phase 2: Study on Environmental Impact (the Study, its submission to public information and consultations); Phase 3: Declaration on Environmental Impact (DIA in Spanish), granted by the competent environmental body.

2.The duration of EIAs, competence of the Central Administration, is considerable reduced: **(i)** all the actions to be implemented during the Phase 2 can not exceed the time limit of 18 months, considered from the day when the project promoter receives the formal notification on the Study's on Environmental Impact achievements; **(ii)** the transfer of the file to the competent environmental body will have to be done in the same period of time, and once received, the body in charge will have a 3 month term for the granting of the Declaration on

Environmental Impact. This way, the total duration of the procedure is of 21 months; half as much the previous duration, of 43 months.

3.If in a maximum of 18 months term, considered from the day when the project promoter receives the formal notification on the Study's on Environmental Impact achievements, the competent environmental body did not receive from the prior competent body the Study on Environmental Impact, neither the technical documentation of the project nor the public opinion results, the file will be closed (which implies the need to reopen from the beginning the entire process of the EIA; this kind of legal solution is already foreseen in the TRLEIA, as to surpass the deadlines imposed by the Autonomous Communities).

To avoid that kind of legal unfair lapses, "when the delay is exclusively or partially attributable to the Administration, the competent environmental body will have to decide, by means of a reasoned decision, *ex officio* or at the request of the prior competent body, if there is a need to close the file or it is possible merely extend the deadline, to a maximum month term". This is a manner to protect a diligent project promoter, avoiding the definitive closure of the file when the delay is not his fault.

4. The Law was adapted to the provisions contained in the "Umbrella Law", in order to carry out a proper transposition of the Services Directive. This way, it introduces the obligation to submit a statement of responsibilities or a previous communication as to access to an activity or its development procedure and, eventually, the granting of the EIA; the statement of responsibilities or the previous communication can not be submitted until the EIA is not carried out, and, in any case, the need to provide the accrediting documentation. The Law also declares that the statement of responsibilities or the previous communication won't have any legal validity or efficiency if their content is not according with the DIA.

The need to obtain a statement of responsibilities or a previous communication, once the project has been submitted to the EIA, implies two important consequences: **(i)** the need to redefine the status of the "prior competent body", which will assume powers regarding the granting of the EIA; it will be "a Central Administration, regional or local body in charge

empowered with enough competences to authorize, adopt or control the promoter's activity upon the statements of responsibilities or previous communications, submitted to an environmental impact assessment procedure"; **(ii)** a subsequent consequence not foreseen by the Law, but obvious enough to be announced: the need to revise the jurisprudence that considers the Declaration on Environmental Impact as a mere preparatory act, and, there for, not able to be appealed by itself, but only once the authorization is granted. So, when the project will only require a previous communication or a statement of responsibilities, the granting of the DIA will imply the ending of the proceeding and, consequently, the possibility to apply its results directly.

5. It is established the need to identify the author(s) of the Study on Environmental Impact or of the required documentation regarding those types of projects contained in the Annexe II and for those ones that, without being included in the Annexe I, may affect directly or indirectly the spaces of the "Nature Network 2000" (known as "Red Natura 2010"). Even so, the Law did not consider necessary to demand from the subscriber of those documents to posses a high professional education or a sufficient capacity and experience in the field, as have already done some other Autonomous Communities (Castilla and León, Castilla la Mancha and the Balearic Islands).

1.4. Royal Decree 367/2010, of 26 March, on the modification of several environmental regulations for their adaptation to the Law 17/2009, on free access to and exercise of service activities, and the Law 25/2009, on modification of several laws for their adaptation to the Law on free access to and exercise of service activities

The purpose of this Law is to complement the transposition into the national legislation of the UE Services Directive, regarding environmental activities. To that end, several regulations have been modified (on prevention and integral control of contamination matters, air quality, waters, coasts, natural environment and genetically modified organisms), as to their adaptation to the prescriptions contained in the referred UE Directive and its transposition laws, deemed to achieve an easier proceeding scheme; to introduce the publicity, impartiality, transparency and competitive concurrency principles into the service

activities; and the substitution in some cases of the authorizations by statements of responsibilities or previous communications.

1.5. Law 13/2010, of 5 July, modifying the Law 1/2005, of 9 March, on regulatory framework of greenhouse gases emissions trading, as to improve it and extend it to aviation activities

As the title itself indicates, the purpose of this Law is to modify the Law 1/2005, transposing into the national legislation the modifications introduced by the recent two UE Directives, after revising the UE Directive 2003/87/CE, on the communitarian greenhouse gases emissions trading system (UE Directive 2008/101/CE, which includes the emissions produced by aviation activities into the trading system, and the UE Directive 2009/29/CE, which carries out a profound revision of that system). This legislative initiative is due to the gained experience upon all these years (to be more specific, from the 1st of January 2005, when the greenhouse gases emissions trading system began).

The main novelty of it consists in the fact that, from 2013 to 2020, the allocation of emission rights will be realized by means of auction sales. The ambition of the legislative power was to offer a real and effective opportunity to the small and medium companies a "full, fair and equitable" access to the emissions trading market, avoiding this way the production of "undesirable distributional effects", as the ones occurred in the electricity sector. The Climate Change Secretary of State will be the responsible body in charge to publish a detailed report, after each auction sale, including the price of each auction period.

Nevertheless, the Law foresees a transitional free allocation period of emission rights until 2020, beneficing those sector/subsectors exposed to a considerable risk of carbon leakage[1],

[1] Those ones for whom the appliance of the greenhouse gases emissions trading system may cause an increase of emissions produced in third countries that haven't imposed in their industries similar reduction obligations.

and also the urban heating and high-efficiency cogeneration systems. In general terms, are excluded from this free allocation system the producers of electricity, the capture facilities, the pipelines for transport and storage emplacements for carbon dioxide.

As for the *new entrants*, a 5% of the total communitarian amount of emission rights has been reserved for them, for the period 2013 – 2020. The rules on the free allocation system to be applied to new entrants will be established upon future communitarian regulations and, if necessary, national regulations implementing this Law (please bear in mind that it is completely prohibited the free allocation of emission rights to new entrants that produce electricity). In case that some of the reserved emission rights would remain undelivered, they would be auctioned as regular ones.

Because of the disappearing from 2013 of the National Allocation Plans (the European Commission will be the body enabled to calculate and publish the amount of emission rights to be conceded to each Member State), has been introduced a new concept, the one of *trading period*, who's duration was established in a 8 years period of time.

The allocation system is introduced by means of the Cabinet of Ministers´ agreement and creates the legal figure of *automatic lapsing of emission rights*, in case that those rights wont be used during their trading period (or emission production).

Upon this Law, transposing the UE Directive 2008/101/CE, the aviation sector is being introduced in the communitarian greenhouse gases emissions trading system. The Law regulates all the aspects applicable to the greenhouse gases emissions trading system in the aviation sector, some of them different from the general trading system (for example, the non existence of the emission authorization legal figure, replaced by monitoring plans). The Law previews that from the 1st of January 2013, the 15% of the total amount of emissions rights will be auctioned in benefice of the aviation sector.

Another important matter is the relative to the Annex I of the Law (where have been included the aviation activities), which regulates the applicable regime, but also incorporates into the greenhouse gases emissions trading system all the new industrial sectors contained in the UE Directive 2009/29/CE, such as the petrochemical, ammonia and

aluminium sectors. The regulatory framework is extended also to other two greenhouse gases kinds, easily measured and monitored with sufficient precision (nitrous oxide emissions produced by some chemical mixtures and perfluorocarbons emissions produced by the aluminium sector).

Last but not least is the content of the Fifth Additional Provision of the Law, including the possibility to grant emission rights or credits to projects located in national territory not submitted to the greenhouse gases emissions trading system.

1.6. Royal Decree 943/2010, of 23 July, which modifies the Royal Decree 106/2008, of 1st February[t], on batteries and accumulators and the environmental management of their waste

The importance of this Decree is the possibility given to the producers of batteries and portable accumulators generating hazardous waste, as to comply with their legal obligation, to collect and duly manage the generated waste not only, as so far, by the means of **(i)** a deposit and return system or **(ii)** an integral management system, but also using a **(iii)** public management system; this last option, of new creation, extends considerable the legal options to be applied by the producers of batteries and portable accumulators.

1.7. Law 40/2010, of 29 December, on geological storage of carbon dioxide

This Law has the meaning to introduce in the national legislation the provisions established upon the UE Directive 2009/31/CE. The legislative strategy is to capture, transport to specific emplacements by means of tubes or tanks and, finally, inject into an adequate underground geological structure the carbon produced by industrial activities, in order to achieve its permanent storage.

The two administrative tools designed by the new regulatory framework of CO_2 are the *investigation license* and the *storage concession*, granted both of them by the Ministry of Industry, Tourism and Commerce, previous favourable reports from the Ministry of the

Environment, and Rural and Marine Affairs and the competent Autonomous Community where the storage emplacement is located.

The *investigation license* is granted as to determine the storage capacity of a land, allowing to its owner to investigate for a period of time of 6 years (extendible to 3 more). The Geological and Mining Institute has already designed a map including the CO_2 storage areas, for more than 20.000 millions tones (20 Gt). And as regards the *storage concession*, this one will offer to its owner the possibility to storage the gas for a 30 years period of time, extendible for two more consecutive periods of 10 years.

Both of them may be transmitted, having obtained previously the authorization from the Ministry of Industry, Tourism and Commerce. After the definitive closure of the activity, the Central Administration will assume the ownership and control of the storage emplacement, as well as the responsibility charge.

Regarding the transportation of the CO_2, it will be the Ministry of Industry, Tourism and Commerce the competent body who will adopt in the future an appropriate regulatory framework.

The Law also establishes a hard disciplinary regime, composed by sanctions from 500.000 Euros (minor infringements) to 5.000.000 Euros (serious infringements).

1.8. Law 41/2010, of 29 December, on protection of marine environment

This Law has transposed to the national legislation the UE Directive 2008/56/CE, of 17 June 2008, establishing a regulatory framework in the filed of the communitarian marine environmental policy (Marine Strategy Framework Directive). This Law will be applicable to the territorial sea, to the Atlantic and Cantabrian exclusive economic zones, to the Mediterranean fisheries protection zone and to the continental platform (that's: all the marine waters, including the seabed, subsoil and natural resources). The Law also regulates the waste poured by Spanish ships and aircrafts into the marine waters, the incineration activities carried out in the see area and the collocation of equipments upon the see grand.

The administrative tool to be applied is the "*marine strategies*", containing rules regarding the protection and preservation of the marine environment, the prevention and reduction of waste, and also the preservation of the biodiversity. The Ministry of the Environment, and Rural and Marine Affairs will define for each marine coastal demarcation, previously consulting the Autonomous Communities, the characteristics of a good environmental status, elaborating afterwards a Measures Programme (for a 6 years period of time), as to achieve or maintain a good environmental status of the national waters.

Regarding the waste poured by Spanish ships and aircrafts into the marine waters, it will be regulated upon specific applicable legislation and other regional agreements, if any.

And as to the legal responsibilities for environmental damages caused to the marine environment, the applicable framework is the Law 26/2007, of 23 October, on Environmental Responsibility.

2. RELEVANT JURISPRUDENCE

2.1 Noise pollution: Supreme Court Decision, of 3 February 2010 (appeal n.º 202/2007, reporting judge Rafael Fernández Valverde)

This Court Decision resolves an administrative - contentious proceeding submitted by an Owners Association of cottages and plots against some specific aspects of the Royal Decree 1367/2007, which develops the Law 37/2003, on Noise, regarding the acoustic zoning, quality objectives and acoustic emissions, and also declares the cancelation of a provision contained in this Regulation.

Upon the article 8.1 of the Noise Law, "*the Central Government will define the objectives of the acoustic quality applicable to different types of acoustic areas, for already existing or future situation*".

The Court Decision declares, admitting the appellants' claims regarding this point, the non-compliance of the above mentioned regulatory provision, contained in the Table A of the Annex II of the Regulation, referred to the "Acoustic quality objectives", in its paragraph f), on "territorial sectors related to general systems of transport infrastructures or other public facilities in need of those infrastructures."

The main cause of this claim was because, meanwhile in other five Sectors foreseen in the Table A the acoustic quality objectives are established upon concrete noise rates, expressed in decibels, in the Sectors described in the paragraph f) the acoustic quality objectives are "undetermined", containing a footnote simply declaring that "in these territorial sectors will be adopted adequate preventive measures on acoustic contamination, in particular, applying the technologies with a minor acoustic impact, chosen between the best available techniques".

The Court declares that this kind of regulatory ambiguity can not be accepted, bearing in mind that is not the same establish, as an acoustic quality objective, a concrete noise rate than disposing that an adequate preventive measures is foreseen to be adopted, because the preventive measures are tools to be applied for the achievement of the final objective and if this objective hasn't have been properly defined, all the remaining mechanisms included in the Law loss their meaning. The Decision also declares that this kind of ambiguity may only lead to a serious lack of defence, which impedes the citizens to defend their legal interests before the competent public authorities.

This way, the Court Decision cancels the former expression "undetermined" contained in the Table A, where are established the "acoustic quality objectives for noise applicable to existing urbanized areas", of the Annex II of the Regulation, regulating the "acoustic quality objectives". Nowadays, they are working on a Draft Amendment of the Royal Decree 1367/2007, as to replace the expression "undetermined" by a footnote expressing that, regarding the limits of those territorial sectors, will not be exceeded the acoustic quality objectives for noise applicable to other acoustic areas adjacent to the first ones".

2.2 Waste: National High Court Judicial Order, of 17 February 2010

This Judicial Order was highly acclaimed by ecological organizations, because of the immediate cessation of the fosto-plaster waste discharges carried out by the companies FERTIBERIA and FMC FORET into the Huelva's marshes. The background of the case is the following:

- In 1965, a factory producing phosphoric acid was implanted in the city of Huelva, purchased afterwards by the company FERTIBERIA, S.A. The evacuation of that acid implied the production of other by-product called fosto-plaster, a toxic and hazardous industrial waste, which was poured into the Huelva's marshes.

- The company was sanctioned for illegal waste discharges in 1998; even the natural persons responsible of the factory were condemned for crimes against the natural resources and the environment (2002).

- On November 27th of 2003, the Ministry of Environment emits an Order declaring the extinction of the concession granted to FERTIBERIA. The company applies the Order, but the National High Court dismisses the claim by the Decision from June 27th, 2007, and ordains the cessation of the waste discharges.

- After the publication of this last Court Decision, declaring the extinction of the concession, between the time period of October 2007 and February 2009, the General Directorate for Coasts has requested seven times to FERTIBERIA to comply with the extinction order, and to cease consequently the waste discharges.

- By the Judicial Order of 14 December 2009, the National High Court disposes the execution of the Decision and imposes the immediate cessation of the waste discharges starting from December 31st of 2010 and not from 2012, as was pretended by the company and other administrations, taking into consideration "all the involved interests, as to allow the accomplishment of an orderly transition and properly environmental protection".

Against this Judicial Order, the involved companies have presented an application for reconsideration before the same judicial body, pleading the damages that the provisional execution of the order would cause to the workers, other companies and installations, but the Judicial Order from February 17th declares the prevalence of the environmental general interest over the private interest of the appellants and, there for, the cessation of the waste discharges as scheduled. The company already has ceased the discharges and now foresees to carry out soil remediation works, because it has been poured more than a hundred million of tons of fosto-plaster on 1.200 acres of marsh.

2.3 Environmental Impact Assessment: Supreme Court Decision of 27 October 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

The Court Decision resolves a contentious proceeding submitted by an Ecological Association against the Council's of Ministries Agreement from May 25, 2007, on public utility and project implementation approval of Penagos-Güeñes air power line, in the Cantabrian and Vizcayan provinces.

The Supreme Court cancels this tracing, justifying that the "power line doesn't pass along the edge, as it's foreseen in the Environmental Impact Declaration (DIA), but within the Triano and Galdames forestall Biotope, which is a protected area; this why, consequently, the authorization violates the conditions established in the DIA and has been issued by an improper use of the technical discretionally power of the Administration.

The Court Decision declares null the appealed agreement, regarding the tracing of the project's implementation, and announces that the Electrical Network of Spain (REDESA or "Red Eléctrica de España) has to draft a new power line project, avoiding this time the Triano and Galdames forestall Biotope.

2.4 Environmental Impact Assessment: Supreme Court Decision of 25 May 2010 (appeal n.º 545/2007, reporting judge Manuel Campos Sánchez-Bordona)

In this relevant Court Decision, the Supreme Court rejects the cassation appeal submitted by the Regional Community of Madrid and entirely confirms the High Court of Justice of Madrid Decision annulling the Decree 131/2001, of the Executive Government of the Autonomous Community, which has declared the prevalence of the general interest of the granite mining exploitation activity of the mountain "Pinar del Consejo", included in the Catalogue of Public Utility Mountains, property of the City Council of Cadalso de los Vidrios.

The Environmental Impact Declaration (DIA) granted for the mining exploitation project was negative, because of its harmful effects on the environmental values of the mountain. These environmental values included in the DIA receive a high legislative protection, because this area is included in the Special Protection Area for Birds (ZEPA), upon the UE Directive 79/409/CEE, including species listed in the national and regional catalogue of threatened species, two of them as endangered species, and as part of the Draft of the Regional List of Communitarian Importance Places.

The confrontation created between the negative DIA and the competent Regional Ministry regarding the implementation of the project was finally resolved by the Executive Government of the Regional Community of Madrid, deciding the definitive execution of the project and imposing to the responsible company the obligation to reforest the quadruple of the eventually occupied area and to promote the declaration of prevalence of the new use of the mountain prior its public utility, as to proceed in the future to its elimination from the mentioned Catalogue (required by the Regional Community of Madrid Law 16/1995, on Forest and Nature Conservation).

The declaration as null of the decree that foresees the prevalence of the new use of the mountain prior its public utility is confirmed by the Supreme Court. The Court Decision states that the Court is not judging neither replaces "the deliberation power of the Regional

Community of Madrid, by giving its approval to the quarry activity", but the Court states openly that during the proceeding has occurred "a clear and evident infringement of the national and European environmental legislation", because of the following reasons:

- The obvious insufficiency and inadequacy of the adopted compensatory measures (consisting, mainly, to carry out reforestation actions), as they are mere legal obligations already included in the Regional Community of Madrid Law on Forest and Nature Conservation, for un-cataloguing cases or transformation of public utility use of mountains.

The mining exploitation is located in a place of "priority natural habitat and/or species", upon the UE Habitats Directive, and, from this point of view, have been violated the provisions contained in its article 6.4, second paragraph, as "for a situation of these characteristics, there has to be a much more intense conditioning"; in particular, it provides that "it would only be possible to present pleadings –as motivation for the project's approval- if they consist in considerations related to human health and public safety, or prior positive effects for the environment, or other imperative reasons of general public interest".

In this concrete case, the Court hasn't appreciate "imperative reasons of general public interest" that would allow the execution of the project, because, even if the mentioned Decree have been enumerated serious labour, economic and social problems of the municipality and of the mining company itself, in case that the works are eventually paralyzed, from the presented documents is impossible to perceived a real "labour and social situation in Cadalso de los Vidrios that may conduct to an imperative situation of general public interest; nor a special labour situation different of other neighbouring municipalities".

- Finally, because "was also infringed the same article 6.4, in its second paragraph, as it demands, beside of a specific motivation, the previous consultation of the European Commission; in particular, it says that "in this last case, using appropriate legal channels, it will be necessary to consult previously the European

Commission"; reality that didn't happened either in this case". The absence of this previous consultation "also implies the invalidity of the Agreement, because of the substantial nature of the fault, mainly because it makes impossible the control carried out eventually by the Commission in this material environmental field".

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EIA, SEA and IPPC[*]

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Environmental assessments - i.e. administrative procedures designed to achieve an early and integrated control of environmental effects of projects, plans, programs - is in Europe a recurring practice into public decision making proceedings, in order to make human activities compatible with a sustainable development.

Into the Italian legal system, the procedures of environmental assessments became quite common due to the transposition of dir. 85/337/EC (on the environmental impact assessment of certain public and private projects: EIA) formally achieved by the art. 6 of the l. 8 July 1986, n. 349, founding the environmental Ministry. However, the first significant implementation of the European rules about EIA has been achieved only through the d.p.r. 12 April 1996, enacted when the first directive on EIA was about to be strongly reformed by the dir. 97/11/EC (early followed by the dir. 2003/35/EC, on the participation of people in the arrangements of plans and programs in environmental matters). Anyway, the complete transposition of the directives on environmental impact

[*] I wish to thank Miriam Allena and Calogero Miccichè for the cooperation provided in preparing this report.

assessment is due to the adoption of d. lgs. 3 April 2006, n. 152, otherwise known as the "environmental Code"[1].

By this act Italy has finally performed, with a significant delay, the dir. 2001/42/EC about the assessment of the environmental effects of certain plans and programs (strategic environmental assessment: SEA). The dir. 2001/42/EC defined just a minimum range of general principles on SEA, giving the States the task to plug - within 21 July 2004 - the specific European rules into the discipline concerning the national planning procedures or into other specific procedures: Italy has been condemned by the European Court of Justice for failing to promptly adopt the implementing legislation[2].

Recently, the d. lgs. 29 June 2010, n. 128 has included into the environmental Code the rules on IPPC (Integrated Pollution Prevention and Control)[3]. The d. lgs. 152/2006 (either in his original version or in the one reformed by the d. lgs 16 January 2008, n. 4) didn't include the legislative framework of this kind of act (which was already mentioned by the d. lgs. 18 February 2005, n. 59, implementing the dir. 96/61/EC)[4].

[1] See Court of Justice, 31 January 2008, *Commission v. Repubblica italiana*, C-69/07 which has condemned Italy for failing to promptly adopt the implementing legislation of dir. 2003/35/EC.

[2] See Court of Justice, 8 November 2007, *Commission v. Repubblica italiana*, C- 40/07. About the chronic Italian delay in implementing European directives in environmental matters see the report of 2006 entrusted by the European Parliament: DG INTERNAL POLICIES OF THE UNION, Status of Implementation of EU Environmental Laws in Italy (IP/ENVI/IC/2006-183), in http//www.europarl.europa.eu/comparl/envi/pdf/externalexpertise/implementation_of_eu_environmental_laws_in_italy.pdf.

[3] By this way, it has been enforced the advice of Consiglio di Stato (sez. consultiva per gli atti normativi) on the d. lgs. 4/2008, given in the Adunanza 5 November 2007, n. 3838 concerning the inclusion of the IPPC discipline into the text of the environmental Code.

[4] The dir. 96/61/EC has frequently been changed in a significant way, until the dir. 2008/1/EC have realized the "codification" of the text.

Into the part II of the d. lgs. 152/2006 there is, nowadays, a general legislative framework on environmental assessments which has been streamlined and simplified, through a better explanation of the dealings between EIA, SEA and IPPC[5].

The environmental assessments are distinguished because of their objects, their contents and their aims: the EIA is aimed at verifying the environmental sustainability of public and private projects having significant effects on the environment[6]; IPPC is aimed at preventing and controlling pollution arising from the industrial activities listed in Annex VIII of the Code: IPPC, such as EIA, concerns specific construction works or specific projects (and their substantial modifications) and provides «measures designed to prevent, where that is practicable, or to reduce emissions in the air, water and land, including measures concerning waste, in order to achieve a high level of protection of the environment»[7].

Through the abovementioned d.lgs, the legislator has confirmed the absorbing feature of EIA, stating that this act «substitutes and coordinates all the authorizations, arrangements, concessions, licensing, advices, clearances, and anyhow defined assents in

[5] The discipline on the impact assessment (known as "valutazione di incidenza") hasn't been included yet into the text of the d. lgs. 152/2006. The dir. 92/43/EC, concerning the protection of natural and semi natural habitat and wildlife (the art. 5 states the due to submit to the impact assessment any public or private initiative determining effects on the protected habitat and wildlife) in Italy has been enforced by the d.p.r. 8 September 1997, n. 357, reformed by the d.p.r. 12 March 2003, n. 120.

[6] See art. 4, par. 4 b), d. lgs. 152/2006.

[7] See art. 4, par. 4 c), d. lgs. 152/2006.

environmental field, required for the construction and the management of works or installations»[8].

According to the d. lgs. 128/2010, whereas a specific activity is subjected not on only to EIA, but also to IPPC, and whereas both are a matter for Regions and Districts, IPPC has to be included and absorbed into EIA, in order to prevent any duplication of investigating and evaluating activities[9].

The SEA is aimed at "throwing back" the step of the environmental assessment, so that the assessment is already done when global decisions - able to draw the setting of the subsequent and specific choices in the matter of territorial administration - are taken. The SEA then consists in a reasoned advice concerning the sustainability of plans and programs[10].

The d. lgs. 128/2010 has also considered that advice binding, stating that the competent authority has to review plans and programs, taking into account the contents of the advice[11].

[8] See art. 26, par. 4, d. lgs. 152/2006. The d. lgs. 128/2010 has institutionalized the use of the interlocutory conference ("conferenza di servizi istruttoria") as a way through which singulars and offices whose functions are substituted or coordinated by the EIA can take part to the administrative procedure.

[9] See art. 10, d. lgs. 152/2006.

[10] The sub- procedural feature of the SEA proceeding is the result of the changes provided by the d. lgs. 4/2008, to avoid a condemnation by the Court of Justice (*ex* art. 228 TEU, nowadays 260 TFEU) because of the non-conformity of the national discipline to the dir. 2001/42/EC. The original version of d. lgs. 152/2006 drew the SEA as an autonomous (although linked) procedure respect to the main planning procedure, stating that the SEA procedure should end with the enacting of a decision having the nature of an administrative act.

[11] See art. 15, par. 2, d. lgs. 152/2006.

In order to clarify the leadings between EIA and SEA, the abovementioned d. lgs. has denied the enforcement of SEA to the authorization proceedings concerning construction works which are able to automatically modify urban plans[12]. By this way the lawmaker intended to stop the practice - which had forged the SEA's purposes - of granting just into general planning proceedings a high level of environmental protection and a strong integration of the environmental assessments.

The reform also introduced a quality assessment during the "verification of subjection" of a certain plan or program to SEA. In case of plans and programs covering small local areas and in case of unimportant changes of environmental and territorial plans and programs, the SEA is necessary just if the competent authority considers the planned activities to have a *significant* impact on the environment, taking into account the different levels of ecological sensitivity of the areas interested by the activities[13].

Besides, the criteria for the verification of subjection to EIA have also changed. According with the reform of 2010, the competent authority is expected to control not only whether the project had a bad impact on the environment, but also whether this impact can be considered "significant"[14].

The d. lgs. 128/2010 has also modified many other important rules of the environmental Code, in order to achieve a strong simplification of the proceedings. It has been pointed out that the general discipline on administrative procedure (l. 7 August 1990,

[12] See art. 6 par. 12 d. lgs. 152/2006, stating that «the SEA concerning the localization of specific construction works is not necessary for the modifications of the territorial planning or the destination of land as resulting after the zoning variances, understanding the enforcement of the discipline about EIA»

[13] See art. 6 par. 3, and 3 *bis*, d. lgs. 152/2006.

[14] See art. 20, par. 4, d. lgs. 152/2006.

n. 241) has to be enforced – if compatible[15] - to all the verification and authorization proceedings ruled by the environmental Code.

According to the d. lgs. 128/2010: the singular can complain with the inactivity of the administration in the EIA proceedings[16]; it is also necessary to grant computer facilities in the EIA and SEA proceedings. In€ order to speed up these proceedings, the lawmaker also set stricter procedural terms, assuring – however - to the interested people the concrete chance to participate.

Beside, the reform of 2010 has cleared up the functions of the State and the other local governments, giving the Regions the power to regulate other eventual ways to select plans, programs and projects which have to be subjected to SEA, EIA and IPPC[17].

At the end, we need to remark the introduction of interlocutory conferences into EIA proceedings and the power of the competent authority to enact a decision, even in case of inactivity or dissent of one or more participating administrations[18]. It also has to be underlined that the abovementioned d.lgs. reduced the research, the prospection and the growing of liquid and gaseous hydrocarbons into the sea[19] and gave the Minister of environment the task of updating the technical rules concerning SEA, EIA, IPPC[20].

[15] See art. 9, par. 1, d. lgs. 152/2006.

[16] See art. 26, par. 2 *bis*, d. lgs. 152/2006.

[17] See art. 7, par. 7, d. lgs. 152/2006.

[18] See art. 25, par. 3 *bis*, d. lgs. 152/2006.

[19] See art. 6, par. 17, d. lgs. 152/2006.

[20] See art. 34, d. lgs. 152/2006.

An updated analysis of the contents of the d.lgs. 128/2010 concerning EIA, SEA, IPPC can be found in: R. URSI, *La terza riforma della Parte II del testo unico ambientale*, *Urbanistica e Appalti*, n. 1/2011, 13; particularly on the SEA procedure: M.L.MARINIELLO, *La dimensione procedurale della valutazione ambientale strategica: un'analisi comparata*, Napoli, 2011.

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PUBLIC ENVIRONMENTAL SERVICES (WATER AND MUNICIPAL WASTE) IN ITALY. NEW REGULATORY MEASURES.

ANNUAL REPORT -2011- ITALY

(January 2011)

Prof. Alessandro LOLLI – Jacopo BERCELLI

ÍNDEX

Water management and municipal waste management services have been involved, in recent years, in a series of regulatory measures which have substantially modified their institutional structure. In a first phase, responsibility for organizing and managing these services has been committed to the sub-area authorities, as dedicated and specialized bodies (A.T.O.). Then, in a second phase, the same responsibility has been transferred to municipal, provincial and regional government authorities.

1. LAW NO. 36 OF 1994 FOR WATER MANAGEMENT AND LEGISLATIVE DECREE NO. 22 OF 1997 FOR MUNICIPAL WASTE MANAGEMENT: OPTIMUM SUB-AREAS AND SUB-AREA AUTHORITIES.

During the 1990's the need emerged within the ambit of the Italian system of regulations for supramunicipal, optimum sub-area organization of local public services regarding the environment, water and municipal waste.

A supramunicipal approach covering large areas was considered necessary for entrepreneurial development and industrialization within the sector.

For integrated water management, law no. 36 of 1994 set forth that "Water management services are reorganized on the basis of optimum sub-areas" (art. 8, paragraph 1) and that "the regions … govern the forms and manners of cooperation among the local authorities within the said optimum sub-areas" (art. 9, paragraph 3).

Legislative Decree no. 22 of 1997 included similar measures for municipal waste management. This law provided for "optimum sub-areas for municipal waste management"

(art. 23, paragraph 1) and "the forms and manners of cooperation among the local authorities within the said optimum sub-areas" (art. 23, paragraph 5).

Lawmakers on the state level contemplated the principle of inter-municipal cooperation. Regional laws governed concrete organization of sub-area authorities.

The above state law provisions provided for, and required, a later regional law for government of the concrete organization of sub-area authorities.

The regions nearly all made provisions that the municipal authorities within the sub-area might choose, as alternatives, between two forms of cooperation: a new public body or a special coordination agreement without constitution of a new body.

2. LEGISLATIVE DECREE NO. 152 OF 2006, KNOWN AS THE CODICE DELL'AMBIENTE (ENVIRONMENTAL CODE): OPTIMUM SUB-AREAS AS PUBLIC BODIES.

Optimum sub-areas and cooperation among municipalities, regarding water and municipal waste management, were provided for in Legislative Decree no. 152 of 3 April 2006, known as the Codice dell'ambiente (environmental code).

An important new development was included, namely that municipalities were obliged to constitute sub-area authorities as new public bodies.

In regard to water management, art. 148 of Legislative Decree no. 152 of 2006 ruled that the sub-area authority was to be a "structure endowed with legal status" constituted in each optimum sub-area, that local government authorities were obliged to hold shares in

them, and that the responsibilities for management of water resources of the said local authorities were to be transferred to the said structures.

In regard to municipal waste management, art. 201 set forth that the sub-area authority is a "structure endowed with legal status" constituted in each optimum sub-area, that local government authorities were obliged to hold shares in them, and that the responsibilities for integrated municipal waste management of the said local authorities were to be transferred to the said structures.

Thus, in 2006, lawmakers on a State level made it obligatory that sub-area authorities for water and municipal waste management be constituted as new public bodies.

This meant that the said new bodies were to be provided with head offices, their own staff, and the means and instruments for conducting their tasks.

In many cases, this generated new costs and items of expenditure for municipalities.

At a time of serious public finance deficits, these costs and items of expenditure began to be considered a waste of public money.

In view of these public finance concerns, lawmakers quite simply abolished the optimum sub-area authorities in 2009.

3. LAW NO. 191 OF 2009 ABOLISHES OPTIMUM SUB-AREA AUTHORITIES.

Art. 2, 186-bis of law no. 191 of 2009 abolished optimum sub-area authorities.

This law delegated to the ambit of regional laws the task of returning the functions of the said authorities to local public bodies (previously, and traditionally, the bodies responsible for them).

In concrete terms, decisions are made by means of regional laws as to whether the functions are to be assigned to municipal or provincial authorities, or to the regional authorities themselves.

This State law sets forth that the decision must be governed by the principles of subsidiarity, differentiation and adequacy.

As a general rule, we may conclude that, in accordance with the principle of subsidiarity, delegation is favour the lower-tier authority, namely municipalities. However, it clearly emerges that assignment of functions to municipal authorities rules out application of the principle of adequacy.

Hence, it appears, for consistency with the indicated criteria to be attained, that he functions of organization of water and municipal waste management be assigned to the provincial government authorities.

This is consistent with the general law of local autonomy, Legislative Decree no. 267 of 2000. The said law assigns to provincial authorities administrative functions regarding the environment in the areas governed by a plurality of municipal authorities (art. 19, paragraph 1).

By way of conclusion we note that the tasks of organization of water and municipal waste management shall be governed by new regional laws, and that, in all likelihood, these regional laws shall assign the said tasks to the provincial authorities.

The principle of differentiation provides for the possibility that regional laws assign the said tasks to the larger municipal authorities, which had already been considered optimum sub-area authorities (see the case of the Municipality of Milan), or to very small regional authorities (e.g. Basilicata).

4. THE NEW RULES GOVERNING THE MANNERS OF MANAGEMENT AND ASSIGNMENT OF LOCAL PUBLIC SERVICES OF MAJOR ECONOMIC SIGNIFICANCE. ART. 23-BIS OF LEGISLATIVE DECREE 112 OF 2008 AND DECREE OF THE PRESIDENT OF THE REPUBLIC NO. 168 OF 2010.

The local government bodies indicated by the regional law shall be responsible for service organization and management.

Art. 23-bis of Legislative Decree 112 of 2008 contains new rules governing local public services of major economic significance.

The new rules have been imposed for "application of Community regulations and in order to foster the broadest application of the principles of competitiveness, freedom of establishment and freedom to provide services on the part of all economic operators involved in management of services of general interest on a local level" (art. 23-bis, paragraph 1).

The decree applies both to water and municipal waste management.

Decree of the President of the Republic no. 168 of 2010 was issued to implement the said law.

5. SPECIAL RULES GOVERNING WATER MANAGEMENT AND THE REFERENDUMS TO ABROGATE LAWS ADMITTED BY THE CONSTITUTIONAL COURT.

The new laws and regulations are fully applied to the municipal waste management sector.

However, for water management, a special regulation has been applied, which facilitates recourse to in house companies.

Generally speaking, recourse to in house companies requires a prior opinion on the part of the national authority responsible for upholding competition and the market (Autorità Garante della Concorrenza e del Mercato).

The AGCM is of the opinion that the market is inefficient in this specific concrete instance and therefore that it is opportune not to have recourse to the marketplace, assigning management to an in house company.

The opinions of the AGCM have been, without exception, contrary.

The Decree of the President of the Republic no. 168 of 2010 facilitates the procedure whereby a favourable opinion may be obtained from the AGCM in the case of water management with respect to the other services.

Indeed, for a favourable opinion to be obtained it will be enough for it to be demonstrated that the in house company has made a profit at the end of the financial year, that it reinvests 80% of the profits in developing the service, and that it charges less that the average within the sector.

This means that, for water management, the decision to opt for in house management shall be facilitated and shall be less exceptional in nature than is the case for other local public services.

Lastly, we must note that on 12 January 2010, the Constitutional Court admitted three referendums on local public service and on water management in particular.

The calls which are the object of the referendums are that art. 23-bis on the manners of assignment of local public services of major economic significance (no. 149 Reg. Ref.), art. 150 of Legislative Decree no. 152 of 2006 on the manners of assignment of integrated water management (no. 150 Reg. Ref.), and that art. 154 of Legislative Decree no. 152 of 2006 on the criteria applying to determination of charges (regarding the part thereof in which, among the criteria "adequacy of remuneration of invested capital" has also been included), be abrogated.

The objective of the three abrogative referendums, indicated above and admitted by the Constitutional Court, is that of affirming the public service nature of water management, and that the said services are not, economic and industrial in nature.

In this regard, we may note that abrogation of the above provisions following the referendums would clash with the provisions of recent years and with needs relating to development of the sector and improvement of the national infrastructure network for water.

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"NUCLEAR RENAISSANCE" IN ITALY

ANNUAL REPORT - 2011 - ITALY

(January 2011)

Prof.ssa Laura AMMANNATI

INDICE

1. LEGISLATIVE CONTEXT

The Italian programme to restart the way towards energy production from nuclear source (the so called "Nuclear Renaissance") has been framed into a broad rethinking about the nuclear energy experience at European level. This renewed interest is justified even by the need of reducing the CO2 emissions in the air and of having a more balanced energy mix by 2020. Nuclear energy, like renewable energies, can help to achieve this goal (see also the European proposals about energy policy of 2007, the new nuclear power plants under construction in Finland and France, the running debates in UK as well as in Germany and Sweden).

In Italy the first legislative step on this track was Law No. 99 of 23 July 2009 which lays down milestones of the new regulatory framework concerning nuclear power (Article 25 "delegating tasks to the Government in the nuclear field" which allows the government to issue one or more implementing decrees providing i)rules for the siting of nuclear power plants, of spent fuel and radioactive waste temporary storage facilities and of the final repository for waste, ii) the requirements regarding the licensing procedure for the construction, operation and dismantling of those plants and iii) the compensation to be paid to the populations living in the proximity of the sites; Article 26 entitles the Interdepartmental Committee for Economic Planning (CIPE) to issue two implementing decisions defining i) the typology of nuclear reactors and power facilities which are to be located in our country and ii) the measures to be adopted in order to promote the creation of consortia for the construction and operation of nuclear power plants) and the principles for the establishment of the "Nuclear Safety Agency" which represents the regulatory body of the sector (Article 29).

According to the delegation, the government approved the Legislative Decree No. 31 of 15 February 2010 (hereinafter "decree") which sets out rules for the siting, construction and operation on the national territory of nuclear power plants, nuclear fuel fabrication facilities, storage systems for spent fuel and radioactive waste, as well as compensatory measures and public information campaigns. This decree was approved within the time limit required by the law, i.e. mid-February and it entered into force on 23 March 2010.

The decree has a really complex structure as it includes a wide range of norms in order to regulate all legal key aspects of the nuclear field. Nevertheless it does not conclusively regulate many elements whose solution is differed to further ministerial regulations of the Economic Development Ministry, in cooperation with other Ministries. Choosing this kind of legislative system "in stages" causes uncertainty in respecting fixed time limits and in defining the content.

2. MAIN ELEMENTS OF THE REGULATORY FRAMEWORK

There are three milestones of regulation of nuclear power as depicted in the decree: 1) the "Nuclear Strategy" which is a programmatic preliminary document worked out by the government. It includes strategic goals such as international alliances necessary for a rapid reduction of our technological gap, the capacity required and the time limits for construction and operation of facilities and moreover instructions regarding the temporary and long-term management of radioactive waste (about this point see the recent proposal of European directive of 3 November 2010); 2) the specification of the sites as potential locations of nuclear power plants, the so called "eligible sites"; 3)the definition of requirements for nuclear operators in charge of operating a new nuclear plant.

The "Nuclear Strategy" represents the real starting programme of returning to nuclear power and is placed in continuity, as an integral part, with the "National Energy Strategy" foreseen by Law No. 133/2008 as a tool of shaping the national energy policy. However neither this document nor the Nuclear Strategy which should have been defined within three months after the approval of decree No. 31 exist yet.

Among the preliminary steps following the definition of the Nuclear Strategy the procedure aimed at defining the sites for the construction of power plants plays a key role. This point is, as presumable, extremely delicate. But the decree only shapes a series of "technical criterion" that have to be assessed and developed in to a scheme of standards brought forward by the Nuclear Safety Agency and defined by the Economic Development Ministry in cooperation with the Ministry of Infrastructures and the Ministry of the Environment. Subsequently the scheme is subjected to public consultation where regions, local administrations and bodies characterised by qualified interests take part. The final draft approved with a ministerial decree along with the Nuclear Strategy is subjected to strategic environmental assessment (SEA). After which the emerging comments could influence retroactively the documents subjected to the SEA which in that case would be modified correspondingly.

The procedure is structured in a really complex way and foresees the interested populations' involvement. This step is essential in order to obtain wide and deep social consensus not only because of the construction of infrastructures characterised by high environmental impact but especially in case of production of nuclear energy that is socially not well accepted. However the scheme does not encompass the precise indication of the eligible sites because only potential operators must indicate one or more sites as the location for a nuclear power plant when they submit the application for the certification.

A further essential element in the regulatory framework is the definition of the requirements that operators have to meet. What is to be highlighted is that the operators' requirements are the same even when operators are organised as consortia. The whole set of these requirements qualifies identity and structure of the potential operator. Actually, first of all, the submission of the "intervention programme" and, consequently, the application for the certification of the site and then the application for the "single licence" foresees that operators meet the requirements concerning many areas (providing suitable human and financial resources as well as technical and professional capabilities; ability in managing the activities relating to the planning, construction and operation of nuclear power plants and the storage and management of radioactive waste; and, more in general, availability of organisational structures necessary to set up and manage the licensing procedure and the activities concerning safety and radioprotection).

Nevertheless a more detailed description of those requirements is differed to a decree of the Economic Development Ministry which should be issued within 30 days after CIPE has approved one of the two implementing decisions foreseen by law No. 99. Regarding this step that is constitutive of the whole licensing procedure no deadline for the approval is given by the law itself.

The requirements necessary in defining operators should not hinder promoting cooperative patterns (consortia) as showed by the well-established Finnish experience. However it seems necessary that the operator, even if in cooperative form, must be equipped with all the necessary capabilities from the time he submitted the "intervention programme" to the Economic Development Ministry. Said programme represents the

starting document of the procedure. The certification that operators meet the established requirements will be released together with the single licence by the Economic Development Ministry.

3. SPECIFIC RISKS OF THE NUCLEAR SECTOR

According to established legal and economic literature the nuclear sector is characterised by specific risks which especially are: i) market risks connected with the unpredictability of energy prices; ii) operation and performance risks reliant, in a liberalised market, on the technological adequacy; iii) risks connected with construction (as the events concerning the construction of the Finnish power plant in Olkiluoto demonstrates) ; iv) regulatory risks regarding modifications and interventions required by regulatory authorities aimed at increasing safety which can influence the project profitability and delay the operation of the power plants; and lastly the political risk that is the most pernicious as it is influenced by social consensus for nuclear power.

Regarding "regulatory risks", article 17 of decree No. 31 foresees that, within 60 days after being put into force, an implementing decree should be approved by the Economic Development Ministry, in cooperation with the Ministry of Economics and Finance. The ministerial decree should define some instruments of financial and insurance coverage "against risks of delayed time limits for construction and operation of power plants" caused by events independent from operators, excluding risks stemming from contracts with suppliers.

Therefore the kind of risks which we are referring to does not concern potential delays caused by excessive length of administrative procedures, but only delays eventually occurring between the assignment of the single licence and the operation of the power plant (for instance, either delays linked to the supervisory activities of the construction or to the rise of legal arguments - not referring to supply contracts - or the change of technical standards on ongoing projects).

The political risk is much more insidious because, on the one side, citizens always have the opportunity to block the production of nuclear energy by means of a referendum and, on the other side, there are no legal instruments which can constrain the succeeding parliaments and governments to comply with previous legislative choices and political decisions. Regarding this point a first attempt to hinder the new start of the nuclear sector in Italy by means of a referendum is ongoing. Just on 12 January 2011 the Constitutional Court ruling established the legitimacy of the referendum questions.

4. SITE CERTIFICATION AND "SINGLE LICENCE" PROCEDURE

Title 2 of decree No. 31 which includes the disposals regarding the integrated licensing procedure states that the construction and operation of nuclear power plants are activities of compelling state interest. Therefore such activities are subjected to the integrated licensing which is granted, on operator's instance and with the prior approval of the Unified Conference of regions, state and local Authorities, by ministerial decree of the Economic Development Ministry in cooperation with the Ministry of the Environment and the Ministry of Infrastructure.

The new licensing procedure for the siting, construction and operation of nuclear power plants is structured in two fundamental phases: the first regards the site certification; the second and subsequent regards the single licence procedure for construction and operation of the power plant and the final certification of the operator. Indeed this one, as holder of the license, is in charge of the safety controls and radio protection as well as of the management of radioactive waste and nuclear fuel while the power plant is in function.

The site certification procedure will be carried out by the Nuclear Safety Agency. Starting from the operators' application regarding one or more sites the Agency will carry out the technical assessment and, if this preliminary investigation is successful, will issue the certification for each proposed site within a time limit of 120 days. At the same time the Agency will forward the certification to the Economic Development Ministry, the Ministry of the Environment and the Ministry of Infrastructures. Afterwards the certification will be

submitted to the region where the site is located in order to obtain its agreement on the base of a prior approval of the municipality concerned.

Lacking the agreement the procedure foresees the intervention of an Inter-institutional Committee formed by representatives of the three ministries mentioned above, the region and the municipality involved. In case of disagreement the final decision is entrusted to the Council of Ministers where the president of the region concerned takes part.

Downstream of this procedure the decree foresees also the agreement of the Unified Conference on the list of certified sites. If the Conference does not decide within two months, the final decision will be taken by the Council of Ministers. On this base the Economic Development Ministry in cooperation with the Ministry of the Environment and the Ministry of Infrastructures adopts the decree of approval of the list of certified sites.

At this stage of the integrated procedure, for each certified site the operator concerned must submit the application for a licence for construction and operation of the nuclear power plant and for the final certification of himself as operator within 24 months after the issue of the decree.

The disposal regarding this phase of the procedure provides that the Agency carries out the preliminary technical assessment and reports its binding opinion within 12 months to the Economic Development Ministry which calls a so-called “services conference” involving the Agency, the ministries and the region and the local Authorities concerned and all the other administrations and parties involved in order to obtain all necessary opinions and agreements. If a local authority does not allow the necessary agreement to be reached, the Council of Ministers shall replace the agreement with the local authority involved by decree.

5. NATIONAL WASTE REPOSITORY AND TECHNOLOGY PARK

The decree dedicates a specific title to "procedures for the siting, construction and operation of the national waste repository for the permanent disposal of radioactive waste, the technology park and the associated compensatory measures".

Article 26 of this decree puts Sogin – a state owned company separated from Enel when the former energy monopolist was privatised and already responsible for waste management and decommissioning of the nuclear power plants operating before the antinuclear referendum in 1987 - in charge of decommissioning of the new plants at the end of their life cycle and for the safe storage of waste and spent fuel. Moreover Sogin has the duty to construct and operate the national repository and a related technology park which will be characterised by an integrated system of scientific research, operational work and technology development regarding the management of radioactive waste and spent fuel.

The licensing procedure for the siting, construction and operation of the national waste repository is similar to that foreseen for new nuclear power plants.

Furthermore the decree requires the creation of a fund targeted at ensuring the necessary funds for the decommissioning of the plants at the end of their life time. At the same time it establishes the financial responsibility of operators and provides that the fund has to be managed in a transparent way by a dedicated body which is independent from the contributors of the fund. The fund is fed by the single licence holders' annual contribution. The organisation in charge is a public body called State Equalisation Fund for the Electricity Industry. And the amount of the contribution is fixed by the Electricity and Gas Authority (AEEG, the Italian energy regulator), on the basis of a proposal of Sogin (the public company mentioned above) and on the advice of the Agency.

6. THE NUCLEAR SAFETY AGENCY

The Nuclear Safety Agency is established and organised by Law No. 99 of 2009 (article 29). Its charter was approved, with a significant delay, in April 2010 rather than mid-November 2009 as foreseen and finally published at the beginning of July roughly at

the same time as the decree (No. 105 of 8 July 2010) which modified the incompatibility regime regarding the appointment of the president and the members of the board who have been appointed recently and are now under scrutiny of the parliamentary commissions concerned.

Apart from several critical comments about this regulatory Agency still "on paper", highlighting its potential role in the nuclear system could be in some ways interesting. Actually the Agency has been empowered to manage many fundamental activities. Summarising they are as follows:

(1) powers concerning both technical regulation such as setting general standards and prescriptions relating to single power plants and administrative regulation (licences, authorizations, certifications and so on)

(2) investigation and supervisory powers especially aimed at guaranteeing safety, health and the environment

(3) sanctioning powers strictly connected with the exercise of supervision up to the eventual interruption of the activities and further to the proposal to revoke the licence by the same administration that issued it

(4) powers concerning information activities for the public also by means of reports and inquiries.

The relevant role of the Agency is evident in all steps concerning site certifications, control on the individual requirements of operators, supervision on the technical standards of power plants up to the definition of the binding opinion concerning construction and operation licensing. Furthermore the Agency is the body which must guarantee, at each level and within the different procedures, the safety standards established by the international and supranational authorities.

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THE LEGAL PROVISIONS GOVERNING WASTE IN THE ITALIAN LEGAL SYSTEM

ANNUAL REPORT - 2011 - ITALY

(May 2011)

Prof. Francesco de LEONARDIS

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1. LEGAL PROVISIONS.

The consumer society in which we live involves the production of a large quantity of waste: in the Italian legal system, these wastes are divided into two distinct categories, wastes from consumption processes (urban wastes) and wastes from economic activities (so-called special wastes). Among the latter, certain are classified as hazardous because of their extremely harmful chemical components.

To get an idea of the scale of the phenomenon in Italy, consult the 2008 ISPRA report on wastes (www.apat.gov.it), which shows that in our country, annual waste production is approximately 33 million tonnes

of urban wastes. This means that, on average, each of us produces more than 500 kilos of urban waste a year! Of this, more than one third (12.4 million tonnes) is made up of packaging materials (cardboard, wood, plastic, glass, etc.). The quantities of special wastes produced, however, amount to approximately 135 million tonnes (of which approximately 10 million are hazardous wastes), i.e. approximately four times the amount of urban wastes. These do not include so-called RAEE (electrical and electronic equipment waste), which totals approximately 500,000 tonnes per year, and end-of-life vehicles (approximately 1.5 million vehicles are removed from the motor vehicle register each year).

Directive 2008/98 of the European Parliament and of the Council of 19 November 2008, which sets down the fundamental principles and rules for definition and management of waste, was incorporated into the Italian legal framework by Part IV of the Environmental Code (Legislative Decree 152 of 3 April 2006) as amended by Legislative Decree 205 of 3 December 2010 (this covers some sixty articles, Articles 177-238), to which the regional legal requirements must also be adapted (Article 177).

The provisions set down in the Environmental Code can be divided into two sections: a general section containing about forty articles (Articles 177-216), relating to the sphere of application of the associated provisions and corresponding exclusions, principles, prevention of wastes, definitions, the liability of the producer, by-products, so-called end-of-waste materials, classification of wastes, powers and jurisdiction, and the associated department and authorisations, and a special section containing about twenty articles (Articles 217-238), dedicated to coverage of specific types of wastes (packaging materials, electrical and electronic equipment, tyres, end-of-life vehicles, the various waste consortia, etc.).

From an historical point of view, after the first transposition of the Community provisions through Presidential Decree 914 of 10 September 1982, it is essential to consider the so-called Ronchi Decree (Legislative Decree 22 of 5 February 1997), which was immediately subject to two substantial corrections and has constituted the basis for innumerable detailed provisions. On various occasions, specifically with reference to waste, Italy has been subject to infringement proceedings for failing to incorporate or incorrectly incorporating the Community provisions: among the various penalties imposed on Italy, see Court of Justice, 18 December 2007, C-263/05, *Commission/Italy* (on the notion of waste)*;* Court of Justice, 10 April 2008, C-442/06, *Commission/Italy*, Court of Justice, 26 April 2007, C-135/05, *Commission/Italy*, Court of Justice, 9 April 2004, C-383/02, *Commission/Italy* and Court of Justice, 16 December 2004, C-516/03, *Commission/Italy* (in respect of waste dumps); Court of Justice, 24 May 2007, C-394/05, *Commission/Italy* (on end-of-life vehicles); Court of Justice, 18 December 2007, C-195/05, *Commission/Italy* (in respect of food waste); Court of Justice, 14 June 2006, C-82/06, *Commission/Italy*

(in respect of waste management plans); Court of Justice, 25 September 2008, C-368/07, *Commission/Italy* (in respect of management plans for port wastes);

We should note that fairly often, especially over the past few years, given the exceptional and urgent nature of the problems that have arisen from time to time, non-standard legal instruments have been used, such as emergency orders.

In this regard, the experience of Campania is typical: a state of emergency in the waste disposal sector was declared for the first time through the Prime Ministerial Decree of 11 February 1994 and has not yet been lifted. The emergency has resulted in the non-application of the ordinary rules governing jurisdiction, with the appointment of extraordinary bodies (from 1994 to 2004, the role of Commissioner for the waste emergency was performed by the President of the Campania region, from 2004 to 2007, other commissioners were appointed to fill this role, and from 2008, the tasks of the commissioner were attributed to the Head of the Civil Defence Department), a host of non-standard legal instruments (ten or so Prime Ministerial Decrees on declaration of states of emergency; a dozen orders through which the responsibilities and powers of the commissioners were enacted), a series of decree-laws (such as Decree-Law 90/2008 (the so-called waste decree) converted into Law 123/2008, Decree-Law 172/2008 converted into Law 210/2008; Decree-Law 195/2009 converted into Law 26/2010), certain rulings of the Constitutional Court (including, among the many, Decision 314/2009) and the Court of Justice (4 March 2010, C-297/08, which found that Italy was guilty of not having created, in Campania, a sufficient network of treatment plants for disposal), and the creation of a Parliamentary commission of inquiry.

2. THE NOTION OF WASTE AND THE RELATED NOTIONS OF BY-PRODUCTS AND END-OF-WASTE MATERIALS.

The first and fundamental problem facing Italian legislators was the definition of the notion of waste; this was absolutely essential, given that the inclusion of a substance or object in this category has important consequences in terms of how it is managed (requirement for authorisations, traceability obligations, criminal aspects, etc.).

Thus, for example, for the purposes of preventing situations where wastes, and above all special hazardous wastes, might be released in an uncontrolled manner into the environment, it is necessary to implement a system to ensure the comprehensive tracking of the various movements, “from the cradle to the grave”. In the past, this took place through completion of hard-copy forms (the so-called Environmental Declaration Form) by everyone who had at any point had control of the waste (producer of the waste, transport operator, etc.), and fairly recently a computerised system was approved, the SISTRI (waste control and traceability system), which makes it

possible to monitor movements of waste products nationally in real time, using a GPS detection system and a complex computer system (Article 188bis of the Environmental Code).

Waste means "any substance or object that the owner discards or has the intention or the obligation to discard" (Article 183(1)(a) of Legislative Decree 152/2006).

This notion contains two elements: one objective (any substance or object) and one subjective (that the owner discards or has the intention or obligation to discard).

With reference to the first element, it should be noted that, in Italian law, wastes are considered to include only movable property (and not, therefore, real property such as, for example, the contaminated land that is separated from a site for the purpose of performing clean-up operations), harmful emissions released into the air (such as the smoke from a factory) or waste water (which is covered by specific provisions).

In relation to the subjective requirement, any object may become waste: if a ripe apple is thrown into a rubbish bin, it becomes waste, although it does not have the corresponding objective characteristics, merely by the fact that there was a intention for it to be discarded.

It is important to classify the various types of waste, since, depending on inclusion in one or other category (urban; special; hazardous and otherwise: Article 184, Environmental Code), different types of obligations are assumed: for example, in general, Community provisions establish the objective of reducing and limiting movements of waste. On the basis of the principle of self-sufficiency and proximity (Article 182bis, Environmental Code), each optimal territorial area (which often coincides with the Province) must dispose of the waste that it produces. But this applies only for urban waste, while it does not apply for hazardous urban waste and for special waste (hazardous or otherwise), for which circulation outside the region is permitted.

While in the past, the tendency of the Community legislators (and, as a consequence, national legislators) was to broaden the notion of waste as much as possible (one such legislator incisively commented that the concept that "everything is waste" prevailed), including within that concept practically any type of substance, the opposite trend has gradually moved to the fore, and this has resulted, on the one hand, in the exclusion from the category of waste, under specific conditions, of various substances and objects (so-called by-products) and, on the other hand, the removal from the category of

waste of substances that previously were classified as such (so-called end-of-waste materials or secondary raw materials).

In the ongoing struggle between the concepts of “everything is waste” and “nothing is waste”, a median position has been adopted, whereby all waste can be referred to as being limited and constrained by the contiguous subsets of by-products and end-of-waste materials.

To clarify the notion of **by-product**, we should note that fairly often, industrial production creates unwanted secondary products that can be reused in the same process or in other production processes.

Initially, it was believed that these secondary products should be classified as waste, as their owner does in any case tend to discard them.

Between 1990 and 2000, there developed Community case law that was absolutely restrictive in respect of any scenario for reuse of production residues: "the essential purpose of Directives 75/442/EEC and 78/319/EEC would be compromised if application of those Directives were to depend on the intention of the owner of the waste as to whether to exclude economic reuse, by other people, of the substances or objects discarded" (Points 8, 11 and 12 of the grounds set out by the Court of Justice, 28 March 1990, C-359/88, *Zanetti* (in *Foro it.*, 1990, IV, 293)). This closed position in respect of any reuse of production residues was confirmed by Court of Justice Decision C-442/92 of 10 May 1995, *EC Commission versus Germany*, (in *Riv.dir.amb.*, 1995, 653) and by Court of Justice Decisions C-304/330, 342/94 and 224/95 of 25 June 1997, *Tombesi* (in *Riv.dir.amb.*, 1998, 47). In Court of Justice Decision C-129/96 of 18 December 1997, *Inter Environment Wallonie*, (in *Riv.dir.amb.*, 1998, 497), the Community judges, discussing the meaning to be given to the term "discard", on which the sphere of application of the notion of waste depends, confirmed that "the mere fact that a substance is used, directly or indirectly, in an industrial production process does not exclude that substance from the notion of waste" (Point 34). Along the same lines, Court of Justice Decisions C-418 and 419/1997 of 15 June 2000, *Arco*, (in *Riv.dir.amb.*, 2000, 691, with comment from A. Gratani) add that "simply because a substance is subject to performance of an operation listed in Annex II B of Directive 75/442/EEC does not mean that the operation consists in discarding that substance and that, therefore, that substance should be considered to be waste pursuant to the Directive " (see Point 51 in this regard).

Subsequently, following the *Palin Granit* decision in 2002 (Court of Justice, 18 April 2002, C-9/00), there was a distinction made between "production residues", i.e. substances that are not specifically sought for the purpose of possible subsequent use

(which should be considered to be waste), and "by-products", i.e. substances that, although not constituting the primary purpose of the production operation, are however "intended to be exploited or sold under favourable conditions, in a subsequent process, without preliminary transformation" by the company (Point 34).

In this ruling, the judges ruled that “the difference between products and wastes lies in the absence of any preliminary transformation operations and in the certainty of reuse without causing damage to the environment” and therefore "there is no justification for subjecting to the provisions of this latter, which are intended to envisage the disposal or recovery of wastes, goods, materials or raw materials that, in economic terms, have the value of products, irrespective of any transformation, and that, as such, are subject to the legal provisions applicable to those products" (Point 35).

The *positive position* in respect of by-products was subsequently confirmed by the Court of Justice, 11 September 2003, C-114/01, *Avesta Polarit Chrome*, (in *Riv.dir.amb.*, 2003, 995, with comment from L. Butti) through exclusion from classification as wastes of those goods, materials or raw materials ("by-products”) that, although obtained accidentally in the course of processing, i.e. as a result other than that principally intended by the production cycle, are actually reused, without preliminary transformation, in the course of the production process. And this was also confirmed by Court of Justice decision C-457/02 of 11 November 2004, *Niselli*, (in *Riv.dir.amb.*, 2005, 275).

While, in a preliminary phase, the notion of by-product was limited to scenarios in which the company that performed the production process subsequently used the by-product in the same production process, that notion was later broadened to include the scenario whereby the same company used the by-product in a different production process or, actually, where the same by-product was used by third parties in another production process.

We therefore arrived at the current definition of by-product, which means any substance or object that is generated on a secondary basis by a production process and that can be used, without any specific processing, in the course of the same or another production process (Article 184bis, Legislative Decree 152/2006).

The new definition of by-product appears to be particularly important, as it clarifies two fundamental points: a) a by-product is not necessarily required to be used in the same production process but may also be used in a subsequent production process; and

b) a by-product is not necessarily required to be used by the same producer but may also be used by a third party.

The notion of by-product is accompanied by the notion of **end-of-waste** or, to use the old terminology, secondary raw material. This type of product exists where the waste is subject to a recovery operation, including recycling and preparation for reuse, and there is a market or a demand for that substance or object and the use of the substance or object does not entail overall negative impacts for the environment or for human health (184ter, Legislative Decree 152 of 2006).

The fundamental difference between by-products and secondary raw materials lies in the fact that the former have never become wastes and, in some way, can be reused as they are without any form of processing, while the latter have become wastes but, following various processing operations, once more become usable products with economic value in the market.

The two notions contribute to limiting the scope of applicability of the notion of waste and, as such, obviously understood subject to the envisaged conditions, contribute to the creation of the recycling society, which constitutes the primary objective of the Community provisions in this area.Il primo e fondamentale problema che si è posto il legislatore italiano è quello di definire cosa sia un rifiuto; ciò appare di assoluto rilievo dato che l'inclusione di una sostanza o oggetto in tale categoria comporta importanti conseguenze in ordine alla sua gestione (necessità di autorizzazioni, obblighi di tracciabilità, aspetti penali etc.).

3. PREVENTION OF WASTE: THE SO-CALLED HIERARCHY.

While, on the one hand, the notions of by-product and end-of-waste materials tend to reduce the objective scope of applicability of wastes, with a prevalence of the concept of "nothing is waste", on the other hand, in current Italian law, there is an increasingly obvious trend towards preventing the formation of waste in all its guises.

And, therefore, while the regulatory approach in the past was geared fundamentally towards "managing" waste, essentially taking for granted the idea that this was a necessary product of contemporary society, a liability that could not be eliminated, today the priority trend is to avoid and/or drastically reduce the production of waste.

The key issue in the waste Directive currently applicable (and recently implemented) is specifically *recycling*, which aims to achieve a real circular economy, or a recycling and recovery society.

In the order of priority of the actions that are required to be performed (the so-called hierarchy in the management of waste or, more correctly, the hierarchy of the procedures for the approach to the environmental problems generated by the production of waste), first position is given over to prevention, with the associated activities (preparation for reuse, reuse, recycling and recovery) and disposal is considered only in very last place.

Each of the steps making up the hierarchy has a specific technical meaning: this ranges from actions that make it possible to reuse the product that has become waste without any processing, such as "preparation for reuse" ("operations associated with inspection, cleaning, disassembly and repair through which products and components of products that have become waste are prepared so that they can be reused without any other pre-treatment"; such as washing of glass bottles: Article 183(q), Environmental Code), and "reuse" ("any operation through which products or components that are not waste are reused for the same purpose for which they have been designed"; such as the use of glass bottles: Article 183(r), Environmental Code), to operations that entail processing such as "recycling" (in this case, the waste is treated to obtain products, materials and substances to be used for the original function: Article 183(u), Environmental Code) and "recovery" ("any operation where the principal outcome is to enable waste to perform a useful role, replacing other materials that would otherwise be used to perform a particular function or to prepare them to perform that function, within the plant or the economy in general"; such as use as fuel or as other means of producing energy; composting; recovery of metals; regeneration of oils, etc.: Article 183(t), Environmental Code).

For the purpose of creating the so-called recycling society, the legislators have identified specific objectives (defined in quantitative terms) and have envisaged a genuine prevention programme, where failure to comply may incur Community penalties.

With reference to the objectives for recycling, Article 181 of the Environmental Code provides that the reuse of materials originating from household waste, as a minimum cardboard, metals, plastics and glass, must be

increased in overall terms by 50% by 2020; and reuse of wastes from construction and demolition must be increased, also by 2020, by 70%.

To achieve these objectives, the national legislators have envisaged a system of differentiated collection (Article 205 of Legislative Decree 152 of 3 April 2006), setting the percentages that must be achieved: 35% by 2006; 45% by 2008 and 65% by 2012 (in 2007, on the basis of the data from the ISPRA, this was 27.5%).

Prevention, however, does not consist merely in the recovery or recycling of wastes, but also in directly avoiding the production of such wastes: significantly, the Environmental Code defines a prevention measure as those implemented before a substance, [a material] or a product has become a waste that reduces "a) the quantity of wastes, including through reuse of products or extension of their life; b) the negative impacts of wastes products on the environment and human health; c) the content of hazardous substances in materials and products" (Article 3(12) of Directive 98/2008 and Article 10 of Legislative Decree 205/2010).

On the basis of the slogan "the best waste is not produced", prevention, in this case, is based on intervention "upstream" from the production or consumption process aimed at reducing the quantity of materials produced and sold so as to obtain a saving in natural resources. This involves the application of the basic principle whereby the less industrial production there is, the less waste there is and, in terms of consumption, the fewer products sold, the less waste will be generated.

And this is what is defined as the "negative" meaning of the principle of prevention: its application results in "non-action" (resulting in "non-production" or "non-sale" of products or materials that could become waste).

In this regard, the principle of prevention may justify, for example, the adoption of real measures for prohibiting certain products: this is the case, for example, for certain products that are particularly damaging for the environment (such as asbestos, DDT, plastic shopping bags).

Still in terms of the same negative aspects, the principle of prevention may also justify the adoption of less extreme measures such as the imposing of taxes on products that may be deemed to be harmful for the environment or even actions intended to provide information to the public (such as labelling).

A further meaning of prevention (defined, in turn, as the "positive" meaning) is that of "production" of products that become waste as late as possible or to the smallest degree possible.

If we succeed in creating products that do not become waste (such as products that dissolve in the environment, because they are made of natural components); products that become waste over a longer period (technically durable products); products in which the components are reusable (multiple use); products in which the components are recyclable; products that are in case ecocompatible, we will truly and fully be applying the principle of prevention.

So as to assess the pollution caused by a product, we need to assess the costs for the entire life cycle of that product: such as, for example, the traditional plastic shopping bag, which, in terms of price, is certainly less than a biodegradable one, but, if we consider the cost of disposal, it is the latter that is better value than the former.

4. . THE "POLLUTER PAYS" PRINCIPLE: THE CHARGE AND THE LIABILITY OF THE PRODUCER.

Application of the "polluter pays" principle means that each consumer or each company that produces waste must pay in proportion to the quantity of waste produced. This therefore incentivises positive behaviours and penalises negative ones.

The problem can be resolved more easily for special wastes and is however particularly complex for urban wastes, as it seems to be particularly difficult to measure, in concrete terms, how much waste each has produced and what are the costs that are common to the entire community (such as those for street cleaning).

Although it is possible to use other types of systems (such as those that envisage the weighing of the waste produced or the sale of bags at a cost that covers collection), legislators have developed a system based on assumptions.

And therefore, in envisaging that the charge should be paid by "anyone who has or owns premises for any purpose", legislators have established that this is "commensurate with the average quantities and quality of the waste produced by unit of surface area, on the basis of the uses and the types of activities performed" (Article 238, Environmental Code) (a dwelling produces less waste, for example, compared to a professional studio).

This then poses the problem of whether this charge should be considered to be a fee and therefore whether it should be private, and the corresponding jurisdiction would therefore be the ordinary civil judge or, rather, a tax or levy and therefore should be public, and the corresponding jurisdiction would therefore be the tax offices. Recently, the Constitutional Court (Decision 238 of 24 July 2009) confirmed the nature of this levy but exclusively with reference to Article 49 of Legislative Decree 22/1997, i.e. the TIA (environmental hygiene tariff), which replaced the TARSU (urban solid waste disposal tariff) envisaged by Article 58 of Legislative Decree 507 of 15 November 1993: the Court avoided ruling on the nature of the TIA (integrated environmental tariff, the same acronym as the above but with a different meaning) envisaged, as we have seen, by Article 238 of the Environmental Code.

A further application of the "polluter pays" principle is the so-called liability of the producer: logic says that a party introducing onto the market a product intended to last for a limited period where there is no possibility that the product could be recycled contributes more to the production of waste than a producer of a durable product with recyclable components. In the same way, a producer who "reappropriates" a product at the end of its life, even if for the purposes of recycling or recovering it, pollutes less.

For certain types of waste, the legislators have envisaged systems of liability: this relates to electrical and electronic equipment, end-of-life vehicles and tyres, for example.

In the implementation of a later Directive, the "liability of the producer" was expressly envisaged (Article 178bis of Legislative Decree 152/2006), whereby anyone producing or selling products of any type may be required to pay the costs for disposal of the products that have been introduced onto the market. The basic idea is to promote ecocompatible design and the reusability of various products, rewarding those producers

that sell products that are more compatible with the environment and making those that produce harmful products pay for them.

5. THE WASTE CONTROL STRUCTURE.

The complexity of the problems facing the waste sector requires a series of entities acting together and that must therefore form the "complete synergistic system" to which reference is made in the Environmental Code (Article 177(6)).

This covers about ten entities with fairly diverse tasks and functions: 1) nationally, there is the Ministry for the Environment; 2) and then the Regions; 3) then the Provinces; 4) the Municipalities; 5) the local water boards (ATO); 6) the companies (frequently fairly mixed) that actually organise the collection and disposal of the waste; 7) the National Waste Observatory (Article 206bis of Legislative Decree 152/2006 (as subsequently amended)); 8) the National Register of Environmental Management Companies (Article 212, Legislative Decree 152/2006 (as subsequently amended)); 9) the Waste Register (Article 189, Legislative Decree 152/2006 (as subsequently amended)); 10) the ISPRA (Article 177(8), Legislative Decree 152/2006 (as subsequently amended)); 11) the Consortia.

In general, the Ministry for the Environment is responsible for setting policy and coordinating the system: it defines the general principles and objectives, the methodologies for integrated waste management, and the standards and technical requirements. At State level, there are also the organisations responsible for information and statistics functions, such as the National Waste Observatory, which is responsible for archiving and electronic documentation, with the support of the provincial observatories, such as the ISPRA, which coordinates the regional environmental protection agencies and performs a similar role for the regional territories, and such as the Waste Register (which records how much waste is produced, the types, where it is transported and where it is disposed of). Still at central level, there is the National Register for Environmental Management Companies, which is

responsible for certification and control functions (verification of the technical suitability of the entities operating in the sector).

The Regions are attributed powers for planning and scheduling (preparation and approval of waste management plans) and authorisation (authorisation for creation of disposal and recovery plant for waste).

The Provinces are responsible in general for powers associated with sanctions and for tasks relating to identification of dumps; the Municipalities and water boards have management authority (control of the management service); and the companies are responsible for operational tasks such as collection.

And then there are the Consortia, which are characterised formally as entities with private legal personality and functionally as entities responsible for the specific and correct management of public interests: this includes the mandatory consortia such as the Used Oils Consortium created in 1982, the Consortium for Disposal of Used Batteries (COBAT) created in 1988, the National Packaging Consortium (CONAI), the National Consortium for Collection and Treatment of Waste Oils and Vegetable and Animals Fats (CONOE) and the Consortium for Recovery of Polyethylene, Plastic, Cardboard and Cellulose, and Steel (POLIECO) created in 1997.

We cannot conclude this report without noting the fact that the fundamental entities required to create the recycling society are really the citizens and all those who perform economic activities: without the support and personal contributions of those people, any attempt to regulate and legislate seems inevitably doomed to failure.

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ENVIRONMENT (CONSTITUTIONAL COURT, 2009)

ANNUAL REPORT - 2011 - ITALY

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Prof. Rosario FERRARA

1. In 2009 the Italian Constitutional Court tackled various themes of environmental nature and its judgments are numerous and significant (over fifty, starting with decision n. 10/2009).

Setting aside the specific topics and sub-topics that are the subject of the individual judgments (affecting all areas: water, air, soil, pollution, etc.), in this field we may observe that the *focus* of the constitutional jurisprudence is still the issue of the division of the legislative competences between the State and the Regions in the field of public policies of protection of the environment when the theme of administrative competences (of the State, of the Regions, and of the lesser territorial authorities) are not directly involved.

In other words, also where the double dilemma arises as to whether on the one hand the environment is a *quid unicum* (an asset which has to be considered as a single unit) or whether it should instead be considered as a complex plurality of assets, and on the other hand whether the environment as such is a non-material or a material asset, the analytical reasoning of our constitutional judge, and naturally of his judgments, always ends up with providing an initial – and sometimes a full - answer to a recurrent question: Who does what and what do they do?

In this context, the constitutional jurisprudence of the year 2009 is aimed at investigating the relationship - which is as chaotic as it is delicate – between the legislative competences of the State and those of the Regions, in the light of articles 117 and 118 of the Constitution, as expressed by Constitutional Law n. 3/2001.

Indeed it is known that art. 117, secondo comma, lettera s) Cost. attributes to the exclusive legislative competence of the State the regulation of the "protection of the environment, of the ecosystem and of the cultural heritage" whereas the subsequent third comma of the same art. 117 identifies as a matter of "concurrent (between the State and the Regions) legislative competence" ("*competenza legislative concorrente*") a plurality of sectors that are objectively implicated and connected with the protection of the environment: the safeguarding of health and food; the administration of the territory; the nationwide production, transportation and distribution of energy; above all the valorisation of the cultural and environmental heritage, and so on.

And to this should be added the fact that, in the light of the fourth comma of art. 117 Cost., any matter that is not expressly attributed either to the exclusive legislative competence of the State, or to the concurrent competence of the State and the Regions, falls under the exclusive (or residual) competence of the Regions. This is a problem which immediately arose with regard to matters which had already traditionally been attributed to the concurrent jurisdiction of the Regions (hunting, building, etc.: cf. the text of art. 117 Cost. prior to the constitutional Reform of 2001).

All this explains and justifies the oscillations of our constitutional jurisprudence and enables us to understand, on the other hand, the important result of conceptual organization that has been achieved through the judgments of the year under consideration.

2. In the year 2009 the Constitutional Court delivered the following judgments on the protection of the environment in our legal system: n.10/2009; n.12/2009; n. 25/2009; n. 30/2009; n. 45/2009; n. 53/2009; n. 61/2009; n.79/2009; n.84/2009; n.86/2009; n.88/2009; n.109/2009; n.122/2009; n.137/2009; n.139/2009; n.141/2009; n.145/2009; n.153/2009; n.165/2009; n.166/2009; n.173/2009; n.186/2009; n.218/2009; n.220/2009; n. 225/2009; n.226/2009; n.232/2009; n.233/2009; n.234/2009; n.235/2009; n.238/2009; n.240/2009; n.241/2009; n.246/2009; n.247/2009; n.248/2009; n.249/2009; n.250/2009; n.251/2009; n.254/2009; n.260/2009; n.272/2009; n.279/2009; n.282/2009; n. 290/2009; n.300/2009; n.302/2009; n.307/2009; n.309/2009; n.314/2009; n.315/2009; n.316/2009; n. 322/2009; n.339/2009.

This is evidently rather a vast body of judgments (53, to be precise!) which are moreover ascribable to some homogeneous trends of thought and deliberation, as we have just seen. It therefore seems preferable to intervene selectively on those decisions that have contributed most towards determining or consolidating the trends and orientations which had already emerged in previous years, or to outline new interpretative lines of the constitutional norms (arts.117 and 118 Cost., which are obviously connected with arts. 9 and 32 as regards the more general principles).

In this context decision n. 61/2009 appears to be of particular value, as its logical antecedent is, to some extent, represented by the previous decisions n. 12/2009, nos. 62, 104 and 105 of 2009.

In decision n. 61/2009 the Court once more tackled the *vexata quaestio* of the distribution of competences between the State and the Regions, in the light of art. 117 Cost., at last and definitively surmounting the jurisprudential trend set in motion by the "mother of all judgments", namely by decision n. 407/2002. After the new "*titolo V°*" of the second part of the Constitution came into force, decision n. 407/2002 led to the formulation of a real process of "dematerialization" of the subject of the environment. Thus the environment (*rectius*, the protection of the environment) was no longer a subject in the technical sense, it was instead a value and, as such, it was able to mobilize the competences of all the subjects of our multilevel system (and especially the legislative competences of the Regions, despite the clear literal contents of the formula about which see art. 117, secondo, comma, lettera s) Cost.).

However, decision n. 61/2009 affirms the pre-eminence – and indeed the exclusivity – of the legislative power of the State in the field of the environment, stating the principle by which, according to what is written in the grounds for the decision: "The Regions, in the exercise of their competences, shall respect the State provisions on the protection of the environment, but for the purposes of achieving the specific objectives of their competences (on the subject of safeguarding health, administration of the territory, exploitation of the environmental heritage, and so on) they may establish higher levels of protection...."

This is a most interesting point as it is not the matter of the environment as such that is, so to speak, fragmented and disjointed, to the extent that it takes on the character of (mere) value. It is instead thanks to fundamental issues of concurrent competence, between the State and the Regions (objectively implicated and connected with the public policies of protection of the environment), that the Regional legislative powers possess an important diffusive capacity, to the point of being able legitimately to raise the threshold and the standards of environmental protection in their territory of competence. This appears to be an important hermeneutic operation if we consider that, in the light of art. 117, terzo comma, Cost., on the subject of competing legislative competences the State can only provide for the "determination of the fundamental principles…" of the single matters. In any case, according to what also the best doctrine has pointed out in comment to this and other coeval decisions by the Constitutional Court (P. MADDALENA, *La tutela dell'ambiente nella giurisprudenza costituzionale,* in *Giornale di diritto amministrativo*, fasc. n.3/2010, 307ff and F. FONDERICO, commenting, moreover, on subsequent decision n. 225/2009, *ivi*, fasc. n. 4/2010, 369ff.), what appears clear and beyond dispute is the exclusive (and even the intangible) nature of the legislative competences of the State in the field of the environment. This means that the albeit active, and not merely marginal or supporting, role of the Regions has to be derived from other matters (those of concurrent competence), without subtracting anything from the ordinative and diriment value of letter *s)* of art. 117, primo comma, Cost.

In this regard the doctrine (P. MADDALENA, o*p. loc. cit.*) certainly hits the mark by pointing out that the judge of the constitutionality of the laws thus states equally the principle according to which the environment is always and in any case "material", objectively a "material" asset (also on this point reiterating the less recent constitutional jurisprudence) while concluding, from another point of view – but in reality with fully consistent logic – that if the State is bound to ensure the "minimum standard of protection" this in no way subtracts from the fact that the aforesaid standards and levels of protection have to in any case entail "appropriate and not reducible" care "of the environment". "Appropriate" and not "reducible" - and therefore "high" - protection which the individual Regions can implement if required, but only thanks to the mobilization of other faculties and powers, in the wake of art.117, terzo comma, Cost.

To fully grasp the elements of originality and novelty of the trend outlined by the aforementioned decision n. 61/2009 which leads, to some extent, to results of a certain degree of stability – almost a solid and stable point from which there is no going back – it may be useful to consult decision n. 62/2008 on the subject of the regulation of refuse which instead appears to follow in the wake of the previously cited decision n. 407/2002 (the "mother of all judgments", as we have already said). And indeed according to this decision of 2008 the legislative competence of the State on the subject of the protection of the environment is interwoven with other interests, with other different competences which are above all ascribable to the Regions: from here to state that the environment is a "value" (and not a matter in the true sense) is a short step, and thus we return to the spirit of decision n. 407/2002.

In any case, the judgments subsequent to decision n. 61/2009 and especially n.12/2009 and n. 30/2009 appear broadly to confirm the assumptions of the often cited decision n. 61/2009. In particular, these judgments uphold the concept that the national regulation regarding the protection of the environment plays the role of "limit", in the sense that it prevails over the regulations made by the Regions (including the Special Statute Regions) even on subjects and fields of their competence.

3. In any case, it is with decision n. 225/2009 that the new jurisprudential trend appears to receive definitive and stable consecration. Without any doubt, this is the weightiest and most important decision to have been issued by our constitutional judge in the year 2009 with regard to the subject of the protection of the environment in our constitutional system (cf. P. MADDALENA, op. loc.cit e F. FONDERICO, *op. loc. cit.*).

Indeed it is stated that: "The subject "protection of the environment" has a content which is at the same time objective, as it refers to an asset (the environment), and finalistic because it aims at the best conservation of the asset itself. On the environment various State and Regional competences are concurrent; however, they remain distinct from one another,

pursuing autonomously their specific objectives through the provision of various disciplines".

So the environment is certainly an asset, it takes the form of a material object and with regard to it there is a plural concurrence of State and Regional powers; the assumptions of this concurrence are in any case constructed according to the principles of autonomy and differentiation/distinction.

The Constitutional Court is perfectly coherent when it adds that "The State is entrusted with the protection and conservation of the environment, by means of establishing "appropriate and not reducible" levels of "protection", while it is up to the Regions, in full respect of the levels of protection established by the State provisions, to exercise their own competences, aimed essentially at regulating the enjoyment of the environment, preventing the environment from being compromised or altered". And so the guideline which had already clearly emerged with the previous decision n. 61/2009 is confirmed, apart from the fact of distinguishing in a clear-cut manner between one competence (of the State) aimed at ensuring appropriate and not reducible levels of protection of the environment and the direct Regional powers aimed instead at regulating the concrete forms of the enjoyment of the asset "environment", without that enjoyment turning into a lower level of its protection.

To this should be added, on the same wavelength as a large part of the jurisprudence which became consolidated in the year 2009, that "State competence, when it is the expression of the protection of the environment, is a limit to the exercise of the Regional competences", pointing out that "The Regions themselves, in the exercise of their competences, shall not violate the level of protection of the environment set by the State" and that, moreover, "The Regions themselves, so long as they remain within the limits of the exercise of their competences, can attain higher levels of protection, thus having an indirect effect on the protection of the environment". Which, all things considered, cannot let us forget, in the opinion of the Constitutional Court, that "This possibility is, however, excluded in the cases in which the State law has to consider itself binding, as it is the fruit of a balance between several interests which may be in contrast with each other".

It is certainly significant that our constitutional judge has reached clear-cut conclusions in the context of a process of balancing/comparison between the protection of the environment and that of health (art. 32 Cost., to be read in connection with art. 117, terzo comma, Cost.).

Indeed the Court fully grasps the links between functions (and above all between culture and values) which bind together in a sort of inextricable *quid unicum* the safeguarding of health and the protection of the environment, as "there is no doubt that the healthiness of the environment conditions human health". And on the other hand it is no less true (at least from the legal point of view!) that "the two competences have different objects", in the sense that the Regional regulations aimed at safeguarding the human right to health can only reflect indirectly on the environment which has already been made the subject of "appropriate" regulations and protection by the law of the State.

Consequently, in the field of the protection of the environment the State has exclusive legislative competence. According to art. 188 Cost. the State therefore has the right grant to itself, i.e. to the Regions or to the lesser territorial authorities, the exercise of administrative functions regarding the environment, in the light of the principles of subsidiarity, appropriateness and differentiation.

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DROIT ADMINISTRATIF ET FINANCES PUBLIQUES

APPORTS DE L'ANNEE - 2010 - FRANCE

(Mars 2011)

Prof. Martin COLLET*

INDEX

Une fois n'est pas coutume, le législateur a fait preuve, au cours de l'année 2010, d'une grande retenue en matières financière et fiscale. S'agissant des dispositions nouvelles susceptibles d'intéresser tout particulièrement les « administrativistes », mérite seulement d'être évoquée la réforme de la fiscalité de l'urbanisme. La loi de finances rectificative pour 2010 (*L. fin. rect. 2010, n°2010-1658, 29 déc. 2010, art. 28*) crée ainsi deux nouvelles

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taxes, la taxe d'aménagement et le versement pour sous-densité, appelées à se substituer, à terme, aux quinze prélèvements pesant jusqu'alors sur les opérations d'urbanisme. Poursuivant avant tout un objectif de simplification du droit, cette réforme entend également s'inscrire dans une logique « environnementale » : les nouvelles taxes ont vocation à pénaliser l'étalement urbain et à densifier l'habitat (en renforçant la taxation des terrains peu construits), afin donc de préserver les espaces non urbanisés.

L'actualité jurisprudentielle fut quant à elle beaucoup plus nourrie en 2010. En matière fiscale comme ailleurs – et ici plutôt plus qu'ailleurs – cette année restera marquée par l'entrée en vigueur de la question prioritaire de constitutionnalité (I). En outre, plusieurs décisions du Conseil d'État comme de la Cour des comptes méritent d'être évoquées, au regard de leur impact potentiel au-delà du strict champ du droit financier. On en retiendra quatre, en particulier : la première porte sur le principe de l'« *estoppel* » et son hypothétique importation par les juges fiscal et administratif (II) ; la deuxième concerne les aspects financiers et fiscaux des conventions d'occupation du domaine public (III) ; les deux dernières intéressent le contrôle par les comptables publics du versement des subventions comme du règlement des marchés publics (IV).

1. LA QUESTION PRIORITAIRE DE CONSTITUTIONALITE EN MATIERE FISCALE

Depuis le 1er mars 2010 et l'entrée en vigueur de la réforme constitutionnelle du 23 juillet 2008, le Conseil d'État et la Cour de cassation ont la faculté de renvoyer au Conseil constitutionnel une question prioritaire de constitutionnalité (QPC), relative à la conformité d'une loi en vigueur aux « droits et libertés » garantis par la Constitution, lorsque la question est soulevée à l'occasion d'un litige devant une juridiction administrative ou judiciaire (Const., art. 61-1). Ainsi saisi, le Conseil constitutionnel a la faculté d'abroger ladite loi, pourtant entrée en vigueur, s'il la juge contraire aux dispositions constitutionnelles (Const., art. 62). Comme on pouvait s'y attendre, la législation fiscale a occupé la première place tant au palmarès du nombre de griefs d'inconstitutionnalité soulevés devant les juridictions administratives qu'à celui des questions transmises par elles au Conseil constitutionnel (la chose est moins flagrante du côté du juge judiciaire, dans la mesure où ses compétences fiscales restent très réduites : il

ne traite chaque année qu'environ 5% du contentieux de l'impôt). Face à ces QPC, le juge fiscal a assurément développé une « politique de renvoi » assez généreuse, afin de ne pas entraver le bon fonctionnement de la procédure (A). Quant aux décisions rendues par le Conseil constitutionnel, elles suggèrent une appréciation beaucoup plus nuancée : indépendamment même des solutions retenues, la manière pour le moins elliptique dont bon nombre de ces décisions sont motivées ne va pas sans susciter l'étonnement (B).

1.1. La politique de renvoi du Conseil d'État

À la lecture des décisions rendues par le Conseil d'État et par les juridictions inférieures, un constat s'impose : le juge administratif entend bien « jouer le jeu » de la QPC. Cette impression ne ressort pas tant des statistiques de renvoi (finalement peu significatives car avant tout dépendantes de la pertinence des questions posées) que du soin manifeste avec lequel les membres de la juridiction administrative tentent de s'approprier la jurisprudence constitutionnelle, afin de remplir leur mission de « tri sélectif » des questions soulevées par les parties. La lecture des conclusions des rapporteurs publics près le Conseil d'État, prononcées sur les affaires en question, est à cet égard éloquente. Ceux-ci s'efforcent manifestement d'apprécier le « sérieux » des questions de constitutionnalité – puisque tel est le critère principal qui détermine la transmission au Conseil constitutionnel – en s'imprégnant des décisions de leur voisin du Palais-Royal et en déployant d'importants efforts de synthèse de cette jurisprudence, pour tenter d'en dégager les lignes de force. La tâche apparaît bien souvent complexe tant, on y reviendra, cette jurisprudence constitutionnelle n'est pas toujours d'une formidable clarté.

Le tri opéré parmi les nombreuses questions relatives au respect des principes d'égalité devant la loi fiscale (qui découle de l'article 6 de la Déclaration de 1789) et d'égalité devant les charges publiques (que le Conseil constitutionnel rattache à l'article 13 de la Déclaration) illustre bien cette logique d'imprégnation. Le Conseil d'État semble en effet en pleine harmonie avec la jurisprudence constitutionnelle lorsqu'il considère que le caractère apparemment discriminatoire de certains impôts qui visent une catégorie particulière de contribuables ou d'activités ne pose guère de difficulté, dès lors que la catégorie en question est délimitée clairement et, surtout, sur le fondement de critères «

objectifs et rationnels », c'est-à-dire cohérents avec l'objectif d'intérêt général poursuivi par le législateur (v. par ex. *CE, 22 sept. 2010, n°341.064, Sté Manirys : Dr. fisc. 2010, n°48, comm. 580, concl. E. Geffray*).

C'est en matière répressive que le Conseil d'État semble faire preuve de la plus grande vigilance, saisissant volontiers le Conseil constitutionnel des éventuelles atteintes aux principes qui président à l'édiction des sanctions fiscales (principes de nécessité, de proportionnalité, de personnalité et d'individualisation des peines, principe du respect de la présomption d'innocence et des droits de la défense, en particulier). Ces renvois sont même parfois opérés contrairement aux conclusions fort argumentées du rapporteur public – montrant bien là le souci du Conseil d'État de mettre un terme aux discussions sur la constitutionnalité de ces dispositifs (v. par ex. *CE, 17 déc. 2010, n°331.113, M. et Mme Bertrand, n°336.406, M. Blanc, n°344.316, M. Soares, n°341.014, Sté Seras II : Dr. fisc. 2011, n°3, comm. 118, concl. P. Collin*).

1.2. Les décisions du Conseil constitutionnel

À en juger par la quinzaine de décisions « QPC » concernant des dispositions fiscales rendues en 2010, l'attitude du Conseil constitutionnel tient, en la matière, en un mot : la prudence. Cette prudence apparaît pleinement compréhensible lorsqu'elle se manifeste par un nombre relativement réduit d'invalidations, en particulier sur le fondement du principe d'égalité devant les charges publiques : une mise en œuvre plus pointilleuse de ce principe emporterait vraisemblablement un inquiétant risque d'effet « boule de neige » (1). Elle devient en revanche franchement contestable lorsqu'elle se traduit par une tendance du Conseil constitutionnel à s'en tenir à une motivation pour le moins sommaire de ses décisions (2). Une telle attitude s'est en effet dessinée dans la mise en œuvre des principes constitutionnels relatifs au procès équitable, à l'encadrement des sanctions ou, encore, au droit de propriété – et ce qu'il s'agisse de décisions de conformité ou, plus grave, de non-conformité.

1) Dans son habit traditionnel de juge des lois non promulguées, le Conseil constitutionnel a développé ces dernières années une jurisprudence assez audacieuse, s'agissant notamment des exigences tirées du principe d'égalité devant la loi et devant les charges publiques, ou encore du principe de nécessité des dispositions fiscales répressives. Les premières décisions rendues à la faveur de QPC suggèrent que le changement de costume n'est peut-être pas sans influence sur la manière d'appliquer les principes en question. Il semble en effet que, pour l'heure, le Conseil fasse preuve d'une grande prudence, en rejetant l'essentiel des questions portées devant lui, et en formulant des réserves d'interprétation voire des invalidations dont les effets restent pour le moins mesurés.

Cette prudence s'est manifestée, en premier lieu, à propos de dispositifs législatifs ayant pour objet de prévenir certains comportements frauduleux – soit en réprimant purement et simplement ces comportements (afin donc de les interdire) soit, plus subtilement, en leur attachant un traitement fiscal défavorable (afin de les dissuader). Une telle attitude s'explique par le souci, rappelé à l'envi par le Conseil constitutionnel, de ne pas entraver « l'objectif constitutionnel de lutte contre l'évasion fiscale » (*Cons. const., déc. n°2010-16 QPC, 23 juill. 2010, Exbrayat : RJF 11/10, n°1072*), avec lequel doit se concilier la mise en œuvre des droits et libertés garantis par la Constitution. Dans un cas tout de même, le juge constitutionnel a fait preuve d'une (relative) sévérité : il a déclaré non conforme à la Constitution une disposition prévoyant la une peine complémentaire obligatoire, censée accompagner l'ensemble des décisions de condamnation pénale pour fraude fiscale (*Cons. const., déc. n°2010-72/75/82 QPC, 10 déc. 2010, M. D. et a. : Dr. fisc. 2010, n°50, act. 477*). Rappelons que le Code général des impôts permet au juge pénal de réprimer, à la demande de l'administration, les cas les plus graves de fraude fiscale (alors même que ces cas conduisent généralement, en outre, à l'édiction de sanctions administratives). Or, d'après la loi, le tribunal correctionnel était tenu d'ordonner « dans tous les cas » la publication de ses décisions de condamnation au Journal officiel et surtout dans deux journaux de son choix, et aussi de prescrire son affichage « sur la porte extérieure de l'immeuble ou des établissements professionnels » des contribuables condamnés, lorsque la fraude visait des impôts dus « au titre de l'exercice d'une activité professionnelle » (*Cass. crim., 28 fév. 2007, n°06-83.014, Époux L. : RJF 7/07, n°841*).

C'est dire l'effet stigmatisant que le législateur souhaitait attacher à la condamnation pénale, et finalement l'effet dissuasif recherché. Il est clair que cette peine complémentaire, au regard de ses conséquences sur la réputation de la personne condamnée, était généralement plus redoutée encore que la condamnation à une peine d'amende ou même de prison avec sursis. Le Conseil constitutionnel a toutefois considéré que, au regard de son automaticité, ce dispositif ne permettait pas d'assurer « le respect des exigences qui découlent du principe d'individualisation des peines » (cons. 5).

S'agissant du contrôle des « simples » dispositions d'assiette (n'ayant pas pour objet principal de lutter contre la fraude), l'application des principes d'égalité devant la loi et devant les charges publiques apparaît pour l'heure tout aussi prudente. Il ne doit toutefois pas être perdu de vue que la mise en œuvre du principe d'égalité apparaît, en matière fiscale, particulièrement périlleuse. La difficulté est d'abord technique tant, presque par « nature », la loi fiscale opère de multiples distinctions – économiques, sociales, familiales, etc. – entre catégories de contribuables pour leur attacher des traitements différents. Or, ces distinctions répondent généralement à de complexes arbitrages politiques, qu'il s'agisse de porter une vision de la justice fiscale et de définir les modalités d'appréciation des « capacités contributives » qui en résultent, ou qu'il s'agisse de déterminer les comportements que les pouvoirs publics entendent encourager ou dissuader, au nom de l'intérêt général. Difficile donc, pour le Conseil constitutionnel, de faire le tri entre les différences de traitement suffisamment justifiées et celles ne l'étant que d'une manière plus aléatoire. Le caractère périlleux de l'exercice tient ensuite aux risques qu'il implique, singulièrement dans le cadre d'un contrôle a posteriori. En raidissant son contrôle du principe d'égalité, le Conseil ne manquerait pas de créer un formidable « appel d'air » contentieux : rares sont les contribuables qui n'estiment pas, de près ou de loin, faire l'objet d'un traitement fiscal inégalitaire, discriminatoire, confiscatoire, etc., et tout aussi rares sont les dispositions de la loi fiscale qui ne peuvent être effectivement interrogées sur ce terrain (dès lors que, toutes ou presque, opèrent de multiples et soigneuses distinctions de situations et de traitements, comme on le disait). Sans doute ces considérations expliquent-elles le peu d'empressement manifesté par le Conseil à censurer les dispositifs d'assiette dont il fut saisi, en particulier sur le fondement de l'article 6 de la Déclaration de 1789 (v. par ex. *Cons. const., déc. n°2010-28 QPC, 17 sept. 2010, Assoc. Sportive Football Club de*

Metz : RJF 12/10, n°1214 ; Cons. const., déc. n°2010-11 QPC, 9 juill. 2010, Machado : RJF 11/10, n°1071 ; Cons. const., déc. n°2010-58 QPC, 18 oct. 2010, Procos : RJF 1/11, n°80). Dans tous ces cas, l'exercice de délimitation par le législateur des catégories de contribuables concernés par les dispositifs litigieux apparut satisfaisant aux yeux de Conseil.

2) Sur le terrain de la motivation de ses décisions, la prudence dont a également fait preuve le Conseil constitutionnel semble, pour la peine, excessive et finalement contestable. En particulier, la première décision « QPC » rendue en matière fiscale (*Cons. const., déc. n°2010-5 QPC, 18 juin 2010, SNC Kimberly Clark : Dr. fisc. 2010, n°48, comm. 576, note M. Guichard et R. Grau*) l'a conduit à considérer – d'une manière assez compréhensible – que la méconnaissance par le législateur de sa propre compétence (c'est-à-dire un cas d'incompétence négative) n'était invocable dans le cadre d'une QPC « que dans les cas où est affecté un droit ou une liberté que la Constitution garantit ». Sur le terrain fiscal, il semble donc qu'une « simple » violation des principes de la légalité de l'impôt et du consentement à l'impôt (inscrits aux articles 14 de la DDHC et 34 de la Constitution) – principes justifiant la compétence quasi-exclusive du législateur pour fixer l'assiette et le taux des impositions de toutes natures –, ne soit pas susceptible d'être sanctionnée à la faveur d'une QPC. Mais, au-delà de cette pétition de principe, le sens exact de la formule employée par le Conseil reste pour le moins mystérieux. Et, paradoxalement, le mystère semble s'épaissir à mesure que la jurisprudence se développe. L'examen par le Conseil de la « contribution aux dépenses d'équipements publics », consistant à permettre aux communes d'imposer aux constructeurs la cession gratuite d'une part de leur terrain pour l'affecter à « certains usages publics », a ainsi conduit le juge à identifier un cas d'incompétence négative affectant le droit de propriété (*Cons. const., déc. n°2010-33 QPC, 22 sept. 2010, Sté Esso SAF : AJDA 2010, p. 2384, note F. Rolin*). Toutefois, dans cette décision, le Conseil s'abstient de donner la moindre précision tant sur la nature de l'atteinte portée au droit de propriété que sur les raisons pour lesquelles les garanties en cause lui paraissent insuffisantes, ce qui ne contribue guère, comme a pu s'en émouvoir à juste titre Frédéric Rolin (*note préc., p. 2386*), à la clarté et à l'intelligibilité de la jurisprudence constitutionnelle.

Une même confusion est à déplorer s'agissant de la première décision « QPC » ayant constaté la violation de la Constitution par le législateur fiscal – du fait, en l'occurrence, d'une disposition rétroactive (*Cons. const., déc. n°2010-78 QPC, 10 déc. 2010, Sté Imnoma : Dr. fisc. 2010, n°50, act. 476*). La chose est d'autant plus regrettable que, en l'espèce, le Conseil constitutionnel juge contraire aux principes découlant de l'article 16 de la Déclaration une disposition d'un texte que le Conseil d'État avait, de son côté, jugé conforme à l'article premier du premier protocole additionnel à la Convention européenne des droits de l'homme (*CE, 19 nov. 2008, n°292.948, Sté Gétécom : Dr. fisc. 2009, n°6, comm. 179, concl. N. Escaut, note P. Fumenier*) : l'occasion était belle pour la juridiction constitutionnelle d'expliciter sa manière d'appliquer des principes dont la formulation ne se distingue que partiellement de celle qui prévaut en droit européen des droits de l'homme. Pourtant, le Conseil s'en tient à relever que le texte en question porte atteinte à « l'équilibre des droits des parties » en s'appliquant différemment à l'administration fiscale et au contribuable. Pourtant, ce type de dispositions législative rétroactive a toujours peu ou prou pour objectif de porter atteinte à cet équilibre des droits des parties, en particulier lorsqu'elle prive certains administrés de la possibilité d'obtenir l'annulation d'un acte administratif (comme c'était le cas en l'espèce). Comme l'affirment régulièrement les juges européens comme constitutionnels, la question n'est donc pas tant de constater une telle rupture d'équilibre que de s'interroger sur le point de savoir si elle apparaît ou non justifiée par un motif d'intérêt général suffisant. Or, en l'espèce, le Conseil reste muet sur ce point. Difficile dès lors de ne pas rester quelque peu dubitatif à la lecture de la décision. Tout au plus peut-on considérer qu'elle a le mérite de montrer que le contrôle de conventionalité n'absorbe pas tout à fait le contrôle de constitutionnalité : il apparaît parfois opportun de contester sur le fondement de la Constitution des dispositions législatives jugées conformes à la CEDH par les juridictions ordinaires. Reste à savoir dans quels cas…

Certes, le Conseil constitutionnel s'est montré plus loquace dans l'examen de certaines lois de validation. Ainsi, en particulier, s'est-il efforcé de relever avec soin les différentes raisons invoquées par le législateur pour justifier la modification rétroactive du « prélèvement sur le produit des jeux de casinos » (*Cons. const., déc. 14 oct. 2010, n°2010-53 QPC, Sté Plombinoise de Casino : RJF 1/11, n°82*). Il n'en reste pas moins que ces

motivations à éclipses conduisent à s'interroger sur la capacité du Conseil constitutionnel à assurer véritablement son nouveau rôle de juge de plein exercice.

2. LE REJET DU PRINCIPE DE L'*ESTOPPEL* AU REGARD DE LA « NATURE » DU CONTENTIEUX FISCAL

Un an après la (timide) consécration par le juge civil du principe selon lequel une partie ne peut, dans certaines circonstances, se contredire au préjudice d'autrui (*Cass., Ass. plén., 27 févr. 2009, n°07-19.841, PBRI, Sté Sédéa électronique c/ Sté Pace Europe et a. : JCP éd. G 2009, II, 10073, note P. Callé ; D. 2009, n°18, p. 1245, note D. Houtcieff ; LPA 13 mai 2009, n°95, p. 7, avis R. de Gouttes*), le Conseil d'État estime dans un avis contentieux du 1er avril 2010 (dont il a été fait état dans cette revue : *CE, Avis, 1er avr. 2010, n°334.465, SAS Marsadis : Dr. fisc. 2010, n°17-18, comm. 299, concl. P. Collin ; RJEP 2010, jur. 42, note M. Collet*) qu'une telle règle de procédure, relevant dans certains systèmes juridiques étrangers du principe de l'*estoppel*, n'est pas invocable en contentieux fiscal. L'intérêt de cet avis ne tient pas tant à sa conclusion – assez prévisible – qu'au raisonnement à la fois sophistiqué et pédagogique qui le soutient et s'adresse aussi bien aux fiscalistes qu'aux administratives. Aux premiers, le Conseil propose en effet une intéressante définition de ce qui caractérise, d'après lui, le contentieux fiscal. Quant aux seconds, ils peuvent trouver dans l'avis *Marsadis* de quoi alimenter la réflexion sur les modalités éventuelles d'importation de mécanismes issus de droits étrangers.

La question de la « nature » du contentieux fiscal est en effet au cœur de la réponse donnée par le Conseil au tribunal qui le sollicitait sur le point de savoir si un principe d'*estoppel* était invocable en cette matière. En droit de l'arbitrage, où il trouve à s'épanouir, ce principe prend la forme d'une fin de non-recevoir qu'une partie peut opposer au moyen soulevé à son détriment par son adversaire, lorsque ce moyen contredit les moyens précédemment soulevés ou le comportement jusqu'alors adopté dans le cadre de procédures certes distinctes mais visant un même litige et, surtout, concernant les mêmes parties. Le Conseil d'État estime que le caractère essentiellement objectif du droit fiscal et, partant, du contentieux fiscal, exclu a priori la consécration d'un tel principe qui suppose d'attacher certains effets de droit aux comportements des parties, et donc à déterminer leur situation

juridique au regard de considérations non prévues par la loi. Comme le rappelle le Conseil, « les obligations des contribuables résultent des textes législatifs et réglementaires, à l'application desquels l'administration ne peut renoncer », et la mission du juge de l'impôt, lorsqu'il est saisi, consiste tout simplement à assurer « l'application (…) de la loi fiscale ».

Prenant toutefois pleinement au sérieux la question du tribunal, le Conseil ne se contente pas d'y opposer une fin de non-recevoir : il s'efforce de souligner comment les principales garanties d'ores et déjà offertes aux contribuables (par la loi comme par la jurisprudence), sans se substituer tout à fait au principe de l'*estoppel*, ont également pour objet de protéger les administrés contre « les comportements de l'administration qui pourraient être qualifiés de changement de position ». Autrement dit, le droit fiscal procédural accorde déjà au contribuable une batterie de garanties qui assurent une protection particulièrement solide contre les changements de doctrine les plus problématiques de l'administration. Ce faisant – et voilà qui devrait intéresser l'ensemble des administrativistes – le Conseil apparaît donc comme partisan d'une « logique de prudence » (*F. Melleray, « Note sous : Avis CE, 1er avr. 2010, SAS Marsadis » : Dr. adm., juin 2010, n°102, p. 45*) à l'égard de ce principe de droit étranger, mais en aucun cas d'une logique de défiance. Au contraire, même : il se montre ici particulièrement attentif aux mécanismes procéduraux développés par les ordres juridiques voisins – du côté du droit international comme du droit privé –, et n'écarte l'importation du principe de *l'estoppel* qu'au terme d'un examen sérieux de son contenu et de ses effets potentiels puis, surtout, après avoir constaté que notre droit public interne offrait d'ores et déjà des garanties équivalentes. Ce faisant, le juge fait sienne une doctrine de bon aloi, portée par de nombreux spécialistes de droit comparé, selon laquelle : « avant de réclamer la création d'une principe normatif supplémentaire – en outre peu adapté à notre tradition –, il faut chercher si les instruments dont dispose notre droit positif actuel, quitte à être améliorés, ne pourraient pas suffire pour lutter contre l'insécurité juridique subjective » (pour reprendre la mise en garde de Sylvia Calmes, à propos du principe du respect de la confiance légitime : *Du principe de protection de la confiance légitime en droits allemand, communautaire et français : Dalloz, 2001, p. 583*). Une lecture a contrario de cette doctrine est évidemment tentante : elle suggère que, face à une situation dans laquelle les règles de procédure contentieuse n'offriraient aux administrés qu'une garantie sommaire de leurs droits

subjectifs – en comparaison de ce que le droit international ou le droit privé prévoit dans des situations comparables –, le Conseil d'État pourrait s'enhardir à étendre le champ ou la portée de certains mécanismes procéduraux. Voilà une belle invitation faite aux plaideurs de se mettre au droit comparé.

3. CONVENTIONS D'OCCUPATION DU DOMAINE PUBLIC ET DROIT FISCAL

Bien qu'il intéresse au premier chef le régime des contrats administratifs et le droit de la domanialité publique, l'arrêt rendu le 5 mai 2010 à la demande de M. Bernard n'est pas sans incidence sur le terrain fiscal (*CE, 5 mai 2010, n°301.420, M. Bernard : Dr. fisc. 2010, n°29-34, comm. 427, note M. Collet*). Le Conseil d'État y consacre la possibilité pour le gestionnaire du domaine public de modifier unilatéralement les clauses financières des conventions d'occupation domaniale – et en particulier les clauses, très fréquentes en pratique, qui prévoient la prise en charge par le cocontractant de l'administration des impositions assises sur le domaine concédé. Rappelons pourtant que si le pouvoir de modification unilatérale reconnu aux personnes publiques compte parmi les « règles générales applicables aux contrats administratifs » (*CE, 2 févr. 1983, n°34.027, Union des transports urbains et régionaux : Rec. p. 33*), le Conseil d'État exclut traditionnellement que ce principe conduise l'administration à modifier unilatéralement les conditions financières prévues par le contrat (*CE, 16 mai 1941, n°58.205, Commune de Vizille : Rec. CE 1941, p. 93 ; CE, 29 sept. 2000, n°186.916, Société Dezellus Métal Industrie : Rec. p. 381*). À l'inverse, dans son arrêt Bernard, le Conseil d'État reconnaît au gestionnaire du domaine public la faculté de faire usage de son pouvoir de modification unilatérale du contrat d'occupation pour en « modifier les conditions pécuniaires » et notamment, comme en l'espèce, afin de « répercuter sur les amodiataires une partie de la cotisation de taxe foncière mise à sa charge par l'administration fiscale ». Même limitée aux conventions d'occupation domaniale, l'innovation est importante.

Évidemment, la prérogative reconnue au gestionnaire du domaine n'est pas sans limite. L'arrêt Bernard s'efforce en effet d'encadrer le pouvoir de révision octroyé à l'autorité gestionnaire au regard de l'objet même de la convention, ce qui le conduit fort logiquement à s'inspirer des principes relatifs à la révision des conditions tarifaires des

permissions unilatérales d'occuper le domaine (v. *CE, 12 oct. 1994, n°123672, Visconti : Rec. CE 1994, p. 442*). Ainsi, aux termes de la décision Bernard, la révision unilatérale des clauses financières doit nécessairement être justifiée par « un fait nouveau survenu postérieurement à la conclusion du contrat ». On suppose qu'un tel fait justificatif peut d'abord tenir à une amélioration des conditions d'usage de l'autorisation domaniale, ou encore à un accroissement des charges – notamment fiscales – pesant sur le gestionnaire, comme c'était le cas en l'espèce.

4. LE CONTROLE EXERCE PAR LES COMPTABLES PUBLICS SUR LES SUBVENTIONS ET SUR LES MARCHES PUBLICS

Versées, en principe, dans le but de favoriser la réalisation d'activités d'intérêt général, les subventions accordées par les collectivités publiques aux personnes privées – association, en premier lieu – font aujourd'hui l'objet d'une réglementation très fine. Indépendamment même des contraintes que le droit de l'Union européenne fait peser sur la délivrance de subventions susceptibles d'être qualifiées d'aide d'État, le droit français s'est considérablement perfectionnée, depuis plusieurs années, pour tenter de prévenir certaines dérives constatées par le passé : sans même parler des cas les plus graves de favoritisme, bon nombre de collectivités locales avaient pris l'habitude de confier à des associations le soin d'assurer à leur place certaines missions d'intérêt général (la gestion de services culturels ou encore d'équipements sportifs, notamment), tout en leur servant de généreuses subventions afin que les tarifs réclamés aux usagers restent modiques. Or, bien souvent, les associations en question pouvaient apparaître comme de simples démembrements de l'administration : en suscitant la création de telles « associations transparentes » puis en participant de manière significative voire exclusive à leur financement, les collectivités publiques pouvaient trouver un moyen commode, quoique illégal, d'échapper aux règles les plus contraignantes de la comptabilité publique, de la fonction public, de la commande publique, etc. (*v. par ex. CE, 11 mai 1987, n°62.459, Divier : Rec. CE, p. 167 ; CE, 5 déc. 2005, n°259748, Département de la Dordogne, AJDA 2006, p. 661*).

Afin de limiter le développement de telles associations et, plus généralement, de prévenir les risques de détournement d'argent public, l'importante loi du 12 avril 2000

(n°2000-321) relative aux droits des citoyens dans leurs relations avec les administrations et son décret d'application du 6 juin 2001 (n°2001-495) imposent aux collectivité publiques d'établir une « convention » dès lors qu'elles versent à une personne privée une subvention dont le montent est supérieur à 23.000€. Cette convention doit définir l'objet, le montant et les conditions d'utilisation de la subvention. Or, dans un arrêt du 18 mars 2010 (*C. comptes, 18 mars 2010, n°57188, Commune de Pacé: AJDA 2010, p. 1260, chr. N. Groper et C. Michaut*), la Cour des comptes a eu l'occasion de rappeler le rôle essentiel de prévention des irrégularités que doivent jouer les comptables publics, en cette matière. Il revient en effet à ces fonctionnaires, seuls habilités à manier l'argent public (et, en particulier, à procéder aux opérations de paiement décidées par les « ordonnateurs », c'est-à-dire les gestionnaires publics – fonctionnaires d'autorité ou élus), de vérifier l'existence d'une telle convention de subventionnement et d'en demander la production à la collectivité publique avant de procéder à leur paiement. Dans le cas inverse, la comptable engage sa responsabilité personnelle et pécuniaire vis-à-vis de la collectivité.

Dans la même veine, mais d'une manière peut-être plus contestable, la Cour des comptes a également eu l'occasion de préciser les obligations pesant sur les comptables en matière de marchés publics. Aux termes d'un arrêt du 23 juin 2010 (*C. comptes, 23 juin 2010, n°58.487, Grand port maritime de Bordeaux : Gestion & Finances publiques 2011, p. 152, chr. M. Lascombe et X. Vandendriessche*), la Cour estime que du fait de l'accumulation d'erreurs émaillant manifestement les pièces produites par un ordonnateur, celles-ci ne pouvaient « constituer le support de quelque marché public régulièrement passé ». En s'abstenant de suspendre le paiement des factures en cause, le comptable public engage ainsi sa responsabilité personnelle et pécuniaire. Comme le relèvent les commentateurs de la décision, celle-ci risque fort de provoquer « un raidissement des comptables publics qui pourraient légitimement considérer qu'il leur serait désormais enjoint de ne plus limiter leur contrôle à la production des pièces justificatives, mais d'opérer un véritable contrôle de fond de celles-ci » (*M. Lascombe et X. Vandendriessche, préc., p. 162*). Pourtant, la jurisprudence considère traditionnellement que les comptables publics « n'ont pas le pouvoir de se faire juges de la légalité des décisions administratives » ordonnant les dépenses (*CE, Sect., 5 févr. 1971, n°71.173, Sieur Balme, Rec. p. 105, concl. Grévisse*) ; en effet, pour apprécier la validité des créances, les comptables doivent

uniquement exercer leur contrôle « sur le productions des justifications » (id.). L'arrêt du 23 juin 2010 a fait l'objet d'un pourvoi devant le Conseil d'État (juge de cassation des décisions de la Cour des comptes) : celui-ci aura ainsi l'occasion de confirmer ou d'infirmer cet élargissement des missions de contrôle confiées aux comptables publics.

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NEW RULES ABOUT PUBLIC FINANCE AND ACCOUNTANCY

ANNUAL REPORT - 2011 - ITALY

(January 2011)

Prof. Livia MERCATI

INDICE

1. FOREWORD

In the last three decades the italian legislation concerning public finance and accountancy has been changed almost every ten years; the reference text dates back to 1978 (law n. 468) and was later amended by three laws: n. 362/1988, n. 94/1997 and n. 208/1999.

As far as public finance management and planning are concerned, several regulations have jointly defined a set of rules which is much more complicated and

structured than one would imagine by taking into account the article 81 of the Constitution, that, as is widely known, refers to the annual budget only.

It is important to remember that with law n. 468/1978 both Financial Law and Cash Basis Accounting were introduced together with Accrual Basis Accounting, the Triennial Budget, and Cash Reports. Furthermore law n. 362/1988 created the Financial Economic Programming Document (DPEF) and the provisions linked with the financial law. Law n. 94/1997 restructured the annual budget, distinguishing between the so-called political budget, divided into basic provisional units of resource (UPB) which are subject to Parliament approval, and the so called administrative or management budget, which is then divided into expenditure categories. Finally law n. 208/1999, widened the content of the Financial law, set up a reserve fund for standing expenses and made compulsory the writing of a technical report about the schemes of legislative decrees.

Law n. 196/31st December 2009, which was introduced to make the existing regulations on Public Finance match the needs created by the institutional changes and the state of public finances, abrogated all these regulations and systematized the whole discipline modifying then evry aspect of Public Finance regulation.This law in particular modified the coordination between different levels of government, the definition of the objectives of public finance, the harmonization of accounting systems, the planning of the objectives of public finance, the documents regarding public accounting, the financial coverage of the expenditures, the Cash Management of public entities, and the planning of cash flows and control systems.Nell'ultimo trentennio il legislatore italiano è intervenuto in materia di contabilità e finanza pubblica con cadenza pressoché decennale; il testo normativo di riferimento risale infatti al 1978 (l. n. 468) ed è su quel testo che hanno inciso i successivi interventi di riforma, introdotti con la l. n. 362/1988, con la l. n. 94/1997 e con la l. n. 208/1999.

2. THE MAIN CONTENTS OF LAW NUMBER 196/2009

The new public finance and accountancy law is therefore a new organic regulation that implements changes by both making specific provisions immediately effective and by referring to delegated legislation. Much of legislation has been delegated to the Government, and therefore most of the reform will be realized by specific legislative decrees, such as the transition to cash only budget, the harmonization of accounting systems, the consolidation of a budget system structured in missions, programmes and actions, the strengthening of accounting systems and the creation of a Consolidation Act regarding public accountancy and treasury (see article 2, article 30, paragraph 8, articles 40, 42 and 49).

The key points of the law can be summarized as follows:

a) the law is aimed at realizing a unitary policy on public finance and an accounting harmonization which should be in line with the so called ?Fiscal Devolution? (law n. 42/2009). The principle according to which the objectives of Public Finance are shared at all levels of government and among all the entities that make up Public Administration is therefore reaffirmed. All data concerning different administrations must be gathered and published using the same methodology and the same accounting criteria. The reform implements this aspect establishing that all the entities making up the aggregation of Public Administration, as Public Accountancy calls it, must share an harmonization programme of accounting and budget systems and schemes as well as presentation and approval deadlines (articles 1, 2, 8; see, *infra*, § 3).

b) Planning cycle and tools are modified (art. 7 and 10), through triennial financial planning which includes details on the State budget. The law establishes that budget planning should be more detailed than the current one, and that it should outline the documents of the trends and planning steps of the economic accounts, of the cash account and of the borrowing requirement for all Public Administration offices (articles: 10,11, 12; see, *infra*, § 4).

c) The reform provides a new budget structure which is based on ‘missions’ and ‘programmes’, according to the scheme used experimentally since the 2008 budget. Law n.

196/2009 codifies on a permanent basis the new budget which is divided into big functional aggregations (the State's main missions) and a limited number of programmes characterized by defined and quantifiable objectives, which need to be approved by Parliament and which all correspond to a centre of responsibility (art. 21). This also leads to greater flexibility in planning and allocating budget resources and gives the possibility of resource adjustments within the same mission (see, *infra*, § 5).

d) Law n. 196/2009, with art. 39, adds a spending review to the budget process, and the creation of special teams in charge of analysing and assessing expenditure, which have the task of monitoring the measures which were taken during the budget planning session (art. 39, paragraph 1). The assessment of the results achieved compared to the programmatic targets stated in the DFP and the monitoring of the efficiency of the measures aimed at reaching such targets are based on the cooperation between the Economy Ministry and the administrations involved. It is aimed at monitoring public expenditure and its evolution in time, and at reaching the overall efficiency within the Public Administration (see, *infra*, § 6).

3. PUBLIC FINANCE OBJECTIVES AND THE MULTI-LEVEL INSTITUTIONAL SYSTEM

In the last few years the national sovereignity has been downsized in favour of supranational (European Union) and sub-national (Regions and local entities) levels of government and a multilevel system has therefore been created and has then evolved.

As far as the first issue is concerned, this fact is confirmed by the agreements signed during the creation of the European Monetary and Economic Union, which imposed greater precision while implementing budget policies, following the directives of the Stability and Growth Pact adopted within the EU. On the other hand the second issue is a consequence of the change made to Title V of the Italian Constitution (implemented by law n. 3/2001), which deeply redefined institutional relations between central and peripheral entities, giving new functions to regional and local levels of government which are granted a

wide sphere of autonomy. The creation of a multi-level system highlighted the need to guarantee an indispensable coordination between the objectives of the financial policies of central Governments and territorial entities through the rules established by the Stability and Growth Pact. In Italy this requirement is met by the Internal Stability Pact, which was first born with the 1999 Financial Law (law n. 448/1998), and whose implementation rules were later modified by the following financial laws throughout the years. The new public finance and accountancy law confirms what has just been said, mentioning explicit cooperation - not just of the public administration as a whole but between all its components as well - in order to reach the objectives of Public Finance.

For the same reason law n.196/2009 says that Regions, the autonomous provinces of Trento and Bolzano and the local agencies will set the targets of their annual and long term budgets in line with the programmatic ones stated in the DFP (article 8, paragraph 1). It also stipulates that the internal Stability Pact should be characterized by stability, consistency, compliance with European parameters and respect of agencies managerial autonomy. (article 8, paragraph 2).

The Public Finance Decision and the Stability Law are intended to, respectively, defining the content and sanctions of the Internal Stability Pact (see article 10, paragraph 2, letter f) and identifying its implementation rules (see article 11, paragraph 3, letter m). It is clear that lawmakers, because of the above mentioned rules, had to face the problem of the governance of a multi-level financial relation system, in a context that, evolving towards devolution models, indicates two potentially conflicting objectives to be achieved: on the one hand the 'right to a budget' of the local legislative assemblies with their autonomy guaranteed by the Constitution (article 119) and on the other hand the national public finance, its unitary character and the transparency of accounts. In this field the coordination between the above mentioned laws and law n. 42/2009 -concerning fiscal devolution- is still unsatisfactory.

4. THE BUDGET PROCESS

The law amended the State's economic and financial planning tools and timing, putting off of the fulfilments linked to the planning cycle as opposed to what law n. 468/1978 had stated. The new planning cycle started with the Joint Report on Public Economy and Finance (RUEF), edited by the Minister of Economy and Finance and handed in to both Chambers by the 15th of April of each year. This report is supposed to update the macro-economic and public finance previsions for the current year according to the final balance and the manoeuvre approved in the previous year. (article 12).

Not later than July 15th the Government is to send the guidelines for the distribution of budget objectives to the Permanent Committee for the Coordination of Public Finance and to the Chambers. In such a way the Government makes the system of 'autonomies' aware of the programmatic objectives set year by year as well as the penalties for local agencies in case they break the limits of the internal Stability Pact. Subsequently, once the judgement of the committee- which is due by 10th of September - has been acquired, the Government draws the blueprint of the Public Finance Decision (DFP) which is then handed in to the Parliament by 15th of September - for its approval or possible amendments - which replaces the Economic and Financial Planning Document (DPEF) with some differences (article 10). The cycle ends with the presentation and implementation of the regulations that constitutes the Public Financial Manoeuvre (article 11), that is to say the Stability Bill of Law (which replaces the Financial Bill of Law and which acquires triennial programmatic importance), the Budget Bill of Law , the Bills linked to the manoeuvre, which, can even be presented out of session by the end of February and finally, the Stability Pact update (article 7).

5. THE BUDGET STRUCTURE

The estimated budget, based on the financial accountancy system registers debit and credit both in the competence phase (assessment and appropriation) and in the cash phase (encashment and payment). It gives every single Ministry the power to carry out expenses after a review and a Parliamentary vote.

In the beginning the Parliament used to vote on all 'budget's chapters' (several thousands) which were then inserted in the estimated expenditure reports one for each ministry. This framework made the procedure extremely tight and it did not assure the control of neither efficiency nor effectiveness in relation to the public policies to be implemented. As a consequence this control was limited to formal aspects.

With regard to the need to define public policies of each sector, and to monitor the efficiency of administrative activities by Law n. 94/1997, target functions were introduced in the budget structure; moreover the Parliament's approval process was shifted from the single spending category to basic estimated units. Each unit corresponded to an administrative centre of responsibility. The complex organizational structure of the State - 'who' does 'what' - was then perfectly represented but 'if' and 'how' target objectives were reached remained unaccounted for.

To address this need law n. 196/2009 (art. 21, paragraph 2) codified yet another budget structure, based on 'missions' and 'programmes'. Missions represent the main functions and strategic objectives of public expenditure was aimed at; programmes consist of the statement of the objectives and goals to be reached. In other words, programmes are the budget classification units through which missions are carried out. They represent a homogeneous aggregation of activities carried out within each single Ministry, in order to reach well defined objectives. Such programmes are to be approved by Parliament.

Each programme is agreed upon through the second level of functional classification, the C.O.F.O.G. (Classification of the functions of government). The implementation of each programme is assured by a single administrative unit, which is a first-level organizational inside the Ministries, a Department or General Direction (see article 3, paragraph 2, legislative decree n. 300/1999).

Each phase of the estimated expenditure includes the 'preliminary notes' that outline the criteria adopted to express the targets formulated in terms of levels of services and interventions, resources to be allotted for their implementation as well as effectiveness and efficiency indicators to be used to evaluate the outcomes.

6. THE SO-CALLED 'SPENDING REVIEW'

The 'expenditure analysis and evaluation' introduced by article 39, law n. 196/2009, is slightly different from the traditional formal juridical control method - which does not take concrete results into account - and uses its own tools of economic analysis to check the results of resource management by each administration.

The resulting activity clearly meets the need to overcome the incremental logic of public finance decisions, contributing to the evolution of the system towards a real planning of needs, in which the budget is defined upon a zero-base criteria. That means an evaluation of the effectiveness curried out each year independently from the previous years allocations.

The triennial planning and the link between expenditure and results reminds us of the Anglo-Saxon *spending review* which is based on the fundamental feature of establishing the triennial spending limits which are a series of objectives agreed on between *Treasury* and the other Ministries in a previous phase of the budget planning process.

On the contrary, in the Italian system, budget planning seems to be following a *bottom-up* procedure (article 23, law n. 196/2009). The Ministries, on the basis of the Mef (Ministry of economic and finance) instructions, outline the objectives and the resources according to the current legislation, without an initial political decision that establishes the resources available for expense programmes.

In practice, even though the new tool is a sign of an evolution towards to budget policy, it risks becoming a formal fulfilment, into another missed opportunity, as it does not have a direct impact on the budget process.

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THE 'EUROPEAN SEMESTER' AND CHANGES TO THE NATIONAL ACCOUNTING DISCIPLINE

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Prof. Livia MERCATI

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1. FOREWORD

Following the economic and financial crisis, the European Union introduced new rules and procedures of economic surveillance, which, besides ensuring stability and preventing macro-economic imbalances, are aimed at favouring growth and competitiveness in compliance with *Europe 2020.*

The so called 'European Semester' was introduced in 2011, in order to better an *ex ante* coordination of economic and budget policies of member states.

The need for a reorganization of the budget cycle, already foreseen by law n. 196/2009, which was able to reform national accountancy (see Report 1/2011) resulted

from the new community procedures aimed at preventing and correcting macro-economic imbalances. This reorganization took place with law. 7 April 2011, n. 39.

2. THE 'EUROPEAN SEMESTER''

The 'European Semester' is aimed at coordinating economic policies in the Eurozone and in the European Union.

To do so, a new procedure was introduced. It foresees, the following phases during the first half of the year: 1) in January the European Commission hands in the Annual Growth Review; 2) between February and March the European Council drafts the economic and budget policy guidelines at a European level and at the level of member states; 3) mid April member states contextually put forward the so called National reform plans (PNR), which are drafted within the new Europe Strategy 2020 and the so called Stability and Convergence Programmes (PSC), which are drafted within the Growth Stability Pact, taking into account the guidelines established by the European Council; 4) at the beginning of June, on the basis of the PNR and of the PSC, the European Commission draws up some Economic Policy and budgetary recommendations for member states; 5) within the month of June the Ecofin Council and for the part it is entitled to, the Occupation and Social Affairs Council, approve the European Commission recommendations, even on the basis of the suggestions by the European Council given in June; 6) during the second half of the year, member states approve their respective financial manoeuvres, taking the recommendations they received into account.

3. THE FINANCIAL MANOEUVRE FOLLOWING LAW. N. 39/2011

Law 7 April 2011, n. 39 has modified the cycle and the means used for budget planning in order to allow a full alignment between national planning and that foreseen by the 'European Semester'.

To guarantee this, the Government, by the 10 April of each year, submits to the Parliament the Economy and Finance Document (DEF), which has replaced the Public Financing Decision (DFP) introduced by law n. 196/2009.

This document, which is divided into three sections, has become the linchpin of economic and financial planning, whose content includes both the Public Financing Decision - which, according to its original version (law n. 196/2009) was to be submitted mid September - and the content of the Economy and Public Financing Report.

The DEF also specifies both the Stability Plan scheme - which will have to contain measures to accelerate the reduction of public debt - and the National reform plan scheme. These last documents will have to be submitted to the European Union Council and to the European Union by 30th April of each year.

In particular, the national reform plan scheme outlines: the country's priorities, with the main reforms to be made, national macro-economic imbalances, and the macro-economic factors that affect competitiveness, the progress of reforms which have already been set up, specifying a possible gap between foreseen and reached results; the foreseeable effects of suggested reforms in terms of economic growth, the strengthening of competitiveness of the financial system and the increase in employment.

An attachment to the DEF, or to its Updating Note outlines possible bills of law related to the public financing manoeuvre, each of which contributes to reaching the programmatic objectives and the implementation of the national reform programme. Such bills have to be submitted to Parliament by the Government within the following month of January.

The DEF has another attachment, besides the Strategic Infrastructure Programme foreseen by the Target Law, which is a specific document related to the implementation stage of the commitments aimed at reducing greenhouse gas emissions.

In order to integrate the DEF, by the 30th June, the Minister of Economy and Finance submits to Parliament an attachment outlining the effects of the monitoring on the public financing balance deriving from the measures stated in the budget manoeuvres implemented even during the year.

With regard to the involvement of Local bodies in economic and budgetary planning, the law foresees that the DEF scheme should be sent to the Permanent Committee for the Coordination of Public Financing for its recommendations. The Committee has to give its recommendations in time to permit Parliament to decide on the DEF itself.

An updating note to the Economy and Finance Document is supposed to be submitted by the 20th September. The presentation of the note – according to the new European economic planning procedures - is no longer prospective and connected to the occurrence of considerable gaps in public financing fluctuation patterns, but it is mandatory.

It may contain several pieces of information among which an update to the programmatic objectives and a macro-economic and public financing estimate

Should public financing objectives need to be changed, Government is to send an update to the guidelines regarding the distribution of objectives to the permanent committee for the coordination of public financing by the 10th September for its preventive advice which is supposed to be given by the 15th September.

Furthermore, should the objectives stated in the Economy and Finance Document and in its Updating Note need to be changed, or should there be considerable gaps in public financing patterns that require remedial action, Government is to submit a report to Parliament, to give reasons for the update or for the gaps and to outline remedial action.

The 15th October of every year is the deadline within which the Stability bill and the State Budget bill have to be submitted to Parliament.

4. FURTHER CHANGES TO LAW N. 196/2009

Law n. 39/2011 did not change the budget structure regulated by law n. 196/2009, but it added some regulations that meet financial management caution criteria which are aimed at facilitating the check of fluctuation patterns and the achievement of public financing objectives, in order to control public spending and to curb public debt.

Law n.39/2011 also foresees the impossibility to use the possible extra revenue that was not foreseen in the budget estimate that derives from a variations of patterns which follow public legislation to cover new financial expenses. It states the "*extra revenue*" should be aimed at improving the public financing budget.

Other changes concern the possibility to introduce limits to the evolution of expenses which are consistent with triennial resource planning. Such possibility is extended to all the expenses stated in the state budget. These changes also foresee a tougher check on public financing given that Parliament may acquire from the ISTAT data and information necessary to examine public financing documents, on the basis of specific agreements.

Finally, following the change made by article n. 42, law 196/2009, the lawmaker took a step back compared to the shift to cash basis accounting. In fact, the current wording of the article delegates Government to implement one or more legislative decrees in order to reorganize the discipline related to the management of the state budget and to strengthen cash budget accounting, although the accrual basis accounting remains valid.

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FISCAL FEDERALISM AND *PUBLIC PROPERTY FEDERALISM*

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Prof. Antonio BRANCASI

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1. INTRODUCTION

The two terms *fiscal federalism* and *public property federalism* (federalism implemented through assignment of State properties to regional and local authorities) are taken to mean, respectively, the transformation that is taking place in Italy in the set-up of public finance, and the transfer of real estate that the State would convey to the Municipalities, the Provinces and the Regions. Both processes stem from the constitutional reform (Constitutional Law No. 3 of 18 October 2001), which has completely changed the part of the Constitution concerning these public bodies. Only recently, with Law No. 42 of 5 May 2009, did the implementation, for aspects concerned, the design outlined by the constitutional reform get underway as regards the aspects under examination. This law limits itself to granting different legislative delegations to the Government, and it is worth pointing out that it was approved by the favourable vote of the parties forming the majority, while the major opposition party abstained.

The law in question takes care to ensure that the implementation of the delegations is sufficiently shared, and thus provides for the setting up of a special Parliamentary Committee and of a Joint Technical Committee: the first (Art. 3) must express its opinion on the delegated decrees implementing the delegation and must then verify the state of implementation of the decrees, ensuring the link with the Regions and the Local Authorities; the second (Art. 4) must furnish shared information bases in connection with the implementation of the delegation and is composed of technicians appointed by the Government, the Regions and the Local Authorities, in addition to by the Senate and the Chamber of Deputies. The time limit within which the delegations must be exercised is 24 months, but it is established that at least one of the delegated decrees must be adopted within the shorter time limit of 12 months from the coming into force of the Parliament act of delegation.

Among the various delegations granted to the Government the only one that has already been implemented regards *public property federalism* (Delegated Decree No. 85 of 28 May 2010); as instead regards *fiscal federalism*, at the moment only some schemes for

delegated decrees are available, concerning, respectively, the Municipalities and the Regions.

2. The resources of Regions and Local Authorities under the new constitutional discipline

Under the new constitutional discipline the financial autonomy of Regions and Local Authorities must be formed by their own taxes and revenues, as well as tax revenue sharing (Art. 119(2)). Their own taxes are established directly by the public bodies themselves and allow them to administer their own tax burden policy; their revenues derive from property management and from the sums owed for the use of services rendered by the public bodies to the population. Through their own taxes and revenues the public bodies have autonomy in terms of revenues, while the power to share in revenue taxes only ensures spending autonomy and involves part of the proceeds from some State taxes being granted to the public bodies (Regions or Local Authorities) that represent the communities that produced them.

It is worth mentioning that these three types of revenues are of a fiscal nature, in the sense that the proceeds thereof depend on the degree of wealth of the pertinent communities: this engenders very unequal situations owing to the pronounced territorial imbalances that characterise the distribution of wealth in Italy. Precisely in view of this, the setting up of an equalisation fund is provided for in order to supplement, through financial transfers, the resources of the public bodies that represent the communities "with less fiscal capacity per inhabitant" (Art. 119(3) of Constitution).

Also provided for is a further typology of State transfers, likewise intended to perform a function of redressing imbalance. In effect, the instrument of the equalisation fund serves only to remove the disadvantages generated by the fiscal nature of the system's revenues: i.e. it provides the public bodies that represent the less wealthy communities an amount of resources greater than those which they would otherwise have at their disposal, such as to allow them to operate (and therefore to supply services and to perform functions)

in the same way as the public bodies that find themselves in more favourable conditions. The equalisation fund instead leaves unmet the need to overcome the imbalances underlying the lesser fiscal capacity or greater needs of certain communities. Precisely for this purpose it is provided that, in order to further ends other than the routine performance of functions, the State allocates additional resources to Regions and Local Authorities, and may even implement special intervention measures for their benefit (Art. 119(5)). Logically, the function of structural equalisation performed by such measures requires, according to the same jurisprudence of the Constitutional Court, that they not be addressed indiscriminately to all public bodies of the same institutional level, but be targeted just for public bodies having the pertinent factors of imbalance.

The system is then completed by the recognition that Regions and Local Authorities have at their disposal assets of their own attributed according to the general principles determined by the State law. Moreover, they may resort to indebtedness, with, however, the specification that this is possible exclusively for financing investments (Art. 119(6)). This power is further limited annually by State laws that fix the fundamental principles for the co-ordination of public finance: involved are provisions which, in conformity with EU restrictions concerning the prohibition against excessive deficits and with the stability and growth pact, place precise restrictions on the various categories of public bodies to curb the expansion of spending and of indebtedness (the so-called "internal stability pact").

3. FEDERALISM MARKED BY SOLIDARITY AND FEDERALISM MARKED BY EGOISM

The Constitution does not limit itself to listing the typologies of revenues that must make up the financial autonomy of Regions and Local Authorities, but also goes so far as to take a position as to their quantitative dimension, in fact establishing that the overall proceeds coming from revenues of a fiscal nature (their own taxes and revenues, as well as the sharing of revenue taxes), possibly supplemented (in the case of the public bodies that

represent communities with less fiscal capacity per inhabitant) by resources deriving from the equalisation fund, must enable Regions and Local Authorities "to fund in full the public functions assigned them" (Art. 119(4)). And is it precisely in the reading of this provision that two different conceptions have emerged of *fiscal federalism*: that of *federalism marked by solidarity* and that of *federalism marked by egoism*.

The interpretation that follows the first of the two conceptions starts from the assumption that the rule intends to guarantee each public body as to the amount of resources at its disposal. For this purpose, the determination of the cost of the administrative functions that each public body is called on to exercise becomes the first operation to be performed in building the entire system; it is on this dimension that the formation of the revenues of the public body are then shaped in such a way as to be able to provide corresponding proceeds.

Since the equalisation fund is allocated exclusively to public bodies with less fiscal capacity, the other public bodies – those with greater fiscal capacity – must be put in a position to cope with the cost of the functions solely with their fiscal policy/means. In other words, in the case of these public bodies, the cost of the functions – meaning the cost required for the exercise of the same under conditions of ordinary efficiency and in accordance with standardised modalities – is assessed in relation to the fiscal capacity of the pertinent community for the purpose of recognising to the public body a sort of fiscal pressure rate the management of which, performed in conjunction with an effective level of suppression of tax evasion, is potentially able to provide sums corresponding to the cost of the functions. Such fiscal pressure is first of all formed by quotas of sharing in tax revenues and secondly by standard tax rates and revenues of their own; the rates are standard in the sense that they are taken as the basis for computation, but actually can be modified by the public bodies entitled to the tax, just as they likewise can change the rules concerning what is subject to taxation and anything else that contributes to determining taxation in this case.

The same fiscal pressure is then also recognised to the public bodies whose community has less fiscal capacity, but logically it is unable to provide such public bodies with revenues corresponding to the cost of their functions: this makes necessary a

corrective measure to be implemented by means of the instrument of the equalisation fund, which the Constitution specially provides for this purpose (Art. 119(3)). This fund must serve to finance the part of the cost of the functions of public bodies with less fiscal capacity that is unfunded by the proceeds from their own taxes and revenues, and by tax revenue sharing.

Thus, a fiscal equalisation is brought about that is at once complete and yet always partial, in the sense that it makes the extent of the fiscal capacity of the single communities indifferent only insofar as the part of fiscal pressure necessary to fund the standard cost of the functions. Fiscal equalisation instead does not regard (which is why it is always only partial) whatever further part of fiscal pressure that the public body may have decided to impose on its taxpayers when faced with a higher-than-standard cost of the functions: in other words, in order to increase services the poorer communities must burden themselves with far greater fiscal pressure than would the richer communities, which imbalance is in no way redressed.

The interpretations of the rule that follow the idea of a *federalism marked by egoism* instead start from the observation that the arrangement under examination is excessively generic, so much so as to leave unresolved the extent to which fiscal equalisation must be practised. In particular, a lack of specification is alleged as to whether the correspondence between the cost of the functions and the resources must operate on a national basis or in reference to each public body. It is also alleged that it has not been clarified whether the equalisation fund must be earmarked just for the public bodies with a fiscal capacity below national fiscal capacity or if public bodies with a fiscal capacity less than that of the public bodies with greater fiscal capacity also must benefit from it.

But these interpretations mainly seem to start from the implicit assumption of a sort of disengagement of the State in the matter of the funding of the cost of the functions, in the sense that, once recognised to Regions and Local Authorities the ambits within which they can exercise their power of taxation, it is these public bodies that have to decide the cost of the functions and, by setting the rates of their own taxes and, more generally, through the exercise of their autonomy in terms of revenues, must take responsibility for

finding the resources, in addition to those provided by tax revenue sharing and by the equalisation fund, necessary for funding the cost of the functions. It is wholly evident that in this way the preceptive value of the constitutional provision is greatly attenuated, because in the face of the recognition to Regions and Local Authorities of rather broad ambits of taxation able to allow them sufficient autonomy in terms of revenues, it would be impossible to draw from the rule any indication as to the degree of equalisation and the quantification of the pertinent fund.

For that matter, whereas in the interpretations oriented toward f*ederalism marked by solidarity* it is precisely the resources provided by the equalisation fund that have the nature of residual revenues, i.e. intended to cover the difference between the cost of the functions and the effective proceeds of the tax revenues of the public body, in this different context of *federalism marked by egoism*, it is instead their own taxes and revenues that have the nature of residual revenues, while the equalisation fund, whatever its size, would in any case be in keeping with the constitutional rule.

4. FURTHER PROBLEMS OPENED BY THE NEW CONSTITUTIONAL DISCIPLINE

A further question raised, in connection with the aspects under examination, by the new constitutional discipline pertains to the relations among the various levels of government in the construction and functioning of *fiscal federalism*, a question concerning which two different models always have clashed: the *binary* model and the *top-down* model.

The *binary* model prefigures a distinct relationship of the State 1) with the Regions; 2) with the Local Authorities: it is the traditional model, which has essentially prevailed up to now and that has won the favour of the same Local Authorities, especially that of the major Municipalities, which have seen in it the solution for escaping the danger of the Regions' centralistic tendencies. The *top-down* model instead gives shape to an articulation of relations from the State to the Regions and from them to the Local

Authorities, in such a way that the Regions would come to play a fundamental role of junction between the State and Local Authorities.

The circumstance that among the matters of concurrent legislative power (i.e. where the State can establish only fundamental principles, while it is up to the Regions to enact detailed rules) is that concerning the co-ordination of public finance and of the tax system (Art. 117(3)), ought to testify in favour of the *top-down* model, which co-ordination, according to the Constitutional Court, takes shape in both dynamic and static terms.

The co-ordination of the first type is that with which the co-ordinator public body (the State through fundamental principles and the Regions through detailed regulation) orients and directs, including in relation to the contingent needs of the economic situation, the exercise of autonomy by the co-ordinated public bodies (the Regions by the State, and the Local Authorities by the State and Regions). In this regard it must be remembered that the State has made wide use of this power of dynamic co-ordination, to such an extent that it has been viewed by many as the means for imposing on Regions and Local Authorities particularly detailed and minute prescriptions about the carrying out of their activities: a like way of understanding dynamic co-ordination has given rise to widespread litigation that in most cases has been resolved by the Constitution Court in favour of the State.

Static co-ordination is instead that by means of which the entire system of *fiscal federalism* is constructed, thus bringing about the constitutional design: and it is precisely the circumstance that in this respect the Regions have concurrent legislative power that confirms the idea of a preference of the Constitution for the *top-down* model.

In the opposite direction, as a factor that instead testifies in favour of the *binary* model, there is the circumstance that provided among the matters reserved to the exclusive legislative power of the State is that concerning the "equalisation of financial resources." A model of the *binary* type would therefore seem to apply to the part concerning the equalisation fund.

The position of the Constitutional Court on these themes has been ambiguous. On the one hand, it has recognised that the saving clause of Art. 23 of the Constitution in the

matter of tax obligations, and therefore also of levy, and the absence of legislative powers assigned to the Local Authorities make necessary legislative discipline of the fundamental aspects of local taxes; while on the other hand, in passing it has specified that "in the abstract situations of normative discipline can be conceived both at three levels (State legislative, regional legislative and local regulatory) and at just two levels (State and local, or regional and local)". In effect, the recognition of law at two levels (regional and local) testifies in the sense of the superseding of the *binary* model of finance of autonomous non-central public bodies (centred on a distinct and separate State-Regions and State-Local Authorities relationship) and of the replacement with a *top-down* system of State-Regions-Local Authorities relations. But even the hypothesis of law at three levels does not contradict in the least the *top-down* model, in view of the fact that in any case it is up to the State to define the fundamental principles of co-ordination of the tax system. Vice versa, the hypothesis of law at two levels (State and Local Authorities) would seem to reproduce in full the traditional *binary* model.

5. THE COMPROMISE SOLUTION OF THE PARLIAMENT ACT OF DELEGATION WITH REGARD TO THE FUNDING SYSTEM

The guiding principles and criteria indicated by the delegation for the implementation of fiscal federalism make it possible to discern, as the basic philosophy that ought to inspire the entire reform, the compromise between the idea of federalism marked by solidarity and that of federalism marked by egoism. This basic orientation is found in both parts of the Parliament Act of delegation, that relating to the financing of the Regions and that concerning the financing of the Local Authorities, which orientation is pursued by differentiating the model in relation to the type of functions that the resources to be recognised to the public bodies would fund.

5.1 With regard to the Regions

The financing of the Regions is regulated differently depending on whether it involves functions necessary for ensuring essential levels of services (those established by State laws in such a way that they are guaranteed throughout the national territory even if concerning matters of regional legislative power) or has to do with the remaining functions.

As regards the former, it is provided that to the Regions shall be recognised taxes with a rate and tax base that are uniform, as well as a tax additional to IRPEF (personal income tax) and a sharing in the VAT (State value added tax) revenues (Art. 8(1)d)) and it is specified that these tax rates and the quota of sharing shall be determined in such a way that the Region with the greatest fiscal capacity is potentially able (i.e. by exercising an effective system of assessment and collection) to obtain thereby a yield corresponding to the standard cost of the functions in question (Art. 8(1)g)). For the remaining Regions – those with less fiscal capacity – it is instead established that each of them shall be granted a share of the equalisation fund corresponding to the difference between the cost of the functions in question, on the one hand, and, on the other hand, the yield from such sharing and from their own taxes earmarked to fund them (Art. 9(1) c)1 and d)).

Involved is a system that certainly, at least in static terms, corresponds to the interpretations consistent with the idea of a *federalism marked by solidarity* and that, if anything, presents critical points in terms of its dynamic functioning. In fact, the share of equalisation fund due to each Region is commensurate with the difference between two amounts, only one of which (the yield from its own taxes and from tax revenue sharing) is susceptible, in a different degree, to adapting automatically to the increase in the gross domestic product and to the increase in prices, while the other amount (the standardised cost of the functions) does not present an analogous characteristic, so that without an automatic updating mechanism the difference between the two amounts is bound to decrease, as consequently also are – in not only real but also even monetary terms – the resources assigned to each Region from the equalisation fund. In the face of this possible outcome the Parliament Act of delegation limits itself to prescribing a periodic verification of congruence of the coverage of the need in connection with the functions in question [Art. 10(1)d)); logically, this not rule out that delegated decrees may provide for parameterising the cost of the functions to the dynamic of the increase in prices or some other factor.

A completely different system is provided for the funding of the remaining functions of the Regions, which follows closely the interpretations inspired by the idea of *federalism marked by egoism*. In fact, for the funding of these functions the Parliament Act of delegation recognises to the Regions a tax additional to IRPEF, whose rate must be established in such a way as to provide a yield on a national basis corresponding to the total amount of the transfers currently arranged by the State in order to fund the functions in question (Art. 8(1)h)). Moreover, a contribution from the equalisation fund is provided for the benefit of Regions that, owing to their lesser fiscal capacity, are unable to obtain from the additional tax a yield corresponding to the transfers currently received from the State for such functions, which, however, must not cover but merely reduce the differences of yield without altering the order thereof (Art. 9(1)b) and g)2): in other words, the Parliament act of delegation places as a restriction the provision that the Regions with less fiscal capacity in any case (even following their participation in the sharing of the equalisation fund) shall have at their disposal less resources per capita than those provided to the Regions with greater fiscal capacity from the yield of their taxation.

5.2 With regard to the Local Authorities

The system is differentiated as concerns the Local Authorities as well, and in this case distinguishes the funding of the Local Authorities' fundamental functions (those specified by State laws even if concerning matters of regional legislative power) from the funding of the remaining functions.

The Parliament Act of delegation limits itself to prescribing a funding for the former "on the basis of standard needs" and through their own taxes, and sharing in State and regional tax revenues, as well as additions to such taxes and the equalisation fund (Art. 11(1)b)). In particular, in the fiscal system to be recognised to the municipalities for funding these functions priority should be given to VAT and IRPEF revenue sharing, and the taxation of real estate (Art. 12(1)b)), while in such fiscal system for the Provinces priority should be given to sharing in an unspecified revenue tax and to the yield of taxes

relating to motor vehicle transport (Art. 12(1)c)). As for the equalisation fund, it is provided that it shall consist of two parts, one intended for Municipalities and the other for Provinces and Metropolitan Cities, the amount of which, with regard to the funding of fundamental functions, should correspond to the difference "between the total of the standard needs for the same functions and the total of the standardised revenues of general application due" to the public bodies (Art. 13(1)a)). The funds should be shared among the Regions (on the basis of the same criteria used to determine the total amount thereof), which in turn should allot the pertinent available funds to the public bodies, applying an indicator of financial need (equal to the difference between the standard value of the outlay and the standard amount of their own taxes and revenues), and an indicator of need of infrastructure (that also takes into account the infrastructure funds of the European Union) (Art. 13(1)c)).

Overall, a system is involved that seems to propose again the one provided, with regard to the Regions, for the funding of the essential level of services, even if with no lack of ambiguous and less than clear features.

As regards the remaining functions – those not defined as fundamental, currently performed by the Local Authorities – the Parliament Act of delegation limits itself to establishing their funding by means of their own taxes, the sharing of unspecified taxes and through the equalisation fund (Art. 11(1)c)). However, no indication of a quantitative type is furnished by the Parliament Act of delegation as to either the total amount of the part of each fund allotted to the funding of these functions or the amount of the share due to each public body. The only specification – generic – is that, as concerns these functions, the two parts of the equalisation fund are "directed toward reducing the differences among the fiscal capacities" (Art. 13(1)f)): in other words, something more must be given to those with less fiscal capacity. Just how much, however, is left unsaid.

5.3 The most critical features

The greatest criticism that has been levelled at the overall design of the Parliament Act of delegation regards the provision for two different models of federalism depending

on the type of functions that must be funded. In effect, the Constitution in no way makes a distinction of the kind, which distinction, moreover, has slight justification.

Indeed, the circumstance that the essential levels of the services are heterodetermined and that the supplier public body is unable to shirk the duty of providing them is not per se sufficient to justify a greater need for solidarity compared with other functions performed by the public body and with other services provided by it. In fact, these functions and services also are generally found in the same condition of the essential levels since – and here we have one of the novelties introduced by the constitutional reform – generally the public body put in charge of enacting the laws and of deciding the content of the administrative activities is not the one that then implements them and that bears the cost of doing so.

Next, as for the fact that the only guarantee furnished to the Local Authorities is the system for funding their fundamental functions, it must be borne in mind that to this qualification, which presupposes a judgement of greater importance of these functions for the autonomy of the public bodies, the Constitution has not linked a different system of theirs, but has only reserved the singling out thereof to State law so as to guarantee the public bodies against any tendency toward regional centralisation.

Furthermore, this diversified funding system, depending on the type of functions, risks conditioning in a negative manner the exercise of the legislative power with which the State must attend to determining the essential levels of the services and to identifying the fundamental functions of the Local Authorities. Actually, in order for the Regions to have guarantees as to the dimension of their tax system, they must hope that the determination of the essential levels of services will cover the most part of their administrative competencies (and they will do everything to ensure that it does). Likewise, in order to have some (perhaps lesser) guarantee regarding the amount of their resources, the Local Authorities must press the State so that it defines as fundamental the greatest number of functions. But this way decisions about the essential levels of services and about the fundamental functions will end up by being taken on the basis of an evaluation of financial interests that have nothing to do with the aspects that the Constitution would want to be considered.

6. THE COMPROMISE SOLUTION WITH REGARD TO RELATIONS AMONG VARIOUS LEVELS OF GOVERNMENT

A compromise solution is also found with regard to the other question, the much debated matter of the relations among the various levels of government and of the choice between the binary model and the top-down model. And in fact, the circumstance that delegated decrees, enacted by the State, must establish the funding system of the Local Authorities would seem to propose again the binary model which, in this matter, has traditionally characterised relations among the levels of government. However, there are different elements opposed to this that instead testify in favour of the top-down model.

In the first place, the role assigned to the Regions in connection with the equalisation funds must not be forgotten, which funds the State allots to them for allocation among the Local Authorities. In the second place, it must be borne in mind that the system for funding the Regions, previously summarised, ought to include among its purposes the functions pertaining to the matters within the scope of their concurrent and residual legislative power, which functions are only in part exercised at the administrative level by the Regions, which, with their laws, must instead allocate to the Local Authorities: and since the funding follows the exercise of the administrative functions and not of legislative power, it is inevitable that the Regions must then see to it that most of the resources that the decrees implementing the delegation will guarantee to the Local Authorities get to them. Closely connected with this point is the provision authorising the Regions to establish new taxes of the Local Authorities, defining the ambits of autonomy recognised to them (Art. 12(1)g)). Moreover, it is even provided that the Regions shall establish for the benefit of the Local Authorities shares in the yield of their taxes and of their tax revenue shares – and this despite the fact that the Constitution provides exclusively for the sharing of State revenue taxes.

All in all, while the Regions-Local Authorities relations that conform to a top-down model are many, they are nonetheless sparingly regulated by the Parliament Act of

delegation, with the risk of leaving the Local Authorities at the mercy of the Regions in the event that the decrees implementing the delegation fail to fill this normative gap. Conversely, the traditional binary model remains, after all, limited to the funding of fundamental functions.

7. PUBLIC PROPERTY FEDERALISM

The discipline provided under Delegated Decree No. 85 of 2010, which has implemented the Parliament Act of delegation regarding *public property federalism*, deals with three aspects: the determination of the properties to be transferred to Regions and Local Authorities, the identification of the assignee institutions of the transfers, and the modalities for the utilisation of such properties.

As for the determination of the properties to be transferred, the decree establishes that a set of assets must in any case be conveyed (State maritime and water property, airports of regional and local interest, mines); moreover, it establishes that some of the remaining available assets are exempt from transfer (ports and airports of national importance, networks/systems of national interest, railways, items forming part of the cultural patrimony, State parks and natural reserves), while others must be singled out by means of a rather complex procedure. This procedure is initiated by the State administrations, which compile lists of the properties necessary for them, and concludes with decrees by the Prime Minister (Italian abbreviation "DPCM") which, in agreement with the representative organ of Regions and Local Authorities and at the proposal of the Minister of the Economy, single out the properties to be conveyed.

The assignees are public bodies that have requested from among the lists of properties to be transferred those that interest them, accompanying the request with the submission of a plan concerning the valorisation thereof. In the event that a property is requested by more than one public body, the assignment shall take place on the basis of a set of criteria as stated in the decree, which are the same used in compiling the lists of the properties to be transferred. The assignment takes place with a DPCM, at the proposal of

the Minister of the Economy, and may be arranged on a *pro quota* basis in favour of more than one public body.

Except for State maritime, water and airport properties, the properties are transferred to the alienable assets (i.e. to the assets intended for economic exploitation) of the assignee public bodies, which, however, can include them in their institutional properties or inalienable assets (i.e. assign them for the direct exercise of their institutional functions). Any fees/rents that the public bodies gain from the assets are detracted from the resources recognised to them at the time of implementation of fiscal federalism, while only 75% the resources gained from the alienation of the properties are granted to the public body, with the remainder going to the State and allocated for the reduction of the public debt.

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THE TRANSPOSITION OF THE PUBLIC PROCUREMENT REMEDIES DIRECTIVE 2007/66/EC IN THE UNITED KINGDOM

ANNUAL REPORT 2010 – UNITED KINGDOM

(June 2011)

Prof. Martin TRYBUS*

The United Kingdom Public Contracts (Amendment) Regulations 2009 SI 2009/2992[1] and the Utilities Contracts (Amendment) Regulations 2009 SI 2009/3100[2] represent the transposition of Directive 2007/66/EC amending the Procurement Remedies Directives 89/665/EEC and 92/13/EC. These Amendment Regulations entered into force on 20 December 2009. The new Regulations apply in England, Wales, and Northern Ireland. Scotland has implemented separately and the new Scottish Regulations also entered into

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[2] http://www.opsi.gov.uk/si/si2009/uksi_20093100_en_1 (accessed in late July 2010). On both instruments see: Henty, "Remedies Directive Implemented into UK Law" (2010) 19 *Public Procurement Law Review* NA115-124.

force on 20 December 2009.[3] While this transposition occurred 11 days before the start of 2010, the transposition was of course only 'felt' after the holiday period and therefore belongs to the major changes in the public law of the United Kingdom for 2010. The following pages will summarise the most important innovations of the new Public Contracts Regulations, including time limits, the automatic suspensive effect including reverse suspensive effect, the standstill-period, and the new remedy of ineffectiveness.

Remedies are now regulated in Part 9 of the United Kingdom Public Contracts Regulations as amended in 2009. Should the High Court find in favour of the applicant, it may grant an order to set aside or to amend a relevant decision by the contracting authority, suspend the implementation of its decisions and of the procedure itself, or to amend a document (for example regarding the specifications). Before the 2009 amendments damages were the only available remedy after the conclusion or making of the contract,[4] with the exception of rare cases of fraud or bad faith. The SI 2009/2992 United Kingdom Public Contracts (Amendment) Regulations 2009 and the SI 2009/3100 United Kingdom Utilities Contracts (Amendment) Regulations 2009 introduced the new remedy of ineffectiveness discussed below.

According to Regulation 47D (2) United Kingdom Public Contracts (Amendment) Regulations procurement decisions must be challenged promptly and in any event within three months from when the grounds for review first arose. Hence the time limit starts to run from the time the grounds for review first arose and not "from the time they became

[3] Public Contracts and Utilities Contracts (Scotland) Amendment Regulations SSI 2009/428: http://www.opsi.gov.uk/legislation/scotland/ssi2009/ssi_20090428_en_1 (accessed in late July 2010).

[4] Even SI 2006/05 United Kingdom Public Contracts Regulation 47 (9) read:

> "In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."

known to those concerned." This arrangement is not in compliance with the requirements of EU law, an assessment already clear from *Universale Bau*[5] and recently confirmed by the Court of Justice in the *Uniplex* case[6] which directly concerned the relevant United Kingdom time limits. According to EU law limitation periods have to run from the time when the applicant "knew or ought to have known" that an infringement of public procurement rules occurred.[7] This will make it necessary to amend Regulations 47D (2) and 45D (2), for public contracts and utilities contracts respectively, as an implementation of the *Uniplex* case is required to comply with EU law.[8]

With a time limit that is triggered by the knowledge of the prospective applicant, proceedings might be initiated much later than three months after the breach of procurement law occurred. On the one hand this compromises the objectives of the time limits, to protect the smooth flow of the procurement process and promote legal certainty. On the other hand it is largely within the control of the contracting entity to avoid this effect through transparency. They can avoid this effect by communicating their decisions to the bidders.[9]

[5] Case C-470/99, [2002] ECR I-11617

[6] Case C-406/08, *Uniplex*, nyr.

[7] McGovern, "Two important decisions of the European Court of Justice on time-limits in proceedings for review procedures in public procurement: the Uniplex case (C-406/08) and Commission v. Ireland (C-456/08)" (2010) 19 *Public Procurement Law Review* 101.

[8] Henty, "Remedies Directive Implemented into UK Law", supra note 2, at NA122, whereas Taylor, "Bridging the remedies gap" (2010) 21 *Practical Law Company* 29, at 31 suggests interpreting Regulation 47D (4) in the light of the *Uniplex* judgment.

[9] In the recent case of *Sita UK Ltd v Greater Manchester Waste Disposal Authority* (Rev 1) [2010] EWHC 680 the High Court decided against a bidder who had initiated proceedings after the contract award when the time limit had elapsed. The bidder had known about the breach in question well before the limitation period had elapsed. According to Skilbeck, "Developments in Public Procurement Law" (2010) 20 *Computers & the Law* 16, at 18

Before the Public Contracts (Amendment) Regulations 2009, the lodging of an application for review had normally no automatic suspensive effect on the ongoing tendering procedure.[10] The new Regulation 47G of the United Kingdom Public Contracts (Amendment) Regulations 2009 SI2009/2992 contains a provision entitled: "Contract making suspended by challenge to award decision". Where proceedings are started with respect to a contracting authority's decision to award the contract, and the contract has not been entered into, the starting of the proceedings requires the contracting authority to refrain from entering into the contract. The requirement continues until the court brings the requirement to an end by interim order under Regulation 47H (1) (a), or the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement, for example in connection with an appeal or the possibility of an appeal. Hence the recently amended Regulations introduced an automatic suspensive effect on the making of the contract until the court decided on the case. An automatic suspensive effect ensures that the *status quo* is maintained until a review body decides on the lawfulness of the challenged act.[11]

Moreover, the possibility of 'reverse suspensive effect' by interim order was introduced in Regulation 47H. This will allow the High Court to remove the now automatic suspensive effect, normally on the application of the respective contracting entity. In deciding on such an application the Court will apply the same test formerly – under the previous 2006 Regulations – used for deciding on the granting of interim relief in the form of a suspension of the procurement procedure outlined above. However, this turns the tables: the contracting entity rather than the aggrieved bidder has to invest time and effort,

this will make breaches of procurement law which occur earlier in the procedure more often becoming the subject of review proceedings.

[10] Henty, "Remedies Directive Implemented into UK Law", *supra* note 2, at 117.

[11] Arrowsmith, Linarelli, and Wallace; *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International: London, 2000), at 773.

and has the difficult burden to establish the requirements of the test.[12] Moreover, the new rules give the aggrieved bidder more time.[13]

With regards to contracts covered by the Regulations, the United Kingdom has introduced a ten-day standstill period between the notification of the results of the tendering procedure to the bidders and the formal conclusion or making of the contract in United Kingdom Public Contracts Regulation 32 (3). Aggrieved bidders thus have the opportunity to mount a challenge to an award decision they believe to be legally flawed.

This standstill period was introduced in 2006 following the *Alcatel* judgment of the European Court of Justice[14] and was amended to a 10 or 15 day period by SI 2009/2992 implementing Directive 2009/66/EC. The Amendment Regulations of 2009 have altered the structure of the standstill period.[15] Under the old 2006 Regulations the standstill period was a two-stage process. First, in a standstill letter to the unsuccessful bidders the contracting entity would provide only the basic information about their bids. Second, the recipient of this letter, in other words the unsuccessful bidder, would then have the opportunity to request a debriefing with additional information including the strengths of the successful tender. As there was only a standstill period of ten days, it was very difficult in practice for an aggrieved bidder to collect the necessary information, gather the evidence, instruct lawyers, and apply for an injunction before the conclusion or making of the contract.[16] In contrast, under the 2009 Amendment Regulations 32A, unsuccessful bidders have to be informed about the reasons for the award decisions in the standstill letter already.

[12] Henty, "Remedies Directive Implemented into UK Law", *supra* note 2, at 117.

[13] Taylor, *supra* note 7, at 31.

[14] Case C-81/98, *Alcatel Austria AG* v. *Bundesministerium für Wirtschaft und Verkehr* [1999] ECR I-7671.

[15] Henty, "Remedies Directive Implemented into UK Law", *supra* note 2, at 116.

[16] Taylor, *supra* note 7, at 30.

Moreover, the standstill period will only begin once that information has been provided. This gives bidders enough time to collect the relevant information, gather the evidence, mandate the lawyers, and to initiate proceedings as envisaged in Recital 6 of Directive 2007/66/EC. Respect for the standstill period is also enforced by the new remedy of ineffectiveness outlined below, since the conclusion or making of a contract before the standstill period has expired is one of the only three violations for which ineffectiveness can be granted.

Following the requirements of the new Remedies Directive 2007/66/EC,[17] 'ineffectiveness' was introduced in the United Kingdom procurement Regulations in December 2009. According to Regulation 47K of the United Kingdom Public Contracts (Amendment) Regulations 2009 the respective courts may declare a public or utility contract ineffective if there are extreme violations of the Public Contracts Regulations. These are the three grounds also provided in the Directive: direct illegal awards, violation of the standstill obligation and of the suspension of the tender procedure, and call-offs above the threshold values of the Directives in the context of framework agreements or dynamic purchasing systems. This will enable legal action by third parties against concluded or made contracts possibly leading to the court nullifying at least parts of the obligations of a concluded or made contract.

According to Regulation 47E of the Public Contracts (Amendment) Regulations 2009 an action for ineffectiveness has to be brought within a time limit of six months after the conclusion or making of the contract. The exception to this rule is when a contract award notice was published or where the contracting authority has informed the economic operator of the conclusion of the contract and provided a summary of the relevant reasons. In these two cases the time limit is 30 days from the date of the publication of the notice.

[17] Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L-134/114.

There is no time limit for the court to issue a decision on an action for ineffectiveness. There are generally no limits for English courts to issue decisions. The time for a court to reach a decision will depend on "the complexity of the issue under consideration and will vary widely."[18]

The approach of 'prospective ineffectiveness'[19] in Regulation 47M (5) will limit the contractual obligations that can be nullified to those which have yet to be performed at the time of the legal action. This means that "[o]bligations that have been performed by any contractor will not therefore have to be undone."[20] According to the Office of Government Commerce's *Explanatory Memorandum to the Public Contracts (Amendment) Regulations 2009 No. 2992*, "UK stakeholders strongly favoured the prospective method, even though that would need to be coupled with an additional method, […]".[21] The Directive left the choice between prospective and retrospective ineffectiveness to the Member States. Moreover, consultation of the stakeholders is good legislative practice. However, this citation from the OGC document could be interpreted as suggesting that the choice was mainly made by the stakeholders or at least that their opinion was a decisive factor. Ineffectiveness and public procurement law in general aims to regulate the behaviour of contracting authorities and bidders. Ineffectiveness aims to deal with the most extreme

[18] Trybus, Blomberg, and Gorecki, *Public Procurement Review and Remedies Systems in the European Union* (SIGMA Paper 41, Paris, 2007), http://www.oecd-ilibrary.org/governance/public-procurement-review-and-remedies-systems-in-the-european-union_5kml60q9vklt-en (accessed in February 2011), at 109

[19] Henty, "OGC Consultation on Implementation of the New Remedies Directive" (2009) 18 *Public Procurement Law Review* NA48, at NA50 citing (United Kingdom) Office of Government Commerce, Consultation on the Approach to Implementation, at paragraphs 28-32

[20] *Explanatory Memorandum to the Public Contracts (Amendment) Regulations 2009 No. 2992*, (Office of Government Commerce, 2009) http://www.ogc.gov.uk/documents/Remedies_EXPL_MEMO.pdf (accessed in December 2010), at 7.3.1.

[21] Ibid.

violations. While, again, consultation is good legislative practice, it is doubtful whether the details of an instrument devised to punish extreme violations of the law should be decided by stakeholders the new instrument is directed against, if they violate the law in such an extreme way. Prospective ineffectiveness is 'ineffectiveness light' and potentially less effective as it is less of a deterrent against the extreme violations it is directed against. Moreover, the distinction between the two forms of ineffectiveness can be difficult to establish.[22]

Regulation 47L of the Public Contracts (Amendment) Regulations 2009 contains an exception to ineffectiveness when overriding reasons relating to the general interest can justify that the contract is continued.

Despite all the criticism expressed above, the introduction of ineffectiveness significantly changes the traditional approach to concluded public contracts in England and Wales (and Northern Ireland and Scotland). At least in theory, which is no small feat, the principle of *pacta sunt servanda* is overcome by the amended Regulations. Again, it is not clear yet how ineffectiveness will operate in practice. However, even with the current lack of clarity it is assumed that it is a major deterrent due to the possible costs, delay to the project, the hassle of re-commencing the procurement procedure, the impact on the budget if fines are imposed,[23] as well as the risk of bad publicity and political pressure.[24]

Traditionally, there were no provisions in relation to periodic penalty payments and no financial or other alternative penalties available in the United Kingdom. However, this changed with the implementation of Directive 2007/66/EC in the United Kingdom (and

[22] Skilbeck, *supra* note 8, at 17.

[23] Clifton, "Ineffectiveness – the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?" (2009) 19 *Public Procurement Law Review* 165

[24] Henty, "Remedies Directive Implemented into UK Law", *supra* note 2, at 116.

Scotland).[25] According to Regulations 47N ”civil financial penalties” may and in some cases have to be imposed by the court. Moreover, the same provisions allow ”contract shortening” as a possible remedy in certain circumstances. Both of these ‘alternative penalties’ can be imposed in addition to or instead of an order of ineffectiveness. In the context of the latter case, they can be imposed if the court is satisfied that any of the grounds for ineffectiveness apply but does not make such a declaration because of overriding reasons in the public interest (see above). Finally, they can be imposed where the standstill period, the automatic suspension of the procurement procedure, or an interim order has not been respected and the court does not make an order of ineffectiveness, “because none was sought or because the court is not satisfied that any of the grounds for ineffectiveness applies.” When the court is considering what ‘alternative penalty’ to impose, “the overriding consideration is that the penalties must be effective, proportionate and dissuasive.” In that context the court will account of all the relevant factors, including the seriousness of the relevant breach of the duty, the behavior of the contracting authority, and in certain contexts the extent to which the contract remains in force.

Compared to the case loads in Germany and France, there are relatively few public procurement cases each year. While this is partly due to the effort and costs[26] involved in having to bring proceedings in the High Court and possibly beyond and the unavailability of cheaper lower level procurement review bodies, the small number of public contracts cases in England and Wales (and Scotland and Northern Ireland) is also a result of the general attitude of tenderers towards review proceedings. The Wood Review found that British tenderers are reluctant to challenge mainly due to the negative consequences of their

[25] As foreseen by Henty, “OGC Consultation on Implementation of the New Remedies Directive”, *supra* note 19, at NA51-52.

[26] The costs indentified as a detrerent to litigation already by Pachnou, ”Bidder remedies to enforce the EC procurement rules in England and Wales” (2003) 12 *Public Procurement Law Reveiw* 35

business relationships and the difficulties of proving a wrongdoing.[27] This changed recently. For the last few years there have been about 20+ public procurement cases each year, amounting to an overall body of case law since the beginnings of public procurement litigation of about 200 cases with about 60 in Northern Ireland alone.[28] While there has been no research into the reasons for this change of attitude regarding litigation, it appears that the findings of the Wood Review are now at least to an extent outdated. An increased awareness of the available public procurement remedies amongst tenderers is likely to be one factor leading to their increased readiness to seek them. Moreover, there is anecdotal evidence that the introduction of the standstill period following the Alcatel judgment in the 2006 regulations made a considerable difference.

The small number of cases, high litigation costs, and the absence of lower level procurement review bodies below the High Court (and Sheriff Court) led to criticism questioning whether the United Kingdom and Scotland public procurement review and remedies systems were sufficiently effective. The number of cases is increasing and might increase even further in the future. While this is partly due to innovations in the review and remedies systems initiated by the implementation of EU law, there also appears to be a shift from the attitude of many tenderers 'not to bite the hand that feeds'. This shift might become more dramatic in the future since the new Coalition Government is unlikely to feed as much as its predecessor did.

[27] Wood Review: *Investigating UK business experiences of competing for public contracts in other EU countries* (November 2004) www.ogc.gov.uk/documents/woodreview.pdf (accessed in January 2011).

[28] This estimate figure emerges from the increased number of United Kingdom and Scotland judgments published in the law reports and discussed in the *Public Procurement Law Review*, other law journals, and the websites of law firms and barristers' chambers.

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ACTOS Y CONTRATOS

INFORME ANUAL - 2010 - ESPAÑA

(Febrero 2011)

Prof. Julio V. GONZÁLEZ GARCÍA

ÍNDICE

1. INTRODUCCIÓN

El año 2010 ha sido un año extrañamente prolijo en relación con los actos administrativos y los contratos públicos en el ordenamiento jurídico español. Como consecuencia de los deberes de transposición de dos Directivas, se han producido cambios legislativos en ambos sectores que justificarían aisladamente que se explicaran en estas páginas.

En relación con los actos administrativos, aunque formalmente la reforma se operó en los últimos días de 2009, la transposición de la Directiva 2006/123 ha abierto la puerta a una forma diferente de entender las formas de intervención en las actividades de servicios; sustituyendo los actos de conclusión del procedimiento por el género de las comunicaciones previas.

En materia de contratos, la necesidad de transponer la Directiva de recursos ha supuesto un cambio tanto en los procedimientos de recurso como en las causas de invalidez de los contratos públicos. Empezaré el desarrollo por este último apartado.

2. APROXIMACIÓN SUMARIA AL RÉGIMEN DE RECURSOS EN MATERIA DE CONTRATOS EN EL DERECHO ESPAÑOL.

2.1 Introducción

La aprobación de la Directiva 2007/66/CE del Parlamento Europeo y del Consejo, de 11 de diciembre de 2007, por la que se modifican las Directivas 89/665/CEE y 92/13/CEE del Consejo en lo que respecta a la mejora de la eficacia de los procedimientos de recurso en materia de adjudicación de contratos públicos (Directiva de recursos en adelante) tiene una notable importancia en la regulación de la contratación pública, constituyendo un complemento inescindible de las Directivas que recogen los procedimientos de adjudicación de los contratos.

La Directiva de recursos ha sido objeto de transposición al ordenamiento español a través de la Ley 34/2010, de 5 de agosto, de modificación de las Leyes 30/2007, de 30 de octubre, de Contratos del Sector Público, 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales, y 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa para adaptación a la normativa comunitaria de las dos primeras. Como se puede apreciar, es básicamente una Ley de modificación de la Ley de Contratos del Sector Público (LCSP, en adelante) y por ello, supondrá incorporar a una norma, de por sí compleja, un sistema de recursos que altera la práctica española en la materia a través de la creación de un Tribunal especial de naturaleza administrativa.

La cuestión de los recursos en materia de contratos, de sus efectos constituye un punto siempre conflictivo, con dos intereses que son contrapuestos. Por un lado, el interés de los participantes en el procedimiento de contratación y que no han resultado adjudicatarios, que pueden pensar que la resolución administrativa no fue la adecuada. Dilatar en el tiempo la resolución del recurso, aunque sea favorablemente al recurrente, supone negar la justicia material ya que es previsible que el contrato esté ejecutado. Al mismo tiempo, cuando se recurre e hipotéticamente se anula un contrato adjudicado se está sin duda provocando un perjuicio al interés general, manifestado en el retraso en la prestación que va a recibir el ente público; riesgo que no es menor teniendo en cuenta que estamos en un momento de incremento de la litigiosidad, tanto administrativa como judicial. Por ello, la solución que se proporcione ha de ser cuidadosa para que ninguno de los dos intereses tenga un prejuicio apriorísitico imposible de asumir.

En todo caso, toda modificación de la normativa, por brillante que sea, se enfrenta a un problema que frena su aplicabilidad: la mayor complejidad de los contratos –de los que los mecanismos de colaboración público privada constituyen el punto mayor-, la sofisticación de los mecanismos de adjudicación –cuyo paradigma es el diálogo competitivo-; el mayor grado de tecnificación y el aumento de la litigiosidad hacen que disponer de un control judicial efectivo y razonable resulte especialmente dificultoso. Aquí no podemos olvidar, tampoco, que el Derecho llega hasta un determinado punto y que los

ámbitos de discrecionalidad administrativa que existen –y es necesario que existan- suponen un freno (material) en el control.

La reforma en el ordenamiento español va a pasar por la redefinición de las causas de nulidad de los contratos y, en segundo lugar, en la modificación del procedimiento de recurso, derogándose el régimen especial de revisión de decisiones en materia de contratación y sustituyéndolo por un mecanismo que incorpora un Tribunal de naturaleza administrativa. A la exposición de ambas cuestiones se dedican las siguientes páginas.

A los efectos del entendimiento del régimen español, sí conviene señalar su complejidad. Complejidad que se ve aumentada por el hecho de que convivan en el ordenamiento contratos sometidos a regulación armonizada –los que están sometidos a las Directivas comunitarias- y los que carecen de esa calificación, que dependerá no sólo de la cuantía sino también de la entidad adjudicataria. Este hecho se traduce, sin dudas, en que el régimen de revisión pueda producir cierta inseguridad.De hecho, los contratos que no llegan a los umbrales comunitarios tienen que someterse al régimen general de los recursos administrativos.

Por último, conviene tener presente que el Tribunal especial se ha creado por ley en el verano del 2010 y su composición se ha retrasado hasta el final del mes de octubre. No hay, por tanto resoluciones que puedan ilustrar la eficacia del mecanismo creado con el legislador.

2.2 Previo: modalidades de nulidad de los contratos del sector público

A los efectos de un adecuado entendimiento de cuál es el régimen español de las modalidades de recurso en materia de contratación pública conviene tener presente un dato esencial: las causas de invalidez de los contratos resultan especialmente complejas y tienen consecuencias sobre los mecanismos de recurso. Precisamente por ello, aun introduciendo un elemento inicialmente no previsto en el esquema general.

La incorporación de los contenidos de la Directiva de recursos se ha traducido en una redefinición de los supuestos de nulidad de los contratos públicos. A la tradicional

distinción del Derecho español entre motivos de "Derecho administrativo" y de "Derecho civil" habrá que añadir una tercera categoría definida en los artículos 37 y siguientes como "supuestos especiales de nulidad" que, siguiendo la clasificación anterior, podría clasificarse como motivos de "Derecho comunitario", dado que son los motivos que proceden de la transposición de la directiva.

2.3 Modificación del sistema de recursos en materia de contratación: configuración de tribunales administrativos especiales

El primer punto que ha de ser destacado es la configuración de un órgano para los contratos de la Administración General del Estado un órgano específico para conocer de los litigios: el Tribunal Administrativo Central de Recursos Contractuales, compuesto por un Presidente y un mínimo de dos vocales, aunque este último número variará en función del número de asuntos que puedan llegar a él. Será el órgano que conozca de las reclamaciones que se susciten por los expedientes de contratación del Consejo General del Poder Judicial, el Tribunal Constitucional y el Tribunal de Cuentas. Pata el resto de los entes del sector público habrá que articular un mecanismo equivalente.

A pesar de su naturaleza administrativa, es un órgano especializado que actuará con plena independencia funcional en el ejercicio de sus funciones. De hecho, los designados como Magistrados tendrán reconocido su carácter independiente e inamovible, estando tasadas las causas de remoción del puesto, de acuerdo con las reglas usuales. La duración del nombramiento será de seis años y no podrá prorrogarse.

2.4 Cuestión de nulidad para motivos de derecho comunitario

El primer elemento que conviene reseñar es la bifurcación de los mecanismos de recurso para la resolución de los litigios que surjan en los procedimientos de contratación. La ley 34/2010 crea, por un lado, una "cuestión de nulidad" y articula un recurso especial de contratación que se analizará en el epígrafe siguiente. No obstante, queda en la opción del recurrente utilizar esta vía de recurso o el recurso especial, lo cual ha obligado al legislador a incluir una cláusula por la que se declara que la cuestión de nulidad se podrá

inadmitir –debería, sería más lógico- "cuando el interesado hubiera interpuesto recurso especial regulado en los artículos 310 y siguientes sobre el mismo acto habiendo respetado el órgano de contratación la suspensión del acto impugnado y la resolución dictada".

En el fondo, la cuestión de nulidad no es sino una adaptación del procedimiento general del recurso especial en materia de contratación, en el sentido de alteración de los plazos en los diversos trámites del recurso y la omisión de otros; concretamente la no obligatoriedad de hacer el anuncio previo que sí se exige en el otro recurso. La única regla sustantiva especial es que carece de efectos suspensivos automáticos.

Sus caracteres más relevantes son los siguientes:

a) Carácter contractual: no es un recurso contra los actos dictados en el procedimiento de adjudicación, sino contra los contratos ya formalizados cuando se den los supuestos especiales de nulidad (art. 37.1 LCSP).

b) Carácter extraordinario o tasado: el recurso contractual sólo puede interponerse cuando concurran los supuestos especiales de nulidad de los contratos, sin que pueda fundarse en otros motivos ni tan siquiera en las causas generales de nulidad de pleno derecho (arts. 37.1 y 39.1 LCSP).

c) Carácter no suspensivo: su interposición no produce la suspensión automática del contrato impugnado [art. 39.5.b) LCSP], sin perjuicio de solicitar medidas provisionales

Resolución del recurso y medidas complementarias

La estimación de la cuestión de nulidad o recurso contractual se manifiesta en la declaración de nulidad, que sólo puede acordarse en los supuestos especiales previstos en el art. 37 (art. 38.1 LCSP). Con carácter general, los efectos de esta declaración de nulidad llevarán, en todo caso, la del mismo contrato, que entrará en fase de liquidación, debiendo restituirse las partes recíprocamente las cosas que hubiesen recibido en virtud del mismo y si esto no fuese posible se devolverá su valor, debiendo la parte que resulte culpable indemnizar a la contraria de los daños y perjuicios que haya sufrido (art. 35.1 LCSP

reformado por Ley 34/2010). No obstante, para evitar efectos mayores derivados de la declaración de nulidad, se permite la sustitución, manteniendo en consecuencia la validez del contrato, adoptando una sanción alternativa (art. 38.2). Se trata de una opción que tiene que solicitar el órgano de contratación ya sea durante las alegaciones ya durante la fase de ejecución de la resolución y que está sujeto al cumplimiento de determinadas exigencias.

2.5 Recurso especial en materia de contratación

Naturaleza del recurso y actos susceptibles de recurso

El primer elemento que ha de ser tenido en cuenta es que este recurso tiene naturaleza potestativa, en cuanto al acceso a la jurisdicción contencioso-administrativa. Esto significa que las vías de recurso judicial están abiertas sin necesidad de interponer esta modalidad de recurso.

No obstante, es previsible que, a diferencia de lo que ocurre con otros supuestos de recursos administrativos, que son muy poco empleados por los ciudadanos, puede tener un recorrido bastante mayor, por dos razones: una por su carácter sumario y por reglas procesales que permitirán una mayor efectividad del recurso y, en segundo lugar, en la medida en que el retraso que acumula la jurisdicción contencioso-administrativa hace que en buena medida quede carente de contenido el objeto del recurso. Ahora bien, ello no obsta para que los procedimientos de recurso se puedan continuar en el contencioso con lo que parte de los efectos benéficos que se quieren obtener pueden perderse en el camino.

Resolución del recurso

El procedimiento del recurso especial finaliza con la resolución. El plazo para dictarla es de cinco días hábiles a contar, no desde la interposición, sino desde la recepción de las alegaciones de los interesados o del transcurso del plazo señalado para su formulación y el de prueba en su caso (art. 317.1 LCSP). La duración total del procedimiento es realmente muy breve: la suma total de los días previstos para los distintos trámites es de 12 días hábiles, a la que en su caso habría que añadir los 10 días hábiles para la práctica de la prueba.

El Tribunal, a la hora de dictar la resolución, tiene plenas capacidades para dictar aquella resolución que considere más adecuada, de acuerdo con los principios de congruencia y motivación. a) Anulación de actos ilegales; b) Indemnización de daños y perjuicios; c) Levantamiento de medidas cautelares. d) Posible imposición de sanción

Efectos de la resolución del recurso

El recurso especial es una primera instancia independiente, administrativa y no jurisdiccional, pues las resoluciones del tribunal administrativo de contratación son susceptibles de posterior recurso contencioso-administrativo (art. 21.1 LCSP). Frente a la resolución dictada en el procedimiento del recurso especial solo puede interponerse recurso contencioso-administrativo, de acuerdo con las nuevas reglas sobre competencia y legitimación -ya reseñadas-de la LJCA reformada por la Ley 34/2010 (recurso directo por los interesados y las entidades adjudicadoras); sin que sea susceptible de revisión de oficio por nulidad de los actos administrativos prevista tanto en el art. 34 de la LCSP como en el art. 102 de la Ley 30/1992 ni de la fiscalización por los órganos de control financiero de las Administraciones públicas (art. 319.1 LCSP).

3. ACTOS ADMINISTRATIVOS

La aprobación de la Directiva 2006/123/CE, del Parlamento Europeo y del Consejo, de 12 de diciembre, relativa a los servicios en el mercado interior, ha supuesto un cambio de gran envergadura en cuanto a los mecanismos de intervención en las actividades de servicios. El plazo de transposición, concluido el 28 de diciembre de 2009 ha motivado que se modifiquen las normas de procedimiento y actos administrativo para adaptar las formas de intervención administrativa a la nueva regulación comunitaria.

La Directiva de servicios se ha transpuesto al ordenamiento español[1], en primer término, a través de una norma transversal -la *Ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio*, coloquialmente conocida como *Ley paraguas*- y, en un segundo escalón, a través de una serie de disposiciones con rango de ley específicas tanto del Estado como de las Comunidades autónomas, dentro de las cuales hay que citar expresamente a la *Ley 25/2009, de 22 de diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio* –coloquialmente conocida por *Ley ómnibus*-.

3.1 Autorización como género y como especie

El régimen que está previsto en la Directiva de servicios afecta a un conjunto amplio de mecanismos de intervención de los poderes públicos en las actividades de los particulares. Se puede afirmar que la *autorización* aparece como un concepto que afecta a toda aquella actividad administrativa en virtud de la cual se realice cualquier actividad de control/delimitación de las actividades de servicios, yendo de las más intensas –como son el otorgamiento de permisos para el ejercicio de actividades, esto es las autorizaciones tradicionales- a la ordenación de todas las formas de registro de operadores, aunque sean motivados por el ejercicio de actividades reguladas. En este punto, resulta necesario recordar que la propia Directiva determina que por régimen de autorización hay que entender "cualquier procedimiento en virtud del cual el prestador o el destinatario están obligados a hacer un trámite ante la autoridad competente para obtener un documento oficial o una decisión implícita sobre el acceso a una actividad de servicios o su ejercicio" (artículo 4).

[1] Normativamente no se puede proporcionar un listado por su extensión, que además se amplía día a día. Puede verse, el tomo de recopilación Directiva de servicios y normativa de transposición, Ed. Aranzadi (2010).

Desde esta perspectiva, la autorización deja de ser un título habilitante en la Directiva de servicios para transformarse en el género de las modalidades de intervención administrativa sobre las actividades de servicios; lo cual imposibilita la articulación del régimen comunitario. No obstante, al lado del género, conviene examinar cómo se articulan las posibilidades que tienen los entes públicos y ante qué tipo de situaciones pueden ser utilizadas las especies de autorizaciones que cumplan con la función tradicional de esta modalidad de títulos.

3.2 Valoración de los mecanismo de intervención administrativa en las actividades de servicios

Como se acaba de indicar, las Leyes paraguas y ómnibus configura un régimen de actos de intervención en las actividades económicas de servicios incluidas en el ámbito de aplicación de la ley que está compuesto por autorizaciones, declaraciones responsables y actos comunicados. Tres modalidades de intervención que responden a finalidades distintas y que, de hecho, plantean el momento de la actividad administrativa en diferentes puntos. Precisamente por ello, la ley recoge unas notas que ha de aplicar la Administración competente que constituyen principios sobre el cómo y el cuándo de la intervención administrativa.

El nuevo artículo 39 bis de la LRJPAP, recordando el contenido del artículo 6 del Reglamento de Servicios de las Corporaciones Locales, establece, en este sentido, que: "*las Administraciones Públicas que en el ejercicio de sus respectivas competencias establezcan medidas que limiten el ejercicio de derechos individuales o colectivos o exijan el cumplimiento de requisitos para el desarrollo de una actividad, deberán elegir la medida menos restrictiva, motivar su necesidad para la protección del interés público así como justificar su adecuación para lograr los fines que se persiguen, sin que en ningún caso se produzcan diferencias de trato discriminatorias".* Principio de menor restricción y exigencia de motivación de la opción elegida por el regulador son, en consecuencia, los puntos sobre los que se estructura la arquitectura de intervención administrativa.

3.3 Las comunicaciones previas como mecanismo de intervención preferente y sus dos especies en el nuevo artículo 71 bis de la LRJPAC

La Ley ómnibus introduce un nuevo precepto en la Ley 30/92, de Régimen Jurídico y de Procedimiento Administrativo Común (LPC, en adelante), el artículo 71 bis, que tiene carácter básico por aplicación del artículo 149.1.18 CE, que cumple la función de establecer la normativa esencial de esta modalidad de intervención administrativa. Con ello, se proporciona un carácter general a todo el territorio nacional de las soluciones que se habían ido desarrollando las Comunidades autónomas, vinculadas a sus propios procesos de simplificación administrativa, adoptadas en el curso de la crisis económica..

De acuerdo con lo previsto en el artículo 71 bis LPC el género de las comunicaciones previas consiste en una declaración efectuada por un particular a la Administración responsable por la que comunica "no sólo los datos e informaciones requeridos por la disposición legal que la regule, sino también –y quizá fundamentalmente- la intención de realizar una concreta actividad. Se trata, en definitiva, de una declaración de voluntad dirigida a la producción de un efecto jurídico concreto previsto por la norma y querido por el interesado: la inversión en ese caso de la prohibición relativa instrumental establecida por la norma, o en otros términos, la obtención del título habilitante"[2]. No es, como es conocido, un instrumento novedoso, aunque sí se puede predicar esta característica de la generalización que hace la legislación de procedimiento administrativo para cualquier procedimiento, y, más aún, que constituye el mecanismo primario que está a disposición de los entes públicos para intervenir la actividad de los particulares.

Esta modalidad de intervención administrativa acostumbra a operar sobre aquellas actividades en las que se pretende ganar en eficacia en el control que realizan las Administraciones públicas, sin que por ello se resienta el interés general, en la medida en que las potestades administrativas se ejercerán a posteriori. Es, por ello, un modelo que

[2] ARROYO JIMÉNEZ, L., Libre empresa y títulos habilitantes, CEPC, Madrid (2004), p. 349.

sirve a la liberalización de mercado que acostumbran a estar, además, desregulados –como ocurre con las actividades de servicios incluidas en el ámbito de aplicación de la directiva- y, por otra parte, permite disponer de una ordenación de los procedimientos administrativos simplificado, modulado, con lo que ello conlleva en relación con el cumplimiento del principio de celeridad administrativa. Téngase en cuenta que en el contexto de la transposición de la Directiva de servicios el disponer de procedimientos simplificados resulta especialmente importante, en la medida en que su tramitación se debe realizar de forma electrónica.

Esta es la esencia general de las dos figuras que recoge el nuevo artículo 71 bis LPC; declaración responsable y comunicación previa. De acuerdo con las definiciones legales, nos encontramos ante comunicación previa en aquellos casos en los que se presenta ante la Administración un "*documento mediante el que los interesados ponen en conocimiento de la Administración Pública competente sus datos identificativos y demás requisitos exigibles para el ejercicio de un derecho o el inicio de una actividad, de acuerdo con lo establecido en el artículo 70.1"*. Por su parte, la declaración responsable es aquél documento "*suscrito por un interesado en el que manifiesta, bajo su responsabilidad, que cumple con los requisitos establecidos en la normativa vigente para acceder al reconocimiento de un derecho o facultad o para su ejercicio, que dispone de la documentación que así lo acredita y que se compromete a mantener su cumplimiento durante el periodo de tiempo inherente a dicho reconocimiento o ejercicio"*.

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CONTRATS ADMINISTRATIFS

APPORTS DE L'ANNEE - 2010 - FRANCE

(Mai 2011)

Prof. Hélène HOEPFFNER[1]

INDEX

L'année 2010 n'a pas été un grand millésime pour le droit des contrats administratifs – du point de vue de leur qualification et de leur régime juridique. Nul arrêt novateur. Nul bouleversement. La jurisprudence a simplement confirmé des principes, apporté des précisions ou confirmé des solutions relatifs tant à la qualification des contrats administratifs qu'à leur régime juridique.

[1] Maître de conférences en droit public à l'Université Paris II- Panthéon Assas

1. SUR LA QUALIFICATION DES CONTRATS ADMINISTRATIFS

Le législateur, longtemps taiseux, a, depuis quelques années, multiplié les contrats administratifs par détermination de la loi, rendant presque sans objet les critères jurisprudentiels traditionnels (v. cependant : TC 6 juillet 2009, *Société coopérative agricole Agrial*, n°3711).

L'année 2010 illustre cette problématique. Seuls quelques rares arrêts font référence aux critères traditionnels du contrat administratif. Au contraire, nombre de décisions précisent les critères d'identification des contrats administratifs spéciaux.

1.1 Théorie générale

Aux termes d'une jurisprudence constante, l'identification d'un contrat administratif suppose la réunion de deux critères cumulatifs. Un critère organique d'abord : un contrat ne peut être administratif que si l'une des parties à celui-ci est une personne morale de droit public (CE 1er juillet 2010, n°333275, *Société Bioenerg, Dr. Adm*. 2010, comm. 139, F. Brenet). Un critère matériel ensuite : un contrat est administratif s'il comporte une clause exorbitante du droit commun (CE 31 juillet 1912, *Société des Granits Porphyroïdes des Vosges*, *Rec. CE 1912* p. 909 ; Les grands arrêts de la jurisprudence administrative, par M. Long, P. Weil, G. Braibant, P. Delvolvé et B. Genevois, Dalloz, 17ème éd., 2009, p.143) ou s'il associe directement le cocontractant au service public (CE Sect. 20 avril 1956, *Époux Bertin*, *Rec. CE 1956* p.167 ; *Les grands arrêts de la jurisprudence administrative, préc.* p.466).

L'arrêt rendu par la première chambre civile de la Cour de cassation le 6 octobre 2010 (pourvoi n° n°09.15-448) illustre, de façon somme toute étonnante, la relativité du **critère organique**.

Statuant au visa de l'article 4 de la loi du 28 pluviôse en VIII « alors applicable » , la Cour, après avoir rappelé « *qu'ont le caractère de travaux publics, les travaux immobiliers répondant à une fin d'intérêt général et qui comportent l'intervention d'une personne publique, soit en tant que collectivité réalisant les travaux, soit comme*

bénéficiaire de ces derniers », conclut que le simple fait qu'un contrat – pourtant conclu entre deux personnes privées – prévoie que « *les équipements publics devant revenir à la commune lui seront remis gratuitement après leur réception* » suffit à caractériser un ouvrage public et, par suite, à retenir la compétence de la juridiction administrative.

Certes, un tel raisonnement est – en principe – retenu, en droit de la responsabilité extra-contractuelle, pour les dommages de travaux publics (TC, 15 janvier 1973, *Société Quillery-Goumy c/ Société chimique routière*, *Rec. CE 1973, tables* p.844).

En droit des contrats, la notion de travail public n'a en revanche jamais permis – à elle seule – de qualifier un contrat de contrat administratif. Les marchés de travaux publics conclus entre deux personnes privées ont toujours été qualifiés de contrats de droit privé (CE Sect., 14 mai 1974, *Société Paul Millet et compagnie, Rec. CE 1974*, p. 310), sauf lorsque l'une des parties agissait « pour le compte » d'une personne publique (CE, 30 mai 1975, *Société d'équipement de la région montpelliéraine, Rec. CE 1975*, p. 326).

En l'espèce, la Cour aurait pu raisonner de la sorte et conclure que la société concessionnaire agissait pour le compte de la commune puisque le bassin à vocation portuaire, construction répondant à un but d'utilité publique, a été remis, dès son achèvement, à la commune, à titre gratuit. Elle n'a cependant pas retenu une telle solution. Procédant par la voie d'une affirmation générale, elle semble considérer que toute opération de travail public au sens de la jurisprudence *Commune de Montségur* (CE, 10 juin 1921, Rec. CE 1921, p.573, *Les grands arrêts de la jurisprudence administrative, op. cit*. p.226) relève de la compétence du juge administratif.

L'arrêt rendu par le Conseil d'État le 19 novembre 2010, *Office National des Forêts c/ Girard-Mille* (n°331837 ; RJEP n°684, 2011, comm. 12, concl. B. Dacosta ; *Contrats-Marchés publ*. 2011, comm. 36, P. Devillers ; *Dr. adm*. 2011, comm. 19, F. Brenet ; *JCP A.* n°3, 17 janvier 2011, 2020, comm. J. Moreau ; *AJDA* 2011, p.281, comm. J.-D. Dreyfus ; *AJCT* 2011, p.141, comm. G. Clamour) réaffirme et précise la place de la **clause exorbitante du droit commun** comme critère du contrat administratif pour les contrats portant sur la gestion du domaine privé.

La multiplication des hypothèses de qualification textuelle des contrats administratifs a considérablement réduit la portée pratique du critère de la clause exorbitante du droit privé. À tel point que certains auteurs en ont conclu qu'il a connu « *une mort sans enterrement* » (N. Symchowicz et Ph. Proot, « De la mort des critères du contrat administratif à celle de la théorie du contrat administratif », *CP-ACCP*, n°100, p.16).

L'arrêt *Office National des Forêts* prouve qu'une telle conclusion était hâtive (v. aussi TC, 15 mars 2010, n°3755, *M. Antony A. c/ Commune de Vallon en Sully* ; *Contrats-Marchés publ*. 2010, comm. 242, F. Llorens).

En l'espèce, l'établissement public avait conclu, en 2007, un contrat autorisant M. A. à occuper des dépendances de son domaine privé en vue d'y exploiter un centre équestre. L'occupant n'ayant pas respecté ses engagements, l'ONF a résilié la convention. En première instance, le tribunal administratif de Pau se déclara incompétent au motif que la convention portait sur la gestion du domaine privé d'une personne publique. La cour administrative d'appel de Bordeaux, au contraire, se déclara compétente au motif que ladite convention comportait des clauses exorbitantes du droit commun. Saisi en cassation, le Conseil d'État confirme cette dernière analyse. Alors même que la présence d'une seule clause exorbitante du droit commun suffit à entraîner l'administrativité d'un contrat (CE, 20 avril 1959, *Société nouvelle d'exploitation des plages*, *Rec. CE* 1959, p.866), le Conseil d'État s'efforce d'en relever trois :

« *Considérant (...) qu'en vertu des stipulations de l'article 7-1 de la convention litigieuse, relatives au calcul de la redevance d'occupation due par l'occupant, l'Office dispose d'un pouvoir de contrôle direct de l'ensemble des documents comptables du titulaire ; que si la clause 8-2-1 de la convention permet à l'ONF de procéder à tous travaux sur la parcelle occupée dans le cadre des compétences légalement dévolues à l'Office par les dispositions du code forestier, elle stipule également qu'il peut exécuter des travaux sur la voie publique ou sur des immeubles voisins pour lesquels quelque gêne qu'il puisse en résulter pour lui, le titulaire n'aura aucun recours contre l'ONF et ne pourra prétendre à aucune indemnité, ni diminution de loyer ; que la clause de l'article 9 de cette même convention, relative aux pouvoirs des agents assermentés de l'Office, compétents en*

vertu des dispositions des articles L. 152-1 et suivants du code forestier pour rechercher et constater les contraventions et délits dans les forêts et terrains soumis au régime forestier, impose au cocontractant d'observer les instructions que pourraient lui donner ces agents ; que la cour administrative d'appel de Bordeaux (...) a exactement qualifié ces clauses (...) d'exorbitantes du droit commun ;

Considérant que l'existence de clauses exorbitantes du droit commun dans le contrat liant M A à l'ONF lui conférant un caractère administratif, la cour administrative d'appel de Bordeaux n'a pas commis d'erreur de droit en jugeant que le litige né de l'exécution de ce contrat relevait de la compétence de la juridiction administrative ; ».

De façon assez paradoxale donc, l'utilité du critère de la clause exorbitante du droit commun est réaffirmée dans un contentieux relatif à une convention d'occupation du domaine privé d'une personne publique (Ph. Yolka, « Une peau de chagrin : la clause exorbitante dans les contrats d'occupation du domaine privé, *JCP A.* 2008, 2117), dans un contexte où le contentieux de la gestion du domaine privé relève pourtant très largement de la compétence du juge judiciaire (en ce sens, l'arrêt reconnaissant la compétence du juge judiciaire pour connaître du contentieux des actes détachables de la gestion du domaine privé : TC 22 novembre 2010, n°3764, *Brasserie du Théâtre c/ Commune de Reims* ; *AJDA* 2010, p.2423, chron. D. Botteghi et A. Lallet ; *Dr. Adm.* 2011, comm. 20, note F. Melleray ; *Contrats-Marchés publ*. 2011, comm. 26, P. Devillers ; *RJEP* 2011, comm. 13, G. Pellissier).

Enfin, l'arrêt rendu par le Conseil d'État le 8 octobre 2010, *Société d'HLM Un toit pour tous* (n°316723 ; *Contrats-Marchés publ.* 2011, comm. 37, G. Eckert ; *Dr. Adm*. 2011, comm. 4, Ph. Billet ; *JCP. A.*, n°51, 20 déc. 2010, 2375, A. Guigue) illustre le second critère matériel du contrat administratif : **le service public**. Il confirme une jurisprudence établie aux termes de laquelle un contrat est administratif lorsque, satisfaisant au critère organique, il a pour objet de confier l'exécution du service public au cocontractant (CE, Sect., 20 avr. 1956, *Époux Bertin, Rec. CE 1956*, p.167) ou lorsque sa conclusion est le moyen même d'exercer une mission de service public.

En l'espèce, une société d'HLM a fait construire un immeuble sur un terrain qu'elle s'est vu confier par l'État dans le cadre d'un bail emphytéotique. Elle a ensuite loué cet immeuble au CROUS de Montpellier afin qu'il l'affecte au logement des étudiants. Un contentieux entre la société anonyme d'HLM et le CROUS relatif à la prise en charge de la taxe d'enlèvement des ordures ménagères a cependant conduit à s'interroger sur la qualification de ce contrat de location.

Saisi en cassation à la suite d'un arrêt confirmatif de la cour administrative d'appel de Marseille, le Conseil d'État juge que le contrat par lequel une société d'HLM loue au CROUS un immeuble d'habitation et n'autorise sa sous-location qu'au profit des étudiants revêt un caractère administratif au motif que « *cette convention a ainsi eu pour objet l'exécution même du service public de logement des étudiants et revêtait en conséquence le caractère d'un contrat administratif* ».

En effet, en l'espèce, le propriétaire de l'ouvrage était une personne privée (SA d'HLM) qui le louait à une personne publique (CROUS), chargée par le législateur du service public du logement étudiant (*c. éduc., art. L.822-1 et s.*). Le contrat ne pouvait donc pas avoir pour objet de déléguer la gestion du service public. En revanche, il constitue une modalité d'exécution du service public, ce qui suffit à entraîner son administrativité (CE 26 juin 1974, *Société La Maison des Isolants de France, Rec. CE 1974*, p.365).

1.2 Contrats spéciaux

L'année 2010 a surtout été l'occasion de préciser certains critères d'identification de contrats administratifs dits « spéciaux », notamment les marchés publics et les délégations de service public. Trois « affaires » mais cinq arrêts illustrent cette tendance.

La première concerne la qualification de **marché public**. En droit communautaire (directive 2004/18/CE du 31 mars 2004, art. 1er), comme en droit interne (C. marchés pub., art. 1er), les contrats conclus par des entités n'exerçant pas une activité économique échappent à la qualification de marché public (CE, avis, 23 octobre 2003, n°369315, *Fondation Jean Moulin*, *EDCE*, n°55, p.207 ; *CP-ACPP* 2004, n°34, note E. Fatôme et L. Richer).

Saisi d'un recours pour excès de pouvoir contre la décision ministérielle de signer la convention d'objectifs et de gestion 2009-2012 liant l'État et la Caisse nationale des allocations familiales (CNAF), le Conseil d'État, dans un arrêt rendu le 28 mai 2010, *Société Enfenconfiance* (n°328731), rejette le recours exercé par la société requérante au motif qu'aux termes de la convention litigieuse chargeant la CNAF de diffuser gratuitement sur un site Internet des informations relatives aux structures d'accueil des enfants, celle-ci n'était pas chargée « *d'exercer une activité économique emportant intervention sur le marché* ». Il précise même qu'il en va ainsi alors même que « *cette convention a pu inciter certains départements à ne pas créer ou développer leur propre site d'information* » et donc à ne pas « *faire appel à cette fin à des prestataires extérieurs* ». Par suite, la convention en cause échappe à la qualification de marché public et, par voie de conséquence, au respect des règles de publicité et de mise en concurrence.

Les deux autres affaires concernent la qualification de **délégation de service public**.

La première affaire concerne le premier critère de la délégation de service public, à savoir son objet : la délégation d'une mission de service public.

Ce critère a donné lieu à un véritable « feuilleton » : celui du stade Jean Bouin qui a démarré devant le tribunal administratif de Paris le 31 mars 2009 (n°0607283/7, *Société Paris Tennis* ; *Contrats-Marchés publ.* 2009, comm. 203, G. Eckert ; *BJCP* n°65/2009, p.312, concl. C. Villalba) et qui a connu son épilogue devant la section du Conseil d'État, le 3 décembre 2010 (n°338272 et n°338527, *AJDA* 2010, p.2343 ; *AJDA* 2011, p.18, étude S. Nicinski et E. Glaser ; *Contrats-Marchés publ.* 2011, comm. 25, G. Eckert ; *AJCT* 2011, p.37, comm. J.-D. Dreyfus ; *Dr. Adm.* 2011, comm. 17, F. Brenet et F. Melleray ; *RDI* 2011, p.162, comm. R. Noguellou).

L'enjeu du litige opposant l'association Paris Tennis à la Ville de Paris et à l'association Jean Bouin était de savoir si la convention autorisant cette dernière association à occuper, pendant vingt ans, deux parcelles du domaine public communal correspondant au stade Jean Bouin et à vingt-et-un courts de tennis était bien une convention d'occupation

du domaine public, laquelle pouvait être conclue sans avoir à respecter une procédure préalable de publicité et de mise en concurrence.

Aux termes du contrat litigieux, les parties avaient clairement exclu la qualification de délégation de service public en stipulant que « *le présent contrat d'occupation du domaine public ne confère (pas) à l'occupant (...) la qualité de concessionnaire de service public* ». L'association Paris Tennis a cependant contesté cette qualification, considérant que le contrat litigieux avait pour objet de confier au cocontractant la gestion d'un service public, sous le contrôle de la collectivité publique.

En première instance, ce raisonnement a été suivi par le tribunal administratif de Paris. « *Considérant que le juge n'est pas tenu par la qualification des conventions donnée par les parties* », il recherche « *la réalité des intentions des parties et leur pratique en 2004* ». Constatant d'une part que, malgré le silence du contrat, des courts de tennis continuaient à être affectés, à la demande de la ville, à l'accueil des activités de sport scolaire et d'autre part, que la ville de Paris conservait des pouvoirs de contrôle sur l'activité de l'association, il conclut que la convention litigieuse a pour objet de confier au cocontractant la gestion d'un service public et non pas simplement d'autoriser l'occupation du domaine public en vue de la réalisation d'une activité d'intérêt général et donc revêt « *le caractère d'une délégation de service public* ».

Saisi d'une demande de sursis à exécution à l'encontre du jugement rendu par le tribunal administratif de Paris (CJA, art. R.811-5), le Conseil d'État, se référant à la lettre du contrat, a au contraire considéré que la convention en cause constituait une convention d'occupation du domaine public dès lors qu'elle laissait le cocontractant libre de déterminer les conditions d'utilisation des installations (CE 13 janvier 2010, n°329576 et 329625, *Assoc. Paris Jean Bouin et Ville de Paris*, *Contrats-Marchés publ.* 2010, comm. 116, G. Eckert ; *BJCP* n°69/2010, p.115, concl. L. Olléon et obs. Ch. M. ; *AJDA* 2011, p.21, chron. E. Glaser ; *RJEP*, n°685, avr. 2011, comm. 20, chron. Ch. Maugüe ; Dr. Adm. 2011, comm. 17, F. Brenet et F. Melleray ; *JCP A.*, n°3, 31 janvier 2011, 2043, comm. Cl. Devès).

La cour administrative d'appel de Paris (CAA Paris, Plén., 25 mars 2010, n°09PA01920, 09PA02632, 09PA03008, *Association Paris Jean-Bouin et Ville de Paris, Contrats-Marchés publ.* 2010, comm. 189, G. Eckert ; BJCP n°71/2010, p.297 ; Dr. Adm. 2010, comm. 93, F. Brenet ; AJDA 2010, p.774, obs. F. Lelièvre), statuant au fond, en appel, s'est écartée de cette qualification. Considérant qu'« *il appartient au juge de prendre en compte non seulement les stipulations du contrat de concession mais également l'ensemble des relations, organiques ou fonctionnelles, nouées entre cette personne et la collectivité propriétaire des équipements concédés, avant, pendant et après sa conclusion* », elle a jugé que la convention revêtait le caractère d'une délégation de service public.

Saisi en cassation, le Conseil d'État a cassé l'arrêt de la cour administrative d'appel de Paris. Confirmant la commune intention des parties, s'appuyant sur les stipulations contractuelles et, plus largement, sur des « *éléments extérieurs au contrat (…) de nature à éclairer la commune intention des parties* », il considère que :

« *la cour ne pouvait se fonder sur l'ensemble des éléments qu'elle a relevés et qui, s'ils concernent des activités d'intérêt général, ne se traduisent pas par un contrôle permettant de caractériser la volonté de la ville d'ériger ces activités en mission de service public, pour en déduire l'existence d'une telle mission dont la gestion aurait été confiée à l'association* ».

Faisant application de la méthode du faisceau d'indices, il examine successivement les arguments retenus par la cour administrative d'appel pour qualifier l'activité de service public et les rejette. Il rejette d'abord l'argument tenant à la présence du club de rugby professionnel laquelle « *sans autres contraintes que celles découlant de la mise à disposition des équipements sportifs ne caractérise pas à elle seule une mission de service public* ». Il rejette ensuite l'argument fondé sur l'obligation d'accueillir les élèves des collèges environnants : l'annexe au contrat « *s'est bornée à constater la répartition hebdomadaire des créneaux d'utilisation du stade Jean Bouin et de la piste d'athlétisme par l'équipe professionnelle de rugby du Stade Français et le public scolaire* ». Il rejette aussi l'argument financier : il considère que le programme de travaux d'un montant de dix millions d'euros n'excède pas les besoins propres de l'occupant et ne constitue pas une

obligation de service public. Il considère également que si, aux termes du contrat, en cas de difficultés financières, « *les parties conviennent de se rencontrer afin d'établir les mesures propres à assurer la pérennité de l'association Paris Jean Bouin, la continuité du service public et la préservation des biens concédés* », ces stipulations ne visent qu'à « *garantir la meilleure utilisation du domaine* ».

Confortant la subjectivité de la notion de service public découlant de la jurisprudence *APREI* (CE, Sect., 22 février 2007, *Assoc. personnel relevant des établissements pour inadaptés*, *Rec. CE 2007*, p.92), l'arrêt permet de conclure qu'une convention relative à la gestion d'équipements sportifs appartenant à une collectivité publique ne constitue une délégation de service public que si les stipulation de ladite convention permettent de « *caractériser la volonté de la ville d'ériger ces activités en mission de service public* ».

La qualification retenue par le Conseil d'État peut prêter à discussion. Mais au-delà, le « feuilleton » laisse perplexe. D'une part, parce qu'on peut légitimement se demander comment un même contrat peut donner lieu à des décisions aussi diamétralement opposées. D'autre part, parce que la subjectivisation de la qualification du contrat risque d'être interprétée par certaines collectivités publiques et leurs cocontractants comme leur permettant d'échapper à la qualification de délégation de service public donc aux obligations de publicité et de mise en concurrence puisque, dans le même arrêt, le Conseil d'État a précisé que la conclusion d'une convention domaniale n'a pas à être précédée d'une procédure de publicité et de mise en concurrence (voir *infra*).

La seconde affaire concerne le second critère de la délégation de service public : la rémunération du délégataire.

Dans un arrêt rendu le 19 novembre 2010, *Consorts Dingreville* (n°320169 ; *Contrats-Marchés publ.*, 2011, comm. 22, G. Eckert ; JCP A., n°48, 29 nov. 2010, act. 875, L.E. ; *AJDA* 2010, p.2240), le Conseil d'État confirme que le critère de la délégation de service public demeure celui de la rémunération substantiellement liée aux résultats de l'exploitation (CGCT, art. L.1411-1 et L. n°93-122, 29 janvier 1993, art.38 ; CE, 15 avril

1996, *Préfet des Bouches du Rhône c/ Commune de Lambesc*, *Rec. CE 1996*, p.137) mais que son appréciation fait l'objet de nuances.

Aux termes d'une jurisprudence désormais classique, le juge a complété le critère législatif tenant à ce que la rémunération du délégataire soit « *substantiellement liée aux résultats de l'exploitation du service* » et exigé qu'une « *part significative du risque d'exploitation demeure à la charge de ce cocontractant* » : environ 30% du déficit éventuel (CE, 7 novembre 2008, n°291794, *Département de la Vendée* ; *AJDA* 2008, p.2143 et p.2454, note L. Richer *; Contrats-Marchés publ*., 2008, comm. n°296, G. Eckert ; *CCC* 2009, chron. 1, J.-M. Glatt ; *BJCP* n°62/2009, p.7, étude T. Pez). L'absence de réel risque l'exploitation exclut la qualification de délégation de service public (CE 5 juin 2009, n°298641, *Société Avenance – Enseignement et Santé* ; *JCP. A.* 2009, avr. 744 ; *RJEP*, n°671, janvier 2010, comm. 3, D. Moreau ; *Contrats-Marchés publ.* 2009, comm. 236, note G. Eckert ; *AJDA* 2009, p.1129).

Or en l'espèce, le Conseil d'État franchit un pas supplémentaire : il considère que la seule perspective d'un déficit suffit à identifier un risque d'exploitation qui n'est pas ici quantifié. Le juge s'appuie sur les modalités de calcul de la rémunération du cocontractant et conclut que celle-ci est susceptible d'être inférieure aux dépenses d'exploitation :

« *Considérant, en premier lieu, qu'il ressort des pièces du dossier soumis au juge du fond que le contrat conclu avec la société Beauvais Sports et Spectacles lui confiait une mission de service public tenant à l'exploitation du palais des spectacles communal sous le contrôle de la commune, s'agissant notamment de la programmation culturelle et des contraintes relatives à son occupation par les équipes sportives de la ville ; que ce contrat accordait à la société une rémunération composée d'une part fixe et d'une part variable calculée en fonction des écarts entre le budget prévisionnel et le budget réalisé, la rémunération globale étant susceptible d'être inférieure aux dépenses d'exploitation ; que le cocontractant supportait ainsi un risque d'exploitation ; que, par conséquent, la cour n'a pas inexactement qualifié le contrat de délégation de service public en relevant que la convention litigieuse confiait au cocontractant l'exécution d'un mission de service public, moyennant une rémunération substantiellement liée à l'exploitation* ».

2. SUR LE REGIME DES CONTRATS ADMINISTRATIFS.

Parmi les solutions méritant de retenir l'attention, certaines concernent la passation des contrats administratifs. D'autres concernent leur exécution.

2.1 Sur la passation

Le contrat administratif, comme tout contrat, naît d'un accord de volontés (C. civ., art. 1101). Théoriquement, les personnes publiques, comme les personnes privées, bénéficient de la liberté contractuelle (CE 28 janv. 1998, req. n°138650, *Sté. Borg Warner*, *Rec.* 20 ; Cons. cons., déc. n°2006-543 DC du 30 nov. 2006, *Contrats-Marchés publ*. 2007, comm. 24, G. Eckert ; *Dr. Adm.* 2007, comm. n°14, note M. Bazex ; *RFDA* 2006.1163, R. de Bellescize ; *RDP* 2006, p.1569, A. Duffy).

Elles ne sont pourtant pas libres de recourir au contrat et encore moins de choisir librement certains types de contrats. Deux arrêts illustrent ces contraintes.

Le premier est un arrêt rendu par le Conseil d'État le 3 mars 2010, *Département de la Corrèze* (n°306911). Il permet de préciser l'étendue des pouvoirs reconnus aux personnes publiques pour créer un service public à caractère industriel et commercial et, par suite, de le déléguer par le truchement d'une convention de délégation de service public.

Le département de Corrèze a créé un service public de téléassistance aux personnes âgées et handicapées puis en a attribué la gestion à un opérateur privé dans le cadre d'une convention de délégation de service public. Le contrat ayant été conclu antérieurement à l'arrêt *Tropic* du 16 juillet 2007, le concurrent évincé a exercé un recours pour excès de pouvoir contre la délibération de la commission permanente du Conseil général qui a retenu l'offre et autorisé la signature du contrat. Il estimait que la création de ce service public portait atteinte au respect du principe de la liberté du commerce et de l'industrie. Il soutenait que ce service public concurrençait illégalement les entreprises privées assurant des prestations similaires, ne bénéficiant pas de subventions publiques.

Rappelant le considérant de principe de l'arrêt Ordre des avocats au Barreau de Paris (CE, Ass., 31 mai 2006, Rec. CE 2006, p.272), le Conseil d'État rejette le pourvoi :

« *Considérant ... que le service de téléassistance aux personnes âgées et handicapées créé par le département de la Corrèze, dans le cadre de son action en matière d'aide sociale, a pour objet de permettre à toutes les personnes âgées ou dépendantes du département, indépendamment de leurs ressources, de pouvoir bénéficier d'une téléassistance pour faciliter leur maintien à domicile ; que ce service consiste, d'une part, à mettre à disposition de l'usager un matériel de transmission relié à une centrale de réception des appels, fonctionnant vingt-quatre heures sur vingt-quatre et sept jours sur sept, chargée d'identifier le problème rencontré par l'usager et d'apporter une réponse par la mise en oeuvre immédiate d'une intervention adaptée à son besoin, grâce à un réseau de solidarité composé de personnes choisies par l'usager, à un service médical, social ou spécialisé et aux dispositifs locaux existants, tels que les instances de coordination gérontologique, les plates-formes de service, le service de soins infirmiers à domicile pour personnes âgées, d'autre part, à intervenir au besoin au domicile de l'usager dans les vingt-quatre heures suivant l'appel de l'usager ou moins, selon l'urgence ; que le délégataire, tenu d'organiser localement le service, doit envisager, en fonction de la montée en charge du dispositif, l'installation d'une agence locale dans le département ; que, pour le financement de ce service, le département de la Corrèze intervient en réduction du coût réel de la prestation pour les usagers ; qu'ainsi, même si des sociétés privées offrent des prestations de téléassistance, la création de ce service, ouvert à toutes les personnes âgées ou dépendantes du département, indépendamment de leurs ressources, satisfait aux besoins de la population et répond à un intérêt public local ; que, par suite, cette création n'a pas porté une atteinte illégale au principe de liberté du commerce et de l'industrie* ».

Il confirme ainsi que l'intervention d'une personne publique sur un marché n'exige pas la démonstration d'une carence de l'initiative privée, quantitative (CE, 30 mai 1930, *Chambre syndicale du commerce de détail de Nevers, Rec. CE 1930*, p.583 ; *Les grands arrêts de la jurisprudence administrative*, par M. Long, P. Weil, G. Braibant, P. Delvolvé et B. Genevois, Dalloz, 17ème éd., 2009, p.262) ou qualitative (CE, 20 novembre 1964, *Ville*

de Nanterre, Rec. CE 1964, p.563). Elle peut être justifiée par la seule existence d'un intérêt public local.

Le second arrêt illustrant l'encadrement de la liberté de la personne publique de choisir le procédé contractuel de son choix est celui rendu par le Conseil d'État le 23 juillet 2010, *Jean-Pierre Lenoir et Syndicat national des entreprises de second œuvre du bâtiment* (n°326544 et n°326545 ; *BJCP* n°72/2010, p.359, concl. N. Boulouis ; *Contrats-Marchés pub*. 2010, comm. 318, G. Eckert ; *RJEP* 2011, comm. 2, F. Brenet ; *JCP. A.*, n°37, 13 sept. 2010, 2265, comm. F. Linditch ; *Gaz. Pal.*, n°274-275, 1er oct. 2010, p.8, comm. J.-L. Pissaloux et C. Gisbrant ; *Nouveaux Cah. Cons. cons*., n°30/2011, p.189, comm. H. Hoepffner).

Aux termes d'une jurisprudence désormais classique du Conseil constitutionnel (voyez not. Cons. cons., déc. n°2003-473 DC du 26 juin 2003, *Loi habilitant le Gouvernement à simplifier le droit* ; déc. n°2004-506 DC du 2 décembre 2004, *Loi de simplification du droit*), le contrat de partenariat est un contrat dérogatoire du droit commun. Il doit être réservé à des situations répondant à un motif d'intérêt général. Parmi celles-ci, le Conseil constitutionnel a cité « *l'urgence qui s'attache, en raison de circonstances locales particulières, à rattraper un retard préjudiciable, ou bien la nécessité de tenir compte des caractéristiques techniques, fonctionnelles ou économiques d'un équipement ou d'un service déterminé* ». De cette réserve d'interprétation « directive » est né l'article 2 de l'ordonnance du 17 juin 2004 aux termes duquel le recours au contrat de partenariat n'est légal qu'en cas d'urgence, de complexité du projet ou, depuis l'entrée en vigueur de la loi du 28 juillet 2008, lorsque le recours à un tel contrat présente un bilan entre les avantages et les inconvénients plus favorable que ceux d'autres contrats de la commande publique.

L'affaire soumise au Conseil d'État concernait l'appréciation de l'urgence.

Dans un premier temps, le Conseil d'État, se plaçant dans le prolongement de la jurisprudence constitutionnelle, rappelle que le recours au contrat de partenariat doit être dûment justifié, autrement dit qu'il s'agit d'une procédure dérogatoire. Il souligne que

l'urgence ne doit pas provenir de simples difficultés. Il confirme que la cour administrative d'appel de Nantes n'a pas apprécié « *l'urgence du projet, sur de simples difficultés ou inconvénients mais sur la nécessité de rattraper un retard particulièrement grave, préjudiciable à l'intérêt général et affectant le bon fonctionnement du service public de l'éducation* ».

Dans un second temps cependant, il affirme que l'urgence n'a pas à être extérieure aux parties, c'est-à-dire qu'elle peut être imputable au pouvoir adjudicateur lui-même. Peu importe que le conseil général n'ait pas anticipé l'augmentation du flux d'élèves à accueillir : l'urgence, « *quelles qu'en soient les causes, est au nombre des motifs d'intérêt général pouvant justifier la passation d'un contrat de partenariat* » (3e cdt.) ; « *il n'incombait pas à la cour administrative d'appel de vérifier la circonstance, qui serait sans incidence sur la légalité du recours au contrat de partenariat, que le retard constaté aurait été imputable au département* » (4e cdt.). Il affirme ensuite que l'urgence peut être motivée par référence à des circonstances postérieures à la décision de recourir au contrat de partenariat : *« la cour pouvait tenir compte, pour apprécier l'urgence du projet à la date à laquelle le département du Loiret a décidé de recourir à un contrat de partenariat, de circonstances de fait qui, bien que postérieures à cette décision, éclairaient les conséquences du retard invoqué* ». Il considère enfin que l'urgence n'impose pas la démonstration préalable de la plus grande rapidité du projet de partenariat par rapport à que celles des autres formules de la commande publique : « *il n'appartenait pas à la cour administrative d'appel, pour apprécier la justification du recours à un contrat de partenariat, de rechercher si celui-ci permettait la construction et la mise en service de l'équipement dans un délai plus bref qu'à l'issue d'autres procédures, c'est pas un motif surabondant, sans incidence sur la solution, qu'elle a estimé, inutilement, que le département du Loiret établissait que le recours au contrat de partenariat permettait en l'espèce au projet d'aboutir dans un délai inférieur d'au moins une année* ».

On mesure ici la bienveillance dont fait preuve le Conseil d'État mais aussi son détachement par rapport à l'esprit de la jurisprudence constitutionnelle qui entendait circonscrire l'usage du contrat de partenariat. Pragmatique, le Conseil d'État retient le sens courant de l'urgence : quelles que soient ses causes, elle requiert une action immédiate.

Certes, la loi du 24 juillet 2008 dispose désormais qu'il peut y avoir urgence « *lorsqu'il s'agit de rattraper un retard préjudiciable à l'intérêt général affectant la réalisation d'équipements collectifs ou l'exercice d'une mission de service public, quelles que soient les causes de ce retard, ou de faire face à une situation imprévisible* ». Mais, comme le rappelle explicitement le Conseil d'État dans le 1er considérant de l'arrêt, cette loi n'était précisément pas applicable au litige.

Dès lors que la personne publique a décidé de recourir au procédé contractuel et qu'elle a choisi le type de contrat approprié à son intervention, se pose une deuxième série de questions relatives à la procédure d'attribution : faut-il mettre en concurrence le contrat ? et dans l'affirmative, comment doit se dérouler la procédure de dévolution concurrentielle ?

Une loi et un arrêt illustrent la première problématique.

La loi d'abord. Confrontées à la progression continue des obligations de publicité et de mise en concurrence, les autorités françaises ont, depuis quelques années, exploité les possibilités qui leur sont offertes par la jurisprudence communautaire de créer des entités à capitaux exclusivement publics susceptibles de relever du « in house » (M. Karpenschif, « SPLA, SPL, SLP. Un an après la communication interprétative sur les partenariats public-privé institutionnalisés : où en est-on du développement de l'économie mixte locale ? », *JCP. A.* 2009, 2230 ; G. Terrien, « Le développement des sociétés publiques locales », *Dr. Adm.* 2010, étude n°18 ; S. Nicinski, « La loi du 28 mai 2010 pour le développement des sociétés publiques locales », *AJDA* 2010, p.1759).

En 2006, la loi n°2006-872 du 13 juillet 2006 *portant engagement national pour le logement* (art. L.327-1 c. urb.) a créé, à titre expérimental, des sociétés publiques locales d'aménagement (SPLA) dont l'objet est d'effectuer, sur le territoire et pour le compte des collectivités territoriales qui en sont actionnaires, des opérations d'aménagement.

En 2010, cette expérimentation a été pérennisée par la loi n°2010-559 du 28 mai 2010 *pour le développement des sociétés publiques locales* (*Contrats-Marchés pub.* 2010, comm. 235, G. Clamour) créant des sociétés publiques locales (SPL) dont l'objet est de permettre à plusieurs collectivités territoriales et à leurs groupements de réaliser des

opérations d'aménagement, de réaliser des opérations de construction mais aussi de gérer leurs services publics industriels et commerciaux ou toutes autres activités d'intérêt général. Bien que ces sociétés puissent prendre la forme de sociétés anonymes régies par le livre II du code de commerce et par les dispositions du code général des collectivités territoriales gouvernant les sociétés d'économie mixte locales, les activités de ces nouvelles SPL sont exonérées de toute mise en concurrence préalable dès lors d'une part, que les collectivités territoriales actionnaires détiennent la totalité de leur capital, c'est-à-dire qu'elles exercent un contrôle analogue à celui qu'elles exercent sur leurs propres services et d'autre part, que ces sociétés exercent « *leurs activités exclusivement pour le compte de leurs actionnaires et sur le territoire des collectivités territoriales et des groupements de collectivités territoriales qui en sont membres* » (art. L.1531-1CGCT).

Incontestablement, ces sociétés sont inspirées du modèle communautaire du *in house*. Elles sont néanmoins soumises à une contrainte supplémentaire puisque la loi exige qu'elles exercent leur activité « *exclusivement* » pour le compte de leurs actionnaires alors que la jurisprudence communautaire se contente d'exiger, outre le critère du contrôle analogue, que l'organisme bénéficiant du régime in house consacre « *l'essentiel* » de ses activités au(x) pouvoir(s) adjudicateur(s) à l'origine de sa création.

L'arrêt ensuite. Dans l'arrêt précité du 3 décembre 2010, *Ville de Paris et Association Paris Jean Bouin*, le Conseil d'État a clôt le débat sur l'éventuelle obligation de mettre en concurrence les conventions d'occupation domaniales.

Alors que certaines juridictions du fond s'étaient expressément prononcées en faveur de l'obligation de faire précéder la conclusion des contrats portant occupation du domaine public (TA Nîmes, 24 janv. 2008, *Société des trains touristiques G. Eisenreich*, *AJDA* 2008, p.2172, note J.-D. Dreyfus ; *Rev. Lamy Collect. Territ.* n°7/2008, comm. 16, G. Clamour ; TA Versailles, 5 janvier 2010, n°06VE12319, *M. Guyard*, *AJDA* 2010, p.1196, concl. J. Sorin ; contrat : CAA Paris, 14 octobre 2010, n°09PA01472, *Lilem A.*, *Contrats-Marchés publ*. 2010, comm. 426, note F. Llorens) ou privé (TA Paris, 30 mai 2007, n°0516131, *Préfet de Paris c/ Ville de Paris*, *AJDA* 2009, p.1766 ; contra. : CAA Bordeaux, 29 nov. 2007, n°05BX00265, *Dumoulin de Laplante, Rev. Lamy Collect. Territ.*.

n°15/2008, comm. 1092, G. Clamour.) d'une procédure de publicité et de mise en concurrence, le Conseil d'État n'avait pas eu l'occasion de se prononcer directement sur cette question. Il ne s'était qu'incidemment prononcé – par la négative – dans un arrêt du 10 juin 2009, *Port autonome de Marseille* (n°317671, *Contrats-Marchés publ.* 2009, comm. 286, W. Zimmer). Saisi directement de la question, le Conseil d'État juge explicitement qu':

« *aucune disposition législative ou réglementaire ni aucun principe n'imposent à une personne publique d'organiser une procédure de publicité préalable à la délivrance d'une autorisation ou à la passation d'un contrat d'occupation d'une dépendance du domaine public, ayant dans l'un ou l'autre cas pour seul objet l'occupation d'une telle dépendance ; qu'il en va ainsi même lorsque l'occupant de la dépendance domaniale est un opérateur sur un marché concurrentiel* ».

Le débat semble ainsi être clôt. Il semble d'autant plus l'être si l'on se réfère aux conclusions de l'avocat général Mengozzi sur l'arrêt de la Cour de justice de l'Union européenne du 25 mars 2010, *Helmut Müller* (aff. C-451/08) considérant que l'extension des obligations de publicité et de mise en concurrence au-delà des marchés publics et des concessions supposerait l'adoption, en droit communautaire, d'instruments législatifs appropriés qui, en l'état actuel du droit, font défaut.

Il pourrait néanmoins être réouvert sous un nouvel angle : celui de l'arrêt rendu par la Cour de justice de l'Union européenne, *The Sporting Exchange Ltd*, le 3 juin 2010 (Aff. C-203/08). Aux termes de cet arrêt en effet, la délivrance d'un agrément – c'est-à-dire d'un acte unilatéral – conférant à un opérateur un droit exclusif pour exercer une activité économique doit respecter les exigences de l'article 49 du Traité CE, notamment le principe d'égalité de traitement et l'obligation de transparence. On peut donc se demander si cette jurisprudence n'est pas amenée à avoir un effet sur les autorisations – unilatérales ou contractuelles – d'occupation du domaine public. Certes, ces autorisations ne confèrent pas nécessairement à leur titulaire un droit exclusif d'exercer une activité économique. Mais elles le font en revanche nécessairement bénéficier d'un droit exclusif d'occuper une dépendance domaniale qui servira de siège à une activité économique. La question pourrait

donc se poser de savoir si, à ce titre, elles ne devraient pas être soumises au principe de transparence.

De nombreux arrêts illustrent la seconde problématique : celle de l'organisation de la procédure de dévolution concurrentielle.

L'année 2010 se caractérise par un renforcement sensible des obligations de transparence, de publicité et de mise en concurrence lié à une interprétation rigoureuse des principes et des textes par le juge administratif. Cette tendance s'est en particulier manifestée pour les marchés publics et pour les délégations de service public.

En témoigne d'abord l'arrêt rendu par la section du Conseil d'État le 10 février 2010, *Perrez* (n°329100 ; *AJDA* 2010, p.561, note J.-D. Dreyfus ; *Contrats-Marchés publ.*, 2010, comm. 99 et repère n°3, F. Llorens et P. Soler-Couteaux ; *Nouveaux Cah. Cons. cons*. n°30/2011, p.187, comm. A. Vidal-Naquet ; *BJCP* n°70/2010, p.189, concl. N. Boulouis et p.195, obs. R. Schwartz) qui annule les dispositions du décret n°2008-1356 du 19 décembre 2008 relevant à 20 000 euros le seuil des marchés dispensés de publicité et de mise en concurrence. Dans cet arrêt, le Conseil d'État a considéré qu'en relevant de 4 000 à 20 000 euros le montant en deçà duquel tous les marchés publics de tous les pouvoirs adjudicateurs sont dispensés, quelles que soient les circonstances, de toute publicité et de toute mise en concurrence, le pouvoir réglementaire a méconnu les principes d'égalité d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures. Il censure ainsi le caractère général de l'exonération de publicité et de mise en concurrence et rappelle, implicitement, qu'une telle dispense n'est admissible que lorsque l'application des règles de mise en concurrence est impossible ou manifestement inutile.

Certes, cet arrêt était attendu à la suite de l'arrêt de section du Conseil d'État du 30 janvier 2009, *ANPE* (n°290236), imposant le respect, à tous les marchés publics, des principes du droit de la commande publique.

Cette annulation n'allait cependant pas de soi, compte tenu des critiques formulées par le Conseil d'État lui-même dans son rapport public *Collectivités publiques et*

concurrence de 2002 (*EDCE* n°53, p.332) dans lequel il dénonçait le carcan du droit de la commande publique. Elle n'allait pas davantage de soi au regard des pratiques de nos partenaires européens.

L'arrêt attire d'ailleurs particulièrement l'attention, car – pour une fois – le droit communautaire ne semble être pour rien dans cette extension des obligations de publicité et de mise en concurrence. En l'espèce, ce ne sont pas ces principes communautaires qui ont servi de fondement à annulation du décret : ce sont les principes français d'égalité d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures auxquels le Conseil d'État (CE Sect. Avis 29 juill. 2002, *Sté. MAJ Blanchisserie de Pantin, Rec*. p.297) a reconnu le caractère de principes généraux du droit et le Conseil constitutionnel (Cons. cons., déc. n°2003-473 DC du 26 juin 2003, *Loi habilitant le Gouvernement à simplifier le droit*), valeur constitutionnelle qui, déconnectés du droit communautaire, ont justifié cette annulation. Depuis le 1er mai 2010 donc (date de la prise d'effet de l'annulation), le seuil des marchés dispensés de publicité et de mise en concurrence est à nouveau de 4 000 euros. En-deçà, l'exonération n'est justifiée que dans les (seuls) cas où « *de telles formalités sont impossibles ou manifestement inutiles, notamment en raison de l'objet du marché, de son montant ou du degré de concurrence dans le secteur concerné* ».

Témoigne également du renforcement des obligations concurrentielles, le rappel par l'arrêt du Conseil d'État du 24 février 2010, *Communauté de communes de l'Enclave des Papes* (n°333569 ; *AJDA* 2010, p.415 ; *Contrats-Marchés publ.* 2010, comm. 131, note W. Zimmer) que, même en procédure adaptée, les pouvoirs adjudicateurs, doivent, dès l'engagement de la procédure, informer les candidats des critères de jugement des offres et des conditions de leur mise en œuvre. Seules les conditions de mise en œuvre des critères de sélection des candidatures n'ont – en principe – pas à être portées à la connaissance des candidats : ce n'est que si le pouvoir adjudicateur entend restreindre le nombre des candidats qu'il devra porter à leur connaissance les critères de sélection des candidatures et les renseignements et documents qui permettront d'opérer cette sélection.

Témoigne encore de ce renforcement des exigences déduites des principes fondamentaux de la commande publique, l'arrêt du Conseil d'État du 18 juin 2010, *Commune de Saint-Pal-de-Mons* (n°337377 ; *Dr. Adm.* 2010, comm. n°129 ; *Contrats-Marchés pub.* 2010, repère n°8, F. Llorens et P. Soler-Couteaux et comm. 271, Ph. Rees) aux termes duquel des sous-critères de choix, pondérés ou hiérarchisés, doivent être « *regardés comme des critères de sélection* » des offres devant faire l'objet d'une publicité auprès des candidats « *dès lors qu'eu égard à leur nature et à l'importance de cette pondération ou hiérarchisation, ils sont susceptibles d'exercer une influence sur la présentation des offres par les candidats ainsi que sur leur sélection* ».

Dans le cadre d'une procédure formalisée en effet, les critères de sélection des offres doivent être annoncés dans l'avis de marchés ou le règlement de la consultation , avec leur pondération ou, le cas échéant, leur hiérarchisation (art. 53 du code des marchés publics).

En pratique cependant, le pouvoir adjudicateur recourt souvent à des « sous-critères » afin d'affiner son jugement, de sorte que l'appréciation des offres consiste à additionner l'appréciation de chacun des sous-critères.

La question se posait donc de savoir – compte tenu du silence du code – dans quelle mesure le pouvoir adjudicateur était tenu d'informer les candidats des conditions d'utilisation de ces sous-critères. Après avoir défini la notion de critère de sélection des offres (« *tout élément d'appréciation qui, eu égard à sa nature et à l'importance de sa pondération ou sa hiérarchisation, est susceptible d'exercer une influence sur la présentation des offres par les candidats ainsi que sur leur sélection* »), le Conseil d'État considère que les candidats doivent dès le départ (dans l'avis de marché ou le règlement de la consultation) être informés de la pondération (ou la hiérarchisation) d'un tel élément. Sa position est ainsi proche de celle retenue par le juge communautaire (CJCE, 18 oct. 2001, aff. C-19/00, *SIAC construction*) en ce qui concerne l'information des candidats sur la pondération ou la hiérarchisation des sous-critères : elle est obligatoire en cas d'incidence sur la préparation et le jugement des offres.

La question se pose encore de savoir si la publicité des sous-critères doit être ou non faite en toute hypothèse. Aux termes de la jurisprudence *ANPE* (préc.), seuls les critères de jugement des offres et les conditions de leur mise en oeuvre doivent impérativement être publiés : la méthode de chiffrage ou d'évaluation des offres n'a pas à être portée à la connaissance des candidats. C'est d'ailleurs ce qui ressort d'un arrêt du Conseil d'État du 31 mars 2010, *Collectivité territoriale de Corse* (n°334279 ; *Contrats-Marchés publics* 2010, comm. 165, W. Zimmer). On peut cependant se demander dans quelle mesure un sous-critère, élément d'appréciation venant immédiatement après le critère principal, constitue une modalité de mise en œuvre dudit critère au sens de la jurisprudence ANPE. Par suite, en attendant que la jurisprudence soit fixée, la prudence invite les pouvoirs adjudicateurs à informer de façon systématique les candidats sur ces sous-critères et sur leur poids respectif.

Témoigne enfin de ce renforcement des obligations de publicité et de mise en concurrence, une série d'arrêts alignant – peu ou prou – le régime de la mise en concurrence des délégations de service public sur celui des marchés publics.

Cette tendance s'est amorcée dès la fin de l'année 2009. Dans un arrêt *Établissement public du musée et du domaine de Versailles* du 23 décembre 2009 (n°328827 ; *AJDA* 2010, p.500, note J-D. Dreyfus ; *Contrats-Marchés publ*. 2010, comm. 83, Ph. Rees ; *JCP. A*. 15 mars 2010, 2103, comm. F. Dieu ; *Dr. Adm.* 2010, comm 36, G. Eckert ; *JCP*. G. 2010, act. 27, L. Erstein), le Conseil d'État a considéré que la personne publique délégante doit – comme le pouvoir adjudicateur dans le cadre de la passation d'un marché public – rendre publics les critères de choix des offres avant le dépôt des offres des candidats à la délégation.

Il a néanmoins maintenu la spécificité du régime des délégations de service en précisant, le 3 mars 2010 dans l'arrêt précité *Département de la Corrèze*, le *21 mai 2010* dans l'arrêt *Commune du Bordeaux* (n°334845, *Contrats-Marchés publ*. 2010, comm. 259, G. Eckert ; *AJDA* 2010, p. 1053 ; *JCP. A.* 2010, 2291, note J.-B. Vila ; *JCP. A.* 2010, 2218 et 2219, notes F. Linditch) et le 18 juin 2010 dans l'arrêt *Communauté urbaine de Strasbourg* (n°336120 et 336135 ; *Contrats-Marchés publ.* 2010, comm. 293, G. Eckert ;

AJDA 2010, p.1233 ; *Dr. Adm*. 2010, comm. 128, F. Brenet ; *JCP. A.* 2010, 2272, note F. Linditch) qu' « *aucune règle ni aucun principe n'impose à l'autorité délégante d'informer les candidats des modalités de mise en œuvre des critères de sélection des offres* ». En effet, les articles L.1411-1 du code général des collectivités territoriales et 38 de la loi n°93-122 du 29 janvier 1993 dite loi Sapin disposent seulement que « *les offres (...) présentées sont librement négociées par l'autorité responsable de la personne publique délégante (...)* ». L'article L.1411 du code général des collectivités territoriales précise en outre qu'« *au vu de l'avis de la Commission, l'autorité habilitée à signer la convention engage librement toute discussion utile avec une ou des entreprises ayant présenté une offre* ». Le juge en a donc déduit que la personne publique délégante conserve la liberté de choisir le délégataire à l'issue d'une négociation, au regard d'une appréciation globale des critères préalablement définis, sans être contrainte par des modalités de mise en œuvre pré-déterminées de ces critères. Elle conserve en outre la liberté d'organiser la négociation : elle n'est tenue ni de fixer un calendrier préalable de ses différentes phases, ni d'engager une négociation avec l'un des candidats retenus, ni même de faire connaître sa décision de ne pas poursuivre les négociations avec l'un des candidats.

Cette liberté des collectivités publiques n'est cependant pas sans limites. La personne publique délégante est tenue, lorsqu'elle entame une négociation avec une entreprise, de négocier réellement, c'est-à-dire mettre cette entreprise en mesure d'améliorer son offre : elle ne peut se contenter de simples auditions et demandes de précisions. Elle est également tenue de respecter les principes d'égalité et de confidentialité. Enfin, la liberté de la collectivité publique de ne pas informer un candidat de la décision de ne pas retenir son offre et de l'écarter de la négociation est désormais largement atténuée par le décret n°2009-1456 du 27 novembre 2009 *relatif aux procédures de recours applicables aux contrats de la commande publique*. Ce texte, complétant l'ordonnance du 7 mai 2009, introduit une obligation de *stand still* après la publication d'un avis d'intention d'attribuer le contrat, à défaut de quoi la convention de délégation de service public est susceptible de faire l'objet d'un référé contractuel et impose la publication d'un avis d'attribution du contrat dans le but de limiter à trente et un jours à compter de cette publication le délai dans lequel un référé contractuel pourra être exercé.

2.2 Sur l'exécution

Depuis quelques années, la logique concurrentielle s'est progressivement étendue du stade de la passation à celui de l'exécution des contrats dans le but d'assurer une certaine continuité dans le processus conduisant de la passation d'un contrat à son exécution.

L'année 2010 illustre cette problématique. La jurisprudence a en effet apporté d'utiles précisions concernant tant la durée d'exécution des contrats, que leur modification et leur résiliation.

Dans un arrêt du 8 février 2010, *Commune de Chartres* (n°323158 ; *Contrats-Marchés publ.* 2010, comm. 147, G. Eckert) d'abord, le Conseil d'État a précisé l'interprétation qu'il convient de retenir des articles L.1411-2 du code général des collectivités territoriales et 40 de la loi Sapin relatifs à la **durée des délégations de service public.**

Aux termes de ces dispositions : « *les conventions de délégation de service public doivent être limitées dans leur durée. Celle-ci est déterminée par la collectivité en fonction des prestations demandées au délégataire. Lorsque les installations sont à la charge du délégataire, la convention de délégation tient compte, pour la détermination de sa durée, de la nature et du montant de l'investissement à réaliser et ne peut dans ce cas dépasser la durée normale d'amortissement des installations mises en œuvre* ».

En l'espèce, une convention de délégation de service public portant sur la construction d'un parc de stationnement, la rénovation de trois autres parcs et l'exploitation de ceux-ci a été conclue pour une durée de trente-deux ans.

Saisi en cassation, le Conseil d'État commence par confirmer sa jurisprudence aux termes de laquelle « *la durée normale d'amortissement des installations susceptible d'être retenue par une collectivité délégante (...) coïncide ou non avec la durée de l'amortissement comptable des investissements* », c'est-à-dire la durée devant normalement permettre au délégataire de couvrir ses charges d'exploitation et d'investissement compte

tenu des contraintes d'exploitation liées à la nature du service et des exigences du délégant ainsi que de la prévision des tarifs payés par les usagers (CE 11 août 2009, n°303517, *Société Maison Comba*).

Puis il complète cette jurisprudence en précisant que « *le point de départ de l'amortissement étant la date d'achèvement des investissements et de mise en service de l'ouvrage, il convient, afin d'évaluer la durée maximale de la délégation, d'ajouter le temps nécessaire à la réalisation de ces investissements à leur durée normale d'amortissement* ».

Ainsi, dans le silence de la loi, le Conseil d'État considère que la durée maximale d'une convention de délégation de service public doit être calculée en additionnant la « durée normale d'amortissement » au sens qu'il lui donne et celle nécessaire à la réalisation desdits investissements.

La jurisprudence – interne et communautaire – a également précisé les principes applicables à la **modification des contrats administratifs**.

La jurisprudence française a précisé les conditions dans lesquelles l'autorité gestionnaire du domaine public peut, unilatéralement, modifier les conditions pécuniaires de l'occupation au cours de son exécution. C'est l'apport de l'arrêt rendu par le Conseil d'État le 5 mai 2010, *Bernard* (n°301420).

Aux termes d'une jurisprudence classique, il appartient à l'autorité gestionnaire du domaine public de fixer, tant dans l'intérêt du domaine public et de son affectation, que dans l'intérêt général, les conditions des occupations privatives. Dans le cadre de ses pouvoirs de gestion, elle bénéficie d'un pouvoir de modification unilatérale, notamment des conditions pécuniaires de l'occupation, qui se distingue du pouvoir général de modification unilatérale des contrats administratifs.

Ce pouvoir a néanmoins été encadré par la jurisprudence. D'abord, dans le cas des autorisations unilatérales d'occupation : c'est ce qui ressort d'un arrêt du Conseil d'État du 12 octobre 1994, *Visconti* (*Rec. CE 1994*, p.442) aux termes duquel : « *si l'autorité*

gestionnaire du domaine public peut tout moment modifier les conditions pécuniaires auxquelles elle subordonne la délivrance des autorisations d'occupation et éventuellement abroger unilatéralement ces décisions, elle ne peut, toutefois, légalement exercer ces prérogatives qu'en raison de faits survenus ou portés à sa connaissance postérieurement à la délivrance de ces autorisations ». Ensuite, dans le cas des conventions d'occupation : c'est l'apport de l'arrêt du 5 mai 2010. Le Conseil d'État, se fondant sur les prérogatives dont dispose la chambre de commerce et d'industrie en sa qualité de gestionnaire du domaine public, conclut qu'elle a le pouvoir de modifier unilatéralement les contrats qui la lient aux sous-concessionnaires du port, y compris dans leurs stipulations concernant le montant de la redevance dès lors que cette modification est justifiée « *par un fait nouveau survenu postérieurement à la conclusion du contrat* », à savoir, en l'espèce, la réévaluation des valeurs locatives des taxes foncières.

La jurisprudence communautaire a – quant à elle – précisé les conditions dans lesquelles les cocontractants peuvent modifier un contrat de la commande publique au cours de son exécution. C'est l'apport de l'arrêt rendu par la Cour de justice de l'Union européenne le 13 avril 2010, *Wall AG* (aff. C-91/08 ; *Europe* 2010, comm. 208, D. Simon ; Dr. adm. 2010, comm.109, R. Noguellou ; *Contrats-Marchés publ.* 2010, comm. 222, W. Zimmer ; *RFDA* 2011, p.98, étude H. Hoepffner).

Complétant sa jurisprudence antérieure (CJCE, 5 octobre 2000, aff. C-337/98, *Commission c/ France*, Rec. *CJCE* 2000, I, p.8377 ; CJCE 19 juin 2008, aff. C-454/06, *Rec. CJCE* 2008, I, p.4401 ; *Dr. adm.* 2008, comm. 132, R. Noguellou ; *Contrats et MP* 2008, comm. 186, W. Zimmer et repère n°9, F. Llorens et P. Soler-Couteaux; *AJDA* 2008, p.2008, note J.-D. Dreyfus ; *MTPB* 13 févr. 2009, p.88, commentaire F. Serre), la Cour précise dans quelle mesure les parties peuvent modifier d'une part, le contenu de leur contrat et d'autre part, céder leur contrat.

Sur le premier point : la modification du contenu du contrat, la Cour confirme son raisonnement antérieur : une modification a un effet novatoire et le contrat modifié se transforme en nouveau contrat devant, le cas échéant, être précédé d'une procédure de mise en concurrence, lorsque « *des modifications substantielles* » sont « *apportées aux*

dispositions essentielles » du contrat initial (arrêt *Wall AG*, point 37). Elle précise ensuite ce qu'il convient d'entendre par modification « substantielle » : la modification d'un contrat en cours de validité peut être considérée comme « *substantielle lorsqu'elle introduit des conditions qui, si elles avaient figué dans la procédure de passation initiale, auraient permis l'admission de soumissionnaires autres que ceux initialement admis ou auraient permis de retenir une offre autre que celle initialement retenue* » (arrêt *Wall AG*, point 38). Concrètement, cela recouvre deux hypothèses, connues en droit interne : celle où la modification aboutit à substituer un nouvel objet à celui initialement convenu et celle où elle conduit à bouleverser l'économie du contrat (voyez, pour les délégations de service public : CE avis, n°364803, 8 juin 2000, *AJDA* 2000.758, obs. L. Richer ; *Contrats-Marchés publ.* 2000, chron. 1, F. Llorens ; *BJCP* n°15/2001, p.94, note E. Glaser ; CE avis, n°371234, 19 avr. 2005, obs. R. Schwartz et Ph. Terneyre, *BJCP* n°45/2006, p.107; *AJDA* 2006.1371, comm. N. Symchowicz et Ph. Proot ; *Contrats-Marchés publ*. 2006, étude n°19, H. Hoepffner ; et pour les marchés publics : CE Sect. 11 juill. 2008, *Ville de Paris*, req. 312354, concl. contr. N. Boulouis ; notes *MTPB* 22 août 2008, p.45, M. Judd ; *JCP. A.* n°36/2008, étude 2189 ; *ACCP* n°80/2008, p.19, note J.-P. Jouguelet ; *ACCP* n°82/2008, note N. Gabayet et H. Gérard ; *LPA* 10 sept. 2008, n°182, p.7, note A. Ledoré ; *Contrats et MP* 2008, comm. n°187, J.-P. Pietri ; *JCP. G.* 2008, act. 509, M.-Ch. Rouault, note D. Melloni ; *JCP*. G. 2008.I.191, chron. B. Plessix ; CCC n°8/2008, comm. 2002, C. Prébissy-Schnall et E. Tachlian-Degras).

Sur le second point : le changement de cocontractant, la Cour assouplit sa jurisprudence antérieure (arrêt préc. *Pressetext*). En 2008, la Cour a jugé qu'« *en général, la substitution d'un nouveau cocontractant à celui auquel le pouvoir adjudicateur avait initialement attribué le marché doit être considérée comme constituant un changement de l'un des termes essentiels du marché public concerné* » (arrêt *Pressetext*, point 40). Autrement dit, elle a considéré que la substitution de cocontractant donne lieu à la conclusion d'un nouveau contrat et suppose que soit organisée une nouvelle mise en concurrence. Cette solution avait alors provoqué la stupéfaction en raison de son caractère diamétralement opposée à celle retenue par le juge français (CE avis, 8 juin 2000, préc.).

L'arrêt rendu le 13 avril 2010 ne revient pas sur cette jurisprudence. Il permet néanmoins – dans cette affaire relative à une substitution de sous-traitant (et non de cocontractant) – de l'assouplir, à tout le moins pour les concessions de services. La Cour considère en effet qu'en principe, la substitution de sous-traitant est possible, sans remise en concurrence du contrat initial et que ce n'est que « *dans des cas exceptionnels* » qu'un tel changement constitue une « *modification de l'un des éléments essentiels du contrat de concession* » : « *lorsque le recours à un sous-traitant plutôt qu'à un autre a été, compte tenu des caractéristiques propres de la prestation en cause, un élément déterminant de la conclusion du contrat* ».

Enfin et en dernier lieu, la jurisprudence a illustré le pouvoir général dont dispose l'Administration de **résilier** le contrat auquel elle est partie, soit pour faute, soit pour un motif d'intérêt général.

La première hypothèse a donné lieu à l'arrêt du Conseil d'État du 27 octobre 2010, *Syndicat intercommunal des transports publics de Cannes, Le Cannet, Mandelieu, La Napoule* (n°318617 ; *Contrats-Marchés publ.* 2011, comm. 7, W. Zimmer ; *AJDA* 2010, p.2076).

Le Conseil d'État rappelle qu'en vertu des règles générales applicables aux contrats administratifs, la personne publique peut modifier unilatéralement le contrat qui la lie à une entreprise, dès lors que cette modification est justifiée par l'intérêt général, que cette modification ne bouleverse pas l'économie du contrat et qu'elle indemnise son cocontractant (CE, 21 mars 1910, *Compagnie générale française des tramways, Rec. CE 1910*, p.216 ; CE 2 févr. 1983, *Union des transports publics urbains et régionaux, Rec. CE 1983*, p.33).

Dès lors que ces conditions sont remplies, le cocontractant est tenu d'appliquer les stipulations contractuelles modifiées à défaut de quoi il engage sa responsabilité pour inexécution du contrat. Il commet une faute justifiant la résiliation pour faute de son contrat et la privation de son droit à indemnité :

« *Considérant qu'il résulte de l'instruction que la société Azur Pullman Voyages a continué à assurer la desserte de la ligne des transports dont elle avait la charge, dans les conditions prévues par la convention du 8 novembre 1996 en refusant de prendre en compte la nouvelle organisation du service public des transports fixé par le syndicat et notamment les nouvelles modalités de billetterie alors qu'elle était tenue d'exécuter cette convention telle que modifiée unilatéralement par la personne publique ; que la société, qui n'établit pas que les modifications ainsi décidée par le STIP auraient conduit à bouleverser l'économie du contrat, a, dans les circonstances de l'espèce, commis une faute de nature à justifier la résiliation de la convention prononcée par délibération du comité syndical du STIP du 6 décembre 1999 ; que, dans ces conditions, la société Azur Pullman Voyages n'est pas fondée à demander la condamnation du STIP à l'indemniser à raison de cette résiliation ; que sa demande présentée devant le tribunal administratif de Nice doit en conséquence être rejetée* ».

La seconde hypothèse a donné lieu à l'arrêt du Conseil d'État du 19 janvier 2011, *Commune de Limoges* (n°323924, *Contrats-Marchés publics* 2011,comm. 87, G. Eckert ; *AJDA* 2011, p.136 et p.616, comm. J.-D. Dreyfus ; *Dr. Adm.* 2011, comm. 38, F. Brenet ; *JCP. A.*, n°11, 14 mars 2011, 2101, comm. J.-B. Vila).

Le Conseil d'État considère que l'intention d'une collectivité publique de transformer en service public une activité antérieurement gérée par un opérateur privé dans le cadre d'une convention d'occupation du domaine public justifie – à elle seule – la résiliation pour motif d'intérêt général de cette convention :

« *Considérant qu'…il était loisible à la Commune de Limoges d'adopter un nouveau mode de gestion de l'activité d'hôtellerie et de restauration jusqu'alors exercée dans le cadre de la convention d'occupation du domaine public conclue avec la société Albatros ; que l'intention de la commune de soumettre le futur exploitant de l'activité d'hôtellerie et de restauration à des obligations de service public tenant notamment aux horaires et jours d'ouverture de l'établissement constituait un motif d'intérêt général suffisant pour décider la résiliation la convention d'occupation du domaine public conclue avec la société Albatros* ».

Cette solution n'a rien de novatrice. Elle confirme d'une part, que les collectivités publiques bénéficient de la liberté de choisir le mode de gestion des activités publiques et d'autre part, que les titres d'occupation du domaine public ont un caractère précaire et révocable (CGPPP, art. L.2122-3).

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BASIC OF PUBLIC CONTRACTS IN ITALY

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1. ADMINISTRATIVE ACTION BY CONTRACTS

Public administrations can conclude all the categories of contracts existing in the legal system. There is no general restriction to make contractual agreements, except for particular provisions concerning specific categories of public entities or specific subject matters. Furthermore, according to national courts (see Corte di Cassazione, II, no. 2624/1984; Consiglio di Stato, V, no. 4680/2001; Regional Administrative Court for the Region Liguria – TAR Liguria, no. 155/2005), also administrations apply the general provision of the Civil Code (CC), Art. 1322, which entitles the parties to bargain contracts not explicitly regulated by the Code itself.

Moreover, in the last years new rules on administrative action extended the entitlement of public bodies to use contractual instruments in a general way: symbolically, legislative policies stimulated administrations to pursue public interests by applying private law, with

the aim of streamlining and improving the efficiency of the whole system, whenever possible (i.e., when there is no mandatory rule compelling administrations to develop unilateral action by exercising administrative powers). In addition, Art. 11, L. no. 241/1990, entitles public bodies to conclude "administrative agreements" (so called "accordi integrativi o sostitutivi del provvedimento") with private parties, with the aim of determining the contents of administrative (discretionary) measures or replacing them at all. In this case the principles of private law should apply only if they are consistent with the administrative procedure; nonetheless the actual implementation of this rule is troubled (except for urban planning agreements).

Even though private law entered the administrative action, administrations shall also apply specific public rules in bargaining public procurements, such as service, supply and work contracts, and in contracting out instrumental services in order to improve their efficiency. This means that even if contracts concluded by public bodies are essentially subject to the CC and, more generally, to private law – except for some particular cases (game and gambling contracts, loan contracts) –administrative law, especially after the adoption of the European Directives, provides rules which modify or supplement CC, in order to protect both the public interests in the development of the public contractual action - guaranteeing, in particular, the constitutional principle of impartiality (Art. 97 of the Constitution) and the maximization of economic advantages for public entities - and the European principles of freedom to provide services and of open and full competition. On these grounds, the procedures that public bodies should follow in bargaining (so called "procedure di evidenza pubblica") should match both the principles and the rules of administrative law and the private law principle of fairness.

As a result, according to the phases of public contracting, a double standard system regulates "public contracts": the selection of competitors follows public rules, whereas private law applies in the performance of the contract (once it has been awarded). This means that the choice of the private partner must be made in compliance with a competitive procedure and the whole contractual action must comply with the principle of good faith and of protection of legitimate expectations.

Furthermore, the double standard system exists also in the field of judicial protection, albeit with some recent innovations: following the general rule on judicial competence – which assigns to civil courts the protection of individual rights ("diritti soggettivi") and to administrative courts the protection of legitimate interests ("interessi legittimi") – bid protests are submitted to administrative courts, while contracts disputes refer to ordinary courts (Art. 133 (1), Code of Administrative Process - hereafter CAP). During the performance of a public contract, indeed, contractual parties have rights and obligations in an equal and synallagmatic relationship, whereas in the tendering procedure, the contracting administration exerts some authoritative powers over the competitors, whose legal position matches the notion of legitimate interest (as the Joint Divisions of "Corte di Cassazione" confirms, by judgment no. 27169/2007, administrative action by contract may be perfectly divided into two phases, the first one governed by administrative law, the second one by private law).

However, the distinction between private law and administrative law is not so sharp, because there are several interferences between the two legal frames: on one side, public administration may be sued by the winner of the competition for pre-contractual liability, if the awarded contract is not concluded by the end of the *standstill period* (that is a minimum period during which the signature of the contract in question is suspended); on the other side, public administration holds some powers of unilateral intervention during the performance of the contract, such as that one to terminate it for default or for convenience. In this legal framework, the intersections between public and private law must be verified case by case.

On these premises, this report aims at analysing the main characteristics of Italian contract law on public procurement.

2. THE LEGAL FRAMEWORK ON PUBLIC CONTRACTS

Unlike French "droit administratif", Italian administrative law does not recognise the category of "administrative contracts", but since the beginning of Italian Kingdom some

acts have regulated specific categories of public contracts. The first and most important statute was L. no. 2248/1865, "Allegato F", concerning public work procurement. Moreover, the 1923 regulation concerning the State budget and public expenditures (R.d. no. 2440/1923) provided a set of general rules about tenderer selection and contract award criteria, holding public auction as a general principle (with the exceptions indicated in the same statute and in some other special statutes) for contract award.

In this framework, EU law has deeply modified national contract regulation, by compelling public entities to implement new procedural rules aimed at guaranteeing an open and full competition among private undertakings in the EU internal market. Moreover, EU Directives oblige Italian legal system to recognise unsuccessful tenderers compensation for damages produced by infringements of European regulations (or national statutes implementing them), regardless of the nature of the affected private interest: this way, EU law has overcome the historical distinction in Italian system between "individual rights" and "legitimate interests".

Since 2006 the Code of Public Contracts (CPC), concerning public works, public services and public supplies, has come in force (see D. Lgs. no. 163/2006). It transposes the Directives 2004/17/EC and 2004/18/EC, which regulate those public contracts with a significant impact (assessed on an economic threshold basis) on transactions between Member States; but it also regulates the same types of contracts (i.e., public procurements), which value is under the European economic thresholds.

Substantially, the CPC maintains the double standard system for contracts with public administrations, providing that what is not expressly regulated by the Code should comply with L. no. 241/1990 (Administrative Procedure Act) as it regards award procedures and other related administrative activities, and with CC as it concerns the contractual activity itself (Art. 2, CPC). Moreover, although the CPC is mainly a public law statute, it provides a number of references to private law, so that interferences between the two legal frames are continuous and relevant.

3. CONTRACT AWARD PROCEDURE

As a general principle, every public entity assigning benefits by contracts to private persons through the allocation of limited resources shall make a call for competition. Indeed, in accordance with the ancient idea laid down in the State budget and public expenditure statutes, tendering procedures have been deemed necessary to guarantee both best value for money and greater administrative advantages for the contracting authority, as well as to prevent public officers' misconducts and briberies. In this view, law aims at favouring public administrations' interests: e.g., the 1923 regulation has exempted the administration from the duty to give reasons, even in the case of exclusion of a tenderer from the contract awarding procedure.

However, EU law has introduced a new balance among the interests at stake, since it has stated that public tendering is deemed necessary in order to guarantee equal chances of the economic operators for public contract awarding and, more generally, whenever a public entity provides market players with an opportunity of profit (see Consiglio di Stato, VI, no. 362/2007). Pursuant to some rulings of the European Court of Justice (ECJ) on the correct interpretation of 2004 directives, competition has become a key principle in contract awarding, aimed at guaranteeing the transparent, equal and non-discriminatory conduct of contracting administrations regardless of the threshold criteria.

In the national system, the CPC has precisely implemented the cardinal rules of EU law, providing a unifying framework for the whole field of public procurements. So, the open, restricted and negotiated procedures shall apply not only to those public procurements with an amount exceeding the economic thresholds fixed by the European Directives, but also to the ones under that EU threshold (with the exception of specific cases – regulated in Art. 121, CPC – which aim at simplifying the typical constraints of formal tendering procedures, even though they comply with the fundamental principles of the EU regulation, mentioned by Art. 2. CPC). Moreover, the same principles also apply to the excluded contracts for procurement, such as contracts on a lot of public services, contracts on weapon production and trade and contracts awarded under international rules (Art. 27, CPC); Art. 30, CPC, also provides that the competitive selection for service concessions

"shall be conducted in compliance with principles derived by the Treaty and the general principles of public contracts".

However, the implementation of EU principles concerning the awarding of local services of economic interest was more troubled, because of a strong tradition of in house providing by local authorities, formerly managed by special public utilities and lately managed by joint stock companies, wholly or partly owned by the local authorities. Recently, the recourse to in house providing has been reduced by administrative jurisprudence and by the legislator. On one hand, the Joint Chambers of the Council of the State ("Consiglio di Stato") and other administrative courts applied in a strict way the in house providing criteria developed by the ECJ; on the other hand, statutes authorised the companies awarded without a competitive selection to operate only within more restricted functional and territorial limits and, finally, assessed the exceptionality of the direct awarding itself, recognising in the tendering procedure ("procedure competitive ad evidenza pubblica") the ordinary awarding of local utilities. But this rule applies in a different way if the company shares a mixed-ownership, composed by both local public authorities and the private parties chosen by a competitive procedure (see d.P.R. no. 168/2010).

Therefore, the CPC implements the principles of non-discrimination, equal treatment and transparency, laid down in the EU Treaties, in order to ensure open and full competition among the economic operators of all the Member States in the field of public procurements. However, the transparency principle is generally observed throughout the whole administrative action by contract, at least in its elementary components, such as the provision of appropriate advertising forms and the setting of suitable deadlines for the presentation of candidatures and tenders. In order to achieve a minimum standard of competition, the Code itself provides a simplified application of these rules also to the under-threshold contracts and to the excluded contracts (see Articles 27, 30, 110, 125, CPC).

Especially, as a relevant component of the transparency principle the Code charges the contracting authority with the legal burden to provide in a proper notice the requirements

for presentation of candidatures and tenders, the contract award criteria, and the specifications of the subject matter of the contract itself, even in cases of direct bargaining. This general rule has been developed by administrative courts over time: for instance, the TAR Piemonte, no. 1524/2002, has upheld that the call for an informal tender creates for the contracting administration an implicit commitment to the principles of transparency and "par condicio"; therefore, the authority itself cannot modify the conditions of the subject matter by the beginning of the procedure and the preparing of tenders. This way, transparency meets the requirements of equal treatment and non-discrimination in order to level playing field.

Eventually, the CPC provisions maintain an old feature of Italian law in this field, quite strengthened in the '90s: precautions against "opportunistic behaviours" of the parties. This is the reason why provisions about negotiated procedures are more restrictive than in the European law, national rules preferring anonymous candidates and secret tenders. This fact contributes to the peculiar complexity of regulation, which is scantily oriented to flexibility and mildly interested in the optimisation of joined welfare (and the Code has not expressively repealed the 1923 regulation in the part relating to contracts).

However, this over-structured system has not prevented public entities from enjoying a substantial contractual freedom: sometimes, *against the law*, as demonstrated by the impressive case-law of both administrative and ordinary courts, as well as by some judgments of the ECJ on actions brought by the EU Commission against Italy for infringements of EU law by State, regional or local authorities; sometimes, *beyond the law,* as the extensive use of contractual schemes as invented in business practice by public bodies demonstrates.

Therefore, public administrations have been condemned and their contract award decisions have been quashed on the ground of the lack of any competitive tendering procedure or the abuse of negotiated procedures (see, respectively, ECJ, 2008, C-337/05 and TAR Lazio, II, no. 3886/2008); or on the ground that, when proceeding by a public notice, the contracting party cannot ask further participatory requirements than those laid down by the law, if they are disproportionate with the value of the contract at stake or they

are irrelevant for the subject matter. Furthermore, another ground for annulment is the rejection of an abnormally low tender, without verifying in detail the justifications given by the competitor about the seriousness and reliability of the tender itself (see, respectively, Consiglio di Stato, V, no. 426/2010, and TAR Puglia, I, no. 3541/2006).

On the other side, public entities can also conclude some kinds of contracts (or combinations of them) created in the business practice by private operators (especially in the experience of multinational companies), such as factoring, insurance brokering, engineering, global service, performance bond, project financing, leasing option, sponsorship. All of those contracts can be included in the framework of *public-private partnership* rules provided by the CPC and in some cases specifically regulated by CPC itself.

4. PERFORMANCE OF PUBLIC CONTRACTS

Administrative and financial controls have always been among the most characteristic elements in the procedure of "evidenza pubblica". Articles 11-12, CPC, provide that the final award decision does not produce binding effects on the contracting administration, until its approval by the competent controlling body of the same administration (*id est*, a senior civil servant). Moreover, the decree approving the contracts concluded by the State administrations must also be submitted to the Court of Auditors ("Corte dei Conti") for external control on administrative and financial regularity, when they involve incomes to the contracting administration or they concern public works above the EU threshold or their amount exceeds one tenth of the EU value (Art. 3, L. no. 20/1994). It should be noted that Art. 19 of the 1923 Regulation laid down similar provisions, establishing that all final award decisions and all contracts did not bind the contracting administration, until they were approved by the minister or by a delegated authority, and could be executed only after this approval; and that the decrees approving the contracts should be controlled by the "Corte dei conti".

On the contrary, basically the performance of public contracts has always belonged to the realm of ordinary law and EU law has not provided relevant transformation on this side of the regulation yet. Therefore, public contracts are generally subjected to CC rules on invalidity, remedies in case of breach and the consequent contractual liability, and enforcement of the contract by judgment of civil courts. However, public entities being endowed with some special powers, the CPC contains eight provisions which establish specific "principles on the performance of the contract".

Broadly speaking, Art. 1372, CC, provides two fundamental principles on contractual relationships: the duration of the synallagmatic obligations (and of their binding effects) as long as established in the contractual regulation; and the impossibility to modify contractual terms and to cancel the contract by one of the parties. Both these principles enforce the ancient rule "pacta sunt servanda". Therefore, by applying this provision (sometimes reminded in the case-law), on one hand, the contractual freedom of public administrations in acting for the best care of public interests is recognised; and, on the other hand, the same capability of such public entities to modify the content of the contract, as determined by agreement, by exercising their special powers, is limited.

However, both the CC and the statutes governing private contractual relationships have some exceptions as it regards the possibility of modifying and cancelling the contract, thus impairing the traditional image of the sanctity of the contract itself. This way, private law tackles the problems connected with the occurrence of unexpected events, from which frustration, impossibility or impracticability of contract may derive; but the presence of a public entity in the contractual relationship can certainly be a stimulus to break the equal positions of the parties and the contractual balance, which is linked to the resulting distribution of risks and benefits.

Furthermore, since the regulation on State expenditures, administrative law has entitled public administrations to lay down, by specific documents, detailed and technical rules for every type of contracts or for particular contracts (respectively called "capitolati generali" and "capitolati speciali". See Art. 5 (7), CPC). On one hand, these specifications aim at integrating the contract notice drawn up by the contracting authorities for a tendering

procedure, working as "lex specialis" regulating the procedure itself, included the award criteria. Moreover, on the other hand, they determine the conditions of the contract performance, integrating the contract regulation after its awarding. In any case, they can advantage public bodies in the contract performance.

Academic literature and the case-law on public contracts have been debating a lot on the legal nature of such contract documents and at present it is a general opinion that the "capitolati generali" (at least that one on public works procurement used by government departments) have the same character of government regulations, while the "capitolati speciali" (at least as regarding the performance of the particular contract) are "general conditions of contract", like in private contractual relationships, and therefore they are subjected to the rules of CC on unfair terms in consumer contracts (Consiglio di Stato, V, no. 6774/2005. Regarding CC, see Art. 1469-bis ff.).

Administrative law has traditionally assigned to contracting public entities the so called "jus variandi", as a partial remedy to the bounded rationality of the administration itself and consistently with the nature of public works procurement as a long-term contract. In particular, Art. 11 of the 1923 regulation established that in the light of an increasing or a decreasing of works during the implementation of a contract, the private contractor is obliged to submit, under the same terms, up to the fifth of the contractual price; beyond this limit, he has the right to cancel the contract. This unilateral power of public administrations has a relevant correlation with the right guaranteed to private parties by Art. 1661, CC: both the provisions take into account the indispensability of the additional works, and consider the changed nature of the contract as the extreme limit to the modifications of the content.

Substantially CPC confirms this regulation, but Art. 132 refers not only to the modifications occurred during the execution of the designed works, but also to the risks in performing activity (such as the so called *geological surprise*). In particular, it provides an exhaustive list of the eligible modifications, due to their essential character and to their relation with the occurrence of unexpected events.

Furthermore, Art. 5, CPC, authorises the Government to adopt a regulation establishing the amount of penalties, consistently with the amount of contracts and the reasons of not-fulfilment, as well as the modalities for their enforcement; but also the CC provides the possibility of sanctions for the breach of contract or the fulfilment on late of the contractual obligations in the relationships between private operators (being there only the limit of their non-proportionate amount assessed as an unfair term).

Indeed, the powers to cancel the contract unilaterally have been deemed more relevant. In particular, Art. 134 and Art. 136 of the CPC provide public entities to withdraw existing contracts for convenience ("recesso dal contratto") or for default ("risoluzione del contratto per grave inadempimento, grave irregolarità, grave ritardo"); Art. 135 adds the power to withdraw contracts for offences concerning the professional conduct of the economic operator concerned, condemned by a judgment having the force of "res judicata", and for revocation of the certification of suitability by bodies established under public law. Moreover, a previous withdrawal for default by a public entity may be a condition for an order of exclusion from future competitive procedures developed by the same authority, on the ground that "the normal level" of confidence could be impaired (So, TAR Lazio, II, no. 5182/2000. See also Consiglio di Stato, V, no. 1500/2010, regarding a previous termination for default by another public administration).

However, some similar powers are also provided for the contractual relationships between private economic operators (Art. 1671 and Art. 1662, par. 2, CC), albeit in accordance with the framework of the Code itself (Art. 1218 and Art. 1375), as powers of "*private self-remedy*" ("autotutela privatistica" or "interna"). And then, the most insidious provisions for the equality of the contracting parties are the administrative prerogatives of "*public self-remedy*" (so called "autotutela pubblicistica" or "esterna"), which stem from the special capability of public administrations to pursue public interests. These powers allow the public party to set aside the award of a contract or quite the public notice itself and then the whole tendering procedure, at any time (Art. 11, CPC. See also Art. 6, D. Lgs. no. 53/2010, as amended by Art. 3(19), Annex 4, CAP), so that also during the performing phase, the contract can become ineffective.

The financial compensation for the private contracting party varies according to the reasons of the exercise of these unilateral powers by public entities. First of all, in case of modifications unilaterally charged on, the nature of the additional amount is assessed as a contractual payment (and not as compensatory damages). Secondly, the termination for convenience entitles the economic operator to the payment of the performed works and the value of the existing materials on site, in addition to the tenth of the amount of non-run. Thirdly, the termination for default too entitles the economic operator to the payment of the performed works; but the final settlement of the terminated contract establishes also the costs resulting from the award of a new contract to another economic operator to be charged on the defaulting contractor.

Moreover, in case of failure or not suitable performance, the suspension of the payment by the public entity is considered as a form of "*private self-remedy*" in accordance to Art. 1460, CC. On the contrary, the lawful exercise of the special powers included in "*public self-remedy*" may entitle the contracting partner only to claim a form of pre-contractual liability, while the wrongful exercise of the same powers entitles the economic operator, who has been awarded the contract, to the compensation for damages (which the administrative courts have been usually determining by the same flat-rate above mentioned).

The primacy of the position reserved to the public administration does not affect the private nature of the contract (especially, for public works); then performing it, the private partner is entitled to legal rights, with corresponding obligations on the public body ("Corte di Cassazione" – Joint Divisions, no. 10525/1996). Thus, the private partner may also sue in civil courts by the general action of termination of contract for breach of the public entity itself (Article 1453 of CC); however, the claimed breach should be reviewed as it regards the possible effect resulting from the lawful exercise of the special powers included in the "*public self-remedy*" ("Consiglio di Stato", VI, no. 6275/2008).

As the breach of the economic balance of the contract is concerned, the CC provides some remedies in order to avoid the termination of the contract itself due to external

factors: to this end, Art. 1467 (3), CC, allows to the party to offer a fair change in the contractual conditions.

Furthermore, specific clauses about the recovery of the contract's economic balance (above all in case of new legislative or governmental regulations) may be included in the public notice and in the other contract documents for the tendering procedure, and then may be reproduced in the contractual regulation, so creating a real contractual obligation. More precisely, for long-term contractual relationship (such as the public works concession), Art. 143, CPC, provides that a restatement of new conditions of balance should be agreed, whenever new mechanisms or price conditions coming from new legislative and governmental regulations would affect the balance of the economic and financial plan of the activity awarded by the concession. The failure of this agreement can bring the economic operator to cancel the contract.

Moreover, Art. 133, CPC, referring to public works procurements, excludes the application of Art. 1664 (1), CC, which entitles both parties to seek review of contractual price whenever increases or decreases in the cost of materials or workmanship have been occurring for more than ten percent of the total price. This means that no price revision is allowed, being on the contrary applicable the criterion of fixed price. However, the price may be increased according to evolution in inflation by a rate established by a government decree, which may be further increased (but also decreased) in case of increases (or decreases) of the costs in construction materials due to exceptional circumstances. Furthermore, the revision possibly resulting from par. 2 of the 1664, CC, according to which economic operators can obtain a fair compensation for the occurrence of considerable difficulties in performing and the resulting modifications to the original design, is among the modifications of the contract included in the list provided by Art. 132, CPC.

On the contrary, according to Art. 115, CPC, all public services and public supplies procurements must hold a clause for price revision, without any reference to the occurrence of unforeseen conditions (differently from the CC). The different treatment of the categories of public procurements may be explained in the following way: because of the

greater onerousness of the performance in public works contracts, the purpose of containing the economic burden on public budgets has been prevailing, albeit without transforming the contract itself into an hazardous one, but using a sort of legal "value maintenance clause" rather than a "hardship clause" (differently also by works concession). And in order to meet the risks to the completion of works or to the quality of the performance, the national regulation on public contracts has opted for a system of insurances (Articles 75, 111, 113 and 129, CPC).

As the end of the public contracts is concerned, Art. 12 of the 1923 regulation established as a general rule that the definition of a certain term of the contractual relationship is mandatory for public bodies; moreover, ordinary expenses (like in the case of rent contracts) may not be exceeding a nine years time. Somehow, this rule is connected with Art. 57 (7), CPC, which forbids tacit renewals of public procurement contracts and sanctions the automatically renewed contract as void, even though this prohibition aims especially at guaranteeing an effective competition.

From the same point of view, CPC recognises the relevant role played by time in the regulation of public contracts: this is true in the case of additional deliveries by the original supplier, awarded by negotiated procedure without publication of a contract notice (the time-limit is three years); in the case of framework agreements (the time-limit is four years); and in the case of public works concessions (the time-limit is thirty years), where the contract duration may be extended with the aim to recover the contractual economic balance (Art. 57, Art. 59 and Art. 143,CPC).

Moreover, according with a consolidated case-laws (Consiglio di Stato, V, no. 6281/2002), modifications in the terms of the contract following a new direct bargaining are not allowed, because public entities must bargain by applying particular procedures ("procedure di evidenza pubblica") even though they have contractual freedom. Therefore, the modifications to a contract should also be concluded by applying the same procedure.

As the contract completion is concerned, being the contracting partner generally chosen through a competitive procedure, public contracts should be implemented by the awarded

party. This protects administrations from the pressures of criminal organizations, which are always interested in assignment and subcontract of public contract (note that Art. 247, CPC, does not affect the controls provided by other statutes aimed at preventing criminal offences).

CPC confirms this general principle in Art. 118 (1), but it also provides some exceptions: Art. 116, CPC, regulates the modifications of the contract depending on subjective events of the contracting partner and Art. 117, CPC, affects the possibility of assigning the amount owed by public entities. Moreover, Art. 118 – as amended by D. Lgs. no. 152/2008 – authorises the awarded operator to subcontracting with quantitative limits (30% of the prevailing category of works, 30% of the whole amount of the contract in case of services and supplies) which should be defined time by time by the contracting authority in the public notice. Furthermore, competitors should indicate in their tenders the parts of the contract they are planning to subcontract and the contracting public entity retains the control on the suitability of the subcontractors, paying directly the amount owed for the performance to each subcontractor.

In conclusion, pressures, stemmed from both internal factors and the competitive market, have made the national regulation on the modifications of public contracts more restrictive than the EU law. At least with regard to subcontracting, which assures a wide discretion to the authorising public administration; and this is one of the general principles which applies also to excluded contracts (Art. 27, CPC). However, further limits to the possibility to renegotiate the contractual terms are going to be provided from the pro-competitive regulation applicable to public procurements, as in the case of the restricted use of the negotiated procedure for the awarding of additional works or deliveries to the contractual partner.

[*] Basically this report is based on the contribution by A. Massera in the volume edited by R. Noguellou and U. Stielkens, *Droit comparé des contrats publics,* Bruxelles, Bruylant, 2010. For a further analysis of the issues discussed due reference should be made to this essay

PUBLIC CONTRACTS

ANNUAL REPORT 2010 - ITALY

(Draft – November - 2010)

Prof. Gabriella M. RACCA

Index

1. THE ITALIAN IMPLEMENTATION OF EUROPEAN DIRECTIVES N. 2004/18/EC AND 2004/17/EC

The Italian market value for public procurements (concerning the total expenditure for the purchase of works, services and supplies) in 2008 exceeded the value of 221 billion

Euro (European Commission, Internal Market, *Public procurement indicators 2008*, april 27, 2010) equal to 14,08% of National GDP. The Italian Authority for the Control of public contracts, calculated the amount of resources involved contracts exceeding 150,000 euros was 79,4 billion euros in 2009, equivalent to 6.6% of GDP, while the previous year was 76 billion euro, representing 6% of GDP (Italian Authority for the Control of public contracts, *Relazione annuale 2009*, 22 giugno 2010). The amount of contracts covered by EU Directive n. 2004/18 was 58 billion euro (about 41.6% for work, approximately 24.8% for supplies and approximately 33.5% for services), and 21 billion concerned the special sectors (about 34.1% to work, about 33.2% to supplies and about 32.5% to services).

EU Directives of March 31, 2004, no. 2004/17 e n. 2004/18[1] regulating public contracts, works and supplies have been implemented in Italy by means **of Legislative Decree no. 163, of April 13, 2006 of the Public Contracts Code** (hereafter **PCC**).

1.1 The allocation of Legislative power between State and Region[2]

[1] **TREATIES:** C. Franchini (eds.), *I contratti di appalto pubblico*, Torino, UTET, 2010; M. Clarich (eds.), *Commentario al Codice dei contratti pubblici*, Torino, Giappichelli, 2010; C. Franchini (eds.), *I contratti con la Pubblica Amministrazione*, UTET, Torino, 2007, I e II, in P. Rescigno – E. Gabrielli (eds.), *Trattato dei contratti*,Torino, UTET, 2007; A. Carullo – G. Iudica, *Commentario breve alla legislazione sugli appalti pubblici e privati*, Cedam, Padova, 2009; A. Grazzini, *Appalti e contratti - Percorsi giurisprudenziali*, Giuffrè, Milano, 2009; M. A. Sandulli - R. De Nictolis - R. Garofoli (eds.), *Trattato sui contratti pubblici*, Giuffrè, Milano, 2008; M. Baldi – R. Tomei, *La disciplina dei contratti pubblici - Commentario al codice appalti*, Ipsoa, Milano, 2009.

[2] **STATE-REGION COMPETENCE:** A. Massera, *La disciplina dei contratti pubblici: la relativa continuità in una materia instabile*, in *Giornale Dir. Amm.*, 2009, 1252; D. Casalini, *Il recepimento nazionale del diritto europeo dei contratti pubblici tra autonomia regionale ed esigenze nazionali di «tutela dell'unità giuridica ed economica» dell'ordinamento*, in *Foro Amm. – C.d.S.*, 2009, 1215-1237.

The State has exclusive legislative competence on competition and consequently, on public contracts[3]. In time Regions have filed claims before the Constitutional Court so as to assert their competence on: public contracts design and planning (Corte Cost. n. 221/2010); contracts below threshold (Corte Cost. n. 401/2007); exclusion of abnormally low tenders (Corte Cost. n. 160/2009).

The Constitutional Court left to Regions only a limited discretion in the choice of the composition and functions of the jury.

1.2 The Italian Authority for the Control of public contracts

Italian PCC (art. 6) envisages the institution of the Italian Authority for the Control of public contracts (*Autorità di vigilanza sui contratti pubblici*), with the task of monitoring both the award and the execution of public contracts.

This authority submits proposals of legislative amendments to PCC to the Government and opinions on the correct interpretation and implementation of the PCC. It also prepares for the Parliament an annual report on public contracts award and execution (for further reference visit www.avcp.it).

The Authority's Monitoring Board on public contracts was created to collect and process data on public contracts over 150 thousand euro awarded and executed in Italy, so as to define standard cost according to territory and sector.

The Monitoring board has also recently started to manage a database of non compliant bidders that were excluded from public bids due to violations or false declarations, either in the selection or in the execution phase.

[3] Art. 117, co. 2, lett. *e*, *l*, *m*, *s*, Cost.

The Authority's activities are funded by the State, the awarding authorities and partly by bidders. Their set contribution, in fact, is mandatory for participation in the award procedures.

2. SUBJECTIVE AND OBJECTIVE COVERAGE, IN HOUSE PROVIDING, CONCESSIONS, PFI AND PPP

The subjective coverage of public procurement legislation is often litigated in Italy. Some interpretative uncertainties still undermine the non-industrial and commercial character of **the body governed by public law**[4]. The qualification of body governed by public law was denied for a consortium company whose shares were partially held by public authorities and whose task was to run a public market area since it bears the economic risk of its activities (Cass., SS.UU., n. 8225/2010). On the other hand, three companies entrusted respectively with the tasks of building and operating airport facilities (Cass., SS.UU., ord. n. 23322/2009), highway facilities (T.a.r. Lazio, Roma, sect. III, n. 2369/2009 e T.a.r. Puglia, Bari, sect. I, n. 399/2009) and organizing a Public Fair were considered bodies governed by public law.

[4] **BODY GOVERNED BY PUBLIC LAW**: S. Girella (a cura di), *Organismi di diritto pubblico e imprese pubbliche : l'ambito soggettivo nel sistema degli appalti europeo e nazionale*, Milano, Angeli, 2010; D. Casalini, *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, in *Urb. e app.*, 2009, 882-889.

The constant specification of **in house providing**[5] requirements through ECJ case-law (ECJ, C-324/07, *Coditel Brabant SA*; ECJ, C-573/07, *Sea s.r.l. v Comune di Ponte Nossa*) shed light on the interpretative issues at stake at the national level, mainly underlining the distinction between property of and control over the in house provider as for the assessment of the similar control requirement (ECJ, C-371/05, *EU Commission v Italy*; ECJ, C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo)* c. *Transformación Agraria SA (Tragsa), Administración del Estado*). The requirement is met whenever several public authorities, holding even a minimal share in the in house provider's capital, exercise the actual power of defining the industrial strategies and the core decisions of the in house provider (Cons. Stato, sect. V, 3 February 2009, n. 591, Cons. Stato, sect. V, 9 March 2009, n. 1365 e Cons. Stato, sect. v, 26 August 2009, n. 5082). The essential destination requirement shall be assessed both from a qualitative and quantitative point of view (ECJ, C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia c. Administración del Estado*; Corte Cost. n. 439/2008) but the Italian legislation limited the in house provider's activities outside its relevant territories, forbidding even the power of tendering in awarding procedures issued by public authorities other than the controlling ones (l.d. n. 223/2006 converted by law n. 248/2006).

The most recent exception to public procurement rules set out by ECJ in C-480/06 *Commission v Germany*), concerning cooperation arrangements among public authorities aiming at carrying out public tasks jointly and without a financial consideration, did not yet

[5] **IN-HOUSE PROVIDING**: for the similar control requirement see R. Cavallo Perin, D. Casalini, *The control over in-house providing organizations*, in *Public Procurement Law Review*, n. 5/2009, 227-240; for a wider perspective see R. Caranta, *The In-House Providing: The Law as It Stands in the EU*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. Comba, *In-House Providing in Italy: the circulation of a model*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; F. Cassella, *In-House providing - European regulations vs. national systems*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. G. Pulvirenti, *Recenti orientamenti in tema di affidamenti in house*, in *Foro Amm. – C.d.S.*, 2009, pag. 108; G. Corso e G. Fares, *Crepuscolo dell'in house?*, in *Foro it.*, 2009, I, 1319; H. Simonetti, *Il modello delle società in house al vaglio della corte costituzionale*, in *Foro it.*, 2009, I, 1314; G. Piperata, *La corte costituzionale, il legislatore regionale ed il modello «a mosaico» della società in house*, in *Regioni*, 2009, 651.

find application in our national case-law. Nonetheless, several forms of cooperation and joint exercise of public tasks among local public authorities are long known in the Italian legal system (art. 15, law n. 241/1990 and art. 31-33, l.d. n. 267/2000) and were recently favoured or even imposed by the budgetary law (l. n. 244/2007, art. 2, § 28; l.d. n. 78/2010, art. 14, § 25-31).

The awarding of **public services concessions** falls outside the scope of EU Directive on public procurement and is subject to the European principles of competition in the internal market (CGCE, 9 September 2010, C-64/08, *Ernst Engelmann*; CGCE, 3 June 2010, in C-203/08, *Sporting Exchange Ltd* v *Minister van Justitie*). Recently the Italian State Council stated that **public services concessions** shall be awarded by means of an open or restricted procedure, whereas the use of a negotiated procedure comply with the EU principles only in case of extreme urgency or disproportionate costs in choosing alternative solutions due to their different technical characteristics (Cons. Stato, V, 21 September 2010 n. 7024).

As for **project financing initiative**[6], following a EU Commission infringement procedure against Italy, (Cons. Stato, IV, 13 January 2010, n. 75), Italian legislation was amended, restoring equality of treatment between the promoter and any other participant (art. 153, § 1-14 modified by l.d. n. 152/2008). PFI in Italy is designed as a two-fold procedure where the first phase (to choose the promoter) is not an awarding procedure subject to the relevant EU rules, whilst the second phase is subject to EU directives on public procurement as far as it aims to choose the final concessionaire (Cons. Stato, Ad. plen., 15 April 2010, n. 1; Cons. Stato, V, 28 May 2010, n. 3399).

As for the definition of **economic operator**, any individual or legal person offering work, supply or service provision on the market, regardless of its legal

[6] **PFI:** G. Manfredi, *La finanza di progetto dopo il d.lgs. n. 152/2008*, in *Dir. amm.*, 2009, 429; V. Cesaroni, *La finanza di progetto*, in *Riv. amm.*, 2009, 119; M. Mattalia, *Il* Project financing *come strumento di partenariato pubblico privato* in *Foro Amm. – Cds*, 2010, 23.

qualification as **non-profit organisation**[7], NGO, public or private body in the relevant national system, is considered an «economic operator» according to EU directives on public procurement (Cons. Stato, VI, 8 June 2010, n. 3638; Cons. Stato, V, 25 February 2009, n. 1128; Cons. Stato, sect. V, 26 August 2010 n. 5956).

3. AWARDING PROCEDURES

3.1 Qualitative selection of tenderers and technical specifications

In Italy, there's a specific system for **work suppliers' suitability requirements' verification**[8], according to which licensed private companies (SOAs) have the task of certifying and assessing the qualification requirements of undertakings which provide works (art. 34 e 40, PCC). The suitability requirements of suppliers and service providers can be self-declared by the latter and their assessment is done by each single contracting authority within each single awarding procedure, thus entailing a considerable amount of time and resources. The verification concerns the winning tenderer and at least 10 % of the other participants chosen by lot (art. 48 PCC).

The extreme detailed Italian discipline on suitability requirements (including personal situation, economic and financial standing and technical and professional ability) often leads to interpretative issues which courts try to settle through the application of

[7] **NO PROFIT ORGANIZATION**: S. Mento, *La partecipazione delle fondazioni alle procedure per l'affidamento di contratti pubblici*, in *Giornale Dir. Amm.*, 2010, 151.

[8] **WORK SUPPLIERS QUALIFICATION SCHEME**: L. Giampaolino, *Il codice degli appalti e il sistema di qualificazione*, in *Riv. trim. appalti*, 2009, 301.

principles such as ***favor partecipationis*, equality of treatment** and **non discrimination**[9], in order to allow for the widest possible participation.

Italian PCC was amended in order to comply with an ECJ decision (ECJ, sect. IV, 19 May 2009, C-538/2007) stating that any national provision defining cases of exclusion from an awarding procedure has to be proportional and reasonable and the exclusion shall follow a specific procedure which the participants are allowed to take part in. Italian PCC presently (art. 38) provides for the exclusion of participants who are substantially and mutually linked only insofar as it is proved that the relevant offers of the linked participants come from the same decisional structure (Cons. Stato, VI, 25 January 2010, n. 247; Cons. Stato, VI, 26 February 2010, n. 1120; C.G.A., 21 April 2010, n. 546; Cons. Stato, VI, 7 April 2010, n. 1967; Cons. St., sect. V, 6 April 2009, n. 2139; Cons. St., sect. V, 8 September 2008, n. 4267). This is the case of firms using the same venues, having the same telephone number, whose chief executives are relatives Cons. Stato V, 10 February 2010, n. 690). Italian case-law requires a specific procedure to assess the **substantial links**[10] among tenderers in order to allow their exclusion Cons. St., sect. IV, 12 March 2009 n. 1459; C. Stato, sect. V, 20 August 2008, n. 3982) and rules for the recording of the exclusion by the Authority for the control of pubic contracts (Cons. Stato, VI, 15 June 2010, n. 3754; Cons. Stato, VI, 5 February 2010, n. 530).

[9] ***FAVOR PARTECIPATIONIS* AND EQUALITY OF TREATMENT:** S. Monzani, *L'integrazione documentale nell'ambito di un appalto pubblico tra esigenze di buon andamento e di tutela della par condicio dei concorrenti*, in *Foro Amm. – C.d.S.*, 2009, 2346; I. Filippetti, *Par condicio e favor partecipationis nell'interpretazione degli atti di gara*, in *Urb. e app.*, 2009, 821.

[10] **SUBSTANTIAL RELATIONSHIP AMONG TENDERERS**: S. Monzani, *L'estensione del divieto di partecipazione ad una medesima gara di imprese controllate o collegate in nome della tutela effettiva della concorrenza*, in *Foro Amm. – C.d.S.*, 2009, 666; M. Briccarello, *Collegamento sostanziale: il superamento del divieto assoluto di partecipazione alla gara*, in *Urb. e app.*, 2010, 731; S. Ponzio, *Il procedimento per l'accertamento del "collegamento sostanziale" tra imprese negli appalti pubblici*, in *Foro Amm. – C.d.S.*, 2010, 1795.

A widespread ground of exclusion is the false or defective self-declaration of the **personal situation requirements**[11] by the tenderers (T.a.r. Piemonte, sect. II, 16 March 2009, n. 772; Cons. Stato, V, 2 February 2010, n. 428; Cons. Stato, VI, 6 April 2010, n. 1909; Cons. Stato, V, 11 May 2010, n. 2822; Cons. Stato, VI, 22 February 2010, n. 1017; Cons. Stato, V, 13 July 2010, n. 4520; Cons. Stato, V, 26 May 2010, n. 3364; Cons. Stato, V, 23 February 2010, n. 1040) that are required even with regard to the economic operator whose qualitative requirements the tenderer relies upon (Cons. Stato, VI, 6 April 2010, n. 1930; Cons. Stato, V, 23 February 2010, n. 1054; Cons. Stato, VI, 15 June 2010, n. 3759). Italian PCC provides also for the exclusion of tenderers who has incurred in previous breaches of public contract even if agreed upon with other contracting authorities (art. 38, § 1, lett. f, PCC; Cons. Stato, V, 15 march 2010, n. 1550; Cons. Stato, VI, 28 July 2010, n. 5029)

3.2 Negotiated procedure and competitive dialogue

The **negotiated procedure** is frequently used in Italy: as for the public contracts (including those below threshold) awarded in 2009, more than 30% (with peaks of m0ore than 60% in the sectors covered by directive n. 17/2004) of the overall tendering procedures are negotiated procedure, accounting for a 20%-25% of the total public contracting

[11] **PERSONAL SITUATION**: G. Ferrari, *Dichiarazione personale del possesso del requisito di moralità da parte dei singoli rappresentanti dell'impresa*, in *Giornale Dir. Amm.*, 2010, 537; G. Manfredi, *Moralità professionale nelle procedure di affidamento e certezza del diritto*, in *Urb. e app.*, 2010, 508; A. Azzariti, *Requisiti di capacità tecnico-professionale e cause di esclusione negli appalti di forniture delle asl*, in *Sanità pubbl. e privata*, 2009, 5, 77; G. Ferrari - L. Tarantino, *Revoca di aggiudicazione provvisoria per condanna penale dell'amministratore e direttore tecnico*, in *Urb. e app.*, 2009, 1518; P. Patrito, *L'art. 38 del codice dei contratti pubblici nuovamente al vaglio della giurisprudenza*, in *Urb. e app.*, 2009, 858; D. De Carolis, *Vicende soggettive delle imprese, obblighi del partecipante e poteri della stazione appaltante*, in *Urb. e app.*, 2009, 327; F. Bertini, *Durc e gare di appalto, tra dubbi e certezze*, in *Urb. e app.*, 2009, 10, 1214; G. Ferrari, *Verifica dei requisiti di ammissione in caso di scissione societaria*, in *Giornale dir. amm.*, 2009, 539; M. Napoli, *Imprese vittime della criminalità organizzata ed esclusione dalle pubbliche gare*, in *Urb. e app.*, 2009, 1413; F. A. Giordanengo, *Sulle caratteristiche essenziali dei consorzi stabili*, in *Foro Amm. - T.a.r.*, 2010, 1567.

expenditure. Therefore our PPC did not implement two of the cases justifying use of the negotiated procedure with prior publication of a contract notice, according to EU Directive n. 18/2004, art. 30, § 1, lett. b) and c): the exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing as well as the case of services, *inter alia* services within category 6 of Annex II A, and intellectual services insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision.

The negotiated procedure without prior publication of a contract notice entails the simultaneous dispatch of invitations to submit a tender to, at least, three economic operators meeting the qualitative selection criteria for the provision of the subject-matter of the contract, thus reducing considerably the competition for the award of the contract.

The implementation of **competitive dialogue**[12] in Italy has been postponed until the entry into force of the Government regulation enforcing the code (Art. 253, § 1-*quarter* PCC), foreseen in the near future. Since the implementation of PCC, a kind of competitive dialogue in Italy has been used solely as a possible instrument to award the few public contracts that do not fall within the scope of the Directives, such as concession of works or services and other forms of PFI and PPP. Nonetheless, Italian PCC limits the use of competitive dialogue which is not available for the most complex work procurements such as strategic infrastructure works and production plants (art. 161-205 PCC), far beyond the purpose of EC law (whereas 31 of EU Directive n. 18/2004).

3.3 Evaluation criteria

[12] **COMPETITIVE DIALOGUE**:, G. M. Racca - D. Casalini, *Implementation and application of competitive dialogue: experience in Italy*, *Public Procurement: Global Revolution V*, University of Copenhagen, 9-10 september 2010; on the comparison between competitive dialogue and French *marchés de définition*: S. Ponzio, *Gli "appalti di definizione" nell'ordinamento francese. La violazione dei principi di trasparenza e concorrenza nell'aggiudicazione degli appalti pubblici*. in *Foro Amm. – C.d.S.*, 2010, 22.

The **distinction between qualitative requirements and selection criteria**[13] (ECJ, sect. I, 24 January 2008, in C-532/06, *Emm. G. Lianakis AE* v *Dimos Alexandroupolis*; Circolare del Dipartimento per le Politiche Europee della Presidenza del Consiglio, March 1 2007; Cons. St., sect. V, n. 2716/2009) is still debated in Italy since Italian administrative courts allow or the evaluation of subjective elements whenever they seems decisive in granting the fair performance of the contract, mainly in case of services contract (Cons. St., Sect. V, 21 May 2010, n. 3208; Cons. St., sect. V, 12 June 2009, n. 3716; Cons. St., sect. V, 2 October 2009, n. 6002; Cons. Stato, V, 22 June 2010, n. 3887).

In case of awarding on the ground of the **most economically advantageous tender criterion**[14], the contracting authority must appoint a **jury**[15] whose composition is defined by Italian PCC in details (art. 84 PCC). The members of the jury must have adequate professional skills with regard to the subject-matter of the contract (Cons. Stato, IV, 31 March 2010, n. 1830; Cons. Stato, V, 14 June 2010, n. 3732; Cons. Stato, V, 30 April 2009, n. 2761) and they must be appointed before the opening of the envelopes that contain the offers (Cons. Stato, V, 6 July 10, n. 4311).

[13] **DISTINCTION BETWEEN QUALITATIVE REQUIREMENTS AND SELECTION CRITERIA:** M. E. Comba, *Selection and Award Criteria in Italian Public Procurement Law*, in *Public Procurement Law Review*, 2009, 122; A. Annibali, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app*., 2010, 201.

[14] **MOST ECONOMICALLY ADVANTAGEOUS TENDER:** I. Franco, *Trasparenza e pubblicità nelle gare di appalto con il criterio dell'offerta economicamente più vantaggiosa*, in *Urb. e app*., 2009, 137; C. Contessa, *L'offerta economicamente più vantaggiosa: brevi note su un istituto ancora in cerca di equilibri*, in www.giustamm.it; A. Mascaro, *Appalti: il prezzo non prevale automaticamente sulla qualità se la lex specialis rispetta i parametri di proporzionalità e ragionevolezza*, in www.dirittoegiustizia.it.

[15] **JURY**: M. Sichetti, *La commissione giudicatrice nella procedura di valutazione dell'offerta economicamente più vantaggiosa*, in *Corriere Merito*, 2010, 3; C. Silvestro, *Funzionari interni componenti delle commissioni giudicatrici e requisiti di professionalità*, in *Urb. e app*, 2009, 1373.

According to the principle of **transparency**[16], every sessions of the awarding body must be open to the public, the only exception being the evaluation of the single element of the most economically advantageous tender criterion by the jury (Cons. Stato, VI, 8 June 2010, n. 3634).

As for the most economically advantageous tender (art. 83, § 4, PCC), Italian rules compel contracting authorities to define in advance, within the contract documents, the elements of tender subject to evaluation and their relative weighting (T.a.r. Piemonte, sect. II, 19 March 2009, n. 785). The jury is allowed to specify the criteria used to mark each element used to determine the most economically advantageous tender, providing that this specification do not entail a modification of the relevant criteria (Authority, opinion n. 119 of 22 January 2007; n. 90 of 20 March 2008; n. 125 del 23 April 2008; n. 183 del 12 June 2008; Cons. Stato, V, 8 September 2008, n. 4271; Corte di Giustizia, decision of 24 November 2005, case C-331/04).

The most economically advantageous tender criterion is sometimes applied in Italy by means of **mathematical formulae**[17] which should provide an easier marking of the single element of the tender, and can seem to be an aid to the objective evaluation of the tender. Nonetheless, they can be thwarted by bidders and may lead to further criticalities instead of smoothing the process. The proportionality and reasonableness of these formulae are often subject to judicial review in order to avoid that a single element of the tender alone could turn to be decisive for the final awarding (Cons. Stato V, 9 April 2010, n. 2004; Cons. St., V, 22 June 2010, n. 3890; Cons. St., VI, 17 December 2008, n. 6278). Some problems may arise when the price element of the tender is zero, since the mathematical formula becomes inapplicable or has an unexpected outcome (leading to a zero mark), thus leading to the exclusion of the tender (Cons, Stato, V, 16 July 2010, n. 4624).

[16] **PUBLICITY OF SESSIONS**: A. Gandino, *Sulla pubblicità delle sedute di gara: riflessioni a margine della trasparenza amministrativa nel codice dei contratti pubblici (e non solo)*, in *Foro Amm.-Tar*, 2009, 1276.

[17] **MATHEMATICAL FORMULA**: M. Mattalia, *L'offerta economicamente più vantaggiosa e l'applicazione della formula matematica prevista dal disciplinare di gara*, in *Foro Amm. C.d.S.*, 2010.

In case of **abnormally low tenders**[18], the contracting authority shall verify their constituent elements by consulting the tenderer, taking account of the evidence supplied (Cons. Stato, VI, 15 July 2010, n. 4584; Cons. Stato, sect. IV, 30 October 2009 n. 6708; Cons. St., sect. V, 13 February 2009 n. 826; T.a.r. Puglia, Lecce, III, 24 September 2009 n. 2186) even when the contract documents require the tenderer to provide in **advance**[19] the justifications of some elements of the tender when the latter is submitted (Cons. Stato, V, 17 February 2010, n. 922; Cons. Stato, VI, 2 April 2010, n. 1893). To that aim, among the details of the constituent elements of the tender which can be considered relevant are: the possible economic exploitation of the service provided in other markets or other contractual relationships (Cons. Stato, V, 2 February 2010 n. 443), the timetable of the contract perfomance (T.a.r. Calabria, Reggio Calabria, 4 June 2010 n. 532) and the reutilization of materials and ancillary services produced during the contract perfomance (T.a.r. Lazio, Roma, III *ter*, 20 may 2010 n. 12518).

[18] **ABNORMALLY LOW OFFER**: M. Pignatti, *Il giudizio sulle offerte anomale tra effettività del contraddittorio ed oggettività nelle valutazioni*, in *Foro Amm. – C.d.S.*, 2009, 1302; T. Del Giudice, *La rilevanza della concorrenza «effettiva» nel giudizio di anomalia dell'offerta: riflessioni in ordine alla compressione dell'utile d'impresa*, in *Foro Amm. – Tar*, 2009; A. Manzi, *Le novità in materia di offerte anomale*, in *Urb. e app.*, 2010, 270; E. Santoro, *Offerte anomale e calcolo del costo del lavoro: favor per le imprese che assumono lavoratori dalle liste di mobilità*, in *Urb. e app.*, 2010, 208; L. Masi, *Offerte con ribassi identici nel procedimento di determinazione della soglia di anomalia*, in *Urb. e app.*, 2010, 186; L. Miconi, *Il problema dei ribassi elevati nell'affidamento dei servizi di architettura e ingegneria: breve commento al nuovo regolamento di attuazione del d.leg. 163/2006 e parere del consiglio di stato n. 313/2010*, in *www.giustamm.it.*

[19] G. Fares, *Sulle conseguenze dell'omessa presentazione delle giustificazioni preventive*, in *Foro Amm.-Tar*, 2009, 813.

Public purchasing aggregation[20] has been one of the main focus of the recent Italian legislation who established central purchasing bodies at the local level[21] able to network with the national central purchasing body (Consip)[22] which, since 2000[23], is entrusted with the task of awarding framework contracts which the government administrations are compelled to take part in[24]. However it is worth noticing that the framework contracts awarded by Consip concern a very few category of products and services, set out annually by a Ministerial decree. Local authorities shall refer to Consip's framework contracts as price and quality **benchmarks**[25] for their own purchasing[26] (Cons.

[20] **PURCHASING AGGREGATION**: G. M. Racca, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119; G. M. Racca, *La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro*, in *Foro Amm. – C.d.S.*, 2010, 1475; G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI (2010); G.L. Albano e F. Antellini Russo, *Problemi e prospettive del Public procurement in Italia tra esigenze della pubblica amministrazione obbiettivi di politica economica*, 2009, in *Economia Italiana*, 809; D. Broggi, *Consip: il significato di un'esperienza, Teoria e pratica tra e-Procurement ed e-Government*, Roma, 2008, 9.

[21] L. 27 december 2006, n. 296, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)*, art. 1, c. 455. See also: Autorità per la Vigilanza sui Contratti Pubblici di Lavori, Servizi e Forniture, *Censimento ed analisi dell' attività contrattuale svolta nel biennio 2007-2008 dalle Centrali di Committenza Regionali e verifica dello stato di attuazione del sistema a rete*, 27 e 28 january 2010, in *http://www.avcp.it/portal/public/classic/.*

[22] See agreement of 21 december 2009 between SCR-Piemonte S.p.A. and Consip S.pA., in *http://www.consip.it.*

[23] L. 23 december 1999, n. 488, *legge finanziaria per l'anno 2000*, art. 26.

[24] legge 23 december 1999, n. 488, *Budgetary law for 2000*, e art. 26, providing the mandatory participation in Consip agreement for any public authority, apart from the municipalities with less than 1000 or 5000 (if mountain) citizens. See also the *Budgetary law for 2001*, art. 58; L. 24 december 2003, n. 350, *Budgetary law for 2004*, art. 3, § 166; d.l. 12 july 2004, n. 168, art. 1, conv. in L. 30 july 2004, n. 191; L. 24 december 2007, n. 244, art. 2, § 574, *Budgetary law for 2008.*

[25] **BENCHMARKS: A**rt. 1, c. 4, lett. c, d.l. 12 july 2004, n. 168; S. Ponzio, *La verifica di congruità delle offerte rispetto alle convenzioni Consip s.p.a. negli appalti pubblici di forniture e servizi* in *Foro Amm. - CdS*, 2009, 2352; I. Pagani, *Appalti di fornitura ed "anomalia esterna" rispetto alle previsioni del codice dei contratti pubblici*, in *Urb. e app*., 2009, 592.

St., sect. V, 2 February 2009, n. 557) and local civil servants who fail in enforcing these benchmarks are **liable** (C. conti, sect. giur. Reg. Valle d'Aosta, 23 November 2005, n. 14).

3.4 Contracts below the EU thresholds

In Italy, public **contracts below threshold**[27] are highly widespread, commonly as a result of a lack of supply chain planning or malpractices in procuring management that can sometimes be regarded as subdivisions to prevent their falling within the scope of EU Directive, thus in breach of the latter (art. 9, § 3, Directive n. 18/2004; Cons. Stato, sect. V, 9 June 2008 n. 2803).

In Italy, public contracts below threshold are subject to the same principles but to simplified rules with respect to those applicable to the contracts above EU threshold: the contract notices can be published in any local newspapers and journals as well as only on the contracting authority's website, thus strongly limiting its advertising effect and reducing possible competition; the economic, financial and technical qualitative selection requirements are simpler and lower and the deadlines for tenders submission are shortened (art. 121-124 PCC). The compliance with EU principles applicable to public contracts that fall outside the scope of EU directives of the rule which allows contracting authorities procuring below threshold to exclude abnormally low offer without requesting the tenderer any details of the constituent elements of his tender is still debated in Italy (Cons. Stato, sect. cons. atti normativi, 6 February 2006 n. 355/06; ECJ, sect. IV, 23 December 2009, in C-376/2008, *Serrantoni Srl and Consorzio stabile edili Scrl* v *Comune di Milano;* ECJ, sect. IV 15 May 2008, C-147/06 *SECAP Spa* v *Comune di Torino* e C-148/06 *Santorso soc.*

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[26] L. 23 december 1999, n. 488, art. 26, c. 3, providing Consip framework contracts' price and quality as mandatory benchmarks for any contracting authority, apart from the municipalities with less than 1000 or 5000 (if mountain).

[27] **CONTRACT BELOW THRESHOLD**: E. D'Arpe, *Le acquisizioni in economia di beni e servizi mediante la procedura di cottimo fiduciario,* in *Corriere merito*, 2009, 95; M. Giovannelli e F. Bevilacqua, *Ammissibilità della procedura negoziata ai contratti fino a cinquecentomila euro,* in *Urb. e app.*, 2009, 401.

coop. Arl v *Comune di Torino*; Interpretative Communication on *relativa al diritto comunitario applicabile alle aggiudicazioni di appalti non o solo parzialmente disciplinate dalle direttive «appalti pubblici»*, in GUCE 1 June 2006, C-179/2).

Besides the ordinary awarding procedures for public contracts below threshold, Italian PCC (art. 125) allows contracting authorities to directly provide works, services and supply by means of using their own material and human resources (*amministrazione diretta*) or to enter into the public contract by means of a negotiated procedure (*cottimo fiduciario*: T.a.r. Campania, Napoli, sect. I, 9 June 2010, n. 13722; T.a.r. Piemonte, sect. II, 19 march 2009, n. 785: T.a.r. Toscana, sect. II, 22 June 2010, n. 2025).

Contracting authorities often purchase below threshold through the e-marketplace established by Consip (*Mercato Elettronico della Pubblica Amministrazione*[28] - M.E.P.A.): through the MEPA, economic operators may offer supply and services to public authorities who can purchase directly without issuing any awarding procedure.

3.5 Environmental and Social Considerations [29].

[28] **E-MARKETPLACE – MERCATO ELETTRONICO DELLA PUBBLICA AMMINISTRAZIONE:** d.P.R. 4 april 2002, n. 101, art. 11, *Regolamento recante criteri e modalità per l'espletamento da parte delle amministrazioni pubbliche di procedure telematiche di acquisto per l'approvvigionamento di beni e servizi.*

[29] **SOCIAL AND ENVIRONMENTAL CONSIDERATIONS**: R. Caranta – S. Richetto, *Sustainable Procurements in Italy: Of Light and Some Shadows*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 143; G. M. Racca, *Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 165; D. Perotti, *La «clausola sociale», strumento di salvaguardia dei lavoratori nel conferimento o nel trasferimento di attività a carattere economico-imprenditoriale da parte delle pubbliche amministrazioni*, in *Nuova rass*., 2009, 24; P. Cerbo, *La scelta del contraente negli appalti pubblici fra concorrenza e tutela della «dignità umana»*, in *Foro Amm. - T.a.r*., 2010, 1875; A. M. Balestrieri, *Gli "appalti riservati" fra principio di economicità ed esigenze sociali*, in *Urb. e app*., 2009, 789; G. Ferrari – L. Tarantino, *Gara pubblica e costo del lavoro*, in *Urb. e app*., 2009, 248.

The Italian PCC, according to ECJ case-law (ECJ 17 September 2002, cause C-513/99, *Concordia Bus*), allows for social and environmental considerations to be include as qualitative selection criteria, technical specifications or most economically advantageous tender criteria (art. 2, § 2 and art. 83, § 1, lett. *E*, PCC).

Some social clauses are expressly provided by Italian legislation which automatically integrates the contract documents even when the latter do not explicitly provide so: it is the case of the compulsory employment of disabled persons (law 12 march 1999, n. 68; Cons. Stato, V, 19 June 2009, n. 4028). A commonly widespread social clause is also the one providing for the compulsory employment of the incumbent provider's employees by the winning tenderer, if compatible with the latter's organization chart (Cons. St., V, 16 June 2009, n. 3900).

4. EXECUTION OF THE CONTRACT

The Italian PCC regulates the **public contract performance phase** as well **(**Cons. giust. amm. sic., sect. giurisdiz., 21 July 2008, n. 600). Nevertheless, the quality standards promised with the tender submission is not always delivered and procuring entities often accept a different and less worse performance as far as the economic operators fail to fulfil the obligations undertaken[30]. Italian PCC compels the contracting authorities to appoint a supervisor of the contract performance (art. 119, PCC) but breaches of contract still frequently happen because of lack of professional skills in managing the performance phase of the public contract.

[30] **CONTRACT PERFORMANCE**: G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI(2010); R. Cavallo Perin – G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm*., 2010, 325; A. M. Balestreri, *L'applicabilità di meccanismi revisionali ai contratti di concessione di servizi*, in *Urb. e app*., 2009, 393.

The more detailed rules concern the execution of works contract (art. 130 et seq. PCC): contracting authorities have the power of supervision of works which entails the power of issuing orders on the performance of works (art. 1662 cod. civ.) (Cons. Stato, VI, 26 May 2010, n. 3347). A specific discipline concerns **subcontracting**[31] (art. 118, PCC) which has to be authorized by the contracting authority (Cons. Stato, sect. IV, 24 March 2010 n. 1713; T.a.r. Lazio, Roma, sect. III, 4 January 2010 n. 34) and entails the disclosure of the subcontractors at the tender submission (Cons. Stato, sect. V, 14 May 2010 n. 3016; Cons. Stato, sect. IV, 30 October 2009 n. 6708).

ECJ qualifies any amendments of the public procurement term and conditions during its performance as a new award in breach of EU rules on public contracts (ECJ, sect. III, 19 June 2008, in C-454/06, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich*, see also: ECJ, sect. III, 29 April 2010 C-160/08, *EU Commission* v *Germany*; ECJ, sect. Grande, 13 April 2010, in C-91/08, *Stadt Frankfurt am Main*; ECJ, sect. III, 25 March 10, in C- 451/08, *Helmut Müller GmbH*). In Italy any **extension of a public contract**[32], if not provided for in the contract documents and conditions, is forbidden as it account for a new direct award without any prior publication of the contract notice (Cons. Stato, VI, 16 February 2010, n. 850).

The fair and correct performance of the public contract is achieved also through the provision of penalties in case of breach of contract which, in case of severe misconduct, can lead to the termination of the contract (T.a.r. Campania, Napoli**,** I, 20 April 2010 n. 2026).

[31] **SUBCONTRACTING**: G. Balocco, *Mancanza od irregolarità della dichiarazione di subappalto ed esclusione dalla gara*, in *Urb. e app*, 2009, 1132.

[32] **EXTENSION OF PUBLIC CONTRACT**: S. Usai, *La proroga programmata del contratto d'appalto*, in *Urb. e app*., 2010, 705; G. Ferrari - L. Tarantino, *Proroga contratti di trasporto*, in *Urb. e app*., 2009, 1148.

5. The Italian Implementation of European Remedies Directive 2007/66/EC

EU Directive n. 2007/66 has been implemented in Italy by the leg.d. 20 March 2010, n. 53 now included in the new Code of administrative procedure (*Codice del processo amministrativo*, d.lgs. 2 July 2010, n. 104 – hereafter CAP)[33]. The new Code of administrative procedure (art. 133) entrusts the administrative courts (Tribunali Amministrativi Regionali and Consiglio di Stato) with the power of declaring the ineffectiveness of the contract as a consequence of the award annulment and regulates the consequences of the failure to comply with the standstill period.

Before the implementation of EU Directive n. 2007/66, the **competence over public contracts litigation** was divided between the administrative court, as for the disputes concerning the awarding procedure, and the ordinary courts (tribunals, court of appeal, Cassazione), as for disputes regarding the contract performance which starts after the contract stipulation. After the implementation of EU Directive n. 2007/66, the administrative courts can declare the award void and the contract ineffective (Cass.,

[33] **Judicial Review**: M. Lipari, *La direttiva ricorsi nel codice del processo amministrativo: dal 16 september 2010 si cambia ancora?*, in *Foro Amm. - T.a.r.*, 2010, (5) LXXIII; M. Lipari, *Il recepimento della «direttiva ricorsi»: il nuovo processo super-accelerato in materia di appalti e l'inefficacia «flessibile» del contratto*, www.giustamm.it; V. Lopilato, *Categorie contrattuali, contratti pubblici e i nuovi rimedi previsti dal d.leg. n. 53 del 2010 di attuazione della direttiva ricorsi*, www.giustamm.it.; M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario*, in *www.federalismi.it*; R. De Nictolis, *Il recepimento della direttiva ricorsi nel codice appalti e nel nuovo codice del processo amministrativo*, in *www.giustizia-amministrativa.it*; F. Saitta, *Contratti pubblici e riparto di giurisdizione: prime riflessioni sul decreto di recepimento della direttiva n. 2007/66/CE*, www.giustamm.it; F. Cintioli, *In difesa del processo di parti (note a prima lettura del parere del consiglio di stato sul «nuovo» processo amministrativo sui contratti pubblici)*, in *www.giustamm.it*; A. Bartolini - S. Fantini - F. Figorilli, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urb. e app.*, 2010, 638; S. Foà, *L'azione di annullamento nel Codice del processo amministrativo*, in *www.giustizia-amministrativa.it*; V. Cerulli Irelli, *Osservazioni sulla bozza di decreto legislativo attuativo della delega di cui all'art. 44 l. n. 88/09*, in *www.giustamm.it.*; R. Caranta, *Il valzer delle giurisdizioni e gli effetti sul contratto dell'annullamento degli atti di gara*, in *Giur. It.*, 2009, 6; F. Goisis, *Ordinamento comunitario e sorte del contratto, una volta annullata l'aggiudicazione*, in *Dir. proc. amm.*, 2009, 116; R. Calvo, *La svolta delle sezioni unite sulla sorte del contratto pubblico*, in *Urb. e app.*, 2010, 421.

SS.UU., ord. 5 march 2010, n. 5291; Cass., SS.U., ord. 10 february 2010, n. 2906; Cons. Stato, V, 15 June 2010, n. 3759), whereas the ordinary courts maintain the competence over the disputes raising during the performance phase (Cons. Stato, VI, 26 may 2010, n. 3347; Cons. Stato, V, 1 April 2010, n. 1885), save the application of special public law rules in this phase (e.g. subcontracting: Cons. Stato, IV, 24 march 2010, n. 1713).

The administrative courts shall grant the renewal of the illegal awarding phases and the following new award[34], whenever it is possible (Cons. Stato, V, 9 march 2010, n. 1373). After the contract subscription, the administrative judge can declare its **ineffectiveness** whenever: a) the award was done without prior publication of the contract notice; b) the award followed a negotiated procedure or direct provision of works, services and supply outside the cases; c) the contract was subscribed not complying with the standstill period (art.121-122, CAP). Whenever the declaration of ineffectiveness is not possible, the judge will rule for compensation of damages[35] (Cons. Stato, V, 15 June 2010, n. 3759 where few months were left before the conclusion of the contract performance).

Italian law implemented the EU rules on the **standstill period**, setting a period of 35 days before the signing of the contract (art. 11, § 10-10bis PCC; T.A.R. Campania, Napoli, Sect. I, 14 July 2010, n. 16776), as well as the relevant derogations provided for in EU Directive n. 89/665/EEC, art. 2*b* as amended by EU Directive n. 2007/66.

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[34] F. Tallaro, *L'esecuzione in forma specifica dell'obbligo di contrarre nei confronti della pubblica amministrazione*, in *Rivista NelDiritto*, 2009, 1195; G. Ferrari - L. Tarantino, *Obbligo della stazione appaltante di formulare una nuova graduatoria di gara*, in *Urb. e app*, 2009, 1385; M. Sinisi, *Il potere di autotutela nell'ambito delle procedure di gara fra annullamento dell'intera procedura e annullamento dei singoli atti della medesima sequenza procedimentale*, in *Foro Amm.-Tar*, 2009, 31; M. Didonna, *Il subentro nel contratto di appalto dopo l'annullamento dell'aggiudicazione*, in *Urb. e app*., 2010, 588; V. De Gioia, *Autotutela demolitoria e risarcimento dell'aggiudicatario*, in *Urb. e app*., 2009, 429.

[35] **COMPENSATION FOR DAMAGES:** E. Boscolo, *L'intervenuta esecuzione dell'opera pubblica: il limite all'annullamento e la sequenza accertamento-risarcimento*, in *Urb. e app*., 2010, 89; A. Reggio d'Aci, *Il G.A. riduce le prospettive di risarcimento per mancata aggiudicazione*, in *Urb. e app*., 2009, 557; B. Gagliardi, *Esecuzione di un contratto* sine titulo, *arricchimento senza causa e diritto all'utile di impresa*, in *Dir. proc. amm*., 2009, 806.

Alternative penalties have been implemented in art. 123 of the CAP for the cases in which the principle of ineffectiveness is deemed to be inappropriate, with the imposition of fines to the procuring entity of a penalty ranging from 0.5% to 5% of the total value of the award price. Such fines will be included in the State's budget. An alternative penalty provides the shortening of the duration of the contract, ranging from 10% to a maximum of 50% of the remaining duration of the contract.

The quantification of damages[36] for illegal awarding of a public contract amounts in any case to the expenses sustained in preparing and submitting the tender and, only if the economic operator is able to prove that he would have been the awarding firm, also to the profit the economic operator would have gained by performing the contract (max. 10% of the contract value profit provided for by art. 345 Law 20 march 1865, n. 2248, all. F is only a guideline). The lost profit should amount to less than 10% reaching up to 5% of the contract value whenever the economic operator fails to prove the impossibility of using its own technical and human resources and machinery in performing other contracts (Cons. Stato, sect. VI, 21 September 2010, n. 7004). The amount of compensation is further reduced when there is no evidence of the right to the award of the contract. Damages may also refer to the loss of qualitative selection requirements the economic operator would have achieved with the contract performance (amounting to a 1-5% of the contract value) (Cons. Stato, sect. VI, 27 April 2010, n. 2384).

[36] **QUANTIFICATION OF DAMAGES**: G. Crepaldi, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento*, in *Foro Amm. – C.d.S.*, 2010, 868; G. M. Racca, *Contratti pubblici e comportamenti contraddittori delle pubbliche amministrazioni: la responsabilità precontrattuale*, in *Rivista NelDiritto*, n. 2/2009, 281; H. Simonetti, *Il giudice amministrativo e la liquidazione del danno: temi e tendenze*, in *Foro it.*, 2009, III, 313.

6. WEB SITES

www.gazzettaufficiale.it Gazzetta Ufficiale della Repubblica Italiana
www.cortecostituzionale.it Corte Costituzionale
www.quirinale.it Presidenza della Repubblica
www.parlamento.it Parlamento italiano
www.camera.it Camera dei deputati
www.senato.it Senato della Repubblica
www.governo.it Governo italiano Presidenza del Consiglio dei Ministri
www.sviluppoeconomico.gov.it Ministero dello Sviluppo economico
www.cnel.it Consiglio Nazionale dell'Economia e del Lavoro
www.cortedicassazione.it Corte Suprema di Cassazione
www.giustizia-amministrativa.it Consiglio di Stato – Tribunali Amministrativi Regionali
www.corteconti.it Corte dei Conti
www.agcm.it Autorità garante della concorrenza e del mercato
www.agcom.it Autorità per le garanzie nelle comunicazioni
www.bancaditalia.it Banca d'Italia
www.garanteprivacy.it Autorità garante per la protezione dei dati personali
www.avcp.it Autorità per la vigilanza sui Contratti pubblici
www.consip.it: Consip S.p.A.:
www.cnipa.gov.it Centro nazionale per l'informatica nella pubblica amministrazione
www.autorita.energia.it Autorità per l'energia elettrica e il gas
www.giustizia-amministrativa.it Consiglio di Stato
www.appaltiecontratti.it Appalti e contratti
www.giustamm.it Giustizia amministrativa
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ACTES UNILATERAUX

APPORTS DE L'ANNEE - 2010 - FRANCE

(Février 2011)

Prof. Pierre DELVOLVE

INDEX

L'année 2010 a apporté certaines précisions concernant tant la nature des actes administratifs unilatéraux que certains aspects de leur régime. Dans les deux cas, il ne s'agit pas d'innovations, encore moins de bouleversements. Mais sont soit illustrés des principes déjà reconnus soit complétées des solutions antérieures.

1. SUR LA NATURE DES ACTES UNILATERAUX

La question de l'identification des actes administratifs unilatéraux est une question classique, dont la solution a des conséquences sur leur régime, contentieux et non contentieux. Dans le premier cas, il s'agit de savoir si un acte présente les caractéristiques permettant de le contester devant la juridiction administrative, dans le second de déterminer les exigences auxquelles il est soumis, notamment pour son adoption et sa diffusion.

L'année 2010 illustre cette problématique avec trois arrêts qui ont été rendus par le Conseil d'Etat.

Le premier concerne des actes adoptés par des organismes à statut de droit privé. Dans le prolongement de l'arrêt du Conseil d'Etat du 31 juillet 1942, Monpeurt (Recueil des arrêts du Conseil d'Etat, 1942, p. 239 ; Les grands arrêts de la jurisprudence administrative, par M. Long, P. Weil, G. Braibant, P. Delvolvé et B. Genevois, Dalloz, 17ème éd., 2009, p. 326), il est admis que des actes adoptés par des organismes de droit privé dans l'exercice d'une mission de service public dont ils sont chargés et des prérogatives de puissance publique dont ils sont dotés, sont des actes administratifs. Il en est ainsi en particulier lorsque un acte pris par un organisme de droit privé concerne l'organisation du service public, comme l'a reconnu le Tribunal des conflits dans le fameux arrêt Compagnie Air France c/époux Barbier du 15 janvier 1968 (Recueil p. 709 ; Les grands arrêts... p. 564).

C'est ce qu'a jugé le Conseil d'Etat dans un arrêt du 11 février 2010, Mme Borvo (req. n° 324 233 ; Actualité juridique, Droit administratif, 2010, p. 670, chronique S.-J Liéber et D. Botteghi) à propos d'une délibération du conseil d'administration de la Société France Télévisions :

« *Considérant que la délibération du conseil d'administration de France Télévisions en date du 16 décembre 2008 chargeant son président-directeur général de mettre en oeuvre de nouvelles règles de commercialisation des espaces publicitaires affecte la garantie des ressources de la société, lesquelles constituent un élément essentiel pour assurer la réalisation des missions de service public confiées à cette société en vertu des dispositions de l'article 43-11 de la loi du 30 septembre 1986, dont celles de diversité, pluralisme, qualité et innovation dans les programmes mis à disposition des publics ; que, par suite, cette délibération, qui touche à l'organisation même du service public, relève de la compétence de la juridiction administrative* ».

Ce même arrêt permet aussi de cerner la nature d'actes qui émanent d'organismes publics. La qualité de l'auteur d'une mesure ne suffit pas à donner à celle-ci la qualité d'acte administratif. Pour qu'il y ait un « acte » au sens juridique exact du terme, il faut une manifestation de volonté produisant des effets de droit. Dans certains cas, une autorité administrative se borne à manifester une intention, à exprimer un souhait : il ne s'agit pas

encore d'une décision. Mais lorsqu'est franchi un seuil où apparaît un ordre, la mesure est un véritable acte administratif pouvant être contesté devant le juge administratif. Tel a été le cas dans l'affaire :

« *Considérant que la lettre du ministre en date du 15 janvier 2008, après avoir rappelé le contexte de la réforme législative alors en cours relative à la suppression de la publicité dans le service public de la télévision, demande au président-directeur général de la société France Télévisions d'envisager les mesures nécessaires afin de ne plus commercialiser les espaces publicitaires entre 20 h et 6 h sur France 2, France 3, France 4 et France 5 à partir du 5 janvier 2009 conformément à l'esprit et à la lettre de la réforme législative en cours ; qu'eu égard à la précision des mesures énoncées et de l'échéance qu'elle fixe pour leur application, la lettre du ministre doit être regardée comme comportant une instruction tendant à ce que soient prises les mesures en cause ; qu'elle constitue ainsi une décision faisant grief* ».

Quant au fond, le Conseil d'Etat a jugé que le ministre n'avait pas le pouvoir d'enjoindre à France Télévisions de ne plus faire de publicité et que sa décision était illégale ; par voie de conséquence, l'était aussi la délibération du conseil d'administration de France Télévisions qui n'avait fait que l'exécuter.

Le même genre de question, mais sur des objets différents, se pose pour les nombreuses mesures que les chefs de service prennent pour assurer le fonctionnement des services placés sous leur autorité. On parle souvent à ce sujet de mesures d'ordre intérieur. Beaucoup d'entre elles ont été considérées comme « ne faisant pas grief » et donc comme insusceptibles d'être attaquées devant le juge administratif. Tel a été le cas pendant longtemps pour des décisions de caractère disciplinaire prises au sein d'établissements scolaires, militaires ou pénitentiaires. La jurisprudence se montre plus rigoureuse depuis les deux arrêts rendus par le Conseil d'Etat le 17 février 1995, Hardouin, Marie (Recueil p. 82 et p. 85 ; Les grands arrêts... p. 692). Elle a été enrichie en 2007 par trois arrêts du 14 décembre 2007, Planchenault, Rec. p. 474 ; Boussouar, Rec. p. 495, Payet, Rec. p. 498, relatifs à des décisions concernant des prisonniers (déclassement d'emplois, changement d'affectation, placement sous le régime des rotations de sécurité).

Elle vient de l'être encore par un arrêt du Conseil d'Etat du 26 novembre 2010, Ministre d'Etat, garde des sceaux, ministre de la justice (requête n° 329 564) à propos de la décision du directeur d'un centre pénitentiaire limitant le nombre de personnes admises simultanément au parloir :

« *Considérant que la décision par laquelle un chef d'établissement pénitentiaire fixe les modalités essentielles de l'organisation des visites aux détenus, et notamment le nombre de visiteurs admis simultanément à rencontrer le détenu, est indissociable de l'exercice effectif du droit de visite ; que par sa nature, cette décision prise pour l'application des dispositions citées ci-dessus affecte directement le maintien des liens des détenus avec leur environnement extérieur; que compte tenu de ses effets possibles sur la situation des détenus, et notamment sur leur vie privée et familiale, qui revêt le caractère d'un droit fondamental, elle est insusceptible d'être regardée comme une mesure d'ordre intérieur et constitue toujours un acte de nature à faire grief* ».

Comme dans les cas précédents, c'est l'effet de la décision sur le « statut » de l'intéressé, l'altération de ses droits, qui conduisent à y voir, non pas une mesure d'ordre intérieur, mais un acte administratif que contrôle le juge administratif.

C'est une autre qualification qui était en cause, celle de document administratif, dans l'arrêt rendu par le Conseil d'Etat (Section) le 7 mai 2010, Bertin (req. n° 303 168 ; Actualité juridique, Droit administratif 2010, p. 1133, chronique S.-J. Liéber et D. Botteghi). La notion ne se confond pas avec celle d'acte administratif et n'a pas les mêmes effets.

Un acte administratif peut être un document administratif en ce qu'il prend la forme de celui-ci, un document administratif peut comporter une véritable décision adoptée par une autorité administrative. Mais, à l'inverse, il existe des actes administratifs qui n'ont pas la forme de document (par exemple, une décision implicite) et des documents administratifs qui ne constituent pas des actes administratifs (par exemple une circulaire qui n'est pas impérative).

La qualification d'acte administratif a pour principal intérêt de permettre un recours contre lui devant le juge administratif. Celle de document administratif est essentiellement destinée à permettre au public d'y accéder.

La loi du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public, plusieurs fois modifiée, a reconnu un droit de communication des documents administratifs aux personnes qui en font la demande, au moins dans certaines conditions

Selon son article 1er alinéa 2, « *tous dossiers, rapports, études, comptes rendus, procès-verbaux, statistiques, directives, instructions, circulaires, notes et réponses ministérielles qui comportent une interprétation du droit positif ou une description des procédures administratives, avis, à l'exception des avis du Conseil d'Etat et des tribunaux administratifs, prévisions et décisions revêtant la forme d'écrits, d'enregistrements sonores ou visuels, de traitements automatisés d'informations non nominatives* ».

La question s'est posée de savoir si des documents concernant les juridictions, et spécialement les juridictions judiciaires peuvent être considérés comme administratifs. Ce ne peut être le cas des décisions de justice elles-mêmes, qui sont des documents juridictionnels. Mais il existe des mesures qui, se rapportant à l'organisation de la justice, ne sont pas en elles-mêmes des décisions juridictionnelles.

Dans le cadre de la jurisprudence issue de l'arrêt du Tribunal des conflits du 27 novembre 1952, Préfet de la Guyane (Recueil p. 642 ; Les grands arrêts …, p. 436), elles ont été considérées comme des actes administratifs relevant du contrôle de la juridiction administrative, y compris lorsqu'elles émanent de magistrats (Conseil d'Etat 17 avril 1953, Falco et Vidaillac, Recueil p. 175 ; 13 mars 1987, Bauhain, Recueil p. 95). On aurait pu penser que des mesures relatives à la composition des juridictions, qui sont des actes administratifs, étaient en même temps des documents administratifs relevant du droit de communication.

Le Conseil d'Etat a décidé le contraire :

« *Considérant que les documents, quelle que soit leur nature, qui sont détenus par les juridictions et qui se rattachent à la fonction de juger dont elles sont investies, n'ont pas le caractère de document administratif pour l'application de la loi du 17 juillet 1978 ;*

Considérant que les tableaux mensuels des assesseurs des quatre chambres correctionnelles du tribunal de grande instance de Lyon pour la période de septembre à décembre 1999, dont M. A a demandé la communication, déterminent la composition de la juridiction pendant cette période ; qu'ils se rattachent ainsi à la fonction de juger dont le tribunal est investi; qu'en conséquence, ils n'ont pas le caractère de document administratif et n'entrent donc pas dans le champ d'application de la loi du 17 juillet 1978 ».

La solution s'explique par la spécificité de la fixation des tableaux des formations de jugement et son rattachement à la fonction de juger : en conséquence il ne s'agit pas de documents administratifs - alors qu'il s'agit d'actes administratifs. C'est une illustration de la dissociation des deux notions et, partant, de celle de leur régime.

2. SUR LE REGIME DES ACTES UNILATERAUX.

Parmi les solutions à signaler en 2010, certaines concernent l'adoption des actes, d'autres leur application dans le temps.

En ce qui concerne l'adoption des actes, une ordonnance du Président de la République (prise en vertu d'une habilitation législative) du 6 mai 2010 a apporté une première remise en ordre dans les dispositions législatives renvoyant pour leur exécution tantôt à un décret simple tantôt à un décret en Conseil d'Etat. L'ordonnance ne concerne que le code rural mais les principes qui ont déterminé son dispositif pourront être mis en oeuvre pour d'autres législations.

Le renvoi par le législateur à un décret en Conseil d'Etat (imposant obligatoirement l'examen du projet de décret par le Conseil d'Etat, sans que le gouvernement soit obligé ensuite de retenir la position du Conseil d'Etat) ou à un décret simple, n'est pas décidé, le plus souvent, en fonction d'une claire vision des besoins pouvant justifier la délibération du Conseil d'Etat. On sait que celle-ci peut contribuer à

éclairer le gouvernement et qu'elle peut constituer une sorte de garantie pour la forme et le fond du texte ; mais on ne sait pas exactement en quoi cela peut être nécessaire.

Désormais le renvoi à des décrets en Conseil d'Etat ne devrait être décidé que dans deux séries de cas (qui peuvent se croiser) : pour des textes concernant les droits, libertés ou principes de valeur constitutionnelle ; pour ceux qui concernent les grandes lignes d'une réglementation majeure. Pour les autres, le renvoi à un décret simple suffit. Dans tous les cas, il s'agit de textes pris sur le fondement de dispositions législatives, dont les décrets (simples ou en Conseil d'Etat) déterminent les conditions d'exécution.

La grille de répartition est appliquée au code pénal. Il reste à l'appliquer à d'autres codes et aux nouvelles lois qui seront adoptées.

Il reste aussi à adopter le décret, en Conseil d'Etat ou non, auquel renvoie la loi lorsqu'il est nécessaire à sa mise en oeuvre. Le refus de l'adopter constitue une illégalité.

C'est ce qu'a jugé le Conseil d'Etat dans un arrêt du 22 octobre 2010, Société Document Channel (requête n° 330 216) :

« *Considérant qu'aux termes de l'article 1369-8 du code civil, dans sa rédaction issue de l'ordonnance du 16 juin 2005 : 'Une lettre recommandée relative à la conclusion ou à l'exécution d'un contrat peut être envoyée par courrier électronique à condition que ce courrier soit acheminé par un tiers selon un procédé permettant d'identifier le tiers, de désigner l'expéditeur, de garantir l'identité du destinataire et d'établir si la lettre a été remise ou non au destinataire. (...) / Lorsque l'apposition de la date d'expédition ou de réception résulte d'un procédé électronique, la fiabilité de celui-ci est présumée, jusqu'à preuve contraire, s'il satisfait à des exigences fixées par un décret en Conseil d'Etat. / Un avis de réception peut être adressé à l'expéditeur par voie électronique ou par tout autre dispositif lui permettant de le conserver. / Les modalités d'application du présent article sont fixées par décret en Conseil d'Etat' ;*

Considérant que ces dispositions ne permettent de présumer la fiabilité des informations relatives à l'identité de l'expéditeur et du destinataire et à la remise d'un

courrier électronique afférent à la conclusion d'un contrat ou à ses modalités d'exécution, que dans la mesure où le procédé électronique utilisé est conforme à des prescriptions réglementaires fixées par décret en Conseil d'Etat ; que si l'absence de mesures réglementaires ne fait pas obstacle à la faculté, prévue par l'article 1369-8 du code civil, d'employer un procédé électronique afin d'envoyer un courrier recommandé avec accusé de réception relatif à un contrat, elle ne permet toutefois pas de satisfaire à la présomption instituée par le législateur ; qu'en dépit des difficultés techniques éventuellement rencontrées par l'administration dans l'élaboration des textes dont l'article précité prévoit l'intervention, son abstention à les prendre à la date de la décision attaquée s'est prolongée au-delà d'un délai raisonnable ; que, dans ces conditions, la décision implicite née le 31 mai 2009, par laquelle le Premier ministre a refusé d'édicter le décret prévu par les dispositions précitées de l'article 1369-8 du code civil méconnaît l'article 21 de la Constitution et doit, par suite, être annulée ».

L'arrêt admet a contrario, comme des arrêts antérieurs (par exemple Conseil d'Etat 13 juillet 1951, Union des anciens militaires titulaires d'emplois réservés à la S.N.C.F., Recueil p. 403) que le gouvernement ne commet pas une illégalité en ne prenant pas le règlement qui n'était pas nécessaire pour que la loi puisse s'appliquer. Mais il confirme que « l'exercice du pouvoir réglementaire comporte non seulement le droit mais aussi l'obligation de prendre dans un délai raisonnable les mesures qu'implique nécessairement l'application de la loi » (en ce sens par exemple 28 juillet 2000, Association France Nature Environnement, requête n° 204 024, Recueil, p. 323).

L'adoption d'un acte administratif doit être suivie d'une publicité adéquate pour qu'il soit porté à la connaissance des intéressés. Pour des actes de portée générale, il doit s'agir d'une publication. Deux arrêts viennent reconnaître l'un, les limites, l'autre, les modalités de cette obligation.

Le premier est celui qu'a rendu le Conseil d'Etat le 16 avril 2010, Association AIDES (requête n° 320 196 ; Actualité juridique . Droit administratif 2010, p. 1878, note L. Delabie) à propos du décret créant un traitement automatisé de données à caractère personnel, dénommé CRISTINA, au profit de la direction centrale du renseignement

intérieur (c'est donc un fichier de police), et d'un second décret dispensant de publication le premier. Cette dispense était fondée sur l'article 26 de la loi du 6 janvier 1978 relative à l'information, aux fichiers et aux libertés, qui la prévoit pour certains fichiers intéressant « *la sûreté de l'Etat, la défense ou la sécurité publique* ».

Après s'être fait communiquer le décret créant le fichier pour en vérifier le contenu, le Conseil d'Etat a admis qu'il entrait dans le champ de la possibilité de dispense de publication. En outre, il a considéré

« *qu'il résulte de l'examen auquel le Conseil d'Etat s'est livré, après communication du décret attaqué, que, compte tenu notamment de la finalité du traitement automatisé litigieux, de la nature des données enregistrées qui sont en adéquation avec la finalité du traitement et proportionnées à cette finalité, des conditions de leur collecte et des restrictions d'accès instituées, que le traitement automatisé dénommé CRISTINA ne porte pas au droit des individus au respect de leur vie privée et familiale une atteinte disproportionnée aux buts de protection de la sécurité publique en vue desquels a été pris le décret ; que, par suite, les moyens tirés de la méconnaissance de l'article 6 de la loi du 6 janvier 1978 et de l'article 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales doivent être écartés* ».

Il y a donc des limites à l'obligation de publier les actes réglementaires.

Le second arrêt concerne, en quelque sorte en sens inverse, l'effort de publication poursuivi par le gouvernement pour les circulaires ministérielles. L'importance de celles-ci dans la vie administrative a déjà été soulignée. Leur foisonnement les rend difficilement identifiables. C'est pourquoi il a été décidé par un décret du 8 décembre 2008 : qu'elles sont tenues à la disposition du public sur un site Internet relevant du Premier ministre ; qu'une circulaire ne figurant pas sur ce site n'est pas applicable ; et qu'elle doit être réputée abrogée. Dans un arrêt du 16 avril 2010, Azelvandre, req. n° 279 817, le Conseil d'Etat en a tiré les conséquences au sujet d'une circulaire qui ne figurait pas sur le site, en constatant que, par suite, elle doit être regardée comme abrogée.

L'affaire dépasse la question de la publicité pour rejoindre celle de l'application d'un acte administratif dans le temps : la non-publication ou plutôt l'absence de nouvelle publication d'une mesure peut valoir abrogation.

La principale difficulté de l'application des actes administratifs dans le temps est celle de leur rétroactivité. En vertu d'une jurisprudence marquée par l'arrêt du Conseil d'Etat du 25 juin 1948, Société du Journal l'Aurore (Recueil p. 289 ; Les grands arrêts ..., p. 384), elle est interdite, sous réserve de rares exceptions.

L'une d'entre elles a été mise en évidence par un arrêt du Conseil d'Etat du 19 mars 2010, Syndicat des compagnies aériennes autonomes (requête n° 305 049 et autres) dans le cas où doivent être tirées les conséquences de l'annulation d'un acte administratif par la juridiction administrative : s'il est nécessaire de prendre un nouvel acte pour combler la lacune (on dit parfois le « *vide juridique* ») résultant de l'annulation alors qu'il y aurait dû y avoir une réglementation pour la période pendant laquelle s'appliquait l'acte annulé, le nouvel acte peut et même doit rétroagir :

« *Considérant qu'Aéroports de Paris, qui devait assurer la continuité du fonctionnement du service public aéroportuaire, pouvait valablement fixer rétroactivement de nouveaux tarifs applicables pour la période couverte par les décisions annulées, dès lors que l'annulation des décisions des 7 et 13 mars 2006 n'a pu prolonger l'application des décisions tarifaires applicables pour la période précédente* ».

Cette rétroactivité est même double : non seulement le nouvel acte va s'appliquer dans le passé, mais son adoption est régie par les dispositions en vigueur à la date à laquelle la décision initiale a été prise. Le Conseil d'Etat considère

« *qu'en outre, si, en règle générale, il appartient à l'autorité compétente, lorsqu'elle est appelée à prendre une nouvelle décision à la suite de l'annulation pour excès de pouvoir d'une précédente décision, de tenir compte des éléments de fait et de droit existant à la date de cette nouvelle décision, il en va différemment lorsque la décision annulée fixe, comme en l'espèce, des tarifs pour une période déterminée ; que l'autorité compétente doit, dans une telle hypothèse, remplacer la décision annulée par une nouvelle*

décision en appliquant les éléments de fait et de droit à la date à laquelle la décision initiale a été prise ; que, par suite, Aéroports de Paris n'a pas commis d'erreur de droit en tenant compte, pour fixer les tarifs applicables du 1er mai 2006 au 31 mars 2007, de la situation de droit et de fait existant à la date de la décision initiale ».

Cette dérogation très remarquable aux principes de l'adoption et de l'effet dans le temps des actes administratifs s'explique par la continuité nécessaire du fonctionnement du service public.

Elle pourrait valoir, non seulement dans le cas d'annulation d'un acte administratif par le juge, mais encore dans celui de son retrait par l'auteur de l'acte.

Le régime du retrait a été marqué par l'arrêt du Conseil d'Etat du 26 octobre 2001, Ternon (Recueil 497, conclusion Séners ; Les grands arrêts..., p. 815), selon lequel

« *sous réserve de dispositions législatives ou réglementaires contraires, et hors le cas où il est satisfait à une demande du bénéficiaire, l'administration ne peut retirer une décision individuelle explicite créatrice de droits, si elle est illégale, que dans le délai de quatre mois suivant la prise de cette décision* ».

Mais l'arrêt Ternon ne règle pas tout : d'une part, il réserve lui-même les solutions pouvant être aménagées par des dispositions législatives ou réglementaires ; d'autre part, il ne concerne que les décisions individuelles explicites, non les décisions individuelles implicites, ni les décisions réglementaires ; de plus, il renvoie aux actes créateurs de droits.

Sous ces trois aspects, la jurisprudence récente a apporté des solutions.

Tout d'abord, l'aménagement d'un régime spécial se trouve illustré à propos du retrait de la nomination d'un magistrat, par l'arrêt du Conseil d'Etat (Section) du 1er octobre 2010, Mme Tacite (req. n° 311 938). Il n'y a pas vraiment de disposition spéciale qui en aménage le régime. C'est plus généralement sur le statut des magistrats et sur la protection particulière qui doit leur être accordée que se fonde le Conseil d'Etat pour écarter le régime de droit commun du retrait défini par l'arrêt Ternon.

« *Considérant qu'aux termes de l'article 16 de la Déclaration des droits de l'homme et du citoyen : 'Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution' ; qu'en vertu de l'article 64 de la Constitution : 'Le Président de la République est garant de l'indépendance de l'autorité judiciaire./ (...) Une loi organique porte statut des magistrats (...)'* ;

Considérant que le principe de séparation des pouvoirs et celui de l'indépendance de l'autorité judiciaire, que traduisent ces dispositions constitutionnelles, imposent que des garanties particulières s'attachent à la qualité de magistrat de l'ordre judiciaire ; qu'ils impliquent notamment que ces derniers ne puissent se voir retirer cette qualité et les garanties particulières qui s'y attachent qu'en vertu de dispositions expresses de leur statut et dans les conditions prévues par ces dernières ; qu'aucune disposition ne prévoit qu'un magistrat de l'ordre judiciaire puisse se voir privé de sa qualité en dehors de la procédure disciplinaire régie par les dispositions figurant au chapitre VII de l'ordonnance du 22 décembre 1958 portant loi organique relative au statut de la magistrature ; qu'il en résulte que le Président de la République ne pouvait rapporter le décret, fût-il illégal, du 18 juillet 2007 et ainsi priver Mme A, en dehors de toute procédure disciplinaire, de la qualité de magistrat de l'ordre judiciaire que ce décret lui avait conférée ; que Mme A est par suite, et sans qu'il soit besoin d'examiner les autres moyens de la requête dirigés contre le décret du 16 novembre 2007, fondée à en demander l'annulation pour excès de pouvoir ».

En deuxième lieu, pour les actes réglementaires, le Conseil d'Etat a repris, dans l'arrêt déjà cité, du 19 mars 2010, Syndicat des compagnies aériennes autonomes, la formule de l'arrêt Dame Cachet du 3 novembre 1922 (Recueil, p. 790) qui pendant longtemps a déterminé le régime de retrait de tous les actes administratifs, individuels ou non. Elle continue à s'appliquer aux actes réglementaires :

« *Considérant qu'il incombe à l'autorité administrative de ne pas appliquer un texte réglementaire illégal, même s'il est définitif ; qu'en outre cette autorité peut*

légalement rapporter un tel texte si le délai du recours contentieux n'est pas expiré au moment où elle édicte le retrait du texte illégal ou si celui-ci a fait l'objet d'un recours gracieux ou contentieux formé dans ce délai ».

Enfin les limites au retrait des actes individuels tenant, aussi bien d'ailleurs dans l'arrêt Ternon que dans l'arrêt Dame Cachet, à la création de droits, portent sur une notion difficile à cerner : on n'a jamais pu définir exactement ce qu'est un droit acquis. Cependant, si le bénéfice d'un acte est subordonné à l'accomplissement de conditions, l'acte ne peut être créateur de droits si les conditions auxquelles il est subordonné ne sont pas remplies. C'est ce que vient confirmer l'arrêt du Conseil d'Etat du 5 juillet 2010, Chambre de commerce et de l'industrie de l'Indre, requête n° 308 815.

« *Considérant que l'attribution d'une subvention par une personne publique crée des droits au profit de son bénéficiaire ; que toutefois, de tels droits ne sont ainsi créés que dans la mesure où le bénéficiaire de la subvention respecte les conditions mises à son octroi, que ces conditions découlent des normes qui la régissent, qu'elles aient été fixées par la personne publique dans sa décision d'octroi, qu'elles aient fait l'objet d'une convention signée avec le bénéficiaire, ou encore qu'elles découlent implicitement mais nécessairement de l'objet même de la subvention* ».

Si le régime du retrait se trouve ainsi précisé par la jurisprudence récente, il n'en garde pas moins une complexité, qui est par elle-même une source d'insécurité alors qu'il se veut garant de la sécurité juridique.

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ADMINISTRATIVE PROCEEDINGS AND PARTICIPATION

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INDEX

1. ADMINISTRATIVE PROCEEDINGS IN THE ITALIAN TRADITION

It seems necessary to start from a very brief description of the context within which the juridical theory of proceedings developed in our Country, so as to describe better the novelties to be reported in the legislation, the legal literature and in case law. In particular, the following observations refer to the legal theory of proceedings as such, and to the participation of private individuals in administrative proceedings, which is an essential element of said theory.

1.1 Theories on proceedings and participation

It is well known that Italy lacked a general law on administrative proceedings until 1990 and that both doctrine and case law built the entire administrative law around the central role of the administrative decision, of the public body and of the power that the latter wields in executing the former. Administrative proceedings, therefore, have had a residual role for a long time.

The doctrine[1] of the MID-XX century created the highest developments of the administrative proceedings, based mainly on two concepts of proceedings: a sequential concept, that focused on the role of the administration, its development and the possibility that the proceedings might legally protect the individual[2], and a second concept, that considered the proceedings as an occasion in which power is transformed into action and that, therefore, found in the proceedings the reasons for the objective wielding of power and for the legitimisation of the idea that the positions of public subjects and private individuals are equal[3], centred around the rule of law.

[1] For necessary framework, VILLATA e SALA, *Procedimento amministrativo*, *Dig. Disc. Pubbl.*, XI, Turin, 1996, 574 and BELLAVISTA, *I procedimenti*, in PERFETTI (ed.), *Manuale di diritto amministrativo*, Padua, 2007, from 377.

[2] See SANDULLI A.M., *Il procedimento amministrativo*, Milan, 1959.

[3] I allude to Benvenuti (see: BENVENUTI F., *Eccesso di potere come vizio della funzione*, in *Rass. dir. pubb*., 1950, 1, ID., *Funzione amministrativa procedimento e processo,* in *Riv. trim. dir. pubbl*., 1952, 118, ID., *Per un diritto amministrativo paritario*, in *Studi in memoria di Enrico Guicciardi*, Padua, 1975, 807, ID., *Funzione. Teoria generale*, in *Enciclopedia giuridica*, 1989, *ad vocem*) and his school (see: PASTORI, *La procedura amministrativa*, Vicenza, 1964, ID., *Introduzione generale*, in *La procedura amministrativa*, Milan, 1965, ID., *Relazione generale introduttiva* in *La disciplina generale del procedimento amministrativo, contributi alle iniziative legislative in corso*, in A*tti XXII convegno di studi di scienza dell'amministrazione*, Milan, 1989; BERTI, *La struttura procedimentale dell'amministrazione pubblica*, in *Dir. e soc*., 1980, 437, ID., *Le difficoltà del procedimento amministrativo,* in *Amministrare*, 1991, 201, ID., *Procedimento, procedura, partecipazione,* in *Studi in memoria di*

Indeed, both the proceedings, the action (be it proceedings or trial), as well as the actions carried out by human beings, when they act within a rational dimension, and the function - in terms of a description of the rules of interdependence between phenomena (including in mathematical sciences) - can be explained as a task and as a focused action, as a relationship or a function.

The difference between these representations in administrative law is, however, highly significant. It is not a difference in the point of observation with regard to a phenomenon that has a shared nature (so that sequentiality or functionality are simply different ways of describing the same problem); the difference in the approach changes the very essence of the described phenomenon.

A. From the point of view of power, indeed, proceedings can be described as a task of a public subject or as an action focused on the making of a decision. Therefore, it has a negative value - that is to say, the violation of a procedural duty leads to the invalidity of the final decision; the decision is and remains the main focus, the proceeding is important only in terms of the final, authoritative decision, its validity, and the study of the proceedings - in technical terms - is significant only with regard to its morphological dimension (that is to say, its descriptive role of the sequence of procedural events pursuant to the template set out in the law, or on the contrary, illegitimately, in departure thereto).

The traditional approach to proceedings as a task described - already with Miele[4] - the proceedings only from the point of view of a decision by the public authority; the finalistic approach allowed Sandulli to develop his very refined theoretical construction of a interconnected sequence of events aimed at creating a decision by the authority. Both

Enrico Guicciardi, *cit.*, 779; ALLEGRETTI, *L'imparzialità amministrativa*, Padua, 1965, ID., *Procedimento amministrativo*, in *Giuristi e legislatori*, Milan, 1997).

[4] MIELE, *Alcune osservazioni sulla nozione di procedimento amministrativo*, in *Foro it*., III, 1933, 380 (see also, ID., *Funzione pubblica*, in *Novissimo digesto*, VII, Turin, 1961, 686).

approaches preserve the centrality of the authority, of the importance of the procedure only in view of the unilateral, authoritative decision. It is not a coincidence that both approaches can be found in the synthetic works of one who, more than others, succeeded in affirming the exercise of authority as the construction paradigm of the whole concept of administration for the public good; indeed, Giannini describes the role of the procedure clearly as follows: «*the administrative proceedings*» are relevant only«*as a function of the weighing of interests*», so «*they tend to combine primary public interest, attributed to public administration, with any other interest it may acquire and which can be considered capable of being protected through the actions that make up the proceedings*»[5]; the action comes from the authority, within the context of the task it is called to perform - that is to say, the definition of the relationship with the unilateral authoritative decision - in order to pursue the interests attributed solely to it. In order to exercise this fundamental volition which allows it to define the role, measure and weigh of the interests that it considers material, public administration shall acquire such interest through the proceedings; in this case, however, proceedings are simply a finalistic sequence of legal actions. The proceedings get their meaning only from the unilateral provision, public power, the role of the authority.

B. In the opposite case, that of proceedings as function, proceedings are the place where abstract power, as envisaged by a law of the objective legislation, is transformed into a concrete, authoritative decision, so that the proceedings have a positive value; it is, indeed a legal activity that celebrates the equal role of the citizens and of public administration in verifying the facts and applying the law - the latter action shall be carried out solely by the public body, unilaterally but impartially. There are several consequences of this, as (I) power entrusted to the administration ceases to be a static concept and becomes "legal energy" emanating from the specific rule, (II) the dynamism of power, which transforms potential into action, necessarily requires a proceeding which is not simply the place in

[5] See GIANNINI, *Lezioni di diritto amministrativo*, Milan, 1950, and ID., *Istituzioni di diritto amministrativo*, Milan, 1981.

which all relevant interest emerge, but rather the necessary - and therefore inevitable[6] - vehicle to make the abstract rule contained in the law concrete, which must be observed by public administration and private individuals alike, so that (III) all the actors in the proceedings - including public administration - have equal positions with regard to the rule and interact with one another; this leads to the fact that (IV) the public subject (administrator) is no longer in the centre because proceedings are defined by the activity (administration) not by the subject, and the activity is carried out on the basis of the power that derives from a law of the objective legislation; (V) the public interest finality - which is at the roots of that power - is governed by all the players in the proceedings, in a confrontation that looks almost like a trial, all acting on an equal basis; the public authority governs jointly and its actions are bound by juridical concepts that subtract from its autonomy, as (VI) at the end of the proceedings it shall only act as an impartial party to adopt the unilateral decision (which is the only authoritative part of the process). The proceeding is a relationship.

This second doctrinal tradition dedicated more studies to the administrative proceedings, given their central role in that theory and these additions have a clear impact on the general law of 1990 on administrative proceedings.

C. From the point of view of the protection of the citizens' subjective position against the authority, the proceedings are a guarantee, a form of protection, so much so that through proceedings it is possible to discover any defects of the decision that might have been generated during the phase in which the authority's volition was being formed; this makes anything that might have occurred before the adoption of the provision also legally relevant. However, in the reconstruction in which the proceedings are a function, not a task, the guarantee function is not limited to the discovery of any invalid features of the authoritative decision, but is rather expressed in the equality of the parties involved in the ascertainment of facts and of the subject matter in the course of the proceedings.

[6] For this, PERFETTI, *Il procedimento amministrativo*, in PALMA (a cura di), *Lezioni*, Naples, 2009, 663.

D. The theories on the participation in the proceedings are influenced by this material distinction and in some ways also anticipate it[7]. Several meanings have been attributed to the participation in proceedings[8]: its protective function with regard to the individual positions[9] has been noted from the earlier studies[10] - similarly to what happens in the jurisdictional joint input - and has been integrated, in the construction of the doctrine, by the democratisation of administrative activities[11] and the co-operation with the citizens in the making of public decisions functions, that are interconnected and mutually enriched

[7] Art. 3, law March 20th 1865, n. 2248, annex E was understand in different ways: for some article 3 stated the right to participate to the administrative procedure (CAMMEO, *Commentario delle leggi sulla giustizia amministrativa*, Milan, year not disclosed, 512, GUICCIARDI, *La giustizia amministrativa*, Padua, 1954, 104, ZANOBINI, *Corso di diritto amministrativo*, II, Milan, 1958, GHETTI, *Il contraddittorio amministrativo*, Padua, 1971, 64, ALLEGRETTI, *Pubblica amministrazione e ordinamento democratico*, *Foro it*., 1984, 205); otherwise case law and the majority in doctrine were on opposite side (see BENVENUTI, *L'attività amministrativa e la sua disciplina generale*, in PASTORI (a cura di), *La procedura amministrativa*, 1964, 540).

[8] CASSESE, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, in *Rivista trimestrale di diritto pubblico*, 2007, 13, CARTABIA, *La tutela dei diritti nel procedimento amministrativo. La legge n. 241 del 1990 alla luce dei principi comunitari*, Milan, 1991, ZITO, *Le pretese partecipative del privato nel procedimento amministrativo*, Milan, 1996, OCCHIENA, *Situazioni giuridiche soggettive e procedimento amministrativo*, Milan, 2002; who wants can also see PERFETTI, *Partecipazione ed obbligo di motivazione*, in PASTORI (a cura di), *Legge 7 agosto 1990, n. 241 e ordinamenti regionali*, Padua, 1995, 155.

[9] Recently LAZZARA, *I procedimenti amministrativi ad istanza di parte. Dalla disciplina generale sul procedimento (L. 241/90) alla direttiva «servizi»*, Naples, 2008, SCOGNAMIGLIO, *Il diritto di difesa nel procedimento amministrativo*, Milan, 2004, DURET, *Partecipazione procedimentale e processo*, in *Procedimento procedura processo*, Padua, 2010 and PERFETTI, *Diritto ad una buona amministrazione ed equità*, in *Riv. it. dir. pubbl. comunitario*, 2010, 789.

[10] ALLEGRETTI, *L'imparzialità amministrativa*, above quoted

[11] It must be mentioned BERTI, *Procedimento, procedura, partecipazione*, in *Studi in onore di Guicciardi*, Padua, 1975, 779.

in the affirmation of the constitutional principle of fair proceedings[12].

1.2. The current regulatory framework

It is not difficult to observe that the physiognomy of administrative proceedings and of participation therein can be discerned, in its main features, through the reading of the provisions of Law n. 241 of August 7th, 1990. Of course, both themes are strongly influenced by doctrinal reconstructions and by the implementation in case law, and the wealth of references in several legislative sources other that the general law on proceedings (from regional to special laws, from the regulations of local public authorities to those of independent regulatory authorities, and so forth); however, at first sight the reference to the general law provisions on the proceedings seem to prevail. In this report, however, it shall be necessary to limit the discussion of this facet only to some references, as specific reports have already been dedicated to individual themes that can only be mentioned here.

1.2.1. In this sense, and in order not to overlap other comments, it seems appropriate to start from the suggestion stated in art. 29 of the law, concerning the scope of implementation of the relevant precepts, so that *"the duties of the public administration to guarantee the participation of the involved parties in the proceedings, to identify a subject to preside over such proceedings, to ensure their conclusion within the set deadlines and to guarantee access to all the administrative documentation, as well as that concerning the maximum duration of the proceedings"* constitute essential levels of performance *"concerning the civil and social rights"* which must be guaranteed all over the national

[12] CRISAFULLI, *Principio di legalità e <giusto procedimento>*, in *Giur. cost*., 1962, 135, SALA, *Il principio del giusto procedimento nell'ordinamento regionale*, Milan, 1985; more recently MANFREDI, *Giusto procedimento e interpretazioni della Costituzione*, in *Procedimento procedura processo*, above mentioned, 59, CLINI, *La giusta procedura nella funzione amministrativa e giurisdizionale*, *ivi*, 81, BELLAVISTA, *Giusto processo come garanzia del giusto procedimento*, *ivi*, 155.

territory pursuant to the relevant article of the Constitution[13]. The duties of public administration and the rights of the individual within the dynamics of the proceedings, therefore, constitute an essential element of the relationship between authority and citizen's rights.

The duty of the administration to decide through proceedings - included implicit or silent ones (such as in the case of a certified notice of the start of the activity or of silent consent) - for which a responsible subject can be identified and in which the involved parties can participate - and discuss - with previous knowledge of their duration, and that must end with a decision[14], are essential characteristics of the position of the individual and of its rights when they come into contact with the authority and, as such, are a development of its constitutional position vis-à-vis the authority. This seems to be the most interesting feature of the proceedings and of the individual's participation therein.

The law also establishes the principles which the party promoting the proceedings must comply with; at the beginning of the law (art. 1) it is stated that *"administrative activities pursue the goals established by law"* - thus clarifying the role of the proceedings - and are *"governed by economy, effectiveness, impartiality, publicity and transparency criteria"* - thus clarifying the principles that characterise the proceedings; very recently[15], also due to the progressive increase of cases in which administrative activities are carried out by private subjects, a provision indicating that such subjects, too, must be obliged to comply with the same "criteria and principles" has been added (par. I *ter*). This latter

[13] This rule was extremely clear also under Constitutional Court case law.

[14] See also art. 2, paragraph I, letter *b*), and art. 21, paragraph I, Law February 11th 2005, n. 15, art. 3, paragraph VI *bis*, Law Decree March 14th 2005, n. 35, art. 7, paragraph I, lettera *b*), Law June 18th 2009, n. 69, art. 3, paragraph II, annex 4 Law Decree July 2nd 2010, n. 104, Presidential Decree July 16th 2010, n. 142, Presidential Decree July 16th n. 144, Presidential Decree November 18th 2010, n. 231, Presidential Decree November 17th 2010, n. 246.

[15] art. 7, paragraph I, letter *a*) Law June 18th 2009, n. 69.

provision seems very important, for several reasons. First of all, it recognises that private subjects, who remain such for all purposes, can too be *"appointed to carry out administrative activities"* second, their activity is also an administrative proceeding, as it is regulated by the same criteria and principles; finally (and as a consequence of the above), it seems to deny the idea that proceedings are within the exclusive purview of public subjects, as they can be carried out also by private subjects.

1.2.2. As there are several specific reports on many of the institutions regulated by Law n. 241 of August 7th, 1990 (as subsequently, variously and too often amended), it seems wiser to analyse the provisions specific to the participation in proceedings. In this case, too, before detailing the novelties in the matter, a brief summary or the existing regulations seems appropriate.

1.2.2.1. The law - incorporating a strongly consolidated position of both case law and doctrine[16] - requires (art. 3) that every administrative decision be motivated by the enunciation of the *"factual premises and legal reasons that determined the decision by the administration, with regard to the results of the investigation"*, except when such

[16] Classical are CAMMEO, *Gli atti amministrativi e l'obbligo di motivazione*, in *Giur. it*., 1908, 253, MORTATI, *Necessità di motivazione e sufficienza della motivazione*, in *Giur. it*., 1943, 1, CANNADA BARTOLI, *Motivazione "per relationem" ad atto non approvato*, in *Foro amm*., 1962, 527; before Law 241: VANDELLI, *Osservazioni sull'obbligo di motivazione degli atti amministrativi*, in *Riv. trim. dir e proc. civ*., 1973, 1595, BERGONZINI, *La motivazione degli atti amministrativi*, Vicenza, 1979, ROMANO TASSONE, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità*, Milan, 1987; subsequent Law 241 ANDREANI, *Idee per un saggio sulla motivazione obbligatoria dei provvedimenti amministrativi*, in *Dir. proc. amm*., 1993, 19, CIMELLARO, *La motivazione del provvedimento amministrativo. Una rassegna della dottrina e della giurisprudenza di ieri e di oggi*, in *Dir. amm*., 1993, 441. In general see GIANNINI, *Motivazione dell'atto amministrativo*, in *Enc. dir*., XXVII, 1977, 257, MAZZARELLI, *Motivazione: motivazione dell'atto amministrativo*, in *Enc. giur*., XX, 1990, *ad vocem* and CORSO, *Motivazione dell'atto amministrativo*, in *Enc. dir.*, IV, 2000, 167. For a recent overview RAMAJOLI, *Lo statuto del provvedimento amministrativo a vent'anni dall'approvazione della legge n. 241/90, ovvero del nesso di strumentalità triangolare tra procedimento, atto e processo*, in *Dir. Proc. Amm*., 2010, 459 and COCCONI, *La partecipazione all'attività amministrativa generale*, Padua, 2010.

provisions are *"regulatory actions"* or "*general in contents*", or when the motivation can be inferred *ob relationem "from another deed by the administration, referred to in the decision itself"*. This provision, although strengthening a consolidated principle, gave rise to considerable discussion - in terms of both the persistence of a lack of motivation within the context of an excess of powers[17], and of the essential elements of administrative decision[18].

1.2.2.2. If the motivation of the measure is a guarantee of participation in the proceedings at the time of decision, the provisions included in paragraph III of the law ([19]) are more specifically dedicated to the decision-making process. In particular, the drafter of law n. 241 provides (art. 7) that *"subjects that are the recipients of the direct effects of the final measure and those who are called by law to participate in it"* and, if *"identified or easily identifiable"*, *"subjects other than the direct recipients"*, if in danger of being prejudiced, have the right to receive notice a notice of the start of the proceedings - save when *"there are obstacles derived from specific reasons of speed"* ; these notices can be sent also with telematic means ([20]); the notice is delivered (art. 8) through a personal

[17] SALA, *L'eccesso di potere dopo la l. 241/90: un'ipotesi di ridefinizione*, in *Dir. amm*., 1993, 211 and recently CODINI, *Scelte amministrative e sindacato giurisdizionale : per una ridefinizione della discrezionalità,* Naples, 2008.

[18] For a wider argumentation, PERFETTI, *Manuale di diritto amministrativo*, Padua, 2007, from 338.

[19] Still fundamental BERTI, *Procedimento, procedura, partecipazione*, in *Studi in memoria di E. Guicciardi*, Padua, 1975, 779, BENVENUTI, *Per un diritto amministrativo paritario*, ivi, 807; after Law 241 see LEDDA, *Problema amministrativo e partecipazione al procedimento*, in *Dir. amm*., 1993, 133, TRIMARCHI F., *Questioni in tema di partecipazione al procedimento amministrativo*, in *Amministrare*, 1993, 135, COGNETTI, *Partecipazione al procedimento e ponderazione degli interessi*, in SCIULLO (ed.), *L'attuazione della legge 241/90*, Milan, 1997, 15, and *"Quantità" e "qualità" della partecipazione. Tutela procedimentale e legittimazione processuale*, Milan, 2000, DURET, *Partecipazione procedimentale e legittimazione processuale*, Turin, 1996, FRACCHIA, *Analisi comparata della partecipazione procedimentale nell'ordinamento inglese e in quello italiano*, in *Dir. Soc*., 1997, 189, VIRGA G., *La partecipazione al procedimento amministrativo*, Milan, 1998.

[20] See also art. 3 *bis* Law n. 241; on digital administrative proceedings see Law Decree March 7th 2005, n. 82 (Digital Administration Code), Law Decree December 30th 2010, n. 235 and the recent book by MASUCCI,

communication (or, if this is impossible or too difficult, with other eligible means), and shall contain the name of the proceeding authority, the object of the proceedings, the office and officer responsible for the proceedings, the deadline for its conclusion and the remedies that can be adopted in case of lack of activity and the office where the relevant documentation is available for perusal. If the proceedings are started by third parties, the notice shall also show the date of filing of the motion.

The interested parties and the parties representing common interests to whom the proceedings might be prejudicial can (are *entitled to*) participate in the proceedings (art. 9), by filing *"written briefs and documents"* which, if relevant *"the administration is obliged to examine"*, and by examining the relevant documentation (art. 10); by reason of both reference to the European Union law principles contained in art. 1 of the law and their higher effectiveness, the greater participation guarantees (the right to cross-examination) included in the European Union legal structure (and, in particular, on the basis of the right to a good administration) shall be considered applicable here. The duty of the proceeding authority to examine the participation documents might convince it to settle the matter with the private citizen, rather than making a unilateral decision (art. 11), or to reject the application filed by third parties; in this way the initiative taken by the filing party is further guaranteed by the fact that such party shall be given (art. 10 *bis*) a *"notice of impediments"* that clarifies the *"reasons why the application must be rejected"*, against which the applying party has *"the right to appeal in writing"* by producing defence arguments (*"observations, integrated by documents if necessary"*).

1.2.2.3. While the aforementioned notice does not apply in some instances (bankruptcy proceedings and welfare matters), more generally, the concept of participation

Procedimento amministrativo e nuove tecnologie. Il procedimento amministrativo elettronico ad istanza di parte, Turin, 2011 (see also ID., *La "telematizzazione" del procedimento amministrativo. Primi lineamenti*, in PERFETTI (ed.), *Le riforme della l. 7 agosto 1990, n. 241 tra garanzia della legalità ed amministrazione di risultato*, Padua, 2008, 225.

in proceedings is not guaranteed (art. 13) when it is aimed at the adoption of *"regulatory, general administration, planning and programming actions"* (and, the law adds, in the case of fiscal proceedings, seizure of assets in the event of kidnappings and change of personal details for prosecution witnesses), while the specific rules concerning participatory instruments for those proceedings remain applicable; there is a clear symmetry with the exclusions concerning the obligation to provide grounds for the decisions.

The lawmaker has further introduced a - very controversial - provision (art. 21 *octies*) that states that provisions that are unlawful by reason of a *"violation of the rules of proceedings or those on the formal structure of the action"* cannot be annulled if *"given the mandatory nature of the provision, it is clear that its executive contents could not have been different from the ones actually adopted"* and that *"in any case"* the unlawful action cannot be annulled *"because of the lack of a notice of the start of the proceedings"* if the administration *"during the proceedings"* is able to demonstrate, which is not easy, that *"the contents of the decision could not have been different from the ones actually adopted"*.

1.2.2.4. Of course, there are principles that can dictate the depth and outlook of proceedings and precepts that regulate the participation therein throughout the whole body of law - from the procedural agreements described in art. 11, that are a consequence of the *"acceptance of observations and proposals"* filed in the proceedings, to the calling of a service conference (art. 14, par. IV) by the private subject and to the importance of the private subject during its performance; from self-certification (art. 18) to the certified notice of the start of the activity (art. 19) and to silent consent (art. 20) as means to achieve a decision, to the wide chapter on the access to documents and information - and in other national and regional laws; it is not possible here to examine the whole of it, and this work shall be limited to some brief observations - for the sake of highlighting any novelties - on the certified notice of the start of the activity (a proceedings and as a form of participation).

1.2.2.5. On the other hand, it is worth mentioning that the outlines of the proceedings and of the private subject's participation therein must be looked for also outside of the text of the general law on administrative proceedings.

First of all, it is necessary to look at the statute establishing public administration - a theme on which the Italian doctrine has not yet reached a consensus, with a division between those who think that the Constitution has fixed the classic system, later eroded by European Union law, and those who see a complete overhaul of it - as the theories on administrative proceedings that have been used since the 1960s to build them as a function were based on the constitutional text. Secondly, participation in proceedings and the concept of proceedings owe a lot to the reflection on their relationship with trial, and so it shall be necessary to pay attention also to this facet - especially given the very recent codification of the administrative trial. Thirdly, sectorial and case law contribute in a material way to the creation of the institutes that have been discussed here and , from this point of view, too, it shall be necessary to explain the introduced novelties.

1.3. Success of positive regulation of proceedings and discard of its theoretical basis

A last general observation might be useful. The consolidation of the proceedings also through the approval of Law n. 241 of August 7th, 1990[21], the consolidation of the principle of fair proceedings (at a constitutional level) and the subsequent principle of good administration (derived from European Union law) seem to have widened the scope of attention of the doctrine and of case law considerably, as well as their importance in practice; however, the wealth of rules - general and sectorial - and the frequency of their implementation in case law have, for the most part, released these institutions to be interpreted and described - two activities that have a considerable importance in the Italian administrative law studies. The innovative strength of the doctrinal reconstructions that had created those institutions was consequently reduced. In line with the leaning towards

[21] On Law n. 241 chiaroscuros, BERTI, *La responsabilità pubblica (Costituzione e Amministrazione)*, Padua, 1994, 319, 323, 403.

juridical technicality that goes together with the respect for written decisions, administrative proceedings and participation in proceedings, in the end, coincide with the text of the law, so that the whole development of administrative proceedings has been reduced to a mere regulation of how the public official must carry out their tasks in order to reach the goal that is the authoritative decision, and thus lost their richness, depth, and meaning. In this process - seemingly unknowing - the proceedings end up coinciding with the interpretation of the positive rules that regulate them, and their interpretation is carried out in light of the traditional approach of the proceedings as task, with a strong link to the proceeding public subject: importance is thus assigned to the administrator, not to the act of administration.

The less descriptive profiles - such as, for instance, the subjective position of the participants in the proceedings[22], or the collective private interests - therefore, remain in the shadows of conditional public interest. More generally, the profile and significance of both the proceedings and the participation therein, seen as tools to make the exercise of power an objective action (as it is a simple implementation of a rule) and the decision-making process equal, remain in the background and are superseded by the centrality of the traditional conception of proceedings.

It seems as if the proceedings and the participation therein are not a consequence of constitutional principles and theoretical constructs that can explain positive law; without action on the part of the lawmaker, there would be nothing, so it is enough to note down the provision made by the lawmaker. In these terms, most of the ability of the proceedings and of the participation therein to govern the authority and make it functional to the full enjoyment of rights is cancelled; the idea of proceedings as a task the authority must carry out according to its own rules prevails; legal science, if it is satisfied by exegesis, does not seem able to guide the development of the system, and simply suffers the novelties introduced by the national and European lawmakers.

[22] ZITO, *Le pretese partecipative del privato nel procedimento amministrativo,* above mentioned.

2. UPDATES

Within this general framework, here are the novelties. The themes described here have not been updated in any material way recently, and the relevant legal literature seems characterised by specific analyses or celebrations of the twentieth anniversary of the introduction of Law 241/1990, rather than by radically new contributions[23].

2.1 Regulatory novelties

As far as the legislative news are concerned, a brief description of the provisions that introduced a code of administrative proceedure, as well as further proceedings streamlining systems and the certified notice of the start of the activity (segnalazione certificata di inizio attività - SCIA) seems in order.

2.1.1. No argument is needed to demonstrate the importance of the relationship, both theoretical and practical, between proceedings and trial, between participation in proceedings and jurisdictional protection; in this respect, the approval of the code of administrative procedure (Legislative decree n. 104 of July 2nd, 2010) cannot be overlooked. Of course, the analysis of the importance of procedural rules for the discipline

[23] See *status quaestionis* after twenty years the Law n. 241 is in force, in CORSO, *Il principio di legalità*, 4, DELLA CANANEA, *Il rinvio ai principi dell'ordinamento comunitario*, MARZUOLI, *Il principio di buon andamento e il divieto di aggravamento del procedimento*, 207, POLICE, *Il dovere di concludere il procedimento e il silenzio inadempimento*, 228, RAMAJOLI, *L'intervento nel procedimento*, 517, CHIRULLI, *I diritti dei partecipanti al procedimento*, 530, VAIANO, *Il preavviso di rigetto*, BASSI [N.], *Gli accordi integrativi o sostitutivi del provvedimento*, ZITO e TINELLI, *L'ambito di applicazione delle norme sulla partecipazione*, 588, PAOLANTONIO e GIULIETTI, *La segnalazione certificata di inizio attività*, 750, LAMARQUE, *L'ambito di applicazione della legge sul procedimento amministrativo*, 1234, all in SANDULLI [M.A.] (ed.), *Codice dell'azione amministrativa*, Milano, 2010. For a more theoretical approach, please refer to the various essays in *Procedura, Procedimento, Processo*, Padua, 2010, above quoted and the recent book by COGNETTI, *Principio di proporzionalità*, Turin, 2011.

of proceedings would require wide comparisons with the whole structure of the code of administrative procedure, which is not required here. However, a few profiles, at least, are worth mentioning.

A. First of all - and of material importance, in our opinion - the administrative jurisdiction itself is defined by the implementation of the rules of administrative proceedings (art. 7 of the code of administrative procedure) Indeed, given that the jurisdiction of the administrative judge concerns litigation over the exercise of, or failure to exercise, administrative power (*"concerning provisions, actions, agreements or behaviours that can be traced back, even indirectly, to the exercise of said power"*) by *"public administrations"*, the code clarifies that, for the purpose of determining jurisdiction, all subjects *"that are in any case called to observe the principles of administrative proceedings"* are also to be considered equivalent to public administrations. The purpose of this provision is clear, but the provision itself gives rise to hermeneutic and systematic disagreements, which we need not consider here.

It is important, instead, to underscore the strong relationship that exists between the mandatory implementation of procedural rules for the purpose of making a decision, and the consequent determination of administrative jurisdiction over said decision, independently from the subjective title of the person who actually makes the decision.

B. Secondly, the provisions of the code of administrative procedure that confirm the possibility, in general, for the judge to verify (and repeat) the assessment of facts carried out by the administration within the context of the proceedings (for instance, art. 19 of the code of administrative procedure) and thus the importance of the equality in both the definition of facts and the participation in the proceedings - and the consequent possibility of filing documents and briefs to allow a better definition thereof - seem important. It seems equally important to underscore that "*factual circumstances and the general behaviour*" of the private subject and of the administration are trial materials in trials for damages (art. 30 of the code of administrative procedure).

C. Independently from the lively discussion on the lack of provisions for a general

assessment action, the provision of art. 31 of the code of administrative procedure must be mentioned; the article does, indeed, provide for an assessment, and this provision states that, after the expiration of the deadline *"for the conclusion of the administrative proceedings, the interested parties can ask for an assessment of the compliance of the administration with its obligations*"; it is clear that the object of the process is the assessment of procedural compliance, with the consequent observations on the structure of the proceedings and on the subjective positions during the same.

D. With regard to the development of the procedural cross-examination, it is important that there be the possibility of having summary (and therefore quick) judgements, with regard to both access to administrative documents (art. 116 of the code of administrative procedure) and the failure to adopt the provision within the deadline set for the ending of the proceedings (art. 117 of the code of administrative procedure); for this reason it does not seem difficult to consider the presence of a trial as a tool for the effectiveness of cross-examination within the proceedings, a tool that can be used also during the proceedings - and especially in judgements on silence, during complex or composite proceedings - with theoretical consequences that are easy to understand with regard to the concept of equality of the parties during the proceedings.

2.1.2. As already mentioned, the lawmaker has often expressed a wish to act on the provisions of Law 241/1990, including recently. The lawmaker's starting point is the wish to reduce the procedural sequence, or substitute it with statements or certificates.

A. On the one hand, the lawmaker has introduced a wide-ranging recourse to silent consent, as well as several departures from the competences of the administrative bodies, in an attempt to reduce the time that is necessary to issue consents to the start of entrepreneurial activities: in this sense, law decree n. 78 of May 31st, 2010, Urgent measures for financial stabilisation and economic competition, which, in art. 43, introduced *"zero bureaucracy areas in Southern Italy"* in which *"new productive initiatives"* would be promoted also by the fact that *"the final decisions in administrative proceedings of any nature and with any object, started by a request by a third party"* are to be considered approved by means of silent consent unless issued by a Government Commissioner acting

(also as a consequence of *"ad hoc service conferences pursuant to Law . 241 of 1990"*) in departure from ordinary competences, is emblematic. These provisions are not new in the Italian system (witness, for instance, law decree n. 112 of June 25th, 2008) and often present a "propaganda" aspect, as they are filled with emphatic and dubious statements ([24]); additionally they lack precision in the use of legal categories which makes it very difficult to implement them and represents a constant departure from the template of procedural law.

B. On the other hand, it cannot be overlooked that the number of cases in which the law gives importance, within the proceedings, to certifications issued by monitored private subjects in substitution for administrative assessments is increasing ([25]). Within this context, mention must be made of art. 49 of law decree n. 78 of May 31st, 2010 (converted by Law n. 122 of July 30th, 2010) that completely overhauled the text of art. 19 of law 241/1990, substituting the commencement notice (dichiarazione di inizio attività - DIA) with a certified notice of the start of the activity (SCIA).

By reason of the new text of art. 19, every *"authorisation, licence, non constitutive concession, permit or clearance, however named, including the applications for the enrolment in professional registers required for the exercise of entrepreneurial, business or cottage industry activities whose issuance depends exclusively by the fulfilment of general legal or administrative requirements and assumptions, and does not require any limitation of quota or specific sectorial planning tools"* ([26]) is *"replaced"* by a *"self-certification"* integrated by statements in lieu of certification and by *"attestations and affidavits by expert*

[24] Such approach is particularly clear in Law Decree June 25th 2008, n. 122 («Government Action Plan for simplification and regulation quality»); see here articles named «Cut-administrative operations» (art. 25), «Cut-Public Bodies» (art. 26), «Cut-paper» (art. 27) or «Open an enterprise in a Day» (art. 38).

[25] See recently BENEDETTI, *Certezza pubblica e "certezze" private. Poteri pubblici e certificazioni di mercato*, Milano, 2010.

[26] Excepted «activities mostly of financial nature».

technicians or by declarations of conformity by the Agency for enterprise" which are proof of the satisfaction of the fulfilment of the requirements and assumptions for the obtainment of the relevant act; once the certified notice has been filed, it is possible to start the activity immediately, but the administration can stop it and order the elimination of its effects if it should ascertain *"any lack of fulfilment of the requirements and assumptions"* that had been certified; however, after sixty days have elapsed, the power of the administration to intervene is limited to a few cases. The lawmaker further declares that the described regime pertains to the protection of competition (so as to exclude any regional jurisdiction) and constitutes the basic level of performance with regard to civil and social rights (so as to exclude any regional jurisdiction), specifying also that said regime replaces the one based on the commencement notice, in all cases in which the latter is referred to ([27]).

The doctrine has criticised the SCIA discipline ([28]) and, for the most part, has brought this new institute back to the original outline of the commencement notice ([29]) - on which, also because of the various swings of the lawmakers, an intense legal and doctrinal debate has ensued, especially with regard to the "self administration" nature of the action of the citizen, the nature of the power of public bodies with regard to the results of the activity that was launched without the relevant requirements and to the legal protection of third parties; however, it would be interesting to analyse this discipline also in light of Directive 2006/123/EC, to assess its systematic scope and to reach conclusions on the more controversial themes also from that point of view.

[27] Case law recently takes position for DIA overstay (see Tar Lombardia, section I, January 13th 2011, n. 89 and January 14th n. 123, see it in *Urb. e app.*, 2011, 579).

[28] See MATTARELLA, *La Scia, ovvero dell'ostinazione del legislatore pigro*, in *Giornale di diritto amministrativo*, 2010, 1328.

[29] In this way BOSCOLO, *La segnalazione certificata di inizio attività: tra esigenze di semplificazione ed effettività dei controlli*, in *Riv. giur. urbanistica*, 2010, 580

2.2 The most recent law developments

It seems that recently case law has taken no stances that can significantly modify the orientation of the general profile of proceedings or the participation therein of the involved parties.

A. The Constitutional Court, on its part, is taken with the problem of extending the obligation to provide grounds for administrative provisions. However, the Court does not seem to take a linear approach in its analysis, as on the one hand it has linked the obligation to provide grounds solely to the principles peculiar to the administrative activity ("*on the one hand, it is a corollary of the principles of good conduct and impartiality of the administration, and, on the other hand, it makes it possible for the recipient of the decision who believes that its legal position has been prejudiced, to have recourse to jurisdictional protection*"[30]) , excluding all guarantees of procedural cross-examination and of the right to procedural defence by limiting the obligation to give the grounds "solely to the trial procedure"[31] (even though the remitting judges had emphasised this point, including by reference to European Union laws - *"this is a constitutional principle common to the European countries, which can be derived from art. 253 of the Treaty on European Union, which is today art. 296 par. 2 of the Treaty of Lisbon*"[32]); the result hereof is that the admissibility of grounding a decision on the basis of a numerical score has been conformed, as the Court prefers to avoid weighing the administration with excessive burdens. Cross-examination and defence would be - clearly backtracking from the guarantee of a fair trial - requirements that would be valid only in a trial context. Other institutions of Law 241/1990 have been involved with constitutional law, but only as profiles that do not contribute to outline the shape of proceedings and participation therein - even though they might have

[30] Constitutional Court, November 2nd 2010, n. 310.

[31] Constitutional Court, January 30th 2009, n. 20.

[32] Constitutional Court, November 2nd 2010, n. 310.

has a considerable practical importance[33], as in the instance of case law on the applicability of DIA to the construction of power plants from renewable sources.

B. Recently, administrative case law has not had the opportunity to establish especially novel principles; nonetheless a sound tendency towards an accurate implementation of the general principles must be pointed out.

Thus, it has been stated that[34] the administrative action must be *"characterised by the classic features of transparency and publicity and by the principles of European Union law, but also by civil law-derived principles, including that of good faith, which can be considered an expression of actions carried out on the basis of principles of good administration"*; the administrative judge is therefore used to implement the principles of non-aggravation, of reasonable duration of the proceedings[35], of transparency and

[33] See Constitutional Court, June 8th 2011, n. 175 admitting the mark as a motivation and giving prominence to the administrative efficiency than judicial review above it.

[34] See Constitutional Court May 10th 2010, n. 171 on Environmental impact assessment, or May 29th 2009, n. 166, above Basilicata Environmental Regional Law April 26th 2007, n. 9, or March 22nd 2010, n. 119 on Puglia Renewable Energy Regional Law October 21st 2008, n. 31.

[35] For Administrative Court of First Instance (TAR), Naples, section III, March 29th 2010, n. 1719, Sicily, Palermo, section III, January 11th 2010, n. 232: article 1 of Law 241, as modified in 2005 introduced in Italy good faith principle.

impartiality[36], of effectiveness[37], proportionality[38], and caution[39]. It cannot be overlooked that all these principles can be derived, by and large, from our Constitution and that, however, case law - following a long-standing tendency to interpret the law - has fully implemented them only after the reformation of art. 1 of Law 241/1990, even going so far, in some instances, to attribute their origin to European Union law[40].

The result is that the developing confirmation of the legal relevance of these principles reduces the space attributed to administrative merit[41].

There is nothing new with regard to the limits to the participation in proceedings pursuant to art. 13 of Law 241/1990, and yet, in observing the cases in which case law has long been validating decisions made without a notice of the start of proceedings, and so

[36] In such way TAR Pescara, section I, February 11th 2011, n. 113; TAR Brescia section I, November 2nd 2010, n. 4520 explicate that is to prefer admittance with prescription than a new decision because in this second way applicant is due to a new instance; TAR Firenze, section I, January 19th 2010, n. 67, clarify that is not due the full examination of an instance if it seems inadmissible; for TAR Sardinia, Cagliari section I, December 7th 2009, n. 2014, sealing of the application in a public tender procedure is to be examined in a not- formalistic way, looking at the goal of the procedure itself.

[37] For TAR Palermo, section I, January 26th 2011, n. n. 126 publicity in public tender procedure is a part of the general principle of fairness,

[38] Administrative decisions with multiple recipient seems ad expression of such principle at TAR Naples, section VIII, September 10th 2010, n. 17398.

[39] Proportionality is for TAR Genoa, section II, May 27th 2009, n. 1238 the measure of the qualifications requested to became public administration contractor due to a public tender.

[40] An example in TAR Trento, section I, July 8th 2010, n. 171.

[41] Notwithstanding such principles are plainly stated in Italian Constitution, for Supreme Administrative Court (Consiglio di Stato) section V, January 19th 2009, n. 4035 concurrency, fairness, publicity, transparency, proportionality, are UC principles, due to observance under UC Laws immediately compulsory in Italy.

without participation[42], it is easy to see that participation is considered much less important than it appears to be in the law.

However, even though such opinions are often unsound[43] and only slightly consistent with the logic of protecting the right to a defence in proceedings[44] - which is upheld by European Union case law - it must be said that they are now very much established in case law. In fact, it might almost be said that procedural guarantees are limited today to slightly more than self-protection procedures[45] and that the number of subjects to whom notice of the start of proceedings is mandatory is extremely limited, as many nominal opponents are also excluded[46].

[42] Recently, TAR Sicily, Catania, section III, February 4th 2011, n. 258, TAR Calabria, section II, February 11th 2011, n. 211, TAR Rome, section III, January 10th 2011, n. 66, TAR Molise, section I, December 10th 2010, n. 1532.

[43] Case law exclude the notice is due in (i) proceedings on instance of the applicant, (ii) not discretionary decisions, (iii) emergency decisions, (iv) decisions related to security measures.

[44] Case law must to be criticized: Supreme administrative Court legitimate the lack of notice in case of exclusion from public tender procedure of the participant if the administration is unfulfilled with requirements, (Consiglio di Stato section VI, December 21st 2010, n. 9324); neither due the notice is – for Consiglio di Stato, section V, June 23rd 2010, n. 3966 – in case the tender is awarded to another participant.

[45] Coherent with UC case law is Italian Supreme administrative Court admitting the lack of the notice in case the participant received the due information in other ways (Consiglio di Stato, section VI, March 9th 2011, n. 1476, section VI, March 2nd 2011, n. 1305, Consiglio di Stato section II, January 7th 2011, n. 1585.

[46] Participation is anytime due in case of decision negative for the applicant (Consiglio di Stato section V, January 17th 2011, n. 206, TAR Salerno, section II, September 20th 2010, n. 11084, TAR Rome, section II, July 7th 2010, n. 23285, TAR Naples, section IV, May 4th 2010, n. 2480, TAR Bari section I, April 12th 2010, n. 1330, TAR Rome, section II, December 13th 2010, n. 36323, TAR Florence, section I, March 24th 2010, n. 742, TAR Rome, section III, March 2nd 2010, n. 3241, TAR Florence, section II, July 6th 2010, n. 2316.

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ACTES ADMINISTRATIFS ET ACTES DE L'ADMINISTRATION PUBLIQUE[1]

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Pr. Carlo MARZUOLI

1.

L'administration publique peut agir à travers des actes administratifs ou des actes de droit privé, uni- ou multilatéraux. Certains actes administratifs peuvent également émaner de sujets privés exerçant des fonctions publiques, d'autres activités administratives ou remplissant des services publics.

[1] La bibliographie est très vaste. Renseignons seulement les contributions suivantes où des bibliographies plus fournies peuvent êtres consultées: D. SORACE, *Atto amministrativo*, in *Enciclopedia del Diritto*, *Annali* III, Milano, 2010; M. RENNA, *Il regime delle obbligazioni nascenti dall'accordo amministrativo*, e S. VALAGUZZA, *L'accordo di programma: peculiarietà del modello, impiego dei principi del codice civile e applicazione del metodo tipologico*, in *Dir. amm*. 2010, n. 1 (il primo) e n. 2 (il secondo).

2.

En ce qui concerne les actes émanant de l'administration publique, la loi (Loi n. 241/1990) prévoit le cadre général suivant.

Une distinction fondamentale existe entre les actes d'autorité ou impératifs et les actes qui ne le sont pas (art. 1, c. 1-bis). Les actes d'autorité sont des actes administratifs. Les actes qui ne sont pas des actes d'autorité sont des actes administratifs s'il existe une réglementation spécifique ; en l'absence de telle réglementation, il sont considérés comme actes de droit privé.

Il faut finalement attirer l'attention sur le fait que beaucoup des relations de travail avec l'administration publique (à part les magistrats, le personnel militaire et d'autre personnel) sont régies par le droit privé et que, dans cette hypothèse, l'administration publique agit (en général) comme employeur privé (art. 5, d. lgs. n. 165/2001).

3.

Actes administratifs

La distinction entre actes d'autorité et ceux qui ne le sont pas est très importante, en particulier pour des raisons de classification. Cela signifie que le caractère essentiel de l'acte administratif n'est pas son caractère d'autorité (ou impératif) qu'il peut effectivement avoir ou non, mais la subordination à un régime particulier de validité : la légitimité. La légitimité consiste en une régulation, voulue pour conférer l'assurance que l'acte sert l'intérêt public tel que définit par la loi. A ces fins, l'instrument principal en est le vice d'excès de pouvoir.

3.1

Le caractère d'autorité est avant tout important du point de vue du principe de légitimité.

Afin de satisfaire les exigences de protection du citoyen, l'acte administratif d'autorité, manifestation du pouvoir de suprématie, est un acte typique. La loi doit expressément prévoir l'acte, le contenu du pouvoir, le type d'effets qui en ressortent et les aspects fondamentaux relatifs à la compétence et la procédure.

Par exemple, l'imposition d'une condition suspensive en matière de permis de construire est seulement envisageable si cette dernière se rapporte à la réalisation d'une construction et si elle est basée de manière directe ou indirecte sur une norme de loi ou de règlement : c'est ainsi que la condition, selon laquelle le permis de construire est délivré au demandeur sous condition qu'il renonce à l'indemnisation des travaux réalisés en cas d'expropriation de la zone sur laquelle les constructions vont être érigées, est illégitime, car il va à l'encontre du principe de la typicité des actes administratifs (Tribunal administratif régional de la Lombardie, Milan, Section IV, 10 septembre 2010, N. 5655)

Ici il s'agit toutefois d'un acte qui est seulement partiellement typique. Ce sont les ordonnances de nécessité et d'urgence qui peuvent déroger aux dispositions législatives (hormis les principes généraux, la Constitution, le droit européen). Ces derniers posent de graves problèmes de compatibilité avec le système constitutionnel et font l'objet d'une critique constante car ils sont utilisés de manière de plus en plus fréquente, non seulement dans le cas de calamités naturelles (tremblement de terre, inondation, etc.), mais également dans le cadre d'évènements de grande envergure (c'est-à-dire pour des événements prévus et préparés de longue date, comme les expositions universelles, les olympiades, les régates ou d'autre types de grands évènements).

Il faut rappeler que c'est le caractère d'autorité qui est déterminant, comme indiqué plus haut, pour établir la nature administrative ou non de l'acte de l'administration (voir n. 1 plus haut.)

3.2

La distinction entre actes administratifs d'autorité et les actes qui ne le sont pas fait l'objet de plus en plus d'intérêt. Pourtant, une partie de la jurisprudence tend à identifier l'acte administratif avec l'acte d'autorité.

Ceci ayant été précisé, il convient de soulever que la notion d'autorité est très discutée.

Selon la thèse la plus diffusée, la caractéristique d'autorité est conférée aux actes qui portent atteinte aux intérêts d'un sujet sans son consentement (unilatéralement). Cette notion est cependant trop générique. Chaque acte administratif, même l'acte administratif qui n'est pas d'autorité empiète unilatéralement sur les intérêts d'autres sujets. Il faut donc ajouter que le caractère d'autorité est l'atteinte aux intérêts reconnus comme droits subjectifs. Dans ce cas, le problème se déplace vers la distinction entre droits subjectifs et intérêts légitimes. Mais, cette interrogation est truffée de solutions incertaines et, d'autre part, moins importante aujourd'hui que par le passé, car aujourd'hui même les dommages occasionnés aux intérêts légitimes donnent lieu à une indemnisation.

Un aide décisive nous vient d'expérience. Selon une tradition ininterrompue, beaucoup d'actes sont (habituellement) identifiés comme d'"autorité", comme les actes de planification (par exemple urbanistique, du paysage), les expropriations, les ordonnances, les réquisitions, les autorisations (de manière prédominante même les concessions) et ces derniers sont qualifiés comme administratives sans problème particulier.

3.3

Une autre distinction pertinente est celle entre acte administratifs contraignantes, dans lesquelles l'administration doit mettre en œuvre intégralement ce qui est prévu par la loi, et les actes discrétionnaires, dans lesquels l'administration peut évaluer et choisir la solution la mieux appropriée pour l'intérêt public.

La distinction fait partie de la tradition et est importante, avant tout sur le plan conceptuel. Selon certains, l'acte administratif contraignant ne serait pas un acte administratif authentique; il pourrait être assimilé à un acte d'exécution d'une obligation légale. En tout cas, par rapport aux actes administratifs contraignants, il y aura toujours des situations de droit subjectif à l 'exclusion de ceux relatives aux intérêts légitimes. Mais cela reste une interprétation minoritaire non suivie par la jurisprudence, qui se base sur l'équation « acte contraignant = droit subjectif » seulement dans certaines matières et hypothèses (par exemple en matière de financements publics) .

A part ce problème, le caractère contraignant de l'acte administratif a de toute manière acquis une importance supérieure par rapport à des objectifs divers. On se rappelle deux aspects. Le premier est de caractère général. Le règlement de la légitimité de l'acte contraignant est en partie différent de celle de l'acte ordinaire. Certains vices, même incontestables, n'entraînent pas nécessairement l'annulation de l'acte s'il est manifeste qu'il n'y avait pas autre solution possible. C'est le cas lorsque le vice consiste dans la violation de règles de procédure ou dans la forme de l'acte (loi n. 241/1990, art. 21-*octies*).

Le second aspect est que les actes d'habilitation ou d'autorisation, quand ils sont contraignants (sauf exceptions indiquées par la loi) sont substitués (art. 19 loi n. 241/1990) par une notification certifiée de début d'activité (s.c.i.a.). L'intéressé déclare à l'administration publique qu'il veut entreprendre l'activité et être en possession des réquisits prévus, pouvant, suite à cette communication, commencer l'activité.

Naturellement, cette fonction particulière de la déclaration du privé a fait surgir le problème de sa nature propre : est-ce un acte purement privé ou un acte administratif (émis par un privé) ou encore un acte comparable, dans certains de ces aspects, à un acte administratif.

4.

L'acte administratif est, selon la tradition, avant tout un acte unilatéral.

Par contre, l'expérience nous a toujours démontré l'existence d'hypothèses dans lesquelles le consensus du sujet privé est indispensable pour la mise en oeuvre de la réglementation fixée par tels actes. On doit penser aux concessions administratives de biens ou de services publics, ou aux conventions en matière urbanistique organisant la construction dans les zones à urbaniser, ou encore par rapport à l'emploi public. Il existe donc depuis toujours le problème de l'importance à accorder au consensus du sujet privé.

Le consensus peut effectivement être considéré simplement comme une condition d'efficacité par rapport à un acte administratif unilatéral (le décret de concession, le décret de nomination pour la fonction publique, les plans de lotissement), actes unilatéraux qui constituent néanmoins les piliers de la réglementation sur les rapports entre l'administration publique et le sujet privé. Conséquence : si l'acte tombe parce qu'il a été, par exemple, révoqué ou annulé par l'administration publique, tout tombe.

Par contre, le consensus peut être considéré comme élément type d'un acte bilatéral (ou plurilatéral) et donc comme un acte de type contractuel entre l'administration publique et le sujet privé.

La loi n. 241/1990 établit (art. 11) que les pouvoirs de l'administration (sauf exceptions, entre autres celui relatif aux actes administratifs de nature générales, à plans, à programmes) peuvent aussi être exercés à travers des actes consensuels entre l'administration publique et le sujet privé intéressé (« accordi »), accords par lesquels il est possible de déterminer le contenu discrétionnaire de l'ordonnance finale voire remplacer l'ordonnance même. La loi a expressément prévu la procédure, établissant que les accords doivent êtres stipulés afin d'assurer l'intérêt public, se basant sur l'application des « principes du code civil en matière d'obligations et de contrats tant qu'ils sont compatibles», attribuant à l'administration publique le pouvoir de se dédire (un pouvoir de révocation) de l'accord pour des motifs d'intérêt public survenus ultérieurement, moyennant une indemnisation.

Il y a donc suffisamment d'éléments pour établir les qualifications juridiques de ces accords: contrats de droit public ou contrats de droit privé (qui, dans leurs aspects essentiels ne sont pas très différent d'un contrat de vente) de l'administration publique.

D'autre part, si nous considérons les événements jurisprudentiels et la nécessité d'affronter de manière spécifique les questions particulières qui se posent (l'interprétation, la validité, la possibilité d'utiliser la résolution contractuelle), la qualification mixte, c'est-à-dire ni entièrement privée, ni entièrement publique s'avère toujours la plus convaincante.

En tout cas, par rapport aux aspects à considérer et réglés par le droit privé, l'application rigoureuse des principes en matière d'obligations et de contrats issus du droit privé est souhaitable. Cela surtout aux fins d'assurer une plus grande stabilité et fiabilité des engagements dérivants de la réglementation établie par l'acte.

Il faut ajouter qu'une exigence du genre est soulignée même pour les accords entre les administrations publiques et en particulier pour les accords de programmes, à travers lesquels plusieurs organismes publics établissent les modalités, les conditions, le financement et les délais pour la réalisation d'oeuvres qui impliquent de manière diverse les mêmes administrations.

5.

Après avoir signalé quelques aspects des actes de nature « administrative », on peut reprendre le point de la distinction entre les actes administratifs et les actes de droit privé de l'administration publique. La qualification de l'acte est déterminante aux fins de la procédure, de l'efficacité et des vices; et il peut être déterminant aux fins de l'importance des intérêts, du juge ayant juridiction, ainsi que des pouvoirs du juge par rapport aux actes soumis. Souvent il n'est pas aisé de connaître la nature de l'acte émis par l'administration publique: soit il s'agit d'un acte administratif, soit d'un acte de droit privé.

Le problème concerne surtout les actes unilatéraux de l'administration publique, dans l'hypothèse d'actes qui ne sont pas des actes d'autorité (étant «d'autorité » ils devraient êtres considérés comme administratifs, n. 2). Par exemple: l'acte de licenciement d'un fonctionnaire, le dédit d'un contrat de droit privé, la nomination d'un représentant de l'entité publique dans une autre ou dans une société ou fondation, etc.

Ces actes correspondent généralement à des mesures que peuvent aussi prendre les sujets privés, et donc, dans l'abstrait et en général, peuvent être qualifiés d'actes administratifs ou actes de droit privé (de l'administration).

Dans nombreuses de ces hypothèses, la présence de normes dictant une discipline particulière permettent de qualifier les actes comme actes administratifs. C'est le cas, comme indiqué plus haut, pour les actes de procédure contractuelle, aujourd'hui réglé par le d. lgs. n. 163/2006, qui, selon des directives européennes règle les contrats publics relatifs au travaux, aux services et fournitures: par exemple la décision d'organiser un appel d'offre public, les actes de procédure de l'appel d'offre, l'adjudication,, c'est à dire l'acte à travers lequel l'administration détermine le sujet avec lequel elle conclura le contrat.

Mais il y a beaucoup d'hypothèses dans lesquelles la qualification est incertaine.

Cela arrive également en matière de contrats publics. Un exemple. La législation prévoit qu'à certaines conditions, l'adjudicataire peut sous-traiter les travaux à une autre entreprise. Par contre, cette situation requiert un acte d'autorisation unilatéral de l'administration publique (art. 118 d. lgs. n. 163/2006). Une partie de la jurisprudence a retenu que tel acte, même si réglé de manière spécifique par les règles du Code des contrats publics (l'art.118), est, de par sa nature, identique à l'autorisation de sous-traitance prévue entre sujets privés régis par le Code civil (art. 1656). Selon cette interprétation, la règle qui concerne cette discipline spéciale ne prévoit aucune appréciation de la part de l'administration ('discrezionalità') (Tribunal administratif régional de Lazio, Rome, Section III, 23 janvier 2010, N. 776). Le Conseil d'état suit par contre une thèse opposée. Selon ce dernier, l'acte autorisant la sous-traitance, réglé par l'art. 118, est un acte de nature administrative parce qu'il est destiné à la poursuite des intérêts publics et, de plus, un acte d'autorité. Le fait

qu'il existe ou non une marge d'appréciation ('discrezionalità') n'est pas déterminante (Conseil de l'état, Section IV, 24 mars 2010, n. 1713).

5.1

La question de la qualification de l'acte de l'administration est parfois résolue en se référant à une notion née à la fin des années trente du siècle dernier en matière d'emploi public et ensuite appliquée de manière générale : la notion d'acte « paritaire » ('paritetico', paritaire : parmi des sujets en position de parité). L'acte, même s'il a la forme d'un acte public, est considéré comme adopté non dans un rapport de suprématie – subordination, mais de parité et ne tombe donc plus sous les règles caractéristiques de l'acte administratif. Par exemple : l'arrêt préfectoral qui détermine, grâce à des tarifs précis, le montant dû pour le service de garde d'un véhicule dans un dépôt public (Conseil de justice administrative, Section judiciaire, 16 septembre 2010, n. 1216).

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ADMINISTRATIVE INTERNAL REVIEW

ANNUAL REPORT - 2011 - ITALY

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Prof. Margherita RAMAJOLI

INDEX

1. INTRODUCTION

Administrative decisions adopted at second instance are characterised by the fact that then relate to previous administrative decisions (so-called **internal review**).

Furthering public interest requires that the administration have the power to review its previously rulings when validity or appropriateness are in doubt, adopting, if necessary, related measures.

The administration is required to protect the public interest on an ongoing basis by, for example, reversing decisions as a way of protecting their goals even though this may create problems with regard to the rights and legitimate expectations created with the decision at first instance and the resulting reliance of private individuals on the stability of the decision.

Currently, Article 21-*quinquies* and Article 21-*nonies* of Italian Law no. 241/90, introduced by Law no. 15/2005, regulate the reversal, *ex officio* annulment and confirmation of decisions, expressly codifying the most important administrative internal reviews, which are thus typified in general terms and no longer left, as before, to development through case law and the academic literature.

However **case law** is still **essential in this area**, contributing to delineating the general features of internal review, with particular reference to issues of jurisdiction (section 3), indemnity payments following the reversal of an administrative decision (section 4) and the power of internal review in cases where a provisional award has been made (section 5).

Furthermore, it needs to be mentioned that in 2010 has been enforced the "advance notice of the intention to appeal to the courts" that puts the administration in a position to decide whether or not to "take action under internal review" (section 2).

2. ADVANCE NOTICE OF THE INTENT TO APPEAL TO THE COURTS AND THE EXERCISE OF THE POWERS OF INTERNAL REVIEW BY THE TENDERING AUTHORITY

The new Article 243-*bis* of the Italian Code of Public Contracts, introduced by Article 6 of Italian Legislative Decree no. 53/2010 transposing Directive 2007/66/EC, has provided for a **notice of appeal requirement to the tendering authority in the area of public procurement.**

This "advance notice of appeal" puts the administration in a position to decide in good time whether or not to "take action under internal review" procedures in light of suspected irregularities. It is a **preventive dispute resolution mechanism centred on the exercise of the power of internal review**.

Individuals who intend to appeal to the courts must inform the tendering authorities of the presumed violations and of their intention to file an appeal. The notice must contain a concise summary of the presumed irregularities in the administrative decisions and the grounds for the appeal that the party intends to raise in the proceedings, without prejudice however to the right to raise different or additional grounds for appeal in the proceedings.

This notice may be presented at any time before the interested party has filed an judicial review; it does not prevent the further continuation of the tender procedures, or the commencement of the grace period for the conclusion of the contract determined pursuant to Article 11(10), or the commencement of the time limit for the filing of an judicial review.

Within 15 days of receipt of the notice, the administration must "communicate its own views in relation to the grounds indicated by the interested party, and decide whether or not to take action under internal review". There no requirement to adopt an internal review before the above time limit, but simply a decision as to whether or not to initiate the review procedure.

However, this decision cannot be a mere decision over whether or not to exercise internal review powers, but must contain indications as to whether or not the grounds raised are well-founded.

Consequently, although the law is silent on this point, it may be appropriate to involve any other interested parties in the review proceedings, such as the successful party, through the notice of the initiation of proceedings pursuant to Article 7 of Italian Law no. 241/1990.

A failure by the administration to respond to the notice is considered equivalent of a denial ("equivalent to a refusal of internal review"). Both the failure by the undertaking to give notice as well as the silence on the part of the tendering authority amount to conduct proceedings may be assessed for the purposes of the decision on costs, as well as pursuant to Article 1227 of the Italian Civil Code on contributory negligence, and hence the level of compensation may be reduced "in line with the seriousness of the negligence and extent of the consequences that resulted from it".

"The total or partial refusal of internal review, whether express or tacit", may be challenged only along with the decision to which it refers or, if the latter has already been challenged, by filing additional grounds (new paragraph 6 of Article 243-*bis* of the Italian Code of Public Contracts, introduced by Article 3 of Annex 4 to Italian Legislative Decree no. 104/2010).

The **advance notice** of the intention to file an appeal **will have a marginal role in reducing litigation**. The reason lies both in the very short time limit of 30 days for the filing of an appeal with the courts, as well as the fact that providing notice does not entail the suspension of the time limit for filing an appeal with the courts, nor of the grace period for the conclusion of the contract.

Accordingly, the specific arrangements put in place to govern the advance notice transform the institution from a dispute prevention mechanism into a mere instrument with the function of notifying the administration of the existence of the risk of irregularities in the award procedure.

3. JURISDICTION OVER DECISIONS TO WITHDRAW PUBLIC FUNDING

In 2010 there was a significant body of case law concerning **the division of jurisdiction between the administrative courts and the ordinary courts over cases involving decisions to withdraw public funding**. A settled view has been established

which uses a general criterion to regulate the division of jurisdiction based on the identification of the "procedural segment" affected by the reversal and its "reason".

Administrative case law follows the settled case law of the Supreme Court of Cassation (Cass., sez.un., 17 febbraio 2010, n. 3679) and distinguishes between the **"static" occurrence of the award of funding** and the "dynamic" situation relating to the use of that funding.

The former falls under the **jurisdiction of the administrative courts**, whilst any other aspect relating to the manner in which the funding is used and compliance with the commitments undertaken falls under the jurisdiction of the ordinary courts (Cons.Stato, sez. VI, 11 gennaio 2010, n. 3; sez. V, 16 febbraio 2010, n. 884; 23 settembre 2010, n. 7088; 10 novembre 2010, n. 7994).

Moreover, the issue of jurisdiction over public funding is also governed by the normal criteria regulating jurisdiction based on the nature of individual legal rights.

A private party has a **legitimate interest** when the dispute concerns not only the procedural stage prior to the award of the benefit, but also the subsequent stage if **the funding has been annulled or used unlawfully or due to the fact that it went against the public interest from the outset**.

On the other hand, such a person will have an individual right if the dispute arises during the disbursement stage of the funding or the withdrawal of the subsidy on the basis of an alleged breach by the recipient; this is also the case for challenges to decisions classified as revocation, expiry or termination, provided that they result from the alleged failure by the beneficiary to abide by the obligations assumed in return for the award of the funding.

In fact, this activity is not authoritative, and there is no balancing of the public interest against that of the private party; it is rather necessary to assess, now on an equal footing, whether or not the parties have complied with the obligations accepted or imposed following disbursement of the funding (Cons.St., sez. V, 16 febbraio 2010, n. 884; sez. VI,

3 giugno 2010, n. 3501; Cons.Giust.Amm.Reg.Sic., 21 settembre 2010, n. 1232; Cons.St., sez. V, 10 novembre 2010, n. 7994; Tar Umbria, Perugia, sez. I, 23 giugno 2010, n. 383; Tar Trentino Alto Adige, Trento, sez. I, 24 giugno 2010, n. 164; Tar Sicilia, Palermo, sez. I, 29 novembre 2010, n. 14192).

Thus, for example, a withdrawal due to the insolvency of the beneficiary undertaking and the finding that it is impossible for the undertaking to fulfil the obligations undertaken when the funding was granted is not the expression of a power of internal review through a new balancing of the public interests involved in the decision to award the funding. It falls under the jurisdiction of the ordinary courts since it impinges upon the individual right "to the continuation of the funding, claimed to have been violated due to the failure to meet the prerequisites for an end to disbursement of the benefit and, therefore, for the breach objected to by the administration" (Cons.St., sez. VI, n. 3/2010; sez. V, n. 7088/2010).

4. INDEMNITY PAYMENT FOLLOWING THE REVERSAL OF AN ADMINISTRATIVE DECISION

Case law has on various occasions had the opportunity to specify the rules governing the institution of the indemnity payment made by the administration to an individual directly affected by the reversal pursuant to Article 21-*quinquies* of Italian Law no. 241/1990.

A **prerequisite** for the award of an **indemnity payment** to the individual who directly suffers the detriment is the **lawfulness of the decision to reverse** (so-called responsibility of the public administration for lawful acts). In the event that the reversal is unlawful there may possibly be grounds for compensation for damage (Cons.St., sez. V, 10 febbraio 2010, n. 671; 6 ottobre 2010, n. 7334).

Contrary to what occurs in situations involving the compensation for damages due to liability, for which the negligence of the party that caused the damage is an essential

prerequisite, in cases involving an indemnity payment **it is not necessary to ascertain any negligence on the part of the administration** (Cons.St., sez. V, n. 671/2010; n. 7334/2010).

A **reversal without an indemnity payment is not unlawful**: the failure to make an indemnity payment does not have the effect of vitiating or invalidating the reversal decision, but simply permits the private party to take action to obtain the indemnity payment (Cons.St., sez. V, n. 7334/2010). In particular, the indemnity payment will be due to the private party if "the legitimate reversal … impinges upon long-standing relations (on an administrative act with lasting effect) and is caused by supervening reasons of public interest, by a change to the factual situation or by a new assessment of the public interest" (Cons.St., sez. VI, 17 marzo 2010, n. 1554).

The prompt adoption of a decision to countermand the decision to reverse does not in itself preclude an indemnity payment: the indemnity payment is subject only to the occurrence of "detriments to the parties directly affected", but may impinge upon the quantification of the indemnity due (Cons.St., sez. V, n. 671/2010).

If the reversal was due only to a clear material error, or the damage was brought about by negligent conduct by the private party, then no indemnity payment will be due (Cons.St., sez. VI, n. 1554/2010); even in the cases involving the reversal of the provisional award of a public contract there will be no indemnity payment (on this specific point, see below).

The **indemnity payment must be limited to the "actual loss"**, as expressly provided for under paragraph 1-*bis* of Article 21-*quinquies* of Italian Law no. 241/1990. Case law has interpreted actual loss to include the cost of participation in the tender procedure due to breach of the "entitlement not to be involved in pointless negotiations" (Cons.st., sez. V, n. 671/2010; n. 7334/2010). In any case, the prerequisites are not met for requesting reimbursement of the cost of participation in the event that the undertaking obtains compensation of the damage resulting from the failure to make the award; in this

case, there can be no greater benefit than that resulting from the award (Cons.St., sez. V, n. 671/2010).

Also in cases involving lawful reversals, private parties may suffer recoverable damages, and which are not limited only to those leading to an indemnity payment; in this case the damages do not result directly from the reversal, but from other irregularities (either procedural or of another nature) committed by the administration (Cons.St., sez. V, 21 aprile 2010, n. 2244; n. 7334/2010).

It has also been clarified in the case law that it is possible to cumulate, within the same proceedings, claims for compensation (on the basis of the unlawful nature of the reversal) and claims for indemnity payments (on the basis of the actual violation caused by lawful yet harmful conduct) due to the effects of the reversal. If the private party challenges the lawfulness of the reversal and seeks compensation, he may however also make a claim in the alternative for an indemnity payment, in the event that the claim for compensation is ruled groundless; the indemnity payment is in fact a residual remedy (Cons.St., sez. VI, 17 marzo 2010, n. 1554).

On the other hand, the administration need **not** make **any indemnity payment** in cases involving a "**reversal as penalty**" or "**reversal by expiry**" in which, in the cases provided for under statute, it reverses a favourable decision under the terms of the legislation as a consequence of the recipient's conduct when the latter breaches specific legislative provisions. In fact, in these cases the reversal does not depend on considerations of expediency, but is the mandatory consequence of a breach of the law (Cons.St., sez. V, 13 luglio 2010, n. 4534).

5. AWARDS AND INTERNAL REVIEW POWERS

All definitive decisions within a tender procedure, from the tender notice to the definitive award, may be reversed under internal review procedures. Article 11(9) of the Italian Code of Public Contracts refers to the "exercise of powers of internal review in the

cases permitted under applicable legislation" and therefore results in the automatic application of the provisions of Italian Law no. 241/1990 (see also Article 2(3) of the Code).

Different arrangements apply to cases in which it is the **provisional award** that is reversed. In these cases, case law considers that if the administration decides to reverse the provisional award, then **the commencement of the relative procedure need not be notified to the provisionally successful tenderer** (Cons.St., sez. V, 12 febbraio 2010, n. 743; sez. VI, 6 aprile 2010, n. 1907; 9 aprile 2010, n. 1997; Tar Lazio, Roma, sez. II, 30 aprile 2010, n. 8975; sez. III, 9 settembre 2010, n. 32177) .

Where a definitive award has been made the successful tenderer is in a qualified legal position and therefore may enter into dialogue with the administration, "presenting facts and submitting observations and assessments aimed at best identifying the concrete and current public interest"; on the other hand, **the provisionally successful tenderer only has a *de facto* expectation** that the procedure will be concluded and has not received a qualified award (Cons.St., sez. V, n. 1997/2010; Tar Lazio, Roma, sez. II, n. 8975/2010; sez. III, n. 32177/2010).

It has thus been concluded that in order to eliminate that expectation and the provisional award, it is sufficient to adopt a decision to defer "by which the tendering authority gives its decision supported by reasons not to proceed to the definitive award and pre-announces the reversal of the decisions taken during the intervening period" (Cons.St., sez. V, n. 1997/2010; Tar Lazio, sez. II, n. 8975/2010; sez. III, n. 32177/2010).

The decision not only does not require the separate initiation of a procedure, but does not even require particular motivation: it is sufficient for example to give notification that it is not possible to initiate the implementation of projects on grounds for reasons out of its own control and that it intends to annul the tender procedure previously held, by decision that is sufficient to constitute notice of a provisional award (Cons.St., sez. V, n. 1997/2010). However, there is no lack of judgments at first instance in which it has been held that the administration is always under an obligation to assess the interests affected, to

carry out a detailed inquiry – albeit without the right to make representations – and to give adequate reasons for its choice (Tar Lazio, sez. II, n. 8975/2010).

Moreover, in cases involving the reversal of a provisional award **there is no obligation to make an indemnity payment**: the indemnity payment is due only in the event that decisions with enduring effect are reversed and not also in cases involving the reversal of decisions with unstable or ephemeral effects, such as a provisional award (Cons.St., sez. VI, 17 marzo 2010, n. 1554; Tar Sicilia, Palermo, sez. I, 13 aprile 2010, n. 4945).

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LOCAL AUTHORITIES

ANNUAL REPORT - 2011 – UNITED KINGDOM

(May 2011)

Christopher KNIGHT

Barrister

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1. INTRODUCTION

The position of local authorities in the United Kingdom is complex and closely regulated by a variety of pieces of primary and secondary legislation. To an already difficult area of law is added a further layer of complexity by the fact that there are usually distinct differences of local authority law between England, Scotland, Wales and Northern Ireland. The nature of devolution in the UK means that a good deal of flexibility is retained in different parts of the country. Scotland and Northern Ireland are governed by essentially separate legal systems and the control of local authorities in those parts of the country is a matter of specialist knowledge. Since the creation of the Welsh Assembley, local authorities in Wales are usually subject to broadly the same position as English local authorities but with important differences of detail, reflecting the concerns – or simply differences in drafting – of the Welsh Assembley.

For ease of reference this report will focus on developments in the law relating to local authorities in England in the past year. In particular, it will focus on the control of local authorites through both judicial and non-judicial means by highlighting some of the more interesting recent decisions of the courts.

It is important to flag a future change to local authority law in England. The Localism Bill is currently progressing through Parliament and will make significant changes to the powers of local authorities, the way in which local authorities exercise their powers, and the political themes underlying the triangular relationship between central governement, local authorities and the electorate. A future report will adress the changes made by the Localism Bill when it is passed into law.

2. NON-JUDICAL CONTROL OF LOCAL AUTHORITIES

One of the most important forms of non-judicial control over the conduct of local authorities is the ability of members of the public to make a complaint to the Local Government Ombudsman („LGO“). This is invariably a cheaper and quicker method of

having one's grievance heard by an impartial person where there is an allegation of maladministration.

The problem for individuals is that LGO Reports do not have legally binding effect. Even when the LGO has upheld the complaint, the substance of the dispute between the individual and the authority may continue to persist if the authority refuse to implement the Report or certain of its recommendations.

A recent example of this was seen in *R (Gallagher) v Basildon District Council* [2010] EWHC 2824 (Admin) where Basildon DC had published the personal details, including medical and educational needs, of a group of travellers (gypsies). The travellers complained that the publication was contrary to data protection law and to Article 8 ECHR. The LGO agreed, making a finding of maladministration and recommending a payment of £300 to each affected person. Basildon DC apologised but declined to make the payments. Kenneth Parker J noted that the amount of LGO Reports which were not implemented by local authorities had dropped to just 1%.

However, the judge rejected a requirement upon authorities to have cogent reasons not to implement the recommended remedy in the LGO Report. At paragraph 27 he reasoned that:

„there is more scope for genuine disagreement on what, if any, steps are required to remedy a particular injustice. There may be a number of options, with varying effects on the use of scarce resources. Local authorities are, of course, accountable to their electors for the use of such resources. It seems to me that Parliament intended that local authorities should be entitled to consider the impact on the fair and efficient allocation of scarce local resources in deciding whether to accept a recommendation of the LGO and, in an appropriate case, to reject such a recommendation because of a disproportionate effect on such resources."

In the *Gallagher* case itself, the court found that the authority had unlawfully failed to implement the LGO Report because it had failed to take into account relevant considerations, took into account irrelevant considerations, and gave manifestly

disproportionate weight to certain considerations. Basildon DC hd therefore acted irrationally.

3. JUDICIAL CONTROL OF LOCAL AUTHORITIES

3.1 Building Schools for the Future

In *R (Luton Borough Council and others) v Secretary of State for Education* [2011] EWHC 217 (Admin), Holman J quashed the withdrawal of funding from Building Schools for the Future (BSF) projects on procedural grounds. The claims against the Secretary of State (SoS) by six local authorities succeeded, and the SoS has been required to reconsider his decisions, although he is not required to restore cancelled funding. Quashing of the SoS's decision to cancel funding for these projects was ordered on several grounds which the Judge summarised as being concerned with a failure by the SoS to consider the individual local authorities and their projects in a sufficiently case-specific way. The SoS had applied a "strict rules-based approach".

First, the Judge held that the SoS had unlawfully failed to consult with the authorities as to the effect on their individual projects of his possible decision options. Applying *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 775, there was a procedural legitimate expectation of such consultation, even though there had been no relevant promise or practice of consultation, because of the "pressing and focussed impact" which the Department for Education past conduct had had upon the claimants. In short, because of the very large sums involved, and the way in which the authorities had continued to act and spend significant sums of money in reliance on the stage that they had reached in the approval process, along with the fact that they had been engaged in continuing dialogue with Partnerships for Schools, stopping the projects without prior consultation was so unfair as to amount to an abuse of power. There was no justification for dispensing with it altogether.

Secondly, Holman J held that the SoS had failed to comply with his statutory equality duties - specifically, the duties to have due regard to the need to eliminate unlawful race, sex and disability discrimination, to promote equality of opportunity between men and women, different racial groups and disabled persons and others, and to take steps to account of disabled persons' disabilities and to promote positive attitudes towards them (now found in section 149 of the Equality Act 2010). It was said in evidence that the SoS had been aware, as a general proposition, that the earlier (and already funded) waves of BSF investment were likely to have delivered funding for schools with greater proportions of disabled or ethnic minority pupils, the Judge said that such a generalised approach "[did] not begin to discharge the equality duties `in substance [and] with rigour'", as required by *R (Brown) v Secretary of State for Work and Pensions* [2009] PTSR 1506. It would appear that the Judge did consider that the SoS should have been prepared to engage in case by case consideration of the relevance of particular pipeline projects to equalities issues before deciding which ones to cancel, at any rate to the extent that any special equality considerations pertaining to particular projects had been highlighted in the consultation that should have taken place. There had been no equality impact assessment (EIA) at the time of the decision.

Thirdly, although his ultimate conclusion is expressed in terms of lack of consultation and breach of equality duties, it would seem that Holman J would also have characterised the case as one in which the SoS had unlawfully fettered his discretion under the grant-making power, section 14 of the Education Act 2002. Here, whilst the SoS had been entitled to adopt rules, each project was an individual case, to which the SoS should have been prepared to give individual consideration for the residual exercise of discretion, at any rate in marginal cases or those where consultation of authorities was required. Instead, the rules had been applied in a rigid and hardedged manner. Open-minded consultation would have avoided any such fettering.

Importantly, attempts to challenge the decisions on rationality grounds were robustly rejected by Holman J. Given the heavy macro-economic and political content of the decision, the Judge's view was that to scrutinise the SoS's reasoning, beyond being satisfied that it was not inherently irrational, would have been "a grave and exorbitant

usurpation by the court of the minister's political role". The Judge also rejected the suggestion that the claimants had had a substantive legitimate expectation that funding would continue to be made available. The basis for the alleged substantive expectation was put slightly differently by different authorities according to their own particular facts, but the essential point in each case was that the authority had reached a certain stage in the approval process, or had been encouraged by correspondence to think that approval would be forthcoming, without having reached the stage at which a final business case had been approved and a promissory note issued on behalf of the Government. Holman J acknowledged that high hopes had been raised, but held that no legitimate expectation was created that any given project would definitely proceed. The decision was quashed on grounds which went to the manner in which it had been reached, rather than to its substantive content.

The judgment will be of considerable interest in the current climate of austerity - whether at central government level, as in the BSF case, or by local authorities themselves, or by other public bodies charged with the distribution of funds. On the one hand, the BSF judgment suggests that rationality challenges are only likely to succeed in such cases where some logical flaw in the approach taken more or less leaps off the page - even where the challenge is to the manner in which available funds have been distributed, as opposed to the more obviously politico-economic decision about how much money should be spent. On the other hand, the case illustrates that authorities which do not think carefully about the procedure to adopt before reaching such decisions may find themselves vulnerable to attack. The funding constraints to which authorities are subject (and the relatively short period which may elapse between knowing what resources they have available and the point at which budgets have to be set) may create real pressure for urgency in decision-making, but more haste may make for less speed if it leads to judicial review. The judgment is also a reminder of the importance which the Courts attach to the equality duties in decision-making, and to the degree of stringency with which at least some Judges will require equalities implications to be analysed. One suspects, cynically, this may be because it enables a decision to made quickly without having to trespass into the more politically treacherous waters of a substantive challenge to how public funds should be spent. The

Luton decision will undoubtedly be a regularly cited decision during the upcoming phase of plentiful challenges to public authority decisions on funding cuts.

3.2 Witness Evidence and Irrelevancy

In *Lancashire County Council v Environmental Waste Controls Ltd* [2010] EWCA Civ 1381 the Court of Appeal held that where a local authority officer had given evidence that he had ignored an irrelevant consideration when assessing a tender, and the Judge had found him to be an honest witness, the Judge had not been entitled to conclude that the officer's decision had been subconsciously affected by the irrelevant consideration. Although in an appropriate case a Judge could be entitled to find that the decision maker was influenced by an irrelevant consideration, even though honestly not aware of being influenced, it was vital that the suggestion was put to him in cross-examination in the plainest terms. It will, of course, be a very unusual case in ordinary judicial review proceedings with cross-examination (or even live witness evidence) at all, but there will be many other proceedings (such as public procurement) in which this will be relevant. If the tender process was found to be honestly operated, as in the instant case, it was extremely difficult to go on to find that the process was defective by reason of regard to an irrelevant consideration.

3.4 Article 8 ECHR and Provision for the Destitute

Any person who is unlawfully present in the UK within the meaning of paragraph 7 of Schedule 3 to the Nationality Immigration and Asylum Act 2002 who is destitute can be (apart from Schedule 3) eligible for assistance from the responsible local authority. In *Birmingham City Council v Clue* [2010] EWCA Civ 460 the Court of Appeal emphasised, at paragraph 27, that Article 8(1) of the European Convention on Human Rights protects 2 distinct rights: the right to respect for family life, and the right to respect for private life. It went on to hold that the local authority must decide whether and, if so, the extent to which

it is necessary to exercise a power or perform a duty for the purpose of avoiding a breach of a person's Convention rights. If the withholding of assistance would not in any event cause a person to suffer from destitution amounting to a breach of Convention rights (typically Article 3), the local authority's investigation ends there. The local authority must, therefore, investigate whether there are available to the claimant other sources of accommodation and support. But if it is satisfied that there are no other sources of assistance which would save the claimant from destitution amounting to a breach of a Convention right, then it must consider the matter further. It must then decide whether there is an impediment to the claimant returning to his country of origin – and if the only problem is funding for transport the authority should arrange it.

There is, the Court of Appeal recognised, a fundamental difference between the immigration functions of the Home Office and the social security functions of local authorities. Local authorities are required to make an assessment of immigration status in certain respects. Nevertheless, it would be contrary to the division of functions provided by Parliament to require local authorities to decide for the purposes of Schedule 3 of the 2002 Act whether a non asylum-seeking applicant is entitled to leave to remain. A local authority could not justify a refusal to provide assistance where to do so would deny to the claimant the right to pursue an arguable application for leave to remain on Convention grounds. It is not for the local authority to attempt to step into the Home Office's shoes and determine substantive asylum appeals, unless the claim is obviously hopeless or abusive.

Of particular importance to local authorities in a period of funding cuts and national austerity Dyson LJ further said, at paragraph 75:

„local authorities may not invoke Article 8(2) by reference to budgetary considerations and the rights of others if the effect of so doing will be to require an applicant to return to his country of origin and thereby forfeit his claim for indefinite leave to remain."

3.5 Misfeasance in Public Office.

Misfeasance in public office is a tort claim which can only be made against an official of the State, including officials of local authorities. It requires a high level of *mens rea*, and as such is not often successfully used. In *R (Khazai) v Birmingham City Council* [2010] EWHC 2576 (Admin) a local authority's direction to members of its staff concerning its treatment of homelessness applications that was unlawful on its terms did not give rise to a claim for misfeasance in public office: the staff member responsible for the direction had not acted in bad faith or reckless indifference to its illegality.

4. ELECTION LAW

Following the 2010 General Election a highly unusual court challenge was launched by the defeated Liberal Democrat candidate against the victorious Labour Member of Parliament, Phil Woolas. It was argued that campaign literature used by Mr Woolas had made a number of untrue and damaging allegations against his opponent, who went on to lose the election by only 103 votes, and that those allegations placed Mr Wollas in breach of section 106 of the Representation of the People Act 1983, which governs the conduct of elections. Section 106 provides that a person who, before or during an election, for the purpose of affecting the return of a candidate at the election, makes or publishes any „false statement of fact" in relation to the candidate's „personal character or conduct" shall be guilty of an „illegal practice", unless he can show that he had reasonable grounds for believing, and did believe the statement to be true.

Upon appeal from a specially-convened Election Court, the Divisional Court decision in *Woolas v Parliamentary Election Court* [2010] EWHC 3169 (Admin) (paragraph 87) summarised what was clearly established by the cases in relation to the meaning of the above expression as being that: (1) no Court has laid down a general definition; (2) a distinction must be drawn between a false statement of fact which relates to the personal character or conduct of the candidate and a false statementwhich relates to the political or public position, character or conduct of the candidate; (3) the facts of some cases illustrate what can clearly be viewed as statements in relation to political conduct; (4)

some statements may without much argument be said to relate to personal character or conduct; and (5) what may in certain circumstances be perfectly innocent statements may come within the prohibition if spoken about a candidate without reference to a political issue. The Divisional Court observed (paragraph 105) that Article 10 ECHR does „not protect a right to publish statements which the publisher knows to be false", and continued (paragraph 106):

„The right of freedom of expression does not extend to the publishing, before or during an election for the purpose of affecting the return of any candidate at an election, of a statement that is made dishonestly, that is to say when the publisher knows that statement to be false or does not believe it to be true. It matters not whether such a statement relates to the political position of a candidate or to the personal character or conduct of a candidate when the publisher or maker makes that statement dishonestly. The right to freedom of expression under Article 10 does not extend to a right to be dishonest and tell lies, but s.106 is more limited in its scope as it refers to false statements made in relation to a candidate's personal character or conduct."

The Divisional Court departed from the Election Court to the extent that (paragraph 109) they did not consider that earlier authorities justified the adoption of the construction of section 106 that a false statement can at the same time relate both to a candidate's public and personal character, and said:-

„110 In our view, the starting point for the construction of s.106 must be the distinction which it is plain from the statutory language that Parliament intended to draw between statements as to the political conduct or character or position of a candidate and statements as to his personal character or conduct. It was as self evident in 1895 as it is today, given the practical experience of politics in a democracy, that unfounded allegations will be made about the political position of candidates in an election. The statutory language makes it clear that Parliament plainly did not intend the 1895 Act to apply to such statements; it trusted the good sense of the electorate to discount them. However statements as to the personal character of a candidate were seen to be quite different. The good sense of the electorate would be unable to discern whether such statements which might be highly

damaging were untrue; a remedy under the ordinary law in the middle of an election would be difficult to obtain. Thus the distinction was drawn in the 1895 Act which is re-enacted in s.106 and which is reflected in the decisions to which we have referred ...

111. In our judgment, as Parliament clearly intended that such a distinction be made, a court has to make that distinction and decide whether the statement is one as to the personal character or conduct or a statement as to the political position or character of the candidate. It cannot be both.

112. Statements about a candidate which relate, for example, to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate. In our view, it is of central importance to have regard to the difference between statements of that kind and statements about a candidate which relate to his political position but which may carry a implication which, if not made in the context of a statement as to a political position, impugn the personal character of the candidate."

This led the Divisional Court to conclude that 2 of the 3 statements for which Mr Woolas accepted responsibility were false statements in relation to the petitioner's personal character or conduct, but that the third was not. Mr Woolas was disqualified from his seat in Parliament, barred from standing for election for three years and fined £5,000.[1]

[1] I gratefully acknowledge the assistance I have gained from my colleagues at 11 King's Bench Walk in this Report and their work in various papers written for seminars, and in the updating supplements to the looseleaf publication *Local Government Law*, to which I am a contributor.

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THE JOINT CONFERENCES AMONG THE STATE, THE REGIONS AND THE LOCAL AUTHORITIES

ANNUAL REPORT - 2011 - ITALY

(March 2011)

Prof. Giulio VESPERINI

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1. GENERAL FRAMEWORK

In recent years a discussion has taken place in Italy over the possibility of transforming the Senate of the Italian Republic into a house representing autonomous local and regional bodies. Projects of this sort have been, however, unsuccessful. The institution of a "Federal Senate of the Italian Republic", elected on a regional basis, actually constituted one of the key points of the Constitutional Law approved in 2005 by the Italian Parliament. Yet the law failed to gain the consensus of the electorate in the referendum of 2006, and this caused the fall as well of that very provision for a Federal Senate.

Over time the tendency for the legislature to fragment administrative functions (and subsequently also political ones) has become deeply rooted, to the point that such functions have been dispersed among the various levels of government, making difficult the identification of the people responsible for taking decisions. In order to compensate for this

fragmentation, the law has provided for a number of mechanisms to link the various subjects involved. Such mechanisms are both of a procedural nature, (consider, for instance, protocols of understanding, agreements, consultations, etc); and of an organizational nature, with the formation of a multiplicity of agencies by sector, created to address the needs of individual areas of activity, composed of representatives of the national State, and of local and regional administrations, and located at the central level.

In short, from the first decades of the last century, and increasingly during the first forty years of the Republican era, the representative associations of municipalities and provinces (and more recently those of the mountain communities[1]) have played an important role in the management of the relationship between the State and the system of local authorities. Moreover, the national laws, on several occasions, have devolved to the latter specific tasks to be performed.

Having in mind these contextual elements, the events that, in almost twenty years, have brought the Italian juridical order to establish, define the tasks, and occasionally, to arm with constitutional protections a series of joint conferences, (and specifically those composed of representatives of the various governmental levels) can be easily understood. The conferences serve, at the same time, both a normative and an administrative purpose – in terms of the former, in a period of progressive transfer of the powers of the State to the regions and local authorities, they represent a substitute for the missing constitutional reforms; - in terms of the latter, these conferences may be helpful in rationalizing the offices connecting the various levels of government, and, as such, they also absorb the tasks of a number of preexisting agencies. Finally, the joint conferences serve a political purpose

[1] This refers to a public authority made up of several mountain and foothills municipalities, often belonging to different provinces. Their goal is to promote the value of mountain areas, and to perform functions assigned them as well as those assigned to municipalities.

as well, since they constitute the principal site of negotiation and of shared decision-making on common interests among the most important national public authorities.

We have three important confirmations of the importance that these joint conferences have assumed over time. First of all, the model of the joint conference - that is to say an agency which simultaneously represents of the levels of government below the central State and is a site of negotiations amongst one another - has been adopted at the European level, with the introduction in 1992 of the Council of the Regions. Moreover, the model has spread within the regions themselves; with the establishment of a series of joint agencies between regions and local municipalities, as well as those among various local governments.

Secondly, the functions assigned to the conferences have grown, significantly, over time. Since 1997 around 350 State laws have established consultation with (or the intervention of) a national joint conference, in order to define the technical aspects and/or the implementation procedures of State interventions. It is worth noting also the regional laws assigning functions to the joint agencies that they have established.

Finally, in addition to those governed by law, we can add those functions assigned to the joint conferences by the State, by the regions and by the local authorities. Among these, in particular, it is worth mentioning the use of the national conferences as a site of negotiation and of discussion between the national State and local/regional authorities on the interpretation, the implementation and the adjustment of the new constitutional provisions.

Moving from such a general framework, in what follows the joint conferences operating at the national level (Section 2) are analyzed, and subsequently those operating at the regional level are examined (Section 3).

2. THE NATIONAL JOINT CONFERENCES

The main permanent conferences operating at the national level are the State-Regions Conference, the State-Cities Conference, and the Unified Conference.

In chronological order, the first was the State-Regions Conference, established, first, by a 1983 Presidential decree, and later by a 1998 law. This Conference is chaired by the Prime Minister, or by a minister on his behalf; the presidents of the regions and the ministers concerned with the matters on the agenda for the day are also invited.

Its main functions are the following: first of all, it advises the government on the broad outlines of State legislation that is of direct interest to the regions; it also gives its advice on how to determine the goals of national economic planning and of financial and budget policy; on general guidelines for elaborating and implementing European Union acts concerned with regional functions; and on any issue of regional interest that the Prime Minister decides to present to it.

The conference also promotes and establishes understandings and agreements between the State and the regions; encourages the coordination between State and regional planning; designates the representatives of the regions in agencies relating to the State; insures the exchange of data and information between the government and the regions: determines the criteria for the distribution of financial resources that the law assigns to the regions: elects those responsible for authorities and agencies that carry out activities or provide services relevant to the exercise of functions shared by government and regions; endorses the pattern of agreement type to be used by both the State and the regions at State and regional offices. Decisions are taken by consensus with the government, and, according to the issue, either the unanimous or the majority consent of the presidents of the regions.

The second joint conference is that which, modeled on the first, brings together the representatives of the State and of the local authorities; this is the State-City Conference. Also similar to the other conference is the relevant legislation. It was established, first, by a 1996 Presidential decree and later by a 1997 legislative decree, that codified the rules fixed by the first decree. The conference is chaired by the Prime Minister (or by a minister

delegated by him) and the most important ministers assigned to local matters also take part. It also includes the presidents of three associations representing local authorities (the National Association of Italian Municipalities – ANCI; The Union of Italian Provinces – UPI; the National Union of Mountain Communities – UNCEM); as well as fourteen mayors and six provincial presidents, designated by the respective representative association.

The functions assigned to the State-City Conference are of four types: First, it coordinates the relationship between the State and local authorities. Second, it acquires information and encourages discussion between the representatives of the State and those of local authorities on the issues connected to the direction of general policy relevant to the functions of municipalities and provinces. Third, it discusses and examines problems regarding the kinds and functions of local authorities, finance, and personnel of the latter, and the management of and carrying out of public services assigned to them. Finally, the State-City Conference is expected to promote agreements between State and local officials.

The same1997 legislative decree establishes a third conference, the Unified Conference. This results from the union of the other two and constitutes, therefore, the principal site of unitary representation between regions and local authorities at the central level. The functions of the Unified Conference are similar to those of the two conferences that are part of it. It promotes and establishes understandings and agreements; it advises; it designates representatives to the agencies assigned to deal with matters of common interest to the regions, the provinces, the municipalities and the mountain communities. The Unified Conference then, is involved in the decision-making process for important choices for State policy. For example, it must give its advice on the most important economic and financial planning legislation; it must be consulted by the government on the general direction of the policies of local and regional public personnel; and also here, as in the previous cases, the Prime Minister can bring to the Unified Conference any other issue of common interest to the regions, the provinces, the municipalities and the mountain communities.

Also of interest are the rules that govern the Conference' decision-making processes. The principle is that these depend on a consensus of all three components of the Conference. The position of the regions and of the local authorities are determined internally by the respective groups. As a rule, the decisions are taken by unanimity. But where this is not possible, the will of the majority prevails. Therefore, to the rule of consensus among the representatives of the various levels of government, is added the practice of consensus (not imposed but sought) within and between each of the two subsets of local authorities.

In conclusion, let us consider the overall workings of these institutions.

The first important thing to note is intense activity. Between 1997 and 2010 the three conferences came together on average fifty times a year and have carried out altogether 5647 acts, of which half consist of advisements (2548 of them). These numbers are significantly differentiated, among the individual conferences: to the State-Cities for example, not more than 10% of the overall activity can be attributed, while the State-Regions conference thus far has been the most productive. Other data, however, confirm the growing importance of the conferences in the Italian constitutional order.

A second aspect regards the functioning of the conferences themselves. Most of the work is done, in fact, during special technical meetings between the State and regional administrative functionaries and the representatives of ANCI, UPI and UNCEM, that take place before the conferences. Every year, around three hundred meetings of this kind are held, and, it is in the course of these that, as a general rule, disagreements between the various administrations are settled. Because of this, the conferences, instead of representing effective forums for discussion between the representatives of territorial bodies, ratify the solutions already agreed to in preliminary hearings among the various interested parties.

3. THE REGIONAL JOINT CONFERENCES

Starting in the 1990s, in light of what happened at the national level, nearly all the regions instituted special permanent conferences among the regional and local executives. These, although called by different names, present common characteristics: they are presided over by the representative of the region; they let representatives of local authorities participate (these are chosen, in turn, by the regional organizations of ANCI, and of UPI); they have primarily consultative functions, and the rules for their functioning are somewhat informal.

In 2001, the need for a permanent structural contact between local and regional governments was given express constitutional recognition. In fact, Article 123, final section, requires the regional statues to regulate the council of local authorities, (hereinafter CAL), "as an agency of consultation between regions and local authorities". In the new regional statutes, CAL has either taken the place of, or, in some cases, has been added to the preexisting joint conferences. The new agencies, however, have become active only in about half of the regions, and have had too brief a lifespan for us to have a full understanding of the characteristics and problems related to their operations. To these, therefore, only a few lines are devoted, while instead some further consideration is given to regional regulation.

The new model of regional consultation is different in many ways from its predecessors. As far as its composition is concerned, all the regions have abandoned the formula of joint participation and are now oriented, in contrast, toward an agency restricted to representatives of solely local authorities.

Moreover, in the statutes, no reference is made to the representative associations of local authorities and only a few regional laws on implementation provide for their presidents the right to be part of the agency, or provide for their participation without voting rights. Therefore, unlike in the past, the local authorities directly elect their representatives to the CAL, without the mediation of ANCI and UPI.

Third, many regions, alongside the traditional consultative functions, assign to these agencies additional functions, such as those of regional legislative initiative; of proposing and of consultation; of naming or designating the local representatives to the regional agencies. Particularly interesting are the provisions of a few regions that assign to the CAL the power to ask the council and the president of the region to promote constitutional review in cases where a State law has violated a local function. The Italian Constitution, unlike its provisions regarding the State or the regions, precludes the municipalities and the provinces accessing the Constitutional Court directly in order to ask its protection of their role. Regional laws such as those mentioned do not resolve the problem (and cannot do so), because they leave to the regions the decision to develop further the request from local authorities; and also because they concern only injuries to the functions assigned to local governments by the State, not also those imposed by the regions themselves. But they represent, anyway, a tool that the local authorities can use to protect, within the limits allowed by the current constitutional frame work, the positions guaranteed them by the very Constitution. On a more general level, this is another example (alongside those of the conferences that function as substitutes with respect to the Federal Senate) of the use of joint conferences to act as surrogates for the unsuccessful proposals for constitutional revision.

A few quick words on how they work in practice. The CAL primarily carry out a consultative function (in general a successful one) on administrative measures and proposed regional laws. On the contrary instead, they rarely participate in the stipulation of understandings, conventions, and procedures for designating. The areas in which they primarily operate are those of tourism, education, commerce, fishing and land management.

Unlike what is provided by law, the representative associations of the local authorities continue to have a significant weight in these agencies. For instance, even in cases in which the regional law expressly assigns to the CAL the function of designating the members of a commission, the latter, in reality, follows the proposals of the presidents of ANCI and UPI. The development of CAL's advisement is still almost always preceded by the technical conferences (called by various names) in which the regional government and the associations representing the local authorities take part In general, it is the conclusion

arrived at in this forum that conditions the content of the advisement of the CAL. Therefore, even if formally they no longer take part, in reality, the associations of local governments nevertheless have a determining weight on the decisions of the CAL.

A last consideration needs to be made. If we compare the CAL and the national joint conferences, we can find common characteristics. First of all, both of them carry out primarily a consultative function in relation to state officials or regional agents, and they draft opinions which are nearly always favorable. Both are agencies for ratifying accords already reached between the executives (national, regional) and the representative associations of local or regional authorities in the course of special preparatory meetings. Finally, in both cases, in the dialogue of the local governments with the State or the regions, even if in different forms, the professional associations of local authorities are of primary relevance.

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POLITICAL AND ADMINISTRATIVE ORGANIZATION OF THE ITALIAN REGIONS

ANNUAL REPORT - 2011 - ITALY

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Prof. Gianluca GARDINI

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1. THE CONSTITUTIONAL FRAME

The reform of the Title V, Part. II, of the Italian Constitution, carried out by the Constitutional Act No. 3 of 2001, has modified the structure of the Republic, as was enacted by the Constitution of 1948: the new version of the art. 114 Cost. confers equal status to the different local government bodies on the inside of the republican's system, which are have now characterized by a form of self-government. Therefore, nowadays the Italian Republic is formed by those bodies (comune, provincia, città metropolitane, Regioni e Stato) which formerly represented only a mere administrative division of the State.

In this way, the art. 114 Cost. fulfils the content of the art. 5 Cost., that "recognizes" and "promotes" the local government bodies, assigning them a specific autonomy, that before the reform was given only to the Regions.

Pursuant the combined provisions of art. 5 and 114 Cost., a new structure of the State has arisen, with pivotal consequences about the status of the local government bodies, the allocation of responsibilities between the different level of government and in general the system of the sources of law.

Therefore, an approach to the legislative frame about the political and administrative organization of the Italian regions cannot leave aside an (even briefly) analysis of the new Title V, Part. II of the Constitution.

With the changes provided in 2001 the Regions can choose the form of government, while the pivotal principles about organization and functioning (art. 123) assign to the Regions a general legislative power (art. 117, par. 2, 3 and 4) whereas before the reform the Regions could legislate only about a few specific areas. Besides, the new constitutional provisions annul the preliminary control of the Government about the regional legislation (art. 127); expand the power of the Regions about the regulation (art. 117, par. 6); redefine the whole administrative system, moving from the principle of the subsidiarity (art. 118) and promote the financial autonomy of the Regions and the local administrative bodies (art. 119).

Basically, the reform of 2001 focused on each local government bodies, giving them much more autonomy than before, so that the general power to legislate does not belong to the State any longer.

Actually, as we are going to see, the situation cannot be represented so straightforwardly, because the State maintains the exclusive power to legislate about some areas, crossing the regional competence. This can certainly affect the regional legislative power, even in those areas where the Constitution assigned to the regional exclusive competence. In this way, even after the reform, the State can still have a paramount role among the political levels which compose the Italian Republic.

The Constitutional Court, speaking about the health care system, says that there are no specific areas which belong to the exclusive competence of the State, but instead there is a general power of the State to legislate about all the areas, in order to guarantee the everybody's right to get the health care, throughout the Country, without that the regional legislative power can narrow that right (decision 26 June 2002, n. 282).

Moreover, the Constitutional Court considered that the art. 114 Cost. does not mean that all the different political bodies are equal and set at the same level (decision. no. 274 of 2003).

1.1 The implementation of the vertical subsidiarity's principle

It has been already passed ten years since the reform was approved, therefore it is time to see how the situation has evolved. It is pretty easy to recognize that the original purpose of the reform is different from the current scenario, firstly with reference to the vertical subsidiarity's principle.

Contrary to the general expectations, that principle could face the possibility not to be implemented in the legal order, keeping instead only a theoretical value, which the State is going to draw an inspiration from.

With the reform of the Title V, the municipalities ("Comuni", i.e. the basic local government) should have had the general administrative competence. The legislator thought that the implementation of the vertical subsidiarity's principle in the art. 118 Cost. would have been useful to protect the preeminent role of the municipalities (Comuni) about the regulation of the administrative functions. In other words, with the reform of the art. 118 Cost., the power of the national and regional legislator should have become weaker than before, precisely because the power of the local governments should have become stronger, at least regarding to the administrative regulations.

Regarding the organizational structure, the Regions should have kept only those functions related with guiding and coordinating responsibility and not referring to any operative decisions. Therefore, the original idea was that the regional structure would have been simplified, because most of the offices would not have been useful any longer, given that many competences should have been conferred to the local governments.

Should be noticed, however, that the reform of 2001 states that the general administrative competence of the local government would not have operated automatically. Instead, the efficiency of the whole system was related with a double legal source: the State had to identify the regional and local competences inside of the areas which are exclusive competence of the State; the Regions had to implement the administrative functions regarding to those areas where both State and Regions can still legislate and to the areas where the Regions have an exclusive legislative competence.

In this way, the State and the Regions had the opportunity to postpone and in general make less intense the devolution of the administrative functions to the local governments. For this reason the State and the Regions are retaining some important administrative functions.

Regarding to the national legislation, this effect has been caused partly by the Constitutional Court, with the famous decision no. 303 of 2003, where the Court established the so called “subsidiarity take over”. With this expression the Court said that, if the lower local governments (Comuni or Province) did not use properly the administrative functions, the upper bodies (Regions or State) could take over those functions from lower level, in order to guarantee the standard respect of the rights. In other words, the general administrative power belongs to the political level which is closer to the population (Comuni or Province), but – if it for some reasons is unable to operate – the next closer political level (Regions or State) is entitled to use that power.

This “subsidiarity take over”, however, cannot be focused only on the administrative functions, but can be related also with the legislative power. Once that State exercised the administrative function, the State itself could also provide the legislation in the same area.

In this way, the contraction of regional power may appear not so unreasonable, because otherwise would be impossible to exercise some essential functions.

Should be noticed that the "subsidiarity take over" is not automatic, but requires a procedure which involves both the State and the Regions. The public interest could be understood only with mutual consent and collaboration between the parties.

The meaning of subsidiarity, as appears in the decision no. 303 of 2003, has two different aspects. First, subsidiarity means that the legislative and administrative functions could be attracted by the upper political level (ascending attitude). Second, with the consent of the different political levels involved, subsidiariety has the capacity to make flexible the rigid order of the legislative competence stated by the art. 117 Cost (dynamic attitude).

The consent of the Regions (and the local bodies) became in several cases, an "essential element" (Constitutional Court, decision no. 233 of 2004) used to test the compatibility of national laws with the Constitution.

The analysis of the decisions provided after 2003 shows that the Constitutional Court has allowed increasingly the "subsidiarity take over". The Court allowed the State to exploit the functions related with secondary regulation, and not only with the legislative power (decisions no. 214/2006, 168/2008, 76/2009), and also permitted the State to regulate the whole administrative regional procedure (decisions no. 88/2007, 165/2007).

From this point of view, the "subsidiarity take over" is not only an exceptional tool in order to guarantee the standard respect of the right throughout the country, but becomes an ordinary way used by the State to regulate functions which are formally already devolved to local government.

Moreover, there are some doubts about the use of the regional consent, which allows the State to take over relevant competences from the Regions. Specifically, it would be better if the law chose the criteria to identify how the Regions could effectively give the consent to use their power. Also, the law should decide when it is required a consultation with the Regions, or simply an advise, or instead when it would be necessary a proper agreement

between the Regions and the State. On the contrary, the Constitutional Court has used a criterion based on a case by case judgement in so far, even if it admitted that the Parliament should provide with a specific law (Constitutional Court decision 219/2005).

In this scenario, the regional legislation did not completely adapt itself to the new constitutional structure. This result is due to two main reasons: on one hand, the uncertainty created by the list of subjects of the art. 117 Cost. has caused many disputes between State and Regions; on the other hands, the lack of funds put a stop to the implementation of the financial autonomy, which is expressly recognized by the new art. 119 Cost.

This situation, as described above, seems to find confirmation even in the statistical data about the financial transfer from the Regions to the other smaller local governments (Comuni, Province e Comunità montane). In fact, this statistical data can be considered a revealing sign of the consequence of the constitutional reform. Actually, the results are very different from those expected when the reform was approved.

The financial transfers from the Regions to the local bodies, as average for the period 2006 – 2009, were 18,1% of the total amount of the expenditure. There are big differences not only between the Regions which have a particular form of autonomy under special Charters (13,7%) and the others (20,8%), but also between the different geographic areas.

Regarding the Regions with special autonomy, the most high rate is in the North Italy (21,9%, whereas in South Italy is only 9,3%), but should be noticed that this result depends on the fact that some Regions (Valle d'Aosta, Friuli Venezia Giulia e Province autonome di Trento e Bolzano) receive the transfer of the funds which are addressed to other local governments situated in their territories, whereas all the other Regions receive only their own funds.

On the opposite, the other Regions exploit the principle of subsidiarity more in Centre and South Italy (circa 24%) than in North Italy (16,9%). Also, the Regions with ordinary Charters used the subsidiarity more in the past, for example in the period 2002 – 2005: now we can see that the amount of financial transfers to local government is decreasing everywhere but in South Italy, where is it stable around 23%. According to this financial

transfer data, seems that during this years the principle of devolution has been carried out mainly in the Regions of the South Italy. This situation partly is caused by the fact that the Regions of South Italy began the devolution later than the Region of North Italy, which are used to doing that since 1970.

As described above, the regional legislation has not yet adapted to the changes provided with the reform of 2001. Another example of this situation is represented by the art. 117, par.2, lett. p), Cost., that entitle the State to exercise exclusive legislative competence about "electoral election, governance of local bodies". There has been no implementation of this article, so the regional legislation is still the same.

The new structure of the Republic, as appears after the reform of 2001, requires a general and organic redefinition of the local government, and the first move, at this regard, is represented by the identification of the fundamental functions of the different political level. The redefinition of the local government as a whole has been felt by the Parliament, which on June 30, 2010 has approved a bill for the "Identification of the fundamental functions of Province and Comuni, simplification of the regional and local government legal order. Devolution." This bill comes from the necessity to re-organize the local government, in order to reach the implementation of the art. 117, par. 2, lett. p) e 118. However, some pivotal points of this bill (called "Calderoli" from the Minister who proposed it) have been already overcame by other Acts (for example D.L. no. 78 of 2010), which makes more difficult the chance to get an implementation of the reform.

2. THE POLITICAL ORGANIZATION OF THE REGIONS

The form of government of the Regions is deeply influenced by the Constitution, which provides a set of detailed rules on regional governance and regulate the relationships between decision-making centres operating at the regional level. In this way, although the art. 123 Cost. allows the Regions to choose their own form of government, in concrete the freedom of choice is not so wide.

First, the Constitution set the compulsory bodies of the Regions in Regional Council (Consiglio Regionale), the executive body of the administration (hereinafter simply "Giunta") and its President. Even the name of this bodies cannot be changed, as the Constitutional Court provided with the sentences no. 106 and 306 of 2002.

There is another body, called Council of local autonomies (Consiglio delle autonomie locali), provided by art. 123 Cost. This new body is considered necessary to create a collaboration between the Region and its local bodies. According to the new Regional Charters already approved, the members of the Council of local autonomies are also members of the local government. Also, the new regional Charters say that the Council of local autonomies has a consultative function, which in specific cases can be so relevant to prevent the procedure from its finalization.

The new version of art. 123 Cost. (as modified by Constitutional Act no. 1 of 1999) set the election rules of the Region's bodies, unless the regional Charters state in a different way. For the first time, the Regions can decide which kind of form of government they want, but always within the boundaries set by the Constitution. Actually the Constitution allows two possible models of government: a "standard" model, which is going to be used unless the approval of the new regional Charters, and a "derogatory" model. The first one is provided by the combined provision of art. 122, par. 5 e 126 par. 3 Cost: the President of the Giunta is elected directly the population. There is also a principle – aut simul stabunt, aut simul cadent – which says that if the President of the Giunta does not hold the office any longer (for resignation, retirement, removal), the Regional Council and the Giunta have to resign. However, this principle is working only if the regional statutory frame chose the direct election of the President of the Giunta. It is possible that the regional Charter chose a different rules about the election, as provides the art. 122 Cost.: even if in theory there are many possibilities, practically the only different solution appears to be that the President is nominated by the Regional Council.

Nowadays, all the Regions adopted the standard model, but some Regional Councils tried to pass Charters which could avoid the effects of the principle aut simul stabunt, aut simul cadent, but keeping the direct election of the President. The Constitutional Court

decided that there is no chance to avoid that principle, if the Regions want the direct election of the President (decision no. 304 of 2002, Charter of Region Marche, and no. 2 of 2004, Charter of Region Calabria). The only way to avoid the principle aut simul stabunt, aut simul cadent is that the President has to be nominated by the Regional Council.

The new electoral system about Regions, according to the new art. 122, par. 1, Cost (as modified by Constitutional Act no.1 of 1999), states that there are two different legal sources to determine the cases where the President or the other members of the Giunta or the Council are not eligible: the national law, which should provide a general framework, and the regional law, which should provide the specific rules. The Act n. 165 of 2004, the national law just described, identified the fundamentals principle about the electoral regional legislation and set in 5 years the duration of tenure of the elected members. The art. 122, par. 2, states that nobody could be at the same time member of another Regional Council or another Giunta or the European Parliament.

Nowadays not every Regions with an ordinary Charter approved their own electoral law: anyway, the Act. No.1 of 1999 stated that the election of the President has to be done when there is the election of the Regional Council; the candidates for the presidency are those who are the first in the electoral lists; the President is the candidate who is voted the most; the President belongs de jure to the Regional Council.

Regarding the transitional discipline, the sentence of the Supreme Court no. 16898 of 2006 (Corte di Cassazione) stated that the national law will be into force unless the Region will provide the case of ineligibility for the position of regional councillor.

After ten years since the approval of the Constitutional Act n. 1 of 1999, the Regions are still working on their organization. As it could be imagined, several Regions have dealt with the arrangement and the approval of the new regional Charters under art. 123 Cost., the review of the regulation order, the approval of the laws to create new statutory bodies (so called Consulte statutarie e i Consigli delle autonomie locali), the review of the electoral law. Some Regions have not yet approved the new Charter (Basilicata, Molise e Veneto), some other have instead modified their Charters (Piemonte, Emilia-Romagna, Toscana,

Umbria, Liguria, Marche e Calabria). Some Regions have approved changes in their internal organization and laws which have implemented their Charters; other regions have only modified the electoral law (Umbria, Campania, Toscana, Piemonte e Calabria. In Calabria, they have approved the primary election for the President of the Giunta.)

The Regions which modified their Charters have generally approved large reforms of their structure and internal organization, although the art. 123 Cost. would set only a few basic rules related with the form of government and fundamental principles. The Constitutional Court agreed with those actions, operating a distinction between the "compulsory content" and the "possible content" of the regional Charter (decisions no. 2/2004; 372, 379 e 379/2004).

The Constitutional Court defined the meaning of the art. 123, which states that the regional Charter has to be in "harmony with the Constitution": it means that there must be no contrast between the regional Charter and the Constitution, avoiding the risk that the Charter would be respectful in theory, but disrespectful practically (decision no. 304/2002).

3. THE ADMINISTRATIVE ORGANIZATION OF THE REGIONS

The Regions have a complex structure, whose design can be decided by the Regions by means of the Charter and the regional laws. Even under this point of view, the recent Constitutional reforms expanded the autonomy of the Regions. On one side, according to the art. 123 Cost., the fundamental principles of organization and functioning have been chosen by the regional Charter, even though they have to respect "the harmony of the Constitution"; on the other side, according to the new version art. 117, par. 4, Cost., the organization of the offices and the other local regional bodies belongs to the exclusive legislative power of the Regions, whereas before the reform the State could regulate this area with its own law.

Moreover, the new version of the art. 117, par. 2 Cost., confirms the extension of the regional legislative autonomy, when it is referring to the "administrative organization of the State and the other national bodies" (lett. g).

The Constitutional Court stated that this rule cannot allow the State to regulate all the public bodies operating in all the areas, but has to be referred to the specific functions assigned to the single public body and to the specific area in which it operates (sent. 270/2005) However, the national law can indirectly affect the regional autonomy: for example, speaking about the health care system, there are regional bodies (called "aziende sanitarie regionali") which have been given that task. Since 1992, the national Parliament stated that these regional bodies belong to the regions, but in the meantime it has regulated their organizational structure. In Italy, the health care area is one of those that both the State and the Regions have the power to regulate. It means that, after the Constitutional reform of 2001, the Regions are entitled to regulate the organizational structure of health care system but always complying with the State rules, which contains the fundamental principles.

Another example of the fact that the State can set a limit to the regional autonomy is that the State can force the Regions to follow specific organizational rules when this is necessary for the safeguard of the general budget or the respect of a stability agreement (national or European).

Moreover, the Regions have to comply with the national law even about the status of the civil servants working for the Regions. For example the recent reform of this area, operated by the Act no. 15 of 2009 and no. 150 of 2009, appears to be binding on the regional organization.

Finally, all the Regions have a so called "direct and indirect" organization. The first one is represented by the organizational structures which are working for the executive branch (Giunta) or instrumental to its functioning, generally formed by departments and offices, related to single members of the executive board ("assessori") and divided into line and staff categories. Also the Regional Council have its own autonomy and its own employees, so to guarantee its full independence from the regional executive branch. Another

distinction can be made between central and peripheral structure. Among the peripheral structures a specific reference has to be made to the regional liaison office with the European Union, which are established by all the Regions since 1996.

The "indirect" regional organization is pretty wide, formed by several bodies and agencies controlled by the Regions. The most part of the regional Charter approved after the recent constitutional reforms confirmed that the Regions exploited this "indirect" organization, without any relevant difference with the past. For this reason, the doctrine criticized that choices, with specific regard to the too wide "indirect" organization established by the Regions, while the Regions should only orient the actions of the local government instead of building their own organization in order to manage directly the administrative functions.

However, the regional administrative organization has been indirectly influenced by the reform of the national organization (privatization and, more generally, the decrease of the direct action of the State to the economy); in the last years, as a matter of fact, the national Parliament forced the Regions to decrease the public expenditure and to cut their instrumental bodies (Decree no. 78 of 2010), in order to guarantee the respect of the general balance and limit the public debt.

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THE FUNCTIONS OF THE REGIONS

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1.

The functions of the Regions are governed by the Constitution of the Republic of Italy in the fifth title of the second part (articles 114-133), which has been profoundly modified by the constitutional law of 18th October 2001, no. 3.

The core of regional autonomy is represented by lawmaking and administrative functions. The Constitution, moreover, provides for the participation of the Regions in the central organization of the Italian Republic also through the exercise of other functions. In particular:

a) each Regional Council can propose draft laws to the Chambers[1];

b) five regional Councils can request the referendum to abrogate, either totally or partially, a law or an act having the validity of a State law[2];

[1] Art. 121, second paragraph, Constitution.

c) five regional Councils may request the referendum on constitutional laws approved at second vote by a majority of less than two thirds of the members of each Chamber[3];

d) for the election of the President of the Republic, the Parliament, sitting in full session of the members of both Chambers, is supplemented by three delegates per Region who are elected by Regional Councils in accordance with procedures that insure minorities are represented; the Valle d'Aosta Region has only one delegate[4].

The first three functions were not effectively exercised in 2010. The President of the Republic was elected in 2006 and remains in office for seven years.

Article 11 of Constitutional Law 3/2001 has finally determined that Parliamentary rules may provide for the participation of representatives of the Regions, of the autonomous provinces of Trento and Bolzano and of local bodies in the Parliamentary Committee for regional affairs. When a draft law, relating to matters in which the Regions enjoy concurrent legislative power or regional financial autonomy and financial autonomy of local authorities, contains provisions on which the Parliamentary Committee on regional affairs, as thus supplemented, has expressed a contrary advice, or a favourable advice that is subject to the introduction of specifically formulated changes and the Committee which carried out the examination at the referral stage has not accepted such changes, the Assembly must decide by absolute majority of its members

This provision, however, has not been implemented and the problem of the participation of the Regions in the formation of new State laws which may impact upon regional and

[2] Art. 75, first paragraph, Constitution.

[3] Art. 138, second paragraph, Constitution.

[4] Art. 83, first paragraph, Constitution.

local autonomy has not been resolved in a manner which may be considered satisfactory (see *The conferences between State, Regions and local authorities)*. It is very common for the Regions to impugn new State laws before the Constitutional Court for infringement of their autonomy.

2.

The lawmaking functions of the Regions are regulated differently for the fifteen ordinary Regions and for the five Regions governed by special Statute.

According to the primary text of the Constitution, the ordinary Regions were granted legislative power over those matters indicated in a list of peremptory character. This legislative power was required to be exercised within the limitation of the fundamental principles laid down or inferable, for each matter in question, by and from the laws of the State, so it was referred to as *concurrent* legislative power; moreover it was also circumscribed by the national interest and the interest of the other Regions[5]. The residual legislative power, for all matters other than those attributed to the concurrent legislative power of the Regions, vested in the State. However State laws could grant the Regions the power to issue legislative rules for their implementation[6].

However for the five special status Regions, legislative power was governed by the relevant special Statutes adopted by constitutional law. The Statutes provided for three types of legislative power: *a)* a concurrent legislative power, corresponding to that of the ordinary Regions; *b)* a legislative power referred to as *exclusive* and not subject to the

[5] Art. 117, first paragraph, Constitution (primary text).

[6] Art. 117, second paragraph, Constitution (primary text).

limitation of the fundamental principles established by or inferable from the laws of the State, but only to the limitations of the general principles of the legal order of the State, of the fundamental principles of the economic-social reforms of the Republic, of compliance with international obligations and national interest; *c*) a legislative power of integration, as well as of implementation, of State laws. Each Statute, however, established separate lists of matters for the various types of legislative power. The Statute of the Valle d'Aosta Region provided only for exclusive legislative power and the power of integration and implementation. The Statute of the Trentino-Alto Adige Region granted legislative, exclusive and concurrent legislative power also to the Provinces of Trento and Bolzano, over matters included on lists that were different to lists of those matters attributed to the legislative power of the Region.

The Constitutional Law of 18th of October 2001, no. 3 has profoundly reorganised the distribution of legislative power between State and ordinary Regions. A number of general limitations have now been established, common to the legislative power both of the State and of the Regions: namely compliance with the Constitution, the obligations deriving from European Union law and those deriving from international obligations[7].

The limitation of compliance with the Constitution was already implicit in the old system due to the binding force of the Constitution, which prevails over all other sources of law; however the other limitations are new. The limitation of the obligations deriving from European Union law allows the State to impugn regional laws before the Constitutional Court, to obtain a declaration of constitutional illegality[8] and thus promptly to remove the conflict between regional laws and European rules, even those that are not directly

[7] Art. 117, first paragraph, Constitution.

[8] Constitutional Court, 3rd of November 2005, no. 246; id., 23rd of March 2006, no. 129.

applicable. The limitation of compliance with international obligations, which historically originated in the analogous limitation placed on the exclusive legislative power of the special Regions, facilitates the closer integration of the whole legal order of Italy with the international legal order. The Constitutional Court has highlighted this limitation, stating that the provisions of the European Convention of Human Rights represent *intermediate law* in cases held to determine the constitutional legitimacy of internal sources of law: the infringement by the State law of provisions of the European Convention of Human Rights therefore becomes a constitutional infringement which may be censured by the same Court[9].

According to the Constitutional Law 3/2001, moreover, there are now three types of legislative power:

a) the exclusive legislative power of the State, which is exercised in relation to the matters indicated in a list of peremptory character[10]; *b*) the concurrent legislative power of the State and Regions, which is exercised in relation to the matters indicated in another list, also peremptory in character[11]; *c*) finally the residual legislative power of the Regions, in relation to all matters other than those indicated in the two lists[12]. The Regions exercise concurrent legislative power, as mentioned above, in compliance with the fundamental principles laid down by State laws. After the reform, the Constitutional Court held that the State in regard to matters of concurrent legislative power may only lay down fundamental principles, but not detailed provisions, not even of a supplementary (i.e. applicable only in

[9] Constitutional Court, 24th of October 2007, nos. 348 and 349.

[10] Art. 117, second paragraph, Constitution.

[11] Art. 117, third paragraph, Constitution.

[12] Art. 117, fourth paragraph, Constitution.

the absence of regional provisions) or transitory character (i.e. destined to cease application in all Regions following the establishment of Regional legislative provisions)[13]: the distinction between State and regional legislative power is now more well-defined than in the past.

The differences from the old system are significant. The residual legislative power now resides with the Regions, and no longer with the State. The national interest is no longer envisaged as constituting a limitation on regional legislative power. The list of the matters of concurrent legislative power does not correspond with the old list of the primary text of the Constitution. State laws can no longer grant the Regions the legislative power of implementation.

The reform of 2001 also regulated the power to enact regulations, which is still a lawmaking power, but at a level subordinate to legislative power. The power to enact regulations belongs to the State in the areas of exclusive legislation, in the absence of delegation to the Regions; in all other matters the power to enact regulations belongs to the Regions[14].

Constitutional Law 3/2001 did not affect the legislative power of the Regions subject to special Statute and of the autonomous provinces of Trento or Bolzano, but provided for the possible future adjustment of the individual Statutes. Until this adjustment occurs, the provisions of the same law apply also to the special Regions and to the autonomous

[13] Constitutional Court, 26th of June 2002, no. 282; id., 27th of November 2007, no. 401; id., 30th of December 2009, no. 340.

[14] Art. 117, sixth paragraph, Constitution.

Provinces for those parts in which wider forms of autonomy are provided for than those they have already been granted[15].

The Government, following appropriate legislative delegation, has identified the fundamental principles, as inferable from current legislation in force, only in three matters of concurrent legislative power[16]. However the Parliament has not made a contribution to defining the areas of exclusive legislation of the State and the new matters of concurrent legislative power, nor has it issued new general policy laws laying down the fundamental principles in these matters: the uncertainties about the extent of these matters and about the fundamental principles, which must be inferred by means of interpretation from the legislation in force, have translated into a significant body of litigation before the Constitutional Court. The Statutes of the special Regions, finally, have not been adjusted to the Constitutional reform. During the course of the 14th legislature (2001-2006) the Parliament undertook not so much to fully implement the Constitutional reform of 2001[17],

[15] Constitutional Law 18th of October 2001, no. 3, art. 10.

[16] Legislative Decree 2nd of February 2006, no. 30, in the area of the professions; Legislative Decree 12th of April 2006, no. 170, in the area of harmonisation of public budgets; Legislative Decree 18th of April 2006, no. 171, in the area of savings banks, agricultural banks, credit institutions of a regional character and land and agricultural credit institutions of a regional character. The legislative delegation had been provided by Law 5th of June 2003, no. 131, art. 1, paragraph 4.

[17] As a result of a broadly prolix judgement, the Law of 5th of June 2003, no. 131, *Provisions for the adjustment of the legal order of the Republic to the Constitutional Law of 18th of October 2001, no. 3*, did not provide any genuinely useful elements for the full implementation of the constitutional reform.

but rather to approve a draft constitutional law proposing a complete reform of the second part of the Constitution, relating to the organization of the Republic, including the system of regional and local autonomies[18]. The constitutional draft law was approved by the Parliament at the end of 2005, but a popular referendum was requested on foot of it[19] and the draft law was rejected[20]: the reform therefore was not completed. In the 15th legislature (2006-2008) there were no significant initiatives. In the 16th legislature, which opened in 2008, the political initiative of the Government and of the Parliamentary majority focused on themes referred to in political jargon as *public property federalism* and *fiscal federalism*. However, these are overblown terms, which relate only to the transfer of State property to ordinary Regions, Provinces and Communes and of a partial reform of the system of financing of these entities.

[18] Parliamentary Acts Senate, XIV legislature, constitutional draft law no. 2544, presented by the President of the Council of Ministers Berlusconi on 17th of October 2003.

[19] The referendum was promoted by fifteen Regional Councils and, separately, also by over 800,000 electors.

[20] The referendum took place on 25-26 June 2006 and registered a wider majority of votes against (15,791,293, equivalent to 61.3% compared to 9,962,348 votes in favour, equivalent to 38.7%).

These reforms have been implemented by ordinary delegation law, which has been followed by a number of Legislative Decrees[21]. The implementation of these reforms will still require other provisions as well as a suitable period of time. No new state initiatives relating to regional legislative power have, however, been implemented.

The general body of legal opinion, based on the broad case law of the Constitutional Court, holds that the new provisions introduced by Constitutional Law 3/2001 are more formal than substantial: the regional legislative power is characterised much more by continuity with the old constitutional order than by radical innovation. The State has exclusive legislative power in a number of areas, commonly referred to as *transversal*, such as the safeguarding of competition or the establishment of the essential levels of the services corresponding to those civil and social rights which must be guaranteed throughout the national territory: these *transversal* areas give the State significant room for intervention in regulating matters relating to concurrent legislative power and also the residual power of the Regions. The national interest, which is no longer specifically referred to in the Constitution, has been retrieved through the limiting effect of fundamental principles in the matters of concurrent legislation and a number of areas of exclusive legislative power of the State: for example, the system of civil and criminal law and protection of the environment, the ecosystem and cultural assets, in addition to the *transversal* areas just mentioned, allow the State to broadly influence regional legislative

[21] The Law of 5th of May 2009, no. 42, Delegation to the Government in the area of fiscal federalism, in implementation of article 119 of the Constitution; Legislative Decree of 28th of May 2010, no. 85, Grant to Communes, Provinces, metropolitan Cities and Regions of property in accordance with article 19 of Law of 5th May 2009, no. 42; Legislative Decree 26th of November 2010, no. 216, Provisions relating to the determination of the costs and standard requirements of Communes, metropolitan Cities and Provinces.

autonomy. In the very many cases in which a legislative intervention is referable at the same time to several areas within the competence partly of the State and partly of the Regions, the Constitutional Court - applying the criterion of the *prevailing area* or the principle of *loyal collaboration* between State and Regions - has contributed to a further reduction of the areas of regional autonomy potentially acknowledged by the reform. The strict division of legislative power between State and Regions has been, finally, attenuated by a judgement of the Constitutional Court of 2003, mentioned below, and by subsequent similar judgements of the Court which followed it.

3.

The primary text of the Constitution established the principle of parallelism for the administrative functions of the Regions: the Regions were entitled to exercise administrative functions in the same matters in which they held legislative power, except for the local interest functions which could be granted by State law to Provinces, Communes or other local authorities[22]. State law could also delegate to the Regions the exercise of other administrative functions[23]. The Regions were generally expected to exercise their administrative functions by way of delegation to the Provinces, or other local authorities or by availing of their offices[24]. The VIII transitional and final provision of the Constitution imposed on the Republic's laws the duty to regulate, for each branch of public administration, the transfer of State functions to the Regions: this provision, despite its location, has been deemed to be non-transitory, but rather of permanent character. In effect,

[22] Art. 118, first paragraph, Constitution (primary text).

[23] Art. 118, second paragraph, Constitution (primary text).

[24] Art. 118, third paragraph, Constitution (primary text).

the most important transfers of State administrative functions to the Regions occurred in three stages, always by way of Legislative Decrees subsequent to the delegation law. The first regionalisation occurred in 1972, immediately after the first election of the Regional Councils[25]. The second regionalisation occurred in 1977[26]. The third regionalisation occurred in 1997-98, with significant innovation over the past[27]: the delegation law was aimed at *granting* functions to Regions and local authorities, thus including the transfer, delegation and assignment of functions; the fundamental criterion of the delegation was the principle of subsidiarity, already introduced into the Italian legal order through the European Charter of local self-government[28]; the areas relating to the assignment of

[25] Presidential Decree 14th of January 1972, nos. 1-6; Presidential Decree 15th of January 1972, nos. 7-11; these Legislative Decrees were issued following the legislative delegation provided for by Law 16th of May 1970, no. 281.

[26] Presidential Decree 24th of July 1977, no. 616, issued following the legislative delegation provided for by the Law 22nd of July 1975, no. 382.

[27] The legislative delegation was provided for by Law of 15th of March 1997, no. 59, followed by various Legislative Decrees: Legislative Decree of 4th of June 1997, no. 143; Legislative Decree of 19th of November 1997, no. 422, modified by Legislative Decree of 20th of September 1999, no. 400; Legislative Decree of 23rd of December 1997, no. 469; Legislative Decree of 31st of March 1998, no. 112, modified by Legislative Decree of 29th of October 1999, no. 443.

[28] The Law of 30th of December 1989, no. 439 had authorised the ratification of the *European Convention relating to the European Charter of local self-government,* signed in Strasbourg on 15th of October 1985; the principle of subsidiarity was provided for by the Charter in article 4, paragraph 3.

functions were not specifically indicated, and only the excluded matters were mentioned. The third regionalisation therefore involved the devolution of new and important administrative functions to the Regions.

The Statutes of the special Regions equally provide for the principle of parallelism between legislative functions and administrative functions; they also provide that the transfer of state administrative functions should occur by appropriate rules implementing the Statutes, issued by the Government subject to the advice of a joint State-Region committee.

Constitutional Law 3/2001 has also profoundly modified the constitutional rules on the administrative functions of the ordinary Regions. The principle of parallelism between legislative functions and administrative functions has been abandoned and replaced by the principle of subsidiarity, together with the principles of adequacy and differentiation. What has been clarified, however, is that the new constitutional principles on the administrative functions of the Regions do not apply automatically, but require the intermediation of new State laws. But after the constitutional reform, no new and broad-based transfer of State administrative powers to the Regions was put in place. It is widely considered that the administrative autonomy of the Regions has increased only as a result of the third regionalisation, considered as a reform of *federalism with an unchanged Constitution,* to which the Constitutional Law 3/2001 subsequently granted constitutional cover, but without significant new effects.

The Constitutional Court has made it clear, moreover, that the State may continue to exercise a significant role in relation to important national interests in the matters of regional legislative competence, even after the constitutional reform. In particular, State law in these areas may provide for subsidiarity in relation to administrative functions of an intrinsically unitary character, with particular regard to tasks relating to the planning and execution of public works of strategic importance for the country, even if based on agreements between State and Regions; moreover, this would involve the State recovering

legislative power over these functions[29]. The principle of subsidiarity, therefore, may operate not just in favour of the Regions, Provinces and Communes, but also in favour of the State, and may have repercussions – still in favour of the State – also on the constitutional distribution of legislative power between State and Regions.

What has been evident is not just the absence of any new transfer of administrative functions to the Regions. A number of significant new laws have in fact strengthened, for the relevant areas, the role of the state administration: for example, the cultural heritage and landscape Code[30], and the so-called environment Code[31]. The new State laws in several areas have not given true prominence to the principle of subsidiarity and they also lack adequate connections to ensure loyal collaboration between the State and regional administrations (see *The conferences between State, Regions and local authorities*).

[29] Constitutional Court, 1st of October 2003, no. 303.

[30] Legislative Decree of 22nd of January 2004, no. 42, subsequently repeatedly amended.

[31] Legislative Decree of 3rd of April 2006, no. 152, *Rules on the environment*, also repeatedly amended.

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LE SYSTÈME DES COLLECTIVITÉS LOCALES – PRINCIPES ET DONNÉES

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SOMMAIRE

La réglementation italienne des collectivités locales s'est inspirée du principe d'uniformité dès la réalisation de l'unité d'Italie en 1861. Sur ce fondement, toute partie du territoire national devait correspondre à une commune et à une province; toutes les communes et toutes les provinces étaient juridiquement égales et elles étaient donc toutes

soumises aux mêmes principes et aux mêmes règles quant à leurs structures organisationnelles et à leurs devoirs administratifs.

Cette organisation n'a été abandonnée, en application des principes constitutionnels, qu'avec la première – et jusqu'à ce jour la seule – réforme générale de la « réglementation des collectivités locales » (« *Ordinamento delle autonomie locali* »), approuvée par la loi du 8 juin 1990, n. 142, modifiée plusieurs fois dans les dix dernières années du XX^{e} siècle par une série de lois, lois qui sont maintenant toutes regroupées dans le texte unique approuvé par décret législatif du 18 août 2000, n. 267.

En réalité, la réalisation de la nouvelle organisation n'a pas suivi immédiatement l'approbation de la nouvelle loi de 1990. La promulgation de la discipline de l'année 2000 a été suivie peu après par l'entérinement – par la loi constitutionnelle du 18 octobre 2001, n. 3 – de la réforme qui a profondément renouvelé les rapports entre l'Etat et les Régions, transformant donc inévitablement aussi la position des collectivités locales. Il est vrai que le nouveau texte constitutionnel, qui développait l'organisation apparue dans les années précédentes, a introduit pour les communes et les provinces les principes de subsidiarité, différenciation et congruence (« *principi di sussidiarietà, differenziazione e adeguatezza* ») (art. 118 Const.), mais de toute évidence un texte normatif ne suffit pas à changer des situations, des habitudes et des façons de faire séculaires. Les dix années suivantes, les collectivités locales sont passées au second plan pour plusieurs aspects, et la réforme régionale, avec ses hésitations et ses contrastes, a eu des répercussions négatives sur leur transformation.

Malgré tout, pendant ces années-là, la situation des collectivités locales a profondément changé. Grâce, entre autres, aux initiatives prises par les collectivités locales elles-mêmes, sous la contrainte de constants problèmes financiers et dans un réel effort d'apporter des améliorations, une nouvelle structure a été mise en place qui a désormais abandonné le principe d'uniformité et présente en revanche un nouveau profil qui se dessine avec une certaine précision.

1. LES ELEMENTS DE BASE: LES COMMUNES ET LES PROVINCES

Selon l'art. 114 Const. « La République est constituée par les communes, par les provinces, par les villes-métropoles, par les régions et par l'Etat » (« *La Repubblica è costituita dai Comuni, dalle Province, dalle Città metropolitane, dalle Regioni e dallo Stato* »): c'est la version introduite en 2001 et qu'il faut tout de suite mettre en parallèle avec celle de 1948 « La République se répartit en régions, provinces et communes » (« *La Repubblica si riparte in Regioni, Provincie e Comuni* »). Le texte original de la Constitution ne mentionnait pas l'Etat, que l'on a voulu par la suite placer sur le même plan que les autres subdivisions territoriales de la République. Il ne mentionnait pas non plus les villes-métropoles qui sont justement une des propositions avec lesquelles la loi de 1990 entendait rompre le principe d'uniformité pour s'acheminer vers le principe de différentiation[1].

L'idée à la base de la figure des villes-métropoles est que, dans des parties déterminées du territoire national de haute densité démographique, économique et sociale, il convient d'abandonner la traditionnelle subdivision des provinces et communes pour concentrer les attributions des unes et des autres sur un sujet unique (art. 22 et suiv., d. lgs. 2000 n. 267). Il faut signaler dès à présent que – comme nous le verrons plus en détail par la suite – les villes-métropoles ne sont pas l'unique proposition de concentration sur une seule structure des fonctions des provinces et des communes. Les villes-métropoles sont toutefois la seule de toutes ces propositions qui comporte la suppression de la province et des communes intéressées. De sorte que l'introduction de la ville-métropole comporte l'élimination des collectivités locales qui seraient la directe expression de la population correspondante. C'est la raison pour laquelle elle a été reprise dans la liste des subdivisions fondamentales

1 Sur lequel, du point de vue communautaire, voir J. Hunt, *Devolution and differentiation: regional variation in EU law*, in *Leg. Studies*, 2010, p. 421 et suiv.

de la République: la souveraineté populaire trouve son expression dans les villes-métropoles (ou mieux trouvera, quand elles seront instituées), de la même façon qu'elle s'exprime dans les autres collectivités territoriales que sont l'Etat, la Région, la province et la commune.

Les villes-métropoles jouissent donc, au même titre que l'Etat, les régions, les provinces et les communes, d'une garantie constitutionnelle de leur existence: elles ne peuvent être supprimées que par une loi constitutionnelle[2].

Jusqu'à aujourd'hui, cependant, aucune ville-métropole n'a encore été instituée et le projet de dépasser l'uniformité de la réglementation locale à travers les villes-métropoles reste parmi les parties non réalisées de la réforme. Les éléments de base du panorama italien des collectivités locales restent les provinces et les communes. Toutefois, justement à propos des provinces et des communes des transformations très intéressantes ont été enregistrées. Pour les illustrer il est utile de rappeler la situation de départ de ces dernières.

L'organisation de fond des collectivités locales a été tracée au lendemain de l'unification du pays, il y a exactement 150 ans, en appliquant à toutes les provinces qui formaient alors le Royaume d'Italie la réglementation en vigueur dans le Royaume de Sardaigne (arrêté royal du 23 octobre 1859, n. 3702). Si l'on observe l'évolution dans le temps du nombre des communes et des provinces italiennes, on s'aperçoit que la situation a peu changé (tableau 1).

2 Dans la nomenclature des unités territoriales statistiques de l'Union européenne (règlement Ce n. 1059/2003 du Parlement et du Conseil européen du 26 mai 2003 et modifications successives) régions, provinces et communes italiennes correspondent respectivement aux niveaux territoriaux NUTS2, NUTS3, LAU2. Cf. Eurostat, *Regions in the European Union. Nomenclature of territorial units for statistics. NUTS 2006 /EU-27 – édition 2007*, Luxembourg 2007 (KS-RA-07-020-EN-N).

Tableau 1. Nombre de communes et de provinces – population moyenne de 1861 à 2010

Recensement	Nombre de communes	Nombre de provinces	Population Total *1000	moyenne par commune	moyenne par province
1861	7.720	59	22.176	2.873	375.864
1871	8.383	69	27.300	3.257	395.652
1881	8.260	69	28.952	3.505	419.594
1901	8.263	69	32.963	3.989	477.725
1911	8.324	69	35.842	4.306	519.449
1921	9.195	69	39.397	4.285	570.971
1931	7.311	92	41.043	5.614	446.120
1936	7.339	94	42.398	5.777	451.043
1951	7.810	92	47.516	6.084	516.478
1961	8.035	92	50.624	6.300	550.261
1971	8.056	94	54.137	6.720	575.926
1981	8.086	95	56.557	6.994	595.337
1991	8.100	95	56.778	7.010	597.663
2001	8.101	107	56.996	7.036	532.673
2010	8.095	110	60.340	7.454	548.545

Source: ISTAT, *Unità amministrative, variazioni territoriali e di nome dal 1861 al 2000, Rome 2001*; ISTAT, *Annuario statistico italiano 2010*, Rome 2010.

Le nombre des collectivités locales augmente au XIX[e] siècle et au début du XX[e] surtout à cause de l'extension du Royaume à la Vénétie (1866), aux Etats pontificaux (1870), aux villes de Trente et Trieste (1918). Il diminue ensuite sous l'effet des réformes introduites pendant la période fasciste[3] et augmente à nouveau après la Seconde Guerre mondiale sous la République. À la stabilité du nombre des communes correspond celle du nombre des

3 Pour ne citer que quelques cas, voir E. Colombo, *Le aggregazioni comunali e il progetto della "Grande Milano"*, in *Amministrare – supplemento*, 2007, p. 141 et suiv.; K. Lavagna, *L'unificazione amministrativa della "Grande Genova"*, *ibidem*, p. 181 et suiv.

provinces[4], sauf dans les dernières années. D'abord en 1992 avec l'institution des provinces de Verbano-Cusio-Ossola, Biella, Lecco, Lodi, Rimini, Prato, Crotone, Vibo Valentia, ensuite dans la dernière décennie avec l'institution de quatre provinces dans la Région Sardaigne (Olbia-Tempio, Ogliastra, Medio Campidano et Carbonia-Iglesia) et pour finir trois dans la péninsule (Monza et la Brianza, Fermo et Barletta-Andria-Trani).

Il s'agit d'un phénomène particulier répondant essentiellement à des raisons politiques, complètement indépendant d'un discours de réforme institutionnelle. En effet, les nouvelles provinces ne correspondent ni à des zones à haute densité démographique, pour lesquelles seraient prévues justement les villes-métropoles, ni à un autre modèle d'organisation nouvelle des fonctions publiques locales. Ces provinces ne sont pas dépourvues de caractères territoriaux et sociaux qui leur sont propres, mais elles sont à tous les effets des « vieilles » provinces.

Au-delà de cet aspect, il convient de regarder de plus près le panorama traditionnel des collectivités locales italiennes. La moyenne du nombre d'habitants de chaque commune ou de chaque province, à l'instar de toutes les moyennes, ne dit pas grand-chose, et peut même être trompeuse. Le fait est que si le cadre général reste stable – d'ailleurs nous avons dit que jusqu'en 1990 les principes de fond restent inchangés – de la même manière les déséquilibres de fond que cache ce cadre restent inchangés. Pour justifier ces observations il nous faut décomposer par région les données des communes, ainsi que cela a été fait au tableau 2. Quelques rapides observations nous permettent des considérations intéressantes.

4 F. Bonini, *Territorio e circoscrizioni amministrative: l'ambito provinciale nella penisola italiana*, in L. Blanco (dir.), *Organizzazione del potere e territorio: contributi per una lettura storica della spazialità*, Milan 2008; M.L. Sturani, *L'"inerzia" dei confini amministrativi provinciali come problema geostorico*, in *Le amministrazioni provinciali in età contemporanea. Problematiche nazionali e caso veneto* – Padoue, 14 mai 2010.

Prenons par exemple la Lombardie et la Sicile: ces deux régions ont à peu près la même extension territoriale avec un léger avantage pour la Sicile. En revanche la situation relative à la population est très différente: la Lombardie a presque le double d'habitants de la Sicile. Par rapport à ces données de fond, ce qui frappe est le nombre des communes: les communes lombardes sont en nombre environ quatre fois supérieur à celui des communes siciliennes. De plus, si l'on observe qu'en Lombardie les communes moyennes et grandes telles que Milan, Brescia, etc. sont supérieures en nombre à celles de la Sicile, on arrive facilement à la conclusion que les communes lombardes sont en grande partie démographiquement plus petites, donc bien différentes d'une part des grandes et moyennes communes lombardes, d'autre part de la majorité des communes à l'autre bout du pays.

Tableau 2. Nombre de communes, population et superficies par région au 31 décembre 2009

	Total des Communes				Communes > 5000		Communes < 5000	
	Nombre	Population	Surface	Densité	Nombre	Population	Nombre	Population
REGIONS								
Piemonte	1.206	4.446.230	2.540.246	175	134	3.123.452	1072	1.322.778
Valle d'Aosta	74	127.866	326.324	39	1	35.078	73	92.788
Lombardia	1.546	9.826.141	2.386.280	412	455	7.672.306	1091	2.153.835
Trentino-Alto Adige	339	1.028.260	1.360.682	76	32	556.971	307	471.289
Bolzano/Bozen	*116*	*503.434*	*739.992*	*68*	19	291.380	97	212.054
Trento	*223*	*524.826*	*620.690*	*85*	13	265.591	210	259.235
Veneto	581	4.912.438	1.839.885	267	268	4.109.847	313	802.591
Friuli-Venezia Giulia	218	1.234.079	785.839	157	63	945.704	155	288.375
Liguria	235	1.615.986	542.155	298	52	1.366.446	183	249.540
Emilia-Romagna	341	4.377.435	2.211.734	196	190	3.969.043	151	408.392
Toscana	287	3.730.130	2.299.351	162	152	3.399.616	135	330.514
Umbria	92	900.790	845.604	107	32	769.517	60	131.273
Marche	246	1.577.676	969.406	167	68	1.223.769	178	353.907
Lazio	378	5.681.868	1.723.597	330	126	5.221.921	252	459.947
Abruzzo	305	1.338.898	1.076.271	124	55	975.352	250	363.546
Molise	136	320.229	443.768	72	11	162.674	125	157.555
Campania	551	5.824.662	1.359.024	429	218	5.129.146	333	695.516
Puglia	258	4.084.035	1.935.790	211	173	3.860.181	85	223.854
Basilicata	131	588.879	999.461	59	32	392.873	99	196.006
Calabria	409	2.009.330	1.508.055	133	82	1.336.774	327	672.556
Sicilia	390	5.042.992	2.571.140	196	192	4.562.005	198	480.987
Sardegna	377	1.672.404	2.408.989	69	64	1.143.651	313	528.753
ITALIA	**8.100**	**60.340.328**	**30.133.601**	**200**	2400	49.956.326	5700	10.384.002

Source: élaboration sur bases ISTAT, *Annuario statistico italiano 2010*, Rome 2010.

Cette situation n'est pas le fruit du hasard, mais dérive d'un choix précis fait au moment de l'Unité d'Italie[5]. L'entité qui fut prise alors comme le correspondant de la « commune »

5 P. Aimo, *Amministrazioni locali e grandi città in Italia: uniformità dell'ordinamento e dimensione territoriale*, in *Amministrare*, 2007, p. 127 et suiv.

(sarde-piémontaise) fut en Lombardie la paroisse[6], alors qu'en Sicile elle était représentée par les centres habités et consolidés depuis longtemps. À distance d'un siècle et demi les conséquences de ce choix sont encore évidentes[7]. Le système des administrations locales n'a été modifié que pendant la période fasciste, et seulement pour quelques grandes villes. Il s'agit cependant de transformations qui d'une part n'ont pas touché l'ensemble des communes et d'autre part remontent à une période précédente aux grands mouvements migratoires de la population italienne enregistrés après la Seconde Guerre mondiale.

En effet, pendant longtemps cette situation a semblé ne poser aucun problème. Tant que les collectivités locales ont eu des tâches et des pouvoirs réduits, tant que l'administration publique dans son ensemble a eu un rôle et un poids limités, la situation des collectivités locales a peu attiré l'attention. Ces deux conditions ne sont plus là. Avec la réalisation progressive de la réglementation régionale à partir de 1970 les communes et les provinces se sont vu assigner de nouvelles tâches. Plus généralement le rôle de l'administration publique dans la société italienne a acquis de plus en plus d'importance. On demande désormais aussi à l'administration publique et aux collectivités locales une plus grande efficacité.

6 De ce tableau il ressort clairement qu'un choix analogue fut fait pour le Piémont. Dans l'un comme dans l'autre cas l'on perçoit facilement l'écho de l'organisation mise en place par la Révolution française qui, par la loi du 22 septembre 1789, substitua à la paroisse les communes à l'intérieur des départements fondés exclusivement sur des critères géographiques. Sur ce point voir M.-V. Ozouf-Marignier, *La formation des départements: la représentation du territoire français à la fin du 18e siècle*, Paris 1989.

7 L. Gambi, *Immagini statistiche dell'Italia unita. La persistenza delle divisioni comunali*, in L. Gambi, G. Bollati (dir.), *Storia d'Italia, vol. VI, Atlante*, Turin 1976, p. 688 et suiv.

2. LE SYSTEME: LA REGION ET L'ORGANISATION DES FONCTIONS LOCALES

La grande stabilité des communes et des provinces est due non seulement à des raisons culturelles et sociales, mais elle dépend aussi de la notable protection juridique dont les collectivités locales jouissent sur la base de la Constitution de 1948.

En premier lieu – nous l'avons déjà rappelé plus haut – l'existence des communes et des provinces est garantie par la Constitution: du moment qu'elles sont vues comme des subdivisions essentielles de la République (art. 114 Const.), un élément constitutif du système exprimé par la souveraineté populaire, elles ne peuvent être supprimées si ce n'est par modification constitutionnelle.

En second lieu, elles sont considérées comme préexistantes à l'Etat: la République « reconnaît et favorise » (« *riconosce e promuove* ») les collectivités locales (art. 5 Const.); celles-ci sont évidemment disciplinées par des lois, qui sont toutefois « des lois générales » (art. 128 Const. dans le texte de 1948) déterminant leurs « fonctions fondamentales » (art. 117, alinéa 2, lettre h), Const.), selon le principe en vertu duquel en général toutes « les fonctions administratives sont attribuées aux communes » (art. 118 Const.). Cette organisation s'est traduite et se traduit toujours par la garantie de l'attribution aux communes de pouvoirs déterminés qui ne sont pas codifiés, mais sont le fruit de l'interprétation d'autres normes constitutionnelles et du rôle traditionnel tenu justement par les communes. Par exemple en matière d'urbanisme et de gouvernement du territoire la jurisprudence de la Cour constitutionnelle est assez claire dans son jugement négatif sur toute intervention de l'Etat ou régionale dans la limitation des pouvoirs locaux dans la régulation de l'usage des sols[8].

8 Cf. E. Ferrari, *I Comuni e l'urbanistica*, in S. Civitarese Matteucci, E. Ferrari, P. Urbani (dir.), *Il governo del territorio*, Actes du 6e Colloque AIDU - Pescara, 29-30 novembre 2002, Milan 2003, p. 125 et suiv.

Enfin, la Constitution a prévu des procédés particuliers pour la modification des confins ou pour l'institution et la suppression des communes et des provinces (art. 133 Const.): pour les premières il faut une loi régionale[9], pour les secondes une loi nationale; dans le premier cas il faut aussi consulter les populations intéressées, dans le second cas l'initiative ne revient qu'aux communes intéressées et la Région doit être consultée. Il s'agit de normes qui expriment un lien entre la population et les collectivités locales, lien plus solide que ce à quoi on pourrait s'attendre. Par le passé elles n'ont été appliquées que sporadiquement mais dans les derniers temps cette matière aussi est en mouvement[10] et il faut souligner que la Cour constitutionnelle, de plus en plus interpellée pour vérifier l'application de l'art. 133 Const. cité, en a généralement offert une interprétation rigoureuse[11].

Nous n'avons donc pas seulement une garantie constitutionnelle de l'existence des communes et des provinces et de l'attribution à celles-ci de fonctions déterminées, mais nous avons aussi une protection de l'existence de *cette* commune ou de *cette* province avec leur territoire et donc des caractéristiques de base qui leur sont traditionnellement propres.

9 Cf. R. Filippini, *Le leggi regionali vigenti in materia di modificazione delle circoscrizioni comunali e di riordino territoriale*, in *Reg. gov. loc.* 1995, p. 599 et suiv.

10 Des listes mises à jour des modifications des collectivités locales se trouvent sur le site de l'ISTAT (http://www.istat.it/strumenti/definizioni/comuni/). Pour d'autres informations utiles, cf. http://it.wikipedia.org/wiki/Categoria:Variazioni_amministrative_in_Italia.

11 Pour nous limiter à la jurisprudence de cette dernière décennie relative aux communes: Cour const., 7 avril 2000 n. 94, in *Giur. cost.* 2000, 901 et *ivi* 4371 avec note de I. Ciolli, *Le variazioni delle circoscrizioni territoriali e la consultazione delle popolazioni interessate nella nuova interpretazione della Corte*; Id., 13 février 2003 n. 47, in *Foro it.*, 2003, I, 1643 note de Sabatelli; Id., 19 juillet 2004 n. 237, in *Le Regioni*, 2005, 204; Id., 6 février 2007 n. 66, in *Foro it.* 2004, 1, 2918; Id., 9 juin 2010 n. 214, in *Foro it.* 2010, 9, 1, 2286; Id., 9 février 2011 n. 3.

Entre l'Etat et la Région les pouvoirs sont distribués non seulement à propos des délimitations territoriales, mais encore d'organisation et de gouvernement général des collectivités locales. Plus précisément, à l'Etat incombe la discipline relative aux élections, aux organes de gouvernement et aux fonctions fondamentales des communes, provinces et villes-métropoles (art. 117, alinéa 2, lettre h), Const.), ainsi qu'à leur financement (art. 119 Const.). Le rôle des régions par rapport aux communes et aux provinces en revanche n'est pas spécifié par un article ou une disposition et se déduit plutôt du système général. Le fait est qu'à la Région reviennent les tâches législatives, et donc – pouvons-nous dire – la ligne directive et d'organisation de fond de la plupart des secteurs dans lesquels interviennent les collectivités locales. Ceci était vrai suivant la version originale du titre V de la Constitution, qui attribuait à la Région des « matières » d'intérêt spécifique pour l'administration locale et c'est encore plus vrai aujourd'hui, après que la réforme de 2001 a étendu la compétence régionale à tous les secteurs non réservés à l'Etat.

Dans cette situation, la législation régionale s'entrecroise inévitablement avec la vie des collectivités locales et, même plus, la Région ne peut ignorer les collectivités locales pour la mise en œuvre de sa législation, pour réaliser ses politiques. Avec le temps et avec la transformation de la situation économique et sociale, mais aussi institutionnelle et administrative de base une nouvelle situation est née dans laquelle la Région d'un côté, les communes et les provinces de l'autre, ont de plus en plus besoin l'une des autres. Dans les secteurs des transports comme de la santé, dans l'urbanisme comme dans les travaux publics il est désormais impossible qu'une commune ou une province ou une Région puisse mettre en œuvre une politique qui n'appartienne qu'à elle, indépendante et coupée de ce qui se passe sur le territoire voisin ou dans le territoire plus vaste qui la comprend.

La loi de réforme de la réglementation locale de 1990 s'était penchée sur cette situation à l'art. 3 en prévoyant que « les régions organisent l'exercice des fonctions administratives au niveau local à travers les communes et les provinces … dans le but de réaliser un système efficace des collectivités locales au service du développement économique, social et civil » (« *le regioni organizzano l'esercizio delle funzioni amministrative a livello locale attraverso i comuni e le province … al fine di realizzare un efficiente sistema delle autonomie locali al servizio dello sviluppo economico, sociale e civile* »). L'année suivante,

face aux objections soulevées par la région Toscane à propos des pouvoirs que cette loi reconnaissait aux provinces et qui aurait diminué le rôle de la Région, la Cour constitutionnelle affirmait que la position constitutionnelle de cette dernière n'était pas lésée et rappelait précisément le fait que l'art. 3 cité en faisait « le centre propulseur et de coordination de tout le réseau des collectivités locales » (« *il centro propulsore e di coordinamento dell'intero sistema delle autonomie locali* »)[12].

L'idée de « système » des autonomies locales[13] reçoit de la sorte un contenu normatif précis et concret. Ainsi, la capacité de la commune ou de la province à répondre aux exigences de sa population n'est plus tant liée à la possibilité de poursuivre des objectifs propres, originaux, indépendants, qu'à l'habileté de faire valoir les exigences locales dans un système inévitablement plus ample et plus complexe. En l'an 2000, au moment de la ré-élaboration de la normative, les dispositions de l'art. 3 de 1990 deviennent l'art. 4 du décret législatif 2000 n. 267, intitulé justement « système régional des collectivités locales ». Dans ce cadre il est significatif que la réforme constitutionnelle de 2001 ait établi que le statut de chaque Région doit prévoir aussi « le Conseil des collectivités locales, en tant qu'organe de consultation entre la Région et les collectivités locales » (« *il Consiglio delle autonomie locali, quale organo di consultazione fra la Regione e gli enti locali* ») (art. 123, alinéa 4, Const.). De cette façon le législateur constituant a cherché à déplacer le rapport entre

12 Cf. Cour const., 15 luglio 1991 n. 343, in *Giur. cost.* 1991, 2718 et *ivi* 2738 observation de L. Vandelli, *La Regione come "centro propulsore e di coordinamento del sistema delle autonomie locali" e le funzioni delle Provincie*; in *Foro it.* 1992, I, 316 avec note de rappel de S. Benini.

13 Qui était déjà apparue dans la littérature: cf. F. Pizzetti, *Il sistema costituzionale delle autonomie locali*, Turin 1979; G.C. De Martin, *L'amministrazione locale nel sistema delle autonomie*, Milan 1984. Après la loi de 1990 cf. E.M. Marenghi, *Il sistema amministrativo locale*, Padoue 1994.

régions et collectivités locales du plan d'un rapport singulier à une dimension de « système »[14].

Ce texte normatif est toujours en vigueur malgré qu'il ait été promulgué avant la réforme constitutionnelle de 2001 et rappelle expressément des normes que cette réforme a profondément modifiées. Le problème est que – comme nous l'avons dit au début – après plus de dix ans le législateur n'ait pas encore réussi à approuver un texte qui adapte le décret législatif 2000 n. 267 au contexte constitutionnel actuel[15]. De toute façon, l' « organisation des fonctions administratives au niveau local à travers les communes et les provinces » est désormais une tâche fondamentale de la Région.

Cette expression est en effet l'heureuse synthèse d'un rôle attribué à la Région par de nombreuses normes.

Nous avons déjà rappelé l'art. 133, alinéa 2, Const. qui requiert la loi régionale pour la modification des confins communaux. À celui-ci vient s'ajouter la tâche de procéder « à la délimitation territoriale de la surface de la ville-métropole » (art. 22, décret législatif 2000 n. 267) et de discipliner cette dernière; de déterminer « les territoires et les zones homogènes pour la constitution des communautés "de montagne" » (« *gli ambiti e le zone*

14 Sur le sujet cf. E. D'Orlando, *Il Consiglio delle Autonomie locali nel modello italiano di decentramento*, in *Il Diritto della Regione*, 2009, p. 111 et suiv.

15 À l'état actuel des travaux parlementaires le projet de loi « Caractérisation des fonctions fondamentales des provinces et des communes, simplification de la réglementation régionale et des collectivités locales, et délégation au Gouvernement en matière de transfert de fonctions administratives, Charte des collectivités locales. Réorganisation des administrations et organismes décentrés » approuvé par la Chambre des députés le 30 juin 2010 et en examen au Sénat (AS n. 2259), comporte un art. 8, intitulé « Modalités d'exercice des fonctions fondamentales ».

omogenee per la costituzione delle comunità montane ») (art. 27, décret législatif 2000 n. 267) et de discipliner la communauté de montagne; de déterminer « niveaux optima d'exercice » des fonctions des communes dans le but de prévoir la constitution d'associations de communes (art. 33, décret législatif 2000 n. 267). Si l'on rappelle aussi la législation de secteur, la liste pourrait rapidement s'allonger: par exemple pour l'environnement on peut rappeler les domaines territoriaux optima pour le service hydrique intégré (art. 147, décret législatif 3 avril 2006 n. 152, « Normes en matière d'environnement ») ou pour la gestion des déchets urbains (art. 196, alinéa 1, lettre g), décret législatif 2006 n. 152).

Ces rappels suffisent probablement à rendre compte de façon assez précise du rôle de la Région dans le système des collectivités locales. Le cadre composé seulement de communes et provinces est désormais bien loin. De même que l'uniformité de ce cadre: la donnée fondamentale est que les différentes Régions ont choisi d'exercer différemment leur pouvoir d' « organisation des fonctions locales ». Il ne fait aucun doute qu'une analyse approfondie des collectivités locales menée aujourd'hui devrait procéder par Région. Viennent ensuite les différences liées aux particularités de chaque matière: pour rester dans le domaine du dernier exemple fait ici plus haut, on peut penser que les caractéristiques spatiales et les exigences organisationnelles du service hydrique ne sont pas les mêmes que celles de la gestion des déchets, que les dimensions des bassins des transports publics locaux ne correspondent pas à la carte des services sanitaires, et les exemples pourraient se multiplier.

Pour finir, il y a des différences normatives: au fil du temps, différentes normes sont venues s'ajouter qui pour telle ou telle autre matière ou secteur ou problème ont donné lieu à des règles diverses. Souvent le législateur suit des voies contradictoires. Et ceci se passe aussi pour certains choix de fond qu'il vaudrait mieux garder constants. Dans l'incapacité ou l'impossibilité de faire ces choix avec des lois consacrées spécialement à la réglementation locale, il arrive par-dessus tout cela que l'une ou l'autre règle soit promulguée à l'occasion d'intervention à caractère financier plus ou moins urgent.

C'est ce qui s'est passé – faute de villes-métropoles – pour deux cas de figures qui constituent des instruments fondamentaux de l'organisation des fonctions locales. Il s'agit des communautés de montagne et des unions de communes qui, ces dernières années, ont attiré respectivement la défaveur et la faveur du législateur à la recherche d'épargne et d'efficacité dans l'administration publique locale.

Une question vient à l'observateur : pourquoi une association de communes sous forme de communauté de montagne serait-elle un choix négatif, économiquement désavantageux, alors que serait positive et avantageuse une association, peut-être des mêmes communes, sous forme d'Union. Certes l'une et l'autre figures ont des caractéristiques propres, mais le fait reste qu'elles sont, dans une certaine mesure, interchangeables.

Passons à l'exposition de l'une et de l'autre situation et laissons le lecteur résoudre ce dilemme.

3. LES COMMUNAUTES „DE MONTAGNE": DE LEUR SUPPRESSION A LEUR REORGANISATION

La communauté dite « de montagne »[16] est une collectivité locale, à l'origine destinée au développement de la montagne sur la base de programmes et de ressources destinées spécifiquement à ce but par l'Etat en rapport avec les objectifs qui ont été inscrits dans la Constitution (art. 44, alinéa 2), fait non surprenant si l'on considère les caractéristiques géographiques de l'Italie.

16 S. Piazza, *Alle origini delle comunità montane: cenni ricostruttivi alla luce del dibattito sul loro destino*, in *Nuova rassegna di legislazione, dottrina e giurisprudenza* 2010, p. 1145 et suiv.; Id., *Oltre le comunità montane: verso le "terre alte" come nuovi territori di politiche per la montagna?*, *ibidem* 2010, p. 1369 et suiv.

Dès 1955, au moment de la décentralisation des services du Ministère de l'agriculture et des forêts, il fut prévu que « les communes comprises entièrement ou en partie dans le périmètre d'une zone montagneuse dont à l'art. 18 peuvent se constituer en syndicat à caractère permanent, appelé "conseil de vallée" ou "communauté de montagne" » (« *i Comuni compresi in tutto o in parte nel perimetro di una zona montana di cui all'art. 18 possono costituirsi in consorzio a carattere permanente, denominato "Consiglio di valle" o "Comunità montana"* ») (art. 13, décret du Président de la République du 10 juin 1955, n. 987). En réalité, il s'agissait de l'encadrement législatif d'une institution qui dans certains endroits d'Italie avait une histoire séculaire et présentait une activité vivace[17]. En 1971, la figure des communautés de montagne est introduite dans la réglementation régionale qui ces années-là s'organisait sur tout le territoire national: la loi du 3 décembre 1971, n. 1102, attribue aux Régions la tâche de délimiter les « zones homogènes » des territoires classés comme territoires de montagne sur la base de conditions établies par la loi nationale (art. 3) et d'instituer les communautés de montagne en « collectivités de droit public » (art. 4).

En 1990 les communautés de montagne sont introduites dans le « système des collectivités locales ». D'une part, elles sont définies alors comme « unions de montagne, collectivités locales constituées de communes de montagne et partiellement de montagne » (« *unioni montane, enti locali costituiti fra comuni montani e parzialmente montani* ») (art. 28, loi de 1990, n. 142); d'autre part, les pouvoirs régionaux sur celles-ci sont confirmés, et le législateur abolit même la définition de « zone de montagne » contenue dans les lois nationales des années cinquante (art. 29): désormais il appartiendra aux Régions d'établir quelle partie de leur territoire est 'de montagne'.

17 Cf. U. Pototschnig, *Le regole della Magnifica Comunità Cadorina*, Milan 1953 (rééd. in Id., *Scritti scelti*, Padoue 1999, p. 295 et suiv.)

Au 31 décembre 2005 l'Istat enregistre 358 communautés 'de montagne'[18]. Fin 2007, la loi de finance pour l'année 2008 décide que « Les régions, pour apporter leur concours aux objectifs de limitation de la dépense public, avant le 30 septembre 2008 doivent faire le nécessaire par le biais de leurs propres lois, entendus les conseils des collectivités locales, pour réorganiser la discipline des communautés 'de montagne' ... de façon à normaliser la dépense courante pour le fonctionnement des communautés de montagne à hauteur d'un montant égal au moins à un tiers du fonds ordinaire ... destinée pour l'année 2007 à l'ensemble des communautés de montagne présentes dans la Région » (« *Le regioni, al fine di concorrere agli obiettivi di contenimento della spesa pubblica, entro il 30 settembre 2008 provvedono con proprie leggi, sentiti i consigli delle autonomie locali, al riordino della disciplina delle comunità montane ... in modo da ridurre a regime la spesa corrente per il funzionamento delle comunità montane stesse per un importo pari almeno ad un terzo della quota del fondo ordinario ... assegnata per l'anno 2007 all'insieme delle comunità montane presenti nella regione* ») (art. 2.17 de la loi du 24 décembre 2007, n. 244).

Vaut-il la peine de relever que le législateur national ne s'intéresse pas du tout aux caractéristiques des territoires et des structures intéressées? L'unique paramètre pris en compte est celui du volume historique des dépenses générales: il faut épargner un tiers des dépenses faites en 2007. Il est vrai que l'art. 2.18 suivant indique aux Régions un éventail de « principes fondamentaux » à ne pas négliger dans la formulation de leurs choix en la matière, mais il est vrai aussi que la production d'une série de sanctions (art. 2.20) dépend exclusivement de l'absence de mise en œuvre de ce qui est prévu à l'art. 2.17. Le contrôle de la plus petite dépense nécessaire est confié à un décret du Président du Conseil des Ministres, promulgué le 18 novembre 2008[19] et qui cite ponctuellement les lois régionales de réorganisation des communautés de montagne.

18 ISTAT, *Annuario statistico italiano 2007*, Rome 2007, tableau 1.10.

19 Publié sur *G.U.* n. 278 du 27 novembre 2008.

Au 1er janvier 2009 l'Istat enregistre 217 communautés de montagne[20].

Ces vicissitudes ne peuvent être réduites purement et simplement à des chiffres et il faut à leur égard souligner au moins deux choses. En premier lieu, c'est que les Régions n'ont pas manqué de faire recours à la Cour constitutionnelle contre l'initiative de la loi de finance de 2008, mais cette dernière n'a pas accepté les relatives contestations. La protection constitutionnelle des communautés de montagne ne peut empêcher des interventions nationales de ce genre[21].

En second lieu, il faut signaler que plusieurs des lois régionales de réorganisation ne correspondent pas à la seule mise en œuvre de réductions des dépenses voulues par le législateur national, mais elles ont ouvert la voie à un plus large discours de réorganisation des communautés de montagne et plus en général des associations entre les collectivités locales[22].

20 ISTAT, *Annuario statistico italiano 2009*, Rome 2009, tableau 1.10.

21 Cour const., 24 juillet 2009 n. 237, in *Foro it.* 2010, I, 729 avec note de R. Romboli, *In tema di contenimento della spesa delle comunità montane*; in *Giur. cost.* 2009, 2970 avec note de G.C. De Martin, M. Di Folco, *Un orientamento opinabile della giurisprudenza costituzionale in materia di comunità montane*; Cour const., 28 janvier 2010 n. 27, in *Foro it.* 2010, I, 729.

22 Filippini R., A. Maglieri, *Le forme associative tra enti locali nella recente legislazione regionale: verso la creazione di differenti modelli ordinamentali*, in *Le Istituzioni del Federalismo* 2008, p. 341 et suiv.; L. Izzi, *Idee per una legislazione statale e regionale sulle forme associative tra enti locali*, in *Le Istituzioni del Federalismo* 2008, p. 377 et suiv.; E. Giardino, *Le forme associative degli Enti Locali nella legislazione regionale*, in *Rivista Amministrativa della Repubblica Italiana* 2009, p. 703 et suiv.

Enfin, avec l'art. 2.187 de la loi de finance pour l'année 2010 (loi du 23 décembre 2009, 191) « l'Etat cesse toute participation au financement des communautés de montagne »[23]. La connexion entre les communautés de montagne et les financements spéciaux pour la montagne prend fin et ce sont la Région d'une part et les collectivités locales d'autre part qui devront pourvoir à leur fonctionnement avec les financements à caractère général.

4. LES „UNIONS" DE COMMUNES ET LES PETITES COMMUNES

Si les communautés de montagne, ou du moins certaines d'entre elles, ont une origine qui remonte loin dans le temps, ce n'est pas le cas pour les unions de communes. Ces dernières sont nées en effet avec la loi de 1990 n. 142. Plus exactement, avec la loi de réforme des collectivités locales fut introduite cette nouvelle possibilité de « forme associative » (art. 24), qui ne trouva son application effective et sa diffusion que quelques années plus tard.

À l'origine, elle concernait les communes ayant une population ne dépassant pas 5.000 habitants, avec pour objet l'exercice en commun d'une pluralité de fonctions ou de services et comme objectif la fusion des communes en question[24]. Il était même prévu que cette fusion devait se réaliser « avant dix ans » (art. 24, alinéa 6). En 1999 la plupart de ces caractéristiques viennent à manquer: la condition d'une population inférieure en nombre à 5.000 habitants et surtout la perspective, voire l'obligation de la fusion, tombent (art. 26, loi

23 Cette norme aussi a surmonté l'examen de la Cour const. Cour const., 17 novembre 2010 n. 326.

24 Sur ces aspects cf. F. Spalla, *Unioni e fusioni comunali: sondaggio di sindaci*, in *Amministrare* 2002, p. 435 et suiv.

du 3 août 1999, n. 265). L'union entre donc dans le décret législatif 2000 n. 267 comme une vague collectivité locale « constituée d'une ou plusieurs communes contiguës, dans le but d'exercer conjointement une pluralité de fonctions de leur compétence ».

Les années suivantes cependant l'union de communes devient l'objet de dispositions de lois régionales et nationales spécifiques, d'organisation du système local voire d'intervention financière. Par exemple, déjà la loi de finance pour l'année 2003, afin de développer les « activités de contrôle du territoire finalisées à renforcer la sécurité des citoyens sur des modèles de police de proximité », affectait des fonds destinés aux unions de communes pour « l'exercice conjugué des services de police locale » (art. 31, alinéa 7, lettre a), loi du 27 décembre 2002, n. 289). Il est facile d'imaginer que, dans une situation financière globalement difficile, un grand nombre de communes ont opté pour la constitution d'une union de communes pour profiter de ces fonds[25].

Cet exemple met en lumière certaines caractéristiques de la figure de l'union de communes: à la différence des communautés de montagne, les unions de communes ne sont pas des subdivisions du territoire local dessinées par la Région, mais elles regroupent ce groupe-ci ou ce groupe-là de communes à l'initiative de ces dernières, même si souvent l'intervention régionale est présente. À la différence des communautés de montagne qui ont un noyau de fonctions dans les interventions au bénéfice de la montagne, les unions de communes peuvent concerner une ou plusieurs des différentes fonctions et un ou plusieurs services des communes.

25 O. Parisi, *La gestione associata del servizio di polizia municipale tra comunità montana e comuni - uno studio di fattibilità*, in *Azienditalia* 2007, p. 1 et suiv.

En réalité la figure se répand et elle anticipe probablement une réorganisation plus profonde des « petites communes » [26]. Aujourd'hui dans la législation italienne il n'y a pas de définition de la « petite commune ». Elle se trouve dans l'actuel projet de loi pour la réorganisation de l'administration locale[27] qui parle de « communes avec une population résidente égale ou inférieure à 5.000 habitants ». Comme souvent dans la législation récente, des fragments de cette discipline sont devenus loi grâce à une disposition urgente à caractère financier. Ainsi l'art. 14, alinéa 28, du décret législatif du 31 mai 2010 n. 78 (dérivé avec modifications de la loi du 30 juin 2010, n. 122) prévoit que les fonctions fondamentales soient nécessairement exercées sous forme associative de la part des communes de population inférieure à 5.000 habitants. Si l'on reprend les données reportés dans le tableau 2 plus haut, on se rend compte aisément du nombre de communes investies de cette règle. Dans la situation actuelle, la règle selon laquelle « la même fonction ne peut être accomplie par plus d'une forme associative » (art. 14, alinéa 29, d.l. 2010, n. 122) est symptomatique.

Il ne nous reste qu'à attendre pour voir quelles applications trouveront ces nouvelles règles.

26 Pour quelques expériences et réflexions cf. S. Bolgherini, *Unione di Comuni: tre casi in Emilia-Romagna*, in *Amministrare* 2009, p. 5 et suiv.; A. Ceriani, *Piccoli Comuni in Lombardia*, in *Amministrare* 2009, p. 35 et suiv.; A. Fraschini, F. Osculati, *L'Unione di Comuni come autorità fiscale unitaria*, in *Amministrare* 2009, p. 129 et suiv. CITTALIA – FONDAZIONE ANCI RICERCHE, *Atlante dei piccoli Comuni*, Rome 2009.

27 AS 2259, cité *supra* à la note 13, art. 20 et suiv. Rappelons que la limite des 5.000 habitants était dans le texte original de l'art. 24, loi 1990 n. 142: voir ci-dessus dans le texte.

5. PERSPECTIVES

Nous pouvons tirer quelques conclusions des vicissitudes décrites.

A première vue, sur le versant des grandes communes il n'y a pas de grandes nouveautés. Le projet des villes-métropoles marque le pas et il ne sera probablement pas repris à brève échéance. Il est vraisemblable que les grandes communes réaliseront des transformations et des innovations de leur propre initiative.

Les petites communes sont en revanche en plein mouvement et un cadre de la situation est offert par le tableau 3.

Tableau 3. Nombre de communautés de montagne et d'unions de communes par Région au 1er janvier 2011. Nombre de communes comprises dans chaque Région et leur rapport au nombre total des communes.

	Total communes	Communautés de montagne Nombre	Communes	%	Unions de communes Nombre	Communes	%
Piemonte	1.206	23	559	46,35	50	304	25,21
Valle d'Aosta	74	8	73	98,65	0	0	0
Lombardia	1.546	23	552	35,71	56	198	12,81
Trentino-Alto Adige	333	23	331	99,4	1	3	0,9
Veneto	581	19	171	29,43	27	97	16,7
Friuli-Venezia Giulia	218	4	95	43,58	4	10	4,59
Liguria	235	12	168	71,49	0	0	0
Emilia-Romagna	348	9	85	24,43	31	163	46,84
Toscana	287	14	112	39,02	6	43	14,98
Umbria	92	5	88	95,65	1	8	8,7
Marche	239	11	109	45,61	11	55	23,01
Lazio	378	22	244	64,55	21	105	27,78
Abruzzo	305	19	224	73,44	6	47	15,41
Molise	136	9	118	86,76	9	52	38,24
Campania	551	20	265	48,09	11	55	9,98
Puglia	258	1	13	5,04	22	102	39,53
Basilicata	131	14	114	87,02	0	0	0
Calabria	409	21	239	58,44	10	49	11,98
Sicilia	390	0	0	0	44	164	42,05
Sardegna	377	2	20	5,31	35	276	73,21
ITALIA	8.094	259	3.580	44,23	345	1731	411,92

Source: Ancitel 2011 (www.comuniverso.it)

Il est difficile d'évaluer la portée effective des transformations qui ont eu lieu. Il se peut que, souvent, il n'y ait eu qu'un changement d'étiquette: nous avons vu que dans une certaine mesure la communauté de montagne et l'union de communes sont des modèles interchangeables. Il se peut que la diminution des dépenses réalisées dans un secteur du système se soit traduite par une augmentation des dépenses dans d'autres secteurs: un exemple type est le déplacement dans les finances générales des interventions au bénéfice des territoires de montagne qui étaient financées précédemment par des fonds spéciaux.La situation est fort changeante de Région à Région.

Il y a cependant un point qui émerge clairement: le bon fonctionnement du système ne peut dépendre exclusivement du paramètre des dépenses. L'organisation d'un système territorial ne devrait laisser de côté aucun critère et paramètre territoriaux.

Il ne semble vraiment pas que la normative à l'étude pour la mise en œuvre de la loi sur le fédéralisme fiscal (loi 5 mai 2009 n. 42, Délégation au Gouvernement en matière de fédéralisme fiscal, en application de l'article 119 Const.) aille dans cette direction.

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LES FONCTIONS DES COMMUNES, DES PROVINCES ET DES VILLES METROPOLITAINES

RAPPORT ANNUEL - 2011 - ITALIE

(Mars 2011)

Pr. Luciano VANDELLI

SOMMAIRE

1. LES FONCTIONS LOCALES DANS LA CONSTITUTION

Profondément innovée avec la réforme, en 2001, du titre V de la Constitution, la structure existante constitutionnelle relative aux fonctions du gouvernement local se fonde sur l'affirmation selon laquelle les fonctions administratives « sont attribuées aux municipalités, sauf que, pour assurer leur exercice unitaire, elles soient conférées aux provinces, aux villes métropolitaines, aux régions et à l'Etat, sur la base des principes de subsidiarité, de différenciation et d'adéquation".

Ce qui est donc central, dans la nouvelle conception de l'article 118 de la Constitution, c'est le rôle de la commune: qui résulte le bénéficiaire prioritaire de toutes les fonctions administratives, sauf s'il existe des raisons qui conduiraient à élever l'exercice de l'activité à un niveau plus large, dans les cas où la commune n'est pas adaptée, en fonction des critères fixés par la Constitutionnels.

Ce sont les lois de l'Etat ou de la région, selon leur compétence, qui établissent la mesure dans laquelle les caractéristiques des fonctions respectent les paramètres de subsidiarité, différenciation et adéquation. Il relève de la responsabilité des législateurs étatique et régionaux, donc, d'évaluer s'il existent, dans le cas concret, les conditions pour laisser aux communes la compétence à la gestion de la fonction, ou s'il est nécessaire de faire une répartition différente, et à quel niveau.

La compétence - comme l'a noté la Cour constitutionnelle, dans la sentence n. 43 de 2004 - doit être déterminée par la répartition générale des pouvoirs, en considérant la liste des matières réservées à la législation exclusive de l'Etat (art.117, alinéa 2 de la Constitution), les sujets traités dans les compétences concurrentes (art.117, paragraphe 3) , et la règle selon laquelle tout ce qui n'est pas expressément attribué au législateur de l'Etat relève de la compétence générale des régions (art.117, paragraphe 4).

D'ailleurs, il faut considérer que c'est réservé à l'Etat la tache d'individuer les fonctions « fondamentales » des municipalités, provinces et villes métropolitaines (article 118, paragraphe 2, lett. p); compétence qui traverse tous les secteurs, même dans les domaines où la discipline relève de la compétence régionale.

Dans ces conditions, l'approche actuelle diffère profondément de celle qui a inspiré le texte original de la Constitution, fondée sur un principe de « parallélisme », qui attribuait aux régions les fonctions administratives dans les mêmes matières qui à l'époque étaient expressément déléguées à la législation régionale. Parallélisme qui était trempé, d'abord, par la prévision que les régions elles-mêmes auraient exercées ces fonctions administratives à travers d'une délégation aux autorités municipales, provinciales et d'autres collectivités locales et, d'autre part, par la possibilité attribuée à la législation de l'État, afin d'identifier,

dans la sphère de compétence législative régionale, des fonctions administratives d '«intérêt exclusivement local", en réservant l'exercice de ces fonctions directement aux collectivités locales. Cette hypothèse, dans l'expérience avait connu d'importantes applications, notamment dans le décret n. 616 de 1977, lorsque dans cette tipologie avait été placée pratiquement l'ensemble du complexe de services aux personnes (santé, assistence, etc.).

2. FONCTIONS ESSENTIELLES

Dans le cadre de la Constitution, donc, joue un rôle central l'identification des fonctions fondamentales prévues par la loi dans la lettre. p) de l'article 117, paragraphe 2, qui constituent la basé sur laquelle se déroule la discipline établie par les lois - étatiques ou régionales – par rapport aux différentes matières.

Dans l'expérience réalisée après l'entrée en vigueur de la réforme du titre V, la question des fonctions fondamentales des communes et des provinces a été abordée dans plusieurs occasions et dans différents contextes:

tout d'abord, dans la loi 131 de 2003 qui, dans le cadre d'une série d'éléments pour la mise en œuvre de la réforme constitutionnelle, déléguait au gouvernement, entre autres, la tâche d'identifier les fonctions essentielles. La délégation, toutefois, a expiré sans succès, compte tenu que le gouvernement n'a adopté aucun décret délégué dans le délai prévu;

- une délégation était également prévue dans la proposition de loi présenté par le Gouvernement Prodi en 2007 ; proposition qui, d'ailleurs, n'a pas atteint l'approbation du Parlement à cause de l'interruption de la législature. Selon cette délégation, les fonctions auraient du être identifiées « afin de fournir, pour chaque niveau de gouvernement local, la titularisé des fonctions inhérentes aux caractéristiques propres à chaque type de collectivité locale, essentiels et indispensables pour le fonctionnement de l'institution et pour satisfaire les besoins primaires de la communauté de référence, même au but de la cohésion du cadre juridique de la République " ;

à titre transitoire, les fonctions fondamentales ont trouvé une première individuation dans la loi sur le « fédéralisme fiscal » (num. 42/2009). En vertu de cette loi, art.21, paragraphe 2, les fonctions de base sont identifiés provisoirement - "au seul but de mettre en œuvre cette loi ... dans le premier temps ..." – en se référant tout d'abord, d'un coté pour les Communes et de l'autre pour les Provinces, à deux types d'activités séparément : d'une part, aux fonctions générales de gestion et de contrôle, communes à toutes les institutions et, d'autre part, à des groupes de fonctions qui permettent de distinguer chaque type de collectivités. Parmi ceux-ci sont placés, pour les municipalités, les fonctions relatives à la police locale, à l'éducation (y compris les écoles maternelles), à l'aide à la scolarisation, à la construction d'écoles, aux routes et transports, à l'environnement et au territoire et aux services sociaux. Pour les provinces, relèvent les fonctions relatives encore à l'enseignement public (y compris la construction d'écoles), aux transports, à la gestion du territoire, à la protection de l'environnement, au marché du travail;

- à l'heure actuelle, le Parlement est en train d'examiner une proposition de loi du Gouvernement sur la «Charte de l'autonomie" (S. n.2259). Dans cette proposition - destinée à remplacer les disciplines transitoires - les listes de fonctions peuvent être les mieux articulés. A partir de fonctions générales attribuées aux municipalités et aux provinces, divisées en: formation portante sur l'organisation et sur l'exercice des fonctions ; programmation et planification des tâches ; organisation de l'administration et gestion du personnel ; contrôle interne ; gestion financière et comptable; surveillance et le contrôle dans les domaines fonctionnels de compétence; organisation des services publics d'intérêt général dans la respective zone territoriale. Pour les Communes, à ces fonctions sont ajoutés les compétences en matière de: coordination des activités commerciales, simplification des activités productives, cadastre, planification et règlements d'urbanisme, protection civile, tâches d'urgence, routes et contrôle de la circulation, transports, services sociaux, construction d'écoles et de services éducatifs, y compris les crèches, éducation jusqu'au niveau de l'école secondaire, théâtres, musées, collections de biens artistiques et bibliographiques, sécurité urbaine, infractions administratives, police locale, état civil. En ce qui concerne les Provinces, sont inclus dans la liste les fonctions en matière de: planification provinciale de coordination, protection des sols, prévention et planification d'urgence en matière de protection civile, protection de l'environnement, compris les

controles sur les rejets d'eau et les émissions, programmation de l'élimination des déchets à niveau provincial, protection et gestion des poissons et des animaux, zones de planification des transports et du trafic, routes et contrôle du trafic, services scolaires y compris les batiments pour l'enseignement secondaire, services de l'emploi, formation professionnelle, promotion et coordination du développement économique.

La relation entre la liste des fonctions fondamentales prévues par la législation en vigueur (loi num. 42/2009) et celle prévue dans le cadre du projet de loi sur la « Charte de l'autonomie » est objet d'une précise discipline, selon laquelle la liste contenue dans la loi n.42 s'applique pour une période de cinq ans (art. 21, alinéa 1, lettre a). Maintenant la règle a été avancée par la «Manœuvres de l'été" (approuvée par le décret n. 78, 31 mai 2010, qui est devenu la loi n.122, 30 Juillet, 2010 n.122) ; où, entre autres choses, est également établie l'obligation pour les petites municipalités d'exercer les fonctions fondamentales en forme associée, c'est-à-dire sur la base d'un accord ou d'une union de municipalités (voir ci-dessous).

3. CONTENU DE FONCTIONS DANS LE DROIT LOCAL

Dans les contenus concrets, la définition des domaines des taches attribuées aux collectivités locales est le résultat d'un complexe entrecroisement entre l'identification (par la législation de l'Etat) des fonctions fondamentales et la discipline (établie parfois par l'État, mais surtout par les régions) des différents secteurs. Dans l'évolution, la répartition en vigueur des taches relevantes de la compétence des collectivités locales sont le résultat des processus de décentralisation mis en œuvre pendant les années 70 et 90.

Nous nous référons, en premier lieu, au décret présidentiel 24 juillet 1977, n 616, adopté dans l' actuation de la loi 382 de 1975, qui visait à redéfinir les activités locales, selon une articulation en «secteurs organiques», ici regroupés en trois grands domaines: a)

services sociaux, b) développement économique , c) planification et utilisation du territoire. La suivante phase de décentralisation a été développée dans le cadre des réformes dites "Bassanini" (du nom du ministre qui a soutenu cette réforme), et en particulier par la loi du 15 Mars 1997, n.59; inspiré au but ambitieux d'attribuer "aux régions et aux collectivités locales toutes les fonctions et les tâches administratives relatives à la gestion des intérêts et à la promotion du développement des respectives communautés ».

À ce fin, la loi prévoyait une délégation particulièrement large, fondée sur principes et critères qui, à l'époque, étaient très innovateurs (et destinés à être incorporés, dans une certaine mesure, dans le texte de la réforme constitutionnelle de 2001), tels que la subsidiarité, l'efficacité et l'économie de l'action administrative, la responsabilisation et l'unicité de l'administration, la différenciation dans la répartition des fonctions (« en tenant compte des différentes caractéristiques des collectivités locales concernées, y compris les formes d'association, d'un point de vue démographique, territoriale et structurelle »), d'adéquation (« par rapport à la pertinence de l'organisation administrative afin d'assurer, même en association avec d'autres organismes, l'exercice des fonctions »), de graduation.

Sur la base de ces critères, le décret législatif n. 112, de 31 mars 1998, d'actuation de la délégation, a réalisée une large redistribution des fonctions, en augmentant le complexe des fonctions exercées par les autorités locales, et parmi ceux-ci, notamment, par les provinces. Dans l'ensemble, comme prévu par le décret 616 de 1977, dans un premier temps, et 112 en 1998, puis, sont attribués aux municipalités et aux provinces:

- Dans le domaine du développement économique et des activités productives: les fonctions relatives à agriculture, artisanat, industrie, énergie, mines et ressources géothermiques, foires, marchés et commerce, tourisme et industrie hôtelière. En partie, ces questions relèvent de la compétence législative « pleine » des régions (comme l'agriculture, l'artisanat, le tourisme) et en partie dans les domaines en compétence « concurrente » (telles que la protection et la sécurité des travailleurs, professions, soutien à l'innovation dans les secteurs productifs, production, transport et distribution d'énergie);

- Dans le domaine du territoire, de l'environnement et des infrastructures, relèvent, entre autres, les fonctions relatives à l'aménagement urbain (à partir de l'adoption des plans) et à l'environnement (avec une référence particulière aux parcs et réserves naturelles, au contrôle de la pollution de l'air provoquée par le chauffage et par la circulation dans les zones urbaines, au bruit et - en ce qui concerne les provinces - à la surveillance sur la pollution de l'eau, sur les sites d'enfouissement et sur les installations de traitement et d'élimination des déchets, etc.), tandis que les communes sont titulaires notamment des fonctions relatives à l'élimination des déchets. D'autres tâches importantes concernent la gestion des routes, des aqueducs et des travaux publics, des transports et du trafic, de la défense civile, et du cadastre;

- Dans les services à la personne et à la communauté, sont inclues les questions qui s'étendent de la police locale à la santé, des services sociaux à l'éducation scolaire et à la formation professionnelle, des activités culturelles aux musées et bibliothèques publiques;

- Dans les services publics locaux, tels que ceux relatifs à l'eau, aux déchets, au gaz et à l'énergie. Dans l'actuation du principe de droit communautaire de concurrence, le cadre juridique actuel vise à assurer une gestion de manière habituelle attribuée à sociétés privées identifiées grâce à des procédures publiques (voir la rubrique "services publics"), mais aux autorités locales sont réservés des choix importantes sur les modalités d'octroi des services, les dimensions, les règles, les tarifs.

La législation de l'Etat, d'ailleurs, définit un cadre général de compétences, qui en concret doit être vérifié à la lumière de la législation régionale; compte tenu que dans nombreux domaines - relevantes de la compétence résiduelle ou concurrente des régions – les choix adoptées en concret par les législateur régionaux sont cruciales soit pour la définition des règles applicables, soit pour les ultérieures décentralisations de fonctions additionnelles.

L'importance de la législation régionale est donc désormais particulièrement évidente dans un contexte constitutionnel dans lequel les régions sont appelées à mettre en œuvre dans son territoire le principe de subsidiarité; mais il n'en est pas moins significatif depuis

longtemps, compte tenu du fait que, c'est à partir de 1970 que les différentes attitudes adoptée par les régions en matière de délégation de fonctions aux collectivités locales peut avoir donné un cadre varié et fragmenté. Un cadre qui, d'ailleurs, cherche maintenant des nouveaux équilibres entre les nouvelles et renforcées compétences régionales et la définition par l'Etat des fonctions fondamentales, uniformes dans tout le territoire national.

4. MODALITE' D'EXERCICE DES FONCTIONS: CONVENTIONS ET ACCORDS

Dans la conception définie dans la Constitution avec la réforme de 2001, est donc essentielle une répartition des fonctions qui tienne compte des critères de subsidiarité et - avec elle - de la différenciation et la pertinence. La mise en œuvre de ces critères est très complexe, dans un pays marqué par la présence de près de 8.100 communes, dont un nombre importante (près de 6.000) n'atteint pas les 5.000 habitants, et souffre des lacunes évidentes en termes d'organisation, de territoire, de finance.

La commune est donc une figure juridique correspondante, dans la réalité, à une très grande diversité, allant de près de 3 millions à moins de 30 habitants. Alors que, au niveau de grande taille, on reste toujours dans l'attente de la mise en œuvre des villes métropolitaines (voir), au niveau de petits villages il semble maintenant abandonnée l'idée – réalisée dans plusieurs pays européens – de traiter la question en les fusionnant dans un nombre beaucoup plus réduit de communes de dimensions assez raisonnables. Donc, pour l'instant, il demeure essentiel, pour la solution des pratiques carences financières et organisationnelles, l'utilisation de formes d'exercice en coopération ou en association.

Le Texte unique sur les collectivités locales (Tuel, de 2000), établit un cadre général à l'égard de ces formes, y compris des flexibles accords consensuels, tandis que prévoit parmi les formes structurées d'association, douées d'autonome personnalité juridique, les consortiums et les unions de communes (voir).

Enfin, comme mentionné ci-dessus, le décret 31 mai n.78 - transformé en loi 30 juillet 2010, n.122 – établis l'obligation pour les communes de moins de 5.000 habitants (3000, pour ceux qui appartiennent aux communautés de montagne), d'exercer les fonctions

fondamentales municipales par moyen de ces formes d'association. En particulier, le décret prévoit l'utilisation d'un accord ou d'une union intercommunale, selon des territoires de taille optimale, qui doivent être définis par une loi régionale, qui doit être approuvé sur la base d'une consultation avec les communes concernées.

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THE CIVIL SERVICE

ANNUAL REPORT - 2011 - ITALY

(March 2011)

Prof. Stefano BATTINI – Benedetto CIMINO

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1. A BRIEF HISTORICAL NOTE

The first organic regulation of public employment in Italy can be traced back to the Act approved by Giovanni Giolitti in 1908. The Act had two main purposes. On one hand, it aimed to guarantee the impartiality of public administration, protecting the civil service against arbitrariness on part of the Government. On the other hand, the so-called "Statuto Giolitti" had been issued to bar the civil service from unionizing.

Thus, a special regulation had been applied to all public employees, including those holding middle and lower-rank positions. The Parliament granted civil servants wages and rights which were not available for private employees at the time.

The same approach prevailed during the Fascist period. In 1923, a second statute had been introduced by Alberto De Stefani. This Act, influenced by the new political culture, was largely based on the principles of hierarchy and uniformity, following the example of the military administration. According to that model, the State set, somewhat unilaterally, the rights and duties of its employees. The Act also established that all disputes concerning public employees were to be settled by the judge for the Public Administration, the State Council. This provision turned out to be decisive in consolidating the peculiarity of public sector employment relationships, which had already been widely recognized and supported by legal scholarship.

The advent of the democratic Constitution in 1948 altered this state of affairs only to a marginal extent. The third statute on public employment (Decree of the President of the Republic No. 3 of 1957, still in force for certain categories of employees such as the police forces), largely re-presented solutions (related to career paths, duties, and guarantees) which had already featured in the De Stefani Act, despite its initial ambitions and also due to the civil service's resistance to change.

In the latter half of the 1900s, the number of public employees grew robustly, together with the increase in public offices and the intensification of State intervention in the economy and society. Public employment became the most desirable (but often also the only) professional outlet for the middle and élite classes in Southern Italy, which suffered from pervasive unemployment already then. The Italian "Southern Question" thus became indissolubly linked to the "administrative question".

Complaints regarding the civil service were widespread and concerned several factors, including: public employees' inefficiency and low productivity; the scarcity of merit-based incentives; the irremovability of employees; favoritism in recruiting and promotion processes; the excessive cost burden imposed on the State budget.

In the 1980s, pursuant to the Giannini Report on the status of the public administration, the first reforms were attempted. These eventually led to Law n. 93/1983 (the so-called Civil Service Framework Law), which, however, still featured compromises to an excessive degree.

A clear paradigm shift took place only in the early 1990s, during the period of severe economic and political crisis known as *Tangentopoli*.

In-depth reforms became necessary, especially to restrain the impact of the civil service's inefficiencies on the public debt's growth. The ideas and reform projects derived from the "New Public Management" philosophy, which had already successfully taken root in the Anglo-Saxon world, easily entered the Italian scene, partially facilitated by the presence of several technical experts in the governments of the time.

2. THE 1990S REFORM

Two guiding principles of New Public Management in particular were transposed to the Italian administrative system: the distinction between management activities on one hand, and direction and control activities on the other; and the diffusion of contractual and market models in the public administrative context.

The first principle led to reformation of the civil service's management classes; the second, instead, to the privatisation of public employees' employment relationships.

2.1 The new public sector management

Before the 1990s, administrative civil servants did not possess specific, clearly defined, competences. Even as far back as the 1970s, laws had been enacted for the purpose but were never applied (namely, the Decree of the President of the Republic No. 748 of 1972).

In practice, all public measures, contracts, and even documents establishing the organization of facilities and staff were adopted or concluded by ministers directly.

Senior civil servants never sought to claim greater powers for themselves. In return, politicians allowed the class to independently regulate its career paths, which featured definite and predictable seniority-based advancements. This tacit deal – defined by Sabino Cassese as a "certainty-power exchange" – led to inefficiency and deterioration in responsibility.

This perspective was inverted upon issuance of Decree No. 29 of 1993, according to which only public managers (as opposed to political leaders) "are responsible for administrative activities, for management and related results"; they hold specific expenditure and organizational powers; they adopt all acts which create obligations binding the administration towards external parties. Ministers may not directly interfere with administrative management; instead, they may only provide direction for managers' actions and, by liaising with offices instituted for the purpose, ensure the achievement of operational objectives and the efficient management of resources.

However, the decree also granted ministers the power to appoint and dismiss managers. At first, the power was exercised only occasionally and extremely carefully, in deference to the tradition of career self-regulation; however, subsequently, increasing and more incisive use of the power was made.

In particular, since reforms introduced in 1998 (with Legislative Decree No. 80 of 1998 and Decree of the President of the Republic No. 150 of 1999), appointments to the civil service became fixed-term and fiduciary in nature, and could be confirmed or revoked at the minister's discretion. Also, ministers may relieve managers of their tasks or confer merely auxiliary duties upon them.

Thus, the executive, once again in the position to influence public sector managerial careers, regained its capacity to interfere with administrative activities, a capacity that it had lost through the operation of the principle of distinction between functions. However, public sector managers were compensated with significant wage increases.

The "Italian-style" spoils system, a middle ground between a merits-based system and pure political patronage, became entrenched: public managers may be selected by means of an open competition, receive high wages and enjoy tenure, but their career is controlled by the executive.

2.2. Privatisation of the employment relationship

As outlined above, for almost a century, Italian public employment was at all levels characterized by unilateral regulation and by the jurisdiction of the State Council. Transfer of an employee, disciplinary measures, and even payment of wages were deemed to be administrative acts, and thus subjected to a special legal regime. Public and private employment relationships were considered "ontologically" different.

This logic too was reversed by Decree No. 29 of 1993, which established that all measures relating to employment relationships (including recruitments and dismissals) were to be given the same legal treatment as those taken by private employers. Only open competitions would still be regulated by parliamentary laws, to ensure impartial and meritocratic selection processes.

Today, public sector employment relationships (including issues such as working time, leave, disciplinary duties, transfers, wages, etc.) are regulated by collective bargaining agreements negotiated every four years by the principal trade unions and the ARAN, a government agency.

The approval of collective bargaining agreements automatically annulled the hundreds of specific laws and regulations which once regulated public employment and often gave rise to injustice and serious inequalities (i.e. the "wage and normative jungle").

However, the introduction of private law did not also bring the efficiency which characterizes private undertakings. The cost of public employment had shrunk in the 1990s but returned to rise in the last decade, at rates even twice those of inflation and of the cost

of private work. Furthermore, at a local level, promotions and career advancements were laxly granted, without organizing open competitions but on the basis of mere seniority.

Attacking these practices would have been extremely costly for governments, in terms of political consensus. To reduce the cost of public employment, recruitment policies were intervened upon, in particular through measures preventing turnover. Consequently, in recent years, young graduates have entered the public administration largely by means of fixed-term contracts, without any right to job stability.

3. THE BRUNETTA REFORM

In 2009, with the enactment of Law No. 15 and the subsequent delegated decree No. 150 (which, together, introduced the so-called "Brunetta" reform), Parliament initiated an in-depth review of the law governing public employment. In particular, the role of collective bargaining agreements and of other forms of trade union participation were significantly scaled down, while the management powers granted to the senior civil service were enhanced.

3.1. The subjects and procedures of bargaining and concertation

Prior to the Brunetta reform, all aspects of employment were negotiated with trade unions. Formal national collective agreements governed regulation of the employment relationship. Merit-based incentives were established by complementary agreements negotiated within individual administrative bodies. Working time, transfers, staff evaluation and salary scales were all matters of "concertation" (that is, of discussion and informal agreement) with trade unions. Trade unions had to be informed and consulted regarding all other organizational decisions.

Since the reform, regulation of many of these aspects is reserved to laws, regulations and unilateral measures taken by administrative bodies (articles 5, 9, 40 et seq. of Legislative Decree No. 165 of 2001). Such aspects include: serious disciplinary measures and the disciplinary process, job mobility, career paths, staff evaluation and the distribution of productivity bonuses. Concertation practices have been de facto abolished, and general policies governing the organization and management of employment relationships need now only be communicated to trade unions.

The procedures that regulate collective bargaining were also thoroughly reviewed. First, control mechanisms were reinforced: national agreements now do not enter into force until they have been approved by the Italian Court of Auditors (previously, the same Court only gave a non-binding opinion); in addition, complementary contracts too are sent to the Court and to the State General Accounts Office, to verify the compatibility of the costs envisaged with the public budget.

Second, the law establishes a specific timeframe for the completion of negotiations with social partners; furthermore, public administration bodies may now unilaterally decide upon all issues that were previously regulated by means of complementary agreements. Trade unions are no longer in the position to paralyze the choices made by administrative bodies, but may only call strikes, as occurs in the private sector.

3.2 Performance management cycles, career advancement and productivity bonuses

The system for evaluating staff performance was entirely reformed (Titles II and III of Legislative Decree No. 150 of 2009). Today, the relevant guidelines, procedures and general criteria are uniform and established for all public administration bodies by the Independent Commission for Transparency and Integrity (Commissione indipendente per la trasparenza e l'integrità, CIVIT).

Furthermore, independent evaluation entities have been established within all administrative bodies; their tasks are to create a system for tracing and measuring individual workers' performances, and to compile a competence- and results-based "ranking of individual employee evaluations". Managers and heads of offices provide the findings required for the evaluation.

Productivity bonuses must now be distributed on a differential basis, i.e. only to the employees who have achieved the best results (previously, bonuses were distributed to all employees on an egalitarian basis).

Promotions too are based on a "merit scale" and granted to a limited number of employees, within budgetary possibilities. The law provides for two types of advancement: "horizontal" advancements, which are purely economic and consist of regular wage raises but unchanged tasks; and "vertical", or career, advancements, which entail regular wage raises as well as additional and more significant tasks. Vertical advancements may be granted only if suitable vacancies arise within the workforce, but may only be relied upon to fill up to 50% of such vacancies; the remaining posts must be filled by means of open competitions (previously, in practice, over two-thirds of such vacancies were reserved to internal candidates).

3.3. Penalties and disciplinary proceedings

The reform impacted upon three aspects of this area especially, (Articles 55 et *seq*., Legislative Decree No. 165 of 2001).

First, new grounds for dismissal were established to address certain particularly common forms of misconduct, such as false reporting of attendance, submission of false medical certificates, and making unjustified and repeated absences.

Second, disciplinary proceedings may continue concurrently with any criminal proceedings which may have been brought to address the same facts. Before the reform, it

was necessary to await conclusion of the criminal trial: in the meantime, the employee, continued to receive partial wages even if he or she was suspended from work.

Finally, the duration of disciplinary proceedings was shortened, and the powers of control and repression enjoyed by heads of office were enhanced; indeed, these officers may now directly impose less serious penalties, without forwarding the case to the specific disciplinary offices, as was the case previously.

3.4 The management

The law sought to strengthen the role and independence of managers (Articles 16, 17 and 19 of Legislative Decree No. 165 of 2010). On one hand, managers may perform their functions with less interferences, due to the reform of relations with trade unions: organizational and management deeds must no longer be subjected to agreement or concertation, but may now be adopted through unilateral decisions. Furthermore, as mentioned above, managers have been granted new powers and responsibilities relating to disciplinary matters.

On the other hand, the Brunetta reform also sought to limit the extremes inherent in the "Italian-style" spoils system by providing for greater job stability and establishing an obligation to provide reasons in case of managers' dismissal. However, some of these new provisions were annulled after only a few months, by means of a decree-law (No. 78 of 2010): therefore, ministers' interests in selecting and controlling the career progression of the civil service's upper management have prevailed.

3.5. Early implementation of the reform

In the course of 2010, implementation of the reform was largely paralysed, or at least hampered by the need to fight the economic crisis, perceived in Italy and in other European

countries. For this purpose, extraordinary and emergency measures were introduced, among which bans or limitations on recruitment until 2015, bans on contract extensions and wage raises, and the reduction of resources to finance productivity and merit bonuses. (Article 9 of Decree-Law No. 78 of 2010).

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THE NEW RULES OF THE SOCIAL SECURITY SYSTEM[1]

ANNUAL REPORT - 2011 - ITALY

(March 2011)

Prof. Loredana GIANI – Dr. Giovanna FILONI

INDEX

[1] Sections 1, 2, 3, 4, 5 and 7 are by L. Giani; Section 6 is by G. Filoni.

1. PREMISE

The social security system has undergone a radical change that has lead, especially in recent years, to a rewriting of the regulatory framework in relation to both administrative labour law and social security and insurance regulations.

With reference to the latter aspect, the turning point can undoubtedly be identified in the reform of the labour market and the special types of contracts, introduced by Legislative Decree No. 276/2003 in Law No. 30/2003 followed, a few years later, by the Protocol on Social Security, Employment and Competitiveness of 23rd July 2007, and transposed to Law No. 247/2007 with which were redesigned the broad outlines of the social security relationship.

The reforming process continued in the following years through regulatory interventions aimed at increasing the level of workers protection; "to encourage employment by companies"; to simplify labour relations through the reform of national collective bargaining; to face up to the crisis through the strengthening and the widening of the instruments of income protection in case of temporary or long term unemployment, thus offering income support to those categories of workers excluded from traditional insurance coverage.

The most important reform in terms of impact on the system was as a result of Legislative Decree No. 78/2010 "Urgent measures for financial stabilization and economic competitiveness" and converted into Law No. 122/2010, then partly amended by Law No. 183/2010 and by Law No. 220/2010.

With the abovementioned provisions the organization of the public bodies which operate in the system has been changed, as well as their organization and areas of interest and, in the case of INPS, the powers granted to it. Other substantial interventions that will only be mentioned in passing here concern the recalculation of the parameters for access to social security, insurance and invalidity benefits and other aspects such as those regarding criminal proceedings connected to the failure to pay the national insurance contributions of

the so called short term employed (contract for a regular ongoing collaboration) and similar which have still not been launched because of a lack of the appropriate ordinance on the part of INPS.

2. THE RATIONALIZATION OF SOCIAL SECURITY BODIES

With reference to the subjective aspects of the aforementioned decree, the legislature intended to reorganize social security through the elimination of some of them in order to achieve the rationalization for savings targets, as expressly mentioned in the text (Article 7). The ESPEMA (Marine Insurance Board) and the ISPELS (Institute for Prevention and Safety at Work) have been abolished and their functions have been assigned to INAIL (Industrial Injury Compensation Board).

In the same act, for identical reasons, have been suppressed IPOST (Institute for Postal and telegraph workers) whose functions were transferred to INPS (Article 7, par. 3); ENAM (National board for the workers in education) with its functions allocated to INPDAP (National social insurance institute for civil service employees) (Article 7, par. 3 *b*); IAS (Institute for social affairs) which will be replaced by ISFOL (Institute for the development for vocational training for workers) whose structure, according to changes made in the conversion, is unaffected and will also be used for providing research and support in the development of social policies (Article 7, par. 15); ENAPPSMSAD (National Pension and Insurance Funds for Sculptors, Musicians, Writers and Playwrights) which joins ENPALS (National Welfare and Assistance Body for Workers in Show Business) (Article 7, par. 16) wherein was established separate fund for assistance and insurance with separate accounting.

In line with the same philosophy the medical Commissions, working within the Ministry of economy and finance for invalidity controls, have also been ended including those present in regional capitals and autonomous provinces which through protocol of

understanding between the Ministry and the Regions will be provided free by local health boards or the health structure of the defence Ministry in the area.

The alterations in the organizational set up do not regard only social security institutions but also their organization and not just in terms of increased staff numbers, thanks to the arrival of the personnel from the closed institutions. In fact, it is foreseen that the management boards of the social security institutions will also be suppressed and their functions, in the plan described in Article 7, par. 7, will be taken over by the President of the body.

3. THE PARAMETERS OF ACCES TO BENEFITS

Having taken into account the parameters for access to benefits, the criteria for the ascertaining of the right to insurance and social security benefits relating to income allowed for by Law No. 14/2009, stemming from Legislative Decree No. 207/2008, have been recalculated. If on the one hand it is confirmed that in the case of a first pay-off the income referred to must be that of the ongoing year, declared in advance in line with what is required by Article 35, par. 9, of the aforementioned discipline, in other cases, on the other hand, reference will have to be made to the income earned the previous year, while for the services which come with an obligation to be reported to the Central Pensioner Registry, in line with Article 35, par. 2, of the abovementioned norm, in the modified text of Article 13, par. 6, of Legislative Decree No. 78/2010, what has to be considered is the income in the same year.

Furthermore it is expected that the recipients of benefits related to income should inform tax authorities of any changes in their income and failing this they will have to provide income data to the social security bodies providing the service. In the absence of the required notices, at paragraph 10 b, of Article 35 of Law No. 14/2009, introduced by Article 13, par. 6, of Legislative Decree No. 78/2010, the suspension of the service during the next year to the one in which the declaration should have been made is foreseen, or

even the revoking of the same in the case in which in the 60 days following the communication of the suspension the person concerned does not provide the required communication with consequent recovery of the sums provided during the year.

Then, the parameters for access to retirement benefits were rewritten for both private and public sector. Without changing the personal and contributory requisites for the right to pension foreseen in current legislation, for all those who attain the abovementioned requirements in 2011 and for those employees who on the 30th of June 2010 had not initiated the period of prior notice (Article 12, par. 4), the so called exit windows were redefined which among other things are no longer fixed but depend on the effective maturity of the requirements.

With reference to the old age pension (65 for men and 60 for women in the private sector, while in the public sector the higher age applies as established by Legislative Decree No. 78/2009, converted with Law No. 102/2009) the right to the commencement to the pension is granted to employers (AGO – compulsory general insurance - and supplementary or additional allowances members) begun 12 months before the date of the maturing of the requisites, which rises to 18 months for the self-employed.

The same windows have also been foreseen for those who access the contributory old age pension according to the system of quotas and retirement pension[1].

[1] Possible exemptions to the general discipline are considered in paragraphs 4 and 5 of Article 12.

4. REGISTRATION OF THE SELF EMPLOYED WITH THE INPS (NATIONAL SOCIAL SECURITY INSTITUTE)

A further novelty involves INPS membership for the self employed.

As is noted the question, that of the double insurance for the carrying out of various independent activities subject to different forms of obligatory I.V.S. (invalidity, old age and survivors) Insurance, has been studied by the Joint Divisions of the Supreme Court of Cassation which have already pronounced in the sentence No. 2340 of 12th February 2010, ending a judicial disagreement, established, as regards the insurance regime of a partner in a limited company that carries out commercial or advanced tertiary activity in the same and at the same time also fulfils the role of manager (including single), the application of the rule of membership of the insurance program foreseen for the activity to which he or she personally dedicate primarily their professional activity.

In the opinion of the judges, in fact, the choice of membership in the management referred to Article 2, par. 26, of Law No. 335/1995 or the management of participant in commercial activities (under the provision of Article 1, par. 203, Law No. 662/1996) is the responsibility of INPS according to the characteristic of the insurance and the contribution is measured exclusively on the basis of income from the main activity and under the current rules of the management of competences.

The normative intervention contains an authentic interpretation of paragraph 208 of Article 1 of Law No. 662/1996, specifying that “autonomous activities which come under the principle of being subject to the insurance foreseen for the principal activity are those exercised in the form of the business of shop keepers, craftsmen and farmers” (Article 12, par. 11).

For such activities the insurance in the corresponding INPS section comes into operation with the exclusion of labour relationships for which is obligatory membership of a separate system.

5. THE BENEFITS REGISTER

Particular relevance in the framework of the reform is assumed by a number of dispositions aimed at rationalising, through an increase of the power granted to INPS, the system of benefits provided throughout Italy.

For example Article 13 stands out which foresees the establishment within INPS of the so called "Casellario dell'assistenza" (Benefits Register) whose aim is to gather, conserve and manage data on incomes and other information relative to subjects entitled to benefits; a single and general database of the benefits supplied throughout Italy in which are involved other than INPS, State administrations, local bodies and non-profit organisations, as well as the organs who supply obligatory types of benefits and assistance, who are obliged to transmit electronically to the Register the data and information relating to all the positions contained in the archives and databases, according to criteria and modes of transmission established by INPS.

6. INPS' POWERS OF COLLECTION: THE NOTICE OF DISHONOUR

Of great importance, in the framework of the reform, is the strengthening of the processes of collection for all ascertained INPS credits from 1st January 2011 – even for periods prior to 2011, including those resulting from checks and those in the form of sanctions, added sums and interest – which, starting from 1st January 2011, will be based on a new instrument having the value of an executive order known as "avviso di addebito" (notice of dishonour).

This norm is one of the dispositions aimed at greatly reducing the times between the appearance of credit being noticed by the institute and the moment in which the warrant officer can launch, in line with the regulation concerning tax roll collection, the recovery also referring to missing periodic payments (on the part of companies or self employed).

For activities carried out until 31st December, the recovery system will remain entrusted to the tax roll, that is to the list of debtors that the credit body draws up and hands over to the collector (the equivalent of the warrant officer) and that, reproduced in the income tax form, is rendered executive by the creditor an thus constitutes an executive title for the collection of payments by a warrant officer who is thus legitimised to act on the goods of the debtor (collective executive order).

From 1st January 2011 the periodic sums omitted by employers and self employed and the sums ascertained through inspections will be requested by means of a notification of a notice of dishonour with the value of an executive order and no longer through the income tax form.

The warning shall be given as a priority by registered email or by convention between municipality and INPS by town council messengers or municipal police officers or by registered post.

The notice of dishonour which INPS will send directly to a tax payer must include, on pain of nullity, all the useful elements for identifying the demand as specified in INPS Circular No. 168 of 30/12/2010 as for the subjective aspect of the notice to pay (such as details of the tax payer; competent INPS office) and the temporal and objective ones. Furthermore it has to contain the formal placing in default of the tax payer.

Paragraph 14 of Article 30 has established that all references contained in current Laws to the tax roll to sums registered into the tax roll and to the tax return form are considered to refer to, with the aim of recovery the sums owed in any way to INPS, at the executive order emitted by the same institute (notice of dishonour).

Departing from the discipline of the tax roll (Legislative Decree No. 46/1999), with the Decision of the INPS President No. 72 of 30 July 2010 were defined the means and terms for the delivery of the warning to the tax collector.

The warning has to be sent to the tax collector at the same time as it is sent to the tax payer electronically according to the technical protocol agreed with Equitalia s.p.a. (Equitalia ltd).

The delivery of the warning is carried out monthly:

- By the 25th of the month, for credits whose deadline for the issue of the warning falls between the 1st and the 15th of the month;

- by the 10th of the month, for credits whose deadline for the issue of the warning falls between the 16th and the 31st of the previous month;

To improve the recovery action, if necessary further electronic means can be defined for the transfer of information from INPS and Equitalia s.p.a.

The notice to pay has as its object:

- The sums owed as insurance payments whose monthly or periodic deadlines have been totally or partly omitted; or paid late;

- The credits ascertained by the offices or by the controlling bodies;

- Any other sums of any type owed to INPS.

The sections involved are:

- The fund for employees. These are sums owed as national insurance payments for employees. The contributions are communicated monthly by the UNIMIENS (an integrated system) declarations;

- The craftsmen section of the self-employed inscribed in the register of craft businesses. The contributions concerned are the shares owed on the minimal contribution, the deadline is quarterly;

- The commercial section for the self-employed identified by Law No. 613/1966 and Law No. 662/1996;

The separate section – purchaser and joint venture. These are the contributions owed for relationship of coordinated and continuous and assimilated collaboration, as well as the contributions for relationships of joint venture based only on labour. The deadline for the contribution is monthly.

- The self-employed agricultural workers;

- Agricultural employers.

7. THE CHANGES IN DISABILITIES SUPPORT REGULATIONS

A reference at the end of this quick overview on some of the principal innovations introduced in the benefit sector should be made to Article 10 of Legislative Decree No. 78/2010 which brought various changes to the framework of invalidity, with the aim of reducing the number of beneficiaries and fighting the phenomenon of "false invalids".

To achieve the first objective the percentage of invalidity for the granting of the monthly check for partial invalids changed in 1st June 2010 from 74% to 85%. To the benefits for invalidity, blindness, deafness, handicaps and disabilities, as well as to the invalidity benefits paid by INPS, a number of other dispositions have been applied that are already in force for other type of benefits (Article 19, par. 2). In particular, Article 9 Legislative Decree No. 38/2000 is applied which allows the institute to rectify errors of any type committed in stating the right to the benefit, paying it or paying it back, within 10 years starting from the date of the original mistaken benefit, except in cases of a wilful misconduct or gross negligence of the subject involved which has been established judicially.

From the point of view of fighting the phenomenon of false invalids, the legislator has provided dispositions aimed on the one hand at intensifying the verification of invalidity with a consequent provision for the recovery of the sums paid as benefits that turn out not to have been due in the case of lack of merit because of fraud or in case of a wilful misconduct or gross negligence of the subject involved. In application of the provisions contained in Article 55, par. 5, Law No. 88/99; on the other, to increase the level of responsibility of the individual operators. From this point of view can certainly be included the dispositions contained in Article 10, parr. 2 and 3, of Legislative Decree No. 78/2010 which contemplate respectively the charge for the failed recovery of the sums wrongly paid out to the responsible functionary who acted fraudulently or wrongly and the responsibility of the health workers who falsely attested or certified a state of illness of handicap. In this last case it is foreseen that the health worker should repay to the body the financial damage for a sum equal to "the payment that corresponds to the economic treatment". For the abovementioned invalidity "in the periods for which was ascertained the enjoyment of the relative benefit, as well as the damage to image of the administration". This is a compensatory action that has to be added to those aimed at establishing criminal, disciplinary and fiscal damage.

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PUBLIC COMPANIES BETWEEN THE MARKET AND SELF-ORGANIZATION OF ADMINISTRATIVE AUTHORITIES

ANNUAL REPORT - 2011 - ITALY

(May 2011)

Prof. Stefano CIVITARESE MATTEUCCI

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1. PUBLIC COMPANIES IN THE ITALIAN LEGAL SYSTEM

In Italy since the '90s – when the transformation of big public monopolist corporations into joint stock public companies began – we have had a strong increase in companies totally or prevalently owned by the State. This process is also known as "formal privatization", because it left the ownership of newly constituted "normal" commercial companies to the State. However, unlike the previous State use of controlled or its own companies to pursue various public tasks (what in the Italian system bore the name of "State Sharing"), the wave of privatizations, under the pressure of European Law, had the objective of fostering the opening to the market of different sectors of public utilities. As the doctrine has emphasized, however, all public corporates operating as industries or in a company-like manner have been involved in that phenomenon of privatization, in such a

way as to give place to a number of patterns of "public companies", which cannot be collected under the single scheme of a big commercial company whose goal is to sell shares into the financial market[1].

Scholars have argued that public companies, thanks to special rules, have gained a specific position in the legal system, and therefore it is a hazard to continue sustaining that with the choice of creating a joint stock company «The State subjects itself to company law to carry out its own management with simpler forms and new chances of achieving its objectives» (from the Explanatory Report to the 1942 Civil Code).

If, indeed, the discipline of these companies is in general terms constituted by private law (Civil Code), a number of exceptions, established by legislation, are aimed at guaranteeing the realization of public ends.

As mentioned by professor Clarich[2], the Association of "Joint Stock Companies incorporated in Italy"[3] has proposed, in a recent report, on the one hand, to eliminate companies that are actually quasi-public administrations – considered hybrid entities undermining the model of private companies –, on the other hand, to repeal limits provided

[1] G. Napolitano, *Le società pubbliche tra vecchie e nuove tipologie***,** in Riv. soc., 2006, 5-6, 999.

[2] M. Clarich, *Società di mercato e quasi-amministrazioni*, in Dir. amm. 2009, 2, 253.

[3] This association, created on 22th November 1910, represents nowadays the galaxy of joint stock companies in their different branches: industry, finance, insurance, services (http://www.assonime.it/AssonimeWEB/public/initAction.do?evento=english)

by legislation for companies (created or participated by the State or local authorities) which operate in a competitive market[4].

In such a report three categories of "quasi-public administrations" are singled out: "in house providing" companies, which are entrusted by local authorities to manage public services without open procedures of selection; companies created for carrying out public functions (as National Corporate for Roads or National Corporate for Flight Assistance); companies which carry out instrumental activities on behalf of administrative authorities, especially regional and local, subjected to a restrictive set of rules (act of Parliament 248/2006).

This classification is useful to have an idea of the "galaxy" of public companies, but actually it is not possible to draw a clear boundary between companies, which normally work in the market, and others, which should be considered disguised public authorities. There is a variety of situations and «the distinctiveness of public companies is probably a question of degree, varying, according to legislation, without solution of continuity, from a minimum to a maximum: from a minimum of distinctiveness (or with no distinctiveness at all), when a company is wholly regulated by private law and the State or a local authority are the owner of stocks to a maximum, when deviations from private law are so important as to cause the predominance of public law regime»[5].

The most common deviations from private law concern the subjection of companies to forms of financial assessments of the Court of Auditors[6], the possibility of

[4] Assonime, *Principi di riordino del quadro giuridico delle società pubbliche*, Roma, September 2008, in *http//:www.assonime.it.*

[5] M. Clarich, *quoted*, 254.

[6] See below in the text the reference to Constitutional Court decision n. 466/1993).

personnel being accused of administrative liability before the Court of Advisors, and the obligation for companies to award contracts according to European Law procedures, about which Administrative Courts have the power to rule.

With regard to this, Constitutional Court (case 466/1993), adopting a substantive notion of public company, has established that companies of "special law" can be defined as the ones which are regulated by a mixture of public and private law, adding that the Court of Advisors keeps its power to assess joint stock companies constituted after the transformation of economic public corporates (like IRI, ENI, ENEL, INA, etc.) until the State has the majority of shares.

According to a part of the doctrine this particular “mixed regime” should determine the acknowledgment of public companies as corporates having not a private but a public law personality, in this way outlining the new category of administrative agencies with the structure and form of companies[7], and going back, somehow, to that public corporate body from which the process of privatization started. This kind of approach – excluding in principle the bodies at stake are commercial companies – assumes a totally different perspective from those who criticize the “betrayal” of company law brought about by the legislation under exam. And yet, also for this “public law perspective” the problem is about generalization: when does a company become an administrative agency with the structure of a company due to deviations from its normal way of operating?

All public companies born by transformation of industrial public corporations (according to the act of legislation n. 359 of 1992), for example, were created not by contract, but through a statute or an administrative act, and moreover they did not possess

[7] See G. Rossi, *Gli enti pubblici in forma societaria*, in *Serv. pubbl. app.*, 2004, 221 ss.; M. Renna, *Le società per azioni in mano pubblica. Il caso delle s.p.a. derivanti dalla trasformazione di enti pubblici economici ed aziende autonome statali*, Torino, 1997, 101 ss.

the requisite of the plurality of members: therefore we notice, from their creation, a significant deviation from the private law pattern. Other deviations deal with a functional perspective: for example the public owner, usually the Minister of Finance, is strongly limited in exercising his own rights and prerogatives by the interference of people formally extraneous to the governance of the company (other Ministers, Prime Minister).

Then, since the second half of the '90s, also administrative courts, developing further the position expressed by the Constitutional Court about the substantive notion of public administration, have reached the opinion that public corporations can have the structure of a company, which, however, the typical principles and rules of administrative action apply to (see Cons. Stato, VI, n. 1206/2001).

2. RECENT REFORMS AIMED AT GUARANTEEING MARKET COMPETITION AND FUNDING CUTS IN PUBLIC COMPANIES

The most recent legislation seems to confirm a tendency towards treating public companies as unique and special figures placed midway between public and private law and articulated in various sub-categories.

Aspects of distinctiveness can be related to two objectives of policy. The first concerns the choices of the State as a shareholder, the second the activity of companies. The first group of limitations is not, in principle, in contrast with normal company law whereas the second is since it determines substantive limitations for management to pursue its own business[8].

[8] For these remarks see M. Clarich, *quoted*.

As regards the first group of limitations we can mention different rules about the "moralization" of the expenditure of public companies not quoted on the stock exchange, controlled directly or indirectly by the State (except for companies only linked to the State), provided by Parliamentary act n. 244/07, *finance maneuver for 2008*, as modified by n. 69/09 and n. 102/09 Parliamentary acts.

These rules establish that statutes of companies have to provide reductions in the maximum number of members of boards and in the compensations of managers by at least 25%. They establish, moreover, the possibility to abolish the figure of vice-president and several other limitations regarding wages and indemnities for members of corporate governance and managers.

We can include in this line of policy other recent legislative rules which concern a manager's liability. A person who has already held the position of manager of a company totally or prevalently owned by the State for five years cannot be reappointed to the position if in three consecutive years of the five the company had a bad financial record caused by avoidable managing strategies.

The other group of rules influence the activity of public companies in a more substantive way. We can think, on the one hand, about decisions on budget, mission, sharing frame, and corporate governance taken directly by legislature, and, on the other hand, about the power of taking directives and approving main managing decisions by the controlling Minister[9].

Referring particularly to the relationship between these companies and the market, recent legislation has introduced a number of dispositions to guarantee market competition.

[9] See M. Clarich, *quoted*, and G. Napolitano, *quoted*.

Art. 13 of the above quoted Bersani-decree of 2006 establishes that «in order to avoid alterations or abuses regarding market competition and to guarantee equality between operators in the national territory, companies, which have their shares totally or partially owned by a public authority or are constituted or participated in by regional and local authorities, as instruments of their ordinary action to produce goods and services, must act with the authorities which created or participated in or entrusted them, and they cannot provide any services for either private or public persons, either through a direct assignment or a selective procedure, and they cannot join other companies or corporations having their headquarters within national boundaries».

Companies that carry out local public services are exempted from this prohibition.

Even deeper consequences are produced by Act n. 244/07 *finance maneuver for 2008,* which seems to reserve market competition to private actors only introducing a general prohibition for public authorities to create companies «having the mission to produce goods and services» and to acquire or maintain participation, albeit a minority in such companies, with the exception of cases in which these companies are strictly instrumental in pursuing institutional tasks[10]. The body in charge must give a reason for its decision to create a company or acquire shares, demonstrating the actual existence of such a necessity, and the relative act must be transmitted to the Court of Advisors, which, evidently, has the duty to assess the lawfulness of such arguments.

This rule seems to confirm that the legislative intent is towards permitting the use of a company-like frame only for better making the organizational frame of public bodies

[10] Also in this case it is possible to create companies which produce services of general interest and which provide commissioning services at a regional level, in support of non profit corporate bodies and authorities granting public contracts, as well as participation in such companies.

fit for pursuing their own specific institutional goals[11]; in fact, on the one hand, private patterns are reshaped to suit public law needs whereas on the other hand, the law obliges public companies not to enter the market in competition with private operators.

We can see this pan-public law tendency also in more recent legislative rules relating both to the way of controlling expenditures and to the extension to public companies of rules regarding organization and the managing of personnel (art. 71 of Act n. 69/2009 as modified by art. 19 of Act n. 102/09).

From the first point of view we notice a considerable increase in the importance of the Minister of Economics. In the case of creation of new national public companies shares must be attributed to this Minister, who is compelled to exercise shareowners' rights with the cooperation of other ministers involved in the subject. Moreover, State authorities have to be authorized by a Prime Minister's decree, under a proposal of the competent Minister with the agreement of the Minister of Economics, to acquire new participations or maintain those already held.

From the second point of view it has been established that companies totally owned by public authorities, which manage local public services, must adopt criteria and rules in recruiting personnel based on principles of publicity, impartiality and competitiveness in force for public servants. Other public companies are expected to follow criteria of transparency, publicity and impartiality in hiring people, even though they do not have the obligation to observe the principles regarding the recruitment of public servants.

Act n. 102/09 has, moreover, extended the prohibitions and limitations regarding the recruitment of people by local authorities to local public companies, which are either directly entrusted with public services without any competitive procedure, or necessary for

[11] See B. Giliberti, I. Rizzo, *Posizionamento e margini di operatività delle società pubbliche nel mercato*, in Foro amm.-CdS, 2010, 2526.

the institutional action of such authorities. Every public company must comply with the regime of authority by which it was created also regarding contracts, consultancies and compliance with the "internal stability pact", the latter according to modalities that are to be defined by the Minister of Economics after consulting the "Conferenza unificata" between the State, the Regions, and local authorities. This latter provision has, however, been quashed by the Constitutional Court (case n. 325 del 2010), which has ruled that the modality of application of the "internal stability pact" regarded the issue of public finance coordination (cases n. 284 e n. 237 of 2009; n. 267 of 2006), about which the legislative competence is shared by State and Regions. Indeed, in cases such the latter, according the Italian Constitution, the regulatory power belongs to the Regions and does not to central government.

Some final remarks are needed about certain clauses of Act n. 102/09, since they are not in line with the above mentioned legislative intent and are perhaps in contrast with the European law of competition.

We would like to mention, first of all, the repeal of the prohibition of the so called "indirect participation", according to which administrative authorities were not allowed to acquire or maintain, through the control of an intermediate company, shares of companies which had as a mission the production and supply of goods and services not strictly instrumental in pursuing the institutional ends of an administrative authority. The threat is that through the veil of their own companies which are strictly instrumental in pursuing institutional ends – and therefore not acting on the market – the public powers can go back to the market.

Also another clause casts doubt on its European compatibility. It is the one that makes it possible for State administrations to confer the management of public funds directly to public companies totally owned by the former over which they exercise a control analogous to that exercised over their own offices and, moreover, which «carry out their activity almost exclusively towards the State administration». This very vague use of the word "almost" opens margins of discretion and uncertainty which could undermine the reference to the usual requisites of "in house providing" companies.

3. BIBLIOGRAPHY

For an annotated bibliography see the Documents area in the Public utilities section.

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PUBLIC BODIES AND PUBLIC ENTERPRISES

ANNUAL REPORT - 2011 - Germany

(April 2011)

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1. PUBLIC BODIES

1.1 Administrative authority, executive body, organ, organizational power

Administrative authorities ("*Verwaltungsträger*") are those entities which are entrusted with administrative functions. These can be the federation (*"Bund"*), *Länder*, districts (*"Bezirke"*), counties (*"Landkreise"*), communes (*"Gemeinden"*) as well as other public corporations, institutions and trusts. Administrative authorities consist of executive bodies ("*Behörden*") and organs.

An *executive body* is a public authority which executes public functions;[3] an *organ* is the entity within the public authority that enables it to act. Executive bodies and organs are not legally capable and therefore act solely on behalf of the administrative authority. Hence, only the administrative authority has the capacity to sue and be sued.[4]

In the German federal state in which both the federation (*"Bund"*) and the *Länder* are states, the *organizational power*, i.e. the ability to establish and furnish public authorities, is divided between federation and *Länder*-states (Art 83 et seqq. GG).

1.2 'Direct' Administration ("unmittelbare Verwaltung")

As a general principle, public administration is exercised 'directly' or 'indirectly' by either the federation or a province. '*Direct' Administration* is

[3] Para. 1 sec. 4 Administrative Procedures Act (Verwaltungsverfahrensgesetz).

[4] Para 78 Administrative Court Procedures Act. (Verwaltungsprozessordnung).

exercised directly by a state authority that is attributed to either the federation or a province, without the intervention of another (legally capable) administrative authority. Hence, 'direct' administration by the federal state is executed for instance by the federal ministries and the federal agencies.

‚Direct' administration is exercised by supreme executive bodies (*"oberste Behörden"*), for instance the ministries, upper executive bodies (*"Oberbehörden"*), intermediate executive bodies (*"Mittelbehörden"*) – executive bodies within an administrative structure comprising upper and lower executive bodies – and lower executive bodies (*"Unterbehörden"*) (with upper and intermediate executive bodies).

As a general rule, the superior executive body is entitled to *give instructions* to a lower body which is then obliged to comply with them. Independent government agencies affect the principle of democratic legitimacy and are allowed only in exceptional circumstances.

1.3 'Indirect' Administration ("mittelbare Verwaltung"

‚Indirect' public administration is exercised by legally capable administrative bodies, i.e. by public corporations ("*Körperschaft*"), institutions ("*Anstalt*) and trusts ("*Stiftung*"). The local administration of a municipality (*"Gemeinde"*) is 'indirect' because the municipalities are public corporations and therefore legally capable.

A *public corporation* is a legally capable organization based on membership which exists independent of the change of the individual members. One distinguishes between person-based corporations (*"Personalkörperschaften"*) whose members are particular natural or artificial persons (e.g. professional associations), territorial corporations (*"Gebietskörperschaften"*) which are defined by the location of a head office or place of residence (e.g. municipality), real

corporations (*"Realkörperschaften"*) whose membership is defined by property rights or other real rights (e.g. hunting association) and organizational corporations (*"Verbandskörperschaften"*) whose members are predominantly artificial persons (e.g. communal administrative unions). Corporations in 'indirect' state administration often have rights of self-governance.

The legal term '*institution*' (*"Anstalt"*) was coined by Otto Mayer as a quantity of material and personal means in the hands of a public authority which is permanently dedicated to a special public interest. Institutions have users instead of members. One must distinguish between institutions which are legally capable and those which are not.

A *trust* is a unit which serves a specific purpose defined by the founder by means of utilizing the endowment fund. There are public and private trusts; they are either legally capable or not.

1.4. Principle of formal legal reservation

The foundation and establishment of legally capable corporations, institutions and public trusts must be carried out through or based on an act of legislation. According to the so-called *principle of formal legal reservation* (*"institutioneller Gesetzesvorbehalt"*), the act of legislation must explicitly set out the body's specifications such as the assigned tasks, the relevant characteristics for membership, obligatory or optional membership, basic provisions concerning the body's organs, their responsibilities and capacity to act as well as state supervision. On the contrary, issues exclusively concerning the body's internal sphere are dealt with not by an act of parliament, but by statute.[5]

[5] Storr/Schröder, Allgemeines Verwaltungsrecht, 2010, p. 45.

2. PUBLIC ENTERPRISES

2.1 Legal structure

The term *Public Enterprise* is not defined in German Law and is essentially interpreted by scholars following the functional approach of European Law as positively expressed in the Transparency Directive.[6]

Though not enacted in legal form, the public administration is granted the freedom to choose whether to establish public enterprises under public or private law, to confer legal capability upon them and to involve private parties ("*Formenwahlfreiheit der Verwaltung"*).

Public enterprises established under public law do not have legal capability if organized as a special fund ("*Sondervermögen"*) or as part of the local administration of a municipality ("*kommunaler Regiebetrieb*") as in both cases departments of public administration are set up for commercial purposes. A self-run enterprise (*"Eigenbetrieb"*) is usually owned by a municipality but not set up as part of its administration, lacks legal capability, is commercially managed and can have its own organs. The German *Länder* have passed relevant legislation (*"Eigenbetriebsgesetze"*). Moreover, *public corporations, institutions and trusts* can be public enterprises, as can be legal entities established under

[6] Art. 2 lit b Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJEU L 318, 17. 11, 2006, p. 17.

private law, i.e. capital and private companies (*"Kapital- und Personengesellschaften"*) such as stock companies and limited partnerhips.

2.2 Scholarly classification

The capability of public enterprises to *hold fundamental rights* is disputed, but predominantly rejected among academics with reference to the fact that public enterprises are - even if partly owned by private parties – necessarily controlled by the state which fundamental rights are directed against. Prevailing opinion is thus that being tied to the state's unique authority to legitimately use force, public enterprises cannot at the same time hold rights in its defense.

The question if and to which extend public enterprises are *subject to fundamental rights* is also disputed. According to the jurisdiction of the German Federal Court[7], the fundamental rights do not protect against competition in business. At the most, public entrepreneurism can be prohibited if private commercial activity is made impossible or is unacceptably affected.

An *enterprise established under public law* is free to operate under public as well as private law (*"Handlungsformenwahlfreiheit der Verwaltung"*), an *enterprise established under private law* can in principle operate only under private law unless it has been authorized by the state to issue acts of sovereignty. When the state operates under private law, the rules of private law apply. Additionally, according to the concept of Administrative Private Law (*"Verwaltungsprivatrecht"*), the basic rules of public law and the essential

[7] BVerwGE 39, p. 329, 336.

requirements of the fundamental rights must be adhered to. The existence of a separate set of rules regarding private administration must be rejected.[8]

The *financial regulations* of the Federation (*"Bund"*) and the *Länder* and the *municipal regulations* contain special provisions concerning commercial activities of the public bodies.[9] However, in principle they do not affect third parties. These provisions establish legal requirements on the admissibility of such activities, for example by defining a valid public interest, specifying the conditions under which the outsourcing of a public service to an enterprise is suitable to fulfill the public interest, demanding that the nature and scope of the enterprise be proportionate to the capacities of the municipality, limiting liability and finally, making it subject to the condition that the task at hand cannot be fulfilled better or more efficiently in any other way, for instance if performed by a private body.[10] Some provisions also require the public body to maintain an adequate level of control over the operations.

8 Schröder, Verwaltungsrechtsdogmatik im Wandel, 2007, p. 223.

9 E.g. para 55 Federal Budget Code (Bundeshaushaltsordnung).

10 For an overview of the problems surrounding third-party effects, see Ruthig/Storr, Öffentliches Wirtschaftsrecht, 2nd edition, 2008, p. 334 f.

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ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW

DROIT ADMINISTRATIF ET DROIT CONSTITUTIONNEL

DIRITTO AMMINISTRATIVO E COSTITUZIONALE

VERWALTUNGS- UND VERFASSUNGSRECHT

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DROIT ADMINISTRATIF ET DROIT CONSTITUTIONNEL

APPORTS DE L'ANNEE - 2010 - FRANCE

(Juillet 2011)

Prof. Agnès ROBLOT-TROIZIER[1]

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L'année 2010 est une année charnière pour le droit constitutionnel français car elle est celle du bouleversement de ses rapports avec les autres disciplines, notamment avec le droit administratif. L'instauration de la question prioritaire de constitutionnalité place en effet la thématique constitutionnelle au cœur des évolutions les plus notables des rapports entre ces deux branches du droit public. Mais elle ne doit pas occulter les autres apports de l'année.

Certains d'entre eux concernent l'application par le Conseil d'Etat des dispositions constitutionnelles relatives aux engagements internationaux, d'autres ont trait à la question de la recevabilité des recours pour excès de pouvoir présentés par des parlementaires qui entendent, par ce biais, contester des actes administratifs susceptibles de méconnaître les prérogatives du Parlement.

Parallèlement, le Conseil constitutionnel a, de son côté, rendu de nombreuses décisions par lesquelles il contrôle *a priori* la constitutionnalité de lois qui touchent aux différents aspects du droit administratif. Pour mesurer l'apport de ces textes à ce dernier, il conviendra de se reporter aux bilans annuels consacrés aux différentes composantes du droit administratif, dès lors qu'ils concernent tantôt les collectivités territoriales (notamment Cons. const. n° 2010-603 DC du 11 février 2010, *Loi organisant la concomitance des renouvellements des conseillers généraux et régionaux* et Cons. const. n°2010-618 DC du 9 novembre 2010, *Loi portant réforme des collectivités territoriales*), le droit public de l'économie (Cons. const. n°2010-601 DC du 4 février 2010, *Loi relative à l'entreprise publique La Poste et aux activités postales* et Cons. const. n°2010-605 DC du 12 mai 2010, *Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*), les droits et libertés et les mesures de police qui en encadrent l'exercice (Cons. const. n°2010-604 DC, *Loi renforçant la lutte contre les violences de groupes et la protection des personnes chargées d'une mission de service public* et Cons. const. n°2010-613 DC du 7 octobre 2010, *Loi interdisant la dissimulation du visage dans l'espace public*), ou enfin le droit de la fonction publique (Cons. const. n°2010-617 DC du 9 novembre 2010, *Loi portant réforme des retraites*).

1. L'INSTAURATION DE LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE OU LA MISE EN ŒUVRE D'UNE NOUVELLE VOIE DE DROIT

Au cours de l'année écoulée, est entrée en vigueur la nouvelle procédure instituant, en France, un contrôle *a posteriori* de la constitutionnalité de la loi. L'article 61-1 de la Constitution, né de la révision constitutionnelle du 23 juillet 2008 (loi constitutionnelle n°2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République), dispose : « *Lorsque, à l'occasion d'une instance en cours devant une juridiction, il est soutenu qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d'État ou de la Cour de cassation qui se prononce dans un délai déterminé* ». Mettant en œuvre cette disposition, la loi organique du 10 décembre 2009 a qualifié cette nouvelle procédure de « question prioritaire de constitutionnalité », dont l'acronyme QPC est aisément entré dans le vocabulaire juridique français ; elle a déterminé les conditions de recevabilité et de transmission au Conseil constitutionnel des questions prioritaires de constitutionnalité soulevées par les justiciables ; et, enfin, elle a fixé au 1er mars 2010 l'entrée en vigueur de la nouvelle voie de droit. Cette loi organique modifie ainsi l'ordonnance du 7 novembre 1958 relative au Conseil constitutionnel (loi organique n° 2009-1523 du 10 décembre 2009, JORF, 11 décembre 2009, p. 21379).

Aux termes de ce texte, la QPC est un « *moyen tiré de ce qu'une disposition législative porte atteinte aux droits et libertés garantis par la Constitution* ». Ce moyen, qui peut être soulevé pour la première fois en appel ou en cassation, ne peut être relevé d'office par le juge et doit être présenté dans un mémoire écrit distinct et motivé.

La juridiction qui en est saisie transmet la QPC à la juridiction suprême dont elle dépend si trois conditions sont remplies : « *1° La disposition contestée est applicable au litige ou à la procédure, ou constitue le fondement des poursuites ; 2° Elle n'a pas déjà été déclarée conforme à la Constitution dans les motifs et le dispositif d'une décision du Conseil constitutionnel, sauf changement des circonstances ; 3° La question n'est pas dépourvue de caractère sérieux.* »

Les juridictions suprêmes, saisies directement ou par le juge a quo d'une QPC, renvoient ladite QPC au Conseil constitutionnel si sont effectivement remplies les deux premières conditions sus-indiquées et si elles jugent que « *la question est nouvelle ou présente un caractère sérieux* ».

Lorsqu'elle transmet une QPC, la juridiction doit en principe surseoir « *à statuer jusqu'à réception de la décision du Conseil d'Etat ou de la Cour de cassation ou, s'il a été saisi, du Conseil constitutionnel* », mais la loi organique pose toutefois quelques exceptions au principe du sursis (procédure d'urgence, instance dans laquelle l'un des requérants est privé de liberté, conséquences irrémédiables ou manifestement excessives pour les droits d'une partie).

La loi organique confère en outre un caractère prioritaire aux questions de constitutionnalité : « *En tout état de cause, la juridiction doit, lorsqu'elle est saisie de moyens contestant la conformité d'une disposition législative, d'une part, aux droits et libertés garantis par la Constitution et, d'autre part, aux engagements internationaux de la France, se prononcer par priorité sur la transmission de la question de constitutionnalité au Conseil d'Etat ou à la Cour de cassation* » ou, pour ces derniers, au Conseil constitutionnel.

Les premiers mois d'application de la nouvelle procédure ont donc permis d'en préciser tout à la fois les particularités et les contours s'agissant des normes invocables à l'appui d'une QPC, des normes objets d'une telle question, des conditions de son admission et de son caractère prioritaire.

1.1 Les normes constitutionnelles invocables au soutien d'une QPC

Quant aux normes constitutionnelles invocables à l'appui d'une QPC, le juge administratif comme le Conseil constitutionnel optent pour une interprétation extensive de la notion de « *droits et libertés que la Constitution garantit* » auxquels l'article 61-1 cantonne le contrôle *a posteriori* de la constitutionnalité des lois.

Les objectifs de valeur constitutionnelle ne sont pas exclus des normes de référence de la QPC sans être pour autant, en tant que tels, des droits et libertés au sens de l'article 61-1. C'est à propos de l'objectif de valeur constitutionnelle d'accessibilité et d'intelligibilité de la loi que la Conseil constitutionnel a d'abord pris position : dans sa décision 2010-4/17 QPC du 22 juillet 2010, il affirme « *que, si l'objectif de valeur constitutionnelle d'intelligibilité et d'accessibilité de la loi, qui découle des articles 4, 5, 6 et 16 de la Déclaration des droits de l'homme et du citoyen de 1789, impose au législateur d'adopter des dispositions suffisamment précises et des formules non équivoques, sa méconnaissance ne peut, en elle-même, être invoquée à l'appui d'une question prioritaire de constitutionnalité sur le fondement de l'article 61-1 de la Constitution* » (*M. Alain C et autres*, cons 9). Ensuite, il s'est appuyé sur des objectifs de valeur constitutionnelle pour apprécier l'atteinte au principe constitutionnel d'égalité : c'est à l'aune de l'objectif constitutionnel de lutte contre l'évasion fiscale que le Conseil vérifie qu'une différence de traitement instituée par la loi est justifiée et ne crée pas de rupture caractérisée de l'égalité devant les charges publiques (Cons. const. n°2010-16 QPC du 23 juillet 2010, *M. Philippe E.*, cons. 6 et Cons. const. n°2010-70 QPC du 26 novembre 2010, *M. Pierre-Yves M.*, cons. 4). Dans sa décision 2010-55 QPC du 18 octobre 2010, il a enfin jugé « *qu'eu égard aux objectifs qu'il s'est assignés, le législateur a adopté des mesures propres à assurer une conciliation qui n'est pas manifestement déséquilibrée entre le principe de la liberté d'entreprendre et l'objectif de valeur constitutionnelle de sauvegarde de l'ordre public* », pour conclure que « *les dispositions contestées ne portent pas atteinte au principe de la liberté d'entreprendre* » (*M. Rachid M. et autres*, cons. 6). Cette jurisprudence semble faire des objectifs de valeur constitutionnelle des instruments de mesure de la méconnaissance des droits et libertés que la Constitution garantit. Mais la reconnaissance de la violation de tels objectifs dans une décision QPC semble devoir rester exceptionnelle (en ce sens, A. Lallet et X. Domino, Chronique générale de jurisprudence administrative française, AJDA, 2011, p. 375), dès lors qu'ils ne constituent pas en eux-mêmes un droit ou une liberté.

Dans le même ordre d'idées, alors que l'étendue de la compétence législative a volontairement été exclue du contrôle *a posteriori* de la constitutionnalité des lois par l'article 61-1, ce que l'on appelle l'incompétence négative du législateur, qui se caractérise par le fait que celui-ci n'exerce pas pleinement sa compétence et renvoie au pouvoir

réglementaire le soin de déterminer des règles qui relèvent, en vertu de la Constitution, de la seule compétence du législateur, est susceptible d'être invoquée à l'appui d'une QPC et sanctionnée par le Conseil constitutionnel lorsque cette incompétence négative est de nature à porter atteinte à un droit ou une liberté constitutionnellement garanti (Cons. const. n°2010-5 QPC, 18 juin 2010 *SNC Kimberly Clark* ; n°2010-33 QPC du 22 septembre 2010, Société Esso SAF et n°2010-45 QPC, 6 octobre 2010, *M. Mathieu P.*). Le Conseil constitutionnel et le Conseil d'Etat ont toutefois précisé que la méconnaissance par le législateur de sa propre compétence ne peut être soulevée au moyen d'une QPC à l'encontre d'une disposition législative antérieure à l'entrée en vigueur de la règle constitutionnelle fixant la répartition des compétences normatives (Cons. const. n°2010-28 QPC, 17 septembre 2010 et CE, 3 novembre 2010, *Mme Le Fur*, n°342502) : on retrouve à cet égard la logique d'une jurisprudence ancienne du Conseil d'Etat en vertu de laquelle l'entrée en vigueur d'une disposition constitutionnelle nouvelle modifiant la répartition des compétences normatives est sans influence sur la légalité des mesures compétemment prises antérieurement (CE, Ass., 26 novembre 1976, *Soldani*, Leb. p. 508), car la compétence de l'auteur d'un acte s'apprécie à la date à laquelle il a été pris. Quant à l'incompétence positive par laquelle le législateur empièterait sur la compétence du pouvoir règlementaire, elle n'est pas, conformément à la jurisprudence traditionnelle du Conseil constitutionnel (Cons. Const. n°82-143 DC, 30 juillet 1982, *Loi sur les prix et les revenus*), un motif d'inconstitutionnalité et ne peut à ce titre être invoquée à l'appui d'une QPC (CE, 15 juillet 2010, Région Lorraine, n°340492).

Cette interprétation extensive du champ de la QPC se retrouve également dans les décisions du Conseil constitutionnel et du Conseil d'Etat qui incluent expressément les principes constitutionnels régissant les collectivités territoriales aux droits et libertés que la Constitution garantit. Ainsi le principe de libre administration des collectivités territoriales énoncé à l'article 72 de la Constitution française est invocable à l'appui d'une QPC (Cons. const., n°2010-12 QPC, 2 juillet 2010, *Commune de Dunkerque*), de même que le principe d'autonomie financière et celui de compensation financière des transferts et création ou extension de compétences des collectivités territoriales qui résultent de l'article 72-2 de la Constitution (Cons. const. 2010-29/37 QPC, 22 septembre 2010, *Commune de Besançon et autres*). Aussi ces principes sont-ils porteurs de droits constitutionnels au profit des

collectivités territoriales qui, grâce à la QPC, disposent d'un procédé nouveau pour en imposer le respect et défendre ainsi leur autonomie face aux éventuels empiètements résultant de la loi. Pourtant, tous les principes constitutionnels relatifs aux collectivités territoriales ne sont pas constitutifs de droits au sens de l'article 61-1, puisque le Conseil d'Etat en a exclu, d'une part, le principe de décentralisation en considérant que « *le principe, énoncé à l'article 1er de la Constitution, selon lequel l'organisation de la République est décentralisée n'est pas au nombre (…) des droits et libertés garantis par la Constitution* » (CE, 15 septembre 2010, *Thalineau*, n° 330734), et, d'autre part, le principe de péréquation financière énoncé au dernier alinéa de l'article 72-2 de la Constitution selon lequel « *la loi prévoit des dispositifs de péréquation destinés à favoriser l'égalité entre les collectivités territoriales* » (CE, 23 décembre 2010, *Commune de Lisses*, n° 343993).

Remarquable est également l'invocabilité du principe de séparation des pouvoirs au soutien d'une QPC qui semble résulter tant de la jurisprudence du Conseil d'Etat que du Conseil constitutionnel. Cette invocabilité apparaît dans des décisions par lesquelles les juges administratif et constitutionnel statuent sur la contestation, au moyen d'une QPC, de validations législatives ; il s'agit alors de garantir l'indépendance et l'impartialité des juridictions et de préserver le droit à un procès équitable. Ainsi le Conseil d'Etat juge sérieux les moyens tirés de la violation du principe de la séparation des pouvoirs et transmet en conséquence de telles QPC (CE, 14 avril 2010, *Mme Lazare*, n°329290, RFDA, 2010, p. 696, concl. C. de Salins ; CE, 9 juin 2010, M. et *Mme Pipolo*, n°338028 ; CE, 25 juin 2010, *Commune de Besançon*, n°326358). Quant au Conseil constitutionnel, il statue sur la question de la méconnaissance du principe de séparation des pouvoirs : dans sa décision n°2010-29/37 QPC du 22 septembre 2010, *Commune de Besançon*, il juge que les dispositions législatives contestées « *ne méconnaissent ni la garantie des droits ni la séparation des pouvoirs énoncés à l'article 16 de la Déclaration de 1789* » ; il semble dès lors faire, des deux composantes de l'article 16 de la Déclaration des droits de l'homme, des moyens autonomes, tous deux invocables à l'appui d'une QPC.

1.2 Les normes objets de QPC

S'agissant des normes objets de questions de constitutionnalité, l'article 61-1 de la Constitution limite la QPC à la contestation de dispositions législatives. En sont exclus les dispositions règlementaires (CE, 2 juin 2010, *Ponsart*, n°338965), les conventions internationales (CE, 14 mai 2010, *Rujovic*, n°312305, RFDA, 2010, p. 710, concl. J. Burguburu) et les actes de droit dérivé de l'Union européenne.

Le Conseil d'Etat a en outre précisé qu'une QPC ne peut porter sur la loi autorisant la ratification d'une convention internationale, car la loi, « *qui n'a d'autre objet que de permettre une telle ratification, n'est pas applicable au litige au sens et pour l'application des dispositions de l'article 23-5 de l'ordonnance du 7 novembre 1958 et est, par sa nature même, insusceptible de porter atteinte à des droits et libertés au sens des dispositions de l'article 61-1 de la Constitution* » (arrêt *Rujovic* précité).

Si les actes du droit de l'Union européenne doivent subir le même sort que les conventions internationales, les mesures législatives prises pour la transposition des directives communautaires sont, en principe susceptibles de faire l'objet d'une QPC. A leur égard, le Conseil constitutionnel a repris, dans une décision QPC, sa jurisprudence élaborée à l'occasion du contrôle a priori des dispositions législatives de transposition. Il juge en effet, dans la décision n°2010-79 DC du 17 décembre 2010, « *qu'en l'absence de mise en cause d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, le Conseil constitutionnel n'est pas compétent pour contrôler la conformité aux droits et libertés que la Constitution garantit de dispositions législatives qui se bornent à tirer les conséquences nécessaires de dispositions inconditionnelles et précises d'une directive de l'Union européenne* » ; et il s'en explique en précisant que, « *en ce cas, il n'appartient qu'au juge de l'Union européenne, saisi le cas échéant à titre préjudiciel, de contrôler le respect par cette directive des droits fondamentaux garantis par l'article 6 du Traité sur l'Union européenne* ». En conséquence, il faut s'attendre à ce que les juridictions suprêmes des deux ordres de juridiction qui assurent le filtrage des QPC ne transmettent plus au Conseil constitutionnel les lois de transposition des directives, à moins qu'apparaisse

sérieux ou nouveau le moyen tiré de la méconnaissance par l'une des dispositions de la loi d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France.

Le Conseil constitutionnel a par ailleurs précisé que la notion de disposition législative susceptible de faire l'objet d'une QPC couvre l'interprétation constante conférée à cette disposition par les juridictions administratives et judiciaires (Cons. const. n°2010-39 QPC, 6 octobre 2010, Mmes Isabelle D. et Isabelle B. et n°2010-52 QPC, 14 octobre 2010, *Compagnie agricole de la Crau*), de sorte que le justiciable puisse contester la constitutionnalité de la portée effective des dispositions législatives applicables au litige. Elle couvre également des dispositions qui ont fait l'objet d'une modification voire d'une abrogation, comme en témoigne la décision n°2010-16 QPC du 23 juillet 2010 : « *la modification ou l'abrogation ultérieure de la disposition contestée ne fait pas disparaître l'atteinte éventuelle à ces droits et libertés* » ; « *elle n'ôte pas son effet utile à la procédure voulue par le constituant* » et « *par suite, elle ne saurait faire obstacle, par elle-même, à la transmission de la question au Conseil constitutionnel au motif de l'absence de caractère sérieux de cette dernière* » (décision précitée).

1.3 Les conditions d'admission des QPC

En ce qui concerne les conditions d'admission des QPC, il faut indiquer d'abord que la loi organique n°2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution réserve aux parties la possibilité de soulever la question de constitutionnalité – excluant ainsi que le juge ne soulève d'office le moyen – en leur permettant de le faire à tout moment de l'instance et devant toute juridiction placée sous l'autorité de la Cour de cassation ou du Conseil d'Etat. Par ailleurs, la loi organique impose, à peine d'irrecevabilité, que le moyen soit soulevé dans un mémoire écrit, distinct et motivé. Cette exigence, qui n'est pas seulement une exigence formelle puisque le Conseil d'Etat rejette comme non sérieuses les QPC dont la motivation est insuffisante (CE, 9 juillet 2010, *SA Genefim*, n°317086 et, même date, *SARL Veneur*, n°340142), a des conséquences contentieuses importantes dès lors que le Conseil d'Etat considère que *« le requérant ne peut présenter pour la première fois au Conseil d'Etat des griefs d'inconstitutionnalité à l'encontre de la disposition de la loi litigieuse autres que ceux*

soumis » au juge a quo (CE, 16 juillet 21010, *Société de brasserie et casinos* « *les flots bleus* », n°339292). Autrement dit, les moyens d'inconstitutionnalité non soumis à la juridiction de transmission ne peuvent être invoqués pour la première fois devant la juridiction suprême statuant sur le renvoi de la question au Conseil constitutionnel : la QPC transmise se trouve cristallisée.

La loi organique pose ensuite trois conditions à l'admissibilité d'une QPC devant les juridictions suprêmes : que la disposition législative contestée soit applicable au litige, qu'elle n'ait pas déjà été « déclarée conforme à la Constitution dans les motifs et le dispositif d'une décision du Conseil constitutionnel, sauf changement des circonstances » et, enfin, que la question, pour les juridictions inférieures, ne soit pas dépourvue de caractère sérieux et, pour les juridictions suprêmes, qu'elle soit nouvelle ou qu'elle présente un caractère sérieux. Statuant sur la constitutionnalité de la loi organique, le Conseil constitutionnel a précisé, en amont, les critères de transmission à son endroit des QPC soulevées devant les juridictions de droit commun (Cons. const. n°2009-595 DC, 3 décembre 2009).

- La première condition ne semblait pas poser de difficulté particulière et le Conseil constitutionnel a, dès sa première décision QPC, indiqué qu'il ne lui appartient pas de remettre en cause la décision par laquelle le Conseil d'Etat ou la Cour de cassation a jugé qu'une disposition était ou non applicable au litige (Cons. const. n°2010-1 QPC du 28 mai 2010, *Consorts L.*). Pourtant, la notion peut soulever quelques interrogations. En témoigne l'invocation du principe constitutionnel d'égalité à l'encontre d'une disposition législative en ce qu'elle n'est pas applicable à la situation du requérant : le Conseil d'Etat a jugé que dans une telle hypothèse, la disposition législative doit être considérée comme étant applicable au litige (CE, 14 avril 2010, *Labane*, n°336753). Dans son arrêt *Blain* du 15 juillet 2010, le Conseil d'Etat a indiqué les critères de l'applicabilité au litige : il juge en effet que la disposition législative qui fait l'objet de la QPC ne peut être considérée comme étant applicable au litige dès lors que, en l'espèce, elle n'est ni appliquée par l'administration, ni « *l'objet, à quelque stade que ce soit, d'une demande de la part [du requérant] tendant à [en] obtenir le bénéfice* », ni invoquée « *par les parties à l'appui des moyens qu'elles ont soulevés devant les juges du fond* » ou devant le juge de cassation

(n°327512). A cette exigence s'ajoute celle d'un rapport direct entre la disposition législative et la demande du justiciable, ce qui implique que la disposition législative applicable au litige est celle qui était en vigueur à la date de la décision qui fait l'objet du recours principal, et ce même si elle a été abrogée depuis (CE, 10 novembre 2010, *Fédération nationale CGT des personnels des organismes sociaux*, n°340106).

- La deuxième condition oblige les juridictions à ne pas transmettre les QPC portant sur des lois qui ont déjà été déclarées conformes à la Constitution par le Conseil constitutionnel. Cette condition fait l'objet d'une interprétation large dès lors que le Conseil d'Etat écarte les moyens d'inconstitutionnalité qui portent sur des dispositions législatives qui ont déjà été jugées conformes à la Constitution, même lorsque la déclaration de constitutionnalité avait été fondée sur un autre motif que celui invoqué par les requérants dans leur QPC (CE, 19 mai 2010, *Commune de Buc*, n°330310). Subissent le même sort, les différentes dispositions composant un article de loi qui a été globalement jugé conforme à la Constitution par le Conseil constitutionnel (CE, 17 décembre 2010, *AFFOP et SNP PSY*, n°341829). Toutefois, la loi organique mettant en œuvre la QPC prévoit une possibilité de contester la constitutionnalité des dispositions législatives déjà jugées conformes à la Constitution : c'est l'hypothèse dans laquelle il s'est produit un « changement des circonstances » après cette déclaration de constitutionnalité. Ce changement correspond soit à un changement dans les circonstances de droit, soit à un changement dans les circonstances de fait qui, dans les deux cas, seraient de nature à affecter la portée de la disposition législative concernée. Il peut s'agir bien sûr d'une révision constitutionnelle, mais aussi de toutes évolutions du contexte juridique ou factuel ayant un impact sur les conditions d'application de la disposition législative qui fait l'objet de la QPC (par exemple, Cons. const. n°14/22 QPC du 30 juillet 2010, *Daniel W. et autres*).

- Quant à la troisième condition de transmission d'une QPC, elle tient à ce que le moyen de constitutionnalité présente soit un caractère nouveau, soit un caractère sérieux. La notion de question nouvelle ne doit pas être confondue avec celle selon laquelle la disposition législative n'a pas déjà été déclarée conforme à la Constitution par le Conseil constitutionnel. Une question est nouvelle lorsqu'elle concerne une disposition constitutionnelle qui n'a pas déjà fait l'objet d'une application par le Conseil

constitutionnel, c'est-à-dire lorsque celui-ci n'en a pas encore déterminé le sens (cf. Cons. const. n°2009-595 DC précitée) et à condition que ladite disposition constitutionnelle soit en rapport avec le litige (CE, 8 octobre 2010, *Daoudi*, n°338505). Si cette double exigence est satisfaite, les juridictions suprêmes sont tenues de renvoyer au Conseil constitutionnel les QPC qui, par ailleurs, remplissent les deux premières conditions de renvoi sus-évoquées.

Le moyen est également considéré comme étant nouveau par le Conseil d'Etat, lorsqu'il pose une question de principe (CE, 17 novembre 2010, *Le Normand de Bretteville*, n°343752) ou que la saisine du Conseil constitutionnel présente un intérêt manifeste soit parce que la question se pose ou est susceptible de se poser dans de nombreuses litiges (CE, 23 avril 2010, *Cachard*, n°327174), soit parce que la question porte sur un « sujet de société » (en ce sens, A. Lallet et X. Domino, Chronique générale de jurisprudence française, AJDA, 2011, p. 385). Des considérations d'opportunité guident donc le Conseil d'Etat lorsqu'il apprécie la nouveauté d'une question de constitutionnalité.

L'appréciation du caractère sérieux, quant à elle, implique nécessairement une forme de contrôle sommaire de constitutionnalité. Sommaire, l'examen de la constitutionnalité n'en est pas moins une appréciation au fond de l'atteinte invoquée à un droit ou une liberté constitutionnellement garanti. Pour ne pas trop empiéter sur la compétence du Conseil constitutionnel, le Conseil d'Etat a pour politique de faire preuve de parcimonie lorsqu'il considère sérieux le moyen, tandis qu'à l'inverse, il motive dans le détail les raisons pour lesquelles il estime qu'une question n'est pas sérieuse (en ce sens, P. Bon, Premières questions, premières précisions, RFDA, 2010, p. 679, spéc. p. 691) : c'est à l'aune de cette motivation que le Conseil d'État se révèle être un véritable juge de la constitutionnalité de la loi, assumant, de manière de plus en plus décomplexée, son nouveau rôle de juge du caractère fondé des moyens d'inconstitutionnalité. Ainsi opère-t-il un contrôle de la proportionnalité des mesures législatives au regard des objectifs que poursuit le législateur (CE, 13 juillet 2010, *Merlin*, 340302 ; CE, 8 octobre 2010, *Groupement de fait brigade de Nice*, 340849), comme il contrôle la proportionnalité des mesures prises par les autorités administratives.

1.4 Le caractère prioritaire de la question de constitutionnalité

Pour garantir le succès de la QPC, qui ne pouvait qu'être concurrencée par le contrôle de la compatibilité des lois avec le droit international et européen qu'opèrent elles-mêmes les juridictions ordinaires, le législateur organique, en mettant en œuvre cette nouvelle procédure a choisi de lui conférer un caractère prioritaire et d'obliger les juridictions qui interviennent dans la procédure à statuer avec célérité.

- Le caractère prioritaire de la QPC est sans doute l'une des caractéristiques les plus originales de cette procédure et celle qui lui a donné son appellation. La question de constitutionnalité est prioritaire dans la mesure où, lorsque le justiciable soulève concomitamment à la QPC une question de « conventionnalité » de la loi, le juge saisi est tenu de statuer en priorité sur la question de constitutionnalité. Selon la loi organique du 10 décembre 2009 en effet : « *en tout état de cause* », la juridiction – juridiction inférieure ou juridiction suprême – doit, lorsqu'elle est saisie « *de moyens contestant la conformité d'une disposition législative d'une part aux droits et libertés garantis par la Constitution et d'autre part aux engagements internationaux de la France, se prononcer par priorité* » sur la transmission aux juridictions supérieures, ou sur le renvoi au Conseil constitutionnel, de la question de constitutionnalité. La juridiction saisie ne statuera sur la conventionnalité que dans un second temps : soit, par la même décision, après avoir refusé de transmettre la QPC, soit, en cas de transmission, par une nouvelle décision, après avoir reçu la décision par laquelle le Conseil constitutionnel aura statué sur la question de constitutionnalité.

Cette exigence de priorité pose des difficultés au regard du principe de primauté du droit de l'Union européenne, en particulier au regard du principe d'équivalence qui, limitant l'autonomie institutionnelle et procédurale des Etats membres, exige que les juridictions nationales puissent appliquer les règles de procédure nationales lorsqu'est portée devant elles une question de droit communautaire et implique que « *tout type d'action prévue par le droit national doit pouvoir être utilisé pour assurer le respect des règles communautaires d'effet direct dans les mêmes conditions de recevabilité et de procédure que s'il s'agissait d'assurer l'application du droit national* » (CJCE, 7 juillet 1981, *Rewe*, aff. 158/80). C'est la raison pour laquelle la Cour de cassation a interrogé la

Cour de justice de l'Union européenne sur le point de savoir si le caractère prioritaire de la QPC prévu par la loi organique du 10 décembre 2009 est compatible avec les exigences du droit de l'Union européenne (Cass., 16 avril 2010, *Melki et Abdeli*, n°10-40.001 et n°10-40.002 (QPC), RFDA, 2010, p. 445). La Cour de justice de l'Union européenne y a répondu dans son arrêt *Melki* (CJUE, gr. ch., 22 juin 2010, aff. jointes C-188/10 et C-189/10) selon lequel le caractère prioritaire de la procédure incidente de contrôle de constitutionnalité des lois n'est pas contraire au droit communautaire, à condition que les juridictions nationales restent libres, à tout moment de la procédure, de poser une question préjudicielle à la Cour de justice de l'Union, d'adopter toutes les mesures nécessaires afin d'assurer la protection juridictionnelle provisoire des droits conférés par l'ordre juridique de l'Union et de laisser inappliquée, à l'issue d'une telle procédure incidente, la disposition législative nationale en cause si elles la jugent contraire au droit de l'Union. Ainsi, est garanti, en toute hypothèse, le respect de la primauté du droit de l'Union européenne.

Avant même que la Cour de justice de l'Union ne rende l'arrêt Melki, le Conseil constitutionnel avait œuvré pour que le caractère prioritaire de la QPC ne soit pas contraire au droit de l'Union : dans sa décision n°2010-605 DC du 12 mai 2010, il avait précisé, au moyen d'un *obiter dictum*, que « *le juge qui transmet une question prioritaire de constitutionnalité, (…) peut (…) suspendre immédiatement tout éventuel effet de la loi incompatible avec le droit de l'Union, assurer la préservation des droits que les justiciables tiennent des engagements internationaux et européens de la France et garantir la pleine efficacité de la décision juridictionnelle à intervenir* » ; il en déduit « *que l'article 61-1 de la Constitution pas plus que les articles 23-1 et suivants de l'ordonnance du 7 novembre 1958 (…) ne font obstacle à ce que le juge saisi d'un litige dans lequel est invoquée l'incompatibilité d'une loi avec le droit de l'Union européenne fasse, à tout moment, ce qui est nécessaire pour empêcher que des dispositions législatives qui feraient obstacle à la pleine efficacité des normes de l'Union soient appliquées dans ce litige* » ; enfin il ajoute « *que l'article 61-1 de la Constitution et les articles 23-1 et suivants de l'ordonnance du 7 novembre 1958 susvisée ne privent pas davantage les juridictions administratives et judiciaires, y compris lorsqu'elles transmettent une question prioritaire de constitutionnalité, de la faculté ou, lorsque leurs décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, de l'obligation de saisir la Cour de justice de*

l'Union européenne d'une question préjudicielle en application de l'article 267 du traité sur le fonctionnement de l'Union européenne ».

Poursuivant le même objectif, le Conseil d'Etat avait, dans son arrêt Rujovic, indiqué que les dispositions de la loi organique relative à la QPC «*ne font pas obstacle à ce que le juge administratif, juge de droit commun de l'application du droit de l'Union européenne, en assure l'effectivité, soit en l'absence de question prioritaire de constitutionnalité, soit au terme de la procédure d'examen d'une telle question, soit à tout moment de cette procédure, lorsque l'urgence le commande, pour faire cesser immédiatement tout effet éventuel de la loi contraire au droit de l'Union* » ; puis il avait ajouté que « *d'autre part, le juge administratif dispose de la possibilité de poser à tout instant, dès qu'il y a lieu de procéder à un tel renvoi, en application de l'article 267 du traité sur le fonctionnement de l'Union européenne, une question préjudicielle à la Cour de justice de l'Union européenne* » (CE, 14 mai 2010, n°312305). C'est ainsi que la priorité constitutionnelle a fait place à la simultanéité des questions préjudicielles.

Au-delà de la priorité conférée au contrôle de constitutionnalité, l'analogie des droits et libertés consacrés en droit constitutionnel et en droit européen conduit le Conseil d'Etat à tenir compte de la conventionnalité de la disposition législative contestée lorsqu'il examine le caractère sérieux des QPC portées devant lui. Aussi aura-t-il naturellement tendance à juger non sérieuses des QPC portant sur des dispositions législatives dont il aura préalablement reconnu la compatibilité avec les droits et libertés garantis par le droit européen, parfois au prix d'une interprétation conforme de la loi (CE, 16 avril 2010, *Association Alcaly et autres*, n°320667 et CE, 16 juillet 2010, *SCI La Saulaie*, n°334665 qui se réfère expressément à l'arrêt dans lequel le Conseil d'Etat avait procédé à l'interprétation conforme de la disposition législative concernée : CE, Sect., 3 juillet 1998, *Bitouzet*, Leb. p. 288, concl. Abraham). A l'inverse, le Conseil d'Etat ne pourra que juger sérieuses des QPC portant sur des dispositions législatives dont il aura au préalable constaté qu'elles méconnaissent la Convention européenne des droits de l'homme (CE, 24 novembre 2010, *Comité des Harkis et Vérité*, n°342957, à comparer avec CE, 6 avril 2007, n°282390).

- Gage du succès de la QPC, la rapidité de la procédure est garantie par des délais imposés aux différentes juridictions qui interviennent dans la procédure. Aux termes de la loi organique relative à la QPC, les juridictions inférieures sont tenues de statuer « sans délai » sur le moyen tiré de l'inconstitutionnalité de la loi et elles disposent ensuite d'un délai de huit jours pour adresser à la juridiction suprême dont elles dépendent leur décision de transmettre la QPC, si les conditions de cette transmission sont remplies, en motivant cette décision. Le Conseil d'Etat et la Cour de cassation disposent quant à eux d'un délai de trois mois, à compter de la présentation du moyen, pour rendre une décision motivée au regard des conditions de renvoi de la question de constitutionnalité, sous peine de voir la QPC transmise automatiquement au Conseil constitutionnel.

Malgré le caractère prioritaire de la QPC et la célérité de la procédure, le renvoi d'une QPC au Conseil constitutionnel reste conditionné par le respect des règles de recevabilité du recours principal, dès lors que la QPC n'est qu'un moyen soulevé à l'occasion d'une instance en cours. Ainsi, s'agissant des procédures juridictionnelles d'urgence, le Conseil d'Etat a précisé que le juge des référés peut, « *en toute hypothèse, y compris lorsqu'une question prioritaire de constitutionnalité est soulevée devant lui* », rejeter la requête pour défaut d'urgence (CE, ord., 16 juin 2010, *Diakité*, n°340250).

Au cours des premiers mois de son application, la QPC a remporté un franc succès : les justiciables se sont emparés de cette nouvelle voie de droit et, au 31 décembre 2010, le Conseil constitutionnel avait déjà rendu 64 décisions QPC. Si la Cour de cassation a montré quelques réticences à l'égard de la procédure, le Conseil d'Etat a, quant à lui, joué le jeu en transmettant assez largement les premières QPC dont il était saisi. L'avenir dira ce que sera l'effet de la QPC sur les rapports entre les juridictions suprêmes et le Conseil constitutionnel ; mais nul doute que des évolutions auront lieu.

2. LES REGLES CONSTITUTIONNELLES ET LA COMPETENCE DU JUGE ADMINISTRATIF RELATIVE AUX ENGAGEMENTS INTERNATIONAUX.

Dans le courant de l'année 2010, le Conseil d'Etat est venu préciser la portée des dispositions constitutionnelles relatives à la place des engagements internationaux dans l'ordre interne. A l'interface des rapports entre le droit administratif, le droit constitutionnel et le droit international, cette jurisprudence apporte des solutions attendues, mais intéressantes, relatives à l'application des articles 53 et 55 de la Constitution par le juge administratif.

Aux termes du premier article, « *Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'État, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi* ». En vertu du second, « *Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie* ».

Sur le fondement de ces dispositions qui déterminent tant la procédure de ratification que l'autorité dans l'ordre juridique interne des engagements internationaux, le Conseil d'Etat a précisé, par deux arrêts du 9 juillet 2010, l'étendue de sa compétence à l'égard des traités et accords internationaux.

2.1 La réserve de réciprocité de l'article 55 de la Constitution

Dans son arrêt d'Assemblée *Mme Souad Chériet-Benseghir* (n°317747 ; AJDA, 2010, p. 1635, chr. S.-J. liéber et D. Botteghi ; DA, 2010, n°10, comm. M. Gautier), le Conseil d'Etat a, aux termes d'un considérant particulièrement explicite, mis fin à la jurisprudence issue de l'arrêt *Rekhou* (CE, Ass. 29 mai 1981, Leb. p. 220) selon lequel il n'appartient pas au juge administratif d'apprécier si et dans quelle mesure les conditions

d'exécution d'un engagement international par l'autre Etat partie sont de nature à priver les stipulations de cet engagement de l'autorité que lui confère l'article 55 de la Constitution. Parce qu'il s'estimait incompétent pour porter une appréciation sur la condition de réciprocité que pose ce dernier article, le juge administratif s'en remettait à l'appréciation du ministre des Affaires étrangères, lequel pouvait être éventuellement saisi par voie préjudicielle de cette question. En application de cette jurisprudence, le Conseil d'Etat avait rendu le 9 avril 1999 un arrêt Mme *Chevrol-Benkeddach* qui avait valu à la France d'être condamnée par la Cour européenne des droits de l'homme pour violation du droit au procès équitable de l'article 6§1 de la Convention du même nom (CEDAH, 13 février 2003, *Chevrol c. France*, n°49639-99, AJDA, 2003, p. 1984, note T. Rambaud ; D. 2003, Jur. 931, note H. Moutouh ; RFDH, 2003, 1387, obs. V. Michel) : selon la Cour de Strasbourg, l'article 6§1 s'oppose à ce que le juge national s'estime lié par l'avis du ministre des Affaires étrangères car le juge national doit exercer la plénitude de sa compétence en se laissant la possibilité de prendre en considération, dans l'appréciation de la condition de réciprocité, des éléments de fait ou de droit pertinents présentés par les parties au litige. Autrement dit, l'article 6§1 de la Convention européenne des droits de l'homme exige que le juge administratif français soumette au débat contradictoire la question de l'application réciproque des engagements internationaux.

En se conformant aux exigences du droit européen, le Conseil d'Etat considère, dans son arrêt d'Assemblée du 9 juillet 2010, *Mme Souad Chériet-Benseghir*, qu'il revient au juge administratif, « *dans l'exercice des pouvoirs d'instruction qui sont les siens, après avoir recueilli les observations du ministre des Affaires étrangères et, le cas échéant, celles de l'Etat en cause, de soumettre ces observations au débat contradictoire, afin d'apprécier si des éléments de droit et de fait suffisamment probants au vu de l'ensemble des résultats de l'instruction sont de nature à établir que la condition tenant à l'application du traité par l'autre partie est, ou non, remplie* ». Si de nombreux engagements internationaux échappent par principe à la condition de réciprocité de l'article 55 de la Constitution, et particulièrement ceux qui, à l'instar du droit de l'Union européenne et du droit européen des droits de l'homme, établissent eux-mêmes des procédures de sanction des Etats parties en cas d'inexécution de leurs obligations conventionnelles, tel n'était pas le cas de l'accord bilatéral conclu entre la France et l'Algérie qui était en cause tant dans l'affaire Chevrol-

Benkeddach que dans l'affaire Souad Chériet-Benseghir. Aussi le Conseil d'Etat prend-t-il en considération, dans son arrêt du 9 juillet 2010, les arguments avancés par les parties en présence pour juger qu'il « *ne ressort ni des pièces du dossier, ni de l'audience d'instruction* » que « *des grades et diplômes d'enseignement de médecine délivrés en France dans les mêmes conditions de programme, de scolarité et d'examen qu'en Algérie n'y auraient pas été regardés comme valables de plein droit* ». Il faut déduire de cette affirmation qu'il existe une présomption de réciprocité dans l'application des engagements internationaux, que le juge peut renverser en tenant compte des éléments de fait et de droit mis en lumière par l'instruction au cours de laquelle il pourra, comme hier, interroger le ministre des Affaires étrangères, mais sans être lié par l'avis de celui-ci.

2.2 Les conditions constitutionnelles de l'application des engagements internationaux

Dans un second arrêt rendu le 9 juillet 2010, *Fédération nationale de la libre pensée* (CE, Sect, 9 juillet 2010, n°327663, AJDA, 2010, p. 1635, chr. S.-J. liéber et D. Botteghi ; RFDA, 2010, p. 980 concl. R. Keller et p. 995, note T. Rambaud et A. Roblot-Troizier), le Conseil d'Etat précise l'étendue du contrôle qu'il porte sur la procédure de ratification des engagements internationaux et procède à une interprétation neutralisante des stipulations conventionnelles.

Reprenant sa jurisprudence issue de l'arrêt d'assemblée SARL du parc d'activité du Blotzheim du 18 décembre 1998 (Leb. p. 483, concl. G. Bachelier ; AJDA, 1999, p. 127, chr. F. Raynaud et P. Fombeur ; LPA, 23 mai 2000, n°102, p. 6, note G. Béquain ; RFDA, 1999, p. 315, concl. G. Bachelier), le Conseil d'Etat rappelle qu'il résulte de la combinaison des articles 53 et 55 de la Constitution qu'il appartient au juge administratif de vérifier que la publication d'un traité ou d'un accord international a été précédée d'une loi en autorisant la ratification ou l'approbation si celui-ci entre dans la liste des engagements internationaux fixée à l'article 53 de la Constitution. Dans la mesure où cet article dispose que ne peuvent être ratifiés qu'en vertu d'une loi les traités et accords qui « *modifient des dispositions de nature législative* », il appartenait au Conseil d'Etat de préciser ce que couvre cette notion. Dans son arrêt Fédération nationale de la libre pensée, il indique que constitue un traité ou

accord modifiant des dispositions de nature législative, au sens de l'article 53 de la Constitution, « *un engagement international dont les stipulations touchent à des matières réservées à la loi par la Constitution ou énoncent des règles qui diffèrent de celles posées par des dispositions de forme législative* ». L'exigence d'une ratification sur autorisation législative pour de telles stipulations oblige le juge administratif, contrôlant la régularité de la procédure de ratification, à confronter les termes desdites stipulations avec les dispositions législatives en vigueur.

C'est ce à quoi procède le Conseil d'Etat en l'espèce, en mettant en parallèle les dispositions du Code de l'éducation et les stipulations de l'accord conclu le 18 décembre 2008 entre la République française et le Saint-Siège sur la reconnaissance des grades et diplômes dans l'enseignement supérieur. Pour apprécier la régularité de la procédure de ratification, le Conseil d'Etat détermine si les stipulations de l'Accord méconnaissent ou dérogent aux dispositions législatives du Code, et ce malgré la supériorité des conventions internationales sur les lois définie à l'article 55 de la Constitution, laquelle reste conditionnée par la régularité de l'entrée en vigueur des engagements internationaux dans l'ordre interne. En revanche, si les stipulations conventionnelles méconnaissent des dispositions constitutionnelles, le Conseil d'Etat s'estime incompétent pour en faire le constat dès lors que, comme il le rappelle en l'espèce, il n'appartient pas au juge administratif, statuant au contentieux, de se prononcer sur la conformité du traité ou de l'accord à la Constitution (précédemment, CE, 8 juillet 2002, *Commune de Porta*, Leb. p. 260 et CE, 28 avril 2004, *Commune de Chamonix Mont-Blanc*, Leb. tables p. 546).

Pour déterminer si l'accord modifie des dispositions de nature législative au sens de l'article 53 de la Constitution, le Conseil d'Etat est conduit à interpréter le sens des stipulations conventionnelles. A ce titre, il considère que celles-ci n'ont ni pour objet, ni pour effet d'instaurer un régime de reconnaissance automatique des diplômes, dès lors que, selon le Conseil d'Etat, « *la reconnaissance d'un diplôme ecclésiastique est (…) de la compétence des autorités de l'établissement dans lequel souhaite s'inscrire son titulaire* ». Il procède ainsi à une interprétation neutralisante des termes de l'accord afin de maintenir, au profit des établissements publics d'enseignement supérieur, une compétence discrétionnaire dans l'appréciation du niveau d'études dont se prévalent les titulaires de «

diplômes ecclésiastiques » obtenus dans les établissements privés d'enseignement supérieur : « *pour décider de reconnaître le diplôme du candidat* », les autorités de l'établissement d'accueil « *doivent tenir compte, d'une part, de l'équivalence de niveau édictée par le protocole, et, d'autre part, de l'aptitude du candidat à suivre des enseignements dans le grade et la formation postulés, appréciée en particulier au regard du contenu des études suivies* ». Dans ces conditions, affirme le Conseil d'Etat, les stipulations de l'accord « *n'autorisent pas des établissements d'enseignement supérieur privé à délivrer des diplômes nationaux et ne permettent pas aux bénéficiaires de titres délivrés par des établissements d'enseignement supérieur privés ayant reçu une habilitation par le Saint-Siège de se prévaloir, de ce seul fait, des droits attachés à la possession d'un diplôme national ou d'un grade universitaire* ». Dans le même esprit, l'arrêt précise qu'en aucune manière des établissements supérieurs privés implantés sur le territoire national ne peuvent porter le titre d'Université. Est ainsi préservé le principe du monopole de la collation des grades au profit de l'Etat, principe auquel pourtant le Conseil d'Etat ne confère pas une valeur constitutionnelle.

Ayant statué sur le fond, la haute juridiction administrative a éludé la question, qui par ailleurs se posait en l'espèce, de l'intérêt à agir des parlementaires à l'encontre d'un acte administratif contesté, devant le juge administratif, par le biais d'un recours pour excès de pouvoir.

3. LA QUESTION EN SUSPENS DE LA RECEVABILITE DES RECOURS DES PARLEMENTAIRES CONTRE LES ACTES REGLEMENTAIRES

Deux affaires jugées en 2010 ont donné au Conseil d'Etat l'occasion de trancher la question de savoir si les parlementaires, se prévalant de cette seule qualité, ont intérêt à agir par voie de recours pour excès de pouvoir contre les actes administratifs. Pourtant, il n'y a pas apporté de réponse claire, préférant contourner et éluder la question.

Dans l'arrêt *Mme Borvo* du 11 février 2010 (AJDA, 2010, p. 670, chron. S.-J. Liéber et D. Botteghi ; RJEP, 2010, 675, p. 1, note D. Labetoulle ; RFDA, 2010, p. 629, chron. A. Roblot-Troizier et p. 776 concl. J.-P. Thiellay, note N. Sudres ; JCP G, 12 juillet 2010, chron. B. Plessix), le Conseil d'Etat s'est penché sur la question de la recevabilité du recours présenté par divers parlementaires, arguant de leur qualité, contre, d'une part, une lettre du ministre de la culture et de la communication adressée au président-directeur général de France Télévisions l'invitant à supprimer la publicité en soirée sur les chaînes télévisées du groupe et, d'autre part, la décision du conseil d'administration de France Télévisions procédant à cette suppression. L'argument des parlementaires-requérants étaient le suivant : à la date à laquelle la lettre ministérielle et la décision du conseil d'administration de France Télévisions ont été adoptées, l'Assemblée nationale discutait, en première lecture, du projet de loi relatif à la communication audiovisuelle et au nouveau service public de la télévision, qui allait devenir ensuite la loi n°2009-258 du 5 mars 2009 (JO n°56 du 7 mars 2009) dont l'article 28 prévoit la suppression progressive de la publicité sur les chaînes publiques. C'est en invoquant l'atteinte ainsi portée aux prérogatives du Parlement que les parlementaires entendaient faire reconnaître leur intérêt à agir. Pourtant, si le Conseil d'Etat admet la recevabilité du recours, c'est en se fondant, non sur la qualité de parlementaire des requérants, mais sur leur qualité d'usagers du service public de la télévision. Ainsi la haute juridiction a privilégié une autre qualité et a ainsi contourné la difficulté. Sur le fond, l'arrêt constate que le ministre « *n'avait pas le pouvoir d'enjoindre à la société France Télévisions de prendre les mesures* » concernées, ce qui signifie qu'en anticipant sur la loi en cours de discussion, le ministre est intervenu illégalement.

L'arrêt *Fédération nationale de la libre pensée* précité n'apporte pas plus de réponse à la question de l'intérêt à agir des parlementaires. Alors que le recours était intenté par des parlementaires contestant le fait que l'Accord international du 18 décembre 2008 avait été ratifié sans autorisation législative préalable, en méconnaissance selon eux de l'article 53 de la Constitution, le Conseil d'Etat examine l'affaire au fond *« sans qu'il soit besoin de statuer sur la recevabilité des requêtes* » précise-t-il. Renouant avec des solutions retenues dans de précédentes espèces (CE, 29 octobre 2004, *Sueur et autres*, Rec. p. 393, RFDA, 2004, p. 1118 et CE, Ass., 20 mai 1985, n° 64146, *Labbé et Gaudin*, Rec. p. 157, RFDA, 1985, p. 554 ; CE, Ass., 2 février 1987, *Joxe et Bollon*, n° 82436, RFDA 1987,

concl. p. 176), la haute juridiction administrative évite ainsi de prendre position, mais cet évitement n'est possible qu'à la condition que le recours soit rejeté au fond.

En l'absence de réponse claire, les parlementaires pourraient bien être tentés de s'octroyer eux-mêmes, dans une loi, un intérêt à agir par voie de recours pour excès de pouvoir contre les actes réglementaires ; en témoigne la proposition de loi tendant à reconnaître une présomption d'intérêt à agir des membres de l'Assemblée nationale et du Sénat en matière de recours pour excès de pouvoir, proposition qui a été déposée au Sénat (PPL n°203 enregistrée à la présidence du sénat le 23 décembre 2010).

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COMPETITION IN PUBLIC SERVICES AND PUBLIC PROCUREMENT: THREE DECISIONS FROM THE CONSTITUTIONAL COURT

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Prof. Aldo SANDULLI

INDEX

1. TWENTY YEARS OF COMPETITION LAW IN ITALY

Just over twenty years have passed since the Italian Competition Authority (*l'Autorità Garante della Concorrenza e del Mercato – AGCM*) was established by the Italian anti-trust legislation (Law no. 287 dated 10th October 1990).

Commentators have emphasised how a competition culture that was formerly foreign to our legal order, encumbered as it had been by anti-competitive practices for more than half a century, has developed in the peninsula during these last two decades. It has also been noted that, in line primarily with European influence but also, to a lesser extent, with that of the United States[1], the criteria for interpreting the rules on competition have increasingly felt the influence of economic analysis.

It has likewise been observed how a first decade (from 1990 to 2000), with a happy experience of competition-fostering policies and independent authorities in Italy, has been followed by a second, darker decade (from 2001 to the present day) during which the independent authorities' beneficial role within the legal order has been undermined. This state of affairs has been created mainly by the return of an aggressive form of politics, which has emptied competitive practices of their innovative impact from the inside, and by an impenetrable wall erected by the courts, which have contained the role of the authorities from the outside and influenced the way in which competition is understood in our country[2].

[1] G. Amato, *La legge antitrust venti anni dopo*, in *Rivista trimestrale di diritto pubblico*, 2010, No. 4, 923 et seq.

[2] S. Cassese, *L'Autorità garante della concorrenza e del mercato nel "sistema" delle autorità indipendenti*, in *Giornale di diritto amministrativo*, 2011, No. 1, 102 et seq.

In this context, it may be interesting to examine how the Constitutional Court has contributed to the debate during the last year and a half with three significant and controversial judgements. Through these decisions, the Court has influenced the way competition is conceived in our legal order[3] (particularly with regard to public services and procurement), although it seems to have helped instil new doubts rather than allay already existing ones.

Before examining the orientation of the Constitutional Court's decisions, however, it is necessary to clarify a preliminary point. In all three cases, the Court had been called to adjudicate applications made by the State or one/some of the Regions regarding attribution of the legislative competence to protect competition. In this respect, the reform of Title V of Part II of the Constitution effected in 2001 provided for the division of legislative power between the State and the Regions as follows: some expressly listed subject-matters have been attributed to the exclusive legislative power of the State (under article 117(2) of the Constitution); other subject-matters (also expressly listed), have become the object of concurrent legislative power (the State establishes the basic principles and the Regions are responsible for the detailed legislation: article 117(3) of the Constitution) and legislative power pertaining to the subject-matters not listed lies residually with the Regions (article 117(4) of the Constitution).

[3] For a reconstruction of the national rules on competition, with particular reference to the relationship between competition and public services, see, by way of example from amongst the most recent works, A. Police, *Tutela della concorrenza e pubblici poteri*, Giappichelli, Turin, 2007; F. Giglioni, *L'accesso al mercato nei servizi di interesse generale. Una prospettiva per riconsiderare liberalizzazione e servizi pubblici*, Giuffrè, Milan, 2008; A. Lalli, *Disciplina della concorrenza e diritto amministrativo*, Editoriale Scientifica, Naples, 2008; F. Cintioli, *Concorrenza, istituzioni e servizio pubblico*, Giuffrè, Milan, 2010, and D. Gallo, *I servizi di interesse economico generale. Stato, mercato e* welfare *nel diritto dell'Unione europea*, Giuffrè, Milan, 2010.

The protection of competition is one of the subject-matters falling within the exclusive legislative competence of the State (art. 117(2) of the Constitution), although it is not a subject-matter proper but, rather, a legal regime. As such, it cuts transversally through many subject-matters, making the Constitutional Court's work of interpretation a complicated one and ending up creating pockets of exclusive state legislative power even in areas apparently falling within the concurrent or residual power of the Regions.

Not by chance, the number of constitutional disputes regarding the division of legislative competence between the State and the Regions has grown exponentially during the last few years. It is fair to say that, at present, the Constitutional Court is principally being called to decide issues concerning the boundaries between state and regional legislative competence (raised in applications brought directly, challenging legislation).

2. UNIFORMITY AN „ESSENTIAL CHARACTERISTIC" OF COMPETITION

The Constitutional Court's first significant ruling is its Judgement no. 283, dated 6th November 2009. Under this ruling, some provisions introduced by the Region of Puglia in relation to procurement contracts below the EU threshold were declared to be constitutionally unlawful.

According to the Court, «the entire regulation of public procurement procedures is ascribable to the protection of competition, and legislative competence consequently lies exclusively with the State». For such purposes, it is irrelevant whether the contract is above or below the threshold or whether the content of the contested provision fosters competition. This, in the Court's opinion, insofar as the Constitution has provided that it is to be exclusively the State that regulates the protection of competition, in order to ensure the same regulation throughout the national territory.

Unlike the subject-matter of environmental protection (where regional legislative interventions providing for a higher level of environmental protection than the State's are permitted), in the case of competition protection «uniformity constitutes a value in itself because different regional regulatory provisions are liable to result in regulatory inequalities which produce territorial barriers». In the Court's opinion, «the protection of competition cannot be achieved area by area: of its very nature, it cannot tolerate territorial differentiations that would end up restricting or even neutralising the effects of the rules that guarantee it».

The Constitutional Court has adopted a highly statist position with this ruling. As has been noted, such a position ends up penalising regional regulatory power even in the cases where measures fostering competition have been introduced[4].

It is precisely this last point that would seem to constitute the heart of the matter. Measures that apparently foster competition can end up creating great hardship to undertakings and therefore harm the process through which competition develops. The Court thus seems to have meant to say that whilst, on the one hand, competition law must be contextualised within the legal system in which it is applied, on the other, if it is to catch on and produce results, undertakings must be able to count on a competition law that is particularly "robustly" uniform throughout the national territory.

On the whole, the criterion thus established by the Court may be viewed favourably but it lays itself open to potential criticism (criticism that disregards the object of the Court's decision, however): precisely on account of the environmental framework, not always are all the areas within the national territory "culturally" equipped to sustain the competition-fostering measures that have been introduced.

[4] E. Carloni, *L'uniformità come valore. La Corte oltre la tutela della concorrenza*, in *Le Regioni*, 2010, 670 et seq.

3. COMPETITION AND THE „SOCIAL USEFULNESS“ LIMITATION

The Constitutional Court's second important ruling is its Judgement no. 270, dated 23rd June 2010. This declared the rules permitting the merger between Alitalia and AirOne, undertakings operating in the air transport sector, to be lawful.

In this case, the Court had been called to evaluate the constitutional legitimacy of a decree-law that effectively permitted the merger of Alitalia with AirOne, in derogation from the anti-trust law governing mergers. This was for the purposes of saving Italy's national airline (in crisis) and resulted in a constriction of the freedom of competition.

The Court reached the conclusion that the *"norma-provvedimento"*[5] was lawful. It considered that, in certain particular circumstances, it is reasonable and proportionate to weigh the interests of competition against those of social usefulness: especially, in this case, in the light of sub-clauses (2) and (3) of article 41 of the Constitution, which expressly refer to social usefulness and social purposes.

[5] Translator's note: the Court used the term "*norma-provvedimento*" to refer to the specific decree-law issued by the Government in this particular case. The instrument normally used in such cases is a *"legge-provvedimento"*: a law adopted by Parliament that has the *form* of an Act of Parliament (*Legge)* but the *content* of an administrative measure (the content is not addressed to a general category of citizens but, rather, to one or more specifically identified parties: in this case, Alitalia and AirOne). In the case in point, the peculiarity was that the measure relating to Alitalia and AirOne was not adopted by way of a law of Parliament's but by a governmental decree-law (*decreto-legge*). Decree-laws are measures that have the value of an Act of Parliament but are adopted by the Government in cases of urgent necessity. They have to be converted by Parliament into a *"Legge"* within 60 days, failing which it is as if they had never been adopted.

The Court held that article 41 of the Constitution, «by establishing that private economic initiatives cannot be conducted contrary to the principle of 'social usefulness' or in a manner that is harmful to security, freedom or human dignity, and by providing that public and private-sector economic activity may be directed and co-ordinated towards social ends, permits a form of regulation that also ensures the protection of interests other than those pertaining to the protected competitive market». Such a form of regulation, however, is permitted by way of derogation and only in absolutely exceptional cases.

And, in the Court's opinion, such a situation existed in the case under examination, since the legislator was facing the very serious crisis of a provider of an essential public service and had to guarantee the activity's continuation in a sector of strategic importance for the national economy. This also for the purposes of preserving the enterprise's value and averting a serious employment crisis.

So, «the balancing of a multiplicity of interests imposes a choice that is atypical of anti-trust investigations but effectively characterised by economic-policy and market-regulation connotations that are imposed by an exceptional situation».

On the basis of such premises, the Court applied the proportionality test to the measure adopted by the Government. It concluded that the contested provision passed the test and was constitutionally lawful, partly because the Italian Competition Authority enjoys the power to intervene *ex post* and sanction possible abuses of a dominant position deriving from the merger.

The Constitutional Court's judgement has delivered a serious blow both to the material "economic constitution" and to competition culture, fuelling as it does the State's dirigiste policy of interfering to protect indigenous interests. As has been noted, the thesis that

competition law gives way in the face of other interests gains credit, whilst the statement that the competition principle will be extended further appears to remain pure theory. [6]

Indigenous interests that are mainly private, moreover, in relation to which the constitutional reference to social usefulness does not appear to have been made in a wholly convincing manner. In short, an unsatisfactory judgement in many respects, not least of which the obscure application of the proportionality test, which the Court enunciated but did not carry out with sufficient rigour.

4. COMPETITION AND THE ECONOMIC IMPORTANCE OF PUBLIC SERVICES

The third significant judgement issued by the Constitutional Court on the subject of competition and public services is Judgement no. 325, dated 3rd November 2010. This ruled that the state measures governing modes of action for entrusting local public services (section 23-*bis* of Decree-Law no. 112, dated 25th June 2008) were lawful.

The measures provided that: a) local public services are to be entrusted by way of competitive public procurement procedures; b) direct awards to hybrid companies the private partner of which is chosen by way of a competitive public procurement procedure shall constitute an "ordinary" conferral of the management, on condition that the tender competition procedure regards not only the partner's legal status but also the attribution of «specific operational tasks connected to the running of the service» and that the private partner is allocated a shareholding of not less than 40%; c) direct awards must «be made

[6] L. Stecchetti [L. Prosperetti] e G. Amaretti [G. Amato], *Il ventennale dell'antitrust e la Corte costituzionale*, in *Mercato concorrenza regole*, 2010, 459 et seq.

in observance of the principles of Community law», with the further prerequisite that there exist «circumstances that, by virtue of the distinctive economic, social, environmental or geomorphological characteristics of the territorial context of reference, do not permit an effective and useful recourse to the market», and d) direct awards may be made with in-house forms of management, in observance of the conditions required by Community law, after seeking the opinion of the AGCM and with the further prerequisite that there exist «exceptional circumstances that, by virtue of the distinctive economic, social, environmental and geomorphological characteristics of the territorial context of reference, do not permit an effective and useful recourse to the market». Through recourse to competitive procedures, the Italian Parliament has thus clearly inclined towards a competition-fostering solution, to be applied uniformly throughout the national territory.

The Constitutional Court's judgement is long and complex.

The Court took the relationship between national law and European law as the starting point for its reasoning and assessed whether European law has imposed such an advanced solution on the national legislator in the context of competition in local services. The Court clarified that the national law is compatible with European law but that it does not constitute «an application required by the Community and international law referred to, (…) choosing as it does one of the various ways of regulating the subject-matter that the legislator could lawfully have adopted without breaching the cited sub-clause (1) of article 117 of the Constitution». Thus the Italian legislator could have opted for less advanced solutions as far as competition was concerned.

The judgement analyses the Italian concept of a local public service of economic importance and the European concept of services of general economic interest, identifying their common profiles and the differences between them.

Referring to the judgement given by the Court of Justice of the European Union on 21st September 1999 in case C-67/96 (Albany International BV), the Italian Constitutional Court held that the two concepts comprise the same elements, since in both cases the service «a) is provided through an economic activity (in the form of a public or private

undertaking), understood in the broad sense as any activity that consists of offering goods or services in a specific market» and «b) provides services considered necessary (i.e. directed at achieving objectives that are also "social") *vis à vis* an undifferentiated universality of citizens, irrespective of their particular circumstances».

In the Constitutional Court's opinion, the differences between the two concepts are the following.

In the first place, the Community provisions allow the direct running of a local public service in cases where an individual Member State considers that application of the competition rules would obstruct a public body's "particular tasks" (article 106 TFEU), censuring state decisions only in cases of manifest error. The national measures, on the other hand, chose to prohibit the direct management of local public services by the local body concerned. Thus the Italian Parliament, in exercise of its discretionary power, chose not to make use of a possibility conceded by the European provisions.

In the second place, the Community provisions allow the service to be entrusted directly to hybrid companies that have carried out a public tender competition to select the private partner. They require the partner to be an industrial partner but do not set any minimum or maximum levels for the private party's shareholding. As currently formulated, however, section 23-*bis* departs from the Community law in the part where, for the purposes of the abovementioned direct award, it imposes the further condition that the private partner is to be allocated «a stake of not less than 40 per cent». This has the twofold effect of reducing the number of cases where a service is entrusted directly and extending the general Community rule requiring awards to third parties by way of public tender competitions. In this case, too, the result is achieved through exercise of the legislator's discretionary power, but in a manner that is compatible with the Community provisions.

In the third place, the Community provisions permit "in-house" awards but only on certain conditions that are to be interpreted restrictively: the entire share-capital must be publicly owned, the awarding authority must exercise the same form of control over the awardee as it exercises over its own offices and the awardee must carry out the most

important part of the activity for the awarding authority. This exceptional form of award is justified by Community law on the basis that the existence of the abovementioned conditions prevents the "in-house" contract effectively constituting a genuine contractual relationship between the awarding authority and the awardee, since their effect is to ensure that the latter is, in reality, no more than the *longa manus* of the former. In addition to the three conditions indicated, the Italian measure lays down others that limit the circumstances in which recourse to in-house management of a service is permitted. In this way, the possibility of derogating from the Community competition rules governing awards of a service by way of public competition is limited even further. Even the Italian Parliament's derogation option does not result in the national law being incompatible with the European law, however, since it favours solutions that foster competition.

The Court then proceeded to examine whether competence to govern the modes of action for entrusting local public services lies with the State or with the Regions. It held that, in the case in point, the competence was an exclusive state competence, pursuant to article 117(2) of the Constitution, because such area of intervention falls within the "competition protection" category of subject-matter, «considering its structural and functional aspects and its direct impact on the market».

The Court went on to find that the Italian Parliament's solution (designed to restrict the cases of in-house awards even further than the Community law does) was not unreasonable or disproportionate, even though it was not required by the Constitution.

Finally, in the Court's opinion, «for the national legislator, as for the Community one, 'economic importance' also exists where, in order to overcome the particular difficulties of the territorial context of reference and guarantee quality services even to a group of users who are disadvantaged in some way, automatic market mechanisms are not enough and it is necessary to intervene publicly or provide financing that compensates an operator's duties to provide a public service, provided that it is concretely possible to create a market upstream, i.e. a market in which undertakings negotiate with public authorities the supply of these services to users». Thus the thesis that «economic importance exists only on the twofold condition that a market for the service actually exists and that the local body

decides at its discretion to finance the service with the proceeds deriving from the business activity in that market» cannot be confirmed.

That stated, the Court concluded that, «The determination of the conditions constituting economic importance is reserved to the exclusive legislative competence of the State, by virtue of the fact that such issue falls within the subject-matter of competition protection».

On the basis of the arguments set out above, the Constitutional Court held that the state legislation was constitutionally lawful. It also declared the constitutional unlawfulness of some regional laws, including one enacted by the Region of Campania which had provided for regional competence «to regulate the regional integrated water service as a service without economic importance and to establish autonomously both the legal status of the parties to be entrusted with the service and the timeframe for expiry of the contracts currently in force».

Through this judgement, the Constitutional Court has applied the rules on competition rigorously and extensively and, by adopting an objective test of a service's economic importance[7], has considerably reduced the scope for regional legislative intervention in the field of local public services. The competition-fostering solutions adopted by Parliament have placed Italy in an extremely advanced position regarding the formulation of competition rules for the market in the area of local public services. They are, however, solutions that are perhaps more advanced than the Italian legal order and sociological context (in some areas in the South, above all) are currently capable of sustaining, impacting as they do, what is more, on the management of services of extreme social importance, such as water services.

[7] On this point, see V. Cocozza, *Una nozione oggettiva di "rilevanza economica" per i servizi pubblici locali*, shortly to be published in *Munus*, No. 1, 2011.

It has recently been noted how, in the field of local public services, the legislator has inclined towards competition measures for the market, rather than concentrating on seeking a competitive relevant market[8]. On the other hand, such an attempt would have been fruitless in many cases, on account of both the history and the nature of local bodies in Italy: it is hard to find a relevant market in the majority of the peninsula's small and medium-sized municipalities.

5. CONCLUSION

The Constitutional Court's recent decisions highlight at least two significant inconsistencies both in the Italian legislation and in the Court's own consequential journey in interpreting the topic of competition in public services and contracts.

On the one hand, as far as relations between the State and the Regions are concerned, one has the impression that the "protection of competition" parameter has sometimes been used to erode the Regions' legislative powers in economic matters, including in sectors (such as local public services) in which it would be natural to think of creating a role of primary importance for the regional law-maker. Thus, in comparison with the considerable increase in regional legislative autonomy following the constitutional reforms of 2001, the Court has taken a retrograde step. A step that may be partly justified by the shoddy quality of regional legislation during the last few years.

[8] F. Merusi, *La tormentata vita della concorrenza nei servizi pubblici locali*, shortly to be published in *Munus*, No. 2, 2011.

On the other hand, in the face of a push towards competition for the market in sectors in which it is difficult to identify a relevant market, significant restrictions on competition in the market may be noted in sectors in which a substantial relevant market does exist. Thus the national regulation of competition appears rhapsodic and inconsistent, being expansive in some cases and protectionist and restrictive in others.

In this sense, if it is true that competition cannot be regulated area by area, it is equally true that it cannot be regulated by way of derogations and exceptions. Not if competition is to be taken seriously and is to be capable of producing socially advantageous results.

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EL PRINCIPIO DEL BUEN FUNCIONAMIENTO: DESDE EL METAJURÍDICO A LA LÓGICA DEL RESULTADO EN EL SENTIDO JURÍDICO

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Prof. Mario R. SPASIANO

ÍNDICE

1. EL PRINCIPIO DEL BUEN FUNCIONAMIENTO: DE LA RELEVANCIA ORGANIZATIVA A LA ACCEPCIÓN RELACIONAL.

El párrafo primero del artículo 97 de la Constitución identifica en los principios de imparcialidad y del buen funcionamiento [1], los fundamentales cánones jurídicos de referencia de la disposición de la organización y de la actividad de la pública administración. A pesar de eso, el principio del buen funcionamiento ha sido puesto por mucho tiempo en el ámbito del metajurídico, tanto desde el punto de vista de la doctrina[2] como de la jurisprudencia (en particular la constitucional). Las causas de esta circunstancia tienen que reconducirse por un lado a la escasa atención por parte de los especialistas de derecho administrativo, en lo tocante a los asuntos de la organización pública; por otro lado, al bien conocido repudio de la importancia jurídica de todos esos conceptos que no se hallan inmediatamente entre los tradicionales cánones de dirección de la actividad administrativa, en su sentido legalista-formal. En efecto, si la doctrina penal nunca ha desconocido el carácter jurídico a principios como "las buenas costumbres" o como el "común sentido del pudor", desde siempre considerados parámetros de evaluación de conductas que comprenden hechos jurídicos ilicitos (cuyos contenidos necesitan y pueden adaptarse a las circunstancias históricas del tiempo en el que se invoca sus aplicaciones), los juristas administrativistas han viceversa tendencialmente adscrito en el área de lo "mínimo juridico" el buen funcionamiento, cuya consideración, en una visión claramente

[1] Una reconstrucción de la evolución histórico-jurídica del principio del buen funcionamiento sobretodo bajo el perfil organizador se encuentra en M.R. SPASIANO, *L'organizzazione comunale – Paradigmi di efficienza pubblica e buona amministrazione*, Nápoles 1995, en particular 223ss.

[2] Sobre el perfil apuntado, cfr. P. Barile, *Il dovere di imparzialità della P.A.*, en *Scritti in onore di P. Calamandrei*, Padua 1958, IV, 136; N. Speranza, *Il principio di buon andamento – imparzialità nell'art. 97 Cost.*, en *Foro Amm. 1972, II, 86.*

reductora, a menudo se dejó involver en la descuidada materia de las ciencias de la administración, y por lo tanto "no digna" de ponerse al nivel del derecho[3], o como más, englobada en el sentido jurídico de imparcialidad de la acción administrativa, renunciando a todo buen propósito de hallazgo de una específica autonomía conceptual.

Hasta la Corte Constitucional ha tradicionalmente enseñado su incomodidad para ejercer su proprio sindicado bajo el perfil del buen funcionamiento, preferiendo más atrincherarse en el respeto del poder discrecional del legislador[4]. Y desde una perspectiva correspondiente plenamente a la posición así describida como apartada del Órgano Consultivo también el Consejo de Estado ha seguido definiendo, todavía en 1980, el principio debatido como "canon propio del ordenamiento particular de la administración y no una regla del ordenamiento general"[5].

Bajo un perfil que es sólo por aparencia diferente, por mucho tiempo se ha por otra parte debatido sobre la relevancia organizadora y/o funcional del principio del buen funcionamiento.

La doctrina prefería reconocer en la disposición del art. 97 Const. principios de valencia funcional, aún más considerando que la organización pública, hasta recientemente, ha constituido "*objeto de descripciones morfológicas, no de conocimiento teórico, y de manera contraria, la tesis según la cual la materia de la organización no afectara la ciencia del derecho, como que las normas a ella relativas no producían situaciones jurídicas subjetivas o intersubjetivas, estaba muy difundida*" [6].

[3] En términos, C. De Seta, *Principi giurisprudenziali in tema di buon andamento*, en *Ammin. e Contab*. 1985, 27; G. D'Alessio, *Il buon andamento dei pubblici uffici*, Ancona, 1993, 268ss.

[4] Corte Const. 3 de marzo de 1959, n. 9, en Giur. Cost. 1959, 237.

[5] Consejo de Estado, Sección IV, 16 de mayo de 1980, n. 504, en Giur. It.1981, III, 21.

[6] M.S. GIANNINI, en *Gli elementi degli ordinamenti giuridici*, en *Riv. Trim. Dir. Pubbl*. 1958, 236.

Sólo elaboraciones más modernas (y deliberadas) han sabido llegar a una concepción más amplia, capaz de considerar relevante, bajo el perfil jurídico, el aspecto organizador de los cargos públicos [7], valorizando la necesaria correlación entre el estado estructural y el estado funcional de la acción pública: es decir, al final, que un acción eficaz, rápida, proporcionada, no puede que constituir el resultado de una organización (estado estático) inspirada arriba por dichos criterios.

Además, el Órgano Constituyente también había evidenciado el reconocimiento de un innegable enlace entre la disposición de la organización y el ejercicio de la acción, cuando había establecido, en la interpretación del párrafo primero del artículo 97 y también en la esencialidad de la tesis destinada a revisar la legitimidad de los diferentes modelos de administración pública[8], que imparcialidad y buen funcionamiento tenían que considerarse los términos de una única proporción destinada a concebir una "manera" de organizar los cargos públicos, para intentar valorizar una idea bidimensional del principio, es decir como un instrumento de organización racional y objetivo de la acción administrativa.

Verdaderamente, en la Asamblea Constituyente no fueron pocos los especialistas que habían declinado la oportunidad de la transposición del principio de buena administración en una pertinente disposición. Pero, acabó imponendose la orientación muy bien resumida por Guido Falzone en su obra de 1953 según la cual la acción pública tenía que ser útil para la comunidad "*no para ser hecho de administración, sino para ser hecho de buena administración así como quiere el derecho*"[9], adjudicando así un tipo de fuerza jurídica al deber mismo.

[7] R. MARRAMA, *I principi regolatori della funzione di organizzazione pubblica*, en AA.VV. *Diritto amministrativo*, Bolonia 1998, I, 397ss.

[8] Sobre la molteplicidad de los modelos de administración pública existentes en el texto constitucional, M. NIGRO, en *La Pubblica amministrazione fra Costituzione materiale e formale*, en *Riv. Trim. Dir. Proc. Civ.* 1985, I, 163.

[9] G. FALZONE, *Il dovere di buona amministrazione*, Milán 1953.

Por otro lado, tenemos que reconocer que se necesita considerar la juridicidad de las normas constitucionales en una visión más amplia que la de las otras normas legislativas que contemplan semejante principio como que "*donde su contenido atribuye una relevancia o determina un principio o una decisión, la juridicidad se resuelve en un deber ser, …, que conlleva un valor preceptivo, tanto como acción que como límite, para la conducta de los individuos*" (Amorth) [10].

A pesar de que la doctrina haya continuado produciendo elaboraciones bastante diferentes y fragmentarias, con disertaciones que por otra parte no renunciaban a enmarcar el principio del buen funcionamiento en el ámbito del metajurídico (o a adjudicarle una relevancia limitada a la organización del empleo público, casi como si el artículo 97 de la Constitución fuese destinado a agotar su eficacia en ese ámbito), en la jurisprudencia en materia administrativa, sobretodo de primer grado durante los años 70 empezó a emerger una gradual y siempre mayor conciencia de la circunstancia que la norma constitucional cuanto menos imponía al legislador de realizar una organización de los cargos de manera que se garantizara, además, la efectiva tutela de la "*exigencia superior*" del buen funcionamiento. En este contexto, para la primera vez, se advirtió que si es incuestionable que el legislador tenga una amplia discrecionalidad, más bien de libre juicio en lo tocante a elecciones sobre la justa disposición estructural y gestional de los cargos públicos, de todas maneras el caudal del buen funcionamiento llama ontológicamente los principios de logicidad, no arbitrariedad, criterio y mesura, como parámetros substanciales para evaluar la efectiva correspondencia de los modelos legislativamente ratificados con los cánones establecidos por parte del principio mismo del buen funcionamiento [11].

[10] A. AMORTH, *Il contenuto giuridico della Costituzione*, (1946), Bolonia 1981.

[11] Verdaderamente la orientación del Consejo de Estato no estaba por cierto priva de contradicciones e incertidumbres. P. CALANDRA, en el estudio *Il buon andamento dell'amministrazione pubblica*, en *Studi in memoria di V. Bachelet*, Milán 1987, I, 158, subraya que el Consejo de Estado a menudo tendía a definir el principio del buen funcionamiento como "canon propio del ordenamiento específico de la administración y no regla del ordenamiento general". Ni a diferentes consideraciones nos lleva la jurisprudencia de la Corte

Bajo esta idea, tuvo una importancia particular la sentencia del Pleno del Consejo de Estado número 2 de 1972[12], con la cual se subrayó que donde fuera "*legislativamente puesto un sistema organizativo que haga possibile, hasta sólo de manera abstracta, no honrar los principios del buen funcionamiento y de la imparcialidad, las normas del sistema mismo no se pueden considerar constitucionalmente legítimas*".

La sentencia, en verdad, a pesar de que se apartara de la tarea – que no es en efecto fácil - de encarar y definir el posible contenido del principio del buen funcionamiento, subrayaba – aunque no podamos saber con que grado de real conciencia - la relevancia del principio considerado bajo el perfil de la organización ya no meramente estática sino relacional.

Después de la dicha sentencia, de hecho, la jurisprudencia administrativa, aunque con oscilaciones y reflexiones, fue favorable a reconducir el contenido del principio del buen funcionamiento al hallazgo de la corecta relación entre niveles de gobierno, mejor dicho, entre elecciones legislativas (o también de la administración en el ejercicio de su actividad de programación) y actividad administrativa.

La doctrina que en los años 70 trató ahondar en el estudio del buen funcionamiento propio con relación al perfil de la conexión entre niveles de gobierno, encontró en los estudios de Sepe (1975)[13] y de Andreani (1979)[14] los aportes más

Constitucional: en lo tocante a esto, cfr. U. ALLEGRETTI, *Corte Costituzionale e Pubblica Amministrazione*, en *Le Regioni* 1982, 1186; M.R. SPASIANO, *Profili di organizzazione della pubblica amministrazione in cinquanta anni di giurisprudenza della Corte Costituzionale*, en G. DELLA CANANEA y M. DUGATO (al cuidado de), *Diritto Amministrativo e Corte Costituzionale*, Nápoles 2006, 163ss.

[12] Pleno del Consejo de Estado 22 de febrero de 1972, n. 2, en *Riv. Cons. Stato* 1972, I, 77.

[13] O. SEPE, *L'efficienza nell'azione amministrativa*, Milán 1975.

[14] A. ANDREANI, *Il principio costituzionale di buon andamento della pubblica amministrazione*, Padua 1979.

importantes. Ambos los especialistas consideraban el principio encarado como una expresión de la fundamental función de dirección gubernativa, mejor dicho de coordinación de los diferentes poderes públicos y niveles de gobierno.

A las hipótesis de estos autores no sólo se les da el mérito de aporte de justicia de las orientaciones expresadas por los que precedentemente habían negado la relevancia organizativa del principio examinado, sino sobretodo ellos tienen el mérito de haber proyectado el principio del buen funcionamiento hacia una dimensión contextualmente unitaria y relacional del ordenamiento, luego aún más confirmada por la siguiente evolución jurisprudencial y normativa.

En vero, no se puede olvidar que ya en 1968 la teoría de la así llamada procedimentalización del buen funcionamiento, propuesta por Berti[15], había sentado las bases del pensamiento ahora rellamado. Pero en las páginas del difunto jurista, la noción racional del buen funcionamiento respondía aún a reglas de carácter formalista, como si el enlace entre las entidades titulares de autoridades públicas encotrase satisfacción sólo porque reglamentado en el ámbito de una secuencia, precisamente, procedimental. Y, por lo contrario, con la experiencia maturada durante los años siguientes a la institución de reales instrumentos para la coordinación intersubjetiva, parece claro que el contenido del principio del buen funcionamiento no agota, en relación a este perfil, su propio valor en la formal consideración de la mayoría de los intereses públicos y particulares posibles, sino va a representar un "*precepto funcional de contenido substancial*" (Andreani), para el logro de práticos resultados de enlace entre las instituciones.

En otras palabras, el principio del buen funcionamiento, considerando la relevancia organizativa que tiene, es principio jurídico substancial como expresión típica de "eficiencia pública"[16], es decir necesidad de tutela precisa y efectiva de todos los intereses

[15] G. BERTI, *La pubblica amministrazione come organizzazione*, Padua 1968

[16] Sobre la eficiencia pública, M.R. SPASIANO, *L'organizzazione comunale* …..., ob. cit., en particular 234ss.

encomendados a la consideración de cada nivel de gobierno, admitiendo, obviamente, las exigencias de arbitraje, sintesis y unitariedad ínsitas en el equilibrio entre subsidiariedad y adecuación atribuidas a la evaluación discrecional de la administración.

Bajo un perfil diferente, necesitamos también indicar que al principio del buen funcionamiento en el sentido relacional (y a las instituciones que lo representan concretamente) el ordenamiento ha algunas veces reconocido la molteciplidad de contenidos y objetivos: a veces, subrayando la respondencia a criterios de economicidad (respondencia a parámetros de minor coste o de simplificación de la acción administrativa); otras veces, exaltando su eficacia y eficiencia (objetivo de más elevados *estándares* de calidad de los resultados); y otras veces, ponendo en evidencia las finalidades de garantías (satisfacción de las expectativas expresadas por las varias comunidades y coordenación entre los relativos intereses)[17].

Propio este último perfil ha adquirido en el tiempo particular relevancia, llegando a ser medida de referencia del grado de aprobación democrática de la activitad administrativa ejercida por los varios niveles de gobierno, en una perspectiva según la cual, como subrayado por la Corte Constitucional en la histórica decisión número 123 de 1968[18], de verdad el principio del buen funcionamiento se hace importante, como "*bisagra de la vida administrativa y luego condición del desarrollo de la vida social*".

2. EL BUEN FUNCIONAMIENTO COMO PRINCIPIO DE LEAL COOPERACIÓN.

[17] Sobre estos perfiles, véase G. PASTORI, *La burocrazia*, Padua 1967, 91.

[18] Corte Constitucional, 9 de diciembre de 1968, n. 123, en *Giur. Cost*. 1968, 2151.

La conciencia gradualmente adquirida de la juridicidad del principio del buen funcionamiento y de su valor también bajo el perfil relacional entre los diferentes niveles de gobierno, ha consituido el *humus* sobre el que – también - se ha implantado la elaboración del principio de leal cooperación, de origen jurisprudencial y ahora – como es conocido – considerado también en el texto constitucional (artículo 120 Const.)[19].

Aquí no queremos volver a recorrer el largo y tortuoso *iter* evolutivo del principio debatido que representa el resultado, en nuestro ordenamiento, de la tentativa de elaboración, por parte de la Corte Constitucional, de un modelo cooperativo basado en una lectura sistemática del reparto de competencias entre Estado, Regiones y (luego también) entidades locales. Basta, por lo contrario, sólo con subrayar que la jurisprudencia del órgano consultivo, con la contribución decisiva de ZAGREBELSKY, ha actuado según una doble idea de la manera de interpretar la cooperación entre niveles de gobierno: por un lado, notando la exigencia de un modelo cooperativo que quiere la coparticipación de las Regiones en las funciones del Estado y viceversa; por el otro lado, afirmando la utilidad, en las hipótesis de competencias sobrapuestas o confinantes entre varios sujetos del ordenamiento, de instrumentos que favorezcan la codecisión o, de todas maneras, el envolvimiento de todas las entidades interesadas en el proceso decisional de interés común.

El buen funcionamiento luego ha constituido una importante aunque no exclusiva base constitucional del principio de leal cooperación.

[19] En lo tocante a esto, véase el ensayo de A. GRATTERI, *La faticosa emersione del principio costituzionale di leale collaborazione, che propone un'interessante ricostruzione storica*, con amplia bibliografía, en *La riforma del Titolo V della Costituzione e la giurisprudenza costituzionale. Atti del seminario di Pavia svoltosi il 6-7 giugno 2003* (al cuidado de E. BETTINELLI – F. RIGANO), Túrin 2004, 426ss.

La sentencia número 214 de 1988[20] del órgano consultivo por primera vez califica el principio de leal cooperación justo como corolario del más amplio principio constitucional del buen funcionamiento, fuente de inspiración y de legitimación de disposiciones normativas aptas para crear instrumentos o, de todas maneras, formas de enlace o de coordinación paritaria (entendimientos, consultas, etc.) entre Estado y Regiones.

Por otra parte es claro que, faltando uniformidad y sobretodo coordinación de la acción de los diferentes niveles de gobierno, las finalidades de eficiencia de toda la administración pública, propias del buen funcionamiento, acabarían por quedarse – también según el órgano consultivo – "objetivos lejos e inalcanzables", aún más en un ordenamiento pluralista, costantemente llamado a conseguir la composición de intereses de las diferentes comunidades que lo componen.

Dichas premisas anticipan las razones de una nueva interpretación del principio mismo de subsidariedad, según la cual si la interferencia entre competencias es causa de impedimento de una precisa distribución de funciones entre los poderes públicos, en lo tocante al interés público a garantizar, el aparato administrativo tiene que actuar por formas de cooperación institucional.

Es verdad que la perspectiva dialógica "subsidariedad- leal cooperación" supone un modelo de autonomismo no competitivo, que no está tanto basado en una clara separación de las competencias, sino en el hallazgo de instrumentos aptos para permitir un diálogo y una cooperación prácticos y eficaces cada vez que surgan intereses en conflicto, justo de diferentes niveles de Gobierno. Y la doctrina[21] – como es conocido – no ha perdido la ocasión para reconocer que la funcionalidad de semejante modelo queda atada a la

[20] Corte Constitucional, 25 de febrero 1988, n. 214, en www.cortecostituzionale.it

[21] M. CAMMELLI (al cuidado de), *Territorialità e delocalizzazione nel governo locale*, Bolonia 2007.

garantía de una adecuada participación de todos los niveles de gobierno implicados en los procedimientos, a la determinación de la decisión final.

También la Corte Constitucional se ha orientado hacia esta dirección en la importante sentencia número 303 de 2003[22] donde ha prospectado la extensión del principio de subsidiariedad en el sentido dinámico y de los procedimientos (también en lo tocante al ejercicio del correspondiente poder legislativo de organización de la función): a la presencia de exigencias unitarias, la atribución del poder decisional a nivel del estado se puede considerar constitucionalmente legítima siempre que haya "*una disciplina que prefigure un iter en el que tienen la debida importancia las actividades de forma concertada y de coordinación horizontal, o sea los entendimientos, que tienen que conducirse según el principio de lealtad*".

Bajo otro perfil, parece evidente que el principio de leal cooperación como expresión dinámica relacional del buen funcionamiento se impone no sólo a la administración estatal sino también tanto a la de las regiones como a la de las entidades locales, quienes no pueden ni discordar inmotivadamente por actuaciones obstruccionistas con capacidad de detener el ejercicio de la función estatal sin adecuadas razones[23].

Desde esta consideración, la exigencia de hallar un método de superación del disenso injustificado, para evitar inútiles retrasos con la capacidad a veces hasta de minar la funcionalidad misma de la acción administrativa. Además, la leal cooperación ínsita en el entendimiento tampoco excluye *a priori* la posibilidad de prever, por el legislador, procedimientos aptos para superar posibles situaciones de estancamiento. Aquí luego la oportunidad, justo en el nombre del principio del buen funcionamiento, de llegar a la

[22] Corte Constitucional, 1 de octubre de 2003, n. 303, en www.cortecostituzionale.it, con comentario de A. MOSCARINI, *Titolo V e prove di sussidiarietà: la sentenza n. 303/2003 della Corte costituzionale*, en *Riv. informatica federalismi.it*.

[23] Corte Constitucional 11 de enero de 1993, n. 6, en www.cortecostituzionale.it

previsión de intervención sustitutiva, sea como las de tipo previsto por el segundo párrafo del artículo 120 de la Constitución, sea como las de tipo previsto por las leyes ordinarias estatales o regionales. Poderes sustitutivos aptos para garantizar el efectivo ejercicio de la función administrativa pero según rigurósos límites y condiciones que la jurisprudencia misma de la Corte Constitucional ha claramente indicado para limitar su uso en las solas hipótesis previstas por la leyes en las cuales se encuentre una concreta y grave amenaza para el buen funcionamiento de la actividad de la pública admnistración: tiene que tratarse, como es conocido, de actividades sin carácter discrecional en el *an* [24]; se necesita de todas maneras respetar los prinicipios de subsidariedad y de leal cooperación[25]; es necesario que el sujeto inerte, competente en vía ordinaria, pueda evitar la sustitución por el autónomo cumplimiento[26].

3. EL BUEN FUNCIONAMIENTO COMO PRINCIPIO DE CARÁCTER FUNCIONAL.

Como apuntamos antes, el reconocimiento de la importancia del buen funcionamiento, tanto como organización que como coordinación entre los poderes

[24] Corte Constitucional 16 de julio de 2004, n. 227, en www.cortecostituzionale.it

[25] Corte Constitucional 2 de marzo de 2004, n. 73, y también 14 de mayo de 2004, n. 140, ambas en www.cortecostituzionale.it

[26] Corte Constitucional 2 de marzo 2004, n. 70, en www.cortecostituzionale.it

públicos no ha agotado el empujón, ejercido sobretodo por la doctrina, hacia la búsqueda de un valor específico funcional del principio debatido[27].

Es en esta nueva perspectiva que el sentido del buen funcionamiento ha sido en vía preliminar acercado a la evaluación global de la actividad desarrollada por la administración, incluyendo en eso la evaluación de la legitimidad y hasta del mérito de la conducta, como que ambos se consideran indisolublemente conectados entre ellos en la evaluación de la justicia y de la bondad de la acción administrativa: por un lado, el aspecto normativo-formalistico, que expresa la "regularidad" de la potestad ejercida, por otro lado el aspecto práctico y con contenidos, que subraya la adecuación de la elección hecha[28].

Como ya apuntado, el buen funcionamiento ha sido objeto de una interpretación destinada a subrayar su valor de instrumento para amejorar el rendimiento del aparato público, aquí juntado con el criterio de eficiencia de la obra de la pública administración[29].

La nopción de eficiencia ha sido considerada por mucho tiempo antinómica con respecto a la exigencia de afirmación del principio de legalidad en todas sus articolaciones e implicaciones. Esta tendencia[30] constituye en vero la consecuencia de una idea sólo economista de la eficiencia, lo concreto de la transposición en el ámbito del derecho administrativo de un concepto empresarial sin ningún proceso de adaptación.

[27] En lo tocante a este tema, véase R. Ferrara, *L'interesse pubblico al buon andamento delle pubbliche amministrazioni: tra forma e sostanza,* in *Dir e proc. amm.* 2010, 31 ss.

[28] C. De Seta, ob. cit., 27.

[29] Sobre este tema, cfr. A. Massera, *I criteri di economicità, efficacia ed efficienza*, en M.A. Sandulli (al cuidado de), *Codice dell'azione amministrativa,* Milán, 2011, 22ss.

[30] J. Wieland, *L'autonomia dei comuni nel difficile rapporto tra efficienza dell'amministrazione e vicinanza al cittadino*, en *Foro Amm*. 1993, 1728 ss.

Con esta visión, tenemos que compartir la observación según la cual la aplicación de la eficiencia a la acción de los poderes públicos "*objeta a la historia de nuestra administración, ignora la finalidad de una disciplina que ha funcionado durante más de cien años*"[31].

La adaptación que citamos, de todas maneras, no puede que seguir el hallazgo de la específica pregnancia axiológica del criterio de eficiencia.

En lo tocante a esto, necesitamos apuntar que en doctrina no faltaron los quienes pusieron dudas radicalmente sobre la posibilidad de hallar contenidos específicos y concretos en los cuales el buen funcionamiento pudiera expresarse en términos funcionales[32].

A conclusiones completamente diferentes llegaba por lo contrario la mayoría de los especialistas iuspublicistas que encontraba en el buen funcionamiento una noción de eficiencia como atribución a la pública administración de medios jurídicos elásticos aptos para permitir un mejor proporcionamiento de la actividad abastecida con respecto a la finalidad preestablecida[33]. Entonces, se daba a la ley la carga de preparar dichos medios, (potencialmente) idóneos para conseguir de manera congrua el objetivo preestablecido; esto permitía establecer, entre norma y organización, una relación necesariamente dúctil, con la capacidad de garantizar a la última la posibilidad de ejercer su acción con métodos y responsabilidad adecuados. Además, si la legalidad constituye el parámetro de la acción, la eficiencia integra su resultado, en el sentido que el punto de vista por tradición garantista de la administración estaba integrado por una ineludible exigencia de la congruidad de la acción: la administración ya no es una mera ejecución de la ley porque ha cambiado la

[31] G. Guarino, *Quale amministrazione?*, Milán 1985, 111.

[32] En esta dirección, M.S. Giannini, entrada *Organi*, en *Enc. del Dir*. XXXI, Milán 1981, 43.

[33] M. Nigro, *Studi sulla funzione organizzatrice della pubblica amministrazione*, Milán, 1966, 85

relación entre poder y sociedad y la misma Constitución impone la realización de un aparato de servicio con la capacidad de realizar y garantizar la igualdad substancial [34]. Si por lo tanto, la eficiencia se hace concreta en una relación entre instrumentos y objetivos, entendimos que su afirmación supone en primer lugar la consideración de la funcionalidad operativa de las estructuras propuestas al ejercicio de la actividad administrativa: esta es una tarea que afecta tanto al legislador como a la administración, en particular en lo tocante al ejercicio de los poderes de estatuto (donde previstos) y de reglamentos.

La percepción difundida de la exigencia de un administración con la capacidad de cumplir efectivamente con sus propios deberes, como instrumento de desarrollo y de tutela de la persona más que como obstáculo a la realización de derechos e intereses de los individuos, ha llevado, además, a la adopción de la ley sobre el procedimiento administrativo, la ley número 241 de 1990, cuyas importantes y numerosas modificaciones e integraciones son muy bien conocidas. Esta norma puede constituir un válido soporte a la presente investigación si es verdad que ha establecido los parámetros generales dentro los cuales tiene que actuar la acción administrativa. La ley número 241/90 con siguientes modificaciones e integraciones, establece en el artículo 1 que *"La actividad administrativa … se basa en criterios de economicidad, eficacia, imparcialidad, publicidad y transparencia según las modalidades previstas por esta ley y por las demás dispocisiones que disciplinan los síngulares procedimientos, y también por los principios del ordenamiento comunitario"*. De esta manera, si se llama la atención esplícitamente sobre la imparcialidad, el principio del buen funcionamiento entra en la ley sobre el ejercicio de la actividad administrativa de manera mediata, es decir sólo por la consideración de los términos de economicidad y eficacia.

Sobre la economicidad se pueden encontrar por lo menos tres acepciones: una organizativa, una funcional y una contable. Pronto tenemos que decir que por cierto no se

[34] P. Calandra, *Il buon andamento dell'amministrazione pubblica*, en *Studi in memoria di V. Bachelet*, Milán 1987, I 157s.; N. Speranza, *Governo e pubblica amministrazione nel sistema costituzionale italiano*, Nápoles 1971, 89.

puede considerar inspirada por el criterio de economicidad organizativa una administración en la cual no se encuentren la distribución infraorgánica e interorgánica de las competencias de manera clara y lineal. Lo mismo podemos afirmar, bajo el perfil funcional, para una acción administrativa que actúe por *iter* procedimentales tortuosos, hechos peores por pasajes supérfluos, repetitivos, hasta inútiles. Tampoco es económica una administración que no cuide la cobertura financiera de sus propias deliberaciones de expensa o que omita considerar en una evaluación comparativa los beneficios (también sociales) alcanzables con respecto a las cargas asumidas. Luego, podemos considerar que el criterio de economicidad pida también la autonomía financiera (posiblemente también la del impuesto) de la administración agente, fuente ineludible de responsabilidad.

Pero la noción de economicidad implica también algo más: este principio se define de hecho con otros sentidos que rellaman los conceptos de especialización y adecuación de la acción administrativa. El primero tiene que ser considerado en el sentido que los aparatos administrativos tienen que tener a su disposición instrumentos de *governance* idóneos para conseguir los resultados previstos. La segunda acepción permite, por lo contrario, adentrarse en la investigación de un ulterior parámetro de referencia que se pueda de alguna manera llevar a la noción de eficacia administrativa. En términos generales, ella expresa la relación entre objetivos preestablecidos y resultados logrados y luego la capacidad de un sistema para realizar concretamente el programa político/administrativo predeterminado. Más específicamente, en el ámbito del derecho público, la eficacia puede luego definirse como la capacidad de un poder público de realizar exactamente esas finalidades que el ordenamiento le asigna.

Verdaderamente, también la publicidad y, por último, la transparencia – ambos criterios apuntados en el artículo 1 de la ley modificada n. 241/1990 cit. - contribuyen a la composición de manera integrada y unitaria, del complejo sentido del buen funcionamiento. En lo tocante a esto, la publicidad, considerada como mero respeto formalista de reglas de difusión de la información por cierto no constituye un síntoma de precisión administrativa, por lo menos hasta que no sea asociada a la transparencia. El uso de instrumentos generalmente tradicionales de publicidad (como por ejemplo la publicación en diarios y boletines), tanto como el acceso de información surgen a lo sumo, en algunos casos, como

verdaderos medios de ocultación o de distorsión de la realidad representando instrumentos de comunicación póco o para nada fruibles por parte del ciudadano común o a veces hasta por parte de los operadores jurídicos mismos. Luego, se hace necesaria, para una acción inspirada por el buen funcionamiento, una configuración de la transparencia[35] en calidad de condición de real conociencia de actas y de actuaciones de la pública administración (por parte de sujetos externos), en lo tocante a las relativas razones inspiradoras y a las finalides conseguidas.

La relación de la transparencia con el buen funcionamiento (y la imparcialidad) del que constituye un lógico e indefectibile corolario, parece evidente: ella juega una función esencial de tutela y de garantía de todos los intereses implicados en la obra de la pública administración.

Desde diferente perfil, podemos también apuntar que las prerrogativas propias de una administración inspirada por el principio del buen funcionamiento determinan también una percepción del fenómeno participativo en una dimensión estructural, hasta antes que procedimental, del sistema[36] intero. Semejante dimensión brota por lo menos de dos factores contextuales de tipo jurídico; en primer lugar la importancia constitucional que tiene el principio de subsidariedad horizontal que evidentemente compromete el poder administrativo en una lógica ontológicamente dialógica, justo por la prioridad de autorregulación en todo ámbito de intervención de relevancia pública con respecto a la posibilidad de creación de un poder autoritativo (que, de hecho, se legitima sólo donde la sociedad o el mercado no tienen la capacidad de alcanzar de manera autónoma una disposición equilibrada de los intereses). Bajo otro perfil, la ley número 241/1990 impone

[35] M.R. Spasiano, *Trasparenza e qualità dell'amministrazione*, en *Studi in onore di Spagnuolo Vigorita*, Nápoles, 2007, III, 1435.

[36] Sobre la dimensión estructural de la participación, véase M.R. SPASIANO, *La partecipazione al procedimento amministrativo quale fonte di legittimazione dell'esercizio del potere: un'ipotesi ricostruttiva*, en *Atti del Convegno dell'Università degli Studi di Catanzaro, Copanello, 6 – 7 luglio 2001*, Túrin 2002, 163ss.

al poder administrativo de "estructurarse" de manera dialógica para permitir la aplicación de todas esas entidades que gestionan la partecipación en los procedimientos.

En esta perspectiva, se ejecuta esa relación de constante simbiosis entre las diferentes componentes del ordenamiento, una relación que si durante la programación se exalta en su más amplia manifestación (aunque con las limitaciones persistentes de la ley número 241/90), adquiere una particular importancia y vivacidad también en la fase ejecutiva.

Ya ningún fondamento puede hacer alarde de esa orientación dirigida a prospectar un insuperable contraste entre la realización de una administración eficaz y una administración participativa[37]. Podríamos debatir sobre el hallazgo de formas de participación más oportunas y modernas en los procedimientos administrativos, pero ningún especialista de la disciplina podría discutir sobre la increíble capacidad de la participación de erguirse como una auténtica fuente de legitimación del poder[38], condición indefectible de una acción administrativa eficaz.

La disponibilidad de la administración para destacar y considerar todos los intereses implicados en su acción no encuentra luego una limitación en la eficacia sino se califica por ella traduciendose en la exigencia de evaluar de manera seria y rápida los intereses importantes y sólo los hechos y las circunstancias estrechamente relacionados con el objeto del procedimiento.

Hasta desde el final de los años 50, una doctrina acreditada reconocía que la organización pública trabaja para satisfacer de manera concreta las necesidades para las que

[37] E. Cardi, *La manifestazione di interessi nei procedimenti amministrativi*, Perugia 1984, I, 36ss.

[38] M.R. Spasiano, *La partecipazione al procedimento amministrativo quale fonte di legittimazione all'esercizio del potere: un'ipotesi ricostruttiva*, en *Dir.amm.*, 2002, 283 ss.

está creada por el legislador[39]. Desde este punto de vista, deducimos que el buen funcionamiento (como la imparcialidad) constituyen un criterio de ejecución dirigido para hacer reconocible, por la comunidad, un poder público que, como tal, tiene la capacidad de conseguir utilidad para el interés publico.

En otras palabras, la administración tiene la capacidad de hallar y realizar concretamente, por el filtro del buen funcionamiento el interés común determinado sólo de manera abstracta o de todas maneras delineado por la ley. Este interés no será sólo la suma algebraica de intereses parciales, sino la justa consideración y ponderación de ellos: en semejante perspectiva, el abstracto y a menudo parcial interés legislativamente determinado, baja a la realidad, se enriquece en contenidos y se hace perfecto dando cumplimiento a las exigencias concretas de los administrados hasta llegar a ser "regla del caso"[40], mejor dicho justo interés[41].

Buen funcionamiento e imparcialidad se definen y se completan mutuamente bajo el perfil de recíproca garantía, produciendo así una relación de correspondencia biunívoca. Considerando de manera equilibrada y común los dos principios, posibles conflictos entre exigencias de actuación del poder y exigencias de garantía de las situaciones subjetivas implicadas en la acción encuentran una solución preventiva, combinandose de esta manera los principios de eficiencia y de solidariedad, en un delicado y dinámico equilibrio de valores que encuentra una adecuada composición propio en la fase ejecutiva del poder[42].

[39] V. Ottaviano, *Sulla nozione di ordinamento amministrativo e di alcune sue applicazioni*, Milán 1958, 9.

[40] M.R. Spasiano, *Spunti di riflessione in ordine al rapporto tra organizzazione pubblica e principio di legalità: la regola del caso*, en *Dir.amm.*, 2000, 131 ss.

[41] G. Berti, *Il principio organizzativo nel diritto pubblico*, Padua, 1986, 160

[42] Para V. Bachelet, en *L'evoluzione della pubblica amministrazione*, en *L'amministrazione in cammino – Guida agli scritti giuridici di V. Bachelet*, Milán 1984, 69 s, "No podemos olvidar que nuestra Constitución impone, con el buen funcionamiento (…), también la imparcialidad de la administración: la cual por cierto tiene muchas componentes de equidad, de justicia, de exacta y humana comprensión de las situaciones; pero tiene también como

Esta perspectiva impide también relegar la imparcialidad a un mero signo formal y nominalistico[43] y rebajar el buen funcionamiento a un simple compromiso intersubjetivo entre partes implicadas en diferentes intereses[44].

La perspectiva enunciada conecta el artículo 97 Const. y, en particular, el principio del buen funcionamiento en una visión amplia del ordenamiento que echa sus raices en una lectura global de los principios fundamentales del texto consitucional. El ordenamiento administrativo tiene de hecho, como su objetivo último, la tutela del ciudadano (art. 3 Const.) y el pleno desarrollo de la persona humana por la efectiva participación de los

necesario soporte, la ejecución de la ley. Y esto aún más en una administración participativa, donde la ley, precisamente, tiene que tutelar la imparcialidad del servicio para los que pertenecen tanto a la mayoría como a la minoría de los usuarios".

También G. FALZONE (*Il dovere di buona amministrazione*, ob. cit., 129) destacaba la existencia de un deber de buena administración como síntesis de imparcialidad y buen funcionamiento, impuesta por la Constitución. La A. de todas maneras frente a este deber no era capaz de configurar una corelada posición jurídica subjetiva de derecho para el ciudadano. Por tanto él estaba "obligado" a usar la bien conocida teoría de los intereses difusos, que, como es conocido, tratando de la colectivitad en su conjunto, no encuentran otra tutela que la de genérica disponibilidad de la administración para encarar sus tareas: ahora la situación es completamente diferente, siendo ampliamente reconocida la legitimación para actuar de organismos representativos de intereses meta-individuales. Sobre este tema, R. Lombardi, *La tutela delle posizioni giuridiche meta-individuali nel processo amministrativo*,Túrin, 2008.

[43] A. ANDREANI, *Il principio costituzionale di buon andamento della pubblica amministrazione*, ob. cit., 33.

[44] G. Pastori, en *La burocrazia*, Padua,1967, 224 ss. amplia el ámbito de los principios de imparcialidad y buen funcionamiento hasta considerarlos como calificadores de toda actividad de los ciudadanos en el área del derecho público, sin embargo precisando algo. Mientras que la imparcialidad – como posibilidad de evaluar todos los intereses – para soportar la aproximación no puede limitarse a tener una importancia organizativa, pero tiene que traducirse en regla de la actividad, el buen funcionamiento puede trasponerse *tout court*. "La augmentada importancia de esta regla y la progresiva aproximación de las actividades particulares y públicas desde este punto de vista, además se favorirán (…) también por la introducción de la técnica del obrar administrativo, que contribuye a la equiparación de hecho de los dos órdenes de actividad".

individuos en la organización política, económica y social, sin distinción de sexo, raya, idioma, religión, opiniones políticas. Por eso, se compromite a quitar toda diferencia que limite de hecho la libertad o la igualdad entre los ciudadanos, actuando de forma subsidiaria (art. 118 Const.). Y la persona humana a la que se refiere el párrafo segundo del artículo 3 de la Constitución, es el individuo (art. 2 Const.) titular de derechos inviolables, tanto como persona individual, como en sus formas de vida asociada (art. 2) y de participación en las más amplias comunidade locales (art. 5), inevitablemente relacionado con otros individuos por un vínculo inderogable de solidariedad política, económica y social (art. 2 Const.).

La dimensión personalista y – a partir del vínculo de solidariedad –social de la pública administración afectan de manera importante sus disposiciones organizativas, desplazando el tradicional eje dialéctico autoridad-libertad hacia ese de eficiencia-garantía, cuya síntesis ofrecida por el artículo 97 Const. constituye la más acreditada (ya no única) expresión normativa.

Imparcialidad y buen funcionamiento, luego, aspectos complementarios de una realidad única, síntesis completa del concepto global de "buena administración" a la cual el ordenamiento democrático encarga – aunque no de forma exclusiva – la tarea de realizar las condiciones que permitan el pleno desarrollo de la persona humana, en un contexto en el que criterios como eficacia, eficiencia, economicidad, etc. acaban por tener contenidos y características claramente diferentes con respecto a los que los mismos conceptos tienen en sus ámbitos de origen (generalmente empresariales).

Esto no comporta, sin embargo, la confusión entre la "buena administración", a la cual llegamos en virtud de reflexiones hechas hasta ahora, y la misma "buena administración" propia del ordenamiento europeo, cuyos sentidos específicos e importancia echan sus raíces en contextos completamente diferentes, que no podemos investigar en este estudio.

4. LA RECIENTE EVOLUCIÓN DE LA JURISPRUDENCIA ADMINISTRATIVA EN EL ÁMBITO DEL BUEN FUNCIONAMIENTO.

La contribución ofrecida por la evolución de la jurisprudencia administrativa en el ámbito del buen funcionamiento ha llegado a tener, especialmente en los últimos años, contenidos muy interesantes, destinado por la mayoría a fortalecer el significado y la importancia, sobretodo en lo tocante a la funcionalidad de la actividad administrativa.

En este sentido la mayoría de la jurisprudencia administrativa ha vislumbrado en el buen funcionamiento la fuente a la que atar el deber de la administración pública para abastecer una adecuada y congrua razón en el ejercicio de algunas actividades, y esto aún antes que la ley número 241 del 1990 en el artículo 3 había ratificado de forma explícita la obligación[45]. En esta perspectiva, la razón tiene que permitir a la parte interesada de entender de manera *exacta y fácil* las razones puestas como fondamento de la acción pública, también en aplicación del principio instrumental de transparencia[46].

El principio del buen funcionamiento ha sido además considerado expresión de la exigencia de una actividad procedimental indagatoria completa y "representante la realidad" que según la elaboración de algunas sentencias del Consejo de Estado[47] y de

[45] En términos, T.A.R. Toscana, Sec. III, 14 de septiembre de 2010, n. 5938, en Red. Amm. 2010, 09; T.A.R. Umbria, Sec. I, 29 diciembre de 2009, n. 832; Cons. Estado, Sec. V, 6 de diciembre de 2007, n. 6243, en Foro Amm. CDS 2007, 12, 3433

[46] En términos, Cons. Estado, Sec. IV, 22 de septiembre de 2005, n. 4983, en Foro Amm. CDS 2005, 9, 2570.

[47] Entre las otras, cfr. Cons. Estado, Sec. V, 10 de septiembre de 2009, n. 5424, en www.giustizia-amministrativa.it .

Tribunales Administrativos[48] Regionales, no sólo tiene que constar de las razones formales y sustanciales de las determinaciones administrativas tenidas, sino tiene la capacidad de poner la participación al procedimiento de los sujetos interesados en una perspectiva de cooperación funcional para la emersión de los intereses considerables, para una seria y meditada consideración de los mismos para la determinación de la disposición final de subción en el auto[49].

También para la jurisprudencia administrativa – como detectado *supra* en las reflexiones de la doctrina – el principio del buen funcionamiento es sinónimo luego de economicidad en la particular acepción que tiene en el ámbito de las dinámicas públicas[50], es decir sobretodo como prohibición de inútil aumento de las cargas (meramente) formales del ciudadano[51].

Una diferente e interesante perspectiva jurisprudencial pone el buen funcionamiento entre los principios guías de las elecciones que la administración tiene que hacer.

Desde este punto de vista, puede tener coherencia con eso la disposición para avanzar cesiones inmobiliares preordinadas para la búsqueda de recursos aptos para satisfacer prioritarios intereses de la comunidad tanto en el caso de cesiones para los actuales titulares como por la reducción de los precios, para facilitar la rapidez de los

[48] T.A.R. Lombardia, Milán, Sec. I., 3 de marzo de 2010, n. 496, en Foro Amm. TAR 2010, 3, 755; T.A.R. Lazio, Roma, Sec. II, 24 de octubre 2007, n. 10748, en Foro Amm. TAR 2007, 10, 3090.

[49] T.A.R. Sicilia, Palermo, Sec. I, 7 junio de 2007, n. 1627, en Il merito 2007, 65; T.A.R. Sicilia, Catania, 30 de enero de 2007, n. 179, en Foro Amm. TAR 2007, I, 297.

[50] Cons. Estado, Sec. IV, 27 de julio de 2010, n. 4910, en Dir. & Giust. 2010

[51] Cons. Estado, Sec. V, 27 de marzo de 2009, n. 1840, en Foro Amm. CDS 2009, 10, 2343.

ingresos, como también favoreciendo los ingresos en la hipótesis de venta al precio de mercado en detrimento de los tiempos de realización[52].

En algunas hipótesis el principio del buen funcionamiento impone el ejercicio preliminar de evaluaciones discrecionales para el hallazgo de la mejor solución posible, de tipo organizativo o funcional, donde se encuentren diferentes hipótesis de decisión[53]. En este sentido, por ejemplo, ha sido considerado como fuente de la obligación de evaluación de la compatibilidad, también por la comprobación de competencia, de una iniciativa económica particular con la más corecta disposición de un servicio público[54]; el buen funcionamiento consiste (también), de hecho, en el "poder-deber atribuido a la administración de aprestar las medidas y los instrumentos más adecuados, oportunos, congruos, eficientes y eficaces para alcanzar de manera efectiva y corecta el interés público concreto"[55].

Tras algunas orientaciones expresadas por la Corte Constitucional (cfr. sentencias números 233 de 2006 y 103 - 104 de 2007; en último, números 34, 81 y 224 de 2010), el principio del buen funcionamiento ha sido considerado un pilar sobre el que se sustentan las necesarias garantías procedimentales para impedir, además, el uso de mecanismos automáticos de caducidad o sustitución de altos dirigentes, por razones de tipo político de

[52] Cons. Estado, Sec. VI, 28 de abril de 2010, n. 2428, en Dir. & Giust. 2010.

[53] Cons. Estado, Sec. VI, 10 de febrero de 2010, n. 668, en Dir. & Giust. 2010.

[54] En términos, Cons. Estado, Sec. V, 17 de febrero de 2010, n. 915, en Foro Amm. CDS 2010, 2, 382.

[55] Cons. Estado, Sec. V, 15 de marzo de 2006, n. 3568, en Foro Amm. CDS 2006, 3, 872; Cons. Estado, Sec. IV, 22 de octubre de 2004, n. 6972, en Foro Amm. CDS 2004.

alternación (según el así llamado principio del spoil system) de diferentes grupos políticos[56].

Por último, luego, si – como hemos notado – el buen funcionamiento representa el principio de transparencia y de prohibición de aumento de cargas para el ciudadano, también como alivio del ejercicio de acciones judiciales no necesarias[57], parece también expresar indirectamente formas de privilegio, por el ordenamiento general, hacia un tipo de tutela restitutoria en detrimento de la resarcitoria patrimonial, que tiene que considerarse subsidiaria con respecto a la primera también por lo dispuesto en el artículo 24 Const[58].

El nuevo contexto delineado por la interpretación jurisprudencial del buen funcionamiento ofrece una nueva dimensión jurídica a los criterios de eficacia, eficiencia y economicidad de la acción administrativa, todavía antes y prescindiendo del dictado legislativo en el artículo 1 de la ley número 241 de 1990, la cual en realidad enseña la incorporación de las orientaciones expresadas en particular por la autoridad de la administración y de la auditoría[59].

Por otra parte, la eficacia del principio debatido prescinde de la forma de ejercicio de la función pública, extendiéndose también a la hipótesis de uso de estructuras de orden privatístico[60], considerando la circunstancia que la acción de la pública administración

[56] T.A.R. Sardegna, Sec. I, 21 de mayo de 2010, n. 1240; Cons. Estado, Sec. V, 16 de octubre de 2007, n. 5388, en Ragiusan 2008, 291, 37; T.A.R. Campania, Nápoles, Sec. V, 3 de abril de 2006, n. 3316, en Com. It. 2006, 6, 88.

[57] T.A.R. Lazio, Roma, Sec. II, 8 de junio de 2009, n. 5449, en Foro Amm. TAR 2009, 6, 1769.

[58] Cons. Estado, Sec. IV, 10 de diciembre de 2009, n. 7744, en www.giustizia-amministrativa.it; ib., 22 de junio de 2006, m. 2066, en Foro Amm. 2006, 6, 1771; ib., 22 de octubre de 2004, n. 6959, en Foro Amm. CDS 2004, 2855.

[59] Tribunal de cuentas, Reg. Campania, Sec. jurisd., 6 de julio de 2009, n. 752, en Riv. Corte Conti 2009, 4, 171.

[60] T.A.R. Campania, Salerno, Sec. II, 7 de abril de 2006, n. 438, en Foro Amm. TAR 20086, 4, 1442

nunca puede ser en detrimento del respecto de reglas legislativas y contractuales inspiradas por el respecto de valores de importancia constitucional[61]. Desde aquí deriva que la búsqueda de la eficiencia y de la eficacia en las estructuras públicas no puede estar en contraposición con el principio de legalidad que representa un límite impracticable para las elecciones gestionales de la actividad del directivo público[62]. Su consideración, luego, impone que el resultado administrativo, por otra parte considerado como parámetro de evaluación de la obra de los *administradores* públicos, se entienda en el ámbito de una lógica que evidentemente dirige la acción no sólo para el respecto de las reglas de conducta y de los modelos procedimentales puestos como garantía de los diferentes sujetos con los cuales la administración se encuentra en el cumplimiento de su acción, sino para el efectivo logro de una *utilitas*, único factor, en un ordenamiento inspirado también por el principio de subsidiariedad, para legitimar la existencia de sujetos con poderes de relevancia pública.

5. EL BUEN FUNCIONAMIENTO, LA LÓGICA DEL RESULTADO Y LAS RECIENTES LEYES DE REFORMA.

Desde hace algunos años, exigencias de racionalización del gasto público y de un mejor uso suyo, ofrecen al buen funcionamiento otros sentidos diferentes de los que normalmente practican y expresan. En particular ha ido atenuandose – de manera por cierto ni plana ni sin contradicciones – una profunda revolución de la manera misma de entender la acción del poder público, que desde ejercicio de actividad meramente

[61] Tribunal de Cuentas, Reg. Lombardia, Sec. Jur., 10 de marzo de 2006, n. 172, en Foro Amm. 2006, 3, 1153.

[62] T.A.R. Lombardia, Milán, Sec. II, 9 de junio de 2006, n. 1352, en www.giustizia-amministrativa.it

conforme con el dictado legislativo ha ido respondiendo a exigencias diferentes que podríamos definir como – de manera quizás demasiada sintética – "atención al resultado".

Verdaderamente, el uso proprio de la palabra resultado, cuya matriz nos lleva de inmediato a lógicas de empresa, ha provocado no pocas perplejidades en varios especialistas, preocupados por las consecuencias que la nueva "filosofía empresarial" habría podido producir para la legalidad, valor auténtico e imprescindible de la acción administrativa. Casi como si el logro del resultado asimismo fuese un riesgo inaceptable para una actividad que tiene que permitir la ejecución del dictado legislativo respetando todas las reglas para la tutela de las garantías del ciudadano y – más a menudo – de la administración pública misma.

A pesar de eso, en este contexto, no podía escapar una observación importante: es decir, si es verdad que la pública administración tiene que perseguir las finalidades reconocidas por la ley, esto no puede dar lugar al logro solícito del mismo resultado de alguna manera prefigurado e impuesto por la ley. Podemos presentir en semejante afirmación – por lo menos in *nuce* - la maturación de la conciencia que el resultado administrativo no constituye algo que se pone fuera de la norma y luego fuera del principio de legalidad, sino asigna a éste un sentido más principal, más coherente con la exigencia de efectividad de tutela de los intereses para los que los diferentes centros del poder público hallan legitimación. Podemos luego destacar que la "relevancia atribuida al resultado administrativo constituye la inovación más profunda de la manera de entender jurídicamente la actividad administrativa; y puede, entonces, modificar la manera de administrar, es decir la manera en la que los funcionarios entienden su acción"[63].

En otras palabras, el resultado es la capacidad que las entidades tienen para satisfacer las exigencias para cuya tutela han sido creadas: en conclusión, es una forma de expresión del buen funcionamiento como por el artículo 97 de la Const.

[63] F.G. Scoca, entrada *Attività amministrativa* en *Enc. del Dir*. (VI actualizado), Milán, 2002, 10.

No por casualidad, el ordenamiento prevé la supresión de las entidades asíllamadas inútiles en virtud de la Ley número 59 de 1997.

La importancia atribuida por el ordenamiento al resultado administrativo y su subsunción en el ámbito de la legalidad, determina la extensión de la comparación norma-acto con la relación norma- acto- resultado, el último considerado evidentemente en términos no económicos, sino jurídicos como por el sentido ya delineado. El resultado administrativo, de hecho, lejo de consistir en la necesaria satisfacción material de la pretensión del ciudadano, se realiza más bien en la necesaria toma en consideración de sus intereses jurídicos y de sus solicitudes, y también de la satisfacción de sus peticiones en términos de adecuación de la respuesta (no necesariamente positiva), como que en esa – además – se ponen las justas exigencias de la certeza del derecho.

En conclusión, el resultado administrativo, como expresión del buen funcionamiento de la pública administración, implica la pronta toma en consideración de los intereses, su rápida ponderación y su eficaz tutela, en el respeto de los parámetros temporales y lógicos propios de cada ámbito de actividad pública. Áun más considerado que – como es conocido - la norma de ley no puede por cierto considerarse exhaustiva ni en lo tocante al hallazgo de intereses dignos de atención ni a la medida de su consideración – como prueba la circunstancia de la proliferación de los organismos para la coordenación y la simplificación de la evaluación contextual de los intereses en juego (conferencias de servicios, ventanillas únicas, acuerdos de programa, etc.).

La lógica del resultado, expresión del buen funcionamiento, luego no tiene nada que ver con el resultado a toda costa, o con la necesaria satisfacción material de la pretensión del ciudadano. Y a ella se oponen todas esas formas de legitimación de la inercia administrativa, como los mecanismos de silencio significativo o de declaracion de inicio de actividades (hoy también s.c.i.a. en italiano, es decir aviso de certificado de inicio de actividades), que, si por un lado dejan el ciudadano en la incertidumbre, por el otro provocan serias dudas de legitimidad que afectan la misma razón de ser de sujetos

que, aunque allí para el ejercicio de funciones de administración activa, de esta manera tienen la legitimación para atrincherarse detrás de formas de inacción[64].

Las más recientes reformas en lo tocante a organización y directivo público, que tienen una ya inadecuada disciplina de la responsabilidad pública (sobretodo de auditoría) y a las cuales no faltan contradicciones, han actuado – con pasos atrás y huidas adelante – para la enfatización de la lógica del resultado como expresión del principio del buen funcionamiento.

De hecho, con la ley número 15 de 4 de marzo de 2009 el Parlamento otorgaba al Gobierno una amplia delegación finalizada a la optimización de la productividad del trabajo público y a la eficiencia y transparencia de las públicas administraciones. En particular, el Gobierno tenía delegación para adoptar uno o más decretos legislativos para: modificar e integrar la disciplina del sistema de evaluación de las estructuras y de los

[64] Es notorio que en lo tocante a los silencios significativos y a la asíllamada declaración de inicio de actividad (hoyendía ampliamente remplazada por el aviso de certificado de inicio de actividades) existe una amplia gama de doctrinas a las cuales se acompañan también un vario (y contradictorio) contexto jurisprudencial (también estamos a la espera de la decisión del Pleno del Consejo de Estado justo sobre la naturaleza jurídica de la declaración de inicio de actividades y del aviso de certificado de inicio de actividades). Aunque no exprimamos opiniones ahora, no podemos que destacar como tanto el silencio significativo como la declaración de inicio de actividades constituyen elementos de negación de la misma lógica de legitimación de la existencia de poderes de administración activa, reservando, en vía de hecho, a la pública administración una función de mero ejercicio de poderes de autotutela. Aún más considerando que los últimos se caracterizan por la incertidumbre que generan en los destinatarios, quizás destacados para encarar onerosas inversiones en contextos que no parece arriesgado definir a veces por lo menos dudosos desde el perfil jurídico. Ni el refuerzo del ejercicio del poder de anulación, después de la entrada en vigor de la reforma de la ley número 241/1990, es capaz de tranquilizar sobre este aspecto. Lo que hemos ahora expresado encuentra nuevo vigor donde la reflexión se relaciona con esas grandes áreas del país en las que la difusión de fenómenos de delincuencia organizada encuentra nuevo estímulo propio desde el uso de formas de silencio y de autocertificación, considerada la continua escasa (y hasta inexistente) capacidad (o voluntad) de las administraciones locales para intervenir por el ejercicio de efectivos poderes rehabilitadores En conclusión, silencios y aviso de certificado de inicio de actividades desde instrumentos de semplificación a ocasiones de ilegalidad (además que de incertidumbre jurídica).

empleados de las administraciones públicas; introducir en la organización de las públicas administraciones instrumentos de valorización del mérito y métodos de estímulo de la productividad y de la calidad del rendimiento del trabajo; modificar la disciplina del directivo público, de las sanciones disciplinarias y de la responsabilidad de los empleados de las administraciones públicas.

La delegación, luego, ha sido aplicada por la adopción del decreto legislativo número 150 de 27 de octubre de 2009.

El objetivo principal de la reforma era amejorar el buen funcionamiento de la administración, es decir la eficiencia y la eficacia de su acción, por la valorización del mérito y la definición de un sistema más estricto de las responsabilidades, todo esto por una necesaria reexaminación del papel del personal directivo (sobretodo de alta dirección) y de su relación con el órgano político.

Por las recientes disposiciones, toca a los órganos políticos aprestar, de forma preventiva, los objetivos anuales de la administración y considerar, de forma real, cuantos se lograron efectivamente (artículo 4, párrafo II, apartado b, ley número 15/2009).

La dirección política se materializa en los siguientes actos: a) directivas generales que contienen las direcciones estratégicas; b) plan anual, redactado de acuerdo con el directivo, sobre la *performance* (los resultados) coherentemente con objetivos y recursos, y también Informe anual sobre la *performance*, de tipo real; c) verificación de los objetivos estratégicos alcanzados; d) definición de un programa trienal para la transparencia (artículo 15, decreto legislativo número 150/2009).

La reforma establece la plena autonomía del dirigente de nivel más alto, comparado con un real impresario público para la evaluación de los resultados (artículo 4, párrafo II, apartado e y artículo 5, ley número 15/2009), es decir los resultados de su colaboradores. A este poder se enlaza una específica responsabilidad en caso de falta de supervisión sobre la efectiva productividad de los recursos humanos asignados y sobre la eficiencia de la relativa estructura. Al veredicto sobre la verificación de dicha responsabilidad, parte la prohibición de pago de la remuneración de carácter accesorio.

Sobre este último aspecto, se prevé la redefinición de la remuneración del directivo según el resultado, que no podrá ser inferior al 30% de la retribución total.

En esta perspectiva, tanto la ley de delegación como el relativo decreto de ejecución quieren "*fortalecer el principio de distinción entre las funciones de dirección y control que incumben a los órganos de gobierno y las funciones administrativas que corresponden al directivo, en el respeto de la relativa jurisprudencia constitucional, regulando la relación entre altos órganos y altos dirigentes para garantizar la plena y coherente ejecución de la dirección política de los órganos de gobierno en ámbito administrativo"* (artículo 6 de la ley número 15 de 2009).

El uso de la palabra "fortalecer" evidentemente indica la conciencia de la preexistencia del principio de distinción funcional entre política y administración, pero expresa también la necesidad de instrumentos de ejecución y de enlace más adecuados.

Pues bien, parece evidente que delinear con mayor especificidad los papeles y las funciones propias del órgano político y administrativo, y también atribuir a éste último un más amplio margen de autonomía de decisión (y, como consecuencia, de responsabilidades) no es suficiente para ofrecer más coherencia a la relación entre política y administración, en la medida en que no se resuelve el auténtico factor crítico representado por las formas de evaluación de la obra del directivo.

En lo tocante a esto, el decreto legislativo número 150 de 2009 prevé en primer lugar la creación, a nivel nacional, de una Comisión para la evaluación, la transparencia y la integridad de las administraciones públicas, como órgano independiente con la tarea de dirigir, coordinar y supervisar el ejercicio de las funciones de evaluación, ofreciendo a las administraciones individuales los criterios y los modelos de evaluación de referencia (artículo 13, decreto legislativo número 150/2009)[65]. Cada administración luego tiene que

[65] La Comisión está compuesta por cinco miembros – nombrados con decreto del Presidente de la República., a propuesta del Ministro para la pública administración y la inovación – escogidos entre expertos en management,

aprestar un organismo independiente de evaluación de los resultados del trabajo – en sustitución de servicios de control interno – que tiene la tarea de monitorear el sistema de evaluación en coherencia con lo dispuesto por la Comisión central. A este órgano no incumbe la función de verificación y evaluación de la obra de los órganos directivos. En virtud del artículo 14, párrafo IV apartado e) del decreto legislativo número 150/2009, de hecho, el organismo de evaluación se limita a "proponer al órgano de dirección política-administrativa la evaluación anual de los altos dirigentes". A todo esto, añadimos como el mismo carácter de independencia de dicho organismo parezca más formal que real, si sólo consideramos que el mismo órgano de dirección pólitica nombra sus miembros (artículo 14, párrafo III).

En conclusión con el nuevo sistema se ha introducido un "filtro" - esta individuación de un sujeto (aparentemente) independiente al cual encargar la redacción de una especie de instrucción – sin pero modificar el aspecto más importante sobre la regulación de las relaciones política/administración, o sea la disposición de la responsabilización de la función de evaluación del alto directivo, todavía atribuida al órgano político.

Se trata, bajo este perfil, de una "reforma a la que falta algo ", como que la facultad del sujeto político para alejarse de la propuesta de evaluación del organismo relativo deja invariada la disposición vigente anteriormente de sujeción substancial del dirigente frente al órgano político.

Por lo contrario, tenemos que acoger las novedades introducidas por la reforma en lo tocante al régimen de los criterios de empoderamiento, cambio o revocación de los cargos directivos, para los que se prevé una adecuación de la relativa disciplina a los principios de transparencia y publicidad, en particular, *"excluyendo la confirmación del*

misuración de los resultados, gestión y evaluación del personal, y trabaja independientemente pero en cooperación con la Presidencia del Consejo de Ministros y con el Ministerio de Economía y Finanzas.

cargo directivo asignado en caso de falta de logro de resultados" (artículo 6, párrafo II, apartado h), ley número 15/2009; artículo 40, ley número 150/2009). Podemos observar como- de manera completamente comprensibile – las normas especifiquen que la evaluación del logro de resultados predeterminados por el dirigente individual tenga que ocurrir considerando criterios y objetivos indicados de manera preventiva y analítica al momento del empoderamiento, y luego, evidentemente, permitiendo la posible cuestionabilidad de las elecciones (confirmación o revocación) hechas por los órganos políticos.

También parece positiva, la novedad introducida sobre el acceso a la cualificación de dirigente de primer nivel: en virtud del artículo 47 del decreto legislativo número 150/2009, se establecen nuevos procedimientos de acceso a las administraciones estatales y a las entidades públicas no económicas, previendo, en particular, un concurso de titulaciones y de pruebas para recubrir el 50% de los empleos disponibles anualmente, claramente para permitir el logro de las posiciones más altas a los sujetos que demuestren tener los requisitos.

Delineando algunas cortas reflexiones de conclusión que puedan resumir los resultados que este estudio había establecido llegar, o sea, la emersión de una ruta evolutiva hecha por el principio del buen funcionamiento, desde los albores del reconocimiento a nivel constitucional hasta los tiempos actuales, no puede que observarse como el camino interpretativo de este principio se haya connotado, en el ámbito de una ruta bastante tortuosa, con algunas etapas esenciales por las cuales al buen funcionamiento se han atribuido, durante el tiempo, sentidos conceptuales siempre más elaborados e importantes que han consagrado su presencia entre los valores fundantes del ordenamiento administrativo.

Desde la importante acquisición de una importancia jurídica hasta su relevancia desde el punto de vista organizativo, con particular referencia al perfil relacional entre los diferentes niveles de gobierno, hasta su reconocimiento de principio capaz de expresar una influencia determinante también para el aspecto funcional de la acción administrativa, el

buen funcionamiento por cierto ha jugado un papel esencial en el proceso de reforma para levantar el "resultado" a factor dinámico y positivo del contexto jurídico público.

Solucionada la dicotomía prospectada por el inaceptable trueque legalidad-eficiencia[66], hemos llegado de hecho a un concepto de "buena administración" que es algo completamente diferente del logro "a toda costa" de un resultado rápido y ventajoso desde el punto de vista económico, que a lo contrario, trata más del grado de satisfacción del ciudadano-usuario (o como se afirma a menudo con otras palabras, pero equivalentes, con "la calidad de los resultados"), considerando la prioritaria e irreprimible exigencia de la administración de tutela de derechos, de situaciones jurídicas subjetivas – desde las más débiles - de concretos bienes de la vida, de imparcialidad y de transparencia[67].

Lo que significa, en términos más concretos, es que el rendimiento administrativo, en virtud del principio debatido, tiene que ser ofrecido en el ámbito de modelos de conductas, cuyos parámetros de referencia son el tiempo, la sencillez de los procedimientos, una adecuada información, el uso de estructuras organizativas idoneas para la finalidad institucional (en términos de calidad y cantidad), y también – si bien no menos importante – el respeto de la dignidad del ciudadano con el cual la administración entra en contacto.

Todavía recientemente[68] se ha subrayado como en la sociedad contemporánea la calidad de la acción de la administración pública, con sus formas y sus tiempos operativos, constituye un factor de gran importancia no sólo en ámbito económico, es decir en

[66] F. LEDDA, *Dal principio di legalità al principio d' infallibilità dell'amministrazione*, en *Foro amm.*, 1997, 3303 ss

[67] M. R. SPASIANO, *Funzione amministrativa e legalità di risultato*, cit., p. 274 .

[68] Permítase otra vez la referencia a M. R. SPASIANO, *Crisi dei mercati e dell'amministrazione democratica*, en AA.VV., *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni*, Nápoles, 2010, 461 ss., y también, *La semplificazione come garanzia di effettività*, que está por publicarse.

presencia de mercados de tipo competitivo, sino también en contextos de valor social, donde la calidad de la vida del ciudadano depende - como es experiencia común – de manera relevante también de la calidad de las respuestas que la administración prepara. Desde este punto de vista, el buen funcionamiento, como resultado jurídico, se identifica en la efectividad del ejercicio de la acción administrativa, en una respuesta cierta, clara (no importa si favorable o desfavorable) que el particular tiene un auténtico derecho para obtener, ofreciendo garantías de tutela concreta, solo objetivo para el que una norma puede legitimar la atribución de un poder público y su relativo ejercicio.

Si luego el buen funcionamiento no encuentra lugar en el ámbito de una administración unilateral y de tipo autoritativo donde estaba más limitado en el área del meta-jurídico, hoy llega plenamente a la dimensión de lo que es relevante jurídicamente, también en relación al hecho que su consideración (o la de los instrumentos que representan su directa ejecución) en el ámbito de prescripciones de normas, hace posible que su violación determine la imposición de específicas medidas reparadoras, en términos de indemnización y sanciones, hoy también interponiendo auténticas demandas colectivas[69].

[69] R. LOMBARDI, *" La class action nell'ordinamento giuridico italiano"*, Actas de la conferencia de Nápoles, 19 de octubre de 2009, que está por publicarse.

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ITALY AND THE ECHR

(CONSTITUTIONAL COURT REPORT 2010)

(March 2011)

Prof. Stefania NINATTI and Marilena GENNUSA

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1. INTRODUCTION

What is the real role played by the European Convention on Human Rights (ECHR) in the Italian system of sources of law? This question has engaged Italian scholars[1] and case law

[1] On this issue, see Cocozza F., *Diritto comune delle libertà in Europa*, Giappichelli, Torino, 1994; Sorrenti G., *Le Carte internazionali sui diritti umani: un'ipotesi di "copertura" costituzionale a più facce*, in Pol. Dir., 1997, 349 ss.; Pace A., *La limitata incidenza della C.e.d.u. sulle libertà politiche e civili in Italia*, in *Convegno in occasione del cinquantenario del Consiglio d'Europa per la protezione dei diritti umani e delle libertà fondamentali in onore di Paolo Barile*, Accademia Nazionale di Lincei Roma, 2001; Montanari L., *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne*, Torino, Giappichelli, Torino, 2002; AA.VV.,

since the 1950s, given the difficulties there are to grasp the legal features of the relationship existing between the ECHR and the domestic legal order. According to the initial approach of the Italian constitutional court (ICC), the ECHR, like every international treaty, should have been recognized as having the same legal authority as the internal act of ratification. Since the ECHR was ratified through an ordinary law (law no. 848/1955), the ICC recognized it as a source of law belonging to the level of ordinary statute, despite the fact that its content, the protection of human rights, belonged by its very nature to the constitutional law. ICC Judgement no. 388/1999 shed some light on this unsatisfactory theoretical legal framework – established through a rather "monolithic" ICC case law[2] –, stating that the domestic and international provisions on human rights are complementary, to the extent that the content of the former must be used to interpret the latter, and *viceversa*. It is clear, though, that the legal framework was still extremely confused.

In this context, the 2001 Italian constitutional reform significantly amended Art. 117, para. 1 It. Const. According to this new paragraph, legislative power must be exercised by the State and the Regions in compliance not only with the Constitution, but also with the obligations deriving from EU legislation and international obligations.[3] At first, it did not

La Convenzione Europea dei Diritti dell'Uomo. Profili ed effetti nell'ordinamento italiano, Giuffrè, Milano, 2002; Zanghì/Vasak, (a cura di), *La Convenzione Europea dei Diritti dell'Uomo: 50 anni d'esperienza. Gli attori e i protagonisti della Convenzione: il passato, l'avvenire*, Giappichelli, Torino, 2002; AA.VV., *La Corte Europea dei Diritti Umani e l'esecuzione delle sue sentenze*, Editoriale Scientifica, Napoli, 2003; AA.VV., *La Corte costituzionale e le Corti d'Europa*, Giappichelli, Torino, 2003; Bultrini A., *La pluralità dei meccanismo di tutela dei diritti in Europa*, Torino, Giappichelli, Torino, 2004; Tega D., *La Cedu e l'ordinamento italiano*, in Cartabia (edited by), *I diritti in azione*, Bologna, Il Mulino, 2007, p. 67 ss. and at last, in general, see Tesauro G., *Costituzione e norme esterne*, Il diritto dell'Unione Europea, 2/2009, p. 195 ss.

2 The only exception can be seen in the decision no. 10/1993, where the ratification law was allowed with an "atypical competence" which cannot be derogated by subsequent conflicting legislation.

3 On this issue, see Sorrentino F., *Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario*, in Dir. pubbl. comp. europ., 2002, p. 1335 ss.; Conforti B., *Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari*, in Foro it., 2002, V, 229 ss.; Luciani M., *Le nuove competenze legislative delle regioni a statuto ordinario*, in

appear that this reform could actually affect the aforementioned ICC case law: accordingly the ordinary and administrative judges persistently approached the question regarding the ECHR legal status in very different ways.

Precisely in this new constitutional context the ICC radically modifies its approach on the ECHR legal status. And it is a two-staged change.

The first stage is the so-called "October Revolution" (decisions no. 348 and 349, both delivered in October 2007). In these judgements, the ICC acknowledges the legal status of the ECHR within the domestic legal order in the light of the reformed Art. 117, par. 1 It. Const.[4] This is its reasoning: first of all, thanks to the reference to the obligations deriving

ww.associazionedeicostituzionalisti.it; Cannizzaro E., *La riforma federalista della Costituzione e gli obblighi internazionali*, in Riv. dir. int., 2001, p. 921 ss.; D'Atena A., *La nuova disciplina costituzionale dei rapporti internazionali e con l'unione europea*, in Rass. parl., 2002, p. 913 ss.

[4] These landmark decisions declared unconstitutional the national legislation governing the refund for legitimate expropriation and the public administration's practice of the so-called "constructive (or indirect) expropriation". Both of these pieces of legislation, in fact, represented a systemic violation of Protocol No. 1, Art. 1 ECHR, according to the ECtHR well-established case-law. Ex multis, see for instance Donati F., *La CEDU nel sistema italiano delle fonti del diritto alla luce delle sentenze della Corte costituzionale del 24 ottobre 2007, Osservatorio sulle fonti, 1/2008*, Conforti B., *La Corte costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione*, in *Giur. It.*, 2008, p. 569 ss.; Condorelli L., *La Corte costituzionale e l'adattamento dell'ordinamento italiano alla CEDU o a qualsiasi obbligo internazionale?*, in *Dir. umani e dir. int.*, 2008, p. 302 ss.; Cannizzaro E., *Sentenze della Corte europea dei diritti dell'uomo e ordinamento italiano in due recenti decisioni della Corte costituzionale*, in *Riv. dir. int.*, 2008, p. 138 ss.; Gaja G., *Il limite del rispetto degli obblighi internazionali: un parametro definito solo parzialmente*, *Riv. dir. int.*, 2008, p. 137; Ruggeri A., *La Cedu alla ricerca di una nuova identità (sentt. 3482007 e 349/2007)*, in Forum dei Quaderni Costituzionali; Cartabia M., *Le sentenze gemelle: diritti fondamentali, fonti, giudici*, in Giur. cost. 2008, p. 3564; Pinelli C., *Sul trattamento giurisdizionale della Cedu e delle leggi con essa configgenti*, Giur. cost. 2007, p. 3518 ss.; Cicconetti S., *Creazione indiretta del diritto e norme interposte*, in Associazione Italiana dei Costituzionalisti; Rossi L.S., *Recent Pro-European trends of the Italian Constitutional Court*, in *Common Market Law Rev.*, 2009, p. 319 ss.; Bultrini A. , *Le sentenze 348 e 349/2007 della Corte: l'inizio di una svolta?*, in *Dir. pub. comp. europ.*, 2008, p. 171 ss. ; Tega D., *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte subordinata a fonte "sub-costituzionale" del diritto*, in Forum dei Quaderni Costituzionali; Giupponi T. F., *Corte costituzionale, obblighi internazionali e "controlimiti allargati": che tutto cambi perché tutto rimanga uguale?*, in Forum dei

from international obligations ex Art. 117, par. 1 It. Const., the international treaties signed by Italy become an interposed parameter of the judicial review on legislation. Accordingly, the Constitutional Court is the only institution competent to declare unconstitutional an internal law which contrasts with the ECHR. The ordinary and administrative judges, on the contrary, cannot disapply the internal conflicting provision but must refer the question to the Constitutional Court which holds the competence of the Conventional review on legislation. The only power that is granted to the ordinary and administrative courts – indeed, a powerful instrument – is the possibility to provide an interpretation of the conflicting internal law consistent with the ECHR provisions (s.c. "*interpretazione conforme*", in Italian). Secondly, the ICC states its preliminary power to evaluate the consistency of the ECHR provisions with the Constitution, due to the sub-constitutional status of the interposed norms that derive from the international obligations[5]. If on one hand constitutional supremacy is recognized, on the other hand, the ICC acknowledges the far-reaching monopoly held by Strasbourg to interpret the Conventional provisions. According to the ECHR legal system, in fact, the Strasbourg judge is the only competent body to interpret the ECHR and to guarantee the constant application of the ECHR. In other words, the object of the ICC judicial review is the ECHR as it "lives" in the creative interpretation of the ECtHR and not the bare ECHR provisions by themselves.

After this first ICC judgment, the number of questions of constitutionality grounded on alleged violations of Conventional rights increased, to the extent that the Constitutional Court needed to intervene again in 2009 through two general, "systemic" rulings (decisions no. 311 and 317/2009) aimed at redefining the theoretical framework established in 2007. In a nutshell, the following principles emerge from these judgements,: a) A centralized

Quaderni Costituzionali; Luciani M., *Alcuni interrogativi sul nuovo corso delle giurisprudenza costituzionale in ordine ai rapporti fra diritto italiano e diritto internazionale*, in Corriere giur., 2008, p. 203 ss.; Sorrentino F., *Apologia delle sentenze gemelle*, Diritto e società, 2009, p. 213 ss.

5 See again judgement no. 349/2007, where it is specified even further that only in this way can a fair balance between the need to respect international obligations and the need not to violate the Italian Consitution through such an interational compliance be struck.

system of conventional review on legislative power with the ICC is confirmed as the only competent court The ensuing ban for the ordinary and administrative courts to non-apply the internal conflicting provision is also confirmed: on the contrary, they must issue a referral order to the ICC. The Constitutional Court is thereby trying to put a stop to a sort of underlying "diffuse Conventional review on legislation" by the ordinary and administrative judges. b) The binding authority both on ordinary courts and the Constitutional Court – of the ECHR as interpreted by the European Court of Human Rights (ECtHR) is given more and more importance Such an obligation is however certainly triggered only when the national judge faces the same situations faced by the Strasbourg Court. Accordingly, a kind of autonomous margin of appreciation is left to the domestic judge, because this latter can move away from the ECtHR interpretation if it considers the case in question is different from the one ruled at supranational level. c) The doctrine of Constitutional supremacy is also recognized and it follows that the ICC, when comparing domestic and conventional provisions, is obliged to ensure the highest standard of fundamental rights protection, since a lower level of protection deriving from the ECHR system is not admitted. In this light, the interposed Conventional provision must be consistent with the Italian Constitution and the ICC may adopt its own margin of appreciation in order to pursue the highest expansion of guarantees in the competition between Constitutional and Conventional provisions. This "own" margin of appreciation is undoubtedly different by nature and content from the one provided by the ECtHR, being subject to a balance established to evaluate the fundamental rights considered within the domestic legal context as a whole, in order to prevent the strengthening of one right leading to the weakening of the other.[6]

This is the general framework recently established by the ICC, and in 2010 further cases allowed the constitutional judges to refine their previous statements.

[6] To look in greater depth into the matter more , see Lamarque E., *Gli effetti delle sentenze della Corte di Strasburgo secondo la Corte costituzionale italiana*, Corriere Giur., 2010, p. 955 ss.

2. THE DUTY TO REFER THE QUESTION OF CONSISTENCY WITH THE ECHR TO THE CONSTITUTIONAL COURT AND THE BAN TO NON-APPLY THE INTERNAL CONFLICTING LEGISLATION.

The ICC judgement no. 93/2010[7] is an exemplary application of the aforementioned principles, supported also by the fact that a well-established ECtHR case law on the issue in question and several European judgements against Italy already existed. The Constitutional Court, in decision no. 93/2010, states that the legislation on application of preventive measures is unconstitutional (Art. 4, l. no. 1423/1956 and Art. 2-ter, l. no. 575/1965) as it does not permit that, upon request of the interested persons, proceedings on the application of preventive measures are carried out in public hearings before first-instance courts and courts of appeal (even if the power of the judge to order that the hearing is totally or partially carried out without the presence of the public – if the peculiarities of the concrete case so require – is confirmed). The alleged violation concerned Art. 117, par. 1 It. Const. – through the infringement of Art. 6 ECHR – and Art. 111 It. Cons. regarding the respect of due process of law.

First, the ICC reasoning analyses the ECtHR case law on the protection of public hearings in proceedings under Art. 6 ECHR. From such a case law the following principles can be inferred: a) Judicial transparency is a fundamental element for the safeguarding of fair proceedings; b) The principle of public hearings in proceedings, though fundamental, is not absolute, since the ECHR allows exceptions in the presence of conflicting values (public order, interests of morals, national security, interests of juveniles, etc.). Ordinary courts have to strike a fair balance between the (regular) need for publicity and the (exceptional) need for confidentiality aimed at protecting different values on a case by case basis, evaluating the details of the circumstances at stake. The legislation can certainly *a priori* provide for cases where the presence of the public is excluded in general or with respect to certain types of proceedings, but judges have to maintain a power of concrete balance

[7] On this decision, see for example Guazzarotti A., *Bilanciamenti e fraintendimenti: ancora su Corte costituzionale e Cedu*, in Quaderni Costituzionali, 2010, p. 592 e ss.

between the conflicting interests: in other terms, the choice to depart from publicity always depends on the case being examined. c) The same can be said for proceedings in which preventive measures are applied, because they can impinge heavily on liberty, property and the economic freedoms of the interested parties, even if these proceedings are characterized by the fact that they are highly technical.

Once these fundamental elements of the issue in question have been clarified, it is an easy task for the ICC to trace them back to the Italian Constitution, even if this latter does not expressly provide for public hearings (while the International Covenant on Civil and Political Rights and the EU Charter of Fundamental Rights do so expressly). After all, the ICC itself had already stated on many occasions that public hearings in proceedings is a fundamental principle inherent to a democratic system founded on popular sovereignty: every judge has to comply with this principle from which its own legitimation derives, according to Art. 101 It. Const.[8] Without doubt evoking international and supranational acts in order to fill the gap in our Constitution of an express provision regarding public hearings, the ICC seems to describe as "constitutional" a principle which actually stems from outside the Italian Constitution itself[9]. We could, however, read this ICC choice as a clear example of the afore-mentioned program (see the 2009 judgements on this issue) to use the ECHR system as a tool to expand the constitutional protection of fundamental rights .

The last step of the ICC reasoning in decision no. 93 was the declaration of unconstitutionality of the conflicting internal norms, as the conflict could not be settled by interpreting the domestic norm in accordance with that pertaining to the Convention.

8 Art. 101 It. Const.: «Justice is administered in the name of the people. Judges are subject only to the law.»

9 See Conti R., *Corte costituzionale e Cedu: qualcosa di nuovo all'orizzonte?*, in Corriere giur, 2010, p. 624 e ss.

Furthermore, another interesting aspect emerges in this case, since the issue at stake concerns a very controversial legislation that caused some problems for the ordinary judges who had to apply it. This ruling, in fact, ends a lengthy judicial controversy, since some of the lower courts had used the ECHR in order to apply – through an analogical interpretation – the public hearings principle even to cases in which publicity was not expressly provided for. Therefore, in some ways, the Constitutional Court seems to address not only the supranational legal order and the Strasbourg Court, but also – and probably first and foremost – the domestic judiciary.

3. WHICH PARAMETER? ART. 117, PAR. 1 IT. CONST. (IN CONJUNCTION WITH THE ECHR) OR THE DOMESTIC CONSTITUTIONAL LAW?

The reading of the other 2010 ICC decisions facing the question of the relationship between internal sources of law and ECHR appears to be more complex, as the Italian order was not directly involved in the issues at stake. Nevertheless, they give some interesting cues as to the parameters which can be invoked before the Constitutional Court in these cases.

Indeed, despite the highly-debated question on openness in judgement no. 311/2009 to a possible use of Art. 10, par. 1 It. Const.[10], if the alleged violation concerns a Conventional norm which enshrines a general principle of international law, the traditional parameter used by ordinary and administrative courts to refer the question to the ICC continued to be art. 117, par. 1 It. Const. In some cases the ECHR (notably Art. 6) was invoked directly and not as an interposed norm between ordinary law and Art. 117, par. 1 It. Const.: the ICC clarified, though, that Art. 6 ECHR is not invocable as a parameter by itself, because it is a

[10] According to the Art. 10, par. 1 It. Const., the Italian legal system conforms to the generally recognized principles of international law.

mere interposed norm that works only in conjunction with an infringement of the Art. 117, par. 1 It. Cons. (order no. 163/2010)[11].

Reading two ICC judgements in 2010, though, a doubt emerges regarding the very need to use art. 117, par. 1 It. Const. in conjunction with the ECHR: in other words, one can speculate if these cases, in the end, could not be solved by mere referral to internal constitutional provisions reaching the same outcome, without calling for the application of the ECHR.

In decision no. 187/2010, for instance, the ICC declares the unconstitutionality of Art. 80 of the 2001 Finance Bill (l. no. 388/2000) in the part in which the provision limited the enjoyment of the right to social benefits and economic allowances (including a monthly disability check) only to foreign nationals with a regular residence permit and possessing a residence card.[12]

The unconstitutionality of such a provision is declared under the infringement of Art. 14 ECHR (concerning the prohibition of discrimination) jointly with Art. 1, First Protocol, ensuring the right of property. The ICC, in fact, after a thorough reconstruction of precedents in Strasbourg, none of which concerned Italy but always involved other States, concludes that the ECHR which was adopted, as usual, in the ECtHR interpretation, establishes two different principles: if, on one hand, it allows wide room for national discretion "upstream" as for the assessment of the level of social benefits to be ensured, on the other hand, it claims "downstream" that the allowance regulation, once established, should not be discriminatory. The same statement is even more relevant if we consider the nature of the check at issue, as it is not supplementing a lower salary due to the presence of a certain disability, but it aims at giving individuals the minimum level of sustenance and

11 In order no. 55/2010, in a case where the ECHR was invoked again directly, however, the ICC did not pronounce on the matter.

12 In the Italian legal system, in order to acquire a residence card one should have lawfully lived in Italy for more than five years.

survival: accordingly, in these cases, it is clearly forbidden to discriminate between Italian citizens and foreign nationals. The ICC, in fact, states that this kind of check – *also in the light of Strasbourg's statement* – represents an ineluctable standard of equality between citizens and foreigners lawfully living in Italy.

Certainly, this decision reconfirms the already underlined expansive potential of the fundamental rights protection, in which the Italian Constitution and the ECHR are called to provide a positive contribution to ensure the highest standard. And, as already pointed out, the arbiter of the interaction of constitutional and ECHR provisions is only the Constitutional Court itself.

Looking in greater depth at the issue, the question must be asked as to whether the problem cannot be solved by means of a merely "domestic" constitutional parameter. Although the referring judge had alleged exclusively, through the interposition of Conventional norms, that there had been an infringement of Art. 117, par. 1 It. Const., such limits to the monthly disability check could perhaps have been equally declared unconstitutional according to Art. 3 It. Const. As a matter of fact, the ICC itself recognizes that the check is indeed essential to safeguard those vital needs of every human being, whether Italian citizen or foreign national, which the Italian Republic is obliged to promote and protect. This ICC statement seems to imply a State responsibility by itself, without the need to call upon the ECHR system to intervene.

Without entering into the details of this issue, the last remark highlights the ordinary courts' praxis to use ever more frequently, at least in matters of fundamental rights, the external, Conventional parameter instead of the domestic one, even in cases in which this latter could be profitably used: it perhaps depends on the fact that the external parameter is more open and elastic – as "living" in the ECtHR case law – and therefore more suitable to update the domestic Bill of Rights without encountering the hermeneutic constraints of the domestic Constitutional norms.

The judgement no. 196/2010 seems to follow the same tendency to rely strongly on the supranational order even when the domestic one could have found the tools to solve the

case. In decision no. 196, in fact, the Constitutional Court was called to review art. 186 and 187 of the New Highway Code which provides for car confiscation as a security measure when people are condemned for drink- or under-drugs-driving. Since the Italian Criminal Code qualifies such a confiscation as a security measure, and these latter are ruled by the law in force when they are applied, they could be carried out even retroactively: The problem is that – as explained in the referral order – the referring judge considers car confiscation not as a security measure – as it is lacking in any precautionary aim – but as real punishment, thus incurring in the violation of Art. 7 ECHR – "No punishment without law" (hence the principle of irrectroactivity of criminal law) – in conjunction with Art. 117, par. 1 It. Const.

The Constitutional Court agrees with the ordinary judge's reasoning[13]: the judiciary applies car confiscation retrospectively in a very general way, without exception, even if the confiscation at issue can certainly be defined as punishment and not as security measure. The outcome of this reasoning is that, since the contrast of the internal provision with Art. 7 ECHR cannot be repaired through a consistent interpretation, the internal norm is declared unconstitutional[14].

As well as in the previous judgement no. 187, the ECtHR case-law quoted in decision no. 196 concerns neither Italy nor a *car* confiscation case involving another European country, but merely the punitive essence of the confiscation in itself. Even more evident than in the judgement no. 187, in this case the ICC uses the international and internal legal orders as concurring with each other: more exactly, on one hand, it uses both its own case law and Strasbourg's law to show they are aimed at reaching the same effect and, on the other hand,

13 Though only with reference to Art. 186, since the question concerning Art. 187 was declared inadmissible as such a provision was not relevant for the ordinary proceedings from which the question was referred to the ICC.

14 Nevertheless, Art. 186 is indeed declared unconstitutional only in the part in which it refers to Art. 240 It. Criminal Code concerning security measures. If such a reference fades, in fact, car confiscation cannot be any longer qualified as a security measure and therefore it can be no longer applied retroactively.

it uses both the Italian Constitution (although Art. 25 It. Const.[15] was not invoked as a parameter) and the European Convention to prove they are aligned.[16]

Also in this case, we are tempted to think that the application of Art. 25 It. Const. alone could have perhaps reached the same outcome as the one achieved through the competition between the domestic and the international norm: the referring court, though, preferred to appeal only on the ground of the Conventional one. The ICC probably does not dislike this choice of the referring judge, since in this way it can play the role of Strasbourg's "main actor", leaving the door open also to the use of internal parameters, if deemed helpful in to solving the case...

Lastly, it must be underlined that an isolated administrative case law (Regional Administrative Tribunal for the Lazio Region and the Council of the State) had called for the direct applicability of the ECHR (and for the non-application of the internal provision in contrast with the Conventional one) relying on Art. 6 of the European Union Treaty[17]. As can be noticed, the thorny issue at stake in these judgements is the interweaving of fundamental rights protection at supranational level and the interplay between the ECHR and a legally binding EU Charter of Fundamental Rights, in particular after the EU accession to the ECHR is achieved: an issue, as pointed out also in the Report on EU matters, which is in fact at the top of the ICC agenda.

15 According to Art. 25 It. Const. «No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for that provided by law.»

16 See par. 3.1.3. in law.

17 See Regional Administrative Tribunal for the Lazio Region (TAR Lazio), decision no. 11984/2010; and Council of the State judgement no. 1220/2010.

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Prof. Stefania NINATTI e Marilena GENNUSA

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1. INTRODUCTION

As it is well known, having recognized the principle of the supremacy of community law within the Italian legal system, the ICC (the Italian constitutional court), starting back in 1984, established that the primacy of EU sources of law with direct effect has to be guaranteed directly by the ordinary or administrative judge. More specifically, if a possible

conflict between an internal and a EU provision cannot be solved by means of interpretation, the judge has to apply the EU norm and not apply the national one (the s.c. non-application, or *disapplicazione* in Italian): this general rule applies to internal provisions of both primary level (ICC judgment no. 170/1984) and constitutional level (ICC judgment no. 399/1987). The only exception to the principle of supremacy of community law and direct application of its sources of law can be identified in the possible violation of either fundamental rights or supreme principles of Italian constitutional system, i.e. the s.c. "counter-limits" to European integration, always considered intangible.[1] In

[1] Quite understandably, the doctrinal reflections on this issue are endless: for a first general reading on the EU sources of law and for their relationship with the Italian legal order see Tosato G. L., *I regolamenti delle Comunità europee*, Giuffrè, Milano, 1965, p. 965; Conforti B., *Diritto comunitario e diritti degli Stati membri*, in Riv. dir. int. priv. proc., 1966, p. 5 ss.; Monaco R., *Diritto delle Comunità europee e diritto interno*, Giuffrè, Milano, 1967; more recently, within the numerous studies, you can read, for example, Gaja G., *Fonti comunitarie*, Dig. Disc. Pubbl., VI, (1991), p. 433 ss.; Guzzetta G., *Costituzione e regolamenti comunitari*, Giuffrè, Milano, 1994; Rossi L.S., *Rapporti fra norme comunitarie e norme interne*, in Dig. Disc. pubbl.,Torino, XII, 1997, p. 367 ss.; Pizzorusso A., *L'attuazione degli obblighi comunitari: percorsi, contenuti e aspetti problematici di una riforma del quadro normativo*, in Foro it. 1999, V, p. 225ss.; D'Atena A., *L'anomalo assetto delle fonti comunitarie*, Dir. Un. Eur., 2002, p. 591 ss.; Celotto A., *L'efficacia delle fonti comunitarie nell'ordinamento italiano. Normativa, prassi, giurisprudenza*, Utet, Torino, 2003; Cartabia/Gennusa, *Le fonti europee e il diritto italiano*, Giappichelli, Torino, 2009.

For a theoretical framing of the "*Community path of the ICC*" – as prof. Barile named it in a seminal article published in Giur. Cost., 1973, p. 2406 ss. – regarding the difficult application of the EU sources of law read, for example, Sorrentino F., *Corte costituzionale e Corte di giustizia delle Comunità europee*, I, Milano, 1970; Condorelli L., *Il caso Simmenthal e il primato del diritto comunitario: due corti a confronto*, in Giur. Cost., 1978, p. 669 ss.; Tizzano A., *La Corte costituzionale e il diritto comunitario: vent'anni dopo*, in Foro Ital. 1984, I, c. 2062; Donati F., *Diritto comunitario e sindacato di costituzionalità*, Giuffrè, Milano, 1994; Sorrentino F., *Profili costituzionali dell'integrazione comunitaria*, Giappichelli, Torino, 1994; Cartabia M., *Principi inviolabili ed integrazione comunitaria*, Giuffrè, Milano, 1995; for a comprehensive outlook on the evolution of this issue see AA.VV., *Diritto comunitario e diritto interno*, Atti del seminario svoltosi in Roma, Palazzo della Consulta, 20 April 2007, Giuffrè, Milano, 2008; Cassese S., *Ordine giuridico europeo e ordine nazionale*, Report, 20 November 2009, in www.cortecostituzionale.it.

short, we could affirm that the ICC accepts the supremacy of EU law but under condition (doctrine of counter-limits), thus adhering to the dualist doctrine according to which "the two legal orders, Community and State, are at the same time distinct and coordinated" (ICC judgment no. 170/1984)

If this happens in matters of "indirect review" (the s.c. incidenter proceeding) of legislation – namely the case in which the judge refers to the ICC a question of constitutional legitimacy of a statute, as an incident to an ordinary legal proceeding – the case of "direct review" (the s.c. principaliter proceeding) of legislation, occuring when the controversy arises between regions and state is different: according to this latter procedure, the state government or the region can appeal against the state or the regional law to the ICC. As a matter of fact, in this case there is not a judge able to apply the EU act and not apply the conflicting internal law since the appeal is direct: accordingly, the ICC stated that the supremacy of the EU order could here be better safeguarded through its declaration of unconstitutionality of the conflicting internal law. Thus, starting from the Ninety's (judgments ICC 384/1994 and 94/1995), the constitutional judge decides matters of constitutionality having as object a conflict between a regional or state law and a community act with direct effect, when the questions arise within conflicts between regional and state law.[2]

The s.c. "*disapplicazione*" led to a profound change - whose importance was perceived only later and thanks to a rather agressive ECJ case law –, within the Italian legal system. This change was particularly far-reaching considering two different perspectives: on one hand, it questioned the proper role of the ordinary judge, since according the Constitution

[2] For a theoretical overview of this stage of constitutional case law see Amoroso G., *La giurisprudenza costituzionale nell'anno 1995 in tema di rapporto tra ordinamento comunitario e ordinamento nazionale: verso "la quarta fase"?* Foro it. 1996,V,73; Barone G., *La Corte costituzionale ritorna sui rapporti tra diritto comunitario e diritto interno*, Foro it. 1995,I, 2050; Groppi T., *Le norme comunitarie quale parametro nel giudizio (preventivo) di legittimità costituzionale delle delibere legislative regionali*, Le Regioni 1995,923; Ruggeri A., *Le leggi regionali contrarie a norme comunitarie autoapplicative al bivio tra "non applicazione" e "incostituzionalità" (a margine di Corte Cost. n.384/94)*, Le Regioni, 1995,469.

"judges are exclusively subjected to the law" (art. 101, para. 2) – on the contrary, in this occasion, they are exceptionally allowed not to apply it; on the other hand, – in the fields of EU competence – this choice ends up breaking the general rule of a centralized review of constitutionality (art. 134), with the ICC as the only body endowed with the power to strike down statutes in conflict with the constitution.

This innovative system based on the supremacy of EU law – recognized by the court by means of an imperative interpretation of art. 11 It. Const. – was further acknowledged through the 2001 constitutional amendment, according to which the "obligations deriving from the Community system" (art. 117, 1° c., Cost.) over the domestic legislative power are for the first time formally included in the constitutional charter.[3]

The potential outcomes implied in this system – we dare to say – are not yet totally known and the judgments of the year 2010 in this field (even if not pivotal) while confirming in many aspects the theoretical framework previously depicted, hold important rationalizing elements, thus contributing to shed light on a system not totally stabilized to-date.[4] Furthermore, a 2010 case-law leitmotiv, maybe even more persistent than before, is the call

[3] On this issue see exemplarily, Sorrentino F., *Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario*, in Dir. Pubbl. Comp. Europ., 2002, p. 1335 ss.; Conforti B., *Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari*, in Foro it., 2002, V, 229 ss.; Luciani M., *Le nuove competenze legislative delle regioni a statuto ordinario*, in ww.associazionedeicostituzionalisti.it; Cannizzaro E., *La riforma federalista della Costituzione e gli obblighi internazionali*, in Riv. dir. int., 2001, p. 921 ss.; D'Atena A., *La nuova disciplina costituzionale dei rapporti internazionali e con l'unione europea*, in Rass. parl., 2002, p. 913 ss.

[4] The judgments more suited to shed light on the already fully ongoing rationalizing process of the relationship between domestic and EU orders will be discussed in this report, while the CC judgments nr. 112, 127, 178, 180, 266, 288, 340, 345; and the order nr. 174 will not be analyzed, as considered of less relevance under this perspective.

for the internal judges to interpret – as long as it is possible – the internal provision in compliance with the EU law (the s.c. *consistent interpretation*).

2. RETURN TRIP: THE FIRST EXAMPLE OF DIALOGUE BETWEEN THE IT. CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF JUSTICE IN THE CONTROVERSIES BETWEEN STATE AND REGIONS ON THE CONSTITUTIONALITY OF A LAW

ICC Judgment nr. 216 marks the conclusion of the well known *querelle* on the s.c. "luxury taxes" fixed by Sardinia Region: in that occasion the Government appealed the ICC against the choice expressed by one of its region to tax some luxury products (regional law no. 4/2006) – namely, second houses owned (and those used for tourism), ships and airplanes, arguing that they were in conflict with many constitutional provisions as well as some provisions of the EC Treaty. The ICC declared the tax on second houses owned unconstitutional on the basis of the Italian constitution (ICC order nr. 102/2008) and referred, for the first time in the ICC history, the question involving taxes on ships and airplanes to the ECJ according to art. 234 (now 267) EC Treaty.

In fact, the Sardinian law maker opted to tax only ships and airplanes which are not owned by residents in Sardinia: this legislative choice involved not only doubts of constitutionality from an internal point of view, but required to verify the consistency of this provision with art. 49 and art. 87 EC Treaty, i.e. the respect of the fundamental freedom of services and of the EC prohibition of non-authorized State-aid distorting competition. Accordingly, the

ICC suspended the proceeding and referred the question regarding art. 49 and art. 87 of the EC Treaty to the ECJ (ord. n. 103/2008[5]).

Without any hesitation, the ICC's decision to use the preliminary reference procedure has been labeled by the doctrine as pivotal, to an extent that starting from this moment they fixed the beginning of a new phase in the ICC "community path". But this is not all: it is also pivotal if we consider the fact that not only it never used it before but also that, in the past, the constitutional judge always excluded to be endowed with the features required by the EC Treaty in order to be fit to refer a question to the ECJ.

5 This first referral to the ECJ by the ICC has been widely studied by the legal scholar: see, among others, Daniele L., *Corte costituzionale e pregiudiziale comunitaria: alcune questioni aperte*, I quaderni europei, Online Working Paper 2009/n. 16, December 2009. For a comparative point of view on this issue see Passaglia P. (ed.), *Corti costituzionali e rinvio pregiudiziale alla Corte di giustizia*, Internal Seminar of the ICC, April 2010, in www.cortecostituzionale.it. For further analisys see also Perlingieri P., *Leale collaborazione tra Corte costituzionale e Corti europee*, Napoli, 2008; Guarino G. C., *Costituzione italiana e integrazione europea: aiuti di Stato, distrazione amministrativa e costi impropri per le imprese*, in *Riv. coop. giur. internaz.*, 2009, p. 13 ss.; Bartole S., *Pregiudiziale comunitaria ed "integrazione" di ordinamenti*, Le Regioni, 2008, p. 808; Sorrentino F., *Svolta della Corte sul rinvio pregiudiziale: le decisioni 102 e 103 del 2008*, Giur. Cost, 2008, p. 1288; Cartabia M., *La Corte costituzionale e la Corte di giustizia: atto primo*, Giur. Cost, 2008, p. 1312, Antonini L., *La sent. n. 102 del 2008: una tappa importante per l'autonomia impositiva regionale*, Giur. Cost., 2008, 2646; Cannizzaro E., *La Corte costituzionale come giudice nazionale ai sensi dell'art. 234 del Trattato CE: l'ordinanza n. 103 del 2008*, in RDI, 2008, p. 7689; Celotto A., *Crolla un altro baluardo*, in www.Giustamm.it, Di Seri C., *Un'ulteriore tappa del cammino comunitario: la Corte costituzionale rinvia una questione di "comunitarietà" alla Corte di giustizia*, in www.Giustamm.it; Pesole L., *La Corte costituzionale ricorre per la prima volta al rinvio pregiudiziale. Spunti di riflessione sull'ordinanza nr. 103 del 2008*, in www.federalismi.it; Gennusa M. E., *Il primo rinvio pregiudiziale da Palazzo della Consulta: la Corte costituzionale come «giudice europeo»*, Quad. Cost., 2008, p. 612 ss.; Zicchittu P., *Il primo rinvio pregiudiziale da Palazzo della Consulta:verso il superamento della teoria dualista?*, Quad. Cost., 2008, p. 615 ss.

Not so long ago, in fact, the Court seemed to have definitively settled this issue, stating without hesitation that the ICC cannot be considered a "national jurisdiction" in a technical sense, as art. 267 EC Treaty requires in order to be able to use the preliminary reference procedure: too many differences and too many peculiarities characterize the ICC when compared to the judges, ordinary or special as they may be, as the ICC affirmed definitively in order no. 536/1995. For this reason order no. 103/2008 can really be considered, from a certain point of view, revolutionary: to justify this assertion it suffices to read the ICC order when in states – in marked contrast with the above-mentioned statement – that, even if the constitutional court is the supreme institution of constitutional guarantee of the internal legal system, it still can be defined as national jurisdiction in the sense of art. 234 (now 267) EC Treaty. More specifically, order nr. 103/2008 affirms that the ICC represents a national jurisdiction of last resort, endowed with the consequent legitimacy to use the preliminary reference procedure.

To downsize the significance of this outstanding ICC *revirement* and to put it into perspective, we should recall that the referral was issued within a conflict between regions and state, i.e. a ICC direct review (art. 127 It. Const.): as we already explained, in this type of controversies the ICC happens to be the only judge reviewing the case and, accordingly, able to refer the case to the ECJ. Even though the use of preliminary reference procedures appears to be limited to this particular field, the ICC introduces a truly significant change and opens the way for a direct dialogue with the supranational counterpart.

Considering more in-depth the details of the dialogue as it actually developed in this first case, it emerges that its contents are not particularly surprising: the ICC scantily refers the case to the ECJ, this latter answers with judgment C-168/2009 (17 November 2009) – declaring, as a matter of fact, that the Sardinia law is actually inconsistent with art. 49 and 87 EC Treaty and leaving the application of this statement to the domestic judge – and the ICC judgment no. 216/2010 simply applies it to the case, declaring the unconstitutionality of the regional law as much as it concerns the luxury tax on ships and airplanes owned by non-residents.

On the contrary, when the ICC review is indirect (incidenter proceeding), the previous framework does not incur any change: the preliminary reference procedure has to be promoted by the ordinary or administrative judge. If need be the judge can – in the meantime – refer the question to the Constitutional Court too – the s.c. system of "double preliminarity" (*doppia pregiudiziale*) – and the ICC has the last say in deciding the issue.[6]

3. INDIRECT DIALOGE TESTS

Notwithstanding our previous analysis of the first example of direct dialogue between ICC and ECJ, with judgment 216/2010, we already experienced many attempts of dialogue between the two courts in an "indirect" way – at a distance we could say – each time the constitutional judge has to rule on cases concerning issues on which the ECJ had already had the occasion to decide, even if dealing with other States or with similar but not identical situations. In all these occasions the ICC proved to be aware of the ECJ case-law and faced it, ending up often to use part of it, even if remaining within the borders of a wholly domestic issue. Hence, our wordings "dialogue tests", or dialogue "at a distance", or "indirect dialogue", are aimed at simply pointing out the reference to ECJ case-law within

[6] According to the system of "double preliminarity", the judge has to refer the case first to the ECJ and only afterwards, if it is necessary, to the ICC. A famous application of this procedure can be seen in ICC order no. 165/2004 (*Berlusconi* case), in which the ICC suspended the constitutional review of that case as soon as it discovered that a preliminary question was already pending before the ECJ on the same issue. The decision to wait for the ECJ judgment was taken in order to prevent the possibility of issuing a judgment in conflict with ECJ one. A peculiar application of this procedure can be seen in the case *Mariano*, in which the tribunal of Milan referred on the very same day the question separately to the ICC and to the ECJ: the ECJ answered with order C-217/08, *Mariano v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (17 march 2009,) declaring not to have the competence on this matter and just some days after the issuing of this order, the ICC solved the case just applying the internal law (ICC, judgment nr. 86, 27 March 2009). For further reference see.: Rovagnati A., *Nuove scelte giurisprudenziali in tema di doppia pregiudizialità (comunitaria e costituzionale)?*, Quad. Cost., 2009, p. 717 ss.

the arguments used by the ICC. In 2010, judgment 138 and 325 are the most relevant examples of this kind of dialogue.

Judgment nr. 138/2010 concerns a possible discrimination of non-married couples (more precisely, same-sex couples) and involves questions of constitutionality about some provisions of the Italian civil code on marriage reserving this institute only to hetero-sex couples: even if this case regards, first and foremost, a sensitive issue regarding the institute of marriage and the principle of equality, the question touches on the relationship between national and supranational level of government, as stressed by the claimants when they rely on the evolution of this institute at supranational level.

Four claims against a possible discrimination of non-married couples (more precisely, same-sex couples) have been raised before the Constitutional Court questioning the traditional reading of art. 29 Cost. and relying on a combined reading of art. 2, 3, and 29 it Const. together with art. 117 of It. Const., according to which "legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations". And it is only the possible violation of this latter that will be analyzed in the present report.[7]

The reference to EU and international obligations in this reasoning serves rather as reinforcement of this new constitutional reading than as an isolated ground. Its use is really diversified and never systematic, as we already noticed in the German constitutional court case. In fact, the EU Charter of Fundamental Rights, the Universal Declaration of Human Rights, the European Charter of Human Rights, various interventions of supranational institution (even a proposal for a EP resolution of 1983), some judgments or legislative acts of other EU countries are all used to "support" such thesis without being necessarily grounded nor relevant. We would be tempted to identify in this case another example of the

[7] For further in-depth examination see reports in "Human Rights".

well known "cherry picking" judicial attitude when confronted with the use of "foreign law" in constitutional adjudication.

The answer provided by the Constitutional Court on 15th of April 2010 is very plain and at the same time out of the ordinary: specifically with reference to the aspect of supranational obligations in this field, which we are particularly interested in, the Italian constitutional judge observes – thus re-organizing the aforementioned referral orders – that the relevant provisions for the judgment are art. 12 ECHR and art. 9 of the European Charter of Fundamental Rights. The constitutional court is well aware that, in the course of the trial, the Lisbon Treaty entered into force thus conferring to the Charter of Fundamental Rights a new *status*, namely the same force of the Treaty; still, this point is not relevant for the case at stake since art. 9 of the Charter of Fundamental Rights (as well as art. 12 ECHR) in the recognizing the fundamental right to marry refers expressly to the "national laws governing the exercise of this right". *Ad adiuvandum*, the ICC recalls also the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union – as it is well known, even if they are not legally binding still they are recognized as an interpretative tool – regarding art. 9 clarify that "this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex." Therefore, according to the reading of this provision, the regulation of this field is a domestic competence.

Accordingly, the arguments of the claimants relying on the supranational evolution in this field are rejected, since the competence on marriage and family appears to be still strictly in the hand of the domestic law-maker. One cannot not underline, though, that even if this reading is from a certain point of view irreprehensible, this point is becoming more and more a crucial point, a truly sensitive issue, given the complexity of the ECJ case-law on this topic that renders uncertain the future possible developments.

The second example of indirect dialogue with the ECJ in 2010 is represented by judgment no. 325, characterized by a lengthy and detailed analysis of the EU legal framework in the field at stake, from which the ICC infers a lack of contrast between said framework and the Italian provisions object of the review.

More precisely, the object of the question of constitutionality in this case – within a direct review procedure (or principaliter proceeding) – is the delicate issue of the different ways

to award local public services. The questions of constitutionality – raised, separately, both by the State and the Regions – involve more constitutional provisions, within which also art. 117, c. 1, Const.: this – as in the previous case – will be the only aspect analyzed of this broad decision.[8]

The interesting aspect of this case is represented by the special position taken by the ICC: facing – on one side – different regional appeals against the state law arguing a clear violation of the EU legal system as well as the European Charter of Local Self-Government and – on the other side – the State's arguments supporting that the very same legislation is just the "set verses" ("a rime obbligate" in Italian) legislation applicable in order to comply with the EU obligations, the constitutional judge decides to proceed directly with the interpretation of the supranational and international legal framework. The ICC does it thoroughly, citing ECJ judgments, the Commission's communications and anything that can be useful to clarify not just a very complex but also crucial issue in order to ensure the respect of competition within EU territory.

Limiting, as already said, our analysis to the point of a possible violation of EU law through art. 1, c. 23 bis, l.d. no. 112/2008, the ICC infers that EU rules constitute just "a mandatory *minimum* for the member States law-makers" (para. 8.1, conclusion on points of law): therefore, according to the ICC judgment, it is not foreclosed to a member state to choose a more restrictive discipline than the mandatory minimum prescribed by the EU. Actually, this possibility is a constitutive part of that "margin of appreciation" the lawmaker can dispose with regard to the mandatory minimum margins established by the EU system in the field of the safeguard of competition. The domestic legislative discretionality – within the limits set by the EU order – is definitively reaffirmed by the constitutional judge, but only after an intense "dialogue" with the EU order, its legislation and its case-law.

[8] For further in-depth examination see the report by Aldo Sandulli in this area.

Indeed, this topic is really disputed, and maybe also for this reason the ICC felt the need to intervene in such a precise way.

In both the cases analyzed above, it appears evident, though, that the ICC is trying to carve out an autonomous space of dialogue, interacting with the EU counterparts as the "main actor"

4. THE CONFLICT BETWEEN INTERNAL LAW AND A NON-SELF-EXECUTING COMMUNITY ACT: THE COURT REGAIN HIS ROLE

ICC judgment nr. 28/2010 distinguishes itself as it is the first case in which the Court uses the reformed art. 117, c. 1 Const. – always in conjunction with art. 11 Const. – in a direct review (incidentaliter proceeding) and it is also the first case in which the Court declares a law unconstitutional on the ground of being in conflict with a community act without direct effect.

We cannot properly defined this – i.e. the fact that in such a case the constitutional judge is the competent body to intervene in order to guarantee the respect of the EU law – as a novelty in terms of relationship between internal and EU sources of law, since the landmark judgment no. 170/1984 the ICC reserved to itself the possibility to declare unconstitutional a law in the case that there is not a EU act directly applicable by the ordinary or administrative judge instead of the conflicting internal law. And this is exactly the case at stake. In this sense, thus, judgment no. 28 could be seen as a simple, concrete application of a possibility already foreseen in the past.

Considering the case more in-depth, though, the analysis of this judgment is less clear than it appears at a first reading: examining its content at length, it appears that a very delicate problem of temporal sequence of Italian criminal laws was involved. The first criminal law implementing a EU directive (the s.c. "Ronchi decree", l.d. no. 22/97) was stricter but in

compliance of EU law, the second one (l.d. no. 152/2006) was milder but with a possible conflict with the EU law.

Since the illegal disposing of waste is recognized both by the EU directive and the Italian law as an alleged criminal offence, leading to the corresponding criminal liability, the critical item turns out to be the interpretation of the waste status. More precisely, when a substance is not defined as waste but as by-product (as it happens in this case), the problem of criminal liability is no longer existing. In this case, as a matter of fact, the first Italian implementation of the EU directive qualified – as well as the EU directive itself – pyrite ashes as waste, the following amendment of the internal provision – in conflict with the EU directive – re-listed it defining it a by-product, thus exempting it from much stricter and burdensome obligations foreseen for wastes.

The Constitutional Court is thus asked to solve the case, also bearing in mind that the 2006 legislation is alleged to be in contrast with a EU non-self executing directive, since it is foreclosed to a EU act to make the decision more burdensome – without the intermediation of an implementing domestic law – for the criminal liability of a defendant.

Indeed, the directive could be arguably recognized as - if not endowed with direct effect in the technical sense - at least endowed with the effect to preclude judges to apply the internal conflicting provision, with the ensuing application of the domestic law previously in force (and actually applying when the crimes occurred).

The Court firmly clarifies, in this occasion, the right procedure to follow: the non self-executing directives cannot lead to the non-application of the internal conflicting provision. In accordance with the primacy of community law, though, these latter cannot be applied either: accordingly, the only viable way is to strike them down through the constitutional review: In this sense, it is important to recall that judgment no. 28 very clearly defines the EU provisions as binding and prevailing over the internal laws thanks to art. 11 and 117, para. 1, It. Const.

In sum, it is possible to grasp in the reasoning of the Court that, together with the a very classical (and steady) reading of the primacy of community law – even in a sensitive field

as criminal law and even if the community law is not self-executing –, another equally classical reading of the non-application of the internal provision in conflict with non self-executing directive is thus reaffirmed: to be honest, we could say that the judge can surely "disapply" the conflicting law but only passing through a declaration of unconstitutionality…with the corresponding "supremacy" of the Constitutional Court in this field.

A doubt inevitably emerges, though: if this is a first concrete example of a question already clarified by the ICC in 1984, we are not completely positive that the European integration has not further moved forward in this quarter of a century, thus rendering this ICC judgment – even if irrefutable from the point of view of our sources of law system – not totally consistent with the more recent ECJ case-law.[9] In such a case, i.e. a case in which it was possible to restore the law previously in force and consistent with the EU diktat just not-applying the conflicting provision – and where clearly, it was not possible to provide a consistent interpretation –, the primacy of community law principle could perhaps be better served by this last option instead of proceeding with a constitutional review procedure, that due to its very nature simply "slows down" what should be the direct and swift application of community law. We should bear in mind, though, that we are dealing with a criminal law case and in this field even the ECJ case-law is not always very coherent:[10] therefore, at least, the credit of clarifying the internal legal frame on this issue must be given to judgment no. 28.

Judgment no. 227/2010 seems to be in line with this theoretical framework confirmed by the ICC in judgment no.28, regarding (once again) the constitutionality of the Italian law implementing the European arrest warrant discipline when it establishes that an Italian

[9] See, for example, on this issue, the well known ECJ judgment, 11 November 2004, case C-457/02, *Niselli*.

[10] You can refer, on this point, to the ECJ judgment, 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi et al.*

judge could legitimately refuse to extradite an Italian citizen while provided that the same judge could not refuse to extradite a citizen from any other European country.[11]

Letting aside the numerous relevant aspects of this proceeding and focusing on the analysis of the ICC position in framing the relationship between internal and supranational order and the possible conflicts between their sources of law, it has to be pointed out that the EU discipline was a framework decision – i.e., an act by definition not self-executing – and with the principle of non discrimination according to nationality to which, on the contrary, the attribute of direct effect is granted. Nonetheless, the Court deems perfectly coherent to proceed with the constitutional review procedure instead of the non-application of the conflicting law.

The Court observes, as a matter of fact, that the principle of non discrimination is not always, by itself, a sufficient condition in order to not apply the conflicting internal provision. The principle of non discrimination, indeed, as one can infer also by the ECJ case-law, even if theoretically endowed with direct effect, is not always to be recognized as self-executing to an extent that the internal law is always in contrast with it. If, on one hand, the difficulty of leaving the direct applications of principles in the hands of the ordinary judge is rather evident (and, first and foremost, the principle of non discrimination which would imply for the ordinary judge a very complex analysis of different legislative sources of law, typical competence of the constitutional judge), on the other hand, the position of the European Court of Justice on this issue is at the same time simple and straightforward, just calling for the application of community law and the acknowledgment of its primacy[12].

[11] The ICC solves the case declaring that the Italian provision is unconstitutional when it does not state that the judges can refuse to extradite citizens of any European country legally and effectively residing in Italy (namely, he adopted a s.c. "*additive judgments*") and the other questions of constitutionality involving the parameters of art. 3 and 27 It. Const. were absorbed.

[12] Even if in a totally different field but, notwithstanding, exemplary of a certain position of the ECJ, see ECJ judgment, 19 January 2010, case C-555/07, *Kücükdveci*, in which the European judge reaffirms the obligation to

Certainly, as in the above-mentioned case – cited at the conclusion of this judgment – the object of the question concern a criminal law circumstance, hence another reason for the prudent choice of the constitutional judge. To sweeten the pill the Court is expressly recalling the ECJ case-law both as identification tools of the *ratio* underlying the framework decision and as evaluating tools of the proportionality of the exception. But, after all – the constitutional judge seems to be telling us that – the intervention of the Constitutional Court is also needed to implement the EU diktat.

5. WHICH PARAMETER?THE CONCURRENCE OF ART. 117 AND ART. 11 IT. CONST.

In order to complete the present analysis, it is important to observe that in 2010 the Court in different occasions faced the question regarding the appropriate parameter according to which the judge can refer a case to the Constitutional Court, when the object of the constitutional review concerns a conflict between domestic laws and community law. It is also urged to start addressing the possible use of the European Charter of Fundamental Law as parameter of the constitutional review.

First of all, the already mentioned judgment no. 227/2010 regarding the European arrest warrant appears to be relevant in this regard: in this case the ordinary judge referred the question to the Court relying only to art. 117, para 1, It. Const. The Constitutional Court makes haste to integrate the parameters adding art. 11 It. Const., traditionally used for conflict between domestic and community sources of law. According to the ICC, this "integrative" faculty is perfectly admissible if the referral order, even omitting the indication of part of the parameters, clearly refers to them. The clear reference would be implied in the fact that the referral judge is *de-facto* applying the principles governing the

disapply the internal law also if in contrast with the principles foreseen n the European Charter of Fundamental Rights (in this case, the principle of equality) and if with horizontal effects.

relationship between internal and EU orders, established in art. 11 It. Const. Furthermore, the Court underlines that while art. 117 It. Const. is filling the gap regarding the fact that the conventional obligations (as the European Convention for Human Rights) were not provided for by the Italian constitution, art 11 It. Const. represents the safe foundation for the relationship between internal and community orders. Hence, the limitations of sovereignty that permit to acknowledge the primacy of the EU legal order. This specification is meaningful because it points out to another difference between the direct constitutional review and the indirect one: while in the first one art. 117 Const. can have autonomous relevance also in reference to the application of community law, in the second one the same article can have only an ancillary position, since art. 11 remains the fundamental parameter, and art. 11 can be invoked[13]only together with art. 117.

Always referring to the European arrest warrant, we can recall also the ICC order no. 374/2010: in this case the question is referred to ICC directly using as parameter art. 20 of the European Charter of Fundamental Rights (in conjunction with art. 3 It. Const.), without any possible intermediation of art. 11 or art. 117 It. Const. Strangely enough, the Court does not even mention this fact, just deciding the case with an order of inadmissibility on the grounds of the lack of relevance in the referral proceeding. But one can be sure that in the future the Constitutional court will address this issue – namely the legal effects of the European Charter of Fundamental Law and the its role as a possible parameter in the constitutional review –, considering that this latter is one of the unsolved dilemmas of this last stage of the European integration.

[13] As well clarified also in judgment no. 216/2010, "community law serves as interposed provisions fit to integrate the parameter for the control of the consistency of regional legislation with art. 117, para. 1, It. Const."

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THE LAW SOURCES CONCERNING THE PRIVATE LABOUR RELATIONS IN THE PUBLIC ADMINISTRATION

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Prof. Alessandra PIOGGIA

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1. PRIVATISATION

In Italy, at the beginning of Nineties, the laws governing employment in the public administration were deeply transformed. The regime of the employment relationship has gone in fact, for almost all categories of civil servants[1], from public to private[2].

The rich and detailed special set of rules and the law sources system of unilateral

[1] The categories of employers excluded from privatisation are magistrates, State's lawyers and magistrates, the military, the police, the fire brigade, the diplomats, the prefects, the university professors and researchers.

[2] See S. BATTINI, *Il rapporto di lavoro con le pubbliche amministrazioni*, Padova, Cedam, 2000.

regulations that until that time defined as "public" the work within an administration, were substituted by a set of rules almost exclusively based on the private right. They are represented by a normative section (civil code and set of rules concerning private work) and a contractual one (collective and individual labour agreements). The normative section still contains several special rules concerning only people working in public administrations; it is based on the decree no. 165/2001. These regulations were kept, in order to guarantee a special discipline in favour of several aspect of the agreement, due to the public nature of the employer. They govern, for instance, the personnel selection by means of public competitive examinations, the career progress, the incompatibility between public and private jobs, the disciplinary responsibility and some few aspects relating to the employee-administration relationship[3].

Differently of the development of privatisation in other European State's public administrations, in Italy the regulations governing the private right is applied also to the public administration's managers.[4].

The public employment was made similar to the private one to the maximum extent firstly by limiting as possible the special rules reserved to the public employees. This aim was suitably represented by the regulation allowing the possibility for the collective agreements to derogate from the laws that establish rules that apply only to the public administration employees. This general condition of derogability was excluded only if law, introducing a special discipline about the public employees, clearly forbids the collective agreements to provide differently..

The transformation of sources of employment for civil servants was also made to correspond to a different legal ways of applying them in concrete management of the

[3] See R. CAVALLO PERIN, *Le ragioni di un diritto ineguale e le peculiarità del rapporto di lavoro con le amministrazioni pubbliche,* in *Diritto amministrativo*, 2003, 119.

[4] On management see F. MERLONI, *La dirigenza in Italia*, Rapporto annuale 2011, in this network section, as well as, *Dirigenza pubblica e amministrazione imparziale*, Bologna, Il Mulino, 2006.

employment relationship. Under the public law, the relationship with the worker was governed by public law provisions (administrative provisions); after privatisation, the acts of management of the relationship are made by managers with the same legal capacity of the private employer[5].

The public managers have also been endowed with the ability to make decisions about the offices' organization. It is a relevant task as it represents the sole point of contact between the discipline of the administrative organization (public level) and that one governing the labour relationship with a public administration (private level).

Differently from those ones concerning the labour relationship, the sources of organization are almost completely public rights law sources. At the top there is law, whose task is to state the "general principles" of the offices' organization; the organizational acts adopted by each administration, that is statutes, regulations and general administrative acts, derive from it. The sequence of the sources about organization, which thus far belongs to public law, ends, however, as mentioned above, with the acts adopted by the managers in the exercise of powers under private law. To the managers compete organizational choices of detail, those involving mainly the distribution of operational tasks between offices and therefore have an impact on the management of employment[6].

2. THE COMPETENCES OF STATE AND LOCAL ADMINISTRATIONS

In order to complete the above described picture, the competences concerning

[5] See art. 5, paragraph 2, decree no. 165/2001.

[6] See P. CERBO, *Potere organizzativo e modello imprenditoriale nella pubblica amministrazione*, Padova, Cedam. 2007; A. PIOGGIA, *La managerialità nella gestione amministrativa*, in F. MERLONI, A. PIOGGIA, R. SEGATORI (eds), *L'amministrazione sta cambiando? Una verifica dell'effettività dell'innovazione nella pubblica amministrazione*, Milano, Giuffrè, 2007, 117.

offices organization and concerning the management of labour relationship have to be taken into consideration as they belong to the different bodies of the Italian republic [7].

Until the constitutional reform that in 2001 reorganised the relationships between State, regional and local administrations, the State law had been stating uniform regulations about the employment in the public administration as well as, in general terms, about the offices organization.

The changes introduced in the Constitution at the beginning of the 21st century deeply modified the situation. The State law competence concerns the matters ruled by the second paragraph of art. 117, while the remaining matters are governed by the regional laws[8].

Since the labour relationships and the offices organization are strictly connected, the competences about both the matters have to be explained in detail.

The labour relationships regulation is under the State's competence concerning the civil regulations (art. 117, second paragraph, letter 1), interpreted by the Constitutional Court as concerning the "uniformity in the national territory of the fundamental rules governing the relationships among private citizens"[9]. The private nature of the rules concerning the labour relatioships allows defining the matter as relating to the relationships governed by the civil law[10].

[7] See A. TROISI, *L'impiego regionale: fonti e spazi di competenza legislativa delle regioni*, in *Le istituzioni del federalismo*, 2009, 819.

[8] See E. CARLONI, *Lo Stato differenziato*, Torino, Giappichelli, 2004.

[9] See the sentences no. 95 and no. 189 both of them dated 2007.

[10] In order to assign the State the competence of regulating the labour agreement in the public administration, art. 117, paragraph 2, Constitution, rules not only the matter concerning the "civil legal system" but also other matters. They are: "immigration", determination of the essential levels of civil and social rights to enjoy services in the entire national territory and "national insurance" (matters of exlusive State's competence), as well as "labour guarantee" (matter of State and regional administrations' competence). See L. ZOPPOLI, *La riforma del*

As far as the offices organization competences are shared by different government levels. Constitution assigns the State law the competence to regulate statal administration and the national public bodies' administrative organisation (art. 117, paragraph 2, letter g) as well as of regulating the government bodies of the local administrations (art. 117, paragraph 2, letter p). As far as the last competence is concerned, it has to be intended as referring to those bodies of direct or indirect political representation, only. Therefore the administrative offices organization in the local administrations falls within their competence. Constitution indeed assigns them the qualification of autonomous administrations provided with their own statutes (art. 114, paragraph 2) and allows them adopting regulations concerning their function organisation (art. 117, paragraph 6). Therefore, the regional law, even if in general terms has jurisdiction in regulating the matter excluded from the State's competence, is limited by the organisational autonomy of the local administrations. This is the reason why the regional administration can regulate its own administrative organisation only[11].

This situation stresses that, in presence of a uniform regulation of the employment relationship in the public administration by the State law, the offices organization falls within the competence of each government level that could manage it even in different ways. As far as organisation is concerned, the sole common rules able to oblige State and regional and local administrations are those ones belonging to Constitution and deriving from it.

The strict connection between organisation and employment regulation implies the presence of a "hazy area", where the individuation of the competent law source is not easy to be found. There are indeed some aspects, as the managers' appointment, the

titolo V della Costituzione e la regolazione del lavoro nelle pubbliche amministrazioni; come ricomporre i "pezzi" di un difficile puzzle?, in *Lav. pubb. amm*., 2002, 156.

[11] By issuing the sentence no. 372/2004, the Constitutional Court has nevertheless admitted that the regional administration can promulgate rules about the local administration, even if only exceptionally and when there would be specific "unitary needs".

definition of their tasks, the personnel assessment or the access to work are, ruled by the discipline concerning the employment and the administrative organisation contemporarily. The Constitutional Court has no well-defined position towards the matter and therefore answers time by time the autonomy or the uniformity needs[12]. For example, in the case of personnel selection by means of public competitive examinations in a public administration, the Court assigned to regional or local administrations the possibility of independently regulating the matter[13], even if in full obedience of the Constitution's provisions[14]. However, the Court itself has recognized the possibility of the state to fix the economic constraints that apply to regions and local authorities, thereby limiting their autonomy [15].

3. THE LEGAL REFORM OF 2009

The most recent reform concerning the public administration as a whole was promulgated by the Minister of the Public Administration Innovation. It is the law no. 15 and the consequent legislative decree no. 150, both of them dated 2009.

The decree in hand partially modifies the former legislative decree no. 165/2001 regulating labour in the public administration and the offices organisation; on the other hand, it partially introduces a specific discipline, in particular referring to the regulation of the so-called "performance cycle", concerning the assessment of an administration and the staff (personnel and managers) working in it.

[12] See F. CARLESI, *Riforma del titolo V della Costituzione e lavoro presso le pubbliche amministrazioni nelle pronunce della Corte costituzionale*, in A. PIOGGIA, L. VANDELLI (eds), *Quale amministrazione nella nuova Costituzione? L'immagine dell'amministrazione attraverso la giurisprudenza costituzionale dopo la riforma del titolo V della Costituzione*, Bologna, Il Mulino, 2006.

[13] See sentences no. 95/2008 and no. 380/2004.

[14] See sentences no. 81/2006, no. 252/2009, no. 9/2010 and no. 169/2010.

[15] See sentence no. 4/2004.

As far as the law sources are concerned, this reform is characterised by a relevant re-concentration of the most organisational decisions and the discipline concerning the labour relationships in the State law[16], neglecting the trade unions and autonomies' role.

It has to be stressed that the reform in hand affected the mechanism allowing a collective labour agreement to derogate from the special rules concerning the public administration's employees. According to the modification introduced by art. 2 of the legislative decree no. 165/2001, it is not more possible in general terms, but only if permitted by the law.

In order to strengthen the law's role, all rules contained in the legislative decree no. 165 were defined as "imperative"; therefore, any kind of contract not consistent with them results automatically void and therefore inapplicable to labour relationships..

Also the matters that could be regulated by the agreement were relevantly reduced. In particular, the personnel and managers' assessment was removed from the negotiation between administration and trade unions, resulting today as wholly regulated by the law. The reasons of this change were the difficulty of creating an efficient system of assessment within the public administration and the role of the trade unions representatives until now.

The agreements established in each public administration indeed often disagreed with the spirit of the national agreements as far as assessment was concerned, since they introduced some mechanisms reducing to a minimum (and sometimes eliminating) the possible differences in assessing the personnel and managers' individual performances. The consequence of the reform in hand is also the elimination of the national agreements role that was not inappropriate.

[16] See G. D'ALESSIO, *Le fonti del rapporto di lavoro* pubblico, in F. PIZZETTI, A. RUGHETTI (eds), *La riforma del lavoro pubblico*, Studi Cis Anci, EDK editore, 2010.

Even on the relationship with the regions and local authorities, the reform shows a lack of confidence in the role of autonomy. As said above, the matter concerning the "labour agreement" (that can be uniformly regulated by State through the civil legal system) and that one concerning "organisation" (provided with its own set of rules) have to be distinguished, even if there is still a "hazy area" between them. The reform of 2009 introduced not only several rules that can be defined as relating to the labour agreement, but also a high number of rules concerning organisation that should be only applied at the State level.

As far as the first ones are concerned, legislator correctly included them in the "civil set of rules" and therefore considered them as uniformly applicable to all government levels. With regard to the other ones, the reform introduces such a mechanism suitable to bind regional and local administrations that would not have a constitutional justification and therefore would seem as potentially damaging the autonomies guaranteed by Constitution.

Article 74, paragraph 2, legislative decree no. 150 contains indeed a series of organizational rules that can be also applied to regional and local administrations as they directly derive from article 97 Constitution; therefore they can be defined as general principles. In general terms, article 97 concerns the administrative organization and provides that it has to be regulated in order to assure the administration impartiality and good performances.

Taking into account the other articles of Constitution regulating regional and local administrations, these principles have to be implemented at each government level through different kinds of management. Therefore the legislative decree no. 150/2009 is not entitled to directly apply article 97 to regional and local administrations, too. Also the Constitutional Court stated that the State law has no claim to state principles binding the regional administrations as far as matters clearly falling within its competence are

concerned[17].

On the other hand, it appears regional and local administrations do not want to react to the legislator's intention of regulating some matter falling within their competences; they seem to accept this concentration of law sources aiming at regulating the administration management.

[17] Sentence no. 233/2006.

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THE SENIOR CIVIL SERVANTS ("DIRIGENTI") IN ITALY

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INDEX

1. THE UNIQUENESS OF THE ITALIAN "DIRIGENZA" IN THE EUROPEAN LANDSCAPE OF SENIOR CIVIL SERVANTS.

The Italian administrative Reform is largely based on a huge investment in a new role for the "*dirigenza*", approximately correspondent to the British experience of the Senior Civil Servants.

In the present legal discipline a high level public official, either in a central government Department or in a Region/local authority has, at least from a formal point of view, powers of acting independently from the political bodies governing its administration. Furthermore he has powers of governing the civil servants allocated to his office in the same way as a private entrepreneur.

Italy has formally abandoned the "ministerial responsibility" system, creating a clear and rigid distinction between the (only political) responsibilities of governing bodies in the public administrations and the responsibility of "*dirigenti*" for the administrative action.

The Italian reform of public administration, started in the early nineties' (1992-93), has two main objectives: to ensure a better efficiency, introducing, implementing the Italian principle of "*buon andamento*" fixed in the art. 97 of the Constitution, in the functioning of public administrations, ideas and instruments driven from private business experience; to guarantee more impartiality in the use of administrative powers (the impartiality principle of the same art. 97 Const.).

This legal discipline is, in many ways, unique in the European landscape[1] (even though non-exempt of serious problems of implementation) and therefore deserves to be better known and understood.

2. HOW TO BORDER THE LIMITS OF THE CATEGORY

In order to better border the space covered by this category is necessary to recall that the Italian *dirigente* has the exclusive power of taking administrative decisions and formal administrative acts. After the administrative reform of 1992-93[2] members of political bodies can no more directly assume any administrative decision of specific care of a public interest; they can only adopt acts of general direction, of "political address" which can delimit the discretion of *dirigenti*. This is the so-called "distinction between politics and administration" within any body of the public administration.

That has the consequence of a clear distinction in the area of "decision": the *dirigenti* are decision-makers whose relationship with the administration is different from that of politicians or of political staffs (political advisors, in general any position attributed on a fiduciary basis). The *dirigenti* are senior civil servants permanently operating for their public administration, on a basis of professional status, while the other figures act for the administration on a temporary basis[3]. The former receive a salary for their activity, the latter receive only an "indemnity".

[1] A comparative analysis of the different legal system of the Senior civil service in Europe can be found in F. MERLONI, *Dirigenza pubblica e amministrazione imparziale*, Bologna, Il Mulino, 2006.

[2] Act n. 421/1992 and the following Legislative decree n. 29/1993. All the present discipline is now summoned in the Legislative Decree n. 165/2001.

[3] In the Italian terms they are "honorary officials" (see G. FERRARI, *Funzionario onorario*., *Enc. Dir*.).

In the "decision-making area" there is a "political" decision (of political address, directive) and an "administrative" decision, reserved to different and separated categories of decisions makers.

Within the large category of civil servants, corresponding to the wide categories of French "fonctionnaires publiques" or German "beamten", the Italian *dirigenti* are a specific category of "public employees"[4].

How can we distinguish between the general position of "public employees" and the *dirigenti's* one? Even in this case is possible to use a functional criterion: while all the public employees are (as in all the European countries) collaborators in the administrative process of decision making, the Italian *dirigenti* can act either as collaborators (with the political bodies in the adoption of political decisions) or as direct decision makers. This implies that their legal status is for same matters common with the general status of public employees and for other, more specific matters, a particular status.

3. HISTORICAL NOTES

The history of the Italian *dirigenza* is a history of progressive appearance of the category, within the larger category of "public employees".

The first step has been the formal creation of the dirigenza at national level in 1972[5]. In the following twenty years the Italian *dirigenza* enjoyed a position approximately

[4] In the ordinary legislation the discipline of the legal status is always concerning the public employees. In the Constitution (in particular art. 97) this term is used in combination with the term "*funzionari*".

[5] Presidential Decree n. 748/1972, which provided three level of dirigenza: "dirigente generale", "dirigente superiore", "primo dirigente", corresponding to three levels of offices in the public organization (particularly in the ministerial departments).

similar to the “senior civil servants” or to the “haute function publique”. They were always closed collaborators with the political (and administrative) decision makers, not themselves decision makers. This new category of public employees were comparable to the other in the European landscape only in terms of tasks given and functions, not in terms of tradition of impartiality or neutrality. The Italian *dirigenza* was, at the beginning, a weak and politically dependent one.

The turning point occurred in the 1992, when an acute financial crisis, doubled by the appearance of corruption cases in public administration, imposed an administrative reform focused in the research of more efficiency and more impartiality in the functioning of public bodies, at all levels of government.

Both objectives has been conceived as strictly linked with a new role for the existing weak *dirigenza*.

As far as efficiency is concerned, the Italian reform was largely inspired by the New Public Management set of instruments and concepts. The main target was to “isolate”, within the organization of different public bodies, individual offices (or separate public bodies or authorities/agencies), in order to measure their costs and their outputs. The measuring of bureaucratic performance, generally aimed to identify the apt action necessary to achieve better organization (and better procedures), in the Italian version also implied a stronger responsibility of the civil servants nominated as chief of the “isolated” offices.

The basic idea was to stimulate the *dirigenti* to obtain better use of the labour force allocated in the offices assigned to their responsibility. The stimulus has been conceived as twofold: on one hand a positive one (in terms of prizes awarded: a part of the salary is linked to the results obtained by the office under the *dirigente*’s guide), on the other side negative: the lack of efficiency of the office or the not fulfilment of the action targets fixed

in the directives adopted at political level could imply the early removal from office or the non confirmation of the job at its expiration[6], or a cut in the prize part of the salary.

As far as impartiality is concerned, the basic idea of the reform has been to reserve the powers of adopting administrative acts only to the *dirigenti*, excluding any intrusion of the political bodies. Trough a legislation more and more clear, the present discipline provide a clear-cut division between tasks of political bodies and *dirigenti*[7], strengthened by the prohibition for the political bodies of "revoking, modifying, reserving to themselves, taking over or in any way adopting acts in the competence of *dirigenti*[8]. The consolidated jurisprudence of the administrative courts considers unlawful acts of actual management adopted by political bodies (or by their staffs). The consequence is the annulment of this kind of acts, considered as invalid for incompetence[9].

The reform is founded on the idea that a professional civil servant, recruited on merit basis (trough a competition procedure) and depending from the administration on the basis of permanent status, better guarantees the impartiality of administrative action, while politicians (and all the figures acting on a fiduciary basis) are competent only for acts of political address and guidance of the dirigenti's activity.

These principles have been always confirmed and in many cases consolidated by the following legislation, in the years 1998, 2001, and 2004. In 1998 the employment relationship between the *dirigente* and the administration in which he operates has bee

[6] This is the so called "responsabilità dirigenziale": see art. 21 of the Legislative Decree n. 165/2001.

[7] See art. 4 of the Legislative Decree n. 165/2001.

[8] See art. 14, paragraph 3, of the Legislative Decree n. 165/2001.

[9] On the legal concept of competence in the Italian discipline of the public organization see A. PIOGGIA, *La competenza amministrativa*, Torino, Giappichelli, 2001.

clearly defined as a private law relationship for the entire category, including the *dirigenti generali* (at the beginning of the Reform process not privatised)

Finally, in 2009, came the so called "Brunetta legislation"[10], aimed to strengthen the performance measurement of public employees and the responsibility of the *dirigenti* for the results obtained by the offices under their control.

The legal discipline of *dirigenza* deserves a brief description, to focus the basic points and the problems still opened in its implementation.

4. BASIC ITEMS: POWERS, NOMINATION, JURIDICAL STATUS

As told before, the *dirigente* has reserved powers of administrative action (following the public law rules on administrative procedure) and powers of the so-called "micro-organization", that implies powers of organizing the activity of the employees and powers of giving them tasks and objectives.

For the latter part of his activities the *dirigente* acts applying private law rules. He is the "private employer"[1112] for the civil servants allocated to his office. In this case we are in presence of a simulation, strengthen by the privatisation of the labour relationship of

[10] By the name of the Minister for public administration presently in charge, starting from 2008. The two major acts are: the Act n. 15/2009 and the Legislative Decree (of development of the Act n.15) n. 150 of the same 2009.

[11] See art. 5, paragraph 2, of the Legislative Decree n.165/2001.

[12] For a suggestive interpretation on the entrepreneurial role of the *dirigente* see P. CERBO, *Potere organizzativo e modello imprenditoriale nella pubblica amministrazione*, CEDAM. Padova, 2007

civil servants in Italy. All the civil servants acting in Italian public administrations[13] have their working conditions regulated by private collective agreements. They are paid for the work services given. The consequence is the possibility of simulating the existence of a private system of labour relations: on one hand the *dirigente* as a private employer; on the other hand the civil servants allocated to his office, considered as his subordinates.

As far as the nomination procedure is concerned, one must distinguish between the access to the career of "dirigenza" and the appointment to a specific task (with the responsibility for the activities of the office and for its results).

To become a *dirigente* there are particular ways of access, regulated by the law. The whole category of dirigenza is divided in two levels, corresponding to two levels of offices in the organization of o a public body. Normally only a *dirigente* of the upper level (the *dirigente generale*) can be appointed to the offices of "general" level, but there are many cases of appointment of dirigenti coming from the bottom level.

In a small portion of the total amount of posts also persons coming from a different administrations or by the private sector can be appointed to offices of *dirigenti* level. This is the so called "external *dirigenza*", too often utilized to introduce in the administrations persons chosen on a fiduciary basis, in order to have a larger number of followers, politically loyal to the appointing bodies.

While the recruitment of *dirigenti* (like the other civil servants) is operated through a competitive examination, is up to the political body governing the public administration to appoint to a specific public office.

The main problems linked to the appointment are:

[13] With the exception of few categories, which remain with a public law labour relation, i.e. judges, diplomats, prefects, policemen, university professors. The exception is founded on a particularly strict relation between work conditions and exercise of a public function.

a) The discretion of political bodies. Are the politicians totally free in the choice of the *dirigente* to appoint, or are the same limits (criteria, procedures to follow)? On this point the present discipline is silent, but there are positions in doctrine that propose the introduction of such limits.

b) The duration of the mandate as chief of the office. Before the reform of 1992-93 the task of responsibility for an office was given to a *dirigente* without temporal limits. The reform, in order to increase the responsibility for results, has introduced a temporal limitation. At the expiration of the mandate the task can be confirmed or not[14]. The problem stay in the effective duration of the task: a too brief duration implies that the appointment's renewal will stay in the same hands as the first one, a situation which can create a subordinate position of the *dirigente* towards the political body who appoints. The Constitutional Court hasn't yet dealt with this point, bur has stressed that «a too short duration of the task would imply some risks for the impartiality of the *dirigente*»[15].

c) The limits in revoking in advance (or not confirming at the expiration); the present discipline provides the possibility of not confirming the appointment at its expiration, in case of not fulfilment of the objectives or the not conformity with the directives given by the political bodies[16]. In case of violation of duties and of heavier responsibilities the task can be revoked in advance or the work contract can be removed.

d) The juridical nature of the appointment, which is acutely disputed. On one hand there are views that consider the appointment as an administrative act, regulated

[14] The present situation for the "dirigenti" in central administration (State) is: the mandate must last not less than three years and not more than five years. The ordinary duration of the mandate of political bodies is five years.

[15] See the sentence n. 103/2007, point 9.2: «a too short duration of the mandate appears to be not easily compatible with a good system of guarantees adequate to assure an impartial, efficient and effective development of the administrative action».

[16] See art. 21 of Legislative Decree n. 165/2001.

by the public law. These views stress the strict link with the public interest of the appointment, which is the instrument for giving the *dirigente* the public powers of administrative action. On the other side is used the decisive argument of jurisdiction: the ordinary judge (not the administrative one) is the only competent on the disputes concerning the appointments and their revocations[17]. Is possible to conclude that the act of appointment is a private one, of unilateral nature (the decision to appoint is only in the hands of the political body, it not negotiated), accompanied by a private law contract, necessary to regulate the economic aspects of the work relationship. The awarding of the public powers to act as an organ of the administration doesn't follow from the appointment act, but from the organization rules that provides competences for each office.

5. PROBLEMS OF IMPLEMENTATION: DIFFICULTIES IN ACTIVATING THE RESPONSIBILITY FOR RESULTS.

The *dirigente*'s can take his responsibility for results only if: a) each year the political bodies adopt their acts of directives, which must contain specific objectives for each office and for each dirigente; b) each year the administration measures the output of the offices, their performance; c) on the basis of the performance measuring, the political bodies adopt the consequent acts: the positive ones, the distribution of prizes (the mobile part of the salary); the negative ones, the not confirmation or the early removal from office in case of lack in efficiency or in the fulfilment of the directives.

Till now the whole mechanism was jammed: the political bodies have largely preferred not to adopt their directives, distributing the prizes to all the *dirigenti* without measuring or evaluating their results. On the other hand the *dirigenti* didn't claim for an effective evaluation. No directives, no performance measuring, no responsibility for results.

[17] See art. 63 of Legislative Decree n. 165/2001.

And, as a consequence, the *dirigenti's* gratefulness (and a possible subordination) towards politicians for better salaries assured automatically.

The "Brunetta legislation" of 2009 tries to face this situation attacking the lack of responsibility from a different point. The new discipline[18] doesn't order the political bodies to adopt directives, but creates new bodies within each central administration, the Independent Organs for Evaluation[19]. The distribution of prizes has predetermined limits (the evaluation of the best performance can be recognized to not more than 25% of the total amount of civil servants working in each administration (in the case of *dirigenti* the 25% of that category) and is possible only on the basis of a previous performance measurement. In addiction the new legislation invests largely in a more wide transparency, which is defined[20] as "total access" to "every aspect of public organization", in order to stimulate "forms of widespread control" on the public administrations functioning. The idea is that transparency can be assumed as a new instrument of "pressure" by the outside (by citizens) towards the various actors in the public administrations (political bodies in their control over the performance of *dirigenti*, the *dirigenti* in controlling the performances of the other civil servants operating in the offices under their control) in order to prevent any internal collusive arrangements at the expenses of the general public interest to efficiency and effectiveness.

[18] For a first commentary see G. GARDINI, *L'autonomia della dirigenza nella (contro)riforma Brunetta*, in Lavoro nelle pubbliche amministrazioni, 2010, 579 ss..

[19] In Italian OIV (Organismi Indipendenti di Valutazione della performance). See art. 14 of the Legislative Decree n. 150/2009. The activity of the OIVs is coordinated at central level, by an independent authority called CiVIT (Commissione indipendente per la Valutazione, la Trasparenza e l'Integrità delle amministrazioni pubbliche) provided by art. 13 of the same Legislative Decree n. 150/2009.,

[20] See art. 11, paragraph 1 of the Legislative Decree n. 150/2009. For a commentary on the new legislation on transparency see E. CARLONI, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa* , in Dir. Pubbl., 2009, 779 ss..

The implementation of the new legislation is still at the very beginning. We shall wait and see if it will give the actual change expected.

6. PROBLEMS OF IMPLEMENTATION: DIFFICULTIES IN GUARANTYING THE PERSONAL INDEPENDENCE OF THE SENIOR SERVANTS.

The exclusive power of administrative decision recognized to the *dirigenti* is aimed mostly to exclude the politicians from taking this kind of decisions. Therefore the reserve of activity is necessary, but not sufficient. The legal condition of the *dirigenza*[21] has to assure an effective position of independence[22] of the individual *dirigente* from pressures aimed at conditioning his decision-making.

In the present situation the principle of distinction between tasks of politicians and tasks of *dirigenti* within the public administrations is formally observed: all the administrative acts are in fact adopted by the *dirigenti*. That doesn't imply that they take their decisions in an independent way.

There are several means used by the political bodies to avoid the principle of distinction and interfere with the *dirigenti's* decisions:

a) Fixing a short duration of the *dirigenti*'s mandate (for example adopting the shortest possible duration provided by the law: 3 years in central state administrations);

[21] For an organic set of proposals see G. D'ALESSIO (a cura di) *L'amministrazione come professione*, Bologna, Il Mulino, 2008

[22] On the independence as a personal character of the civil servants responsible of public tasks and offices and not as character of the public bodies see B. PONTI, *La nozione di indipendenza nel diritto pubblico come condizione del funzionario*, in *Dir. Pubbl.*, n.1, 2006, p. 185-246

b) Using incorrectly the power of appointment of external *dirigenti*, in order to have a certain number of *dirigenti* linked to politicians by a fiduciary relationship;

c) Using the spoils system method (i.e. establishing the automatic removal from office at any change of political mandate) in order to have the same results as point b).

For the first mean, till now no changes are envisaged at legislative level. Only a clear intervention of the Constitutional Court could lead the Parliament to a new consideration of the necessary independent position of the *dirigenti*.

For the second point, instead, there are important news: the recent "Brunetta legislation" has clarified that the external *dirigente* is not an instrument for introducing fiduciary civil servants. The appointment of an external *dirigente* has to be "explicitly motivated". The persons coming from outside should have a "specific professional qualification not present" inside the concerned administration.[23] The only case for an external appointment is the absence, in the concerned administrative body, of skills for a specific office to cover.

This new legislation has been preceded and accompanied by a very clear jurisprudence, in the same direction, of the Constitutional court[24].

[23] See art. 40 of the Legislative Decree n. 150/2009, modifying art. 19, paragraph 6 of the Legislative Decree n. 165/2001.

[24] See the following sentences: n.9/2010 (annulling an act of the Piemonte Region for avoiding the principle of the public competition to accede to public offices); n.161/2008 (annulling the spoil system applied to appointments of dirigenti coming from other administrations, on the ground of an alleged fiduciary relation); n. 81/2010 and 124/2011 (annulling the spoil system applied to appointments of dirigenti coming from the private sector, on the ground of an alleged fiduciary relation)

As the third point is concerned, decisive has been the role played by the Constitutional Court to progressively limit the use of spoils system in the recent legislation, either at central state level or at regional level.

This impressive jurisprudence[25] can be summarized as follows:

a) The distinction among competences of political bodies and competences of *dirigenti* introduced in the ordinary legislation in 1992-93, in the form of an exclusive competence for administrative action recognized to the *dirigenti*, has a constitutional value: the principle has to be considered as a direct application of the constitutional principle of impartiality (art. 97 Cost.);

b) The *dirigenti* have the obligation of acting impartially;

c) The impartiality of the *dirigenti* decisions must be assured trough specific guarantees of their position towards the political bodies who have the appointing powers;

d) Among the guarantees of the position of *dirigenti* one of the most important is the non application of the spoils system;

e) Each administration has to distinguish between the area of *dirigenti*, that are chosen and nominated on professional and not fiduciary basis, and the area of the more strict and "political" collaborators of political bodies;

[25] See the following sentences: n. 233/2006 (authorizing the spoils system for a large series of tasks assigned on fiduciary basis at regional level, including the position of the "dirigente generale", considered as a "summit" one); n. 103/2007 (prohibiting the spoils system for the dirigenti, including the dirigenti generali in the central state administration); n. 104/2007 (prohibiting the spoils system for positions previously considered as fiduciary at regional level); n. 34/2010 and 224/2010 (prohibiting the spoils system in some summit position in public bodies at regional level); n. 304/2010 (admitting the spoils system for the members of Ministerial Cabinets, called by the law –Legislative Decree n. 165/2001, art. 14 - "uffici di diretta collaborazione")

f) In order to distinguish the two areas the criterion is twofold: an organizational criterion (the Constitution Court seems to consider as fiduciary all the "summit" positions); a functional criterion (when the competences imply impartiality there's non space for any fiduciary relationship; when the competences imply a political support to political bodies there's room for a fiduciary relationship).

The Constitutional Court's jurisprudence has been very useful in clarifying the necessity of coping very carefully with the different aspects of the personal independence of the *dirigenti*, in order to assure their impartiality in the administrative decision making. The theme of spoils system proved to be more easily attacked by a Court that has prevailing negative powers (the declaration of constitutional illegitimacy of a legal norm). The Court's position has nevertheless produced a renewed attention on the instruments necessary for a positive guarantee of the *dirigenti's* personal independence.

7. THE LEGAL STATUS OF DIRIGENTI TO ASSURE THEIR IMPARTIALITY

The major items relevant for personal independence of *dirigenti*[26] are:

a) The regime of incompatibility; this is a point not in depth considered in the Italian legal discipline, generally for all the civil servants and particularly for the category of *dirigenti*. The starting point is the regime of total engagement of a civil servant recruited by a public administration; this regime should preserve the civil servant from being conditioned by external interests (economic or political); the principle is weakly

[26] For an organic vision of the actual discipline and its implementation problems in order to assure the impartiality of all public officials (civil servants and other officials, like political bodies) in Italy see F.MERLONI, R.CAVALLO PERIN (a cura di), *Al servizio della Nazione. Etica e statuto dei funzionari pubblici*, F.Angeli, Milano, 2009.

reinforced by a regime of individual authorization which has to be given by the concerned administration for any employee's external activity. The authorization is allowed only when these activities don't reduce the fulfilment of the duties included in the public work relationship. An insufficient attention has till now been paid to other issues, decisive in particular for *dirigenti* (as they take important administrative decisions): the right to join a political party, the undertaking of tasks in the private sector, in firms subject to the administrative power of the concerned administration, during and immediately after the limits of his mandate;

b) The duties of declaration of potential conflicts of interest and of abstention from taking the decisions conditioned by an existing conflict; these duties have been affirmed in some acts and assumed as general principles in the jurisprudence of the administrative courts, but still remains without a positive, clear and procedural discipline;

c) The standards of conduct in public life. The Italian discipline in this matter is largely poorer than the French or the German ones. The problem is complicated by the privatisation of the work relations in public administrations. On one hand the list of positive duties of behaviour is now contained in a "code" adopted by a public regulation and inserted in the collective agreements (which have a private law nature). On the other hand the weakness of the legal value of such duties has produced a practical absence of disciplinary responsibility (see Bernardo Mattarella contribution). This negative trend is now opposed by the recent "Brunetta legislation"[27] and by the promotion of Codes of conduct (having more an ethical nature than a juridical one)[28].

[27] See the Legislative Decree n. 150/2009, art. 69, which has introduced a new legal discipline of the disciplinary procedures in the decree n. 165/2001 (the new articles from 55-bis to 55-nonies). The major limit of this discipline is the absence of independent bodies charged with the application of the new system; the independence should be assured either towards the political bodies or towards the civil servant trade unions of the same administration.

[28] The Codes are adopted either by single administrations (bur in this case one could suppose the aim of adopting a juridical set of behaviour's duties) or by categories or groups of civil servants.

8. THE "DIRIGENZA" AT REGIONAL AND LOCAL LEVEL

At regional and local level there are some important differences in the legal regime of *dirigenza*.

Firstly, the Constitution recognizes to regional and local authorities a large autonomy in regulating their own organization, autonomy including the discipline of offices structure, the discipline of competences of different office at decentralized levels, the discipline of *dirigenti*'s powers [29]. The recent tendency of State legislation is to limit that autonomy, trying to impose a new uniformity. In the "Brunetta legislation" large is the use of different techniques, like the declaration of some central state dispositions as general principles directly coming form a constitutional one, or as minima levels in providing services that have to be assured for all the citizens in the whole territory of the State[30].

Secondly, the creation of the category originally came from some provisions of the collective agreements on civil servants and only later has been provided by the law[31].

Thirdly, not in each administration is possible to find a *dirigenza* (or a *dirigenza* organized into two levels): it depends on the size of the administration. Almost in all the

[29] On the breaking of the uniformity principle in favour of a larger differentiation of the organizational models as consequence of the reform of the Title V of the Italian Constitution see E. CARLONI, *Lo stato differenziato*, Torino, Giappichelli, 2004.

[30] See the Legislative Decree n. 150/2009, art. 16, 31 and 74. The power of fixing minima standards for service delivering is recognized to the central state legislation by art. 117, paragraph 2, point m) of the Italian Constitution.

[31] See the Act n. 142/1990 and the present Legislative Decree n. 267/2000, both providing for the principle of reserve of administrative competences to the dirigenza.

regional administrations there are the two levels, while in the smallest local authorities there isn't any kind of *dirigenza*.

The organization issues coming from the size of the administrative apparatus imply a differentiated application of the principle of distinction between political bodies' and *dirigenti*'s competences even though the Constitutional Court considers the principle as a direct application of a constitutional one (the principle of impartiality) therefore applicable in every public administration. In the smallest communes the law[32] authorises the political bodies to adopt administrative acts, with the assistance of the non-*dirigenti* employees of the commune.

Other principles aimed to assure the quality and the impartiality of *dirigenti* have to be applied also in regional and local authorities: the access through a public competition[33]; the procedural guarantees necessary either in nominating and revoking tasks of *dirigente* or in evaluating outputs and results[34].

[32] See Act n. 388/2000 art. 53, paragraph 23. The exception concerns the communes with less than 5.000 inhabitants.

[33] The principle is directly fixed in Constitution. See art. 97, al. 3.

[34] This principle is recalled by the Constitution Court, for justify the prohibition of spoils system for the dirigenti. The only way to remove a dirigente form his office is a public and guaranteed procedure, no automatic removal is possible.

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THE CIVIL SERVICE IN GERMANY

ANNUAL REPORT - 2011 - COUNTRY

(May 2011)

Prof. Dr. Heinrich Amadeus WOLFF

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1. Two parts of civil service in Germany

The civil service in Germany is divided into two parts. The greater part of employment relationships at the Federal, State and commune level (in total about 2.6 million) is based on civil law. These are the workers in the public service. Their relationship corresponds structurally to the right of employees in the private sector. The basis for that are the respective individual employment contracts and above all the collective agreements or wage agreements. Uniform collective agreements were being used for public service only until 01.10.2005. These collective agreements were terminated by the federal States. Now applies: The collective agreement for public service (TVöD) deals with the employees in the Federal government; the communes, however, use the collective agreement for the public sector in the federal States (TV-L), which allows for differences in labour times between these federal States. Separate, somewhat different collective agreements are being applied in Hessen and Berlin.

In a slightly smaller part of the civil service, employment relationships are based on public law (1.8 million). In particular, officials, judges and soldiers and other specific public legal relations (mandates of the members of the parlaments, legal relationships of Ministers, etc.) are within this group.

2. Common developments

Both groups are characterized by three common lines of development in Germany:

- First, the number of employees in public service has decreased for many years. The continuous efforts since the reunification of Germany, not to let the state budget overrun, are resulting in permanent job cuts in public services. This has lead to a decrease of employees in ten years by about 60,000, or about 15%.

- Second, the legislature is trying to keep the pension insurance of both the insured ones on the one hand and officials, judges and soldiers on the other

hand financed. This is leading to several, mostly small recesses in the amount of pension payments (pension or supply of officials).

- Third, the uniformity of the employment relationships of the respective groups were given up or reduced. Now, for an official in Berlin and an official in Bavaria, exercising similar activities, more differences in rights and obligations can be found than a decade ago.

3. Law on public officials

Within the civil service based on public law, the law on public officials is the central one. The other public-service relationships are based on this kind of Civil Service Law.

The civil service law in Germany is traditionally not open to reform. This is mainly due to a constitutional rule, according to which the legislature is required to comply, while adopting the rules on civil service, with general principles of law which were already laid down in the Weimar Constitution (1919 to 1933) or even earlier (Article 33 paragraph 5 GG: (The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service.).

4. Federalism Reform I, 2006

This standard is very debatable and was inserted on purpose by the legislator of the constitution, trying to complicate the access to the civil service law by progressive groups. Despite this fundamental immobility, the civil service legislation is changing in Germany. This goes back to a major constitutional amendment in September 2006, with which the relationship between the federal States and the government, i.e. the rules on the organisation of the Federal Republic, were substantially altered (Federalism Reform I, 2006). The legislative powers between Federation and States in the civil service law have been redeployed under this federal reform. Federal States can now decide for themselves, especially on the payment, utilities (pension rates of civil servants) and the rules governing the career (outline and relation of offices to each other).

In contrast, the Federal government can pass standardized laws, only on the fundamental rights and duties for all officers, while not dealing with any remuneration and pensions. Currently, all Federal and state rules on civil service officials are being changed due to this shift in competence. Through that, a much larger variety of specific issues is going to arise than it has been the case in recent years. This process is still going on.

The range of diversity that is expected is not very large. This is initially based on Article 33, paragraph 5 GG. Also, the restricting jurisprudence of the Federal Constitutional Court, which is interpreting the general principles of the civil service law very traditionally, seems to result in a continuous homogeneity of civil service law. One can see this point in the last three important decisions (as in particular the waiting period for care of three years, BVerfG, Decision v. 20.03.2007, 2 BvL 11/04, the problem with forced part-time, BVerfG, Decision v. 19.09.2007, 2 BvF 3/02, and finally the judgment on the temporary high-ranking positions, BVerfG, 28. Mai 2008, 2 BvL 11/07). Thirdly, the parliaments of all 16 federal States and the Federal legislature are trying not to complicate the exchange of officials too much among federal States and between the federal State and the government.

Finally, fourthly, the political pressure on the civil service law has decreased. Politically, a reform of civil service law is not anymore required in the same way as ten years ago. There is a certain resignation, which is based on the recognition that the current design is difficult to change and, moreover, is not only disadvantageous for the employer.

If one wants to qualify the German civil service law content, it is possible to say: The Federal Constitutional Court says that the civil service has the task to secure a stable, law-abiding government in the political power play (see BVerfGE 121, 205, 221).

5. Principles of civil service law

The civil service law is based on the following idea: officials devoting their entire abilities to the employer for the purpose of realizing public wealth, and particularly the acts of parliaments, in a neutral and equal way. The employer shall care for the official and his family in return. The officer is given a secure legal status, which makes him independent and allows him to fully concentrate on his task. However, he cannot influence the content

of this status himself in a contract. The rights and obligations are designed unilaterally by the legislature, under constitutional guidelines.

Central principles of civil service legislation are:

- loyalty (the officials must faithfully serve his employer);
- moderation obligation (the officer mustn't behave extremely in his official position or in private life);
- Dependence on instruction (the officer must comply with instructions coming from his superiors - unless the instruction violates criminal law or human dignity);
- ban on strikes (the official musn't strike);

  not quite fixed working hours (if required, the official shall work overtime);
- disciplinary rules (erratic behaviour is sanctioned by separate administrative penalty rules);
- Principle of alimentation (the official receives a salary for the position he holds, not specifically for his work);
- Official principle (the official only receives a raise when obtaining a new position);
- Recruitment on accomplishment (In a vacancy, the candidate who is best suited for the job will get it);
- The pension depends on the position occupied by the officials at the end (if he has held it at least three years);
- Care Duty: The employer must take care of his officials.

6. Future problems of the development of civil service law

Central problems of the development of civil service law in the near future are going to be:

- the relief of public budgets off the expected huge costs for the accumulated supply of retired officers;
- the flexible deployment of officers by the employer and thus an improvement for the employer in putting officers at posts that do not completely conform with their previous activity;
- the introduction of an assessment system that is linked to the accomplishment and not to the fact, that the officers are acquainted with the employer or supervisor;
- Increasing the influence of unions of civil servants;
- Easing the change from the civil legal relationship to the free market;
- the easy change and advancement within the public service; it is intended to allow, according to the principle of lifelong learning, an easier rise within the civil service;
- the further equality of same-sex partnership with the married couple.

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ACTIONS IN THE NEW CODE OF ADMINISTRATIVE PROCESS

ANNUAL REPORT – 2011 - ITALY

(June 2011)

Prof. Vittorio DOMENICHELLI

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1. INTRODUCTION

The new code of administrative process (c.p.a.) for the first time generally disciplines the cases that can be submitted before the administrative judge: the action of annulment (Art. 29), the action of conviction (Art. 30), the action opposing silence and the declaratory judgement of nullity (Art. 31). It is not possible to deal here with the problem of legal action before the administrative judge, a problem which has absorbed scholars of the administrative process for a long time. It is sufficient to note here that the difficulties of

classification initially depended on the ambiguity around the jurisdictional nature of the Council of State and the defining of legitimate interest as a legal position of substantive nature. Once these doubts were resolved, it was possible to elaborate the theory of jurisdictional administrative action on the basis of that of an action before the ordinary judge, and consequently proceed to systemize the actions that can be put before the administrative judge, moreover anchored to the action of impugnment of an administrative provision which has been the only true jurisdictional administrative "action" for a long time. At the end of the last century, thanks to scholars and case law, also under the impetus of some European regulations, the legislator had amended the system of actions, without moreover impairing the impugnment structure of the administrative process, above all enriching it with the action for compensation for damages ensuing from damage to legitimate interest, for a long time denied in the Italian legal system (Legislative Decree *D.lgs.* 80/1998 and Law 205/2000). An amendment that set in motion the profound transformation of the system of actions specified by the Code, but previously elaborated by scholars, and followed to a certain extent by case law as well.

2. **PROPOSABLE ACTIONS: FROM THE COUNCIL OF STATE COMMITTEE'S OUTLINE TO ENGROSSMENT.**

The new Code devotes a specific discipline to actions and can with good reason consider that it constitutes the heart of the Code, seeing that the action outlines the relationship between law and proceedings. The discipline of the actions set out in the Code, nonetheless, seems to be the result of the consolidation of the discipline previously in force rather than a true reform, as on the contrary the mandate foretold. In fact, Parliament had identified amongst the guiding principles and criteria the regulation of actions and the functions of the judge through the forecast of *declarative and constitutive judgements and convictions, fit to satisfy the winning party's claim* (Art. 44, para. 2 let. b no. 4 L. 69/2009).

Despite this the Code does not appear to be a simple reorganization of the rules in force and prevailing case-law trends, but can become the starting point for a further evolution of the administrative process.

Prompted by their intention to fully carry out the mandate, the Commission set up at the Council of State had drawn up a draft Code that forecast, in addition to the three actions currently foreseen in D.lgs. 104/2010, the action of verification of the existence or non-existence of a disputed legal relationship and the action of fulfilment as well as executive and precautionary actions.

The Commission's outline, reorganized by Executive intervention, has been streamlined, in particular exactly the part about the actions, the actions of verification and fulfilment having been deleted and the executive and precautionary ones transferred to the part concerning the specific discipline of the respective proceedings.

In the heat of the moment the first comments on the final text were rather critical, since, beyond reorganization of the regulations, the Code did not reach the goal of aligning administrative justice to the levels of protection required by the Constitution and European jurisprudence. (A. Romano Tassone, F. Merusi) Besides, the justifications produced for the revision of the outline of the Code, in particular, did not appear very convincing, on the basis of alleged and undemonstrated needs to reduce public spending that instead would appear to conceal a concept of justice which in the confrontation between authority and liberty sees the sacrifice of the latter, (A. Pajno).

Subsequently more articulate opinions and appraisals have appeared, asking the question whether it is still possible, going beyond the literal data and playing on the principles which inspired the Code (*in primis* the principle of effectiveness of protection), to deduce interpretatively the action of mere verification and the action of fulfilment.

Some scholars (A. Travi) maintain that the list contained in Chapter II, Title III of Book I of the Code is peremptory in nature and does not permit the introduction of actions that the legislator has deemed it necessary to expressly exclude. Other scholars (E. Follieri, M. Clarich), on the contrary, consider that the Code has laid down an open system of

actions and that consequently atypical actions can also be proposed, within which could fall the action of fulfilment and the action of verification formally expunged by the Government.

Preliminarily to the examination of the actions which can be proposed before the administrative judge, it should be observed that Chapter II devoted to actions does not exhaust the catalogue of actions provided not only by the Code, but also by other sources of regulation. In addition to precautionary and executive actions, no longer expressly mentioned in Chapter II, but disciplined respectively in Articles 55 and 112 of the Code, think for example of the action relating to access (Art.116 c.p.a.), whilst the action for the efficiency of public administration is disciplined by Legislative Decree 198/2009.

In the light of that, it can be asserted that Chapter II does not contain a complete and exhaustive organic whole of the feasible actions in proceedings, so that the elimination of the action of verification and the action of fulfilment in the engrossment could have been a mere simplification, the action of fulfilment being traceable within the action of conviction for failure to exercise mandatory administrative activity (Art. 30, paragraph 2) and in the action opposing silence (Art. 31), with verification of the obligation to act and with the possibility of obtaining an order to act from the judge (Art. 34, para. 1, let. b.). As to the action of verification, the fact remains that verification of rights cannot be excluded from exclusive jurisdiction (precisely since it also recognizes *ratione materiae* rights) and it had already been accepted by case law even before the Code; whilst the verification of legitimate interests, without disputing the documents, is admitted within the action of conviction (cf. Art. 30, 2nd para.).

The typology of the actions, common both to the general jurisdiction of legitimacy and to exclusive jurisdiction, follows the traditional tripartition of actions of annulment (constitutive), verification (declaratory) and conviction, drawn up within the realms of civil proceedings, although with the specificness of administrative judgement. The principle of typicality of the actions is toned down moreover, on one side by the introduction of flexible elements, found both in the plurality of the applications that can be submitted by the

claimant and sub-dividable in different ways in relation to their need of protection (Art. 32), and in the multiplicity of the verdicts that can be obtained from the judge (cf. Art. 34).

If this plurality were exploited by scholars and case law, it could lead to the construction of actions which are not rigidly anchored to typologies that are each separate from the other, but linked to the subdivision of the proposable claims and the verdicts obtainable from the judge; claims and verdicts conforming to the specific need of protection and redress of the damages for which the administrative proceedings must be predisposed, on a par with civil proceedings.

2.1 The action of annulment

The Code, even though admitting the principle of plurality of actions, shows however a clear preference for the action of annulment. Indeed Art. 29 is placed at the beginning of Chapter II to underline that the action of annulment is still the «queen of actions» (M. Clarich), whilst in the Council of State Commission's outline, the action of annulment was, as it were, one of many, being placed between the action of verification and the executive action.

The action *de qua* is attemptable in the traditional cases of transgression of a law, incompetency and misuse of power within the time limit of forfeiture of sixty days from communication or knowledge of the damaging act (excepting cases of disputes on matters of public contracts in which the time limit is reduced to 30 days: cf. Art. 120, 5th para.). The centrality of the action of annulment is observed by the fact that the administrative process continues to maintain as its subject matter the exercise or non-exercise of administrative power as is reaffirmed by Art. 7, para. 1, though related not to measures alone, but also to acts, agreements and behaviour if they are "even indirectly ascribable to the exercise of that power".

The action of annulment provided for by the Code, however, seems to be connoted differently compared to the past, since in order to ensure the effectiveness of protection the

judge's verdict must «contain the order that the decision be implemented by the administrative authority» (Art. 88) and the formula according to which the verdict of annulment must safeguard the administrative authority's further measures has disappeared (Arts. 26, L.1034/1971 and 45, R.D. 1054/1924). That is why the judge's verdict annulling the act does not stop at the moment when it is quashed, but can contain further provisions, amongst which stand out those aimed at ensuring the sentence and the non-suspended judgements are carried out, which was previously reserved to the judge in compliance proceedings and that can now already be adopted during cognizance (Art. 34, para. 1, let. e) and, more generally, all those provisions aimed at guaranteeing satisfaction of the legal situation inferred in the trial (Art. 34, para. 1 let. d).

2.2 The action of conviction

The action of conviction, as outlined in Art. 30 c.p.a., takes form first of all (but not only) as an action for compensation of damages for injury to rights in cases of exclusive jurisdiction, but also to legitimate interests in the jurisdiction of legitimacy, in the case of damages caused by the unlawful exercise of administrative activity or by the non-exercise of mandatory administrative activity. It is provided as a general rule that the action of conviction can be presented simultaneously with another action (*in primis* the action of annulment), but it can be proposed independently as well in cases of exclusive jurisdiction or in cases disciplined by the same article (Art. 30, 1st para.: which confirms once and for all the collapse of the so-called preliminary administrative action, on the subject of which see *infra*).

The contents of the independently proposable action of conviction for the compensation of damages are outlined both by Art. 30, 2nd para. (for cases of unlawful exercise of administrative activity or non-exercise of mandatory administrative activity) and by Art. 30, 3rd para., (which explicitly recognizes the claim for compensation for damage to legitimate interests regardless of impugnment of the provision causing the damage), as well as for damages ensuing from non-observance of the time limit of the close of proceedings.

Nevertheless, if there is symmetry between the proposable actions and issuable verdicts, from reading Art. 34, under the entry "Judgements on the Merits", the inference is that the contents of the conviction can also be more varied in comparison with what Art. 30 would have us perceive. In fact the judge can condemn the administration, as well as to compensate damages (for the equivalent or in a specific form), also to adopt «*appropriate measures to satisfy the subjective legal situation inferred in the trial* » (Art. 34, para 1, let. c). The very ample formula used by the code appears suited to comprise every type of regulative measure, without exception, thus including the order to issue a provision against an unlawful refusal or in the case of inactivity: the latter being a case in point for which the action opposing silence is foreseen, aimed at ascertaining the administration's obligation to act in accordance with Art. 31, 1st para., but which can well be aimed at obtaining a judge's order to the administration remaining inactive to act within a time limit (ex Art. 34, 1st para. let. b).

It should be noted that some scholars (M. Clarich, E. Follieri) have considered they can read into the expression «*appropriate measures to satisfy the subjective legal situation inferred in the trial*» (but one could also add into the order to act just mentioned) confirmation of the implicit introduction of the action of fulfilment, whilst for other scholars (A. Travi) it is about a lack of coordination in the drawing up of the final text, since the delegated legislator's intention would have been to not introduce the generalized action of fulfilment (it being perhaps superfluous, as the same results can be reached during compliance proceedings).

Another important aspect introduced by Art. 30 is represented by the relationships between impugnatory protection and compensatory protection, that is so say between the claim of annulment of the unlawful measure damaging a legitimate interest and the claim for compensation for damages produced by the same. Remember how a deep contrast was created on this point between the Council of State and the Supreme Court (*Cassazione*) with regard to what is called "preliminary administrative action". In particular, the highest administrative judge had held that an action of compensation regarding damage caused by measures which were not impugned in good time within the time limit of forfeiture was not attemptable, whilst the Supreme Court, on the other hand, upheld the independence of the

action of compensation, attemptable in the period of limitation of five years independently from prior impugnment of the damaging act.

The Code, recognizing the possibility of independently proposing the compensatory action compared to the action of annulment, intends to overcome the controversy on the preliminary administrative action, even if it circumscribes the autonomy of the action of conviction to compensation with a series of limits: first of all by fixing a forfeiture time limit of 120 days in place of that of limitation, a time limit which starts running from the day in which the damaging fact happened or from knowledge of the provision if the damage stems from it; secondly establishing that in determining compensation the judge assesses the real circumstances and the overall behaviour of the parties and excludes compensation of damages that could have been avoided by using ordinary care, even through trying out the instruments of protection provided, obviously including the act of impugnment of the damaging act and the relevant precautionary application. The mechanism provided for by the Code seems to constitute an implicit reference to Art. 1227 of the Civil Code (c.c.), among other things explicitly referred to by Art. 124 c.p.a. concerning protection on the subject of contracts. And exactly as provided by Art. 1227 c.c., the Council of State's Plenary Assembly no. 3/2011 has recently confirmed that the choice not to make use of impugnatory protection can influence the legitimacy of the compensatory claim, being assessable as behaviour contrary to good faith and to the principle of correctness in bilateral relations: so excluding the possibility of compensating damages that could have been avoided bringing into action all the protective instruments (impugnatory and precautionary) the code offers.

All things considered, the provision of the time limit of forfeiture together with the onus of impugnment tend to enhance the action of annulment. Besides it has been asserted that the new Code, in regulating the relationships between the action of annulment and compensatory action, has introduced a sort of concealed preliminary nature (Pajno) since mere compensatory action would risk taking shape as «little more than a school case» (Clarich).

Nonetheless, the Code is concerned with coordinating the action of annulment with the compensatory action, establishing that in the eventuality that an action of impugnment has been put forward, compensatory action can be formulated during the trial and in any case up to 120 days from the sentence becoming final and even during compliance proceedings (ex art. 112, 1st para.), so permitting the claimant to choose the legal strategy of waiting for the outcome of the annulment trial in order to then submit and articulate the claim for compensation (Art. 30, para.5).

2.3 The action opposing silence and the declaratory judgement of nullity

Art. 31 provides for two independent actions: the action opposing silence and the declaratory judgement of nullity. With reference to silence, the rule disciplines the substantive assumptions of the action, whilst the aspects that are more strictly related to the trial are disciplined by Art. 117 c.p.a.. The action opposing silence, as is well-known, has magisterial origins: it started out as an action of verification aimed at verifying the administration's obligation to act. Over time the content of the action has evolved and starting from the 10th 1978 Plenary Assembly the possibility was advanced, within the limits of binding acts, for the judge to go beyond mere verification of the unlawfulness of silence and to pronounce a decision on the legitimacy of the petition. Once this chink was opened, cautiously at first and then opening ever wider, the idea has been established that the subject matter of the trial is not silence in itself, but the claim asserted by the claimant.

Between 2000 and 2005, the legislator had intervened to discipline the trial on administrative inaction, introducing an accelerated proceeding and the possibility for the judge to also pronounce a decision on the truth of the claim. Most case law has affirmed that the power of cognizance of the truth of the claim only exists in the case of bound provisions, the judge having to limit himself to declare the obligation to act where discretionary assessments are at stake. Art. 31 has therefore acknowledged the trend of the majority of case law that has limited the verdict on the truth of the claim only to cases of bound activity, moreover introducing the eventuality in which the activity takes

discretionary shape in the abstract, but in concrete terms not leaving further margins for exercising it. It could be a question of complex proceedings in which discretion is already exercised, for example in root planning choices, so binding the subsequent act of authorization.

The action directed at guaranteeing protection towards the inactivity of the public administration is linked to the obligation, provided for by Art. 2 of L.241/1990, to conclude the proceedings with a provision expressed within prearranged time limits. The claim is not subject to forfeiture time limits and may be proposed as long as the non-execution continues and in any case within a year from expiry of the time limit for conclusion of the proceedings, maintaining intact the possibility of re-proposing the petition to start proceedings where the conditions recur.

The sentence, as mentioned, may not limit itself to verifying the obligation to act, but, in accordance with Art. 34, also contain the order to the administration that remained inactive to act within a time limit that Art. 117 specifies to be as a rule not longer than thirty days. Where necessary it is provided that an *ad acta* commissioner charged to carry out the activity can be nominated.

Art. 31 has, moreover, outlined the action of nullity as a distinctive action of verification, its object being the structural pathology of the administrative provision. The substantive position is defined by Art. 21 *septies* of L.241/1990, whilst the discipline of the trial is regulated in somewhat concise terms by paragraph 4 of Art. 31. The application addressed to the verification of nullities provided for by the law must be proposed within 180 days, except for nullities relating to acts issued in avoidance or violation of the sentence (Art. 114, 4th para. let. b). Nullity of the act can, however, always be opposed by the resisting party or be officially found by the judge. Even though it is not mentioned, the counter-applicant could also object nullity, provided that they have an interest in it.

Some perplexity could arise with reference to the question of the allocation of jurisdictions, since in the face of a null provision there could be a subjective position with the basis of a right and so have the jurisdiction of the ordinary judge, excepting matters of

exclusive jurisdiction in which the administrative judge also recognizes some rights, in which case the action of nullity is certainly to be submitted before the administrative judge.

2.4 The problematic nature of the action of verification

In the sphere of administrative actions the action of verification merits some reflection, an action that, as mentioned, had been contemplated by the Council of State Commission but deleted from the list of actions in the final draft.

In tune with scholars who for some time have already upheld the admissibility of the action of verification in the administrative trial, Council of State case law in recent times has also upheld that the action of verification may be attemptable independently, even in the absence of an express prescriptive provision within matters of exclusive jurisdiction, as it is directed to the verification of the existence (or foundation) of a disputed right.

In particular, the action of verification has been recognized in the cases of declaration of the start of an activity – today included in exclusive jurisdiction by Art. 133 of the Code – to allow a third party to go to the administrative judge and have the declaration of the start of an activity (Council of State, sect. VI, 717/2009: 2139/2010) that is damaging to their own legal sphere declared illegitimate.

More in general, nevertheless, it is being discussed whether the action of verification is admissible in the jurisdiction of legitimacy, doubting that an instrumental situation like legitimate interest is susceptible to verification without also involving the administrative power correlated to this situation and consequently considering that this could permit a possible avoidance of the onus to impugn the damaging provision.

The Code had meant to overcome this formulation by introducing a specific action of verification in the Commission's draft, as mentioned, also in the light of overcoming of preliminary administrative action, that nonetheless the Government thought fit to remove from the final draft, even if verification is consubstantial to the power to judge and so

should always be admitted when an administrative relationship or its extent, substance or duration is disputed.

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COMPETENCE

ANNUAL REPORT - 2011 - ITALY

(May 2011)

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1. PREAMBLE

Competence - within administrative jurisdiction - denotes the part of jurisdiction that is up to each branch of the jurisdictional structure made up of the Council of State (Consiglio di Stato), regional administrative Tribunals (TAR) and the Council of administrative justice for Sicily (Consiglio di giustizia amministrativa per la Regione siciliana). Competence is assigned according to the criteria of degree, territory and subject matter.

Until the TAR were established, which occurred with 1971 Law no.1034, in the Italian legal system the problem of division of competence on the basis of degree did not exist, since there was only one degree of justice that took place before the Council of State.

It was this law that indicated the TAR and Council of State as branches of jurisdictional administration, a structure reaffirmed today by the Code of administrative procedure (2010 Legislative decree no.104) that, in Art. 5, paragraph 1, identifies as branches of administrative jurisdiction in the first degree the TAR and the regional tribunal of administrative justice for the autonomous region of Trentino – Alto Adige (the discipline of which, the following 3rd paragraph, reserves the Special Statute of the Region and the related rules for implementation) and, in Art.6, recognizes the Council of State as the branch for the last degree of administrative justice. The only exceptions to this system are represented by the confirmation of competence of the Council of State in the sole degree for the execution of the final judgement in the case of amendment of the sentence appealed and by the identification of the Council of administrative justice for the region of Sicily as judge of appeals against judgements issued by the Sicily TAR.

The TAR are set up in each Region and their seat is in the regional capital; in eight Regions detached sections are also set up based in the provincial capitals. In Trentino - Alto Adige the TAR is based in Trento and has an autonomous section in Bolzano, provided with more extensive competence with respect to the other TARs.

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2. MANDATORY TERRITORIAL COMPETENCE

In Italian Administrative procedure the main criterion of division of competence is that of territory, formerly regulated by the 1971 TAR law, in articles 2 and 3, depending on a series of rules relating to the traditional model of administrative procedure as being judgement of opposition to documents. Today the discipline, notably changed, is contained in Art. 13 of the C.P.A. (Code of Administrative Procedure), and is no longer laid down exclusively with reference to the opposition to documents and measures, but is extended to disputes that concern agreements or the conduct of public administrations (amongst which,

in accordance with paragraph 2 of Art.7 C.P.A., are included "….also subjects equivalent to them or in any case required to respect the principles of administrative procedure).

First of all it is provided that the TAR in whose area the public administration that issued the document or carried out the agreement or conduct opposed is based is 'unavoidably' competent. Nevertheless, above all in order not to excessively burden the Lazio TAR, where many public administrations are based, the criterion of the seat of the agency is mitigated by that of the efficacy of the document. Thus the combination of criteria already ratified in the TAR law is confirmed and, so, if the documents (or the agreements or conduct) opposed produce immediate and direct effects restricted to the territorial area of a Region, it is mandatory that the TAR within the area of which these effects are produced is competent (Art. 13, para. 1). Clarifications of the law are stated in these terms (Council of State, section VI, 17 July 2007, no. 4033).

The criterion of the seat of the agency appears to be reaffirmed in para. 3 of the same article 13, where, with regard to the documents of public subjects other than State administrations with effectiveness beyond the region, the competence of the TAR in whose area the agent Authority is based is ratified, whilst for documents of state administrations with effectiveness beyond the region the competence of the Lazio TAR based in Rome is established.

For petitions opposing silence, the leaving out of the regulations, one must consider the provision omitted and so the area of the effects of the conduct of omission, with the consequent competence of the local TAR if these effects remain limited to the local area (see for example Cons.Stato, section VI, 5 June 2006, no. 3349).

Para. 2 of Art. 13 C.P.A. is plain, on the other hand (like the previous Art. 3 of the TAR law) with reference to disputes on the subject of civil service personnel (the non-privatized part today): on this subject mandatory competence falls to the TAR within whose area the premises of service is situated (known as the civil service tribunal), meaning the premises where the employee is formally based on the basis of a legally existing working relationship at the time the opposed document is issued (Council of State, Section IV, 22 March 2005, no.1238). It should be remembered that, in accordance with para. 1, lett. O), and para. 2 Art. 135 of the Code, disputes relating to working relationships of DIS, AISI

and AISE personnel are, instead, devolved to the functional competence of the Rome seat of the Lazio TAR.

Art. 47, para. 1, of the C.P.A. affirms – reaffirming what was already inferred from Art. 32, para.3, TAR Law – that the division of disputes between TARs with seats in the regional capital and the detached Section is not considered a matter of competence. The latter, in fact, constitutes a functional arm of the wider unit of which it is part.

The matter must be raised by the parties, other than the petitioner, in the act of court appearance or anyway with an document filed no more than 30 days from the expiry of the term of 60 days from the accomplishment of service of the petition to them. The President of the TAR acts on this with a non-opposable order stating the grounds, having heard the parties who made the request. So the provisions of Art. 15 are not applied in these cases, with the exception of paragraphs 8 and 9 of the same, if precautionary measures have been set, which we will pause to consider below.

Moreover secure kinds of cases are those of functional competence ex art. 14 of the Code, relating to which the division between TAR in the regional capital and the detached Section is also considered, an evident exception with respect to the previous system of rules, a really matter of mandatory competence and therefore is wholly subject to the discipline contained in articles 15 and 16 C.P.A.

Note that the C.P.A. does not specify how one is to identify the competent TAR for petitions put forward in cases of exclusive jurisdiction other than civil service, when it is a question of verifying subject rights or a sentence to pay sums of money. For these cases, some authorities have, in the past, proposed reference to the seat of the administration called to court, whilst prevailing case law has rather considered applicable the rule in Art. 20 C.P.C.(Code of Civil Procedure) (according to which, for cases relating to obligation rights, the competent judge is the one of the place in which the obligation produced in the proceedings arose or must be performed), that is the provisions of Art. 25 C.P.C. (which also refers to the place where the obligation arose or must be performed: see Cons. Stato, section V, 26 September 2000, no. 5108).

Moreover, regarding trials for compensation, connected to a sentence of annulment, administrative jurisprudence – faithful to the prejudicial argument - has

affirmed the competence of the TAR called to decide on the application for annulment (Cons. Stato, AP,18 October 2004, no. 10).

It is important to emphasize that one of the most significant changes of the 2010 Code is represented by its having ratified as mandatory the territorial competence of the regional administrative tribunals, where on the other hand Art. 31, TAR Law, held that this competence could be derogated; it could not be noted as a matter of course by the judge, but only objected by the interested party with the rule of competence to be put forward by the final date of twenty days from the appearance before the court and, furthermore it could not constitute grounds for appeal.

Today the rule of mandatory territorial competence, also extended with regard to precautionary measures, demonstrates its intention to overcome some distortions produced by the previous discipline that permitted the parties, in particular the petitioner, to choose the administrative judge in the first instance (known as forum shopping) who should have pronounced a decision in the case of petitions for precautionary measures even if he was clearly incompetent, and also in the case in which the rule of competence had been raised. The new discipline sets out that if the judge considers himself incompetent he cannot adopt any precautionary measure (Art. 15, 5th para., and Art. 55, 13th para.,C.P.A.).

3. MANDATORY FUNCTIONAL COMPETENCE

In the system of regulations previously in force a distinction was made between cases of functional competence identified by case law (Cons.Stato, section VI, 27 July 2007, no.4190) and cases identified by special laws that assigned certain documents or relationships to a TAR other than the one ordinarily competent on the basis of criteria that determine territorial competence.

In the new structure, competence being declared mandatory as a general principle, the cases of functional competence are characterized not so much by this point of view as, precisely, by being based on special rules. For them – pertaining to particularly delicate subjects – it is required that they be dealt with and settled, already in the first instance, by the same, uniform jurisdiction. The most important cases of functional competence are

those provided for today by para. 1 of Art. 14, C.P.A., that remits to the mandatory competence of the Lazio TAR, Rome seat, disputes indicated by the subsequent Art.135 and all the others that are referred to this Tribunal by law. Other cases of functional competence, indicated in the following paragraphs of Art.14, are the mandatory competence of the Lombardy TAR for petitions put forward against the provisions of the Authority for Electricity and Gas (based in Milan), as well as the mandatory competence of the compliance judge ex art. 113 of the Code. This article provides that the petition for compliance must be put, regarding sentences of the administrative judge, to the judge who issued the provision about which the question of compliance is about: competence is also of the TAR for its provisions confirmed in appeal with the grounds that it has the same regulating content and is in conformity with the first degree provisions (In case law, see Cons.Stato sect.VI, 20 January 2009, no. 243).

Amongst other cases of functionally mandatory competence, in para.3 of Art.14 reference is made to every other judgement for which the law or the Code identify the competent judge with criteria other than those in Art. 13 on territorial competence.

4. COURT FINDINGS OF INCOMPETENCE, REGULATION OF COMPETENCE AND RELATED SYSTEM

The discipline on this point, contained in Articles 15 and 16 of the Code, diverges noticeably from that laid down by Art.31 of the TAR Law.

In accordance with the new regulations, in every stage of first degree justice, unless a decision has turned up on the regulation of competence by the Council of State, the lack of competence (territorial or functional) can by noted as a matter of course by the TAR with an order also indicating which TAR is to be considered competent. If within the term of 30 days from the communication of the order the case is reassumed before the judge announced as competent, the trial continues before the same and does not give rise to any forfeiture (Art.15, para.1, and Art.16, para.2). The order of the judge resorted to who declares his own competence or incompetence is moreover impugnable, within 30 days of

service or 60 days from its publication, with the regulation of competence (art. 16, para. 3) which in this case is not a precautionary instrument, but becomes a "subsequent" means of opposition that nevertheless follows the discipline in Art. 15 relating to "precautionary" regulation.

Lack of competence can also constitute specific grounds for appeal of the charge of the judgement opposed before the Council of State "that, explicity or implicitly, decreed on competence" (art. 15 para. 1).

Thus the judgement that decided on competence together with merit, implicitly or even explicitly, is subject to ordinary appeal which can be based on the TAR's incompetence only. In this case the Council of State annuls the judgement and restores the documents to the competent TAR ex art. 105, para. 1, C.P.A.(if, on the other hand, the lack of competence is not produced as specific grounds of appeal one will build on the internal point judged ex art. 329, 2nd para., C.P.C., and in analogy to what is provided in Art. 9 C.P.A. on the topic of lack of jurisdiction).

Coming now to the precautionary rules of competence, it should straightaway be said that articles 15 and 16 of the C.P.A. outline different types.

First of all paragraphs 2 and 3 of the Code refer to the regulations as a petition of the interested party.

In this respect, with an obvious difference with respect to the previous discipline (art. 31, 2nd para., TAR law) which established, barring some exceptions, the possibility to put forward a petition within 20 days of the date of appearance before the court, in the new code a notable extension of the terms within which the regulations can be proposed can be noted.

Furthermore, whilst Art.31, TAR Law, legitimized only "the party resisting or intervening in the trial" to propose the regulation of competence, Art. 15, para. 2, C.P.A., using the generic expression "each party" would appear to legitimize to the purpose the petitioner as well: besides it is not impossible to suppose that the petitioner, realizing his

error or doubting the competence of the TAR resorted to, wishes to give rise to a clarification in order to prevent any appeal by the losing party, should the same TAR have implicitly considered, deciding on merit, its own competence.

Paragraph 2 of Art.15 consents the exercise of this faculty "until the case is decided in the first instance".

In accordance with the same paragraph "the regulations are proposed with a petition served on the other parties and filed, together with copy of the documents useful in order to decide, within 15 days from the last service at the secretary's office of the Council of State".

It is to be remembered that, with regard to the identification of the "other parties", prevailing case law has for some time been oriented at considering as such those who can legitimately contradict: the counter-interested, even if they are not appearing (see Cons. Stato, sect. IV, 21 January 2009, no. 293), or at the most the omitted counter-interested, present in court (see Cons. Stato, sect. VI, 5 January 2001, no. 22).

Paragraphs 3 and 4 of Art. 15 establish that the Council of State accepts the decision on the regulation of competence in Council Chamber with a binding order for the TAR in which it indicates the TAR competent and also provides for the costs of regulation. This judgement on costs "remains effective even after the sentence that defines the judgement, barring other decrees expressed in the sentence". So the TAR can amend what has been decided in the Council of State's order as to costs, constituting in any case, the regulation of competence, not a means of opposition, but a court incident relating to the judgement of first instance.

If the judgement is returned before the TAR declared competent within the final term of 30 days from service of the order pronouncing a decision on regulation, that is within 60 days of its publication, no forfeiture will take place (art., 15, 4th para., C.P.A.). In default of this, the judgement will be declared extinct ex art. 35, para. 2, lett. a, of the Code.

Nothing is said about the case, with reference to the case of regulation as a petition of the interested party, in which precautionary petitions have been proposed (and the TAR has not officially registered its incompetence). Evidently the tribunal should not consider itself deprived of the power to decide on the precautionary application despite the regulation proposal, even though naturally having to consider the effects of such a judgement temporary, as ratified in para 8.

Another type of regulation of competence is that officially required by the same TAR and regulated by paragraphs 5 and 6 of Art. 15 C.P.A..

Paragraph 5 assumes that a precautionary petition has been proposed by the claimant and that the TAR resorted to, even though not recognizing its own competence, does not decide to make provisions in accordance with Art. 16, para. 2, that is directly finding its own incompetence with an order that also indicates the competent TAR: this could happen in the case in which the judge is in doubt as to his own competence or is convinced that the parties would not be disposed to be acquiescent to the court's findings of incompetence, and wishes to prevent their opposition to the related order.

In these cases the administrative judge will request the regulation of competence with an order indicating the TAR it considers competent and will not have to decide on the precautionary application. Paragraph 6 determines some aspects of the trial.

As has already been mentioned, once the regulation of competence has been requested from the Council of State as a matter of course, the TAR resorted to cannot pronounce a decision on the precautionary application. Regarding this para. 7 of Art. 15 makes clear that "in defaults of proceedings as in para. 6, the petitioner can repropose the precautionary applications to the TAR indicated in the order as in para. 5 (that is the one with which the regulation of competence was requested) and the same decides in any case on the precautionary application, so even in the case that it in turn considers itself incompetent: this is certainly in order not to render ineffective a precautionary measure not agreed with the requisite timeliness.

Besides it is a secure fact, in the same provisions, what is set out in para. 8 that provides for the extreme operation of the precautionary measures adopted by the judge declared incompetent, which in any case lose their efficacy after thirty days from publication of the order regulating competence. Finally para. 9 specifies that "the parties can always re-propose the precautionary applications to the judge declared competent".

Furthermore it is necessary to point out the power of the Council of State, resorted to during the precautionary appeal, (art.62, para.4, C.P.A.), to raise before it violation by the judge in the first instance of rules on competence; in this case the supreme counsel submits the matter to the cross-examination of the parties and decides with an order, indicating the competent TAR in accordance with para. 4 of Art. 15.

It has already been remembered that, in the case in which the judge notes his incompetence as a matter of course, whether or not a precautionary measure has been requested, he must indicate with an order the TAR he considers to be competent, before which the trial will be reassumed (para.2, art.16 C.P.A.). Paragraphs 3 and 4 of Art.16 provide a further hypothesis of regulation for this eventuality, that can be requested as a matter of course by the judge before whom the trial is reassumed in accordance with para. 2.

In this case the procedural provisions contained in paragraph 6 and the following paragraphs in Art. 15 of the Code should anyway be applied.

This discipline of competence is all in all too complex, and one that certainly needs to be simplified. Corrective proposals are already under consideration along these lines.

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THE JURISDICTION OF THE ADMINISTRATIVE JUDGE

ANNUAL REPORT - 2011 - ITALY

(May 2011)

Prof. Vittorio DOMENICHELLI – Prof. Paola SANTINELLO

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1. INTRODUCTION: THE DIVISION OF JURISDICTIONS

Italian administrative law is organised following a system of double jurisdiction. This principle is stated by the Constitution (articles 24, 103 and 113), which - substantially absorbing the former discipline – bases the division of disputes between an ordinary judge and an administrative judge on the *causa petendi*, that is the nature of the legal position of the injured subject (respectively subject law and legitimate interest), with the exception of, as will be mentioned below, cases of exclusive jurisdiction, in which it is up to the administrative judge to be "also" cognizant of the rights of a subject, (as in Constitution Art. 103). It is interesting to point out the very recent sentence of the United Sections of the

Court of Cassation (Italian Supreme Court) dated 14 April 2011 no. 8487, where it is stated that the ordinary judge is also "permitted to be cognizant of legitimate interests, to know and if necessary rescind an act of the Public Administration, and to consequently bear on subordinate relationships according to the different types of jurisdictional intervention provided for".

Furthermore, there are special administrative jurisdictions like the Court of Auditors (*Corte dei conti*) and the National Water High Court (*Tribunale superiore delle acque pubbliche*).

The theme of the division of jurisdictions has long been the subject of normative arrangements, creative mediations of jurisprudence and consideration of the law. The milestone of this process of tidying up the subject is currently represented by the Code of Administrative Procedure, Legislative Decree 2 July 2010, no. 104, which has essentially kept the features and limits of the jurisdiction of the administrative judge unaltered (from the criterion of division according to the legal position of a subject – indeed, as mentioned, provided for by the Constitution - to the compensatory safeguard for damages caused by harm to legitimate interest, to the exclusion of jurisdiction on acts issued by the Government in the exercise of its political power, and so on).

2. RECENT REFORMS AIMED AT GUARANTEEING MARKET COMPETITION AND FUNDING CUTS IN PUBLIC COMPANIES

The Code confirms the structure of administrative jurisdiction (that is the various powers of cognizance and decision-making of the administrative judge) in *general jurisdiction of legitimacy, exclusive and extended to merit.*

Art. 7 of the Code, first of all, devolves to administrative jurisdiction "disputes in which an issue is raised about legitimate interests and, in particular matters stated by law, about the rights of a subject" (para. 1). It has been noted how this provision, compared to the text of art. 103 Const., does not reproduce the word "also" before "the rights of a

subject". However, interpreters consider that this provision is in line with what is called "living law", as required anyway by proxy law. In fact, it is well-known how the constitutional court has on more than one occasion stated that in the definition of the limits of exclusive jurisdiction it is first of all necessary for the dispute to involve *closely linked* legal positions of subject law and legitimate interest, (see sentence 204/2004). But the same Court has recently added that, if it is true though, in line with the historic reasons at the origin of the set-up of this jurisdiction, it is normally necessary for a tangle of legal positions to exist within which it is difficult to identify the descriptions identifying the single positions of the subjects, it cannot be excluded that the cognizance of the administrative judge can have as its aim *even the rights of the subject only*, provided that the administration acts as an *authority* and that is, through the use of administrative powers that can be exercised both through unilateral and authoritative acts and through consensual forms and, lastly, through conduct (sentences 259/ 2009 and 35/2010).

In its entirety, administrative jurisdiction is therefore linked to the *power of public administration*, in which the Code includes "also the subjects equivalent to it or in any case bound to respect the principles of administrative proceedings" (for a broader idea of the concept of Public Administration see also Art. 1-ter of L. 241/1990). This is clarified by the same Art. 7, paragraph 1 c.p.a. (code of administrative procedure), according to the provisions of which disputes devolved to administrative jurisdiction are those "concerning the exercise or non-exercise of administrative power".

Furthermore, they "concern measures, acts, agreements or conduct also indirectly ascribable to the exercise of this power, carried out by the public administration": being a general clause aimed at explaining the ratio of the different cases of administrative jurisdiction in uniform terms. That explains how if "disputes relating to acts, measures or omissions of the public administration are attributed to the general jurisdiction of legitimacy of the administrative judge…." (art. 7, paragraph 4) and cases of jurisdiction of merit are indicated by law and by Art. 134 of the Code (art. 7, paragraph 6), "agreements" and "conduct" fall within exclusive jurisdiction only.

If many uncertainties about the renewal of consensual activity (agreements) do not exist to the exercise of the power of authority (see art. 11, l. 241/1990), the issue of "conduct" has always appeared much more delicate and complex. The constitutional court has lastly made the distinction - now absorbed by the Code – between disputes relating to "conduct linked – even "indirectly" – to the exercise, even if unlawful, of a public power" and "conduct" carried out where power is lacking, that is through mere fact only, for which the related devolution to exclusive jurisdiction is to be regarded constitutionally unlawful, (sentences 204/2004 and 191/2006).

2.1 General jurisdiction of legitimacy

Originating as a judgement of supreme opposition (consisting solely in ascertaining the unlawfulness of an administrative act and resulting in its repeal), the traditional general model of administrative jurisdiction has continued to assert itself for a long time, despite new provisions on the subject of administrative justice (see. law 205/2000) having already marked it as being surpassed through the expansion of powers of cognizance and of decision-making of the administrative judge, explicitly permitting the administrative judge to deliver sentences of conviction for damages and compensation, specifically.

There has been a further turning point with the Code, that, after having sanctioned the general principle for which "administrative jurisdiction insures full and effective protection in accordance with the principles of the Constitution and European Law" (Art. 1 c.p.a.), invests the administrative judge with more extensive *investigative powers* – according to Art. 63 c.p.a. the judge can ask for clarifications or documents; allow witness evidence in writing; order checks to be carried out or, if it is indispensable, arrange for technical advice; also arrange the gathering of other means of evidence provided for by the code of civil procedure, with the exception of the formal examination and oath – and more extensive *decisive powers*, with the result that, at least implicitly, the possibility is allowed to also issue declaratory and investigative judgements, as well as convictions to adopt all

appropriate measures to protect the legal position of the subject produced before the court (cf. art. 34, para. 1, lett. c), c.p.a.). Art. 7, para. 4, c.p.a. , furthermore includes disputes (also) "relating to damages for injury to legitimate interests and to other consequential proprietary rights, even if introduced autonomously" (so settling the much debated question of the administrative preliminary question), providing that the forfeiture time limit of 120 days is respected, provided for by Art. 30 c.p.a., which, amongst other things, if the necessary conditions exist, provides for compensation for damages specifically, in accordance with Art. 2058 c.c. (see also art. 34, para. 1 lett. c). And more, Art. 31 c.p.a., regulating action against silence, gives power to the judge to pronounce on the truth of the claim produced in court (in the case of bound activity) and to establish nullity provided for by the law.

2.2 Exclusive jurisdiction

As previously mentioned, in some particular matters provided for by the law, where the tangle of legal positions ascribable as much to subject law as to legitimate interest is difficult to disentangle – that is, one makes an issue of the rights of a subject provided that they are linked to the exercise of administrative power – disputes are reserved for the "exclusive" jurisdiction of the administrative judge.

The scope of exclusive jurisdiction has been defined by subsequent legislative steps (see in particular articles 33 and 34 of legislative decree 80/1998, succeeded by Art. 7 of law 205/2000), but essentially redrawn by constitutional law, the principles of which have now been absorbed in the Code, together with a structural acknowledgement (art. 133 c.p.a.), even though it is non- peremptory (exceptions have been made for "further provisions of law"), of the different and very numerous cases in which this jurisdiction applies.

So the 2010 legislator has confirmed the "full jurisdiction" of the exclusive administrative judge, to whom fall the *investigative powers* now provided for in the first instance – and extended as already mentioned to the general jurisdiction of legitimacy –

from Art. 63 c.p.a., and the *decisive powers*, already recognized by the previous discipline, and now by Art. 7 c.p.a., at para. 1, at para. 5 ("…the administrative judge is also cognizant of the disputes in which there is an issue of rights of the subject, also for the purposes of compensation), at para. 7 ("The principle of effectivity is fulfilled through the concentration before the administrative judge of any form of protection of legitimate interests and, in the particular matters indicated by the law, of the rights of the subject"). Remember, moreover, that Art. 30, para. 2, c.p.a., after having provided that, as much for the jurisdiction of legitimacy as for matters of exclusive jurisdiction, "the conviction for unjust damages deriving from the unlawful exercise of administrative activity or from the non-exercise of a binding one can be asked for", adds that "in cases of exclusive jurisdiction compensation for damages from injury to the rights of a subject" can also be asked and, more, referring to both jurisdictions that "if the necessary conditions exist as provided for by article 2058 of the civil code, damages in specific form can be requested".

It can be noted, to conclude this point, how the most significant changes made by the Code of Administrative Procedure have been concerned with general jurisdiction of legitimacy, rather than the exclusive one and that the two tend to align themselves substantially, although the *single court model of full jurisdiction* that was expected has not been totally realized and the general jurisdiction of legitimacy has not completely lost its original character of supreme opposition (ZITO).

2.3 The jurisdiction of merits

Merits jurisdiction is *extraordinary* and is exercised only in disputes indicated by the law and by Art. 134 c.p.a.. On the basis of this article such disputes, fewer in number compared to the past, have the purpose of: a) putting into effect enforceable jurisdictional judgements or final judgements in the scope of the court as in Title I of Book IV; b) acts and operations on the subject of elections, assigned to administrative jurisdiction; c) pecuniary sanctions, dispute of which is devolved to the jurisdiction of the administrative judge, including those applied by independent administrative authorities; d) disputes over

the boundaries of regional authorities; e) refusal to grant film permission as in article 8 of law 21 November 1962, no. 161.

The administrative judge in the exercise of this jurisdiction, compared with that of legitimacy, has greater decisive powers at his disposal, which are not limited to the annulment of the administrative act impugned, but spread to the possibility of taking the place of the administration (Art. 7, para. 6, c.p.a.) specifically through the adoption of a new act, or amendment or reform of the act impugned (Art. 34, para. 1, lett. d, c.p.a.). Nevertheless, it should be pointed out that the rules on the merit judge's control have always met with sporadic and limited enforcement, such that this jurisdiction, even after approval of the Code, is considered a "historic remnant".

3. LACK OF JURISDICTION

If substantially (the division of jurisdiction), the Code has not introduced very significant changes, the rules more closely connected to trial, especially regarding lack of jurisdiction and "*translatio iudicii*", reveal some originality.

Art. 9 c.p.a. – overtaking the precedents of the Plenary Assembly of the Council of State (*Consiglio di Stato*) (see decision no. 4/2005), but absorbing more recent trends of the united sections of the Supreme Court (*Corte di Cassazione*) (see no. 24883/2008 e n.3200/2010) – provides that the lack of jurisdiction can be pointed out by the judge, also official, only in the court of primary jurisdiction, and that in appeal and other courts of contest this is only possible if the lack of jurisdiction is produced with the specific reason "against the charge of the contested judgement that, implicitly or explicitly, has decreed on the jurisdiction", with the consequence that if the primary stage decision that examined the merit of the dispute is not contested from the point of view of jurisdiction, this is strengthened as the authority of the administrative judge.

Another new element – from the viewpoint of continuity of trial and integration between jurisdictions (DE PRETIS) - consists in the codification of the principle,

introduced in a general way by the c.p.c. (code of civil procedure), of the *translatio iudicii*, by which when jurisdiction is declined by the administrative judge in favour of another national judge or viceversa, *the trial and substantial effects of the application are safe facts,* provided that the case is re-proposed before the judge indicated in the judgement declining jurisdiction, within the peremptory term of three months from it being made final (Art. 11, para. 2 c.p.a).

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L'INSTRUCTION DANS LE CONTENTIEUX ADMINISTRATIF ITALIEN

COMPTE-RENDU ANNUEL - 2011 - ITALIE

(Mai 2011)

Pr. Carlo Emanuele GALLO

SOMMAIRE:

1. LE CODE DU CONTENTIEUX ADMINISTRATIF.

Le Code du Contentieux administratif, approuvé par la loi du 2 Juillet , 2010, n° 104, régit dans le deuxième livre, consacré au contentieux administratif de première instance, le régime de la preuve et les pouvoirs du juge.

Ces dispositions reflètent en partie ce qui, auparavant, avait été requis par la loi et a été reconnu comme correct par la jurisprudence et la littérature, et introduisent quelques nouvelles dispositions.

2. LA CHARGE DE LA PREUVE.

Le procès administratif italien est un procès de parties: ce sont les parties qui formulent leurs questions et demandent au juge les mesures conséquentes. La règle générale devrait être, par conséquent, la charge de la preuve: si la partie qui invoque le droit ne prouve pas les allégations de fait, son application doit être rejetée.

Le procès administratif est destiné à contrôler l'exercice du pouvoir de gouvernement et le citoyen est clairement en difficulté pour trouver du matériel de l'enquête, puisque le matériel est normalement disponible dans l'administration qui exerce le puissance et adopte l'acte que le requérant conteste. Dans cette situation, sur la base de la littérature faisant autorité, la jurisprudence a jugé que le requerant n'a pas une charge de la preuve complète, mais plutôt juste une charge de commencement de preuve; il doit soumettre au juge une reconstruction crédible de la réalité. Ce sera le même juge, qui utilsera ses propres pouvoirs dans la recherche de la vérité. De cette manière, le contrôle sur l'activité administrative est exercé aussi précisément que possible, de même que l'intérêt public étant en cause (une reconstruction complète de la question est Bertonazzi L.).

Ce système ne s'applique pas lorsque le citoyen affirme que cette administration a manqué à son obligation: dans ce cas, l'administration n'exerce pas la puissance, ne prend pas une vraie mesure, et, par conséquent, doit être considéré que le citoyen est en mesure de démontrer qu'il correspond à ses questions. Dans ce cas, le fardeau de la preuve est complète.

La regle générale qui se souvient n'est pas changé après que la loi du 7 août 1990, n° 241 a reconnu le droit du citoyen d'obtenir tous les documents qui sont utiles pour sa protection dans le procès, et cela parce que l'exercice de ce droit ne modifie pas le délai du recours juridictionnel, qui, par conséquent, peut aussi expirer lorsque le demandeur, sans faute de sa part, n'a pas encore reçu les documents sur lesquels faire valoir ses propres questions.

Le Code du Contentieux confirme cette orientation (ainsi R. CHIEPPA, M. CLARICH, C.E. GALLO, C. SALTELLI), comme le Conseil d'Etat a reconnu dans la décision de l'Assemblée plénière du 23 Mars, 2011, n° 3. Le Code, en fait, donne encore plus pleinement que les lois pertinentes précédentes, le pouvoir d'instruction au juge, qui peut ordonner l'examen de documents, la visite des lieux, les verifications, les expertises, l'enquête.

La seule mesure d'instruction que le juge ne peut pas disposer sans demand de parties est la déposition des témoins (article 63 du Code).

Il s'ensuit que si le Code prévoit que c'est aux parties de fournir la preuve qu'ils sont à leur disposition (article 64) cela signifie seulement que lorsqu'un individu est confronté à la puissance de l'administration a la charge de principe de la preuve et lorsqu'il est confronté à l'obligation de l'administration a le fardeau de la preuve: l'ordonnance de procédure, par conséquent, donne au juge un large pouvoir discrétionnaire (F.G. SCOCA, P. CHIRULLI).

Le comportement des parties est également significatif à un autre régard: le Code (article 64, ce qui est nouveau) prévoit que le tribunal devrait considerer acquis les faits pas spécifiquement contesté par les parties constituées.

3. L'ACCÈS AU FAIT.

Le juge administratif dispose d'un accès complet à la réalité: il peut, et doit, si nécessaire, pour déterminer totalement la réalité du fait qu'il est représenté par le requérant et d'autres parties de la procédure: le juge peut déclarer les faits sans être obligé de considérer les faits comme indiqué par l'administration.

En vertu du Code de procédure administrative (article 63, qui est une nouveauté), le juge administratif peut utiliser tous les moyens de preuve qui sont admis dans le procès

civil (sauf l'entrevue officielle et le serment que n'est considére pas comme éligible dans le procès administratif).

Et ainsi, le tribunal peut reclamer des documents, un'enquête, un'expertise, des eclaircisements administratifs, peut ordonner l'inspection des lieux, peut ordonner l'exécution d'une vérification.

Le tribunal peut aussi disposer la déposition des témoins (même cela est une nouveauté du Code), mais seulement si la chose est requise par les parties; les témoins doivent repondre par des déclarations écrites et que, afin de rendre plus rapide l'enquête sur l'affaire.

4. LE PRÉSIDENT ET LA SECTION DANS L'INSTRUCTION.

Dans le procès administratif il n'y a pas un moment spécifiquement dédié à l'acquisition de l'épreuve.

La compétence dans le domaine de l'enquête est donnée, en général, au le président et a la section. Le président peut intervenir lorsqu'il considère, après l'examen des demandes des parties; il doit seulement attendre, en règle générale, le délai pour la constitution de l'administration, qui doit produire les documents nécessaires à la décision de l'affaire. Le président peut confiée à un autre juge toute requête (seulement la section peut ordonner la verification et l'expertise).

La section, quand il est investi par la décision de l'affaire, peut ordonner toutes les misures d'instruction; pour éviter le retard de la decision, le Code (Art. 65) prévoit que la section doit etablir la date de la prochaine audience pour la discussion.

5. CONCLUSIONS.

Les pouvoirs d'instruction des juridictions administratives ont toujours été utilisés avec prudence; en règle générale, le juge s'est limité à l'acquisition de documents, comprenant les actes sur lesquels l'administration a adopté la mesure. Cette approche est justifiée et compréhensible si on considère que l'administration reconstruit habituellement exactement la réalité des faits, mais parfois se trompe dans l'interprétation des règles régissant ses activités.

Dans le procès administratif a toujours été plus importante la discussion sur les questions de droit que le débat sur des questions de fait.

Néanmoins, alors qu'en fait la question est posée, devrait être donné une réponse complète, avec une conclusion qui ne laisse aucune zone d'incertitude: le juge administratif, par conséquent, peut reconstruire la réalité, quand en a besoin de le faire. Un problème particulier concerne le contrôle des choix de l'administration: dans ces cas, il est difficile de distinguer si la loi avait pour but de donner à l'administration une competence technique unique, qui ne peut donc être évaluée par d'autres, ou si, au contraire, il a simplement voulu donner à l'administration la tâche de faire le choix de la technique la plus appropriée.

Devant la tendance à contrôler les activités de l'administration avec un contrôle complet, comme la Constitution prévoit, dans ses articles. 24, 103, 111, 113, le Code veut éviter que les très qualifiés évaluations techniques d'une administration peuvent être contredites sur la base d'une expertise: l'expertise peut être ordonnée seulement si elle est essentielle si, c'est-à dire, que l'évaluation technique de l'administration publique en aucune manière ne peut pas être considérée comme correcte.

Dans l'ensemble, même à l'égard de l'instruction, l'expérience du procès administratif, qui a maintenant plus de 130 ans d'histoire, est considéré comme positive.

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JURISDICCIÓN CONTENCIOSO-ADMINISTRATIVA

INFORME ANUAL - 2010 - ESPAÑA

(Mayo 2011)

Prof. Jesús GONZÁLEZ PÉREZ

ÍNDICE

1. IDEA GENERAL

La regulación del proceso administrativo ha sido objeto de múltiples modificaciones el ultimo año. A principios de mayo de 2010 entraron en vigor las reformas necesarias para la implantación de la nueva oficina judicial en este orden jurisdiccional (Ley 13/2009, de 3 de noviembre). Asimismo, entraron en vigor las normas promulgadas durante ese año: la LO 1/2010, de 19 de febrero, que excluye del conocimiento de los Tribunales del orden jurisdiccional contencioso-administrativo los recursos directos o indirectos que se interpongan contra las Normas Forales fiscales de las Juntas Generales de los Territorios de Alava, Guipuzcoa y Vizcaya (añadiendo un apartado d) del art. 3 de la LJCA), la Ley de 5 de julio de medidas contra la morosidad de las operaciones comerciales y la de 5 de agosto de modificación de la legislación de contratos del sector público. Y ya en 2011, algunas de las normas de la extensa Ley 2/2011 de 4 de marzo, de Economía Sostenible, afectan a la Ley reguladora de la Jurisdicción contencioso-administrativa.

De aquí la importancia de las obras generales aparecidas últimamente sobre la regulación del proceso administrativo. Como la de SANTAMARIA PASTOR (Ley reguladora de la Jurisdicción contencioso-administrativa, Comentario, Ed. Justel); la que coordinó MARTINEZ VARES (Contencioso-administrativo, Comentarios y jurisprudencia), que, al estar escrita por prestigiosos Magistrados de la Sala de lo Contencioso-Administrativo, ofrece la garantía de conocer la opinión de los más altos intérpretes de la normativa vigente, y, ya en 2011, después de la Ley Economía Sostenible, la 6ª edición de mis Comentarios a la Ley de la Jurisdicción contencioso-administrativo, editada, como las anteriores, por Civitas.

2. IMPLANTACIÓN DE LA NUEVA OFICINA JUDICIAL Y OTRAS REFORMAS

La Ley 13/2009, de 1 de noviembre, de reforma de la Legislación procesal para la implantación de la nueva Oficina Judicial ha sido la que ha afectado y modificado a mayor número de artículos de la LJCA. El art. 14 modifica 66 artículos de esta Ley.

La reforma tiene como finalidad esencial aumentar las competencias de los Secretarios judiciales, reduciendo la de los Jueces y Tribunales, lo que les permitirá centrarse en las funciones esenciales de juzgar y hacer ejecutar lo juzgado, lográndose una mayor agilidad de los procesos, superando en lo posible la tremenda lentitud de la Justicia. Al no limitarse la competencia de los Secretarios a actos de ordenación (diligencias de ordenación) del proceso y dictar unos nuevos tipos de actos procesales denominados decretos (no definitivos y resolutorios), ha sido necesario regular los recursos admisibles contra sus actos, a los que se dedica un nuevo artículo (el 102 bis), que establece que:

- Contra las diligencias de ordenación y decretos no definitivos será admisible recurso de reposición.
- Y contra los decretos que pongan fin al procedimiento o impidan su continuación o los demás que se determinan expresamente un llamado recurso de revisión ante el Juez o Tribunal. Y contra la resolución de éste recurso de apelación o casación en los supuestos previstos en los artículos 80 y 87.

Por otro lado, la LO 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la Legislación procesal para la implantación de la Oficina judicial, añadió una DA 15ª a la LOPJ en la que se establece el requisito de un depósito de escasa cuantía para interponer recursos en los distintos órdenes jurisdiccionales, cuyo fin principal –dice el preámbulo– es, “disuadir a quienes recurran sin fundamento jurídico alguno, para que no prolonguen indebidamente el tiempo de duración del proceso, en perjuicio del derecho a la tutela judicial efectiva de las otras partes personadas en el proceso” destinándose los ingresos que puedan generar por el uso abusivo del derecho al proceso de modernización de la Justicia.

3. ÁMBITO DEL ORDEN JURISDICCIONAL CONTENCIOSO-ADMINISTRATIVO

Dos de las disposiciones dictadas en el último año afectan al capítulo primero del Título I de la Ley de la Jurisdicción: la LO 1/2010, de 19 de febrero y la Ley 34/2010, de 5 de agosto, que modificó la Ley de Contratos del Sector público.

3.1. La LO 1/2010 de 19 de febrero

Esta Ley modificó el art. 9.4. LOPJ, que reduce el ámbito del Orden judicial contencioso-administrativo y, congruentemente, añadió al art. 3 de la LJCA, un apartado, el d), que excluye del conocimiento de esta jurisdicción –y le atribuye en exclusiva al TC– "los recursos directos ó indirectos que se interpongan entre las Normas Forales Fiscales de las Juntas Generales de los Territorios de Alava, Guipuzcoa y Vizcaya", dictados en el ejercicio de sus competencias exclusivas garantizadas por la DA 1ª de la CE y reconocida en el art. 42,1 del Estatuto de Autonomía del País Vasco (DA. 5ª,de la LOTC). Una correcta interpretación de la DA 1ª a la LJCA hacia innecesaria esta modificación.

3.2. La Ley 38/2010, de 5 de agosto.

El artículo 21.2, LCSP (añadido por la Ley 34/2010, de 5 de agosto), atribuye al orden contencioso-administrativo jurisdicción «para resolver las cuestiones litigiosas relativas a la preparación, adjudicación, efectos, cumplimiento y extinción de los contratos administrativos. Igualmente corresponderá a este orden jurisdiccional el conocimiento de las cuestiones que se susciten en relación con la preparación y adjudicación de los contratos privados de las Administraciones públicas y de los contratos sujetos a regulación armonizada, incluidos los contratos subvencionados a que se refiere el art. 17, así como de los contratos de servicios en las categorías 17 a 27 del Anexo II, cuyo valor estimado sea igual o superior a 193.000 euros del que pretendan concertar entes, organismos o entidades que, sin ser Administraciones públicas, tengan la condición de poderes adjudicadores. También conocerá de los recursos interpuestos contra las resoluciones que se dicten por los órganos de resolución de recurso previstos en el art. 311 de esta Ley». Se reitera así la

doctrina de los actos separables que había elaborado la jurisprudencia y ya había recogido la Ley de 1.956 y se extiende la jurisdicción a las cuestiones que se planteen en materia de contratos sujetos a regulación armonizada y a los otros que se determinan.

4. CONTENCIOSO-ADMINISTRATIVO EN MATERIA DE CONTRATACIÓN EN EL SECTOR PÚBLICO

Las normas procesales administrativas, al aplicarse a los litigios planteados en materia de contratación del sector público, han sido objeto de importantes modificaciones, aparte de la ampliación del ámbito de esta orden jurisdiccional, a que me refiero en el apartado anterior.

4.1. La Ley 34/2010, de 5 de agosto

La Ley 34/2010, de 5 de agosto, que incorporó al Ordenamiento español el contenido de la directiva 2007/66/CE en materia de contratos del sector público, ha introducido importantes modificaciones en la LCSP y en la LJCA. Entre ellas la creación de unos órganos especializados, dotados de cierta independencia para conocer de los recursos y reclamaciones en vía administrativa que se determinan.

La composición de estos órganos en los ámbitos de la Administración general del Estado, de las Comunidades Autónomas y de las Corporaciones Locales, se regula en el art. 311, LCSP. Conocerán de los recursos especiales en materia de contratación contra los actos que se determinan en el art. 310, LCSP y de las reclamaciones de los procedimientos de adjudicación de los contratos en los sectores del agua de la energía, los transportes y conocimientos posibles a que se refiere el art. 101 de la Ley 31/2007, de 30 de octubre.

El recurso especial que se regula en los artículos 310 a 319, tiene carácter potestativo y su interposición producirá los efectos de quedar en suspenso la tramitación del procedimiento de contratación.

Como dice el preámbulo de la Ley, la finalidad de la reforma no fue otra que reforzar los efectos del recurso, permitiendo que los candidatos y licitadores que

intervengan en los procedimientos de adjudicación puedan interponer recurso contra las infracciones legales que se produzcan en la tramitación de los procedimientos de selección contando con la posibilidad razonable de conseguir una resolución eficaz.

Para ello, la Directiva establece una serie de medidas accesorias para garantizar los efectos de la resolución que sé dicte en el procedimiento de impugnación. Una de tales medidas es precisamente la suspensión del acuerdo de adjudicación hasta que transcurra un plazo suficiente para que los interesados puedan interponer sus recursos. Congruente con ésta, se prevé también, que la suspensión de los acuerdos de adjudicación se mantenga hasta que se resuelva sobre el fondo del recurso o, al menos, sobre el mantenimiento o no de la suspensión.

Por otra parte y con carácter general se prevé la facultad de los recurrentes de solicitar la adopción de cualesquiera medidas cautelares tendentes a asegurar los efectos de la resolución que pueda adoptarse en el procedimiento de recurso o a evitar los daños que puedan derivarse del mantenimiento del acto impugnado.

4.2. La medida cautelar del pago inmediato de la deuda

Quizás, la más novedosa de las modificaciones de la regulación del proceso administrativo durante este último año haya sido la introducción de la medida cautelar de pago inmediato de la deuda, introducida por la Ley 15/2010, de 5 de julio. De aquí que haya suscitado el interés de la doctrina en las publicaciones periódicas, como ponen de manifiesto los siguientes trabajos: En el diario "La Ley" núm. 7472 de 21 de septiembre de 2010, el de DORREGO DE CARLOS y JIMENEZ DIAZ, La nueva regulación de la morosidad de las Administraciones públicas: criterios prácticos de aplicación del régimen de la Ley 15/2010, y, en "El Consultor de los Ayuntamientos y de los Juzgados", los de AYALA MUÑOZ, La Ley 15/2010, de 5 de julio, ¿un nuevo procedimiento judicial para demandar a las Administraciones públicas en caso de morosidad?. (núm. de 18 de octubre de 2010), y SANCHEZ CERVERA, La medida cautelar de pago inmediato de la deuda, introducida por la Ley 15/2010, de 5 de julio, y su aplicación al amparo del privilegio de

inembargabilidad previsto en el 173 Texto refundido de la Ley Reguladora de las Haciendas Locales (nº 8 de 30 de abril de 2011).

El desorbitado endeudamiento de las Administraciones por la insensata actuación de las personas que detentan el poder en cada una de ellas acometiendo actividades, muchas veces innecesarias, careciendo de fondos para hacerlo, conduce fatalmente a la imposibilidad de pagar a los contratistas, no ya en los plazos legales sino en plazos muy superiores con la consiguiente repercusión en las economías de las empresas y en la grave crisis que padecemos.

Y a nuestros geniales legisladores no se les ha ocurrido otra cosa que establecer lo que llaman "medida cautelar de pago inmediato de la deuda", que más se parece a un proceso ejecutivo…. El mecanismo que establece y regula en el nuevo art. 200 bis de la LCSP es el siguiente.

- Establecer un plazo para que las Administraciones hagan efectiva las deudas.
- Transcurrido este plazo, los acreedores podrán reclamar a la Administración contratante el cumplimiento de la obligación y el pago, en su caso de los intereses.
- Si transcurre un mes sin que la Administración hubiese contestado, se entenderá reconocido el vencimiento del plazo de pago y los interesados podrán incoar proceso administración en relación a la inactividad de la Administración, pudiendo solicitar como medida cautelar el pago inmediato de la deuda. Pero ¿cómo?.

La Ley prevé que se siga el procedimiento para acordar y hacer efectiva la medida cautelar. Notificado el auto al órgano administrativo, éste dispondrá "su inmediato cumplimiento", siendo de aplicación lo dispuesto en el art. 134 del Título IV, según la regla del art. 134.1 de la LRJPA.

Luego ante la resistencia de los titulares de los órganos administrativos, estaremos ante las enormes dificultades que plantea todo intento de hacer efectiva una condena de pago de una cantidad liquida, dificultades que se dan aunque ya exista sentencia investida

en cosa juzgada. Y cuando no hay dinero ni posibilidad de obtenerlo no podrá hacerse efectivo, ni de modo "inmediato" ni de otro modo. "Lo que es imposible es imposible y además...".

5. MODIFICACIONES INTRODUCIDAS POR LA LEY 2/2011, DE 4 DE MARZO, DE ECONOMÍA SOSTENIBLE

La Ley de Economía Sostenible ha afectado a la regulación de buena parte de los sectores del Ordenamiento jurídico, con las consiguientes repercusiones en el proceso administrativo. La DF 43ª modificó la Ley 34/2002 de 11 de julio de Servicios de la Sociedad de Información y de Comercio Electrónico y el Texto refundido de la Ley de propiedad intelectual de 1.996, así como los correlativos de la LJCA.

5.1. Autorizaciones judiciales

Las modificaciones introducidas en las Leyes 34/2002 y de la Propiedad intelectual se concretan en exigir la autorización judicial para realizar ciertas actividades: adoptar las medidas necesarias para que se interrumpa la prestación de servicios o para retirar los datos que vulneren los principios que se establecen. A los que figuraban inicialmente, la Ley de economía sostenible ha añadido «la salvaguarda de los derechos de propiedad intelectual».

5.2. Competencia

La competencia para otorgar la autorización se atribuye a los Juzgados Centrales de lo Contencioso-administrativo, modificando en tal sentido el art. 9.2, LJCA.

5.3. Recursos

Se admite recurso de apelación contra los autos dictados sobre la autorización judicial (art. 80.1. d) LJCA).

5.4.Procedimiento

Se añade a la LJCA el art. 122 bis, que regula los procedimientos para obtener la autorización.

5.5. Modificación de la DA 4ª, apartado 5, LJCA

Esta DA 4ª enumera una serie de actos contra los que era admisible recurso contra la Sala de lo contencioso-administrativo de la Audiencia Nacional.

La Ley de Economía Sostenible modifica el apartado 5, que queda redactado así:

> «5. Los actos administrativos dictados por la Agencia Española de Protección de Datos, Comisión Nacional de Energía, Comisión del Mercado de las Telecomunicaciones, Comisión Nacional del Sector Postal, Consejo Económico y Social, Instituto Cervantes, Consejo de Seguridad Nuclear, Consejo de Universidades y Sección Segunda de la Comisión de Propiedad Intelectual, directamente, en única instancia, ante la Sala de lo Contencioso-Administrativo de la Audiencia Nacional».

Y suprime el apartado 6.

6. JURISPRUDENCIA

La jurisprudencia de los Tribunales del Orden contencioso-administrativo ha seguido manteniendo la rígida interpretación formalista de los últimos años, con objeto de impedir el acceso del mayor número de recursos posibles ante los Tribunales Superiores, a fin de acelerar la Justicia.

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JUDICIAL REVIEW AND REMEDIES IN A NUTSHELL

ANNUAL REPORT - 2010 - Germany

(Mai 2011)

Prof. Dr. Klaus Ferdinand GÄRDITZ

INDEX

1. CONSTITUTIONAL LAW

Judicial review and remedies in administrative law are profoundly influenced by constitutional law. The current German corpus of administrative court procedure is based on constitutional guarantees, especially the effective recourse to the courts as a means to protect individual freedom rights. In fact, constitutional demands growing in detail over the past 60 years have forged a coherent system of judicial remedies putting the administration under effective control..

1.1 Guarantee of Effective Judicial Review

Article 19 paragraph 4 of the German Constitution (*Grundgesetz* – Basic Law) guarantees any person whose rights are affected by public authorities a general recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The guaranteed recourse is, according to the established jurisdiction of the Federal Constitutional Court, more than a mere right to file a request. It is the guarantee of effective judicial review. The Federal Constitutional Court has moulded detailed aspects of effectiveness out of the abstract constitutional provision. As a result, the whole administrative court procedural law is interspersed with constitutional stuff.

Due to the guarantee of effective judicial review, the legal control of the administration is vested in ordinary and special courts. Administrative jurisdiction is exercised by independent courts separated from the administrative authorities. There are special administrative courts, but they are organized as an ordinary court. According to Article 97 of the Basic Law, judges shall be independent and subject only to the law. Judges are appointed for life.

1.2 Organization of Administrative Courts

According to Article 74 paragraph 1 No. 1 of the Basic Law, the Federation has legislative power extending to the court organization and procedure. Based on this power the federal legislation enacted the Code of Administrative Court Procedure.

Regarding Article 95 of the Basic Law, the Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction. In accordance with Article 92 of the Basic Law the remaining courts – the large body of the judicial branch – are courts of the constituent states (Länder). As a result of the special federal structure of Germany, judicial review of the administration rests with the administrative courts of the Länder, at least in principle. It is even within their jurisdiction to control the federal administration.

The organization of the courts remains within the legislative competence of the Federation (see the aforementioned Article 74 paragraph 1 No. 1 of the Basic Law). According to federal law, administrative courts of the Länder shall be the Administrative Courts (the first instance competent in most cases) and one Higher Administrative Court (primarily a court of appeal with power to review the relevant facts) in each state; in the Federation it is the Federal Administrative Court, which shall have its seat in Leipzig. The competences of the Federal Administrative Court primarily include the legal control of the Länder courts as a court of appeal regarding federal law. The Federal Administrative Court has only a very limited jurisdiction as a first instance.

In addition to the general administrative jurisdiction, there are special administrative courts. Fiscal Courts are competent to rule on matters of tax law. The jurisdiction of the Social Courts includes cases arising under the public social security system. Even ordinary courts have jurisdiction over specific administrative law cases. They act as functional administrative courts. The most important administrative law cases within the jurisdiction of ordinary courts are the review of administrative acts of the antitrust and competition authorities, energy regulation law, and public liability.

Judicial review of parliamentary statute law is monopolized in the Federal Constitutional Court and 16 constitutional courts of the constituent states with regard to Article 100 paragraph 1 of the Basic Law: If a court concludes that a law enacted by parliament on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Länder court with jurisdiction over constitutional disputes where the constitution of a constituent state is held to be violated, or from the Federal Constitutional Court where the Basic Law is held to be violated.

2. STATUTE LAW

2.1 The Code of Administrative Court Procedure

The rules of administrative court procedure and provisions on the organization of courts are laid down by federal statute law, the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*). There are special (but similarly structured) codes regarding fiscal courts and social courts: the Code of Fiscal Court Procedure (*Finanzgerichtsordnung*) and the Code of Social Court Procedure (*Sozialgerichtsgesetz*). In addition, there are complementary provisions on administrative court procedure in profusion, scattered on various administrative statutes, e. g. in the laws on energy and telecommunications regulation, the law on judicial review and remedies regarding environmental procedures, or in the German antitrust law.

2.2 General Principles of Administrative Court Procedure

Remedies to administrative courts are, at least in general, restricted to plaintiffs that can claim the impairment of an individual right. In accordance with Section 42 paragraph 2 Code of Administrative Court Procedure an action shall only be admissible if the plaintiff claims that his/her rights have been violated by the relevant administrative act

or its refusal or omission. As a consequence, neither a mere interest of the plaintiff nor public interests in the legality of administrative actions are sufficient to grant a standing.

Regarding the procedure at court, there are some general principles an administrative court has to apply. There is the fundamental right to be heard (Article 103 paragraph 1 of the Basic Law) demanding the court to consider every relevant aspect brought forth by the plaintiff or by another party during the procedure. In addition, German administrative court procedure is an inquisitorial system of administrative justice. Thus, the court has to examine the relevant facts ex officio. The court is not bound to the submissions or to the motions for the taking of evidence of the relevant parties (Section 86 paragraph 1 Code of Administrative Court Procedure).

2.3 Remedies

The Basic Law guarantees effective recourse to the courts, as far as any person can claim that his/her rights are violated by public authority (see above). Thus, the Constitution warrants an effective and coherent system of remedies against all acts of state that affect the citizens. The Code of Administrative Court Procedure offers an adequate set of remedies, at least if the code is interpreted in conformity with the Constitution. Nonetheless, remedies are divided into separate actions with different requirements for the admissibility of an action and with different competences of the courts to remedy a request.

The most important actions are the rescissory action (*Anfechtungsklage*) and the enforcement action (*Verpflichtungsklage*) according to Section 42 paragraph 1 Code of Administrative Court Procedure, as both actions are applicable to administrative acts, the common legal form of an administrative measure. An administrative act is a sovereign decision of a public authority on a specific case under public law. According to Section 42 paragraph 1 Code of Administrative Court Procedure, the plaintiff can request by means of an action the rescission of an administrative act or the sentencing to issue a rejected or omitted administrative act. If the dispute does not rest on the questioned legality of a valid administrative act the code offers an action for a declaratory judgement

(*Feststellungsklage*): The establishment of the existence or non-existence of a legal relationship or of the nullity of an administrative act, according to Section 43 Code of Administrative Court Procedure, may be requested by means of an action if the plaintiff has a justified interest in the establishment being made soon. In addition, there is an unwritten (but constitutionally demanded) residual action that, like an omnibus clause, covers every request that is not explicitly codified within the Code of Administrative Court Procedure, the so called general action for performance (*allgemeine Leistungsklage*). Thus, recourse to the courts is made independent from the legal form of administrative measures, and a comprehensive system of actions against every act of state that might impair individual rights is established.

A successful rescissory judgement rescinds the relevant administrative act and, thus, eliminates any of its effects that impair the plaintiff's rights (see Section 113 paragraph 1 Code of Administrative Court Procedure). If an enforcement action or a general action for performance proves to be well-founded, the administrative court puts the obligation incumbent on the administrative authority to effect the requested official act (see Section 113 paragraph 5 Code of Administrative Court Procedure). If the administrative authority does not comply with the relevant judgement, the final verdict can be enforced against the authority through the court (see Section 167 et sequ. Code of Administrative Court Procedure).

Prior to lodging a rescissory or enforcement action, according to Article 68 Code of Administrative Court Procedure the lawfulness and expedience of an administrative act shall be reviewed in preliminary proceedings by administrative authorities. The functions of preliminary proceedings are, on the one hand, to offer the public administration an instrument of self-regulation and, on the other hand, to grant the applicant an additional remedy to settle conflicts without involving the courts. Notwithstanding that, federal law enables both federal and state legislation to establish exceptions and exclude preliminary proceedings for certain subjects. A broad scope of statute provisions in federal and state administrative law has taken advantage of this facility. A couple of constituent states have generally abolished preliminary proceedings, recently, to reduce bureaucracy and to accelerate procedure.

2.4 Interim measures

According to Section 80 paragraph 1 Code of Administrative Court Procedure an objection raised by a plaintiff and a rescissory action automatically enfold suspensory effect, that means that the relevant administrative measure may not be enforced until the court hands down a decision. Thus, there is no need to provide additional interim measures as long as the suspensory effect lasts. Nonetheless, there are various legal exceptions and restrictions reducing the suspensive automatism. The administration can avoid the suspensory effect if the relevant administrative act is replenished with a special clause providing for immediate enforcement. In those cases, on request by the plaintiff, the court dealing with the main case may completely or partly order or restitute the suspensory effect in accordance with Section 80 paragraph 5 Code of Administrative Court Procedure.

In all other cases, Section 123 Code of Administrative Court Procedure empowers the administrative courts to provide interim measures with regard to a pending dispute. On request of the plaintiff, the court may, even prior to the lodging of an action, provide interim measures regarding the subject-matter of the dispute if the substantial danger exists that a right of the plaintiff might be considerably impeded. Interim orders are also admissible to settle an interim condition regarding a contentious legal relationship if a regulation by court appears necessary, above all in order to avert major disadvantages or prevent immanent force.

3. IMPACT OF EUROPEAN LAW

European Union law has a deep impact on the German system of administrative court procedure, as European Union law depends on national courts enforcing European law and improving its effectiveness in the decentralized European enforcement system. The general aim of effectiveness followed different paths to influence national law. From a European perspective a plaintiff that takes recourse to the courts to file a European law

based claim is an effective instrument to put the decentralized administrative enforcement of European Union law and the national administrations under effective judicial control. As a result, the narrow concept of standing under German administrative court procedure law has been widened step by step to fit the European demands regarding effective decentralized judicial review. Although European law does not demand a systematic shift from an individual rights based standing to a concept of 'objective' control, the effectiveness of European Union law depends on a broad access to national courts and is based on a more or less instrumental concept of individual rights. Therefore, a substantial interest in the enforcement of an EU directive or regulation may be sufficient to create an individual right and an appropriate standing before the national courts, even though German administrative law doctrine might have qualified the relevant provision as 'merely objective' (that means not granting individual rights). In effect, European Union law has opened the recourse to the courts, in particular in disputes concerning environmental standards.

A recent decision of the European Court of Justice shows obvious conflicts between, on the one hand, the European approach of a wide access to justice as a means of public control and, on the other hand, the narrow concept of standing of the German administrative court procedure law. Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment warrants that members of the "public concerned" have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the relevant Directive (Article 3 paragraph 7 and Article 4 paragraph 4). In contrast, the German law on judicial review and remedies regarding environmental disputes (*Umweltrechtsbehelfsgesetz*) grants standing only as far as an organization could claim an infringement of a provision granting individual rights (not necessarily to the organization itself but to any individual subject). This statute obviously proved to be unsuitable to translate the wide access to justice concept of Directive 2003/35/EC into adequate German court procedural law. Thus, the European Court of Justice, in a Judgement from 12 May 2011 (C-115/09), unsurprisingly (and rightly) quashed the German attempt to evade an effective transformation of the Directive.

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LIABILITY AND ACCOUNTABILITY

(Ombudsman)

ANNUAL REPORT - 2011 - UK

(July 2011)

Dr Richard KIRKHAM[1]

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1. OMBUDSMAN SCHEMES IN THE UK

The first statutory ombudsman scheme in the UK to be established was the Parliamentary Commissioner for Administration in the Parliamentary Commissioner Act 1967. The idea has become firmly embedded within the UK's constitutional arrangements since that point, with an array of ombudsman schemes established in both the public and private sectors. The result is that a significant amount of redress is achieved through ombudsman schemes, but there is no one clear model or structure of ombudsman, or even agreed nomenclature.[2] Indeed, if one broadens one's concept of an ombudsman somewhat, the UK also possesses a wide range of ombudsman-like bodies that perform, at least partially, some of the roles normally attributed to an ombudsman.

1.1 The different ombudsman schemes

The oldest form of ombudsman in the UK are the public services ombudsmen. A number of ombudsman schemes have been introduced as the idea gradually spread across different branches of the public sector and account was taken of the different nations within the UK and their corresponding different layers of devolved government. The ombudsman

[2] Reference is frequently made to 'Commissioners' or 'Commission' or 'Adjudicator'.

schemes set up more recently are supported by more thorough supporting legislation. The powers and remit of the older ombudsman schemes have been or are in the process of being updated to reflect more clearly the practice of the ombudsman today.

Public services ombudsman schemes can be loosely categorised into two branches – (i) ombudsmen schemes that are responsible for investigating a broad spectrum of government activity and which have full autonomy from the executive, a design feature emphasised through a strong parliamentary connection, and (ii) ombudsman schemes with more confined and specialised jurisdictions and which generally are not fully independent of the executive and which do not necessarily report to Parliament.

Of the ombudsmen generally considered to operate with full independence, the post of Parliamentary Commissioner for Administration (capable of dealing with complaints about most central government activity) has, since 1973, always been jointly held by the Health Service Commissioner for England. The joint post is generally referred to today as the Parliamentary and Health Service Ombudsman. Separately in England there is a Local Government Ombudsman for England (which has a weak relationship with parliament), while in Northern Ireland there are two ombudsman schemes (the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints), although again the posts are in practice held by the same individual. In both Scotland and Wales there is an ombudsman scheme linked to a local democratic chamber, with general responsibilities for public service issues.

Within the 'non-parliamentary' category of ombudsman schemes there is much variety. Generally the posts have been established in response to a specific need in a particular area of public sector activity. Hence within the UK, there is more than one specialised 'ombudsman-like body' operating in the fields of prison and probation, the

police, housing and higher education. Other schemes perform some of the services one might expect an ombudsman to perform, although by no means all, such as the Children's Commissioner for Wales. The specialised role of the Information Commissioners in the UK should also be noted as their existence means that an ombudsman does not perform the function of dealing with complaints in this area. Unlike an ombudsman, the Information Commissioners operate more in a quasi-judicial capacity and their operation is more clearly integrated into the legal system (namely notices/decisions issued by the Information Commissioners can be appealed).

Most of the public services ombudsmen and ombudsmen-like bodies in the UK are members of the British and Irish Ombudsman Association (BIOA), along with a number of ombudsmen from the private sector. Details of all these institutions can be found on the association's website (see below, Part 4).

1.2 The roles of the ombudsmen

The specific roles of ombudsmen in the UK are generally detailed in statute. The dominant role of an ombudsman is as a complaint handler within a defined jurisdiction, although the expectation is that the scheme will also assist in the process of improving the quality of administration through the recommendations that it makes and the provision of guidance (this latter role is not always specified in legislation). Other roles of the ombudsman can be identified. In particular, the ombudsman has often become a source of information and guidance about the administrative justice sector as a whole for citizens that find it difficult to negotiate the complaints system.

1.3 Powers to recommend redress

The exact legal description of the ombudsman's powers varies from scheme to scheme, but the most common denominator is the power to make recommendations where, after an investigation, the ombudsman is satisfied that an injustice has occurred as a result of maladministration. In addition, a number of ombudsman schemes now refer to 'service failure' as a ground for making a recommendation.

Ombudsmen in the UK do not operate on the basis of precedent nor does legislation or case law detail the meaning of the tests of either 'maladministration' or 'service failure'.

The range of recommendations that the ombudsman can make in the UK is considerable. The main limitations on the recommendations an ombudsman can make are twofold. First, ombudsmen cannot make a remedy that requires the enforcement of a court eg injunction, declaration or a quashing order. Second, the ombudsman is required to consider the legal and practical ability of the public body involved to implement the recommendation. Subject to these qualifications, in principle, the ombudsman can recommend any remedy that is suitable to the needs of the situation, including financial compensation.

1.4 The implementation of redress

With one exception, the Commissioner for Complaints for Northern Ireland, there is no power to enforce in the courts the recommendations of the ombudsmen in the UK. The success of ombudsman schemes, therefore, is dependent on a range of factors, including (i) the respect in which ombudsman schemes are held by the bodies that they investigate; (ii) the potential for public embarrassment that a refusal to implement an ombudsman's recommendations might lead to; (c) the ability of the ombudsman scheme to

obtain support for its work from its associated democratic assembly; (d) the potential for the aggrieved complainant to judicially review the decision of the public body not to implement the ombudsman's recommendations.

2. DEVELOPMENTS IN 2010/11 – LEGISLATIVE REFORM

There have been a series of interesting moves during the year to reform the legislative basis of the ombudsman schemes in the UK.

2.1 The reform work of the Law Commission

The Law Commission in England and Wales has for several years been developing proposals to reform the law on redress in the public sector.[3] The conclusion of the review was that no concrete proposals were recommended by the Law Commission, but it did undertake to carry out a further review of one particular aspect of the system of redress in England and Wales – the work of the public sector ombudsmen.

The review of the public service ombudsmen is ongoing, with the aim to publish a final report in the summer 2011. Some of the likely proposals can be anticipated as they have been trailed in the previous work of the Law Commission. Thus it is probable that the Law Commission will make recommendations in the following areas:

[3] Law Commission. 2010. *Administrative Redress: Public Bodies and the Citizen*. Law Com 322. London: Law Commission.

- The appointment arrangements for the Parliamentary Ombudsman
- Allowing for a more flexible process of submitting complaints – this will include the removal of the MP filter from the Parliamentary Ombudsman scheme
- Amending legislation to facilitate a more flexible distribution of cases between the courts and the ombudsmen
- Clarifying the process by which complaints are closed
- Harmonising the reporting arrangements for the ombudsman

In addition to these potential reforms, the Law Commission have been looking at some more contentious issues. In particular, the Law Commission has been looking at the legal status of ombudsman reports (for s further discussion, see below, 3.3).

2.2 The expanded role of the Scottish Public Services Ombudsman

A feature of the evolution of the work of ombudsmen in the UK over the last ten years has been the enhanced emphasis that has been placed on the relationship between lower level complaints processes and the ombudsman. The importance and nature of this relationship has recently been clarified in Scottish law. The *Public Services Reform (Scotland) Act 2010*, section 119 has given the Scottish Public Services Ombudsman a new statutory responsibility for publishing a Statement of Principles concerning complaint handling procedures for certain public authorities and reporting on the compliance of those authorities with the Principles.

The remit of the Scottish Public Services Ombudsman has also been expanded during the year as a result of legislative reform aimed at rationalising the complaints handling system in Scotland. As a result, the functions of the Scottish Prisons Complaints

Commission has been transferred to the Ombudsman, as has the complaints handling function of Waterwatch.

2.3 Consultation in Northern Ireland

The legislative arrangements for the ombudsmen in Northern Ireland are amongst the oldest in the UK. For some years the benefits of updating those arrangements have been debated and proposals have now been put forward by a Committee of the Assembly and a consultation process undertaken. The outcome of that process should be announced shortly, with the likelihood that legislative reform will be recommended.[4] The reforms that are currently being considered include proposals on:

- The merger of the two ombudsman schemes
- The appointment and funding of the ombudsman
- Facilitating joint work with other public bodies
- Enhancing the links with the Northern Ireland Assembly
- A specific power to issue guidance
- Extending the jurisdiction to cover all bodies that spend public money
- Considerations of professional judgments in social care
- Allowing for a more flexible process of submitting complaints – this will include the removal of the filter from the Assembly Ombudsman scheme
- Removal of the power to enforce in the courts a recommendation of the Commissioner for Complaints

[4] For a summary of developments in Northern Ireland, see Northern Ireland Assembly, Research and Library Service. 2011. *Research paper: The office of the Northern Ireland Assembly*. NIAR 145-11 (Paper 43/11).

- Allowing for enhanced openness in ombudsman reports as to any individuals investigated, provided they were given a right of reply

3. DEVELOPMENTS IN 2010/11 – SIGNIFICANT REPORTS ETC.

3.1 The proposed abolition of the Administrative Justice and Tribunals Council

Under the Public Bodies Bill currently being considered by Parliament, the Government are proposing to abolish the Administrative Justice and Tribunals Council. The Parliamentary and Health Service Ombudsman is a member of the Council, which has a remit to oversee, to report on and commission research upon the administrative justice system.

The abolition of the Council will have three main knock-on effects for the public sector ombudsmen. First, it will remove from the system a body that is currently, to a degree, capable of asking searching questions of the operation of ombudsman schemes in the UK. Second, it will reduce the potential for the administrative justice system to be coordinated in a coherent, effective and efficient fashion. At present in the UK there exists a highly complex network of dispute resolution options for potential complainants to choose from. The extent to which this system is appropriately designed for purpose or understood by users is uncertain. Nor is it clear that in the absence of the Administrative Justice and Tribunals Council any single government agency will be equipped to take on board an equivalent role. Finally, the abolition of the Council will make it more likely that complainants will continue to use the ombudsman partially as an information service to navigate their way around the administrative justice system, even when their grievance is not within the jurisdiction of the ombudsman.

3.2 The Equitable Life investigation

One of the largest, longest running and politically difficult investigations that the Parliamentary Ombudsman has ever had to undertake looks like it has come to an end, at least as far as the Ombudsman is concerned. The Ombudsman's investigation into the regulation of Equitable Life Assurance Society started in 2001, and has seen her produce more than one report. In 2008 the Ombudsman issued a report which found maladministration in the form of 'serial regulatory failure' on the part of the Government and recommended that an apology should be made and that the 'Government should establish and fund a compensation scheme with a view to assessing the individual cases of those who have been affected by the events covered in this report and providing appropriate compensation'.[5]

For over a year the Government refused to accept in full the recommendations of the Ombudsman, noting that the potential compensation involved was likely to amount to billions of pounds, by far the largest compensation package ever recommended by the Ombudsman. The Ombudsman did not accept the Government's response and a successful legal challenge to the response was brought by a group of affected complainants against the Government. This legal challenge obliged the Government to reconsider its position.[6] Following the General Election of 2010, the new Coalition Government accepted all ten findings of maladministration made by the Ombudsman in the original report. Parliament then passed the Equitable Life (Payments) Act 2010 with a view to putting in place a compensation scheme to implement the Ombudsman's recommendations.

[5] Parliamentary Ombudsman, *Equitable Life: a decade of regulatory failure* (HC 815 (2007/08)).

[6] *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495.

Whether or not the established compensation scheme will satisfy the grievances of the complainants is a matter over which the Government and the complainants remain divided. The Ombudsman herself has said:

'Whilst I recognise that some of the people who complained to me will be extremely disappointed by the Government's decisions on affordability and eligibility, I cannot say that those decisions are incompatible with the recommendations in my report.'[7]

Thus, with the matter having been debated and legislated on by Parliament, the Ombudsman has taken the view that for her part, the matter is now closed. Given the scale, complexity and contentious issues involved in this investigation, this represents a very positive conclusion to the Equitable Life investigation and retains the extremely successful record of the Parliamentary Ombudsman in obtaining redress for complainants once a recommendations has been made. It is very difficult to identify a single investigation of the Ombudsman that has not eventually led to a positive response from Government, but the Equitable Life affair thoroughly tested the constitutional relationship between the Executive and the Parliamentary Ombudsman.

3.3 Using the courts to force public authorities to reconsider their response to the ombudsman

[7] Parliamentary Ombudsman, *Letter to the All-Party Parliamentary Justice for Equitable Life Group*, 16 December 2010.

Ombudsman schemes are well known to differ from most other dispute resolution mechanisms in that the ombudsman cannot enforce their recommendations. Finding effective ways in which to force public authorities to respond appropriately to ombudsman reports, therefore, is an important public law issue. The case of *R (on the application of Gallagher & Anor) v Basildon District Council* [2010] EWHC 2824 (Admin) (*Gallagher*) represents the latest in a growing line of cases in which the courts have been prepared to rule the decision of a public authority to reject the recommendations of an ombudsman unlawful. The Administrative Court based the ruling on the failure of the local authority involved to take into account relevant considerations when the decision was made.

This approach to tackling ombudsman disputes will not always be easily available to complainants given the cost of bringing a judicial review challenge. However, it has so far proved effective in encouraging public authorities to respond in a more constructive manner which recognises the legitimacy of the ombudsman's findings and recommendations.[8] Fortunately, the occasions when this route will be necessary are few, but this development in law is an interesting and important legal addition to the ombudsman format.

4. WEB SITES

http://www.bioa.org.uk/ - British and Irish Ombudsman Association

[8] Basildon District Council (06/A/16993 + two others), Local Government Ombudsman website.

http://www.lgo.org.uk/ - Local Government Ombudsman for England

http://www.ombudsman.org.uk/ - Parliamentary and Health Service Ombudsman

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LIABILITY AND ACCOUNTABILITY

ANNUAL REPORT - 2011 - GERMANY

(July 2011)

Dr. Athanasios GROMITSARIS

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3. WEB SITES

1. LIABILITY OF GERMAN PUBLIC AUTHORITIES

1.1 Liability under the European public order

1.1.1 Liability for violation of the European Convention on Human Rights

The European Convention on Human Rights is a constitutional instrument of European public order. According to the German Federal Constitutional Court the provisions of the German Constitution are to be interpreted in a manner "that is open to international law".[1] Contracting States are to be held accountable under the Convention for breaches of human rights within their own territory, and, as an exception to the principle of territoriality, for acts of their authorities which produce effects (effective "control and authority" over an individual, and thus "jurisdiction") outside their own territory.[2]

Article 5 (5) ECHR provides that the victims of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation that can cover both pecuniary and non-pecuniary loss. The claim is not based on fault. Nevertheless, a substantial award is more likely in cases of deliberate behavior not conforming to laws by the authorities.[3] This liability claim is comparable with the German cause of action for unlawful impairment of immaterial goods (*see below 1.5.2*) with the

[1] BVerfG,2BvR2365/09vom4.5.2011,Absatz-Nr.(1-178),headnote2
http://www.bverfg.de/entscheidungen/rs20110504_2bvr236509.html

[2] See ECHR, CASE OF AL-SKEINI AND OTHERS v. THE UNITED KINGDOM, judgment,Application no. 55721/07,7 July 2011, paras 130-140 with a review of relevant case law.

[3] See for ex. a police conduct that "amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979" in: ECHR, CASE OF BOZANO v. FRANCE (ARTICLE 50) Application no. 9990/82, 2 December 1987, para 2.

difference that the latter does not include damages for pain and suffering (*Schmerzensgeld*).[4] The award of damages is not a necessary reaction to a violation of Article 5. The Strasbourg Court has held in many cases under Article 5 (5) that a finding of a violation is sufficient just satisfaction. The specific right to compensation under Article 5 (5) ECHR does not, anyway, limit the general powers of the Strasbourg Court under Article 41 ECHR. The Strasbourg Court had to deal with the provisions of the German Criminal Code on "preventive detention" (*Sicherungsverwahrung*, §§ 66, 106 *Strafgesetzbuch StGB*) which occurred when individuals were considered a danger to public safety and had already committed crimes. These provisions have now been declared unconstitutional by the BVerfG. For an eleven years detention the Court awarded damages for "non pecuniary damage such as distress and frustration, which cannot be compensated solely by the findings of a Convention violation."[5]

The damages award under Article 41 ECHR is intended to achieve complete reparation for damage derived from a human rights violation. The exercise of discretion by the Strasbourg Court under Article 41 takes following factors[6] into account: The (deliberate, offensive) conduct of the respondent State or its agent and the State´s record of previous violations, the intensity or degree of loss, the seriousness of the violation, the existence of other measures in response to a violation, the possibility that the finding of a violation is sufficient satisfaction rendering any further monetary award to the applicant unnecessary, as well as consideration of the contributory negligence and the conduct of the

[4] BGHZ 122, 268 (268 and sequ.).

[5] ECHR, applications nos. 27360/04 and 42225/07, CASE OF SCHUMMER v. GERMANY Judgment (Merits and Just Satisfaction) 13 January 2011,para 92; ECHR, Application no. 6587/04, CASE OF HAIDN v. GERMANY, Judgment (Merits and Just Satisfaction) 13 January 2011, para 75 (detention must result from a conviction).

[6] For an analysis of this discretion from a comparative point of view see Gromitsaris, Rechtsgrund und Haftungsauslösung im Staatshaftungsrecht, Duncker & Humblot Berlin, 2006.

applicant in general. The application of the causation test is met with difficulties with regard to speculative losses or the broad head of loss of opportunities. Interest is recognized as a pecuniary loss and default interest is paid if the damages awarded by the Strasbourg Court under the Article 41 are not paid by the respondent State within three months of the date of judgment.

Recent cases with Germany as respondent State - apart from a breach of the right to "family life" [7] under Article 8 of the Convention – deal mainly with breaches of the right to trial within a reasonable time..[8] The Court reiterated that the reasonableness of the length of proceedings must be assessed with reference to "the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute".[9] Claims for pecuniary losses failed on causal grounds. The Court took its regular view that it was not in a position to speculate as to what the outcome of legal proceedings might have been, or as to how the applicant's professional life would have developed, had the violation not occurred, and therefore no causal connection between the pecuniary losses claimed and the breach of the requirements of Article 6 as to their length could be established. Nevertheless, in a case where the domestic authorities did not struck a fair balance between the general interest of legal certainty and the applicant's interest to have his claim examined by a court, and the delays which occurred were mainly imputable to the national court's conduct, although the German procedural law would have allowed declaring the applicant's motion admissible, damages for pecuniary loss were granted. The

[7] Application no. 20578/07, CASE OF ANAYO v. GERMANY Judgment (Merits and Just Satisfaction) 21 December 2010,para 77.

[8] The German Highest Court in Civil Matters (*Bundesgerichtshof*, BGH) also found in 2007 that a breach of the duty of the State to organize its courts in a way that avoids delays in bringing proceedings can trigger liability in damages: BGHZ 170, 260-275.

[9] ECHR, applications nos. 397/07 and 2322/07, CASE OF HOFFER AND ANNEN v. GERMANY, Judgment (Merits and Just Satisfaction) 13 January 2011,para 55.

Court "did not find it unreasonable to regard the applicant as having suffered a loss of opportunity in that he could not obtain a ruling on the merits of his claim".[10] With regard to non-pecuniary loss the finding of a violation usually would not constitute sufficient just satisfaction for the damage. Accordingly, also in the cases under scrutiny here, damages were granted for distress suffered from the unreasonable length of civil proceedings, or from the clearly excessive length of criminal investigation proceedings which were finally discontinued, and from the lack of an effective remedy to complain about that length.[11] Damages as just satisfaction are awarded under three heads: pecuniary loss, non-pecuniary loss, and costs and expenses. The latter cover the costs incurred in domestic proceedings as well as before the Commission and the Strasbourg Court only in so far as they have been actually and necessarily incurred, they were essentially aimed at preventing or redressing a violation of the Convention and they are reasonable as to quantum. In length-of-proceedings cases the protracted examination of a case beyond a "reasonable time" may involve an increase in the applicant's costs. [12]

1.1.2 The principle of Member State liability under European Union law

The European Court of Justice points out constantly in accordance with settled case law that there is a principle of Member State liability for loss or damage caused to individuals as a result of breaches of EU law for which the Member State can be held

[10] Application no. 71440/01, CASE OF FREITAG v. GERMANY, judgment (merits and just satisfaction) 19 July 2007para 40,64.

[11] ECHR, applications no. 45749/06 and no. 51115/06, CASE OF KAEMENA AND THÖNEBÖHN v. GERMANY, judgment (merits and just satisfaction) 22 January 2009,para 96; ECHR, Application no. 26073/03, CASE OF OMMER v. GERMANY (no. 2), judgment (merits and just satisfaction) 13 November 2008,para 82.

[12] ECHR, Application no. 26073/03, CASE OF OMMER v. GERMANY (no. 2), judgment (merits and just satisfaction) 13 November 2008,para 85; ECHR, CASE OF KAEMENA AND THÖNEBÖHN v. GERMANY, para 100; ECHR, application no. 58911/00CASE OF LEELA FÖRDERKREIS E.V. AND OTHERS v. GERMANY, judgment (merits and just satisfaction) 6 November 2008,para 112.

responsible. The question as to whether there is a principle of Member State liability is not within the national authorities´ remit. This principle is deemed to be inherent in the system of the treaties on which the European Union is based. According to that case-law the duty to pay damages holds good for any case in which a Member State breaches EU law, "whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation".[13] Individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals. It is, in principle, for the national courts to apply the criteria for establishing the liability of Member States and the extent of reparation for damage caused to individuals by breaches of EU law. The necessity of complying with the familiar principles of equivalence and effectiveness, however, brought about some frictions between the German law of tortious governmental liability and European case law. They concern the nature of the remedy in domestic law, the legitimacy of liability for legislative wrongs, the scope of the rights infringed and the interpretation of the fault requirement in German tort law in relation to the European law requirement of "sufficiently serious" breach.[14]

With regard to the Member State liability for breaches of EU-law the ECJ has left it to the domestic legal systems to attune the application of the *Francovich* remedy to their existing legal framework. The federal highest court in civil matters (BGH) considers the *Francovich* remedy as Community law (sui generis) remedy which is separate[15] from other

[13] ECJ, Case C‑429/09, 25 November 2010, Günter Fuß v Stadt Halle, para 46.

[14] Matthias Ruffert, AEUV Art. 340 (ex-Art. 288 EGV) [F. Member State Liability]Calliess/Ruffert, EUV/AEUV 4. Auflage 2011, paras 36-76.

[15] See for example recently LG Hannover , 14 O 57/10, 25.11.2010, Zeitschrift für Wett- und Glücksspielrecht (ZfWG) 2011, 75.

domestic remedies for the liability of public authorities, and especially the domestic head of tort for breach of official duty. On the other hand, it is argued that the cause of action for the remedy should be based on the "europeanisation" of the domestic head of tort (§ 839 BGB in conjunction with Article 23 GG) that provides for the liability of public authorities for wrongful conduct (*see under 1.4*). This view holds that the requirement of the breach of duty owed to a third party as well as the fault requirement should be interpreted in conformity with the community law; they should be modified to comply with the conditions set out by the ECJ. Therefore, according to the condition of "sufficiently serious breach" which amounts to the manifest and grave disregard of the limits of discretion Member States are granted for the measures they take, fault laid down in § 839 BGB turns into a notion of objective organizational "fault". At any rate, the right to reparation may not be made conditional on "a concept of fault going beyond that of a sufficiently serious breach" of European Union law "such as intentional fault or negligence".[16] The application of the second condition requiring that the violated Community rule should be designed to confer a right onto the aggrieved party brings about a modification of the national tripartite "protective norm test": this makes it much easier for the courts to establish that a Community law rule is intended to protect certain individuals and not the public at large.[17] Finally, the reparation of the loss or damage caused by them to individuals as a result of breaches of European Union law must be commensurate with the loss or damage sustained.[18]

[16] ECJ, Case C‑429/09, 25 November 2010, Günter Fuß v Stadt Halle, para 68.

[17] Wolfram Höfling, Vom überkommenen Staatshaftungsrecht zum Recht der staatlichen Einstandspflichten, in: Hoffmann-Riem/ Schmidt-Assmann/ Voßkuhle, Grundlagen des Verwaltungsrechts, Volume III, 2009, 945, paras 48-60.

[18] ECJ, Case C‑429/09, 25 November 2010, Günter Fuß v Stadt Halle, para 92.

1.2 Guarantee for governmental liability under the German Constitution

The liability of German public authorities regards the liability not only of the Federation (Bund) and the federal states (*Länder*), but also of other territorial units and entities of public law (for ex. municipalities). According to Article 20 III of the German Constitution (Basic Law, Grundgesetz - GG) law and justice bind the executive to the same extent as the judiciary and the legislature. This is the *Rechtsstaat* -Principle which places its emphasis on the protection of directly enforceable subjective individual rights and the guarantee to effective judicial protection against infringements committed by public authorities (Article 19 IV GG). Art. 34 GG completes this basic principle by establishing a so-called "institutional guarantee" for governmental liability. It makes clear that there must be some form of liability of public authorities. Exclusions and limitations of liability of public authorities are exceptional and need a rigorous justification.[19] The technical prerequisites of state liability are entrusted to the legislator who is not banned from abrogating existing provisions (for instance, the "old-fashioned" § 839 BGB)[20] and drafting a new statute.[21] This is a task the legislator already embarked on with the enactment of the State Liability Act in 1981 as a Federal act which was intended to simplify and co-ordinate the liability law of public authorities. Finally that statute was declared unconstitutional and void by the Federal Constitutional Court in 1982 on the grounds that the Federation lacked legislative competence to enact it.

[19] Fritz Ossenbühl, Staatshaftungsrecht, 7th Edition, C.H.Beck, Müchen, 1998, 6, 9, 294; Wolfram Höfling, Vom überkommenen Staatshaftungsrecht zum Recht der staatlichen Einstandspflichten, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Assmann/Andreas Voßkuhle, Grundlagen des Verwaltungsrechts, Volume III, C.H.Beck, München, 2009, 945, paras 19-22; Susanne Pfab, Staatshaftung in Deutschland, C.H.Beck, München, 1997, 95.

[20] See on the reasons for reform: Hans Jürgen Papier, GG Art. 34, Maunz/Dürig, Grundgesetz, 2011, paras 93-100; Ulrich Stelkens, Staatshaftungsreform im Mehrebenensystem, in: Die Öffentliche Verwaltung (DÖV) 2006, 770.

[21] See on this point the decision of the Federal Constitutional Court: BVerfGE 61, 149, 198.

1.3 Tortious liability

1.3.1 General rules

The German law of torts as codified in the Civil Code (BGB) consists of three general clauses, specifically regulated torts, and rules for vicarious liability. Strict liability rules are considered to be exceptional and are provided for by special statutes (for ex. traffic laws). The first general clause enumerates the interests to be protected; it is the "absolute" rights of the individual (which the legal system protects erga omnes) that are explicitly brought under the headings of "life, body, health, freedom, property or any other right" (§ 823 I BGB). The courts have brought under the heading of "other right" interests which are valid against all persons (not contractual rights) such as patent rights, trade rights, servitudes, the legal interest of the owner of an established and active business in that business as a going concern, and the general right to personality which grants protection against unauthorized interventions in a person´s private life and other attacks against her/his personality.[22] The development of the right to personality could be based on the Bonn Constitution of 1949 (Grundgesetz, GG) that declares the inviolability of the dignity of man (Article 1 GG) and guarantees the individual´s right to the free development of her personality in so far as she does not violate the rights of others or offend against the constitutional order or the moral code. The second general clause of the German law of torts deals with the infringement of laws intended for the protection of others (§ 823 II BGB), and the third concerns intentionally caused damage to another in a manner contra *bonos mores* (§ 826 BGB).[23]

[22] LG Berlin, judgment, 02.12.2009, 23 O 68/09,in: NVwZ 2010, 851-856.

[23] Gert Brüggemeier, From Individual Tort for Civil Servants to Quasi-Srict Liability of the State: Governmental or State Liability in Germany, in: Duncan Fairgrieve/Mads Andenas/John Bell (eds), Tort Liability of Public Authorities in Comparative Perspective, BIICL 2002, 571, 571-573. On a comparative analysis of the German approach to tort law on the basis of German case law translated into English see: Walter van Gerven/Jeremy Lever/Pierre Larouche (eds), Tort Law. Ius Commune Casebooks for the Common Law of Europe, Hart Publishing, Oxford and Portland, Oregon, 2000, 63-68.

Apart from the general clauses of tort the German Civil Code entails provisions for certain specific tort situations: endangering the credit of another person (§ 824 BGB), liability for inducing others to sexual acts (§ 825 BGB), liability for damage done by animals (§§ 833-834 BGB), liability for damage done by buildings (§§ 836-838 BGB), and a provision dealing with liability for breaches of official duties by civil servants (§ 839 BGB). This provision has recently been complemented by the liability for culpable conduct of court-appointed experts (§ 839a BGB).

1.3.2 Tortious liability of public officials and authorities pursuing ordinary private law activities

When public authorities act under private law (in a so called fiscal matter, or in solely financial or private relationships, not in a public function) the general rules of private law govern their liability. They can be sued for the enforcement of private contracts, for damages for failure to perform and for damages for tortious acts before the ordinary courts in the usual forms of civil procedure. In the event that the civil servants pursue ordinary private law activities, they will be held personally liable under § 839 I 1 BGB. Art. 34 GG will not apply: there will be neither extensive interpretation of the concept of "official" nor any exculpatory shift of liability onto the State (*see below 1.4.1*). Nevertheless, the civil servant will be able to avoid his personal liability if she/he can invoke the vicarious liability of the public authority as an alternative source of compensation for the aggrieved party on the basis of § 839 I 2 BGB. Other public employees (not civil servants) are liable according to the tort provisions applying to private persons. Where civil servants and public employees pursue ordinary private law activities public authorities are held vicariously liable for their civil servants and employees for torts of organs in accordance with § 831 BGB (dealing with liability for vicarious agents as long as there is an employer´s own fault in selecting or supervising the employee) or in accordance with § 31 BGB (dealing with

liability of an association for organs), and § 89 BGB (dealing with the application of § 31 BGB to the treasury and to corporations, foundations and institutions under public law).[24]

1.3.3 Tortious liability of public officials in case of breach of official duty (§ 839 BGB)

§ 839 BGB is the main provision on liability for unlawful und culpable conduct of public officials. In cases where § 839 BGB is applicable the general rules of tort (§§ 823, 826 BGB) do not apply. § 839 BGB imposes a personal liability to compensate on an "official" who intentionally or negligently violates an official duty and, hence, has to compensate for any damage, and not only for the infringement of the rights named in § 823 or for certain enumerated interests. This special liability is incurred only by "officials" having the status of "civil servants" in the narrow sense. In German administrative law the term "public servant" is used as a generic concept to include "civil servants" (*Beamte*) as well as "public employees" (*Angestellte*) and "public workers" (*Arbeiter*). Historically (during the 18th century) the relation between the public official and the public authority was perceived of through the lenses of a private law contract on mandate based on categories of Roman law. According to this perception, if an official acted illegally, those unlawful acts were *acta contra mandatum*, and as such, they were not attributable to the public authority. They were seen as simple torts committed by a private tortfeasor. Beyond the limits of the mandate the official became a private person that could be sued before the ordinary (civil) courts like every other private tortfeasor: *si excessit privatus est*. Despite all the criticism expressed throughout the 19th century against a legal thinking in terms of a private law mandate contract the idea of a purely private liability of the public official exceeding the limits of his powers is still to a certain extent reflected in § 839 BGB. The codification of private law that entered into force in 1900 did not change the private law

[24] Wolfgang Rüfner, Basic Elements of German Law on State Liability, in: John Bell/Anthony W. Bradley (eds), Governmental Liability: A Comparative Study, UKNCCL-BIICL, Bell and Bain Glasgow 1991, 249, 271-272; Brüggemeier in: Fairgrieve/ Andenas/ Bell, 571, 574.

tort liability of civil servants into some form of liability of the State itself. According to the wording of § 839 BGB the liability claim is directed against the official personally. A regulation on the liability of the State itself was introduced later on with the Weimar Constitution of 1919 which provided in Article 131 for a transfer of liability from the individual official to the State employing the official as its agent. Article 34 of the Basic Law (GG) has adopted this provision with minor changes.[25]

1.4 Liability for unlawful and culpable conduct in the exercise of public authority according to § 839 BGB in conjunction with Article 34 GG.

1.4.1 Transfer of the personal liability of the public servant onto the public authority

The combination of § 839 BGB with Article 34 GG creates a cause of action for an indirect State liability claim. It presupposes that the prerequisites for a personal liability of the official according to § 839 BGB are met. Pursuant to Article 34 GG the State can be held liable for the wrongs (violations of official obligations) done to the citizens by "any person, in the exercise of a public office entrusted to him". The State takes over the individual liability of the agent found under § 839 BGB exempting the agent from her/his personal liability. The individual agent as debtor is replaced by the State. The transfer is aimed to provide an efficient judicial protection for the aggrieved party who was often unable to gain compensation from the personally liable officials. Another rationale was that potential personal liability of the civil servants might make them act cautiously. To make sure that officials would not misuse the immunity granted to them from personal liability, Article 34 GG reserves a right of recourse against him on the part of the State to recover damages in case the breach of duty was willful or grossly negligent. Furthermore, Article

[25] See on the historical development: Horst Gehre, Die Entwicklung der Amtshaftung in Deutschland seit dem 19. Jahrhundert, Bonn 1958; see also: Stefan Oeter, The Responsibility of the State as Legislator in Germany, in: Eibe Riedel (ed.), German Reports on Public Law, Nomos, Baden-Baden 1998, 103, 104-106.

34 GG extends the meaning of "official" so broadly so as to include any person who is entrusted with a public office or certain public function (*Beliehene*), may he/she be a public servant, a member of an executive or legislative body at federal, regional or municipal level, and a private person or an enterprise[26] entrusted in a specific case with public authority. This can include for ex. a schoolchild who has been asked by the teacher to help with supervision or is assisting in physical education classes. Public bodies should not be allowed to escape liability by handing over public law duties to private persons. Even parliament is deemed to act as a "public official" within the meaning Article 34 GG.[27]

Tort liability for judicial acts is expressly regulated in § 839 II BGB. If judges breach their official duties in a judgment in a legal matter, then they are only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function. Tort liability for legislative wrong is not expressly regulated. The key question is how the Courts interpret the prerequisite in § 839 I BGB requiring the violation of an official duty to a third party by an officer, i.e. whether the members of Parliament owe an obligation to eventually aggrieved and individualized citizens and not to the public at large when they participate in legislating.

1.4.2 Fault

The concept of fault (willful or negligent breach of official duty) is understood as an objective standard of care with regard to particular types of behavior of a reasonable

[26] On the breach of duty on the part of a private enterprise tearing down a shaky old building that was becoming dangerous see OLG Koblenz, judgment, 05.05.2010 , 1 U 679/09, in: DVBl 2011, 60.

[27] Manfred Baldus/Bernd Crzeszick/Sigrid Wienhues, Das Recht der öffentlichen Ersatzleistungen, C.F.Müller, Heidelberg, 3d Edition, 2009, paras 101-115; Ralph-Andreas Surma, A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence, in: Fairgrieve/Andenas/Bell (eds), Tort Liability, 2002, 366-368.

public servant in the exercise of a public office entrusted to him. This concept comes very close to the notion of strict liability. There is a dominant trend from individual fault towards "organizational" fault.[28] No evidence of an identifiable public servant within the public authority´s hierarchy having committed a wrongful act is necessary.[29]

1.4.3 Breach of official duty owed towards the aggrieved party

As to the breach of "official duty" provided for by the wording of § 839 BGB, the courts ask the question whether the legal rules governing the activity of the public authority and its relationship to the aggrieved party have been breached. The damage must occur in the fulfillment, not merely incidentally during the performance of the official duty. Article 20 III GG establishes the main general duty incumbent upon public officials: they are bound by law and justice; they have to act lawfully and to exercise their discretion in a lawful manner. The case law has created a whole host of official duties that derive from all kinds of legal rules.[30] A discretionary decision may be reviewed by a court in a public wrong case and trigger liability for not plausible exercise of discretionary powers.[31] This refers to the question whether the aggrieved party suffered a loss because of an erroneous use or no use at all of the public authority´s discretionary powers, or because the exercise of discretion took forms that are not in accordance with the purpose of the respective legal rule that grants the authority discretionary powers.

[28] See for an objective fault during a fire brigade rescue operation: Oberlandesgerich (OLG) Hamm, judgment, 28.05.2010, I-11 U 304/0911 U 304/09 para 36.

[29] Ossenbühl, Staatshaftungsrecht, 1998, 72-76.

[30] Ossenbühl, Staatshaftungsrecht, 1998, 41-50.

[31] For interesting comparative insights with German case law in English translation see: B.s. Markesinis, J.-B. Auby, D. Coester-Waltjen, S. F. Deakin, Tortious Liability ofStatutory Bodies, A Comparative and Economie Analysis of Five English Cases, Oxfort & Portland (Oregon), Hart Publishing, 1999.

1.4.3.1 Protection of the claimant or of the public at large

The official duty must be owed to a third party.[32] This is the so called theory of the protective norm "*Schutznormtheorie*" which consists in a tripartite test: The object of the duty and the intent of the legal provisions that regulate that duty must be to safeguard not only the interests of the public at large, but must at least also protect the plaintiff or a class to which she/he belongs. The plaintiff must be a member of the class of people protected by the duty and the harm must fall within the scope of the duty. In the field of banking supervision and regulation the legislator excluded any liability of the supervisory authority by specifying that banking supervision is only performed in the public interest at large. This has been accepted by both the BGH and the ECJ.[33] The official duty to supervise banking activities is, hence, not owed to each individual bank account owner, thus excluding the liability of the authority for wrongfully performed supervision.[34] A duty towards the plaintiff deems to exist when the latter has a right to claim performance of that duty, when the public authority and the plaintiff have entered into a specific relationship (for example State school and pupil relationship), where the public authority interferes with absolute rights of the plaintiff, or when the legal rule imposing the duty on the public authority aims at the protection of the type of legal interest that is affected. Finally, legal duties incumbent upon the legislator are owed to the public at large. Only special case laws which are an exceptional type of legislation (Maßnahme- or Einzelfallgesetze) may establish a duty

[32] BGHZ, judgment 16.09.2010,III ZR 29/10, in: NVwZ 2011, 249-251.

[33] Ossenbühl, Staatshaftungsrecht, 1998, 57-69.

[34] Section 4 (4) of the Act Establishing the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – Bafin*) reads: "The Supervisory Authority performs its functions and exercises its powers exclusively in the public interest". BGH, 20.01.2005 - III ZR 48/01, BGHZ 162, 49; ECJ 12 October 2004 C-222/02 Peter Paul [2004]ECR I-09425.

aimed at protecting certain individuals and trigger a damages claim. Another exception is recognized for a breach of EU-law by the German legislator.[35]

1.4.3.2 Breach of international law

Violations of international law could also constitute a breach of duty owed to a third party. A distinction is drawn between contemporary cases and infraction of humanitarian law during the Second World War. The solutions are different depending on whether the cases arose before or after the Basic Law entered into force. Claims for damages can be brought by persons injured by the German armed forces when the latter violate international law in the course of their deployment outside Germany´s borders and this violation constitutes a breach of duty in the sense of § 389 BGB in connection with Article 34 GG.[36] In the *Distomo* case, however, the federal highest civil court (BGH) excluded State liability for illegal acts of sovereign power (of the German military forces committed on foreign soil) that were covered by the principle of sovereign immunity.[37] The case was decided on the grounds of the law as it was in 1944: In wartime the application of national State liability law was suspended and replaced by the special regime of the laws of war; individuals were not directly protected by international law, but mediated by their home State. In the same case, the BVerfG came to the conclusion that liability was

[35] BGHZ 134, 30-41, 24. 10.1996, III ZR 127/91, NJW 1997, 123.

[36] Niclas von Woedtke, Die Verantwortlichkeit Deutschlands für seine Streitkräfte im Auslandseinsatz und die sich daraus ergebenden Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen, Duncker & Humblot, Berlin 2010; Stefanie Schmahl, Amtshaftung für Kriegsschäden, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 699, 709; Elke Schwager, The Right to Compensation for Victims of an Armed Conflict, in: Chinese Journal of International Law 4 (2005), 417, 433.

[37] On jurisdictional immunities of the State in the Distomo case see International Court of Justice, 4 July 2011, Germany v. Italy; the Court granted Greece permission to intervene in the proceedings as a non-party (15 July 2011). Italian courts had declared Greek judgments based on violation of international humanitarian law by the German occupation forces during World War II enforceable in Italy.

excluded under domestic law anyway by virtue of Section 7 of the Imperial Law on the Liability for Civil Servants. This norm provided that with regard to foreigners the State assumed liability only if reciprocity of liability was secured, something Greece guaranteed only in 1957. The BVerfG concluded that only the liability of the State was excluded, not that of its officials. The Court qualified the "events in Distomo" not as a "typically National Socialist injustice" but as "a general, albeit hard misfortune of war (that is) inherent with violations of international law", and more particularly, as an illicit excess of "retribution measures against civilians uninvolved with military operations"[38]: The Court found that such "retribution measures were according to the legal understanding of the time often contrary to international law as to their nature and extent, however, they were considered also by the Allies during the Second World War to be permissible in principle."[39] In contrast with the application of the liability for culpable conduct, the Court held that the rules relating to State liability for unlawful conduct not based on fault cannot be applied to acts of the German military forces during an armed conflict because they are meant to cover only day-to-day administrative activities. In the *Varvarin Bridge* case the Higher Regional Court of Cologne held that the State liability law had developed since the Second World War and could now be considered as applying both in times of peace as war.[40] The BGH denied, however, compensation to the victims of the NATO attack on the bridge of Varvarin holding that neither international humanitarian law nor any official duty was culpably breached by the German soldiers.

[38] BVerfG, 2 BvR 1476/03 vom 15.2.2006, Absatz-Nr. (1 - 33), para 30 http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html

[39] The court quotes hier (para 26) Oeter, in: Fleck (ed.), Handbuch des humanitären Völkerrechts in bewaffneten Konflikten, 1994, Nr. 479.

[40] Stefanie Schmahl, Amtshaftung für Kriegsschäden, ZaöRV 66 (2006), 699-718; Markus Rau, State Liability for Violations of International Humanitarian Law - The Distomo Case Before the German Federal Constitutional Court, German Law Journal 2005, 701-720, 708.

1.4.4 Causation

The first stage of the causation inquiry consists in establishing a link between the tortfeasor´s conduct and the injury of the plaintiff. The conduct of the defendant is "assumed away" or "eliminated in thought" from the sequence of events in order to see whether the same result would then have occurred. In a further step a probabilistic criterion is introduced that excludes all consequences which lie outside the sphere of influence and risk of the defendant (adequacy theory)[41] and focuses on the general suitability of the event to lead in all fairness and reasonableness to the occurrence of the damage. Additionally, the damage must come within the scope of protection of the rules and duties which have been breached (*Schutzzweck*). All in all the assessment of causation is based on the respective "spheres of risk" of the parties. Public authorities are not liable for injuries that represent the realization of a risk that springs from the plaintiff´s sphere of influence which therefore entails among others the general risk associated with existence in modern society.

Public authorities can successfully defend themselves against the damages claim by showing that the damage would have occurred in any case whether or not a breach of duty could be established. However, there are two limitations[42] of this defense of alternative lawful conduct which denies a sufficient causal link between the public authority´s unlawful conduct and a damage that would also have occurred, had the authority acted lawfully. The first restriction regards the violation of rules that are designed to protect human rights, such as major procedural rules based on the constitutional protection guaranteed in Article 2 GG (right to self-fulfillment) and article 104 GG (liberty may be restricted only pursuant to a formal law) of the Basic Law, and therefore of such importance that their violation is sufficient in itself to lead to the liability of the public

[41] Ossenbühl, Staatshaftungsrecht, 1998, 70-72.

[42] Martina Künnecke, Tradition and Change in Administrative Law. An Anglo-German Comparison, Springer , Berlin Heidelberg 2007, 206, 236-238, 240.

authorities. The other restriction to the defense of "alternative lawful conduct" applies to cases in which the public authority had discretion in exercising its powers: The establishment of a causal link will fail unless it can be shown that the authority was under a duty to perform its discretion in a particular way and this exercise would have avoided the damage occurred.[43]

1.4.5 Alternative remedies

Pursuant to § 839 I 2 BGB, i.e. in the area of tortious liability for breach of official duty, if solely negligence is attributable to the official she/he may be held liable only if the aggrieved party is unable to obtain compensation from another source. The claimant often overlooks the fact that she/he carries the burden of arguing and proving that there is no alternative way of recovering her/his losses.[44] However, the courts consider this rule out of date because officials and public authorities should not conceal their liability behind the liability of private individuals. This holds true in cases where officials are in the same position as private persons, as for example in their daily activities: they are subject to a duty to take care just like any private person. When the official´s activity creates a source of risk in the same way as any other private person´s activity, this will give rise to a duty of care; the official will be held liable to the same extent und in the same way as private persons in the same situation. The official will have to take the same type of necessary precautions like a private person acting in the same situation to protect others against this risk (*Verkehrssicherungspflichten*).[45] While using the road officials are held liable according to

[43] Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, paras 152-157.

[44] Brandenburgisches OVG 2. Zivilsenat, 16.01.2007, 2 U 24/06 para 36, in: Landes und Kommunalverwaltung (LKV) 2008, 190-192.

[45] VG Aachen 6. Kammer, 05.01.2011,6 L 539/10 (Winter road maintenance services, violation of a duty to maintain and ensure safety); LG Heidelberg, judgment, 5 O 85/10, 06.10.2010 duty of care towards adult persons using a kids-tube-slide.

the same rules as other road users. Moreover, § 839 I 2 BGB will not apply to social security and private insurance payments. Those payments are not considered as an alternative redress from another source excluding the liability of officials. This is because the social security system should not bear the costs of a culpable breach of public duty. With regard to private insurance the insurer pays the policy holder a sum of money upon the occurrence of a specific event in exchange for periodic payment from the insured. These payments should not therefore be to the advantage of the tortfeasor, and they should not prevent the aggrieved party from obtaining redress from the public authority that has acted in a deficient manner.[46]

1.4.6 Contributory negligence

Where fault on the part of the injured citizen contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid, both depend on the circumstances, and in particular to what extent the damage is caused mainly by one or the other party. Pursuant to § 254 II BGB this also applies if the fault of the injured person is limited to failing to draw the attention of the public authority to the danger of unusually extensive damage, where the public authority neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. Contributory negligence regularly brings about only a reduction – not an entire exclusion - of the liability claim equivalent to the responsibility share.[47] Contributory negligence makes, in particular, a balance of interests possible between the protection of confidence for individual and collective investment on the one hand and contributive fault in cases where unlawfully granted planning permissions are challenged by a third party, on the other

[46] Reinert, § 839 BGB in: Bamberger/Roth (eds), Beck'scher Online-Kommentar BGB C.H.Beck München 01.03.2011, paras 88-94.

[47] Ossenbühl, Staatshaftung, 1998, 88-91.

(*Vertrauensschutz und mitwirkendes Verschulden*).[48] The injured party is (pursuant to § 254 II BGB in conjunction with § 278 BGB) also responsible for fault on the part of her/his legal representative, and of persons whom she/he uses to perform her/his obligation, to the same extent as for fault on her/his own part (for ex. lawyers, architects).[49]

1.5 Liability of public authorities for property damage and impairment of life, health and freedom not based on fault

1.5.1 Liability for lawful conduct: Compensation for breach of equality before public charges

According to the case law of the BGH, when lawful administrative measures affect property interests or personal interests of the citizens the latter are entitled to adequate compensation for the loss they have sustained. They have to show, however, that they were subjected to a special burden through lawful measures taken for the greater common good. Public authority´s action sacrifices individual´s particular legal interests for the benefit of the general public. The legal basis of this claim is to be found in the principles developed in the case law on the ground of the broad idea of sacrifice for the common weal (*Aufopferung*, *Sonderopfer*) which had been codified already in §§ 74, 75 of the introduction of *the General Prussian Land Law* (*Allgemeines Landrecht für die Preußischen Staaten*) of 1794. Compensation for compulsory purchase (expropriation) is simply one version of this general principle which is not limited to infringements of ownership and other property rights but was extended through the case law of the Highest Civil Court (BGH) to the sacrifice of personal immaterial goods (*Aufopferung* in the narrow sense). This explains why the term compensation for "expropriatory measures"

[48] BGH 149, 50 (55).

[49] BGH 7. Zivilsenat, judgment 10.02.2011, VII ZR 8/10, para 46, 47.

(*Entschädigung für enteignende Eingriffe*) was used to name the cause of action for lawful encroachments upon property rights.[50]

Compensation for injuries involving property rights is granted when the legal interests and rights affected by the State measures are covered by article 14 (1) GG. This constitutional concept of ownership protects not only ownership, but also other real rights, as well as established and active businesses (*Recht am Gewerbebetrieb)*, entitlements under public law and even debt securities (*Forderungsrechte*); chances and expectancies are not protected. Interference with these property rights must exceed the permissible general limits imposed by article 14 II GG on ownership within the relative social context (*Sozialgebundenheit: "Property imposes duties. Its use should also serve the public weal"*). In cases of loss in immaterial goods compensation is granted if the legal interests and rights affected by the administrative conduct are covered by article 2 II GG (life, health, bodily integrity, freedom of movement). The broad idea of sacrifice for the sake of the general public is, hence, extended to the sacrifice of personal immaterial goods (*Aufopferung* in the narrow sense). The injury must affect the victim unequally when compared against others. Only those disadvantages which exceed what citizens can be expected to bear in everyday life in modern society (life´s ups and downs, life´s general risk, *allgemeines Lebensrisiko*) can trigger a compensation claim. The special burden on the aggrieved party must be required by the public authorities through compulsory measures and sustained in the public interest of society in general.

[50] Peter Axer, Article 14 GG, in: Epping/Hillgruber, Beck'scher Online-Kommentar GG, 01.07.2011, paras 138-139.Rüfner, in Bell/Bradley, 259; For two BGH-cases in English translation (with notes) see Ius Commune Casebooks - Tort Law: http://www.casebooks.eu/tortLaw/chapter3/

1.5.2 Liability for unlawful impairment of property, life, health and freedom not based on fault

The Highest Civil Court (BGH) derived its case law on a cause of action for compensation based on lawful conduct from the principle of sacrifice (*Aufopferung*) in the broad sense. Compensation can be paid only if a special burden (*Sonderopfer*) exceeding the permissible general limits on ownership or life´s usual ups and downs is imposed upon the plaintiff. However, in the case of unlawful but inculpable measures touching upon property interests or immaterial goods no special burden needs to be additionally and specifically proved by the plaintiff. In such cases the unlawfulness of the public authority´s conduct itself constitutes a special sacrifice for the aggrieved party, since unlawful measures cannot count among the permissible expectations of conduct that everybody is bound to accept as part of life in society under the rule of law. Cases of unconstitutional legislative conduct are not covered by the case law on unlawful but inculpable interference with private property or personal interests. The argument to justify this liability claim was that, if compensation had to be paid for lawful encroachments upon property rights or health and physical integrity anyway, even more had it to be paid for unlawful ones.[51] The BGH focused on a comparison with compensation for lawful infringements on property interests, i.e. for breach of equality before public charges which is the main characteristic of expropriation (*enteignender Eingriff*) and coined the term "quasi-expropriation" (*enteignungsgleicher Eingriff*) in the case of compensation paid for unlawful infringements on property rights without fault. The cause of action does not cover compensation for unlawful interference with occupational freedom (Article 12 GG).[52] In the field of encroachments upon immaterial goods covered by article 2 II GG the case law does not distinguish terminologically between lawful and unlawful measures, but speaks generally

[51] Rüfner, in Bell/Bradley (op.cit), p. 260.

[52] For a discussion see Matthias Ruffert, Article 12 GG, in: Epping/Hillgruber (eds),Beck'scher Online-Kommentar GG,01.07.2011, 31-32.

of sacrifice (*Aufopferung*) in the narrow sense, while the doctrine uses the term "sacrificial encroachment" (*Aufopferungsanspruch*) for lawful and "quasi-sacrificial encroachment" (*aufopferungsgleicher Eingriff*) for unlawful infringements on personal rights.

The public authority´s conduct must cause a damage or loss of property or health as an immediate result of the authority´s action (*Unmittelbarkeit*).[53] When a shop becomes inaccessible to the public because of street works, the shopkeeper is entitled to adequate compensation for the loss caused to him by the street works. With regard to compensation for the sacrifice of immaterial goods the case law involves death or injury caused by other prison inmates, injuries or death of an innocent bystander who is the unintended victim of shooting in the course of a police operation, injury from State vaccination programs, or injury of a person who has been paralyzed due to pharmaceutical treatment.

1.6 Liability for omissions

Liability for omissions is important because public authorities have numerous duties to supervise, control or regulate various kinds[54] of economic activities or even a positive obligation to protect certain constitutionally recognized institutions and certain legal interests of the citizens (for ex. duties of oversight and safety, such as protection from health-threatening dangers of new technology).[55] Liability can be a tool of supervising supervisors and regulators. However, not all protective duties correlate with corresponding individual rights. Public authorities cannot be held liable for failures to act not based on fault (mere omissions); only a "qualified omission" can engender liability, i.e. the

[53] Ossenbühl, Staatshaftungsrecht, 1998, 248-252.

[54] For example liability for culpable omission to adopt precautionary measures on the part of an insolvency court. Heinz Vallender, § 21, in: Uhlenbruck a.o (eds), Insolvenzordnung, Franz Vahlen München, 13. Edition, 2010, para 56.

[55] Robert Rebhahn, Public Liability in Comparison – England, France, Germany, in: Helmut Koziol a.o. (eds) European Tort Law, Springer Wien a.o. 2005, 68-93, 84-88.

aggrieved party must be entitled to claim the adoption of a specific measure (she/he must have a claim to the omitted conduct or benefit), for ex. the public authority refrains from deciding upon an application to issue a planning permission although the applicant fulfills all the requirements for getting that permission. Omissions based on fault may engender liability if there was a legal duty to act on the public authority´s side and if this duty protects third parties. In this area damages claims for flawed controls of building activities or of banking and insurance markets have been discussed most. The State may not act as an insurer with standards of strict liability.[56]

1.7 Damages and Compensation

German liability law draws a distinction between damages (*Schadensersatz*) and compensation (*Entschädigung*). Tortious liability of public authorities triggers liability in damages. General rules on nature and extent of damages of the Civil Law Code (§§ 249 BGB) apply. The defendant must restore the position that would exist if the circumstance obliging her/him to pay damages had not occurred. Damages comprise lost profits, i.e. profits that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected (§ 252 BGB). In addition, damages for pain and suffering are awarded in personal injury cases, violation of the plaintiffs general right of personality, and deprivation of personal liberty. The types of damages that can be granted in an official breach of duty do not include payments in kind. This is due to the fact that the civil courts which have jurisdiction over public liability claims do not have authority to impose upon public administration a duty to undertake a particular public law act in order to rectify the harm suffered by the aggrieved party.[57]

[56] This topic has been mainly discussed in connection with the liability for malfunction of technical equipment, for example traffic lights: Papier, Article 34 GG, in: Maunz/Dürig (eds), Grundgesetz 61. Ergänzungslieferung C.H.Beck München 2011, para 114.

[57] Ossenbühl, Staatshaftungsrecht, 1998, 110-111; Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, para 95, 261.

Compensation is granted for lawful or unlawful measures not based on fault. It is calculated according to the rules governing compensation for expropriation. Compensation for affecting property rights is confined to making up the monetary damage which constitutes a special individual burden in contradiction to the principle of equality before public charges. Loss of chances or frustrated expectations of gaining future profits are not recovered. Compensation is also paid in cases of infringement on immaterial goods when the special sacrifice for the common good required by the aggrieved party results in consequential material loss.[58] Compensation for impairment of immaterial goods is awarded under reference to § 9 Federal War Victims Relief Act (*Bundesversorgungsgesetz, BVG*), according to which the following items are to be taken into account inter alia: the costs of treatment and physical training for disabled, nursing and care allowances, or survivorship annuity.[59]

1.8 Judicial review and liability of public authorities

According to constitutional and administrative law doctrine, actions for damages are not on the same level as judicial review and actions for annulment which are considered as "primary" remedies of legal protection against unlawful conduct; rather, damages are seen as "secondary" protection, as remedies of last resort. Additionally, the relationship between judicial review and liability claims is also a question of division of labor between the administrative courts, the constitutional court and the civil courts. In practice, such a question can determine the outcome of the case: For example the questions as to what extent the liability court is bound to the decisions of the administrative courts or to the administrative decisions (acts) of public authorities that have become final and can no longer be challenged before the administrative courts because of missing the deadline for filing an action for annulment. Pursuant to § 839 III BGB the plaintiff has no right to

[58] Rüfner, in Bell/Bradley, p. 268.

[59] BGHZ 45, 46, (77); Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, para 334.

choose between public law remedies, especially an action of annulment, and an action for damages. The aggrieved party must first seek redress before the administrative courts which have the authority to declare unlawful the administrative measure that caused the damage, i.e. an act that deals with an individual case (*Verwaltungsakt*), a by-law (*Satzung*) or an executive regulation (*Verordnung*). German legal system recognizes also full judicial review of legislative acts on the ground of constitutionality, but an unconstitutional parliamentary bill may only be brought before the constitutional court. Only a damage that cannot be averted by the use of those "primary" remedies against the wrongful, unlawful and/or unconstitutional act itself before the administrative courts (and finally by a constitutional complaint before the constitutional court) can trigger a civil damages claim. It is the civil courts, according to Article 34 sentence 3 GG that have jurisdiction over damages claims even if directed against wrongful parliamentary acts. If the damage is caused by the implementation of statutes, executive law-making or municipal by-laws (for ex. zoning and development plans) the aggrieved party has to take action against the implementation act before the administrative court in order to quash it. This principle on the pre-eminence of public law remedies is confirmed by of the BVerfG in its Gravel Mining (*Nassauskiesung*) decision[60] which developed the rule that unlawful encroachments upon property rights do not become lawful when the aggrieved party is granted compensation. There is no choice for the aggrieved party either to petition the administrative courts to invalidate the unlawful impairment of property interests itself or to bring a claim for compensation.[61]

[60] BVerfG 15 July 1981, BVerfGE 58, 300.

[61] BGH 3. Zivilsenat, Judgment III ZR 37/10 10.02.2011, para 37, in: Versicherungsrecht (VersR) 2011, 796-80; Ossenbühl, Staatshaftungsrecht, 1998, pp. 78-86, 103-108.

1.9 Liability and the doctrinal system of fundamental rights

Fundamental rights are binding for the legislature, the executive and the judiciary as valid enforceable law. Human dignity is a key concept of the liberally democratic constitutional structure of Germany.[62] It is considered protecting a human being´s "right to have rights" (*Enders*) or a human being´s "decision-making and planning ability" (*Gröschner*) or human existence "as an end in itself and for its own sake" (*Böckenförde*) within a context of plurality and dissent.[63] Public authorities have to refrain from interfering with citizens' rights[64] in a non-proportional manner, and unlawful administrative conduct can be challenged at court.[65] In the event that an unlawful administrative act has already been enforced, the citizen can require the public authority to remove the still existing consequences of that act (claim for nullifying the consequences, *Folgenbeseitigungsanspruch*): defamatory public statements must be withdrawn, disturbing

[62] See for an example of tortious State liability for degrading detention conditions in prison BVerfG,1BvR409/09vom22.2.2011,Absatz-Nr.(1-53), http://www.bverfg.de/entscheidungen/rk20110222_1bvr040909.html

[63] See the analysis of the relevant case law oft the BVerfG by Christoph Enders, Die Menschenwürde in der Verfassungsordnung: zur Dogmatik des Art. 1 GG, Mohr Siebeck Tübingen 1997; Ernst-Wolfgang Böckenförde, Blätter für deutsche und internationale Politik 10 (2004), 1216-1227;idem, Menschenwürde als normatives Prinzip, Juristenzeitung 2003, 809; Rolf Gröschner, Menschenwürde als Konstitutionsprinzip der Grundrechte, in: A. Siegetsleitner/N. Knoepffler (ed.), Menschenwürde im interkulturellen Dialog, Freiburg/München 2005, 17.

[64] See on the significance of this negative obligation (and a corresponding claim of the citizen to have an infringement of her/his fundamental rights set aside by the State) for the liability of public authorities: Bernd Grzeszick, Rechte und Ansprüche. Eine Rekonstruktion des Staatshaftungsrechts aus den subjektiven öffentlichen Rechten, Mohr Siebeck, Tübingen 2002, and Christoph Enders, Abwehr und Beseitigung rechtswidriger hoheitlicher Beeinträchtigungen, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds), Grundlagen des Verwaltungsrechts, Volume III, 2009, 1063-1131; Wolfram Höfling,

[65] The general clause of § 40 of the Law on Administrative Courts (Verwaltungsgerichtsordnung - VwGO) provides for judicial review proceedings in all non-constitutional public law disputes.

effects of unlawful noise and vibration emissions and immissions by factories run under public law rules must stop. Additionally, a remedy of specific performance (*sozialrechtlicher Herstellunganspruch*) is available if public authorities acted unlawfully in the area of social security law by giving a citizen wrong advice or false information which caused her/him to miss out on a benefit from the State; the remedy enables the aggrieved person to make a claim for that benefit. [66]A damages claim can only be granted as a remedy of last option. However, infringement of fundamental rights cannot, per se, trigger liability. Despite an extensive discussion in scholarly literature about the introduction of a new liability cause of action for the violation of fundamental rights, the BVerfG takes the view that fundamental rights primarily create negative obligations for public authorities not to interfere with individual´s sphere of freedom, and that, even though they also constitute an objective value system giving guidelines for lawful governmental conduct, and although they exceptionally create positive obligations for public authorities to promote individual freedom, they, nonetheless, do not engender *eo ipso* a positive obligation to pay damages in case of violation.[67]

In State liability law fundamental rights play a key role in defining unlawfulness und damage. Any measure reducing the freedom (intrusion, impairment, interference *Eingriff*) covered by the scope of protection (*Schutzbereich*) of a fundamental right must be explicitly justified and based upon law (*verfassungsrechtliche Rechtfertigung*). These three elements are understood as cooperating components in interplay. A diminishment or impairment of the legal interests protected by article 14 I GG (ownership) and article 2 II GG (health, physical integrity, freedom of movement) can take place not only through final, direct and imperative legal measures (commands or prohibitions) but also through physical,

[66] Mahendra P. Singh, German Administrative Law in Common Law Perspective, Springer Berlin a.o. 2001, 267.

[67] This is consistent case law of the Federal Constitutional Court since BVerfGE 61 , 149 (198); see recently BVerfG, 1 BvR 1541/09 vom 26.2.2010, Absatz-Nr. (1 - 49), 23 http://www.bverfg.de/entscheidungen/rk20100226_1bvr154109.html

"factual" or mediated disadvantages.[68] This is important for two major case categories: The liability of public authorities for unintended damage caused through factual measures (public works), and the liability for false or incomplete information or (product) warnings. The interference with property rights or immaterial goods must not be intentionally directed against particular assets or goods. Accidental, unintended, unforeseeable damage caused by lawful or unlawful conduct of public authorities can be compensated, as long as immediacy (*see above 1.5.2*) of the damage and special sacrifice imposed upon the aggrieved party are established.

The recent cucumber "war" between Spain and Germany regarding E-coli outbreak shows the significance of public information policy and warnings. With regard to liability of public authorities for providing information the public interest in receiving reliable information in the areas of foodstuffs[69] industry, safety, and environmental or (mental) health[70] protection collides with the interests of the entrepreneur or producer of the goods in question who wants to avoid any revenue loss due to the information providing activity of the authorities. Such error-prone dissemination of information in crisis situations can be an intrusion into the scope of protection of fundamental rights. Any mistakes made in the diagnosis of risks and hazards could amount to a breach of the official duty to appropriately assess the situation and to pay close attention to both the suitability of form and the objectivity of content as well as to the possible distortion, misinterpretation and powerful impacts of a statement, recommendation or warning. A claim aimed at cancelling a warning

[68] On the extensions (Erweiterungen) of the concept of interference with fundamental rights see: Papier, GG Art. 14, in: Maunz/Dürig (eds), Grundgesetz 61. Ergänzungslieferung C.H.Beck München 2011, paras 688-691.

[69] Laura Schnall, Staatliche Information und Warnung, in: Rudolf Streinz (ed.) Lebensmittelrechts-Handbuch,C.H.Beck München, August 2010,paras 250-251.

[70] Susanne A. Wagner, V. Im Besonderen: Hinweise und Warnungen in: Rehmann/Wagner, Medizinproduktegesetz (MPG), C.H.Beck, 2. edition 2010, paras 17-20.

unlawfully upheld by the public authority is also available (*see above 1.9*).[71] A causal link between the information and a drop in sales and lost profits must be established. A further liability risk is presented to public authorities by the rules implementing the European service directive that requires a national authority to act as the sole contact institution to a foreign entrepreneur and to operate as one-stop agency to foreign companies offering them advisory services.[72] The official duties that are to be observed here are subjected to the same principles that apply to the liability of experts for correct and complete advice.

1.10 Special claims and provisions complementing the general State liability law

1.10.1 Liability for breach of quasi-contractual obligations and claims of restitution

The general rules on tortious and inculpable State liability are complemented by three types of causes of action based on quasi contractual obligations that are regulated in the German Civil Code (BGB) and adjusted to the needs of State liability law. The most important relevant provisions are: § 280 BGB (damages for breach of duty), § 688 BGB (typical contractual duties in safekeeping), § 677 BGB (Agency without authorization), and § 812 BGB (unjustified enrichment). Claims for damages for the culpable violation of contractual or quasi contractual duties (and especially of a duty of care, *Führsorge- und Obhutspflicht*) springing from special relationships under public law (*verwaltungsrechtliche Schuldverhältnisse*) can be granted in specific institutional settings, such as in civil service (*Beamtenverhältnis*), in search and seizure or in property securing procedures (*Verwahrung*),[73] and in the case of using public facilities and institutions, for example a

[71] Grzeszick, BeckOK GG Art. 34,in: Epping/Hillgruber (eds), Beck'scher Online-Kommentar GG, Stand: 01.04.2011, paras 44.1.

[72] On those information obligations see § 71c I of the Law on Administrative Proceedings (*Verwalrungsverfahrensgesetz*, *VwVfG*).

[73] Thüringer Oberlandesgericht 4. Zivilsenat, judgment 31.05.2011, 4 U 1012/10, para 27.

municipal sports hall (*Inanspruchnahme öffentlicher Einrichtungen*). It is disputed whether a duty of care also exists (on the part of the public authority) in State schools, prisons or army.[74]Another specific group of cases regards the claim for the reimbursement of expenses in the context of "agency without specific authorization" (*Geschäftsführung ohne Auftrag*) which is based on the application of §§ 677, 688 BGG with the necessary modifications. A private person who conducts a transaction for a public authority without being instructed by the authority or otherwise entitled towards the authority must conduct the business in such a way as the interests of the administration require in view of the real or presumed will of public administration. The business must be carried out in consideration and not in circumvention of administrative discretionary powers, structures of competencies and any applicable law. In both groups of cases the administrative courts have jurisdiction even in respect of claims for damages.[75] Finally, claims of restitution because of unjust enrichment are based on the principle of the lawfulness of public administration (Article 20 III GG). The conditions of the restitution claim are the same as in private law (§ 812 BGB). According to this principle of lawfulness public authorities are under a duty to revoke any transfer of assets that was performed without legal grounds at the expense of another person and to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur. Public authorities are liable to reverse the enrichment even if they has disposed of the enrichment, they have not obtained a substitute for it and they were in good faith at the time of disenrichment. Keeping the unjust enrichment is in no case compatible with the principle of the lawfulness of the administration.[76]

[74] Martin Morlok, Retrospektive Kompensation der Folgen rechtswidrigen Hoheitshandelns, in: in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds), Grundlagen des Verwaltungsrechts, Volume III, 2009, 1133, paras 93-102.

[75] Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, para 241.

[76] Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, para 512.

1.10.2. Specific legislation

The general rules on tortious and inculpable State liability are complemented by particular provisions. The legislation on State liability of the former East Germany that provided for a direct liability of the State for inculpable unlawful conduct irrespective of the nature and category of the legal interests affected is still valid in the form of Federal State law in the *Länder* of Brandenburg and Thuringia (Staatshaftungsgesetz DDR). In the *Land* Saxony-Anhalt (LSA) there is a specific statute (*Gesetz zur Regelung von Entschädigungsansprüchen im Land Sachsen-Anhalt*) which constitutes a legislative expression of the case law (*see above 1.5.2*) on State liability for unlawful property damage not based on fault (*enteignungsgleicher Eingriff*).

Moreover, particular provisions exist in police, environmental or social law. The legislator does not violate the standard of non-arbitrariness (principle of equality according to article 3 I GG) by not providing for compensation of all possible victims of State action, since the *Grundgesetz* does not prevent the legislator from distinguishing between different categories of victims and for opting not to compensate a specific category. The BVerfG has ruled out a violation of Article 3 GG for example in the Distomo case[77]. Police law provisions establish the liability of police authorities for lawful or unlawful conduct not based on fault.[78] Persons or entities directly responsible for causing a danger to public safety and order or persons and entities that own or possess dangerous facilities or sites may not claim compensation for injuries or damage incurred while the police was taking appropriate measures against the dangerous situation they are responsible for. By contrast, compensation has to be paid (based on the principle of special sacrifice) when measures are taken against persons or entities that were not responsible for causing a dangerous situation.

[77] BVerfG,2BvR1476/03vom15.2.2006,para30(1-33), http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html .

[78] BGHZ judgment 03.03.2011 III ZR 174/10, in: Zeitschrift für Schadensrecht (ZfSch) 2011, 376-378, para 13.

Special provisions in social law or specific compensation provisions for reasons of equity are of great importance. Such provisions are to be found for ex. in the Federal Epidemics Control Act, the Victims Compensation Act[79], the Federal Act on Pensions of Victims of War, the compensation for non-prevention of riot damages or personal injuries provided for in the Riot Damages Act or in the Personal Injuries Act. In cases of catastrophic damage German law does not provide a single remedy but follows a mixed approach which combines different sources of compensation. Catastrophes raise the question of tortious liability as well as of insurance benefits or of specific State aid for the victims.[80] Besides the federal government and the *Länder* have established specific institutions, agencies and measures whose task it is to protect the population against catastrophic risk.[81]

Compensation duties are also provided for in planning law when necessary precautionary measures are imposed upon project promoters and plant operators for the general good or to avoid detrimental effects on the rights of others; in the event that such precautions and provisos are impracticable or irreconcilable with the project the person affected may claim reasonable monetary compensation (§ 74 II 2, 3 VwVfG). A compensation has further to be paid for the withdrawal of an administrative individual act which gives rise to a right or an advantage but is contrary to law and does not provide for payment of money or for the making of a divisible material contribution. The authority has

[79] On the scope of § 1 II Gesetz über die Entschädigung für Opfer von Gewalttaten (OEG) see: Landessozialgericht für das Land Nordrhein-Westfalen 10. Senat, decision,L 10 (6) B 8/09 VG,22.02.2010, in: Gesundheitsrecht (GesR) 2010, 433-435.

[80] Ulrich Magnus, Germany, in: Michael Faure/Ton Hartlief (eds), Financial Compensation for Victims of Catastrophes: A Comparative Legal Approach, Springer, Vienna, 2006, 119-144, 120.

[81] See for ex. the Civil Protection Act (Zivilschutzgesetz ZSG) Federal Journal for Statutes - (Bundesgesetzblatt BGBl. I 1997, p. 726 ff.) which defines the tasks of the civil Protection or the Federal Act on Civil Protection and Assistance in Catastrophes (Gesetz über den Zivilschutz und die Katastrophenhilfe des Bundes ZSKG) 29. July 2009 (Federal Journal of Statutes I p. 2350).

to make good upon application the disadvantage to the person affected deriving from her/his reliance on the existence of the act to the extent that her/his reliance deserves protection with regard to the public interest (§ 48 III VwVfG). Likewise, revocation of a lawful beneficial administrative act can engender compensation for reliance on the continued existence of the act (§ 49 VI VwVfG).

2. ACCOUNTABILITY

2.1 Rule of law and democratic principle

German administrative law is grounded in the principle of the rule of law and the democratic principle. According to the traditional view the accountability of the executive manifests itself through the hierarchical[82] organization of the administration and a chain of legitimation which has its origin in Parliament.[83] The specific requirements posed by the democratic principle to legitimize the conferment of sovereign powers to the EU are also the starting point for the Lisbon judgment of the BVerfG.[84] At national level, the minister is accountable to the Parliament, and her/his subordinates are accountable to her/him through her/his right to give binding instructions to them. This is premised on the democratic principle in Article 20 II GG. However, self-government is not simply just another link in a

[82] On accountability within the administration see: Stephanie Schiedermair, Selbstkontrollen der Verwaltung, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 541, paras 1-59.

[83] On parliamentary accountability of the executive in German law see Wolfgang Kalh, Begriff, Funktionen und Konzepte von Kontrolle, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 427, paras 73-81.

[84] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html; see on this topic Armin Steinbach, The Lisbon judgment of the German Federal Constitutional Court - New Guidance on the limits of European integration?, in: German Law Journal, Vol. 11 No. 04 ,2010, 367-390.

chain of hierarchy. Competent and neutral authorities that have their powers conferred upon them by an authority legitimized by Parliament fulfill their tasks abiding by the Parliamentary statutes. Both the decision makers and the content of their decisions must establish a link to the Parliament. Deficiencies on the one side may be compensated for by intensifying the other side as long as a sufficient level of democratic legitimacy on the whole is attained (*hinreichendes Legitimationsniveau*) which is judicially reviewable. In the case of independent agencies their independence from binding government instructions must be based on constitutional reasons, such as preventing politics from intruding into the freedom of broadcasting or from distorting administrative expertise in the field of environmental or scientific risk analysis.[85] With regard to full-fledged privatization (material or functional privatization) where public tasks[86] are delegated[87] to a private party, public administration is responsible for ensuring that the rights of consumers and recipients of privatized services will be acknowledged and the common good will be taken into consideration.[88] At any rate, if a private service provider should no longer be able of

[85] Eberhard Schmidt-Aßmann, Legitimacy and Accountability as a Basis for Administrative Organisation and Activity in Germany, in: Matthias Ruffert (ed.), Legitimacy in European Administrative Law: Reform and Reconstruction, Europa Law Publishing, Groningen 2011, 49, 51-55. Hans-Heinrich Trute, Regulierung – am Beispiel des Telekommunikationsrechts, in: Eberle/Ibler/Lorenz (eds), Der Wandel des Staates vor den Herausforderungen der Gegenwart. Festschrift für Winfried Brohm, C.H.Beck, München, 2002, 328.

[86] See on this topic and relevant distinctions Susanne Baer, Verwaltungsaufgaben, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 717, paras 10-23.

[87] See on delegation and externalization modi: Helmuth Schulze-Fielitz, Grundmodi der Aufgabenwahrnehmung, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 761, paras 91-118.

[88] Trute, Die demokratische Legitimation der Verwaltung, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 307, paras 7-14, 42-58, 60-75, 79.

fulfilling a task, the public sector still stands as some sort of "guarantor".[89] This type of State responsibility is explicitly provided for in the Constitution in the area of telecommunications, postal, and railway services (Article 87 f GG). Pursuant to Article 33 IV GG the exercise of sovereign authority (*Ausübung hoheitlicher Befugnisse*) on a regular basis is to be entrusted, as a rule, to members of the public service who stand in a relationship of service and loyalty defined by public law. Tax collection or guard duty in penal institutions would be an "exercise of sovereign authority" in that sense.[90] In the event that a private law company dominated by the public administration is entrusted with the fulfillment of public tasks (formal or organizational privatization), the public authority is obliged to avail itself of private company law in order to secure sufficient influence on the decisions of the company (*Einwirkungspflicht*).

2.2 Federalism

2.2.1 Executive federalism and joint decision traps

The Federal Republic of Germany is a polycentric organization based on the strong organizational position of the *Länder*.[91] It comprises the federal level and 16 States (*Länder*), including three city States. Distinctive feature of Germany´s federal system is the executive autonomy of the States. While legislation is exercised predominantly by the federation, administration is in the hands of the *Länder* and local authorities. The execution

[89] Andreas Voßkuhle, Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung, in: VVDStRL 62 (2003), 266.

[90] Martin Burgi, Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf, Gutachten für den 67. Deutschen Juristentag, volume 1, Beck 2008, 61, 62.

[91] From a comparative point of view: Anna Gamper, A "Global Theory of Federalism": The Nature and Challenges of a Federal State, in: German law journal 6 (2005), 1297-1318.

of federal laws falls in the purview of the *Länder*.[92] Previously, Article 84 I of the Constitution (GG) required Federal Council´s (*Bundesrat*) approval if a federal law included the establishment of an agency or administrative proceedings at the State level in the execution of a federal law. However, when the political majorities in the *Bundestag* und the *Bundesrat* differed, Article 84 I GG was used by the opposition to block the political agenda of the ruling parties, with recourse to the Mediation Committee between the two chambers, unsatisfactory compromises and increasing political entanglements (*Politikverflechtung*) being a frequent result.[93] In 2006 stage one of important federal reforms took place (*Föderalismusreform I*), aimed to distinguish clearly between the legislative powers of the federation (*Bund*) and the States (*Länder*).[94] The exclusive legislative powers of the federation were increased (Article 71 GG), items of previously "concurrent" legislation (*konkurrierende Gesetzgebung*) were delegated to the Länder (Article 74 GG), and federal framework legislation (*Rahmengesetzgebung*, Article 75 of the Constitution before the reform) was completely abolished, delegating legislative competencies either to the federal level or to the Länder. The reform was meant to enhance accountability, legitimacy and transparency. A major goal was to reduce the proportion of laws requiring *Bundesrat* consent. According to the newly reformulated Article 84 GG the federal government may still lay down administrative proceedings guiding implementation, but it also gets the possibility to couple these recommendations with the option for the

[92] Philipp Dann, Parlament im Exekutivföderalismus, Berlin 2004.

[93] Peter M. Huber, Deutschland in der Föderalismusfalle ?, C. F. Müller, 2003; Christian Hillgruber, German Federalism – An Outdated Relict? in: German Law Journal 6 (2005), 1270; Arthur Gunlicks, German Federalism and Recent Reform Efforts, in: German Law Journal 6 (2005), 1283-1295; idem, German Federalism Reform: Part One, in: German Law Journal 8 (2007), 111-131.

[94] Fritz W. Scharpf, Community, Diversity and Autonomy: The Challenges of Reforming German Federalism, in: German Politics,17(2008),509 — 521; see Simone Burkhart/Philip Manow/Daniel Ziblatt, A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany´s 2006 Constitutional Reform, in: Carolyn Moore/Wade Jacoby (eds), German Federalism in Transition. Reforms in a Consensual State, Routledge, London and New York, 2010, 16, 18-21.

States to adopt their own, divergent, administrative implementation of a specific federal law. The changes of Article 84 GG try to overcome the so called "joint decision trap" as they now free the federation of the need to obtain the consent of the *Länder* for its legislation by reducing the areas subject to joint policy-making, and at the same token they give the *Länder* a right to deviate from federal legislation, i.e. they give them more autonomy by extending their room for maneuver. A second major feature of the reform was the separation of spheres of jurisdiction between levels of government. In the area of "concurrent" legislative powers the *Länder* obtained the possibility of enacting deviating laws.[95]

2.2.2 Financial federalism and budgetary constraints

A reform of public finance structures appeared to be equally necessary. A particular problem was for instance a practice according to which the federal government used to delegate with the consent of the *Länder* cost intensive responsibilities directly to local authorities without providing them sufficient funding. Stage two of the federal reforms in 2009 dealt with the implementation of new fiscal rules (*Föderalismusreform II*).[96] The reforms addressed especially a disentangling of public finance structures, the prevention and management of budgetary crises, debt management and tax autonomy for

[95] Peter M. Huber, Föderalismusreform I – Versuch einer Bewertung, in: Durner (ed.), Reform an Haupt und Gliedern, Symposium aus Anlass des 65. Geburtstag von H. J. Papier, 2009, S. 25; idem, Entflechtung der Verwaltungskompetenzen als Leitidee der Föderalismusreform, in: Zeitschrift für Staats- und Europawissenschaften 6 (2008), 255.

[96] Stefan Korioth, Die neuen Schuldenregeln für Bund und Länder und das Jahr 2020, in: Martin Junkernheinrich et. al., Jahrbuch für öffentliche Finanzen 2009, Berlin 2009, 389; Dietmar Braun, Föderalismusreform II: Zur Reform der föderalstaatlichen Finanzverfassung/Reforming Fiscal Federalism, How to Make German Fiscal Federalism Self-enforcing: A Comparative Analysis, in: Zeitschrift für Staats- und Europawissenschaften 5 (2007), 235-262.

the regions.[97] Central feature of the second phase of federal reforms was the introduction of a debt brake rule. Despite criticism (stressing that fiscal rules tend to be pro-cyclical), the German debt brake rule is a "second generation" budget balance rule designed to avoid the pro-cyclical effects of a more conventional budget balance rule. It includes an exit clause, and an absolute majority of the *Bundestag* can suspend it during emergency situations if it passes at the same time an amortization plan to repay the extra amount.[98] Within the context of the European sovereign debt crisis the *BVerfG* focuses on the judicial control of the observance of these constitutional rules, leaving it to politics to decide on the issue of economic governance in the Euro Zone.[99]

[97] On German fiscal system providing insurance for State government budgets against asymmetric revenue shocks see: Ralf Hepp/Jürgen von Hagen, Fiscal Federalism in Germany:Stabilization and Redistribution Before and After Unification, in: Zentrum für Europäische Integrationsforschung Center for European Integration Studies Rheinische Friedrich-Wilhelms-Universität Bonn, Working Paper B 01, 2009, 1-30; On how fiscally strong and fiscally weak States respond to taxing autonomy at the State level see: Helmut Seitz, Minimum Standards, Fixed Costs and Taxing Autonomy of Subnational Governments, in: CESifo Working Paper No. 2341 CATEGORY 1: PUBLIC FINANCE, June 2008.

[98] Mark Hallerberg, The German Debt Brake in Comparative Perspective – When Do Fiscal Rules Succeed? In: Christian Kastrop/Gisela Meister-Scheufelen/Margaretha Sudhof (eds), Die neuen Schuldregeln im Grundgesetz, Berlin, 288, 293, 294-296; Eric Mayer/Nikolai Stähler, The debt brake: business cycle and welfare consequences of Germany's new fiscal policy rule, in: Discussion Paper Series 1: Economic Studies No 24/2009, 1-51; on incentives for unsound State fiscal policy see: Alexander Fink/Thomas Stratmann, Institutionalized Bailouts and Fiscal Policy: The Consequences of Soft Budget Constraints in: CESifo Working Paper No. 2827, Category 1: Public Finance, October 2009.

[99] See the oral hearing (5.7.2011) before the *BVerfG* on the Greek bailout: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-037. For the scholarly discussion (mainly from a European law point of view or, also, combining European and German constitutional law) see: Hentschelmann, Finanzhilfen im Lichte der No Bailout-Klausel – Eigenverantwortung und Solidarität in der Währungsunion, Europarecht (EuR) 2011, 282; Seidel, Europarechtsverstöße und Verfassungsbruch im Doppelpack, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2011, 241; Polzin, Finanzhilfen für Griechenland: Verfassungsrechtliche Schranken?, Die Öffentliche Verwaltung (DÖV) 2011, 209;Sonder, Solidarität in der Währungsunion: Griechenland, Irland und kein Ende? Zeitschrift für Rechtspolitik (ZRP) 2011, 33; Herrmann, Griechische

Pursuant to § 7 Federal Budgetary Legislation (*Bundeshaushaltsordnung* BHO) the principles of efficiency and economy impose an obligation to consider the extent to which public functions or economic activities serving public purposes may be performed by the private sector. Adequate economic feasibility and efficiency studies must be carried out for all measures taken that have an impact on matters affecting finances. Private-sector contractors must show to what extent they can perform the public tasks and economic activities conferred upon them equally well or better than the public sector. § 65 Federal Budgetary Legislation provides that the Federal Government may participate in a private-law enterprise only if the purpose intended by the Federation cannot be achieved in any better or more cost-effective way. German Courts of Auditors have recently found[100] that so called "alternative funding models" (*alternative Finanzierungsmittel*) such as contractual and institutionalized public private partnerschips, leasing, factoring, Special Purpose Vehicles (*Projektfinanzierungsgesellschaften*) can be extensively used in order to circumvent budgetary constraints in so far as they constitute a liability structure that does not fall under the classical definition of budgetary debt (*haushaltsrechtlicher Kreditbegriff*).

2.3 Local Self-Government´s double role

Given the German two-tier federal system, the local government level is, from a legal point of view, a constituent part of the *Länder*. On the one hand, local self-

Tragödie – der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2010, 413.

[100] See the analysis and caveats by Holger Mühlenkamp, Ökonomische Analyse von Public Private Partnerships (PPP) - PPP als Instrument zur Steigerung der Effizienz der Wahrnehmung öffentlicher Aufgaben oder als Weg zur Umgehung von Budgetbeschränkungen? -, Speyer, Januar 2010; Claus Jürgen Diederichs, Wirtschaftlichkeitsuntersuchungen bei PPP-Projekten, in: Neue Zeitschrift für Baurecht und Vergaberecht 2009, 547-452; see also Christian Jahndorf, Alternative Finanzierungsformen des Staates - Leasingmodelle, Liegenschaftsmodelle, Parklösungen: Verwaltungsschulden, Veräußerungserlöse oder Krediteinnahmen? Zur Auslegung des Kreditbegriffs i.S. Art. 115 I GG, in: Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2001, 620-626.

administration is not a separate order of government, it is deemed to be a form of "indirect State administration" (*mittelbare Selbstverwaltung*) serving to implement federal and Land laws. This is the area of delegated duties. Such delegations can leave to local authorities some degree of discretion as to the way of performing the delegated responsibilities (*Pflichtaufgaben ohne Weisungen*) or they can leave no autonomy at all (*Pflichtaufgaben nach Weisung*). On the other hand, local authorities have a constitutionally recognized general competence in the form of an institutional guarantee to regulate all local affairs on their own responsibility (they do so mostly by issuing municipal by-laws, *Satzungen*) within the limits prescribed by law (Article 28 II GG).[101] That means that local authorities, due to their general competence, need not be empowered by a specific law to regulate an issue of local importance. A legal basis in a federal or *Land* statute is only required for by-laws that restrict property and individual freedom of citizens or the rights of enterprises. Article 28 II GG also means that federal and *Land* lawmakers are entitled to delineate the precise scope of local self-government as long as they preserve in principle a core sphere of autonomy and responsibilities of local authorities. Local authorities may invoke Article 28 II GG before the Federal Constitutional Court or the respective courts of the *Länder* to annul statutes violating the constitutional guarantee of local autonomy in a specific proceeding called "process for hearing the constitutional complaints of municipalities" (*Kommunalverfassungsbeschwerde*).[102] They may defend their constitutional right to their own source of tax revenues[103] (*Finanzhoheit*), to charge fees for public services (*Gebühren*), to create new types of local excise taxes (*Steuererfindungsrecht*).[104]

[101] Martin Burgi, Federal Republic of Germany, in: Nico Steytler (ed.) Local Government and Metropolitan Regions in Federal Systems, McGill-Quenn´s University Press 2009, 137, 141, 143-146; idem, Kommunalrecht, 2 edition, C.H.Beck, München 2008.

[102] Eberhard Schmidt-Aßmann/Hans Christian Röhl, Kommunalrecht, in: Schmidt-Aßmann (Hrsg.), Besonderes Verwaltungsrecht, 13. Aufl. 2005.

[103] German municipalities are subject to a system of vertical and horizontal fiscal transfers that partly explain a heavy reliance on business taxes: Thiess Buettner/Fédéric Holm-Hadulla, Fiscal Equalization: The Case of

The supervision by the State is restricted – with regard to local self-administration matters – to a control of legality (*Rechtsaufsicht*), whereas in the execution of State functions and delegated business local authorities are subject to technical and much tighter supervision by the state authorities (*Fachaufsicht*). In a variety of financial activities local authorities need the prior approval of specially assigned *Land* authorities. Consultancy and supervision failures can trigger the supervising authority´s liability. This liability risk has proven to be, at least since the Oderwitz-decision of the Highest Civil Federal Court (*Bundesgerichtshof*, BGH), a brake in the development of public private partnerships.[105] If local authorities´ budget is not balanced they have to prepare a spending cutting and budget consolidation plan that needs approval.[106] § 103 Municipal Code North-Rhine Westphalia describes the tasks of the local auditors, and § 104 of the same Code provides that the managing director of the local auditing committee must be free of influence of the chief executive officer or the chief financial officer. Taking up (additional) loans is only allowed if no other means of financing is possible and money will be used for investments or investment promotion measures. Prior approval of the supervising authority is also needed for using financial derivatives or engaging in leasing or public private partnerships

German Municipalities,in: Center for Economic Studies and the Ifo Institute for Economic Research, Munich, Journal for Institutional Comparisons 6 (2008), 16-20.

[104] Stefan Korioth, Finanzen, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (eds), Grundlagen des Verwaltungsrechts, volume III, C.H.Beck, München 2009, 83, paras 89-93.

[105] *BGH* judgment, Oderwitz, 12. 12. 2002 - III ZR 201/01. http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e5ce96a333b24046dd3138a0f06581db&nr=24933&pos=0&anz=2

[106] On liabilities structure and credit-related transactions of municipalities see for instance the following circular of North-Rhine Westphalia: Innenministerium Nordrhein-Westfalen, Kredite und Kreditähnliche Rechtsgeschäfte der Gemeinden MBl.NRW.2006 S. 505, geändert d. RdErl.v.4.9.2009 (MBl.NRW.2009 S. 428), 2009. PPPs and Leasing are considered to be particular credit-related transactions (at paras 5.2, and 5.3).

contracts. However, municipalities are considered as not capable of falling into bankruptcy from a legal point of view as they may not liquidate their assets.

2.3.1 Public services management

Traditionally, German municipalities used to offer a broad portfolio of services to the public. They used to own a single multi-utility company, the so called "city works" (*Stadtwerke*) which (vertically) integrated the various infrastructure services and had the opportunity to cross-subsidize loss-generating, deficit-ridden sectors (for example public transport) by more profitable segments such as energy.[107] Over the last two decades multifunctional local authorities have experienced - under the influence of lean government concept, New Public Management marketisation trend and EU-led market liberalization policies - a transformation of administrative units from the utilities sector and the social or cultural sector into self-standing corporations. Moreover, they have broadened cooperation with public and private partners. Conventional municipal service delivery has been in part replaced by a plurality of single-purpose outside providers selected by competitive tendering. Institutional options have been increased, and varied network structures emerged where public, non-profit and commercial organizations collaborate. As local government performs new roles as stimulator and coordinator new challenges arise for guaranteeing the effective steering and control capacities in such networks.

These developments are obvious in the different sectors of public utilities. The provision of social services was usually based on cooperation between local authorities and a certain type of non-profit organizations, so called free welfare associations (*Freie Wohlfahrtsverbände*). The latter date back to late nineteenth century charities and self-help organizations and reflect the principle of subsidiarity according to which social services ought to be provided by public authorities only if families and non-profit organizations

[107] Hellmut Wollmann/Gérard Marcou (eds), The Provision of Public Services in Europe. Between State, Local Government and Market, Edward Elgar UK, USA 2010, 12, 242, 248, 250, 252, 254, 256.

cannot cope. For the non-profit organizations privatization meant that they lost market shares to commercial providers becoming themselves more similar to their competitors.[108] After the introduction of long-term care insurance scheme (*Soziale Pflegeversicherung*) in 1994[109] long-term care insurance funds (*Pflegekassen*)[110] have been made responsible for licensing service providers, whereas local authorities restricted themselves to a general responsibility of guaranteeing, albeit not providing the service themselves. The provision of gas and electricity was traditionally seen as a responsibility of the local authorities and as a part of the self-government´s task of providing public services for the public good. Expectations of an efficient self-regulation by way of a "negotiated grid access" were disappointed. After that experience, the establishment of the Federal Network Agency (*Bundesnetzagentur*) and the introduction of a procedure for incentive regulation (*Anreizregulierung*) that allows the Agency to check and reduce[111] grid user fees by way of a benchmarking procedure oriented on the most effective and least expensive provider, exposed municipal corporations in distribution and supply sector to a new competitive context. However there is also a trend on the part of municipalities towards "recommunalization" by forming transmission grid operation companies (*Netzbetriebsgesellschaften*), establishing shared services, or setting up new power plants of

[108] Reinhard Wiesner, § 3 Freie und öffentliche Jugendhilfe, in: Wiesner (ed.) SGB VIII, 4th edition 2011, paras 19-20.

[109] Oliver Bechtler, § 4 Die gesetzliche Krankenversicherung und die Grundzüge der Pflegeversicherung, in: Michael Terbille, Münchener Anwaltshandbuch Medizinrecht 1.edition 2009, paras71-74.

[110] See the introductory and explanatory notes by Karl Peters, § 46 Pflegekassen,in: Stephan Leitherer (ed.) Kasseler Kommentar,Sozialversicherungsrecht, C.H.Beck München, 69. Ergänzungslieferung 2011.

[111]The BGH has now got the opportunity to rule on the application of the calculation methods provided for in the Ordinance On Incentive Regulation (Anreizregulierunngsverordnung):Kartellsenat28.6.2011,EnVR 34/10 http://juris.bundesgerichtshof.de/cgibin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e7bcea3308a0dd38c9a1b05135b2bcd3&nr=56877&pos=0&anz=64.

their own.[112] In the water sector privatization did not have any sweeping effects.[113] Political control plays here a stronger role than in other sectors due to the specific features of the public good at stake (no optimal conditions for market competition and lack of political will to decouple water service management and water resource management). There has been a disputed partial privatization of water supply in Berlin. Details of agreements for the partial privatization of the Berlin Water Works (Berliner Wasserbetriebe, BWB) were disclosed after a referendum held in February 2011 in Berlin. The European Commission shall now (12 years after the partial privatization) examine to what extent the grantor takes part in the financing through minimum-revenue streams or other forms of guarantees, including compensation for short-falls, that might meet not only the definition of a financial guarantee contract but also that of an unlawful State aid measure.[114] Privatization has been particularly strong in waste management.[115] The 1994 Recycling Waste Management Act reassigned responsibilities in the sector. The private producer or owner of waste has been made responsible for ecologically acceptable recycling and disposal and municipalities´ responsibility has been reduced to household waste.[116]

[112] Isabel Stirn,Speyerer Kommunaltage – Rekommunalisierung der Versorgungsaufgaben (7.-8. Oktober 2010), in: Zeitschrift Kommunaljurist (KommJur) 2011, 48.

[113] Torsten Schmidt, Liberalisierung, Privatisierung und Regulierung der Wasserversorgung, in: Landes- und Kommunalverwaltung (LKV) 2008, 193.

[114] Redaktion beck-aktuell, EU-Kommission überprüft umstrittene Teilprivatisierung der Berliner Wasserwerke, Verlag C.H. Beck, 21. Juli 2011.

[115] For a review of developments sicne the 1994 Act and an outlook over implementation of upcoming EU law see: Gerhard Friedrich, EU erzwingt neues Kreislaufwirtschaftsgesetz Kommunen und Privatentsorger streiten sich um Abfälle, in: Zeitschrift für Rechtspolitik (ZRP) 2011, 108.

[116] See for a description of public service management in Germany in English: Hellmut Wollmann/Gérard Marcou (eds), The Provision of Public Services in Europe, Edward Elgar UK, USA 2010, 12, 23, 25, 53, 59, 69, 103, 112, 152, 155, 169, 177-179, 196, 199, 213, 223, 228, 232, 233, 242, 246, 254.

2.3.2 Municipal enterprises and private law corporations

There is a wide range of institutional forms of service management that may be adopted by German municipalities.[117] A scholarly classification of these forms encompasses direct management of service delivery (*Regiebetrieb*), public law semi-autonomous municipal enterprises (*Eigenbetriebe*) or institutions under public law (*Anstalt des öffentlichen Rechts*) that can be designed on a case by case basis with regard to powers, legal personality and public or private partners. Intermunicipal consortiums or special purpose associations (*Zweckverbände*) are associations of municipalities which are endowed with legal personality and constutionally guaranteed by article 28 II GG. Increasing involvement of private corporate forms of organization enhanced the trend towards corporatization over the last few decades due to financial straits. Apart from private-law enterprises fully owned by municipalities (*Eigengesellschaften*), stock corporations (*Aktiengesellschaften, AG*) and limited companies (*Gesellschaften mit beschränkter Haftung, GmbH*) are widely used. In the case of public private partnerships mixed companies are formed when private partners are included among the shareholders of a limited or joint stock company. Various cooperation models have been developed, differing mainly with regard to ownership and control of the relative assets, service provision and residual value. In the operator model (*Betreibermodell*) for instance, the private partner agrees not only to build and finance an infrastructure project but also to run it for a certain period. Lease contracts, outsourcing of management and service concession arrangements finally also belong to the municipal variety pool. In 2005, the PPP Acceleration Act (*ÖPP-Beschleunigungsgesetz*) was adopted aimed at accelerating such

[117] Werner Hoppe/Michael Uechtritz (ed.), Handbuch Kommunale Unternehmen, 2 edition, Verlag Dr. Otto Schmidt, Köln 2007; Helmut Cox, Public Enterprises and Service Providers in Institutional Competition and Undergoing Structural Change. New challenges to the theory of public economics and public services in Germany, Annals of Public and Cooperative Economics 79 (2008), 527; Dalia Omer, Enterprise and Innovation and PPPs in Germany: Recent Developments, in: European Public Private Partnership Law Review 3 (2010), 132; see further Silvia Bolgherini, Local Government and Inter-Municipal Cooperation in Italy and Germany, in: Alexander Grasse (ed.) Politische Italien-Forschung, Occasional Papers, No 12/2011, 1-64, http://www.italienforschung.de.

partnerships through partially abolishing the real estate transfer tax in (*Grunderwerbssteuer*) connection with PPP projects, and at allowing the participation of open property funds (*Offene Immobilienfonds*) in PPP.[118]

2.4 Methods of steering and control

Whatever the public service provision model (direct municipal management, municipal or commercial law corporation) the ultimate responsibility for service conditions and quality lies with local authorities that have to maintain some form of control over the service provision operations of the provider. Against this backdrop many municipalities have adopted at least selected elements of the New Steering Model which is the predominant model of administrative reform efforts in German local government since the 1990s.

2.4.1 Corporate governance and municipal holdings

The most widespread corporate type today is the limited company. It is attractive because it offers sufficient managerial freedom combined with flexible possibilities of influencing the governance structure, while German stock-company law protects the autonomy of the corporation and does not allow sufficient influence by the owning municipality. Municipalities ensure their influence by way of appointing directors of the service provider company, for ex. by the creation of a supervision board (*Aufsichtsrat*) in joint stock companies, where the municipality nominates at least a majority of members. Conflicts of goals and interests between the political activity of supervisory board members and their involvement in the economic control of private corporation and of service

[118] On the impact of tax law reform (Zinsschranke § 4h EStG, § 8a KStG) on PPP : BMF-Schreiben vom 4. Juli 2008 - IV C 7 - S 2742-a/07/10001

providers must be resolved in the light of the fulfillment of public policy goals and not only of market led decisions and profit maximization.[119]

Large municipalities usually form municipal corporate groups. Transparency, accountability, and efficiency in this multi-actor institutional world do not emanate from contractual arrangements in a reflex manner. Rather, governance structures depend on the interplay of different sectors of law: the law on limited liability companies and stock corporations as well as municipal law on economic activity of municipalities. Therefore, municipalities reestablished on a new their organization adopting a holding model (*kommunaler Konzern*) burrowed (with adjustments) from the business sector and commercial law. The law on holdings becomes an administrative steering tool. Municipal Budged Codes (*Gemeindehaushaltsordnungen*) provide for some necessary adjustments of the commercial law rules to the particularities of municipal holdings.[120] However, the impact of international accounting standards on the commercial accounting law has brought about changes which are not followed by a parallel development of the municipal accounting rules.[121] The degree of divergence between the two systems of rules depends on the question whether municipal codes make a "dynamic" reference to commercial law as

[119] Thomas Mann, Steuernde Einflüsse der Kommunen in ihren Gesellschaften, in: Verwaltungsblätter für Baden-Württemberg, 2010, 7.

[120] For explanatory details see: Modellprojekt Neues Kommunales Finanzmanagement, Praxisleitfaden zur Aufstellung eines NKF-Gesamtabschlusses, 4. Auflage, Düssledorf, September 2009.

[121] Andreas Glöckner, "Modernising" commercial accounting law in Germany - effects on public sector accrual accounting? An analysis of the federal government legislation on the reform of the German Commercial Code, Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer, Discussion Papers, 2009, 1-59; Alexander Reuter, Objekt- und Projektfinanzierungen zwischen Zurechnung und Konsolidierung nach HGB, IFRS und US-GAAP, in: Betriebs-Berater (BB) 61 (2006), 1322.

from time to time amended or, rather, a "static" reference to the law as it stood at a specific point of time.[122]

2.4.2 Responsibility centers and accrual accounting

Another major reform and new steering instrument has been the introduction of new budgeting procedures marking a turning point from input-orientation to output- and outcome-based orientation and triggering a transition from cash accounting, the so called "*Kameralistik*", to a resource-based accrual accounting system. With the use of activity-based budgeting and management, responsibility or "result centers" and catalogues of "products" have been introduced as new tools of output steering (*produktorientierte Steuerung*). These tools are aimed at making budget responsibilities identifiable and making cost monitoring and accounting control more efficient. However, not all municipalities that have defined such "products" use them to negotiate budgets or to really reorganize administrative processes.[123] The German accrual accounting system for public authorities is traced from the German commercial code, not from the International Public Sector Accounting Standards (IPSAS). Roughly speaking, in this area, "each federal State has reinvented the wheel for its own local level".[124] There is an ongoing discussion of the relation between modernized cash accounting or German commercial accrual accounting on

[122] For example, pursuant to § 49 Gemeindehaushaltsordnung of North-Rhine Westphalia the commercial code shall apply with the necessary modifications (*entsprechend*) as last amended by Act of 24 August 2002.

[123] Sabine Kuhlmann/Jörg Bogumil/Stefan Grohs, Evaluating administrative modernization in German local governments: success or failure of the `New Steering Model´?, in: Public Administration Review 68 (2008), 851.

[124] Ulf Papenfuß/Christina Schaefer, Public financial reporting in true and fair terms - discussion on shortfalls in Germany and recommendations for the reform agenda, in: International Review of Administrative Sciences 75 (2009), 715, 722.

the one hand and the impact of IPSAS on the other.[125] The new accounting system is of great importance for financial reporting in the area of municipal holdings, public spending, leasing and public private partnerships. For instance, the ownership of the underlying asset in a PPP-Project is established according to criteria that are not premised on the legal provisions relating to ownership but on economic or beneficial ownership. Pursuant to § 39 German Tax Code (*Abgabenordnung*, AO) an economic owner is the owner who exercises absolute rights over an investment good for the total useful economic life in such a way that he/she can, as a rule, economically exclude the civil law owner from affecting the economic good during the normal period of its useful life. In such a case the economic good is attributable to the economic owner who is responsible for the accounting and can be a different owner than the owner according to civil law. Economic ownership is the criterion used to decide whether the underlying asset in PPPs represents a State asset or an asset from the private partner. For the fiscal handling of leasing the German Finance Ministry has issued leasing decrees that stipulate who is the economic owner of the leasing object at which point in time of a lease agreement. Economic ownership is a concept that comes close to the notion of "control" within the meaning of the IPSAS Exposure Draft 43 (2010) on Service Concession Arrangements. Likewise, International Financial Reporting Standards (IFRS) rule 12 (IFRIC 12) requires the private sector reporting of PPP assets on the basis of a "control" test whereas the statistical treatment of PPPs as required by the Eurostat for measuring the impact of PPPs on government debt and deficit is based on a "risks and rewards" test. Introduction of a consistent uniform test and a change in Eurostat´s rules would not be possible without a revision of Maastricht rules anyway. As Eurostat notes, Germany has opted not for double reporting of the accounting and statistical

[125] Norbert Vogelpoth, Internationale Rechnungslegung für öffentliche Verwaltungen, in: Die Wirtschaftsprüfung 14/15 - 2001,752; idem, Vergleich der IPSAS mit den deutschen Rechnungslegungsgrundsätzen für den öffentlichen Bereich, in: Die Wirtschaftsprüfung, Sonderheft 2004, 23.

treatment of PPPs on the basis of different tests, but "for a single reporting notwithstanding the negative impact on debt and deficit generated by the substantial over-reporting." [126]

2.4.3 Pricing service concession assets and the laws on public fees

The pricing strategies a private infrastructure operator is allowed to pursue are restricted by the public law on infrastructure user fees. Pricing constraints become an accountability tool. In PPP-Concession models the private operator of the asset used to provide a public service is compensated for its service over the period of the contractual arrangement through user payments. There are tensions here between market oriented pricing of service provision and the laws on public user fees. The Law on public fees is based on some key principles regarding usage pricing: The Equivalence Principle means that all fees and charges must be in an appropriate ratio to the service provided (*Äquivalenzprinzip*). The equality principle (*Gleichbehandlung der Gebührenbemessung*) refers to the non discriminatory distribution of resources across different groups. The cost-recovery principle (*Kostendeckungsprinzip*) stipulates that the price level of user fees may not amount to selling public services at a price less or higher than what they cost. The user fee must reflect the actual asset usage and service provision cost (*Wirklichkeitsmaßstab der Inanspruchnahme der Einrichtung*). Only where doing so is particularly difficult or economically unreasonable a probabilistic cost assessment is allowed (*Wahrscheinlichkeitsmaßstab*).

Traditionally, user fees are intended to cover the costs incurred through the development, financing, operation and maintenance of an asset used for public services. They are not aimed primarily at profit making. An appropriate imputed return for the private investor is provided for in the § 3 IV of the Private Financing of Highway Construction Act of 1994 (*Fernstraßenbauprivatfinanzierungsgesetz - FStrPrivFinG*)

[126] Eurostat, Treatment of Public-Private Partnerships. Purposes, Methodology and Recent Trends, European PPP Expertise Centre 2010, 1-32, 27.

which meanwhile has been amended twice (in 2002 and 2005), and in the Municipal Charges Acts of the *Länder* (*Kommunalabgabengesetze – KAG*). The main principles of this imputed return for the private investor have been developed in the case law of the administrative courts[127] and are based on the annual average returns for ten-year German government bonds plus an appropriate private company-specific risk-premium. The latter is limited to 7% whereas a risk-premius of at least 15% could be in line with the market and the infrastructure project risk situation. The tension between private pricing policy and administrative fees regulation is explained by the following factors: Administrative fees regulation is based on the logic of having to align oneself with the local network and to use the local infrastructure system (duty to connect to and use local public infrastructure, *Anschluss- und Benutzungszwang*), there is neither competition and substitution risk nor infrastructure project based demand risk. A cost-coverage-shortfall can only be offset (for example pursuant to § 6 II 3 KAG NW) within three years after the end of the calculation period and under the condition that the reason for the difference between anticipated costs and actual costs incurred was a forecasting error.[128] Against this backdrop the service concession asset operator is not allowed to practice behavioral, peak load, penetration, or differential pricing and to discriminate among different user groups in order to benefit from their varying readiness, ability or unwillingness to pay. He is limited, from a legal point of view, in his efforts to guide demand in the appropriate direction over the life cycle of the service concession arrangement.[129] However, different levels of utilization of asset capacity

[127] See the seminal case law of the Oberverwaltungsgericht (OVG) Münster, North-Rhine Westphalia, and recently the judgment of 13.4.2005 – 9 A 3120/03.

[128] See the the commentary on § 6 KAG NW in the loose-leaf edition of Driehaus, Kommunalabgabenrecht, author: Brüning, 43. Ergänzungslieferung (September 2010), paras 49-50, 104-105a (Verlag Neue Wirtschafts-Briefe, Herne/Berlin).

[129] See on this topic Erik Gawel/Christopher Schmidt, Finanzwissenschaftliche Probleme der Gebührenfinanzierung von Verkehrsinfrastruktur nach dem Fernstraßenbauprivatfinanzierungsgesetz (FStrPrivFinG), Duncker & Humblot Berlin 2010, 130-141, 194-198.

and services offered can, from a legal point of view, justify different levels of user fees. Only actual differences in cost generated by differences in intensity of use can legally justify price discrimination among different groups of users. A good example is the surcharges for heavy polluters in the area of public sewage treatment.[130]

2.5 Legal forms and the two-fold mission of administrative law

The two-fold mission of German administrative law is seen in the guarantee of both protection and effectiveness. This guarantee is based on the development of standard legal instruments and forms that are deemed to have the function of a "repository" of rules normally applicable to the typical category of administrative activity under consideration (*Speicherfunktion*). The most important legal forms are the statutory regulation (*Rechtsverordnung*), the by-law or ordinance (*Satzung*) and the administrative directives or guidelines (*Verwaltungsvorschrift*) for the purposes of administrative rule making, and the administrative act (*Verwaltungsakt*) as well as the administrative contract (*Verwaltungsvertrag*) for the purposes of adjudication.[131] Enacting a regulation is part of the delegation doctrine which is based on the rule of law and the principle of democracy (articles 20 III GG and 80 GG). Both the citizen and the courts must be able to foresee and control what kind of authorization is granted to the executive, in which cases this authorization will be used (article 80 I 3 GG), and whether the administrative rule maker has exceeded the limits of delegation.[132] Statutory law is the product of parliament and all

[130] Obeverwaltungsgericht (OVG) Schleswig, judgment of 21.06.2000 – 2 L 9/99, in: Kommunale Steuer Zeitschrift (KStZ)2001, 51, 52. For an application on toll roads see Malte Müller-Wrede, Änderung des Fernstraßenbauprivatfinanzierungsgesetzes, in: idem (ed.) ÖPP-Beschleunigungsgesetz: Leitfaden mit Fallbeispielen, Praxishinweisen und Checklisten, Köln 2006, 117.

[131] Eberhard Schmidt-Aßmann/Christoph Möllers, The Scope and Accountability of Executive Power in Germany, in: Paul Craig/Adam Tomkins (eds), Oxford University Press, Oxford, 2005, 268, 275-279.

[132] From a comparative point of view: Uwe Kischel, Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law, in: Administrative Law Review 46 (1994), 213-256.

administrative power is bound to parliament. Delegated legislation is produced by governmental bodies, whereas autonomous bodies such as municipal authorities have the power to issue a special kind of rules, i.e. bylaws (*Satzungen*), in order to regulate within the limits of the law the matters that take their roots in local community. Rules that affect the legal interest of citizens must be made by parliament itself; In case of delegation of rule making power to a private party, ministers must retain the ultimate responsibility as long as the rules do not entail simply technical standards but also policy judgments that private parties are not entitled to make. Accountability of private regulations depends on control over private power by contract, corporate law, consolidation theories that bring private regulators within the realm of public law, for example, through the application of municipal law. That means that sometimes there is a conflict between municipal law and corporate law (see above 2.4).

2.6 Judicial accountability and participatory values

Access to justice is a constitutionally enshrined right to independent and neutral courts (article 19 IV GG). This guarantee of comprehensive legal protection of the citizens against all government actions is characterized by the high intensity of a thorough judicial control from both a factual and a legal point of view.[133] The courts scrutinize the facts of the case for themselves. Even in the exceptional cases where the executive is legally entitled to decide in the last resort the courts control whether the administrative decision is justifiable, the margin of appreciation set by the law has been observed, and the authorities made use of their powers according to the purpose of the authorizing act. The courts apply the

[133] The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, is interpreted by the ECJ as meaning "that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer". Paragraph 122(1) of the Code of Civil Court Procedure (*Zivilprozessordnung, ZPO)* was examined in the light of this principle in: ECJ, Case C‑279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 22 December 2010, paras 59.

principle of proportionality (a suitability, necessity, and adequacy test) to all administrative measures and strike the balance between the protection of individual freedoms and the stabilization of a trustworthy and effective administrative action.[134] Given the thoroughness of judicial control the rules on standing to sue are strict. Assertion of a violation of the claimant´s own rights is necessary, a mere sufficient interest will, unless it has been specifically provided for, not suffice.[135] § 42 of the Verwaltungsgerichtsordnung (Administrative Court Rules; 'the VwGO') provides that: Except where otherwise provided by law, an action for annulment of an administrative measure (*Anfechtungsklage*) or an action for enjoinder (judicial order to adopt an administrative measure in the event of an administrative refusal or failure to act, *Verpflichtungsklage*) is admissible only if the claimant asserts that her/his rights have been impaired by the administrative measure or by the refusal or failure to act. § 113(1) of the VwGO provides that 'in so far as the administrative measure is unlawful and the claimant's rights have thereby been impaired, the court shall set aside the administrative measure together with any internal appeal decision where appropriate'. Third parties may have the right to sue under certain circumstances, when, for instance, they are neighbors or competitors. The courts are reluctant to expand the law of standing generally to associations (*Verbandsklage*). The Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz – UmwRG*) with the amendments which took effect in 2010 transformed European law into national legislation. This Act provided that recognized environmental protection organizations may only bring actions against the infringement of environmental law provisions in cases which would also give citizens a subjective right and access to courts. According to the European Court of

[134] Schmidt-Aßmann/Möllers, in: Craig/Tomkins (eds) 2005, 268, 286.

[135] On the „systemic decision" of an individual-based legal protection against public authorities and its consequences for administrative law see: Friedrich Schoch, Gerichtliche Verwaltungskontrollen, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 687, paras 4-16.

Justice[136] however, this does not meet supranational requirements: European law calls - under the influence of the Aarhus Convention - for a wider access to justice, and environmental protection organizations must have the right to rely on all environmental provisions that are relevant to the authorization of a project although German procedural law does not permit such a challenge, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals.

The German conception of the rule of law places its emphasis traditionally on the comprehensive protection of subjective individual rights and thorough judicial control of government action rather than on participatory values, i.e. the participation of the public in administrative rule-making and decision-making procedures.[137] The traditional view was that the civil service is accountable to the law and to the minister, rather than to affected citizens; the latter have the possibility to seek legal protection as long as they have a standing to sue. Besides, access to administrative data was restricted, traditionally, to parties directly affected by administrative activities. These principles explain why the transposition of, for instance, the European Information Directive or the European Impact Assessment Directive was fraught with difficulties. The significance of public participation, however, has started to change in recent years, and this despite the high thoroughness and rigor of the judicial review of administrative decisions in substance. Public authorities are increasingly committed to enable those affected by the regulations and guidelines to

[136] Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany) lodged on 27 March 2009 — Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e.V. v Bezirksregierung Arnsberg,intervening party:Trianel Kohlekraftwerk Lünen GmbH & Co. KG,(ECJ, Case C-115/09).

[137] See from a comparative point of view: Michael Fehling, Der Eigenwert des Verfahrens im Verwaltungsrecht, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) Bd. 70/2011.

participate in their making.[138] An "information law" is being developing.[139] At the local government level there has been a move towards introducing direct democratic and participatory procedures. In the 1990s the *Länder* introduced local referendum procedures[140] and the direct election of municipal mayors and the head of county administration, the *Landrat.* Opportunities for public participation in local authority rule-making exist already for a long time in planning procedures in the area of building law (*Bauplanungsrecht*) where a notice-and-comment procedure is required. In administrative licensing procedures (*Genehmigungsvefahren*) and planning permission hearings and approvals (*Planfeststellungsverfahren*) which both are legal proceedings for the adjudication of individual cases and lead to issuing an individual administrative act, i.e. a license or the approval of a major infrastructure project, public participation is guaranteed and enforceable. Participation in administrative rule-making is more restricted than participation in proceedings for the adjudication of individual cases. Anyway, according to

[138] Schmidt-Aßmann/Möllers, in: Craig/Tomkins (eds) 2005, 268, 277; Schmidt-Aßmann, Das allgemeine Verwaltungsrecht als Ordnungsidee, 2nd edition, Springer-Verlag, Berlin, 2006, chapter 2, para 114; Arno Scherzberg, Öffentlichkeitskontrolle, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 613, 29-38: „Access to information as a new general principle of law" (at para 29).

[139] Friedrich Schoch, Informationsrecht in einem grenzüberschreitenden und europäischen Kontext, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2011, 388.

[140] A requirement of congruence of facts and criteria is provided for in the municipal codes (see for ex. § 26 GemO NW, § 26 Abs 2 S 1 GemO NW), i.e. a congruence of the justification of the referendum proposal, the wording of the determined question and the funding proposals is necessary. See Oberverwaltungsgericht (OVG) für das Land Nordrhein-Westfalen 15. Senat, 01.04.2009,15 B 429/09, in: NWVBl 2009, 442-443. A good example is the referendum held in Berlin (*Volksbegehren*) on the disclosure of hitherto secret PPP-arrangements regarding water supply in Berlin (Berlin Water Works, Berliner Wasserbetriebe). The city-senate had declared the referendum inadmissible but this decision was annuled by the city-state´s constitutional court. Verfassungsgerichtshof des Landes Berlin Geschäftsnummer: VerfGH 63/08, 6.10.2009: http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VerfGH%20Berlin&Datum=06.10.2009&Aktenzeichen=VerfGH%2063/08.

prevailing scholar opinion a distinction between participatory rights and rights to co-decision is to be drawn. Moreover, participation cannot replace, but only complement democratic legitimacy if administrative decisions are not to be taken at the expense of people who have not participated in the administrative decision-making.

3. WEBSITES

Bundesverfassungsgericht

Bundesverwaltungsgericht

Entscheidungen des Bundesgerichtshofs

Staatliche Finanzkontrolle in Deutschland

Deutsches Institut für Sachunmittelbare Demokratie an der TU Dresden e.V.

Mehr Demokratie e.V. - Bundesländer: Volksbegehren

Kommunale Gemeinschaftsstelle für Verwaltungsmanagement (KGSt)

Lexikon zu Begriffen aus Doppik/NKF und Kameralistik

Das Neue Kommunale Finanzmanagement

Public Private Partnerships Partnerschaften-Deutschland

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R E S P O N S A B I L I T E

APPORTS DE L'ANNEE- 2010 - FRANCE

(Mai 2011)

Prof. Benoît DELAUNAY[1]

INDEX

Les apports de l'année 2010 sont principalement d'ordre jurisprudentiel ce qui ne doit pas étonner dans une matière au premier chef prétorienne.

Au titre de la législation, on doit toutefois mentionner la **loi n° 2010-2 du 5 janvier 2010 relative à la reconnaissance et à l'indemnisation des victimes des essais nucléaires français** (JO du 6 janvier 2010, p. 327). Cette loi prévoit l'indemnisation des

[1] Professeur agrégé de droit public à l'Université de Poitiers

victimes des essais nucléaires en instaurant un régime de présomption de causalité pour les personnes souffrant d'une maladie radio-induite résultant de ces essais. Le fondement de l'indemnisation n'est pas précisé : s'il est acquis que le principe de solidarité nationale n'est pas en cause, il n'est pas pour autant aisé de déterminer s'il s'agit d'un régime législatif de responsabilité pour faute ou sans faute.

Sur le terrain jurisprudentiel, se détache une décision du Conseil constitutionnel par laquelle ce dernier juge contraire à la Constitution l'application aux instances en cours du dispositif de la loi « anti-Perruche » (**Cons. const. 11 juin 2010, décision n° 2010-2 QPC**). Saisi par le Conseil d'Etat (CE 14 avril 2010, *Mme L.*, requête n° 329290) d'une question prioritaire de constitutionnalité portant sur les dispositions de la loi du 4 mars 2002 qui exclut l'indemnisation des préjudices liés à la naissance d'un enfant atteint d'un handicap non décelé pendant la grossesse et qui interdit toute action en justice pour des situations créées avant l'adoption de ce texte (codifié à l'article L. 114-5 du code de l'action sociale et des familles), le Conseil constitutionnel admet la constitutionnalité de ce dispositif pour les situations à venir ; en revanche, il ne saurait s'appliquer rétroactivement aux situations en cours :

« *Considérant que le paragraphe I de l'article 1er de la loi du 4 mars 2002 susvisée est entré en vigueur le 7 mars 2002 ; que le législateur l'a rendu applicable aux instances non jugées de manière irrévocable à cette date ; que ces dispositions sont relatives au droit d'agir en justice de l'enfant né atteint d'un handicap, aux conditions d'engagement de la responsabilité des professionnels et établissements de santé à l'égard des parents, ainsi qu'aux préjudices indemnisables lorsque cette responsabilité est engagée ; que, si les motifs d'intérêt général précités pouvaient justifier que les nouvelles règles fussent rendues applicables aux instances à venir relatives aux situations juridiques nées antérieurement, ils ne pouvaient justifier des modifications aussi importantes aux droits des personnes qui avaient, antérieurement à cette date, engagé une procédure en vue d'obtenir la réparation de leur préjudice ; que, dès lors, le 2 du paragraphe II de l'article 2 de la loi du 11 février 2005 susvisée doit être déclaré contraire à la Constitution* »

A titre principal, la source des décisions de l'année 2010 reste la jurisprudence administrative ; il est possible d'en présenter le bilan contentieux selon les rubriques traditionnelles de la matière.

1. IRRESPONSABILITE

Dans un arrêt rendu le 23 juillet 2010, *Société Touax* (requête n° 328757, Lebon), le Conseil d'Etat maintient l'îlot d'irresponsabilité de l'Etat du fait des opérations militaires en des termes très nets :

« *Considérant en premier lieu que les opérations militaires ne sont, par nature, pas susceptibles d'engager la responsabilité de l'Etat, y compris sur le fondement de la rupture de l'égalité devant les charges publiques ; que les préjudices résultant d'opérations présentant ce caractère ne sauraient ainsi ouvrir aux victimes droit à réparation à la charge de l'Etat que sur le fondement de dispositions législatives expresses* ».

Les faits de guerre, événements de guerre, événements…étaient déjà depuis longtemps reconnus comme entraînant, par nature, l'irresponsabilité de l'Etat. Pour la première fois étaient en cause, dans l'espèce, des « opérations militaires », celles résultant des bombardements de l'opération de l'OTAN au Kosovo par les troupes françaises qui avaient causé des dommages empêchant la reprise de la navigation fluviale sur le Danube.

La décision n'est pas surprenante si l'on veut bien se souvenir que ce types d'opérations fait depuis longtemps l'objet d'un traitement contentieux particulier aussi bien sur le terrain de l'excès de pouvoir par leur caractère d'acte de gouvernement (v. sur la même affaire yougoslave, CE 5 juillet 2000, *Mégret et Mekhantar*, Lebon 291 : la décision des autorités françaises d'engager les forces françaises en Yougoslavie n'est pas détachable de la conduite des relations internationales de la France) que sur celui de l'indemnité au travers de la reconnaissance d'irresponsabilité.

2. FAUTE PERSONNELLE ET FAUTE DE L'ADMINISTRATION

Depuis longtemps, la doctrine signale l'effacement de la faute personnelle au profit de la faute de l'administration. L'année 2010 confirme cette tendance. Il a ainsi été jugé que ne constitue pas une faute personnelle mais une faute de service le fait de bénéficier d'un détachement dont l'agent connaît l'irrégularité mais qui avait été ordonné par le maire, qui en avait pris l'initiative et organisé les modalités (CE 10 mars 2010, *Mme Lejeune c. Commune de Coudekerque-Branche*, requête n° 321125).

En revanche, la responsabilité de l'Etat née du concours de la force publique apporté à une expulsion, est constitutive d'une prise illégale d'intérêt et d'une faute personnelle (CE 2 juin 2010, *Mme Fauchère, M. Mille*, requête n° 307772, Lebon).

3. RESPONSABILITE POUR FAUTE

- En 2010, s'est poursuivi le mouvement continu de déclin de la faute lourde au profit de la faute simple. Dans un arrêt du 2 avril 2010, *Ministre d'Etat, ministre de l'écologie, de l'énergie, du développement durable et de l'aménagement du territoire c. consorts Cyrot*, (requête n° 310562), le Conseil d'Etat a ainsi admis – implictement et a contrario – la responsabilité pour faute simple du fait des dommages mettant en cause l'exercice du contrôle aérien :

« *le service de navigation aérienne a, conformément aux obligations réglementaires respectives des contrôleurs aériens et des pilotes, transmis aux pilotes des aéronefs évoluant dans la circulation d'aérodrome les informations de trafic nécessaires pour prévenir les abordages en vol et qu'il n'a, ce faisant, pas commis de faute dans l'exercice de sa mission de prévention des abordages en vol des avions sur le circuit d'aérodrome* ».

- Plus décisivement, le juge administratif est venu préciser une fois de plus sa jurisprudence relative au droit à un délai raisonnable d'exécution d'une décision de justice. On se souvient que, depuis l'arrêt *Magiera* (CE Ass. 28 juin 2002, *Magiera*) dans lequel il a été admis que l'Etat peut voir sa responsabilité engagée sans qu'une faute lourde ne soit

exigée pour une durée excessive de jugement, celle-ci étant constitutive d'un fonctionnement défectueux du service public de la justice, les arrêts successifs n'ont cessé de préciser les modalités de calcul du délai raisonnable ainsi que les éléments à prendre en compte.

L'arrêt du Conseil d'Etat du 26 mai 2010, *Malfille*, reprend dans son premier considérant l'état du droit :

« *Considérant qu'il résulte des principes généraux qui gouvernent le fonctionnement des juridictions administratives que les justiciables ont droit à ce que leurs requêtes soient jugées dans un délai raisonnable ; que si la méconnaissance de cette obligation est sans incidence sur la validité de la décision juridictionnelle prise à l'issue de la procédure, les justiciables doivent néanmoins pouvoir en faire assurer le respect ; qu'il en résulte que, lorsque leur droit à un délai raisonnable de jugement a été méconnu, ils peuvent obtenir la réparation de l'ensemble des préjudices tant matériels que moraux, directs et certains, causés par ce fonctionnement défectueux du service de la justice et se rapportant à la période excédant le délai raisonnable ; que le caractère raisonnable du délai doit, pour une affaire, s'apprécier de manière globale – compte tenu notamment de l'exercice des voies de recours – et concrète en prenant en compte sa complexité, les conditions de déroulement de la procédure, de même que le comportement des parties tout au long de celle-ci, et aussi, dans la mesure où le juge a connaissance de tels éléments, l'intérêt qu'il peut y avoir pour l'une ou l'autre, compte tenu de sa situation particulière, des situations propres au litige et, le cas échéant, de sa nature même, à ce qu'il soit tranché rapidement ; que lorsque la durée globale de jugement n'a pas dépassé le délai raisonnable, la responsabilité de l'Etat est néanmoins susceptible d'être engagée si la durée de l'une des instances a, par elle-même, revêtu une durée excessive* »

Puis, il ajoute pour la première fois explicitement que la durée globale de jugement, en vertu des principes rappelés ci-dessus « est à prendre en compte jusqu'à l'exécution complète de ce jugement ». En d'autres termes, le délai d'exécution d'une décision de justice doit donc être aussi pris en compte pour l'exécution du délai de jugement.

- En tout dernier lieu, il doit être signalé en raison de l'importance considérable prise par ce contentieux depuis quelques années que le Conseil d'Etat a jugé qu'est une faute créant un préjudice qui doit être indemnisé le retrait illégal de permis de conduire (CE 26 mai 2010, *Banville*, requête n° 327559).

4. RESPONSABILITE SANS FAUTE

Les apports jurisprudentiels de l'année 2010 portent sur les deux fondements de la responsabilité sans faute : la rupture d'égalité devant les charges publiques et le risque.

4.1 Rupture d'égalité devant les charges publiques

L'année est marquée par des applications classiques de la jurisprudence comme la responsabilité sans faute reconnue à partir d'une mesure d'interdiction de circulation des poids lourds sur une route communale qui créé un préjudice aux propriétaires de bâtiments desservis par ce seul accès et louant leurs biens immobiliers à une entreprise de logistique (CE 4 octobre 2010, *Commune de Saint-Sylvain-d'Anjou*, requête n° 310801).

Elle est surtout dominée par **un arrêt d'Assemblée du Conseil d'Etat rendu le 22 octobre 2010, *Bleitrach*** (requête n° 301572) relatif à la responsabilité du fait des difficultés d'accès de personnes handicapées à des bâtiments publics. Le Conseil d'Etat retient la responsabilité sans faute de l'Etat à l'égard d'une avocate contrainte de se déplacer en fauteuil roulant et ayant souffert de l'étalement de travaux d'accessibilité de certains palais de justice. Il condamne l'Etat à la réparation du préjudice moral enduré et qui découle des troubles causés à la requérante dans les conditions d'exercice de sa profession :

« *le préjudice moral dont se prévaut Mme A en raison des troubles de toute nature que lui causent les conditions d'exercice de sa profession présente, eu égard, d'une part, à la multiplicité des locaux dans lesquels elle est amenée à exercer son activité et à la nécessité pour elle, du fait de ses obligations professionnelles, d'accéder à différentes parties de ces bâtiments, d'autre part, à la particularité de la fonction de l'avocat tenant à son rôle de représentation vis-à-vis tant de ses clients que des professionnels de la justice*

ainsi que, lors des audiences publiques, du public et au caractère pénible des situations régulièrement provoquées pour cette auxiliaire de justice par ses difficultés d'accès aux palais de justice, que ne pouvaient pas totalement pallier les mesures prises par les autorités judiciaires pour remédier à cette situation, enfin au nombre d'années pendant lesquelles elle a dû subir cette situation, un caractère grave et spécial dont la charge excède celle qu'il incombe normalement à l'intéressée de supporter ».

4.2 Risque

Le Conseil d'Etat est venu préciser l'étendue de sa jurisprudence classique *Thouzellier* relative à la responsabilité découlant du risque créé par le non-enfermement des mineurs délinquants (CE Section 3 février 1956, *Ministre de la justice c. Thouzellier*, Lebon 49). Le 17 décembre 2010, par un arrêt *Ministre de la justice c. Fonds de garantie des victimes d'actes de terrorisme et d'autres infractions* (req. n°334797), il a décidé le maintien de la jurisprudence *Thouzellier* dans un contexte où s'est beaucoup développée au cours des dernières années la responsabilité de l'Etat fondée sur la garde qui s'applique également aux usagers du service public de la justice. Bien qu'étendue aux institutions privées et aux dommages résultant d'autres méthodes libérales, la responsabilité fondée sur l'arrêt *Thouzellier* a toujours été réservée aux seuls tiers dans la mesure où c'est la situation spécifique du tiers par rapport à l'usager qui justifie un traitement particulier. Le Conseil d'Etat juge que :

« *peut être recherchée, devant la juridiction administrative, la responsabilité de l'Etat en raison du risque spécial créé pour les tiers du fait de la mise en œuvre d'une des mesures de liberté surveillée prévues par l'ordonnance du 2 février 1945 ; que, toutefois, cette responsabilité ne saurait être engagée sur le même fondement vis-à-vis des usagers du service public, qui ne se trouvent pas, face à un tel risque, dans une situation comparable à celle des tiers ; qu'ainsi qu'il a été dit plus haut, le mineur, auteur de l'agression, et le mineur victime de celle-ci étaient l'un et l'autre placés dans le même lieu de vie par décision de l'autorité judiciaire et avaient par conséquent tous deux la qualité d'usagers du service public ; que cette circonstance faisait dès lors obstacle à la mise en œuvre du régime de responsabilité sans faute de l'Etat sur le fondement du risque spécial ; que, par*

suite, c'est à tort que le juge des référés du tribunal administratif de Toulouse a accueilli la demande du FGVTI tendant à la condamnation de l'Etat à lui verser une provision en se fondant sur le terrain de la responsabilité de l'Etat à raison du risque spécial créé du fait de la mise en œuvre d'une des mesures prévues par l'ordonnance du 2 février 1945 ».

5. RESPONSABILITE HOSPITALIERE

L'abondance de la jurisprudence relative à la responsabilité hospitalière implique de distinguer cette question de l'ensemble de la matière.

Sur le terrain bibliographique, il convient de signaler la parution d'un ouvrage très complet sur le sujet rédigé par Ch. Maugüé et J.-Ph. Tiellay, *La responsabilité du service public hospitalier*, LGDJ, 2010.

- Le Conseil d'Etat a eu l'occasion de s'interroger sur l'application de sa jurisprudence *Marzouk* (CE 9 juillet 2003) qui prévoit qu'un établissement hospitalier doit réparer, même en l'absence de faute de sa part, le dommage subi par un patient du fait de la défaillance d'un appareil ou d'un produit utilisé dans le cadre des soins. Il a dû en effet examiner la compatibilité de cette jurisprudence avec les articles 1386-1 et suivants du code civil, transposant la directive du 25 juillet 1985, prévoyant que la responsabilité des dommages corporels causés par un produit défectueux incombe au producteur.

Le Conseil d'Etat, saisi d'un recours indemnitaire par un patient ayant subi des brûlures causées par un matelas chauffant, juge le 4 octobre 2010, dans un arrêt *CHU de Besançon*, (requête n° 327449) que :

« *la responsabilité des établissements publics de santé à l'égard de leurs patients est régie par des principes dégagés par le juge administratif et par des dispositions législatives ; que ce régime particulier de responsabilité extra-contractuelle a pour fondement les relations spécifiques qui s'établissent entre le service public hospitalier et les personnes qu'il prend en charge ; qu'il comporte notamment le principe, dont la cour administrative d'appel de Nancy a fait application, selon lequel un établissement doit réparer, en l'absence même de faute de sa part, le dommage subi par un patient du fait de*

la défaillance d'un appareil ou d'un produit utilisé dans le cadre des soins ; que si ce principe a été dégagé par le Conseil d'Etat dans une décision du 9 juillet 2003, postérieurement à la notification de la directive, dans le cadre d'un litige né antérieurement à sa date limite de transposition, il peut être soutenu qu'il demeure applicable aux dommages survenus postérieurement à cette date au bénéfice des dispositions précitées de l'article 13 qui réservent les droits dont la victime d'un dommage peut se prévaloir au titre de la responsabilité (...) extra-contractuelle , dès lors qu'il relève d'un régime de responsabilité ayant un fondement spécifique, distinct de celui du régime de responsabilité du fait des produits défectueux organisé par la directive ; que la question ainsi posée, qui est déterminante pour l'issue du litige, présente une difficulté sérieuse, justifiant que la Cour de justice de l'Union européenne en soit saisie ».

- Dans un arrêt du 18 février 2010, *Consorts Ludwig* (requête n° 316774), le Conseil d'Etat retient la responsabilité d'un hôpital qui fait perdre à un patient une chance de survivre à une nouvelle opération :

« *en jugeant que la responsabilité du centre hospitalier intercommunal de Fréjus Saint-Raphaël n'était pas engagée, alors qu'il résultait de ses propres constatations que les fautes commises lors de l'intervention du 13 septembre 1996 avaient eu pour conséquence directe une insuffisance rénale qui avait fait perdre à l'intéressé une chance de survivre à l'intervention du 2 juin 1998, la cour a commis une erreur de droit* ».

L'application de la notion de perte de chance a pu être critiquée car peu orthodoxe au regard de la jurisprudence traditionnelle en matière hospitalière et le rôle de l'établissement public hospitalier dans le décès du patient apparaissant très indirect (M. Canedo-Paris, « Perte de chance et lien direct de causalité en matière de responsabilité hospitalière », *RFDA* 2010, p. 791).

- Dans un autre arrêt du même jour, le Conseil d'Etat juge que juge que la victime d'une faute commise à l'occasion du transfert d'un patient d'un établissement de santé vers un autre peut rechercher la responsabilité de l'un seulement des établissements ou de leur responsabilité solidaire, sans préjudice des appels en garantie que peuvent former l'un

contre l'autre les établissements ayant participé à la prise en charge du patient (CE 18 février 2010, *Consorts Aujollet*, requête n° 318891).

- Dans sa décision du 19 mars 2010, *Consorts Ancey* (requête n° 313457, Rec. tab), le Conseil d'Etat confirme la jurisprudence *Bianchi* en l'étendant à un risque commun à des actes médicaux de série. La responsabilité sans faute dans les hypothèses d'aléa thérapeutique n'est pas exclue par le fait que le risque est commun à une large catégorie d'actes médicaux :

« *Considérant que, lorsqu'un acte médical nécessaire au diagnostic ou au traitement du malade présente un risque dont l'existence est connue mais dont la réalisation est exceptionnelle et dont aucune raison ne permet de penser que le patient y soit particulièrement exposé, la responsabilité du service public hospitalier est engagée si l'exécution de cet acte est la cause directe de dommages sans rapport avec l'état initial du patient comme avec l'évolution prévisible de cet état, et présentant un caractère d'extrême gravité* ».

- Le juge administratif a apporté enfin quelques précisions sur le devoir des médecins d'informer les patients subissant une intervention risquée. Ainsi dans son arrêt du 2 juillet 2010, *Mme D.*, (requête n° 323885), le Conseil d'Etat prolonge sa jurisprudence du 5 janvier 2000, *Consorts Telle et AP-HP* (Lebon 5) :

« *Considérant que, lorsque l'acte médical envisagé, même accompli conformément aux règles de l'art, comporte des risques connus de décès ou d'invalidité, le patient doit en être informé dans des conditions qui permettent de recueillir son consentement éclairé ; que si cette information n'est pas requise en cas d'urgence, d'impossibilité ou de refus du patient d'être informé, la seule circonstance que les risques ne se réalisent qu'exceptionnellement ne dispense pas les praticiens de leur obligation ; que le défaut d'information ouvre droit à réparation lorsqu'il a eu pour conséquence la perte par le patient d'une chance d'échapper, en refusant de subir l'acte qui lui était proposé, au dommage qui a résulté pour lui de la réalisation d'un risque de décès ou d'invalidité* ».

« *Considérant qu'après avoir relevé qu'il n'était pas établi que Mme A ait été informée du risque de pancréatite inhérent à la réalisation d'un cathétérisme rétrograde des voies biliaires , la cour administrative d'appel a retenu, pour écarter néanmoins la responsabilité du centre hospitalier de ce chef, que l'intéressée ne soutenait pas qu'elle aurait renoncé à l'opération ou choisi un autre mode de traitement si ce risque avait été porté à sa connaissance ; qu'en se fondant sur un tel motif, alors qu'il lui appartenait seulement, pour déterminer si la patiente avait été privée d'une chance d'éviter le dommage, de vérifier si, eu égard à son état de santé et aux alternatives thérapeutiques existantes, elle avait la possibilité de refuser l'intervention qui lui était proposée, la cour a commis une erreur de droit ; que si elle a également relevé que Mme A ne demeurait atteinte d'aucune séquelle invalidante, une telle circonstance n'était pas de nature à faire disparaître son droit à réparation, dès lors que le risque qui s'était réalisé avait entraîné une invalidité temporaire qui n'avait pu être réparée que par une nouvelle intervention* ».

6. PREJUDICE INDEMNISABLE

- Le Conseil d'Etat reconnaît la constitutionnalité de la non-indemnisation des servitudes d'urbanisme prévue à l'article L. 160-5 du code de l'urbanisme. Saisi d'une question prioritaire de constitutionnalité, il juge le 16 juillet 2010 dans un arrêt *SCI La Saulaie* (requête n° 334665) que :

« *l'article L. 160-5 du code de l'urbanisme, qui ne pose pas un principe général de non indemnisation des servitudes d'urbanisme mais l'assortit expressément de deux exceptions touchant aux droits acquis par les propriétaires et à la modification de l'état antérieur des lieux et qui ne saurait avoir ni pour objet ni pour effet, ainsi que l'a jugé le Conseil d'Etat statuant au contentieux dans sa décision du 3 juillet 1998 n° 158592, de faire obstacle à ce que le propriétaire dont le bien est frappé d'une servitude prétende à une indemnisation dans le cas exceptionnel où il résulte de l'ensemble des conditions et circonstances dans lesquelles la servitude a été instituée et mise en œuvre, ainsi que de son contenu, que ce propriétaire supporte une charge spéciale et exorbitante, hors de proportion avec l'objectif d'intérêt général poursuivi, n'a, par conséquent, pour effet ni de priver le propriétaire, dont le bien serait frappé d'une telle servitude, de la propriété de son*

bien, ni de porter à cette propriété une atteinte d'une gravité telle que le sens et la portée de ce droit s'en trouvent dénaturés, ni d'exclure tout droit à réparation du préjudice résultant d'une telle servitude ; que par suite, la question soulevée n'est pas nouvelle et ne présente pas un caractère sérieux ; qu'ainsi, sans qu'il soit besoin de renvoyer au Conseil constitutionnel la question prioritaire de constitutionnalité invoquée, le moyen tiré de ce que l'article L. 160-5 du code de l'urbanisme porte atteinte aux droits et libertés garantis par la Constitution doit être écarté ».

- Au sujet du préjudice réfléchi, ont été précisées les modalités de calcul du préjudice patrimonial des ayants droit d'une victime décédée qui sollicitaient la réparation du préjudice lié à la perte de revenus dont ils étaient privés (CE 2 juillet 2010¸ *Centre hospitalier territorial de Nouvelle-Calédonie*, requête n° 309562). Après avoir rappelé que le principe de la réparation intégrale impose au juge administratif de tenir compte du montant de la perte de revenus dont la victime ou ses ayants droit ont été effectivement privés du fait du dommage qu'elle a subi, il admet :

« *que cette règle ne fait cependant pas obstacle à ce que soient incluses, dans le calcul du préjudice économique des ayants droit d'une victime, les charges nouvelles qu'auront le cas échéant à supporter ceux-ci pour bénéficier de prestations sociales ou assurantielles équivalentes à celles auxquelles ils avaient droit du chef du vivant de la victime et dont ils se trouvent privés à la suite de son décès* ».

- Enfin, il a été jugé que la victime de la faute d'un agent ne peut se prévaloir d'un préjudice moral indemnisable découlant de l'insuffisance de la sanction infligée au fonctionnaire fautif (CE 2 juillet 2010, Bellanger, requête 322521, Lebon) :

« *Considérant que la sanction disciplinaire n'a pas pour finalité de réparer le préjudice de la victime de la faute commise par l'agent public sanctionné ; qu'il en résulte que la victime, si elle a droit à la réparation intégrale du préjudice résultant de cette faute, n'est pas titulaire d'un droit à indemnité résultant soit de l'absence de sanction disciplinaire de l'agent qui a commis la faute, soit du choix de la sanction disciplinaire qui a été infligée* ».

7. REPARATION ET INDEMNISATION

Plusieurs affaires doivent être signalées et regroupées ici en tant qu'elles résolvent des questions de réparation et d'indemnisation en dépit de leur contenu hétérogène.

- Le Conseil d'Etat étend d'abord l'obligation *in solidum* qui signifie que l'auteur d'une des causes d'un dommage doit assurer la réparation intégrale de celui-ci vis-à-vis de la victime, sous la réserve d'un recours ultérieur contre les autres auteurs. Traditionnellement beaucoup plus réduite en droit administratif qu'en droit civil, elle est ici consacrée dans l'hypothèse le dommage a été causé par des fautes de personnes différentes ayant agi de façon indépendante dans une hypothèse de responsabilité pour faute (CE 2 juillet 2010, *Madranges*, requête n° 323890, Lebon) :

« *Considérant que lorsqu'un dommage trouve sa cause dans plusieurs fautes qui, commises par des personnes différentes ayant agi de façon indépendante, portaient chacune en elle normalement ce dommage au moment où elles se sont produites, la victime peut rechercher la réparation de son préjudice en demandant la condamnation de l'une de ces personnes ou de celles-ci conjointement, sans préjudice des actions récursoires que les coauteurs du dommage pourraient former entre eux* ».

- Le Conseil d'Etat rappelle ensuite qu'en matière de vaccinations obligatoires, la réparation assurée par l'Office national d'indemnisation des accidents médicaux, des affections iatrogènes et des infections nosocomiales (ONIAM) au titre de la solidarité nationale. Il juge irrecevabilité le recours subrogatoire exercé par un tiers payeur contre l'ONIAM (CE 22 janvier 2010, *M. J. Y. A*).

- Précisant les articles 706-3 et 706-11 du code de procédure pénale relatifs au fonds de garantie des victimes des actes de terrorisme et d'autres infractions, le Conseil d'Etat considère par ailleurs dans un avis contentieux rendu le 7 avril 2010, *Idrissi*, que :

« *en raison de la subrogation du fonds de garantie dans les droits de la victime qu'instituent ces dispositions, régissant un mode d'indemnisation fondé sur la solidarité nationale, et en application des principes qui gouvernent la procédure devant le juge*

administratif, ce dernier, informé de ce que la personne victime d'une infraction au sens des dispositions ci-dessus, a saisi une commission d'indemnisation des victimes d'infraction pénale ou obtenu une indemnité versée par le fonds de garantie des victimes des actes de terrorisme et d'autres infractions doit, à peine d'irrégularité de son jugement, mettre en cause le fonds dans l'instance dont il est saisi afin, d'une part, de permettre à celui-ci d'exercer son droit de subrogation et, d'autre part, de s'assurer qu'il ne procèdera pas, s'il donne suite à la demande de condamnation, à une double indemnisation des mêmes préjudices ».

Dans le prolongement de cet avis et sur un sujet proche, le Conseil d'Etat juge le 4 octobre 2010, *M. et Mme de Lucy de Fossarieu* (requête n° 316310) que le recours subrogatoire du fonds de garantie des victimes des actes de terrorisme et d'autres infractions peut s'exercer sur l'indemnité qu'une personne publique a été condamnée à verser à la victime, même si la décision de justice ne l'a pas prévu.

- Le Conseil d'Etat s'est également interrogé sur la combinaison des jurisprudences *Thouzellier* (préc.) et *Axa Courtage* (CE Sect. 11 février 2005, req. n° 252169) au sujet de l'action subrogatoire.

Dans l'arrêt du 17 mars 2010, *Garde des Sceaux c. MAIF*, requête n°315866, il a jugé que :

« *Considérant, d'une part, que la décision par laquelle une juridiction des mineurs confie la garde d'un mineur, dans le cadre d'une mesure prise en vertu de l'ordonnance du 2 février 1945, à l'une des personnes mentionnées par cette ordonnance transfère à la personne qui en est chargée la responsabilité d'organiser, diriger et contrôler la vie du mineur ; que si, en raison des pouvoirs dont elle se trouve ainsi investie lorsque le mineur lui a été confié, sa responsabilité peut être engagée, même sans faute, pour les dommages causés aux tiers par ce mineur, l'action ainsi ouverte ne fait pas obstacle à ce que soit également recherchée, devant la juridiction administrative, la responsabilité de l'Etat en raison du risque spécial créé pour les tiers du fait de la mise en œuvre d'une des mesures de liberté surveillée prévues par l'ordonnance du 2 février 1945* ;

Considérant, d'autre part, que la décision par laquelle le juge des enfants confie la garde d'un mineur, dans le cadre d'une mesure d'assistance éducative prise en vertu des articles 375 et suivants du code civil, à l'un des services ou établissement mentionnés à l'article 375-3 du même code, transfère la responsabilité d'organiser, diriger et contrôler la vie du mineur à ce service ou à cet établissement, dont la responsabilité est engagée pour les dommages causés aux tiers par ce mineur, même sans faute, sans qu'il puisse, lorsqu'il ne relève pas de l'autorité de l'Etat, rechercher la responsabilité pour risque de ce dernier au titre des agissements du mineur concerné ;

Considérant, enfin, que lorsque l'un des coauteurs d'un dommage a indemnisé intégralement la victime des préjudices qu'elle a subis, il ne peut, par la voie de l'action subrogatoire, se retourner contre un autre coauteur que dans la limite de la responsabilité encourue individuellement par ce dernier ».

- Enfin, sur un autre terrain, il a été jugé que la garantie prévue à l'article 11 de la loi du 13 juillet 1983 portant droits et obligations du fonctionnaire n'a pas vocation à se substituer à celle offerte par les assureurs : un assureur ne peut donc être subrogé dans les droits de l'agent qui bénéficie d'indemnités au titre de cette protection statutaire (CE Section 7 mai 2010, *Cie Assurances générales de France* (*AJDA* 2010, 1138, chron. Liéber et Botteghi).

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PUBLIC AUTHORITIES LIABILITY ARISING FROM UNLAWFUL EXERCISE OF POWERS

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[1] Please note that Maurizio Cafagno drafted paragraph one and eight, while Mariano Fazio wrote paragraphs from two to seven.

1. LEGAL EXPECTATIONS AND COMPENSATION FOR DAMAGES: JURISPRUDENTIAL EVOLUTION

Within Italian Administrative law, personal positions depending on the exercise of powers by public administrative authorities are known as "*legal expectations*" ("*interessi legittimi*").

National judges denied in the past that offences to legal expectations could raise compensations for damages caused by public administrative authorities.

Unlawful decisions could grant access to judgments to void such decisions at the most, but they did not allow claims for money to put damaged persons in the same position they were before decision had been taken.

Accordingly, public administrative authorities were exempt from civil liability due to unlawful exercise of their public powers.

This trend went into crisis only recently, at the beginning of the '90s, under the pressure of European community law.

It dates back to that period, for instance, the implementation (by article 13 of now-repealed Law 142/1992, dated 19th February 1992) of the first European directives, named "ricorsi" (i.e. "appeals") (namely directive 89/665/CEE and directive 92/13/CEE), which obliged Member States to grant competitors the right to calim for damages when prejudiced by breaches of community provisions governing the awarding proceedings of public works and supply contracts (these subjects were undoubtedly entitled to legal expectations, despite of domestic taxonomies).

In the same period of time, it was also issued the well-known judgment "*Francovich-Bonifaci v Italian Republic*" (released within joint judicial proceedings C-6/90 and C-9/90), according to which the European Court of Justice considered a member State

liable for damages caused to a citizen due to the lack of national implementation of a European Directive (see SORACE, *Diritto delle amministrazioni*, 380).

These novelties did not change the traditional opinion which denied the right to claim for damages, as the courts initially qualified them as exceptional measures (see Italian Supreme Court, Civil Divisions (*Cassazione Civile*), United Divisions, judgment n. 2667/1993, dated 5th March 1993). Anyway, they paved the way for a forthcoming change.

The change eventually occurred with the landmark judgment n. 500/1999, issued by Italian Supreme Court's United Civil Divisions on 22nd July 1999.

In this judgment, the Italian Supreme Court overturned the previous opinion and stated that public administrative authorities could be held liable on the gound of civil law, for damages caused in the exercise of their powers. The Supreme Court also added that even offences to legal expectations could cause an "*unlawful damage*" ("danno ingiusto") according to article 2043 of the Italian Civil Code (hereinafter "ICC"), not differently form offences to personal rights ("*diritti soggettivi*").

In its judgment, the Supreme Court qualified article 2043 of the ICC not just as a second-rate provision sanctioning behaviours forbidden by other provisions, but as a first-rate provision, suitable to sanction damaging conducts directly; and it expressly stated that "*an offence to a legal expectation raises liability falling within Lex Acquiliae, as well as an offence to a personal right or a different relevant juridical interest, for the purposes of qualifying the damage as unlawful*".

Accordingly, a legal expectation can be coherently considered as an "*advantageous position pertaining to a person in relation with a utility – "a good of life" , subject to an administrative decision, which grants to that person powers useful to affect the correct exercise of their powers by the public administrative authorities, in order to provide for the possible conversion of such an expectation into the good*".

The Supreme Court, admitting full refund of these positions, stated from this very first historic judgment that the award of a claim to get damages repaid by equivalent does

not require a previous claim against the offensive decision before the administrative judge, since the civil judge could pre-emptively ascertain the unlawfulness of the decision in order to qualify as unlawful the conduct of the public administrative authority (see herein-below).

2. RECENT STATUTORY PROVISIONS

One year later, the path opened by judgment n. 500/1999 was followed by the legislator .

Truly speaking, Legislative Decree n. 80/1998 had already allowed administrative judges to award compensation for damages within 'exclusive jurisdiction' matters (that is matters wherein administrative courts have jurisdiction with regard to personal expectation as well as personal rights). Nevertheless, according to the opinions before the issue of judgment n. 500/1999, one could still doubt that the above-mentioned provision would regard liability cases other than those arising from offences to personal rights.

In any case, Article 7 of the Law n. 205/2000 dissolved the uncertainties, as it granted administrative judges the power to award compensation for damages in the exercise of their 'general jurisdiction of legitimacy'.

More precisely, the provision, which amended article 35 of the Legislative Decree n. 80/1990 as well as Article 7 of Law n. 1034/1971, stated that "*administrative regional courts can also judge, within their own jurisdiction, all issues involving a possible compensation for damages, even granting specific performance, as they can judge on different consequent financial rights. Ordinary civil judges can retain resolution of all preliminary issues concerning state and capability of private individuals, except when they deal with the right to stand before courts, as well as the resolution of issues regarding claims against false proof*".

On this basis, once resolved a few minor discrepancies, civil and administrative courts have come to the conclusion that within the current legal framwork administrative

judges have the right to grant compensation for damages raising from offences to legal expectations, overcoming the previous model envisaged by judgment n. 500/1999 on the basis of the former procedural law (see Italian Constitutional Court, judgment n. 191/2006 and Italian Supreme Court, United Civil Divisions, judgment n. 13659/2006).

Recent codification of the administrative judicial procedure, enacted with Legislative Decree n. 104/2010, has confirmed the model built by Law n. 205/2000.In fact, the new Code states on one hand that "*administrative courts within their general jurisdiction of legitimacy can judge claims concerning deeds, decisions or non-performances by public administrative authorities, including those related to compensation for damages emerging from offences to legal expectations and other resulting financial rights, even if such claims are initiated in an autonomous way*" (see article 7, paragraph 4) and, on the other, that "*it is possible to ask for compensation for unlawful damages arising from illegitimate exercise of administrative (discretionary) activity or non-exercise of the mandatory one*" (see article 30, paragraph 2).

3. ISSUES CONCERNING PROOF AND AMOUNT OF DAMAGES

According to the majority of administrative judgments, which mantain the reasoning traced by judgment n. 500/1999, the general rule addressing compensatory obligations of the public authorities emerging from illegitimate administrative decisions is article 2043 of the ICC (see, among most of the judgments, Consiglio di Stato, Fifth Division, 11th April 2011; Consiglio di Stato, Fifth Division, 6th May 2011, n. 2725).

According to this provision, the current leading opinion qualifies as elements of the tort an offence to a juridical position not justified by a provision of law, a financial damage, the causal nexus between damaging event and the public administrative authority conduct and the personal/subjective requirement, to be converted into wilful wrongdoing or gross or slight negligence (Consiglio di Stato, Fifth Division, 6th July 2009, judgment n. 4325).

Even if there are different opinions on the nature and general regulation of the liability within the academia and the case-law (see herein-below, paragraph 6), hereinafter we will still analyse the prevailing interpretative model and therefore focus on some issues concerning the application of the model proposed by the landmark judgment of the United Civil Divisions of the Italian Supreme Court.

One of the most sensitive issues arising from judgment n. 500/1999, which represents the basis of some interpretative uncertainties still unsettled, regards the treatment of damages emerging from offences to th so called pretentious expectations ("*interessi pretensivi*") due to discretionary decisions.

At that time, the judgment stressed the need of distinguishing, for the purposes of ascertaining a relevant financial damage that could be compensated, between offences to expectations concerning the preservation of a good (so called 'oppositional legal expectations') and offences to expectations to the acquisition of a good (so called 'pretentious expectations').

In fact, if an offence to the first ones does necessarily involve a sacrifice to a good of life, because the related enjoyment does exist before the decision, an offence to the second ones requires to evaluate the entitlement to the good of life denied by the public administrative authority in the case.

The different nature of claims for compensation for damages produced by unlawful exercise of administrative activities depending on the oppositional or pretentious nature of the legal expectation is still confirmed by courts, even if not in the same terms of judgment n. 500/1999 (see Italian Supreme Court, Third Civil Division, 23rd February 2010, judgment n. 4326; Administrative Regional Court of Campania, Salerno, Second Division, 13th September 2010, judgment n. 11028; Consiglio di Stato, Fifth Division, 21st April 2006, judgment n. 2256).

In fact, it is clear that it is more difficult to ascertain the right to the good of life, from which the possibility to get compensation for offences to legal expectations depends on, when the public administrative authorities exercise a discretionary power.

The judgment is instead less difficult when referred to a constrained activity, since in this case "in determing the damage one is confronted with a problem not different from that arising when a personal right is offended" (see Sorace, La responsabilità). As in the case of an offence to a personal right, it will be sufficient to ascertain the legal requirements to the right and therefore state that the public administrative authority should have adoptded the decision to grant the right in the case.

Conversely, when the offence is caused in the exercise of discretionary action, it can be difficult to determine if the damaged persons could have pursued and mantained the desired good in the case the unlawful activity was not performed.

Within this class of cases, the judicial evaluation of what a right for a good for life consists in, to be performed by way of a prognostic assessment, threatens to interfere with the powers reserved to the public administrative authorities.

Within these guidelines, the Italian jurisprudence developed two main opinions:

a) a more restrictive approach acknowledges the possibility to perform a prognostic assessment (and accordingly it deems possible to grant compensation for damages originating from non-assignment of the good) when the exercise of a constrained activity is involved, whereas it rules out this possibility when the activity involved is a discretionary one (see Consiglio di Stato, Fifth Division, 29th January 2008, n. 248).

Coherent with this approach it is the idea that "when the expectation does relate to a discretionary activity, a private citizen, in order to obtain compensation for damages due to the offence, should previously wait for the express recognition that he/she is entitled to the good of life (where such a recognition can be awarded directly by the public administrative authority or after a judgment for compliance). Only and exclusively when this recognition is obtained it is possible to claim for compensation for damages, which, in this case, will be reduced to the sole prejudice suffered by delayed achievement of the desired good" (see on the subject DE LEONARDIS).

b) A second opinion (see Consiglio di Stato, Sixth Division, judgment n. 5323/2006), moving from the critical statement that "*a judgment to determine the right (to the good for life) stiffens too much the activities performed by the public administrative authorities and postpones unreasonably the chance to obtain compensation for damages, forcing the judge to deny the compensatory claim for lack of requirements and to reset in motion the administrative procedure that, exercising its power once again it appears to be paradoxically split between the exigency to perform the judgment and the fear to put in place the requirements for the claim for compensation for damages*" holds that, on the contrary, in cases where "*according to the dicta of the administrative judge, it is not easy to reissue the administrative activities, the damage which could be claimed against the administrative public authorities has to be seen within the perspective of a loss-of-chance*".

General Meeting of Consiglio di Stato number 13/2008 – gathered in order to identify the proper moment in which it could be possible to evaluate the claim for compensation for damages due to an offence of (pretentious) legal expectations in the case of annulment of a discretionary decision and, more particularly, to determine "*if such an evaluation should be assessed only after the new exercise of the discretionary power, or immediately, and therefore leaving aside the re-exercise of the power, with prognostic evaluation executed ex ante*" opted for a solution of the conflict which can be seen, for certain reasons, as a compromise.

From one side, in fact, it admitted that it is possible to compensate the damages even when the good for life has not been recognised, and, from the other side, it conditioned the compensation to the exercise of a power that, according to an evaluation of legitimacy, it allows to qualify the consequent administrative activity substantially as a binding one.

As for the objective requirements due to establish an unlawful action, further difficulties as well as interpretative doubts are related to the possibility to determine a relevant financial damage when a public administrative authority offences formal or procedural expectancies.

With a certain degree of approximation, the main jurisprudential trends on the subject can be summarized as follows :

a) according to the first opinion, the sole unlawfulness of the administrative activity of the case is not sufficient to determine a compensatory obligation for the public administrative authorities (see Consiglio di Stato, Fifth Division, 24th December 2008, n. 6538);

b) according to a second minority opinion, violation of such expectancies can give rise to a pre-contractual liability (see Consiglio di Stato, Fourth Division, judgment n. 875, dated 7th March 2005) and it is conceptually apt to give birth to a compensatory damage which can be considered as autonomous and different from an offence to a good of life (see, paragraph 6).

c) according to a different middle-sided, so to speak, opinion, it is possible to compensate not the offence to the formal expectancy per se, but more precisely the consequences that such an offence can create on a good of life (as for this opinion, see Consiglio della Giustizia Siciliana, judgment n. 363, dated 28th April 2008, particularly as for the passage of the judgment which reports that "*failure of the notice as well as of the communication, when the decision has been voided for different reasons, can reflect its consequences as for the possible compensation for damages arising from an unlawful decision, if such a failure has worsened the damage*".

4. (FOLLOWING) CHANCES AND DAMAGES ON MATTER OF CONTRACTS SIGNED BY PUBLIC ADMINISTRATIVE AUTHORITIES

Difficulty of proof and determination of damages do assume peculiar characteristics in the case of tenders procedures, since in this field of law the higher is the .degree of discretionality the harder is the proof of the substance of chances forfeited by unlawful decisions.

In an attempt to frame the case, administrative courts primarily stated that a loss of chance consists in a "*financial entity, juridically and economically subject to autonomous evaluation*" and that the related damage consists in "*a financial damage whose object is the loss not of a financial advantage but of the mere chance to obtain such financial advantage according to an ex-ante evaluation*" (see Consiglio di Stato, Third Division, 31st May 2011, judgment n. 3278).

As far as the burden of proof is concerned, the claimant must bear it proving his/her probability to obtain the good of life (required to be higher than 50 per cent according to the case law) or by way of presumptions (see Consiglio di Stato, Third Division 31st May 2011, n. 3278; Regional Administrative Court of Lombardia, Brescia, Third Division 15th October 2010, judgment n. 4044).

In the case of lack of proof, Courts agree that an equitable evaluation of damage pursuat to article 1226 of ICC is not admissible (since this evaluation "can be used to face the impossibility of proving not the existence of compensatory damages but their exact amount" (see Consiglio di Stato, Third Division, 31st May 2011, judgment n. 3278).

As for the determination of the amount of damages, judges focused their attention on the proof of lack of profits, which is related to a positive expectancy to sign the contract (see CLARICH).

According the prevailing opinion on the matter, the lack of profits can be determined on a lump-sum basis, applying the standard criterion that grants 10% of the starting bid for the auction, reduced by the offer delivered by the company interested in, which has to be reduced up to 5% in the case the company is not able to prove that it has not been able to use other equipment and workers to fulfil other supplies contracts (see Consiglio di Stato, Sixth Division, judgment n.14/2010).

A different and even less trailed opinion does, on the contrary, requires more stricly a rigorous proof (such as the one inferable from the exhibition of the offer proposed) of the percentage of the profits the company could have actually gained from the contract award (see Consiglio di Stato, Sixth Division, 11th January 2010, judgment n. 20).

5. ISSUES CONCERNING THE SUBJECTIVE REQUIREMENT OF AN UNLAWFUL ACTION

The analysis of the subjective requirements for an unlawful decision is difficult because the doctrinal and jurisprudential debate on this subject is intertwined with the one dealing with the nature of the responsibility.

It is well known that regimes concerning negligence and its proof are different depending on the fact that contractual, precontractual or extra contractual liability is involved (see herein-below).

Confusion is increased by the fact that there are ambiguous solutions within the judicial practice, which tend to mingle different models and disciplines and that, even if they do formally recall article 2043 ICC, tend in fact to construe the subjective requirement "*in peculiar terms, exempli gratia, introducing relevant compromises or reversing the burden of proof*" (see Travi, *Presentazione del tema del convegno*, in *La responsabilità della pubblica amministrazione per lesione di interessi legittimi*).

To simplify the issue, even if we are conscious that there are greys areas on this subject, the theoretical landscape does offer the following possible scenarios:

a) before judgment n. 500/1999, in the case of damages caused by legal activity and flawed decisions, the negligent nature of the public administrative authorities did not require to take into account evaluations other than the mere existence of the unlawfulness, (see Italian Supreme Court, United Civil Divisions, 22nd May 1984, judgment n. 5361). The case was referred to as negligence per se (namely "*in re ipsa*" – which could not substantially be defeated by adverse proof).

b) judgment n 500/1999 changed the trend and introduced the need for an actual assessment of the existence of the subjective requirement, to be conducted within the

criteria of correctness, good administration and impartiality, with regard to (not the single officer, but) the public administrative authority of the case, as a whole.

This construction was not exempt from critics.

First of all, some courts underlined the difficulty of qualifying an entire organization as "negligent", instead of a physical person (see Consiglio di Stato, Sixth Division, 6th July 2004, judgment n. 5012).

Secondly, it emerged that the use of the criteria themselves (namely, good administration, correctness and impartiality of the public administrative authorities), which theoretically are useful to determine the unlawfulness of decisions, could involve an undue overlay of the two enquiries (the one concerning negligence and the one concerning the flaws of the decision)

Finally, it was observed that the infringement of the criterion of the good performance (by the public administrative authority of the case) can raise responsibility for negligence, provided that the conduct is just inappropriate and, therefore, not necessarily unlawful (see CARINGELLA F., *Corso di diritto amministrativo*, Milano, 2005, 518).

c) In an attempt to avoid these practical difficulties, some scholars and judges tried to adopt the criteria used by the European Court of Justice in order to assess negligence for breach of community law on matter of liability of institutions and Member States.

Under this perspective, someone suggested that it would be possible to ascertain the negligence of the organization when the decisional unlawfulness had raised severe breach of law, to be determined in accordance with presumptions such as, *exempli gratia*, nature of the administrative activity, unambiguousness of the legislation, participation of the private citizen (see Consiglio di Stato, Fourth Division, 14th June 2001, judgment n. 3169; Consiglio di Stato, Fifth Division, 18th March 2002, judgment n. 1562; Adminitrative Regional Court of Sicily, Catania, Third Division, 21st June 2005, judgment n. 1047).

A scholar (see Sorace, La responsabilità) thoroughly observed that even the opinion that, on the influence of the community-law judgment on matter of liability of Member States, tends to condition liability to the fact that the unlawfulness shows some degrees of 'justifiableness' (see on the subject, Consiglio di Stato, Fifth Division, judgment n. 995/2007), in substance "still comes back and asks for gross negligence by the public administrative authorities".

d) The attempt to follow the path traced by the European Court of Justice has not itself been exempted from critics. Among the arguments against the sole correponpondece of negligence to serious breaches, it is remarked that such a limitation does not have any legal underpinning and that the concept of negligence does have to be traced back to "the procreative process of the unlawful activity and its ability to prejudice the trust of citizens, and to the degree of unconformity to the legal criteria governing the exercise of powers" (see Consiglio di Stato, Fifth Division, judgment n. 4239/2001; Consiglio di Stato, Sixth Division, judgment n. 1261/2004).

A further opinion took inspiration from these critics. Such an opinion, even if it adheres to the theory that traces liability back to the extra-contractual scheme, erects unlawfulness as a basis to set up a presumption of negligence, therefore requiring the public administrative authorities to prove that it was incurred in a case of justifiable mistake (see among the others Consiglio della Giustizia Amministrativa Siciliana, 18th November 2009, n. 1090; Consiglio di Stato, Sixth Division, 9th May 2008, n. 2763; Consiglio di Stato, Sixth Division, 7th October 2008, n. 4812; Consiglio di Stato, Sixth Division, 17th July 2008, n. 3602; Consiglio di Stato, Sixth Division, 13th February 2009, n. 775; Consiglio di Stato, Fifth Division, 20th October 2008, n. 5124; Consiglio di Stato, General Meeting, 3rd December 2008, n. 13).

This solution clearly tends to corrupt somehow the structure of the Lex Aquiliae model with elements of contractual law (see on the subject Consiglio di Stato, Sixth Division, 4th April 2011, n. 2102).

As we can see shortly, the extreme development of this conceptual idea can be traced in the theory according to which the flawed exercise of a public power and its following offence to legal expectations are theoretically able to set up a contractual liability, emerging from "social contact" (see herein-below, paragraph 6).

e) As for the concept of wilful wrongdoing, case law is peculiarly poor.

Instead, the main topic dealt with by scholars who reflected on the subject concerns the need to determine if the fraudulent intent (meaning conscience and will of the wrongdoing) implies the offensive conduct of the officer cannot be referred to the organization.

With some degree of approximation, two main opinions are confronted on the issue.

According to the first one, actions characterized by the will of causing a damage to a third party, such as those creating criminal activities, would interrupt the relationship officer-organization; therefore the consequences of the wilful wrongdoing could not be attached to the legal entity.

As for the second opinion, instead, the fraudulent intent could not erase the nexus of causation existing between the unlawful behaviour of the officer and the exercise of the administrative function; according to this theory, in order to exclude the legal entity's liability it would be necessary that the activity performed by the physical person fell entirely outside his/her own functions (see Italian Supreme Court, Third Division, 6th March 2008, judgment n. 6033).

6. ALTERNATIVE PROPOSALS OF ORGANIZATION OF LIABILITIES ARISING FROM UNLAWFUL EXERCISE OF POWERS

The framework of all the different theories proposed to classify the liability arising from unlawful exercise of power, alternative to the scheme approved by judgment n. 500/1999, can be summarized in the following way.

It is useless to remark that such options involve relevant differences on the gound of legal applicable regimes Apart from the subjective requirement, the differences regard the statute of limitation, the determination of damages able to be repaired, the date on which legal interests and currency appreciation become applicable .

a) Following the Civil remark on the so called liability from "social contact", some authors and some judges support the theory that the "contact" set up between citizens and public authorities can build up a proper duty, due by the public administrative authorities, to act correctly, under good faith, correctness and impartiality, in accordance with article 1173 ICC.

A breach of a duty like this could originate contractual liability within the terms of article 1218 ICC.

Among the major inferences that can be drawn from such an approach, there is the possibility of receiving a compensation for damages even regardless of the assignment of a good for life to which a legal expectation is ordinarily linked with.

This theory is still a minor one (see Consiglio di Stato, Fifth Division, 27th November 2010, judgment n. 8291), even it has been sustained by civil courts (see Italian Supreme Court, First Civil Division, 10th January 2003, judgment n. 157) as well as by administrative-law ones (see Consiglio di Stato, Sixth Division, 20th January 2003, n. 340) that continue to partially uphold it even at present (see Regional Administrative Court of Puglia, Lecce, First Division, 21st December 2006, n. 6040; Regional Administrative Court of Puglia, Lecce, Second Division, 3rd April 2007, n. 1492; Regional Administrative Court of Lazio, Division Three-ter, 21st February 2007, n. 1527; Regional Administrative Court of Puglia, Bari, Third Division, 13th May 2009, n. 11399).

b) A different approach is proposed by a scholar (namely RACCA G.) who sees, inside the administrative activity having authoritative nature, " a possible double order of relationships between administration and private citizens": alongside situations which could produce unlawfulness by administrative actions and where you can see the private citizen as "entitled to legal expectations as well as claims to get the annulment of the offensive action of the case", there would be other situations where the citizen is, on the contrary, "entitled to proper personal rights", which give birth to "a duty of correctness pending on the public administrative authorities" (see on this subject ROMANO TASSONE A.).

In other words, according to this opinion, authoritative relationships with public administrative authorities are (also) marked by the existence of personal juridical positions (having the characteristics of "personal rights") that involve goods different from the one guaranteed by the final decision.

c) A sort of application of this construction can be found in the case law opinion, developed withe regard to selective procedures, which frames the liability of the public administrative authorities as a pre-contractual liability, according to article 1337 of the ICC.

More precisely, according to this theory such a liability couls arise when the damage suffered by the private citizen comes from a conduct performed by the public administrative authority of the case which breaches the rules that protect "legal reliance" of the parties involved in a pre-contractual negotiation (see Consiglio di Stato, General Meeting, n. 6/2005; Consiglio di Stato, Fifth Division, 6th December 2006, n. 7149; Consiglio di Stato, Fifth Division, 16th March 2011, n. 1627, which stated that the damages caused by "*internal annulments of public tenders for contracts due to faults pointed out by the public administrative authority involved only after the final award or that the public administrative authority itself could point out at the very beginning of the procedure for the tender*" can be compensated).

d) A further different opinion, moving from the idea that article 2043 of the ICC comprehends in general the liability from unlawful exercise of powers, but denying that the relationship occurring between a public administrative authority and a private citizen can be

qualified as pre-contractual relationship or as a negotiation, supports the "special nature" of the liability arising from public powers.

According to this opinion, the procedural provisions that vested administrative judges with the power of compensating damages caused by offences to legal expectations should have a substantial value and should be qualified as an autonomous legal basis for liability due by public administrative authorities (see Consiglio di Stato, Sixth Division, 16th March 2005, judgment n. 1057).

e) Finally it should be noted that there are also hybrid case law solutions and proposals of calssification which more or less expressly are prompt to blend features of the aquilian regime with elements of the contractual or precontractual one (see Consiglio di Stato, Sixth Division, 4th April 2011, n. 2102)

7. INDEMNIFICATION BY SPECIFIC PERFORMANCE

The now-repealed article 7 of the Law that introduced Administrative Regional Courts within the Italian administrative-law system (statute law n. 1034/1071) granted administrative judges, in its texts enacted according to article 35 of Legislative Decree n. 80 dated 31st March 1998 and article 7, paragraph 4, of Law n. 205/2000 afterwards, the power to "examine, within its own jurisdiction, all issues involving possible compensation for damages, even by way of specific performance, as well as other consequential financial rights".

The provision, as for its passage concerning the possibility of obtaining specific performance, gave birth to a strong debate, which involved three main positions (see TRAVI A., Processo amministrativo).

a) The first opinion held that the possibility to have indemnification through specific performance, in accordance with article 7, would have allowed a new remedy – similar to that granted by the German law – in order to obtain, within the ordinary judgment

of legtimacy, an order to the public administrative authorities to issue a decision capable of granting to the damaged person the good of life related to the offended legal expectation of the case (as for this opinion, see Administrative Regional Court of Veneto, First Division, 9th February 1999, judgment n. 119)

b) On the contrary, a second opinion held that the above-mentioned provision does imply a reference to the ordinary indemnification by way of specific performance (see Consiglio di Stato, Sixth Division, 18th June 2002, judgment n. 3338; Consiglio di Stato, Sixth Division, 21st May 2004, n. 3355; Consiglio di Stato, Sixth Division, 15th November 2005, n. 637; Consiglio di Stato, Sixth Division, 9th June 2008, n. 2763; among the authors see TRAVI A., Processo amministrativo).

c) Different jurisprudential decisions showed the intention of improperly overlapping the concept of indemnification by specific performance with the phenomenon of ultra-constitutive consequences of annulment sentences (see, exempli gratia, Administrative Regional Court of Lombardia, Third Division, 30th April 2003, judgment n. 1091).

At present, article 30 of Administrative Procedural Code clearly states, that a claim for compensation can involve restitution by equivalent as well as indemnification by way of specific performance.

The content of article 7 of Law n. 1034/1971 has therefore been replaced by a provision according to which "it is possible to claim for compensation for damages through specific performance, if all requirements of article 2058 of the ICC do exist" (see article 30, paragraph 2 of the Italian Administrative Procedural Code).

Accordingly, it is clear that an administrative judge can issue compensation for damages by way of specific performance in the very same cases a civil judge would be entitled to do so (see A. TRAVI, Lezioni)

8. THE DEBATE ON PREJUDICIALITY

The acknowledgment of public authorities liability for offences to legal expectations has originated a coordination issue between compensation for damages and the constitutive remedy of annulment.

Within its judgment n. 500/1999, the Italian Supreme Court expressed the view that a damaged person could claim for compensation without pre-emptively proceeding against the offensive administrative decision.

Later on, the Italian Supreme Court confirmed this opinion (see ordinances nn. 13659 and 13660 released on 13th June 2006 and ordinance 13911 issued on 15th June 2006 as well as judgment n. 30254 dated 23rd December 2008) and mantained that the two remedies are autonomous, even after the administrative judges were granted the power to issue judgments for compensation (see above, paragraph 3), stating also that if the administrative judge of the case would decline a compensatory claim on the basis of the lack of pre-emptive exercise of the claim for annulment, he/she would have incurred in a case of jurisdiction denial, that could have been appeald before the Supreme Court itself.

On the contrary, administrative judges preferred to follow the opposite opinion, confirming on many occasions the prejudiciality of the claim for annulment towards the claim for compensation (see Consiglio di Stato, General Meeting, 22nd October 2007, n. 12; Consiglio di Stato, Sixth Division, 21st April 2009, n. 24369).

The opposition between the two opinins has been in some ways reconciled by the recent enactment of the new procedural code.

In fact, Article 30 of Legislative Decree n. 104/2010 expressly authorizes the exercise of the claim for compensation for damages arising from offences to legal expectations without the previous exercise of the constitutive claim for annulment within the limited period of 120 days starting from the day when the damaging action occurred or the day when the damaged person became fully aware of the offensive decision.

Third paragraph of the article further states that "the judge, when he/she has to determine the amount of damages, must evaluate all factual circumstances of the case and behaviour of all parties as a whole and, in any case, he/she has to dismiss compensation for damages that could be prevented by use of ordinary diligence, even through the remedies provided for by the the law".

Consiglio di Stato stated in its judgment issued through General Meeting on 23rd March 2011 (judgment n. 3) that the legislator, with the introduction of Article 30 of the administrative procedural code, "has *finally intended to show that he appreciates the theory of the pure (procedural) prejudiciality, as long as he appreciated the one of the full autonomy between the two remedies, and has reached a solution that, without taking into consideration the non-exercise of the claim as an abstract and aprioristic procedural estoppel, evaluates the conduct as a specific fact to be assessed within the frame of the general behaviour of the parties, as to deny compensation for damages that could be avoided through petition for annulment*".

This authoritative precedent, therefore, finally reached the conclusion that the omitted exercise of a claim against the offensive decision, even if it does not create a procedural estoppel to the exercise of the claim for compensation for damages, it can anyway become relevant for the purposes of article 1227 of the ICC, which states that compensation is not due for damages a creditor could avoid through ordinay diligence.

Finally, it is worth saying that incorrect exercise of a public power can be realized, not only through an action, but also by an omission, which can cause damages too. This subject is not addressed herein, as it will be object of a specific essay to be issued in this review later on.

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BEHAVIOURAL PUBLIC LIABILITY

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INDEX

1. BEHAVIOURAL PUBLIC LIABILITY: INTRODUCTORY REMARKS. RELATIONSHIP WITH LIABILITY FOR UNLAWFUL ADMINISTRATIVE ACTION. JURISDICTION

Until the introduction of an action for damages before Administrative Courts, public liability arising from unlawful administrative action was virtually excluded in the Italian legal system.

On the contrary, the liability of public authorities for behaviour and practical activities has been acknowledged since the second half of the 19th century and indeed for a long time has been considered the only kind of public liability accepted in our legal system[1].

Public liability has not been considered as an autonomous or special model of liability because of its connection with activities that do not consist in the exercise of administrative power and therefore more easily fit in private law categories, such as rights instead of legitimate interests, this form of[2].

[1] On public liability in general, also for reference, see COMPORTI G. D., *Responsabilità della pubblica amministrazione*, in *Dizionario di diritto pubblico*, a cura di CASSESE S., vol. V, Milano, 2006, p. 5125; RACCA G. M., *L'evoluzione della responsabilità della pubblica amministrazione*, in GAROFOLI R., RACCA G. M., DE PALMA M., *La responsabilità della pubblica amministrazione e risarcimento del danno dinanzi al giudice amministrativo*, Milano, 2003. Favourable to an extension of liability in the public-law area was already CAMMEO F., *Commentario delle leggi sulla giustizia amministrativa*, I, s.d., p. 877.

[2] However, scholars had underlined the need to adapt private-law provisions to public authorities, especially in relaton to fault, by suggesting a no-fault scheme for public liability: ORLANDO V. E., *Saggio di una nuova teoria sul fondamento della responsabilità*, in *Arch. dir. pubbl.*, III, 1893, p. 251.

Besides, Art. 28 of the Constitution, in providing for the liability of the State and civil servants for the breach of rights, has acknowledged that public liability lies on the same foundations of the private law of tort[3].

From then on, the efforts of both courts and scholars have been towards the assimilation of administrative liability to the one provided by the private law of tort for individuals and companies reducing those privileges that, albeit justified by structural and functional peculiarities of public bodies, might bring to the application of a more favourable regime for public authorities.

Nowadays, as a result of the extension of the protection for damages, no administrative activity – whether performed under private or public law – can be said to be exempt from liability whether it infringes rights or legitimate interests.

Since 1998, when for the first time a statutory act introduced the possibility to seek damages before administrative courts, claims for damages have to follow two alternative routes: if damages are connected with the exercise or non-exercise of administrative power, they have to be claimed before administrative courts, whereas if they are the result of simple administrative behaviour which is not connected with the exercise of power, they have to be sought before civil courts[4].

[3]Reminds how public liability, such as acknowledged by sect. 28 Cost., is shaped on the absence of special characters and is subject to the common private-law principles SCOTTI E., *Appunti per una lettura della responsabilità dell'amministrazione tra realtà e uguaglianza*, in *Dir. amm.*, 2009, p. 535. On the nature of State liability for illegal action of its officials – whether direct or indirect – see GRECO, *La responsabilità civile dell'amministrazione e dei suoi agenti*, in *Diritto amministrativo*, a cura di MAZZAROLLI L., PERICU G., ROVERSI MONACO F., ROMANO A., SCOCA F.G., Bologna, 2001, p. 1727.

[4] Sect. 7 of Administrative Courts Act gives administrative courts all the controversies "concerning legitimate interests and, in special fields determined by the law, civil rights, in relation to the exercise or non-exercise of administrative powers regarding acts, decisions or agreements or behaviour directly or indirectly linked to the exercise of power".

Legislative decree no. 104/10 (our Code of Administrative Proceedings) has given the administrative courts the power to judge over whatever administrative conduct as long as it is connected with the exercise of power and it has stated its exclusive jurisdiction on the liability for delay in the exercise of public power. As a result, civil courts jurisdiction is now residual and confined to liability for behaviour not connected with the exercise of an administrative power and material activities.

Nonetheless, the identification of areas of liability whose recognition remain reserved to the civil courts is not easy, because it relies on a criterion that is not clear in its application: the courts are entrusted with the difficult task to ascertain when damages are directly or indirectly connected to the exercise of power and when they arise from simple factual behaviour.

The existence of different jurisdictions is not without consequences: even if the model of public liability comes from the private law of tort, the elements of the liability scheme are interpreted in a different way by the two judges.

Leaving aside contractual liability, which mainly follows private law, public liability has been based by civil judges on the general private law tort clause, as stated in Art. 2043 of our civil code[5], and only in particular cases on other provisions of the civil code that include forms of strict liability.

As to the rationale of administrative courts' jurisdiction on public liability cases, the theoretical foundations of public liability have been highly controversial, since scholars have suggested either that it is a special area of the law of tort or that it might be a branch of

[5] Sect. 2043 c.c. (Tort liability): "Whatever malicious or culpable act that causes unfair harm to someone binds who committed it to restore damages." Who seeks damages has to give evidence of the event, of its unlawfulness, of causation and of fault or malice.

contractual liability, on account of the special relationship that develops between individuals and public bodies during administrative proceedings[6].

Civil courts, unlike administrative ones, require specific evidence of the facts that constitute liability, namely fault.

However, perhaps also thanks to the different approach of the administrative courts, there have been interesting developments in the recent case law of civil courts on administrative liability, attempting to broaden the application of the general clause of *neminem laedere* to administrative activities, and to release the so-called "restraint net"[7].

Recent case law also shows a general confluence of civil and administrative courts towards the acknowledgement of a higher number of no-fault liability hypotheses, with the consequent enhancement of the public bodies prevention role.

On the contrary, administrative courts, whilst trying to relieve individuals from the burden of evidence in relation to the fault element, have a stricter approach towards the proof of damages, both in their existence and in their amount.

In the following paragraphs we will focus on the hypotheses that have recently given rise to significant case law or to new and particularly interesting issues.

[6] On the identification of a special model of public liability, see GAROFALO R., *La responsabilità dell'amministrazione: per l'autonomia degli schemi ricostruttivi*, in *Dir. amm.*, 2005, p. 1.

[7] Which has been advocated in relation to the liability for unlawful administrative acts, as reminded by SCOTTI, *cit.*, p. 522.

2. SPECIFIC CASES:

2.1 Liability for breach of duty of custody

New trends are developing in the case law on liability for breach of duty of custody, especially when damages arise from the lack of (or bad) maintenance of public roads and public properties.

Until a few years ago civil courts did not apply Art. 2051 c.c., which provides a hypothesis of no-fault or strict liability, and furthermore applied with particular rigour Art. 2043, which was more favourable to public bodies.

The claimant was required to give evidence of causation and damages as well as of the existence of a "pitfall" which he could not see nor foresee, with the consequent inversion of the burden of proof as stated by Art. 2051 c.c.[8].

The courts used to argue that, especially in the case of public roads, the extension and the general use granted to the public implied that the public owner could not be bound to a strict duty of custody and therefore they mostly denied the award of damages, granting them only when a "trick" or "peril" was proved to exist. In these cases the duty of custody of the administration was replaced by a duty of prevention and self-responsibilityof the individuals.

A more recent trend in case law, which is now consolidating, tends to restrict the scope of Art. 2043 and its more onerous evidentiary regime in favour of the application of Art. 2051 c.c., albeit courts argue that, especially in relation to publicproperty, public use

[8] Sect. 2051 c.c. (Damages caused by things held in custody): «Everyone is liable for any harm caused by things that he holds in custody, unless he proves a fortuitous event».

exposes the property to unforeseeable and often indeterminate risks for administrative authorities that are in charge of its custody and maintenance[9].

Although a minority case law still relies on the need to protect public bodies from potentially indefinite risks, civil courts are starting to exclude that damages arising from the use of public property or due to lack of maintenance of public goods or infrastructure[10] can be ruled under the provision of the general clause of civil liability (Art. 2043 c.c.) and tend to refer them to the provision of Art. 2051 c.c.[11], consequently applying to the claimant a more favourable evidentiary that such a norm involves[12].

[9] Typical is the case for motorways, in relation to which, also considered the contractual relationship between the manager and the user, our Supreme Court recognises the application of sect. 2051 c.c.: see Cass., sez. III, 6 June 2006, n. 15383, in *Danno e resp.*, 2006, 1145; Cass., sez. III, 6 June 2008, n. 15042, in *Foro it.*, 2008, I, 2823, with comment by PALMIERI, *Custodia di beni demaniali e responsabilità: dopo il tramonto dell'insidia, ancora molte incertezze sulla disciplina applicabile*. In favour of the application of sect. 2051 c.c., in a case involving an accident caused by a oil stain on the road, though in the specific case concluding that the damages had been produced by external causes, Corte d'Appello di Trento, sez. distaccata di Bolzano, 10 August 2009, n. 172, in *www.lexitalia.it*. On the nature of the liability of who has the duty of custody, as interpreted by our Supreme Court, see Cass., sez. III, 19 gennaio 2010, n. 713, in *Danno e Resp*., 2010, 10, 921, con nota di MANINETTI P., *Responsabilità oggettiva: come e perché*.

[10] As to the duty of maintenance of sewerage, in favour of the application of sect. 2051 c.c., see Cass., sez. III, 19 March 2009, n. 6665, in *Foro it.*, 2010, I, 562. See also Cass., SS.UU., 5 March 2009, n. 5287, in *Demanio e Patrimonio pubblico*, 2009, 26.

[11] In this direction, see Cass., sez. III, 23 January 2009, n. 1691 (in *Danno e Resp*., 2009, 3, 322), which, beginning by quoting the words of Corte Costituzionale in judgment n. 156 of May 10 1999, has stated that «the relevant factor for the application of sect. 2051 is in the capability of exercising a power of control and supervision on public infrastructure, since the absence of this factor cannot be inferred by the extension of the road and/or the general use of it by third parties, those being mere signs, but only as the result of a complex research on the specific facts of single case». The Supreme Court confirmed previous judgments in which it had underlined, in relation to public roads, «the need that the duty of custody has to be inquired not only with regard to extension of the road, but also considering its features, its position, its security systems and all the available technical instruments of control, since those factors can influence the users' expectations. Also relevant can be their distance

These significant developments in case law towards a wider recognition of no-fault areas of liability have been favourably considered by scholars, who advocate a more frequent use of presumptive tools also in the area of liability for unlawful administrative action, thus hypothesising a common evolution towards the acknowledgment of a no-fault scheme of public liability[13].

from urban centres (see Cass. n. 3651/2006; n. 15384/2006)». On other cases in which the courts have argued in favour of a duty of custody and on the consequent application of sect. 2051 c.c., see DONADONI P., *La responsabilità civile nella pubblica amministrazione tra onere di custodia e cd. "insidia o trabocchetto"*, in *Contratto e impresa*, 2008, 145 ss. Recently, in the opposite direction, Trib. Brindisi, sez. distaccata di Fasano, 7 April 2011, n. 38, in *www.lexitalia.it*, that confirmed the traditional opinion striking out the application since the claimant had failed to give proof of an invisible pitfall.

[12] As to the burden of proof on behalf of the claimant, see Cass., sez. III, Ord. 9 October 2008, n. 24881 (in *CED Cassazione*, 2008) that specified that «who seeks redress of the prejudice suffered as a result of lack or insufficient road maintenance has to prove, according to the private law liability principles, that damages were caused by the thing supposed to be in custody, according to the factual circumstances of the case. Such a proof consist of the evidence of the event and causation with regard to the thing in custody and can be given also presumptively, since damage itself is already evidence of "anomalous result", i.e. of the objective diversion from a diligent behaviour. The claimant is therefore exempted from proving the existence of a "trick" or "pitfall" – foreign to sect. 2051 c.c. – or of the concurrence of a external cause that are not imputable to the conduct of the person who has the duty of custody. Being an exception to the general rule stated in sect. 2043 and 2697 c.c., sect. 2051 provides for a case of inverted burden of proof, by burdening the person in charge of the custody with the possibility of relieving himself from the presumptive liability by showing evidence of a fortuitous event (strict liability), and give proof that the event was not foreseeable nor avoidable with the expected diligence, considered the powers that he has over the thing in custody and the correspondent duties of control, supervision and diligence that require the adoption of all possible measure able to prevent and avoid the production of damages to third parties». See also Cass., sez. III, 22 April 2010, n. 9546, in *Bollettino legisl. tecnica*, 2010, 6, 567.

[13] For the proposal of the extension of presumptive fault also to unlawful administrative action, see COMPORTI G. D., *Il cittadino viandante tra insidie e trabocchetti: viaggio alla ricerca di una tutela risarcitoria praticabile*, in *Dir. amm.*, 2009, p. 663. In the same direction, AVANZINI G., *Nuovi sviluppi nella responsabilità delle amministrazioni per danni derivanti da attività pericolose e da cose in custodia*, in *Dir. amm.*, 2010, p. 297. European Court of Justice also moves towards a no-fault liability scheme: Corte Giust., sez. III, 30 September

Decisions on damages caused by wild animals[14] or by dangerous activities[15] are still in favour of the application of Art. 2043 c.c. instead of other stricter liability schemes. With respect to these scholars call for a wider application of the presumptive liability schemes provided for by artt. 2050 and 2052 c.c. can be applied instead, in order to enhance the preventive rationale of liability and bind public bodies to a stricter compliance with security and surveillance duties[16].

2.2 Liability for delay in administrative action and for breach of duty of procedural fairness

Although damages for delay in the adoption of a favourable administrative decision, in breach of the duty to complete proceedings stated by Art. 2 of the Administrative Procedure Act, represent a typical behavioural form of liability, they belong to the jurisdiction of administrative courts, according to the provision of Art. 30, par. 4, of the Code of Administrative Proceedings[17].

2010 (case C-314/09), in *www.curia.europa.eu*. In literature, see VALAGUZZA S., *Percorsi verso una "responsabilità oggettiva" della pubblica amministrazione*, in *Dir. proc. amm.*, 2009, p. 50.

[14] See Cass., sez. III, 8 gennaio 2010, n. 80, in *Resp. civ.*, 2010, 12, 814, with note by BENATTI F., *Danno da animali: sulle precauzioni idonee a prevenire il danno*. See also Cass., sez. III, 13 January 2009, n. 467, in *Mass. Giur. It.*, 2009.

[15] Cass., SS.UU., 11 January 2008, n. 584, (*Foro it.*, 2008, 2, 1, 451) in a case of responsibility of the Ministry of Health for HIV contagion due to blood transfusion. Also Cass., sez. III, Ord., 12 March 2010, n. 6117, in *CED Cassazione*, 2010.

[16] AVANZINI G., *Nuovi sviluppi*, cit., p. 281.

[17] Cass., SS.UU., 25 March 2010, n. 7160, in *Urb. e App.*, 2010, 791, with note by SPEZZATI A., *Giurisdizione in materia di risarcimento per danno da ritardo della p.a.*

Case law and scholars have clarified how in this case the right protected by the law is the right to the certainty of the lenght of the procedure, completely irrespective of the so-called right to a favourable decision, i.e., of the evidence of the right to a favourable decision.

Whereas previously case law held compensation of damages caused by a delayed administrative action depended on the outcome of the procedure and on the adoption of a decision whatsoever by the authority[18], the reform of Art. 2 of Administrative Procedure Act recently made compensable damages caused by such a delay, even in the absence of a negative decision and anyway independently from the demonstration of the right to a favourable decision.

Art. 30 of our Code of Administrative Proceedings therefore implemented what was already stated by the law n. 69/09, thus finally releasing the entitlement to damages from the effective end of the administrative procedure. According to the provision of Art. 30, damages for unlawful delay have to be sought at most within 120 days after that one year passed from the statutory deadline for the completion of procedure.

As to the elements of tort, the claimant has to give evidence both of causation and fault, since Art. 30 expressely states that damages have to be a «consequence of the malicious or culpable lack of compliance with the statutory terms for the completion of procedure»[19].

[18] Cfr. Cons. Stato, Ad. Plen., 15 September 2005, n. 7, in *www.giustizia-amministrativa.it*, according to which: «The sysyem of protection of legitimate expectations – when their holder relies on a judicial statement for their fulfilment – allows the award of pecuniary remedies only when the expectation, that cannot be satisfied by the adoption of an administrative decision, has a substantive content connected with the failure or the delay in the adoption of the decision».

[19] Criticism of the provision about fault can be found in GOTTI P., *Osservazioni in tema di risarcibilità del danno da ritardo della p.a. nella conclusione del procedimento*, in *Foro amm. - CdS*, 2010, p. 2473.

Case la recognising in futile expiry of the procedure completion term the sufficient element in most cases to demonstrate the subsistence of the sublective element of the offence, or at least to apply the acquisitive method (giving the judge the power to collect evidence on this element) tends instead to apply a more rigorous criterion for the demonstration of damage and its quantification[20].

As to the nature of damage that can be restored, in a recent decision the administrative judge not only awarded damages that constitute an economic loss, but also restored the so-called biological damages[21].

The introduction of an *ad hoc* form of action for damages due to unlawful delay in the adoption of administrative decisions aroused the interest of scholars and has fueled the idea that public liability can rise from procedural impropriety independently from the demonstration of the right of the claimant to a specific outcome of the procedure[22].

This issue is linked with the theme of liability for breach of legitimate expectations[23]. The damage occurs occurs when an authority releases a decision in favour

[20] CHIEPPA R., *Il danno da ritardo (o da inosservanza dei termini della conclusione del procedimento)*, in *www.giustizia-amministrativa.it.*

[21] See Cons. Stato, sez. V, 28 February 2011, n. 1271, in *Danno e Resp.*, 2011, 5, 543, that awarded the claimant existential damages caused by the two-year delay for the adoption of a planning permission, from which depended the only business of the claimant. As to non-economic damages, see also Cons. Giust. Amm. Reg. Sic., 26 October 2010, n. 1334, in *Foro amm. - CdS*, 2010, 2500, that awarded moral damages caused by a two-decade lenght of a compulsory purchase of land procedure, resorting to the Supreme Court case law according to which non economic damages are restorable when the uthority infringed constitutional personal rights.

[22] SCOTTI E., *Appunti per una lettura della responsabilità*, cit., p. 568 underlines the importance of a foundation of liability on the breach of behavioural principles that can lead to monetary redress independently of the entitlement to the fulfilment of a substantive legitimate expectation.

[23] On legitimate expectations and their legal protection, also for reference, see GIGANTE M., *Il principio di tutela del legittimo affidamento*, in *Codice dell'azione amministrativa*, a cura di SANDULLI M.A., Milano, 2011, p. 130.

of the indvidual which turns out to be unlawful and later annuls it. In such cases, time had brought the claimant to rely legitimately on the consolidation of the favourable effects of the decision.

The case in point is subject to two different readings, which lead to different conclusions as to the choice of the competent judge. If one claims that damages flow from the unlawfulness of the initially favourable decision, the jurisdiction of the administrative courts will follow. If, on the contrary, one argues that damages are the result of the overall administrative conduct and not of the effects of the decision, then jurisdiction will belong to the civil courts, that insofar are the "natural judges" of administrative behaviour.

In this area it is worth highlighting the development of a new case-law of our Civil Supreme Court that states the jurisdiction of the civil courts on damages caused by the breach of legitimate expectations on the consolidation of the legal effects that follow favourable administrative decisions[24].

Supreme Court judges deemed that in such circumstances the claim has no connection to the exercise of administrative powers, also because the latter had been lawfully exercised[25].

[24] Cass., SS.UU., judgments n. 6594, 6595 e 6596 of 23 March 2011, in *www.federalismi.it*, on very similar cases: in the first one, damages had been caused by the administrative annulment of a planning permission followed by a demolition order; in the second one, damages were caused by the demolition of a building that had been erected after the release of a planning permission that had been quashed by judicial review; in the third one, the claimant sought damages following the execution of a construction contract that had been deemed ineffective after the annulment of the tender procedure by judicial review.

[25] The Supreme Court defended its jurisdiction by arguing that: «the planning permission, being unlawful and therefore lawfully annulled, stands as a pure behaviour of the authority that issued it, behaviour that is in breach of sect. 2043 tort general clause, which from the author extends to the State, because such an act, in its apparent lawfulness, had given rise in its receiver to a legitimate expectation that he could start the construction».

The judges in this case stated that «the claimant seeking damages does not contest the unlawful exercise of powers, that sacrificed its substantial interests, but holds the culpability of an administrative conduct consisting in the adoption of a favourable decision, that later on has been either quashed by a judge or annulled by the same authority, and this conduct has consolidated its expectations and given rise to practical effects, that later on had to be lawfully eliminated».

Should this case law become consolidated, other cases could follow in which civil courts will award damages for the breach of procedural rules that, albeit somehow linked to an administrative decision, do not directly flow from it: in such cases damages are the consequence of simple administrative behaviour and not of an unlawful administrative decision.

New hypotheses of public liability could also be foreseen in connection to the breach of procedural duty of fairness even if they do not cause the annulment of the administrative decision in force of the provision stated in Art. 21-*octies* of Administrative Procedure Act, since the new course of administrative action would not lead to a different outcome.

In conclusion, the potential for a new civil jurisdiction, that has been debated among scholars[26], if on the one hand could bring to more effective remedies for the individual, on the other hand could make even more difficult for the claimant the choice of the court, thus jeopardizing the principle of effectiveness and unification of judicial protection.

[26] Criticism of the judgments in SANDULLI M. A., *Il risarcimento del danno nei confronti delle pubbliche amministrazioni: tra soluzione di vecchi problemi e nascita di nuove questioni*, in *www.federalismi.it*. For the opposite view, see CAPONIGRO R., *Questioni attuali in un dibattito tradizionale: la giurisdizione nei confronti della pubblica amministrazione*, in *www.giustizia-amministrativa.it*.

2.3 Liability for breach of duty of supervision

Although on principle administrative courts should now hold jurisdiction on damages caused by non-exercise of public powers, among which the ones connected with the duty of supervising private business that have a relevant public interest (such as bank and insurance activities), civil courts recently exercised their jurisdiction by stating that a Minister can be held responsible for failing to exercise supervision over banking and investment companies whose conduct had resulted in a loss suffered by private investors.

In particular, a group of investors were awarded damages caused by the lack of a diligent supervision and information on the activity of investment companies by the competent authority (Consob)[27]. The Supreme Court argued that when public authorities act in breach of the general clause of good faith and fairness they go beyond their discretionary powers and therefore are liable under Art. 2043 c.c. before civil Courts[28]. The importance of the judgment lays in the statement that the culpable omission of public powers is relevant as such, as the cause of liability because it breaches the general clause of *neminem laedere*.

[27] See Cass., sez. III, 27 March 2009, n. 7531, in *Foro it.*, 2009, 12, 1, 3354, that recognized a «macroscopic culpable failure» of the Ministry of Industry for delaying the adoption and the publication of the revocation of the license to exercise of investment activities and for failing to ainform investors of the risks connected to the investment company financial situation.

[28] See Cass., sez. III, 23 March 2011, n. 6681, in *Resp. civ.*, 2011, 6, 435, that confirmed the Court of Appeal judgment that gave redress to a group of investors that had been damaged by the lack of control on the activities carried out by an investment brokerage company.

2.4 Liability for illegal acquisition of land

Until the last decade, the problem of the so-called indirect compulsory acquisition of land, in the absence of a legislative framework, was settled by the courts through the resort to the concepts of "acquisitive occupation" and "usurpative occupation"[29].

The first occurred when the procedure of compulsory purchase of land, based on a valid administrative act would go on in an irregular way, whereas the second one occurred when no administrative act at all was adopted and the acquisition of land simply happened *de facto*.

In both cases the owner was entitled to the payment of damages but the property, after being transformed and subdued to public destination, became irreversibly acquired by the public authority.

The contrast of such a consequence with the European Convention on Human Rights brought the legislature to enact a provision – Art. 43 of Compulsory Acquisition of Land Act 2001 – by which public authorities were allowed to amend a flawed procedure by the adoption of a decision providing the transferral of property to the public authority and the compensation of damage suffered as a result of the removal of the property[30].

[29] On "acquisitive occupation": CONTI R., *Occupazione acquisitiva, tutela della proprietà e dei diritti umani*, Milano, 2006.

[30] Sect. 43 of Compulsory Acquisition of Land Act 327/2001 (Use of private property for aims of public interest): «1. Having balanced the competing interests, the authority that uses private property for the public interest without having previously adopted a valid acquisition act, can dispose of it and acquire it to its properties provided that the private party is given the monetary redress of damages. 2. The acquisition act: a) can be adopted even if the first act of the acquisition procedure has been annulled by judicial review; b) gives account of the circumstances under which the authority decided to use the property, mentioning the day in which the occupation started; c) determines the amount of the damages sum and orders its payment within the next thirty days, with no consequence on a judicial claim, if already started; d) is notified to the owner of the property under the terms of Civil Process Code; e) Implies the transfer of property from the private owner to the authority; f) is immediately reported on the Land

The provision has recently been declared inconstitutional[31] and this raised again the problem of compensation of those damages suffered by individuals when the compulsory acquisition of land is not obtained by means of a legal procedure[32].

The following case law so far has stated that, once the possibility to amend the flawed procedure by adopting an *ad hoc* administrative decision has been repealed, public authorities have the duty to negotiate the acquisition of land with the owner and to compensate the damage for the illegal occupation of the land occurred until the completion of the contract that duely transfers the property from its original owner to the public authority[33].

The case law states that, in the absence of a valid entitlement for the acquisition of land, the property is not transferred because of the simple material transformation of the property itself, for such an effect would be in contrast with the European Court of Human Rights' case-law, thus stating that in this case the conduct of public authorities constitutes a «permanent tort».

For compensation of damages, the judges agree on saying that it has to be calculated on the basis of the market value of the property when the completion of the

Register; g)....*omissis* 3. If the acquisition act is challenged by judicial review or the owner asks for the restitution of the property, the authority or the user of the property can ask the judge to award damages only without ordering the restitution of the property».

[31] Corte Costituzionale, judgment 8 October 2010, n. 293, in *Urb. e App*., 2011, 1, 56, with note by MIRATE S., *L'acquisizione sanante è incostituzionale: la Consulta censura l'eccesso di delega*.

[32] On the effects of the declaration of inconstitutionality of sect. 43 see PATRONI GRIFFI F., *Prime impressioni a margine della sentenza della Corte Costituzionale n. 293 del 2010*, in *www.federalismi.it* e MARI G., *L'espropriazione indiretta: la sentenza della Corte costituzionale n. 293 del 2010 sull'acquisizione sanante e le prospettive future*, in *Riv. giur. ed.*, 2010.

[33] Cons. Stato, sez. IV, 28 January 2011, n. 676 e 1 June 2011, n. 3331, both in *www.lexitalia.it*.

agreement with which the property right is transferred from the private party to the new public owner occurred[34].

According to a different opinion, the material transformation of land is suitable by itself to transfer the property in favour of the public authority as a result of the application of the private law institution of "specification". In such a case the private would be entitled to compensation calculated on the market value of the property on the day of its acquisition by the public authority[35]. The action, which is based on a compensation and not on a damages claim, would have to be brought before administrative courts, since in the beginning a lawful procedural act was adopted even though it was not followed by its due continuation.

On principle, then, administrative courts hold jurisdiction when the acquisition of land has started with a first valid administrative decision, while civil court can intervene only when the transformation and the subsequent acquisition of land has occurred *de facto*, in lack of any administrative procedure entitlement albeit indirect[36].

[34] See TAR Lazio, sez. II-*quater*, 14 April 2011, n. 3260, *in www.lexitalia.it*. See also Cons. Giust. Amm. Reg. Sic., 2 May 2011, n. 351, in *www.lexitalia.it*, according to which the illegal use of private property implies for the public authority the payment of two distinct damages: the first one restores the loss of the property while the second one has regard to the lack of use of the property (or either of its monetary value) during the period of occupation. See also Cons. Giust. Amm. Reg. Sic., 19 May 2011, n. 369, in *www.lexitalia.it*, as to the determination of the amount of damages.

[35] See TAR Puglia - Lecce, sez. I, 24 November 2010, n. 2683 and 29 April 2011, n. 785, both in *www.lexitalia.it*.

[36] See Cons. Stato, Ad. Plen., 30 July 2007, n. 9, in *www.giustizia-amministrativa.it*.

2.5 Liability for precontractual unfairness and for lawful administrative action

As a general principle pre-contractual public liability, which is based on Articles 1337 and 1338 c.c., occurs when a public authority, in the course of contractual negotiations with private parties, behaved, or fail to behave, in contrast with the principles of good faith and correctness, with which it has to comply according to the general rule stated in Art. 2043 tort liability clause[37].

In this area as well, after the introduction of damages claims in judicial review procedure, the system provides a two-tier jurisdiction: administrative courts when public liability depends on the acknowledgment of a flawed administrative procedure or decision, civil courts when administrative conduct which resulted in the breach of contractual negotiations, is not linked with an administrative decision or procedure, but occurred in a private-law relationship.

For example, civil courts have jurisdiction when an individual seeks damages claiming that a public authority acted in breach of the fairness principle in the course of the purchase of a real estate unit, because it failed to disclose all the legal conditions regarding the sale of the property[38].

[37] On precontractual public liability, in general, see RACCA G. M., *La responsabilità precontrattuale della pubblica amministrazione tra autonomia e correttezza*, Napoli, 2000.

[38] See Cass., SS.UU., 24 June 2009, n. 14833, in *Mass. Giur. It.*, 2009, and TAR Calabria - Catanzaro, sez. I, 3 May 2011, n. 574, in *www.lexitalia.it*, which stated that administrative courts have jurisdiction only in relation to precontractual liabiliy connected to public procurement procedure and not in relation to the sale of property.

Administrative Courts are in charge of the administrative conduct resulting in the annulment of a public procurement tender procedure[39].

The latter are the most frequent causes of administrative precontractual liability in administrative law.

In particular, as to public behaviour that may result in tortious liability in the course of a tender procedure aimed at the awarding of public contracts, the Consiglio di Stato[40] recently stated that pre-contractual liability may occur both when the tendering procedure is quashed by a judge, and: «a) when a public authority calls off a tender because it changes its project, and many years have passed since the first act of the tender procedure; b) because the project cannot be realised any more due to technical reasons; c) because the public authorities realised that the procedure was flawed from the beginning and it had to be consequently annulled from the start; d) when a public authority calls off the tender or refuses to sign the contract after the adjudication decision, because of lack of funds»[41].

[39] For the case law, see Cons. Stato, sez. VI, 17 March 2010, n. 1554, in *www.lexitalia.it*. As to scholarly opinion, see CREPALDI G., *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento*, in *Foro amm. - CdS*, 2010, p. 868; RACCA G. M., *Contratti pubblici e comportamenti contraddittori delle pubbliche amministrazioni: la responsabilità precontrattuale*, in *Nel diritto*, 2009, 281.

[40] Cons. Stato, sez. V, 7 September 2009, n. 5245, in *Danno e Resp*., 2009, 11, 1106.

[41] In the same direction see Cons. Giust. Amm. Reg. Sic. (judgment 25 January 2011, n. 83, in *www.lexitalia.it*) that recognised precontractual liability in a case in which by mistake the envelope containing the offer of the only tenderer had been opened before the formal opening of the procedure and the authority had therefore annulled the entire procedure.

Decisions also stated that the legitimate annulment of preliminary acts for project finance or the unjustified interruption of negotiations can bring to pre-contractual liability if they result in the culpable violation of a legitimate expectation borne by the private party[42].

In such cases liability has been declared despite the lack of administrative unlawfulness on the basis of the unfair behaviour of the public party, which had violated the legal expectation of the private party upon the positive conclusion of the negotiation[43].

As to the type of damages, on account of Art. 1337 and 1338 only the so-called negative interest can be redressed, i.e. damages that rise from the useless employment of contractual efforts. Therefore, both expenses and the lost occasions will be restored, as long as they will be proved by the claimant and not just asked for in a general form.

2.6 State liability by failure to implement EU Directives

Recent Supreme Court decisions have introduced new developments in relation to State liability for breach of the duty to implement EU Directives that, albeit being non self-executing, confer rights to individuals, also clarifying the liability scheme and the terms for the proposal of the action.

[42] In this case the unfair behaviour of the authority is connected to the procurement procedure and therefore to administrative courts' jurisdiction: see Cass., SS.UU., Ord. 9 February 2010, n. 2792, in *www.lexitalia.it*. TAR Sicilia - Catania, sez. I, 15 April 2010, n. 1090, in *www.giustizia-amministrativa.it*, clarified that liability depends on two conditions: one, positive, is a behaviour that gave rise to a legitimate expectation on the conclusion of negotiations; the other one, negative, is the absence of a justification for the interruption of negotiations. For an example of a rigorous inquiry on the fault of the behaviour of an authority that had revoked the tender procedure for lack of funds, see TAR Sicilia - Palermo, sez. I, 4 February 2011, n. 210, in *www.lexitalia.it*.

[43] TAR Lombardia - Brescia, sez. II, 16 March 2010, n. 1239, in *www.giustizia-amministrativa.it*, stated that even the lawful annulment of the preliminary steps of a private finance project can be a source of liability, since the authority should have made an accurate cost-benefit analysis before starting the procedure that it was then forced to terminate. The judgment explains why in that case contractual liability was not available instead.

Despite some precedents adverse to the acknowledgement of public liability for lack of implementation of EU Directives[44], the main trend was in the direction of qualifying the breach of the duty as a tort ex Art. 2043 c.c.[45].

A recent Supreme Court decision has stated the contractual liability of the State by resorting to an *ex lege* obligation[46].

According to the Supreme Court, the conduct of the State is unlawful but only with respect to EU law, thus being unfit to fall in the tortious scheme of Art. 2043 c.c.[47].

In this view, the breach of the duty of implementation can give way to a compensation claim, whose prescription would consequently expire in ten years and not in the five-year time provided for by Art. 2043 c.c.

A more recent Supreme Court decision has further developed these principles by confirming that State liability in this case does not fit in the general tort clause but is

[44] Cass., sez. III, 1 April 2003, n. 4915, in *Danno e Resp*., 2003, 7, 718, wiyh note by SCODITTI E., *Il sistema multi-livello di responsabilità dello Stato per mancata attuazione di direttiva comunitaria*.

[45] See Cass., sez. lav., 9 April 2001, n. 5249, in *Foro it.*, 2002, I, 2663 and Id., sez. III, 12 February 2008, n. 3283, in *Danno e Resp.*, 2008, 5, 581.

[46] Cass., SS.UU., 17 April 2009, n. 9147, in *Foro amm. - CdS*, 2274, with note by GIANNELLI A., *La responsabilità del legislatore per tardivo recepimento della direttiva, modelli a confronto*. The judgment recognizes the entitlement of specializing doctor to damages caused by the failure of the State to pay them according to the provisions of an EU Directive which had been never implemented.

[47] Criticism on the autonomy of domestic law and on the category of EU illegality in expressed by SCODITTI E., *La violazione comunitaria dello Stato fra responsabilità contrattuale ed extracontrattuale*, in *Foro it.*, 2010, I, 175 ss.Among monographic studies on the issue, see BIFULCO, *La responsabilità dello Stato per atti legislativi*, Padova, 1999 e FERRARO F., *La responsabilità risarcitoria degli Stati membri per violazione del diritto comunitario*, Milano, 2008.

referrable to contractual liability, because it stems from the violation of a statutory obligation[48].

The judgment stated that the omission results in a permanent obligation to redress damages in favour of the individuals who might have been given rights had the Directive been implemented. As to the limitation of action, the Supreme Court has connected it to the moment in which the obligation rose, also specifying the regime of the prescription in case of partial implementation of the Directive.

The Supreme Court judgment was published only two days before the European Court of Justice intervened on the same issue, by way of preliminary ruling, and stated that is not in contrast with European Law the provision of prescription time-limit for the action aimed at protecting rights conferred by a EU Directive, even when the Directive has not been implemented, provided that the delay has not been caused by the State itself[49].

Therefore, the Supreme Court interpretation of the time-limit provision is more favourable than the one given by the European Court of Justice.

[48] Cass., sez. III, 17 May 2011, n. 10813, in *www.diritto24.ilsole24ore.com*.

[49] Eur. Court of J., sect. I, 19 May 2011 (case C-452/09), in *www.curia.europa.eu*.

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CIVIL LIABILITY OF THE PUBLIC ADMINISTRATION. JURISDICTION AND PROCESS

ANNUAL REPORT - 2011 - ITALY

(June 2011)

Prof. Giandomenico FALCON – Fulvio CORTESE

In the Italian legal order, the system of judicial remedies concerning the liability of the public administration is quite complex.

Generally speaking, a compensation issue does not need to be raised as a preventive measure before the administrative authority; it is accessible to everyone, regardless of nationality or citizenship, and can be summarised as follows.

***

a) Non – contractual liability:

This concerns the liability for damage arising from conduct on the part of the administration, consisting in an action or in an omission, without the exercise of public powers.

In this case, the jurisdiction of civil courts applies, which have general jurisdiction on all “individual rights” (*diritti soggettivi*), to be distinguished from "legitimate interests" (*interessi legittimi"*) (art. 24 and 103 Const.; art. 2043 Civil Code).

Such action is time barred after five years, which run from the moment in which the harmful event has taken place.

The damage can be proved by the injured party, using all the means provided by the Italian Code of Civil Procedure: documentary evidence; witnesses; formal hearings; sworn evidence. The judge, moreover, can also appoint a technical consultant to better evaluate the facts and to quantify the damage. In all cases in which the quantum of damage cannot be precisely proved, it is awarded by the judge on the basis of an equitable evaluation (art. 1226 Civil Code).

The administration could also be ordered to make "specific restitution" (restitution in kind, *reintegrazione in forma specifica*), but the court may find that only the equivalent in damages is the proper remedy, if the restitution in kind proves to be too onerous for the defendant (art. 2058 Civil Code).

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b) Liability for unlawful acts

This refers to the cases in which the unlawful exercise, by the public administration, of an administrative power causes a damage (economic or otherwise).

In these cases Italian law provides for compensation for breach of a "legitimate interest". Therefore, the administrative courts have jurisdiction (art. 103 Const.; art. 7, Administrative procedure code, legislative decree 104/2004; former art, 7 l. 205/2000).

There has been a heated debate in case-law and among legal scholars concerning the relation between the action for annulment and the action for compensation of damages caused by the unlawful act itself.

The prevailing opinion, by the administrative courts, was that, in order to claim compensation for such damage, it was previously necessary to obtain the annulment of the harmful administrative act. Correspondingly - according to the same courts - in the case of harm caused by the public administration's delay in the emanation of the act, it was necessary to obtain a previous declaration of unlawfulness of the public administration's inertia (this was the thesis of the so-called "administrative prejudiciality", *pregiudizialità*

amministrativa: see Council of State, Plenary assembly – *Consiglio di Stato, Adunanza Plenaria* - decisions nn.4/2003[1], 12/2007[2]; The Court of Cassation – *Corte di cassazione* – followed, conversely, the opposite thesis: decisions 13659 e 13660/2006[3], 35/2008[4]).

Nowadays, a statutory compromise between the two theses has been reached under art. 30 of legislative decree 104/2010.

It provides that the action for compensation may be proposed also in an independent way; however the third paragraph of the same article provides that it shall be subject to a time limit of 120 days, which runs from the day on which the fact has happened or from the knowledge of the act (if the damage directly derives from the act itself)[5].

Furthermore, the same article 30 (par. 3) provides that the court, while awarding compensation, shall take into account "all the relevant circumstances of the fact and the general behaviour of the parties" and that, anyway, the judge "must not award

1 *Foro amm. CDS*, 2003, 877.

2 *Riv. giur. edilizia*, 2007, 1359.

3 *Dir. proc. amm.*, 2006, 1007.

4 *Resp. civ. e prev.*, 2008, 1360.

5 In the case of damages caused by the undue delay of the public administration in the adoption of an act (see art. 2 bis l. 241/1990), paragraph 4 provides that the time-limit of 120 days shall not accrue as long as the failure to fulfil lasts. Anyway, this time-limit runs from the time of one year after the deadline to provide has expired. In order to demonstrate the public administration's inertia, the individual shall respect this second time-limit (see art. 31, par. 2, legislative decree 104/2010).

compensation for damage which could have been avoided with ordinary diligence, including the use of all available legal remedies"[6].

In the short time since this reform no relevant case law ha yet developed, nor a prevailing interpretation established.

Nevertheless, the Council of State (Plenary assembly, n. 3/2011[7]) has already had the opportunity of giving its interpretation of this discipline, providing some clarification about the possible content of the judicial decision. In particular, it states that:

– the administrative court, in a proceeding for damages, may order to the public administration to adopt a specific decision. This is possible when the public administration does not have a discretionary margin of appreciation and, therefore, it is possible to establish with certainty that the complaint is legally well founded[8];

[6] A special discipline is provided by art 124, legislative decree 104/2010, in the case in which the damage depends on the breach of rules on public procurement. If the judge does not declare the ineffectiveness of the contract, the law provides for equivalent compensation of damages, which have been suffered and proved (paragraph 2). Moreover, the conduct during the proceedings of the party who, without justified reasons, has not required the award, or has not declared itself available to succeed in the contract, is evaluated by the judge in compliance with art. 1227 civil code. This latter provides that: if the culpable fact of the creditor has contributed to the damage, compensation is diminished with regards to the seriousness of the culpability and of its consequences (paragraph 1). Compensation is not awarded for damage which could have been avoided by the creditor, following the standard of ordinary care (paragraph 2). An even more particular discipline is provided for public procurement concerning strategic infrastructures (art. 125, legislative decree 104/2010): in this case, the possible precautionary suspension or the annulment of the award does not cause invalidity of the stipulated contract; compensation is possible, but just equivalent compensation.

[7] The decision is available at this website: *www.giustizia-amministrativa.it*.

[8] The Council of State bases its reasoning on art. 34, paragraph 1, letter c), legislative decree 104/2010. It provides that, during compensation proceedings, the judge could order the public administration not only to pay an amount of money, but also to adopt all measures that could guarantee the subjective juridical position.

– in order to dismiss the claim for compensation, the court has to verify the existence of two elements: that the harmful act has not been challenged by its addressee before the administrative courts, and that the administration has not been asked to use its powers to do justice (*autotutela*);

– as follows from the application of the so-called "bona fide" principle, even negative process choices could be theoretically considered relevant behaviours for the exclusion or the reduction of the harm, if it is established that the neglected active behaviour would not have been an important sacrifice for the party and that it could eliminate or reduce the damage[9].

It should be stressed that, in the case of an action for annulment, the compensation claim could be made during the proceeding or, anyway, within a time-limit of 120 days after the decision has become definitive (art. 30, par. 5); moreover, when, during a court proceeding, the annulment of the act is no longer of use to the claimant, the judge shall ascertain the act's unlawfulness if required for the purposes of making a claim (art. 34, par. 3).

It is therefore clear that, even without a strict "prejudiciality" requirement for the action of annulment before the claim for compensation, nevertheless the omission of a prompt challenge of the harmful act before the administrative courts produces serious disadvantages for the claimant, who risks loosing any possibility of compensation.

As to the finding and presentation of the evidence, the means of proof are those mentioned by legislative decree n. 104/2010 (artt. 63 ff.: documents, acquisition of

[9] The Council of State, in the above mentioned decision, has specified that the administrative judge must evaluate (even without being requested by the parties and acquiring all necessary means of evidence) if the foreseeable outcome of the judicial application for annulment and of the use of other means of guarantee could have entirely or partially avoided the damage (throughout a reasoning based on hypothetical causality that takes into account the claimant's conduct as a whole. In this case, the court can also use presumptions.

information from the administration, witnesses - only in writing -, administrative investigations); since 2000 (l. n. 205), the judge can also appoint technical consultants (art. 67, legislative decree 104/2010, at present they are mostly used cases of damage relating to public procurement procedures).

Finally, it has to be stressed that art. 34, par. 4, legislative decree 104/2010 says that in the case of pecuniary award, the court can limit itself, if the parties agree, to set the criteria under which the debtor shall propose to the creditor the amount of the payment within an adequate time-limit. If there is no agreement, or if obligated party does not fulfil its obligation, the court can be asked to determine the amount of money or the fulfilment.

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As to the execution of judicial decisions against the public administration, the general principle of art. 1740 civil code is applied: the debtor shall fulfil his obligations with all his goods, both present and future, except for the specific limitations provided by law.

These limitations, however, are quite numerous.

Many of the public administration's goods cannot be seized by creditors (these are goods in the so called "public domain" and all the goods with a specific public destination or aim). It follows that, practically speaking, generally only money can be seized by the creditor to satisfy his claim.

Moreover, the injured party must follow a specific procedure (art. 14**,** decree law 669/1996, converted into law 30/1997), which provides *inter alia* that a judicial proceeding can be started only after 120 day from the notification of the sentence to the administration.

This special discipline was not to be in conflict with European Law by the European Court of Justice (decision September 11th 2008, C-265/07[10]).

The competent courts for the execution of orders against the public administration are generally the civil courts (Court of Cassation, united sections, n 7578/2006[11]).

Another remedy is also available: the "compliance judgement" (*giudizio d'ottemperanza*), actionable in administrative courts. It is a special judicial procedure by which the public administration is ordered to give execution to a *res judicata*, whereby the court can order the payment of a compensatory amount of money, even substituting the administration if necessary. See art. 112, legislative decree 104/2010.

This procedure can be used also in the case mentioned above, when the public administration does not comply with the criteria established by the court for the determination of the compensation amount, in case of damage caused by the unlawful use of power.

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10 *Foro amm. CDS*, 2008, 2302.

11 *Foro amm. CDS*, 2006, 1750.

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Prof. Tony PROSSER

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1. INTRODUCTION

The public utilities in the UK are different from those in many other countries. They had been publicly owned, but under the Thatcher and Major Governments from 1979-1997 were privatised; now the only substantial enterprises in public ownership are the Royal Mail and Scottish Water, and the former is now being prepared for privatisation. Government has not retained any shareholdings in the privatised enterprises, and regulation takes place through the independent regulatory authorities, each of which will be discussed

below.[1] Government has continued to play an important role in the regulatory environment, however, and there have been a number of changes in the regulatory arrangements in recent years. This report will look selectively at some of the main issues which have arisen in 2010 and early 2011, covering both the last period of the Labour Government and the first year of the Coalition Conservative/Liberal Democrat Government.

A number of important pieces of legislation were passed right at the end of the previous Government in 2010, notably the Energy Act 2010 and the Digital Economy Act 2010, which will be discussed below. The May 2010 election produced a new Coalition Government committed to radically different policies on a number of issues, especially the reduction of public spending. However, this has not so far produced major changes in the regulation of the public utilities, although, as we shall see below, a number of reviews of areas of regulatory policy have been initiated. The regulators have survived relatively unscathed the new Government's cull of 'quangos', through which many public bodies operating at 'arm's length' from government face abolition. However, the official consumer representation body 'Consumer Focus', which has had an important role in monitoring the effectiveness of consumer protection by regulators, faces abolition, as does the Administrative Justice and Tribunals Council which has some supervisory functions over them. There may be changes later; for example the Prime Minister stated before the general election that the functions of Ofcom, the communications regulator, would be changed to remove its policy making role, and a further review is being undertaken of the competition authorities, which may affect the regulators. The regulators themselves, whilst expected to increase their own efficiency, have largely escaped the effects of the major Spending Review process, being largely financed by levies from the industries. I shall now discuss in more detail some selected developments in each of the regulated sectors.

[1] For further information on the regulation of the public utilities, see Tony Prosser, *Law and the Regulators* (Oxford: Clarendon Press, 1997) and *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford: Oxford University Press, 2010), ch. 9.

2. ENERGY

The role of the Office of Gas and Electricity Markets (Ofgem) has been reviewed by the Government, which has decided to retain it as an independent regulator but to set it new strategic goals.[2] Two major themes have been evident here. The first is the continuing efforts by Ofgem to make the liberalised energy markets work effectively for consumers. Thus in 2009 Ofgem undertook major investigation into energy supply markets after the industry had imposed substantial price increases.[3] The measures to be adopted included clearer information on bills, better information on tariffs, making it easier to switch suppliers where customers had outstanding debts, and stronger rules on sales and marketing (almost half the consumers who switched due to doorstep selling did not achieve a price reduction). Ofgem also decided to adopt new licence requirements that charges for different payment methods should be cost reflective and to prohibit undue discrimination in terms and conditions offered to customers, which it considered would substantially help the most vulnerable customers. These changes were mainly implemented by changes in the licences of the regulated companies, but the Energy Act made further provision for reform, notably by giving the Secretary of State power to introduce a new licence condition prohibiting some forms of abuse of market power *ex ante*; this power has not yet been brought into effect. The Act also empowered the Secretary of State to establish schemes for the reduction of fuel poverty and to adjust charges to assist disadvantaged groups of customers.[4]

[2] Secretary of State for Energy and Climate Change, Written Ministerial Statement, 19 May 2011,528 HC Debs col 26WS.

[3] Ofgem, *Energy Supply Probe – Initial Findings Repor*t, (2008); *Addressing Undue Discrimination – Final Proposals, (2009) and Energy Supply Probe – Proposed Retail Market Remedies*, (2009).

[4] Ss. 9-15, 18-23, 26-9.

Ofgem undertook a further retail market review in 2010-11. It found that further action was needed to protect consumers and to deal with structural weakness in the industry. It proposed measures to improve tariff comparability, to enhance liquidity through facilitating market entry by requiring dominant firms to auction generating capacity, to strengthen the remedies introduced after the earlier review and to improve reporting transparency.[5] Ofcom also introduced a rule requiring suppliers to give 30 days notice of price increases. The problems of consumer protection and of competition in the industry are likely to continue to be a major issue for Ofcom in future years.

The second major issue has been that of sustainability, and related questions of security of supply and of the encouragement of renewables. The Energy Act 2010 changed the statutory duties of Ofgem to make it clear that the interests of consumers, which must be protected by Ofgem, include their interests in the reduction of emissions of greenhouse gases and their interests in security of supply.[6] Though competition will remain the primary means of protecting consumers, the regulator must now also consider whether other means would better protect their interests.[7] In order to achieve the goals of decarbonisation, energy security and affordability, the Government consulted on Electricity Market Reform and on Carbon Price Support, and proposed major reforms including the use of feed-in tariffs to support low-carbon generation, a carbon price support mechanism, new emissions standards and a new capacity mechanism to ensure energy security.[8] The role of the electricity market in this has been examined by the Energy and Climate Change Committee of the House of Commons, which considered that 'the big omission from the

[5] Ofgem, *The Retail Market Review – Findings and Initial Proposals* (2011).

[6] Ss 16-17.

[7] Ss 16(3), 17(3).

[8] Department of Energy and Climate Change, *Consultation on Electricity Market Reform*, Cm 7983 (2010); HM Treasury, *Carbon Price Floor: Support and Certainty for Low-carbon Investment* (2010).

Government's proposals is a plan for reform of the wholesale electricity market.' This would need to break the dominance of the current 'big six' energy companies to permit new entrants to invest in low carbon generation.[9] A Government White Paper is awaited on these issues; it is clear that reform of the energy market will be a major future concern, involving both government and the regulator.

3. ELECTRONIC COMMUNICATIONS

The Office of Communications (Ofcom) was established by the Communications Act 2003 as a unified regulator of all forms of electronic communications, including telecommunications and broadcasting and much of the 'new media'. Its work has been largely praised as a successful merging of different regulatory bodies, and it survived review by the National Audit Office and the House of Commons Public Accounts Committee in 2010-11 subject to only minor criticism.[10] However, as mentioned above, the Prime Minister promised to end its (largely advisory) role in the making of policy, and a review of its future is currently taking place.

The most notable work of Ofcom recently has been in the broadcasting field, notably in its review of the Pay-TV market and its advice to Government in relation to the proposed full purchase of Sky-TV by News Corporation.[11] However, a couple of other areas are of interest. The first is that of auctioning wireless spectrum for use for new-generation mobile

[9] 'Electricity Market Reform', HC 742, 2010-12.

[10] NAO, 'Ofcom: The Effectiveness of Converged Regulation', HC 490, 2010-11; Committee of Public Accounts, 'Ofcom: The Effectiveness of Converged Regulation', HC688, 2010-11.

[11] Ofcom, '*PayTV Phase 3 Document: Remedies*' (2010); *Report on the Public Interest Test on the Proposed Acquisition of British Sky Broadcasting Group by News Corporation* (2010).

phone and related purposes; this is seen as essential for extending broadband coverage. After several small auctions, a major auction was announced in 2008; however, it was delayed by litigation on the part of some mobile operators who were strongly opposed to the details of the arrangements. The Government commissioned a review by an Independent Spectrum Broker; this resulted in a direction under the Wireless Telegraphy Act 2006 to Ofcom from the Government to carry out the auction.[12] Ofcom has now consulted on the arrangements for such an auction.

Litigation also figured in a highly controversial new role for Ofcom in the policing of alleged infringement of copyright online under the Digital Economy Act 2010. The Act provides that internet service providers must notify subscribers if their internet addresses are reported by copyright owners as being used to infringe copyright, must keep track of the number of reports about each subscriber and must compile on an anonymous basis a list of those reported on. After obtaining a court order to obtain personal details, copyright owners will be able to take action against those on the list. Implementation of these provisions is through the drafting of a Code by Ofcom.[13] A challenge was brought to these provisions by two internet service providers, with no less than 12 other parties taking part, including organisations concerned with copyright protection and with freedom of speech. The challenge was based on alleged breach of a number of provisions of EU law, including the Technical Standards Directive, the e-Commerce Directive, and the Data Protection and Privacy and Electronic Communications Directive. The challenge was unsuccessful, except on one minor ground relating to the requirement for copyright owners to reimburse part of the enforcement costs, and the provisions were held not to breach EU law.[14]

[12] The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010, SI 2010/3024.

[13] Digital Economy Act 2010, ss 3-18.

[14] *R (on the Application of British Telecommunications plc and TalkTalk Telecom Group plc) v The Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin).

These two examples underline both the complexity of Ofcom's various tasks and the highly litigious nature of the electronic communications industry. Reflecting the latter point, the former Government had consulted on a proposal that the current full right of appeal on the merits to the Competition Appeal Tribunal from Ofcom decisions on electronic communications (not broadcasting) matters be restricted to grounds similar to the more limited ones for judicial review, having decided that this would be compatible with EU requirements.[15] It remains to be seen whether Ofcom's role will be fundamentally changed in the future; clearly it will survive in some form as a regulator, if only to comply with EU law on electronic communications regulation.

4. WATER AND SEWERAGE

There is currently considerable uncertainty about a number of elements in the regulatory regime for water, administered by the Water Services Regulation Authority (Ofwat) for England and Wales and by the Water Industry Commission for Scotland. The last periodic review, in which it sets the price caps for water and sewerage providers, was completed in 2009 with the next due for completion by 2015. However, two major issues remain unresolved. The first is that of developing greater competition in the industry. The current structure in England and Wales is that of regional monopolies with very little provision for competition or new entry. Ofwat's lack of progress in developing greater competition was heavily criticised by Parliamentary committees, and a major review of how this could take place was commissioned by the previous Government (the Cave Review).[16] It reported in

[15] Department for Innovation, Business and Skills, *Implementing the Revised EU Electronic Communications Framework: Overall Approach and Consultation on Specific Issues* (2010).

[16] Professor Martin Cave, *Independent Review of Competition and Innovation in Water Markets: Final Report* (2009).

2009, recommending that, whilst competition for supply to household users was not feasible, various steps should be taken to develop greater competition to supply large business and public sector users with water. These included separation of the suppliers' household and business retain operations, reform to the water supply licensing regime giving Ofwat the power to determine the criteria for setting charges, reform of the merger regime for water, and reform of the 'inset regime' enabling a supplier to replace another outside its own area in certain circumstances. The last Government accepted these conclusions, though it did not include provisions to implement them in legislation passed just before the election. The Coalition Government is considering the issue and proposals to increase competition will be included in a White Paper on water to be issued in Summer 2011. By contrast, in Scotland under the Water Services (Scotland) Act 2005 there is a framework for competition with no location or size restrictions in the supply of the non-household market,

The other matter of controversy is that of water charging. Currently, charging is on the basis of a mixture of charges set on the basis of the notional rateable value of the property and by metering. A number of problems had arisen; thus schemes to protect vulnerable customers had been ineffective and, since the banning of water disconnection for failure to pay bills by household consumers, there had been an increase in bad debt owed to water companies. The former Government established an independent review of water charging (the Walker Review).[17] It recommended a number of changes to the charging system, including the further use of metering in some areas, revised tariff principles and better targeted support for low-income families. Limited provision for social tariffs was included in the Flood and Water Management Act 2010.[18] However, the whole question of charging

[17] Department for Environment, Food and Rural Affairs, *The Independent Review of Charging for Household Water and Sewerage Services – Final Report* (2009).

[18] S. 44.

falls within the review being undertaken by the Coalition Government and will be addressed in the forthcoming White Paper.

5. RAIL

The rail industry is in a similar position to that of water; it has faced major criticism in recent years and now awaiting the outcome of a far-reaching review, in this case particularly focussing on the explosion of costs since privatisation in the early 1980s; public support is running at around five times its level before privatisation (in real terms). Regulation is mainly carried out by the Office of Rail Regulation (ORR) which completed in 2008 its last periodic review of charges which Network Rail, the infrastructure operator, can levy on rail operating companies. The next such review will be in 2013, and work has already commenced on international benchmarking studies, which have shown that Network Rail has considerably higher costs than comparable enterprises overseas. Other work carried out by the regulator has included working with Network Rail to implement improvements and efficiency savings required by the periodic review, improving passenger information during disruption of services, and resilience of the network in bad weather. The major continuing issue is to ensure that Network Rail delivers efficiency improvements and controls its costs and those of its contractors; a report by the National Audit Office has found that, whilst the regulator has significantly developed the range and quality of its analysis, and has required substantial efficiency savings from Network Rail, weaknesses remain in its information on costs and on the gap between Network Rail and more efficient performers.[19]

[19] 'Regulating Network Rail's Efficiency, HC 828, 2010-11.

Almost all passenger services are provided by operators on the basis of franchises awarded for groups of routes. These have given rise to a number of problems, which have included the operator of the East Coast Main Line handing back its franchise after serious financial difficulties; the franchise is now temporarily delivered by a publicly-owned company. More generally, there have been serious problems of micro-management by the Department for Transport which issues the franchises, and which has specified in very considerable detail the services to be provided, thereby limiting initiative and flexibility. The Coalition Government issued a consultation document on reforming franchising in July 2010.[20] This proposed that franchises should be set for a longer period in the future, 12-15 years rather than the current 7-10 years, revised arrangements for the allocation of risk between the operator and government. A base level of service would be specified but this would be fleshed out by bidders for the franchise with greater operating flexibility. Implementation has been postponed, however, to await the McNulty review of value for money in the rail industry. This reported in May 2011 and made a large number of proposals for increased efficiency without reducing the extent of the network or imposing a wholesale increase in fares, and was broadly supportive of the proposals for franchise reform.[21] It will be followed by a White Paper setting out new rail policy in Autumn 2011.

6. POSTAL SERVICES

It is postal services which face the most far-reaching changes in the near future. The Royal Mail has suffered serious financial problems and has been plagued by poor industrial relations. It is currently wholly state owned, and regulated by the Postal Services

[20] *Reforming Rail Franchising* (2010).

[21] Department for Transport, *Realising the Potential of GB Rail; Report of the Rail Value for Money Study* (2011) (the McNulty Review).

Commission (Postcomm). In 2008 the Hooper report recommended that the Royal Mail should enter into a strategic partnership with one or more private sector companies with expertise in transforming a major network business. Its huge pension deficit should be assumed by government, and regulation should be transferred to Ofcom to reflect its presence in the broader communications market.[22] The Labour Government introduced a Postal Services Bill to implement these measures but it was withdrawn after facing political opposition in Parliament to private sector involvement in the Royal Mail. The Coalition Government commissioned an updating of the Hooper review, which came to similar conclusions, in particular that private capital should be introduced.[23] The Government then announced plans for a full privatisation of the Royal Mail, although the Post Office Ltd, which provides actual post offices, would remain in the public sector. This is to be implemented by the Postal Services Bill, introduced to Parliament in October 2010 and which completed its progress through Parliament in June 2011. When it has received the Royal Assent and becomes law, the Bill will restructure the Royal Mail group of companies and makes provision for unrestricted sale of share in it. Historic pension liabilities are to be transferred to the Government, and the Bill gives Ofcom the new function of regulating the postal services sector; it also makes provision for the maintenance of the universal postal service. Finally, the Bill makes provision for a special administration regime should a provider of the universal service face insolvency. State aid approval will be needed for the changes from the European Commission, and the organisation of the sale is likely to prove complex. Nevertheless, unlike the previous Government, the Coalition has succeeded in obtaining the necessary legislative basis for privatisationl.

[22] Hooper Review, *Modernise or Decline: Policies to Maintain the Universal Postal Service in the United Kingdom*, Cm 7529 (2008).

[23] Hooper Review, *Saving the Royal Mail's Universal Postal Service in the Digital Age*, Cm 7937 (2010).

7. AIRPORTS

The major airports are regulated by the Civil Aviation Authority (CAA), which also regulates civil aviation. Though the basic legal procedures are similar to those applying to other regulators of public utilities, there are some differences in its powers and procedures, and reform of these has been promised for over ten years. Legislation to bring its procedure for setting price caps into line with that of other regulators was announced in the Queen's Speech at the beginning of the 2010-11 Parliamentary session, though introduction of the Bill has now been postponed to the following year.

In the meantime, a major problem was the closure of London Heathrow, the UK's busiest airport, from 18-20 December 2010 due to snowfall. Reports commissioned by the British Airports Authority (BAA), Heathrow's owner, and by the House of Commons Transport Committee, were highly critical both of the lack of preparation for such an eventuality and the absence of proper passenger information and concern for passenger welfare. This was attributed to a lack of proper economic and regulatory incentives for the airports operator to provide proper elements of resilience in their operations and to invest adequately in this. Extraordinarily, the major disruption did not figure in Heathrow's performance measures, which recorded an unexceptional month, suggesting the need for major reform in the scope and nature of the relevant performance measures.[24]

Another major issue involved the general competition authorities. BAA (owned by the Spanish company, Ferrovial), is the dominant operator, owning seven UK airports, and in particular the three main London airports, Heathrow, Gatwick and Stansted. In 2009 the Competition Commission, after a detailed inquiry, required BAA to sell both Gatwick and

[24] British Airports Authority, *Report of the Heathrow Winter Resilience Enquiry* (the Begg Report), 2011; Transport Committee, 'Keeping the UK Moving: The Impact on Transport of the Winter Weather in December 2010', HC 794 (2010-11).

Stansted as well as either Edinburgh or Glasgow on the grounds that the absence of competition between airports caused serious consumer detriments to both passengers and airlines.[25] This decision was successfully challenged in the Competition Appeal Tribunal on the ground of apparent bias because a member of the Commission's panel was also an adviser to a pension fund which was a possible purchaser of divested airports.[26] The Tribunal's decision was successfully challenged in the Court of Appeal, which decided in October 2010 that the interest of the panel member was too distant to be of real concern to a fair-minded and informed observer, and so the CAA's decision was re-instated.[27] Leave was not given for further appeal, and the Competition Commission is now requiring the divestment to go ahead.

8. CONCLUSION

2010 has not seen any major new development of general importance for the UK public utilities. Unsurprisingly with the election of a new Government, a number of reviews are taking place and are likely to result in greater changes in the next few years. However, it seems likely that the current arrangements for regulation of the utilities will be retained in something resembling their present form, the most important difference of substance being the transfer of responsibility for regulation of postal services from Postcomm to Ofcom.

If any more general themes can be drawn from the events described here, the most apparent concern the role of markets and the role of government. As the experience in energy shows

[25] Competition Commission, *BAA Airports Market Investigation* (2009).

[26] *BAA Ltd v Competition Commission* [2009] CAT 35.

[27] *BAA Ltd v Competition Commission* [2010] EWCA Civ 1097.

clearly, where public utility markets have been liberalised they need constant regulatory policing both to protect consumers and to facilitate public interest goals such as sustainability. This policing will involve both sectoral regulators and, as in the case of airports, general competition authorities. Indeed, it is now a truism that in these markets liberalisation creates the need for more regulation, not less. The same is true in the rail sector, which has not been fully opened up to competition but where the fragmented nature of the industry has created the need for extensive oversight.

The second theme which is apparent is that the regulators, though independent in their day-to-day decision making, actually have to operate in conjunction with other bodies. These include not just the competition authorities but also government itself. Once more this is apparent in energy, with the interventions of the government department on sustainability grounds needing to be supplemented by market surveillance by the regulator, and in rail where the responsibilities of the regulator sit alongside the regulatory aspects of the franchising process carried out by the Department for Transport.[28] As markets evolve, regulation of the public utilities has become more complicated, and is likely to develop in new ways as the concept of sustainability becomes a more central regulatory objective alongside that of protecting consumers. Transparency in the relations between different actors involved in regulation is likely to become a major area of interest for future public lawyers.

[28] For further discussion of the relationship between regulators and government see Tony Prosser, *The Regulatory Enterprise*, pp. 6-8, 223-30.

9. WEBSITES

www.ofgem.gov.uk: Ofgem

www.ofcom.org.uk: Ofcom

www.ofwat.gov.uk: Ofwat

www.rail-reg.gov.uk: Office of the Rail Regulator

www.psc.gov.uk: Postcom

www.caa.co.uk: Civil Aviation Authority

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SERVICIOS PÚBLICOS

INFORME ANUAL - 2010 - ESPAÑA

(Junio 2011)

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ÍNDICE

1. INTRODUCCIÓN

El concepto tradicional de servicio público responde a una posición del Estado hoy desconocida. Y si bien el recurso a dicha noción se mantiene conforme a un acuerdo más o menos implícito, la realidad que en la actualidad pretende abarcar tiene muy poco que ver con la ideología que le dio vida. Porque dicha transformación está presente en el régimen jurídico en vigor de los distintos "servicios públicos", parece conveniente dedicar unas palabras previas que reflejen la nueva relación establecida entre lo público y lo privado, el Estado y la Sociedad y, sobre todo, su traducción en las concretas técnicas jurídicas que persiguen hoy la satisfactoria prestación de las actividades y servicios demandados por los ciudadanos, objeto, en definitiva, de esta crónica legislativa. Hemos de comenzar señalando que no existe hoy un concepto unívoco de servicio público que haya sido capaz de englobar la complejidad de dicha transformación. A ella suele aludirse afirmando concisamente que el Estado gestor ha dado paso al Estado regulador y garante y es, ciertamente, la noción de regulación la que permite ofrecer una explicación sistemática de todo ello. Brevemente pueden ofrecerse los trazos más gruesos de este cambio, suficientes para comprender la importancia de las modificaciones normativas que se relatan en estas páginas.

Si bien la responsabilidad y garantía de la satisfacción de los intereses generales sigue siendo tarea estatal, la forma de lograrlo ha cambiado. La regulación debe, en primer lugar, decidir qué servicios públicos se reservan aún a la titularidad de las Administraciones públicas y, en su caso, la forma de organizarlos y gestionarlos. Pero si decide entregarlos al sector privado deberá garantizar que se ofrezcan en grado suficiente y en condiciones de calidad. El sector privado, que estará normalmente interesado en aquellos sectores económicamente rentables, deberá atender a las denominadas "misiones de servicio público"[1] impuestas directamente por el regulador al ordenar la actividad correspondiente.

[1] La posición central que ocupa la noción de regulación en la actual realidad jurídica se debe al Prof. Santiago Muñoz Machado y a él corresponde el mérito de haber elaborado un cuadro sistemático de las instituciones y principios jurídicos que encierra. La consulta del Capítulo III, titulado "La actuación regulatoria de la

Al regulador corresponderá, en consecuencia, la supervisión, inspección y control de aquellas. Al tiempo, puesto que es posible la concurrencia de empresas públicas y privadas en un mismo sector, también le corresponderá la regulación de los instrumentos jurídicos dispuestos para garantizar la competencia y la igualdad de condiciones que ha de presidir las relaciones entre todos los operadores.

De modo que puede señalarse sintéticamente que mediante la regulación se decidirá no sólo la titularidad pública o no de los servicios, sino también su forma de gestión en el primer caso, la imposición de obligaciones, en el segundo y la garantía de la competencia en el supuesto de concurrencia de operadores públicos y privados.

A lo largo de este último año se han producido varias modificaciones normativas en distintos servicios públicos, si bien de distinto alcance e importancia.

En primer lugar, la reordenación jurídica que en las últimas décadas había afectado a casi todos los servicios públicos, ha alcanzado por fin al sector audiovisual. Con la aprobación de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual[2], se reúnen en un solo texto los principales aspectos de su régimen jurídico que hasta ahora se encontraban dispersos en multitud de normas, algunas de ellas claramente anacrónicas. Por otro lado, las reformas que el Real Decreto-Ley 13/2010, de 3 de Diciembre, de actuaciones en el ámbito fiscal, laboral y liberalizadoras para fomentar la inversión y la creación de empleo[3] ha introducido para la modernización del servicio aeronáutico consisten fundamentalmente en la separación de las funciones de gestión y navegación aeronáuticas y

Administración pública", de su *Tratado de Derecho Administrativo y de Derecho Público General*, Tomo IV, Iustel, 2011, págs. 487 y ss, para salvar el esquematismo del texto es, por ello, imprescindible.

[2] BOE, núm. 79, de 1 de abril de 2010.

[3] BOE, núm. 293, de 3 de diciembre de 2010.

la entrega de aquellas a una sociedad mercantil para hacer frente a las necesidades de financiación.

Por último, la aprobación hace unos meses de la Ley 2/2011, de 4 de marzo, de Economía Sostenible[4], un prodigio de la mala técnica legislativa, justificada en los cambios necesarios para incentivar y acelerar el desarrollo de la economía, ha supuesto la modificación de numerosas leyes como corresponde a su carácter transversal. Se mencionarán puntualmente aquellas que afectan a los servicios públicos.

1. SECTOR AUDIOVISUAL

Unificar el disperso panorama normativo reinante en el sector audiovisual era desde luego una tarea ineludible y así lo prueba el hecho de que con la aprobación de la Ley General de la Comunicación Audiovisual (en adelante, LGCA) se hayan derogado total o parcialmente diecisiete leyes y un Decreto- Ley. Pero son, en realidad, otros dos motivos los que han urgido finalmente la aprobación de esta norma. Uno de carácter técnico, ya que la adaptación a la tecnología digital, que ha permitido un crecimiento exponencial de los servicios ofertados y de las empresas dispuestas a competir en el mercado, exigía continuar con la renovación del marco jurídico del sector. En segundo lugar, la necesidad improrrogable de cumplir con el Derecho Europeo ya que el plazo de transposición de la norma europea que establece dicha ordenación, la Directiva 2007/65/CEE de Servicios de Comunicación Audiovisual del Parlamento y Europeo y del Consejo de 11 de diciembre de 2007, había sido ya superado. La ley, que ciertamente es clave para el régimen jurídico del sector audiovisual, trae consigo varias novedades de las que destacamos las que se refieren al concepto de servicio público de comunicación audiovisual y su régimen jurídico, los derechos del público y de los prestadores del servicio o la configuración de una nueva autoridad independiente en el sector audiovisual.

[4] BOE, núm. 55, de 5 de marzo de 2011.

2.1. El servicio público de comunicación audiovisual

La normativa sobre medios de comunicación ha sido un campo fértil para el alumbramiento de distintos conceptos más o menos próximos al del servicio público tradicional en un intento de precisar la aplicación a los mismos de las reglas de la competencia. En este sentido, se ha afirmado que la Ley General de la Comunicación Audiovisual es mucho más clara que otras normas precedentes a la hora de establecer la posibilidad de recurrir al art. 106.2 TFUE en la medida en que el cumplimiento de las obligaciones o misiones de servicio público así lo exijan[5]. En su art. 22.1, los servicios de comunicación audiovisual radiofónicos, televisivos y conexos e interactivos, se definen como *servicios de interés general* mientras que en el art. 40.1 se señala que "El servicio público de comunicación audiovisual es un *servicio esencial de interés económico general* que tiene como misión difundir contenidos que fomenten los principios y valores constitucionales, contribuir a la formación de una opinión pública plural, dar a conocer la diversidad cultural y lingüística de España, y difundir el conocimiento y las artes, con especial incidencia en el fomento de una cultura audiovisual. Asimismo los prestadores del servicio público de comunicación audiovisual atenderán a aquellos ciudadanos y grupos sociales que no son destinatarios de la programación mayoritaria".

En todo caso, es obvio, que ha de estarse a la regulación que del acceso, contenido y obligaciones establece la ley para precisar el alcance de dicha afirmación y al régimen establecido en las leyes 17/2006, de 5 de junio, de la Radio y la Televisión de Titularidad Estatal y 8/2009, de 28 de agosto, de Financiación de la Corporación de Radio y Televisión Española, puntualmente modificadas por la LGCA y junto a la que conforman el corpus vigente en materia audiovisual. La LGCA ha recogido escuetamente algunos aspectos que

[5] Vid., MUÑOZ MACHADO, S., *Tratado de Derecho Administrativo y de Derecho Público General*, Tomo IV, Iustel, Madrid, 2011, págs. 562 a 567.

las mencionadas leyes regulan detalladamente. Así dispone que los objetivos generales de la función de servicio público se fijarán para un período de nueve años mediante la suscripción de contratos programas por el Estado y las CCAA en sus respectivos ámbitos de competencia; establece unos límites para los prestadores de servicio público audiovisual de titularidad pública respecto del espacio radioeléctrico que el Estado les puede reservar y, por último, diversas reglas relativas a la financiación entre las que se menciona la transformación de la Corporación RTVE en una sociedad mercantil estatal. Pretende con ello imponer en su condición de norma básica distintos elementos del régimen jurídico del sector audiovisual al resto de Administraciones lo que obligará a la transformación del marco jurídico en aquellas Comunidades Autónomas que aún no se habían acomodado al modelo estatal.

2.2. Acceso a la prestación del servicio y régimen jurídico.

El acceso a la prestación del servicio exige la obtención de licencia, que se otorgará mediante concurso, si la actividad se presta a través de ondas hertzianas terrestres mientras que para el resto de supuestos, por tratarse de un segmento liberalizado, bastará con una comunicación previa al inicio de la actividad. La autoridad audiovisual competente es el Gobierno, sin perjuicio de la participación de las Comunidades Autónomas en la planificación de las licencias mediante mecanismos de colaboración y cooperación.

Se establecen diversas reglas para la celebración de los concursos de adjudicación de licencias con la intención de dotar de mayor transparencia a estos procesos, estableciéndose incluso algunas obligaciones para las Administraciones competentes respecto a las convocatorias y su resolución. Se disponen igualmente novedosas previsiones respecto a la duración, renovación y extinción de licencias. Se otorgarán por un plazo de 15 años y las renovaciones serán por regla general automáticas, bajo determinadas condiciones, si bien se establece que deberá procederse a su adjudicación en régimen de libre concurrencia cuando, entre otros requisitos señalados por la ley, exista un tercero que la pretenda, lo que puede limitar claramente la predicada renovación automática. La adjudicación de la licencia lleva aparejada la concesión de uso privativo del dominio público radioeléctrico de conformidad con la planificación establecida por el Estado, sin

que las mejoras tecnológicas permitan un mayor aprovechamiento de modo que se superen las condiciones establecidas en la correspondiente licencia. Por último, la celebración de negocios jurídicos que tengan por objeto las licencias otorgadas requiere la autorización previa de la autoridad audiovisual competente, estando sometidas su transmisión y arrendamiento a determinadas condiciones fijadas en la propia ley.

2.3. Derechos del público y derechos de los prestadores del servicio

Según indica su Preámbulo, la ley responde a la necesidad de dar seguridad jurídica a la industria y posibilitar la creación de grupos empresariales audiovisuales con capacidad de competir en el mercado europeo pero garantizando al tiempo el pluralismo y la protección de los derechos de los ciudadanos. Por ello, se recoge conjuntamente al comienzo de la misma, en su Título II, los derechos del público y de los prestadores del servicio de comunicación audiovisual.

Derechos del público. Además de recoger diversos aspectos ya contemplados en la legislación existente, como el relativo a los contenidos de la publicidad o los derechos de los menores, se dispone el derecho a recibir una comunicación audiovisual plural, transparente y a la diversidad cultural y lingüística con mención de la reserva de tiempo de emisión para obras europeas y los porcentajes con que los prestadores deben contribuir a financiar la producción europea de películas cinematográficas y de películas y series de televisión. También se mencionan, con novedad, los derechos de las personas con discapacidad y el derecho de participación en el control de los contenidos audiovisuales conforme al ordenamiento jurídico o los códigos de autorregulación que se elaboren.

Derechos de los prestadores del servicio. La libertad de prestación del servicio, observando siempre las obligaciones que le incumben como servicio de interés general que es, ampara la libertad de selección de contenidos y horarios entendida como libertad en la dirección editorial. Se contempla igualmente el derecho de acceso a los servicios de comunicación electrónica que, conforme a las capacidades técnicas y de acuerdo a lo establecido en la normativa sectorial de telecomunicaciones y servicios de comunicaciones electrónicas, podrán ser libremente pactados por las partes. Y también se prevé el derecho a

la autorregulación permitiendo la elaboración de códigos que deberán comunicar a las autoridades audiovisuales competentes encargadas de velar por su cumplimiento, y al organismo de representación y consulta de los consumidores según el ámbito territorial afectado.

Dentro del derecho a realizar comunicaciones comerciales, se permiten crear canales dedicados exclusivamente a emitir mensajes publicitarios y de venta por televisión. Se contempla el derecho al patrocinio y se regula el emplazamiento de productos ofreciendo cobertura legal a una práctica habitual prevista por lo demás en la Directiva que se transpone. Ha de señalarse que el cómputo de emisión de estos espacios se aplica de modo distinto a la legislación anterior y sin incluir los tiempos que ocupan el patrocinio o el emplazamiento de productos o sin limitar la autopromoción lo que puede restar considerablemente el tiempo dedicado a la emisión televisiva.

Especial mención merece el derecho a contratar la emisión en exclusiva de contenidos. La LGCA mantiene en general la regulación ya establecida por la Ley 21/1997 reguladora de las emisiones y retransmisiones de competiciones y acontecimientos deportivos, que ahora deroga, y lo regulado al respecto por la Directiva. Contiene como novedad una enumeración de aquellos acontecimientos entre los que la autoridad reguladora independiente ha de escoger con el fin de elaborar un catálogo con vigencia bienal que han de emitirse en abierto y con cobertura estatal, precisándose si se retransmitirán total o parcialmente en directo o en diferido. Sin embargo, también la propia autoridad reguladora puede añadir, por mayoría de dos tercios, algún acontecimiento no previsto por la Ley.

2.4. Autoridad independiente del sector audiovisual

Una de las principales novedades de la Ley es la creación de la tan demandada autoridad independiente en el sector audiovisual denominada Consejo Estatal de Medios Audiovisuales (CEMA) y que estará adscrita al Ministerio de la Presidencia. La ley dispone sus funciones como autoridad independiente supervisora y reguladora de la actividad de los medios de titularidad del Estado o que estén bajo su competencia y le atribuye potestad

sancionadora. Estará integrada por la Presidencia, la Vicepresidencia y las consejerías cuyos titulares serán nombrados por el Gobierno a propuesta del Congreso de los Diputados por mayora de 3/5 entre personas de reconocida competencia en materias relacionadas con el sector audiovisual, cuyo mandato tendrá una duración de seis años, no renovable, renovándose parcialmente cada tres años, por grupos de cuatro y cinco de sus integrantes. Debe elevar anualmente a las Cortes Generales un informe sobre el desarrollo de su actividad y sobre la situación del mercado audiovisual.

El CEMA estará asistido por el Comité Consultivo, que es también órgano de participación ciudadana, y se crea la Agencia Estatal de Radiocomunicaciones cuyo cometido es el control del espacio radioeléctrico y su protección frente la ocupación o el uso efectivo ilegal del mismo. Su estatuto y funciones estarán sujetos a las disposiciones de la Ley General de Telecomunicaciones.

3. SECTOR AEROPORTUARIO

Con las modificaciones introducidas por el Real Decreto-Ley 13/2010, de 3 de diciembre, los aeropuertos se sitúan en la estela de los cambios que ha experimentado la gestión de las principales infraestructuras públicas, consideradas en nuestro ordenamiento jurídico tradicionalmente bienes de dominio público, y cuyas posibilidades de transformación había abierto ya la Ley General de Patrimonio de las Administraciones Públicas aprobada en el año 2003. Los objetivos de eficacia y, sobre todo, las necesidades de financiación han contribuido a justificar el cambio de régimen jurídico y la entrega de la gestión a una sociedad mercantil estatal en la que se prevé la entrada de capital privado hasta el límite del 49% en los próximos meses.

3.1. Separación de las funciones de navegación aérea y gestión aeroportuaria.

La entidad pública empresarial AENA seguirá ejerciendo las competencias sobre navegación aérea mientras que la gestión aeroportuaria corresponderá, en adelante, a una sociedad mercantil estatal cuya constitución fue autorizada por acuerdo de 25 de febrero de

2011, al amparo del art. 166 de la Ley 33/2003, de 3 de noviembre, de Patrimonio de las Administraciones Públicas, con la denominación Aena Aeropuertos, SA. Su capital social pertenece en su totalidad a AENA que ha de conservar en todo caso la mayoría, pudiendo enajenar el resto según lo establecido en la citada ley.

Régimen jurídico. Dicha sociedad estatal se regirá por el derecho mercantil, sin perjuicio de lo establecido en la normativa administrativa de aplicación en materia presupuestaria, patrimonial, contable y de control financiero. Además, en materia de contratación, se le aplicará la Ley 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales; tendrá la condición de beneficiaria de las expropiaciones vinculadas con las infraestructuras aeroportuarias atribuidas a su gestión, si bien los bienes expropiados se integrarán en el patrimonio de Aena Aeropuertos, SA. Las obras que realicen en aeropuertos y su zona de servicio no requerirán licencia ni actos de control preventivo municipal.

3.2. Patrimonio Aeroportuario.

Todos los bienes de dominio público estatal adscritos a AENA no afectos a los servicios de navegación aérea, se desafectan pasando a ser patrimoniales si bien no procede su reversión por no alterarse el fin expropiatorio, conforme a lo dispuesto por la Ley de Expropiación Forzosa según la modificación que, en este sentido, había introducida ya la Ley de Ordenación de la Edificación. Se integran en el patrimonio de la sociedad AENA Aeropuertos, SA., que mantendrá siempre su titularidad aunque dicho patrimonio sea gestionado por sociedades concesionarias o filiales. Dichas sociedades tienen las facultades necesarias para su administración, promoción, gestión y explotación incluyendo la posibilidad de formalizar con terceros los correspondientes contratos para su utilización y aprovechamiento.

3.3. Gestión individualizada de los aeropuertos

Pese a seguir el camino trazado por otras infraestructuras públicas que han separado sus actividades como es el caso del sector ferroviario, el decreto-ley no deja de introducir cambios que darán lugar, sin duda, al estudio de las cuestiones que plantea. Es el

caso claramente de la gestión individualizada de los aeropuertos que podrá llevarse a cabo mediante la creación de sociedades filiales de Aena Aeropuertos, SA o bien a través del otorgamiento por esta sociedad mercantil de concesiones, rigiéndose en este último caso las tarifas que cobre el concesionario a los usuarios por el derecho privado.

Son también interesantes dos disposiciones que esperan su desarrollo reglamentario relativas a la participación de otras Administraciones Públicas en la gestión del aeropuerto, cuestión siempre polémica. Por un lado, puede crearse un órgano de impulso y seguimiento de la actividad del aeropuerto, del que serán miembros el gestor aeroportuario, la Administración General del Estado, la Comunidad Autónoma respectiva y los municipios del entorno. Mientras que también se prevé, para el ámbito de cada Comunidad Autónoma, los Comités de Coordinación Aeroportuaria con el Estado cuyas funciones serán: la coordinación e impulso de las políticas aeroportuarias del Estado y las Comunidades Autónomas en aquellas Comunidades que hayan desarrollado de manera efectiva su competencia aeroportuaria; la coordinación de la política aeroportuaria del Estado con las políticas urbanísticas, territoriales y medioambientales de las Comunidades Autónomas; la coordinación entre el Estado y las CCAA en materia de servidumbre aeronáuticas y acústicas; la accesibilidad y conectividad del aeropuerto con otros medios y vías de transporte y el desarrollo de rutas aéreas.

4. LEY DE ECONOMÍA SOSTENIBLE: MODIFICACIÓN EN LA NORMATIVA DE SERVICIOS PÚBLICOS

Las modificaciones introducidas por la Ley de Economía Sostenible están normalmente ligadas a diversos ámbitos como es el Derecho de la competencia o el Ambiental, por lo que su tratamiento se situaría fuera del objeto de estas páginas dedicadas a los servicios públicos. No obstante, referimos alguna mención de las modificaciones que se producen o bien en el articulado de la ley, como las relativas a las telecomunicaciones y sociedad de la información y las que se agrupan bajo el título de transporte y movilidad sostenible, o las más numerosas que se encuentran en alguna de sus 60 Disposiciones Finales.

4.1. Telecomunicaciones y sociedad de la información.

Se regula la utilización de las nuevas tecnologías en la banda de frecuencias de 900 MHz también para los sistemas UMTS, se habilita más espacio en el espectro radioeléctrico para prestar servicios de comunicaciones electrónicas y se impulsa el mercado secundario del espectro. Por último, es destacable que se reduce la tasa que los operadores de telecomunicaciones ha de satisfacer según la Ley General de Telecomunicaciones y, en particular, la inclusión como parte integrante del servicio universal, de una conexión que permita comunicaciones de datos de banda ancha a una velocidad de 1 Mbit por segundo, art. 52.

4.2. Transporte

Se procede a clasificar los mercados de los distintos tipos de transporte, en mercados de acceso libre, mercados con acceso restringido o en los que no sea posible la competencia, con el fin de evaluar el grado de competencia y proponer medidas que la promuevan, que se concretan en la disposición adicional tercera.

Se define el concepto de servicios de transporte de interés público como "aquéllos que las empresas operadoras no prestarían si tuviesen en cuenta exclusivamente su propio interés comercial y que resulten necesarios para asegurar el servicio de transporte, a través de cualquier modo de transporte, entre distintas localidades o para garantizar su prestación en condiciones razonablemente aceptables de frecuencia, precio, calidad o universalidad", con el fin de determinar los que son susceptibles de ser subvencionados.

En la Disposición Final vigésimo segunda, se modifica la Ley 16/1987, de 30 de julio, de Ordenación de los Transportes Terrestres, para acortar el plazo máximo de duración de las concesiones y promover mayor competencia en los concursos para adjudicar las líneas en el caso de los servicios públicos de transporte regular interurbano de viajeros por carretera.

Ya, por último, en la disposición final cuarta, se prevé la creación de un Organismo regulador del sector del transporte que integrará las funciones atribuidas al

Comité de Regulación Ferroviaria y la regulación del resto de modos de transporte. Mientras tanto, según la disposición final vigésimo tercera, se modifica la Ley del Sector Ferroviario para dar mayor independencia a dicho comité, dotarle de mayores competencias y se establece que sus resoluciones pondrán fin a la vía administrativa.

4.3. Organismos reguladores

En las disposiciones finales se recogen diversos cambios respecto de los organismos reguladores en los distintos sectores de modo consecuente con uno de los objetivos de la ley que se ha detenido en disponer un marco horizontal y común a todos ellos. Dichos cambios afectan a la Comisión Nacional de la Energía, la Comisión del Mercado de las Telecomunicaciones, la Comisión Nacional del Sector Postal o al propio Consejo Estatal de Medios Audiovisuales al regular el número de consejeros.

4. BIBLIOGRAFÍA

Aún es pronto para registrar bibliografía relacionada con los cambios normativos producidos en el último año. Respecto del sector audiovisual puede consultarse, si bien referido al proyecto de ley, el trabajo de VIDAL BELTRÁN, J., Mª., "El nuevo marco jurídico del audiovisual en España", *El Cronista del Estado Social y Democrático de Derecho*, núm. 10, 2010, págs. 30 a 40.

Ha de mencionarse la aparición en el año 2010 del volumen IV de la Colección dirigida por Santiago Muñoz Machado sobre *Derecho de la Regulación Económica*, publicado en la editorial Iustel. Se trata de una colección que presenta por primera vez de manera sistematizada, el conjunto de normas, instrumentos, técnicas de ordenación, supervisión e intervención de la denominada regulación pública de la economía, de la que han aparecido ya ocho volúmenes. Este último, dirigido por Alberto Ruiz Ojeda, estudia a lo largo de más de 1.000 páginas las cuestiones actuales del régimen jurídico de todos los modos de transporte.

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SERVICES PUBLICS

APPORTS DE L'ANNEE - 2010 - FRANCE

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INDEX

Le droit des services publics n'a pas connu d'évolution majeure depuis le début de l'année 2010. Toutefois, sous l'influence des juges et du législateur, il a subi quelques ajustements qui ont concerné tant le champ des services publics que leur régime juridique.

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1. LE CHAMP DES SERVICES PUBLICS

Lors de l'année 2010, les juges constitutionnel, administratif et judiciaire français ont éclairci certains aspects du champ des services publics. Parmi les différentes décisions qui méritent d'être signalées, certaines portent sur la délimitation du champ des services publics, d'autres sur celle des catégories de services publics.

1.1 La délimitation du champ des services publics

Traditionnellement, le service public est présenté comme une activité d'intérêt général assumée par une personne publique. Plusieurs décisions rendues depuis le début de l'année 2010 illustrent ces deux éléments de définition.

Le service public repose d'abord sur la notion centrale d'intérêt général. Une activité ne peut être qualifiée de service public qu'à la condition qu'elle poursuive un but d'intérêt général, c'est-à-dire qu'elle réponde aux besoins de la collectivité tout entière. Aisément perceptible s'agissant des missions régaliennes de l'Etat, cette finalité soulève davantage de difficultés lorsqu'il est question d'activités économiques et commerciales. En effet, l'exercice de ce type d'activités vise principalement le profit et, pour cette raison, relève normalement des personnes privées.

Pourtant, dès 1930, le Conseil d'Etat a autorisé les collectivités locales à créer des services publics dans la sphère économique « *si, en raison de circonstances particulières de temps et de lieu, un intérêt public justifie leur intervention en cette matière* » (CE, Sect., 30 mai 1930, *Chambre syndicale du commerce en détail de Nevers, Recueil des arrêts du Conseil d'Etat (Rec.)*, p. 583 ; *Les grands arrêts de la jurisprudence administrative (GAJA)*, par M. Long, P. Weil, G. Braibant, P. Delvolvé et B. Genevois, Dalloz, 17ème éd., 2009, p. 262). A partir de cette date, la carence de l'initiative privée, laquelle laisse insatisfaits les besoins de la population, a été présentée comme l'élément permettant de caractériser l'intérêt public exigé pour la création d'un service public dans ce secteur. Mais le juge ne s'en est pas tenu à cette seule hypothèse. S'y est ajoutée ensuite l'insuffisance qualitative de l'initiative privée, reconnue elle aussi comme faisant naître un intérêt public (CE, Sect., 20 novembre 1964, *Ville de Nanterre*, Rec., p. 563). Plus largement encore,

celui-ci a été parfois admis indépendamment de l'état de l'offre privée (CE, Sect., 23 décembre 1970, *Préfet du Val d'Oise*, *Rec*., p. 788).

L'évolution a été synthétisée en 2006 à la manière d'un cours de droit, a-t-on dit : « *Considérant que les personnes publiques sont chargées d'assurer les activités nécessaires à la réalisation des missions de service public dont elles sont investies et bénéficient à cette fin de prérogatives de puissance publique ; qu'en outre, si elles entendent, indépendamment de ces missions, prendre en charge une activité économique, elles ne peuvent légalement le faire que dans le respect tant de la liberté du commerce et de l'industrie que du droit de la concurrence ; qu'à cet égard, pour intervenir sur un marché, elles doivent, non seulement agir dans la limite de leurs compétences, mais également justifier d'un intérêt public, lequel peut résulter notamment de la carence de l'initiative privée* » (CE, Ass., 31 mai 2006, *Ordre des avocats au barreau de Paris*, *Rec*., p. 272).

En réalité, la rédaction de ce considérant n'est pas exempte de toute critique. L'espèce qui a donné lieu à l'arrêt *Département de la Corrèze* rendu le 3 mars 2010 (Req. n° 306911) le prouve parfaitement.

Dans cette affaire, le Conseil d'Etat devait se prononcer sur la légalité de la création d'un service public départemental de téléassistance aux personnes âgées et handicapées. Or au regard de l'activité en cause, la mise en place de ce service public a conduit le département à s'immiscer sur le marché économique. Par conséquent, conformément aux règles rappelées en 2006 qui régissent de telles interventions, le juge s'est attaché à vérifier que la création du service public de téléassistance répondait à un intérêt public.

Cette vérification révèle que l'arrêt *Ordre des avocats au barreau de Paris* opère une distinction malencontreuse entre les activités de service public et les interventions sur un marché économique. Il est en effet impossible de tracer une frontière hermétique entre ces deux types d'activités tant la prise en charge d'activités économiques par les personnes publiques se fait généralement, comme c'était le cas en l'espèce, sous la forme d'un service public. Malgré cela, le Conseil d'Etat a, dans son arrêt du 3 mars 2010, reproduit à

l'identique le considérant de 2006. Sans doute peut-on lui reprocher de ne pas avoir corrigé l'ambiguïté alors que l'espèce lui en fournissait l'occasion idéale.

Par ailleurs, l'arrêt *Département de la Corrèze* conduit à relativiser l'apport de l'arrêt de 2006 en ce que celui-ci affirme officiellement que la carence de l'initiative privée est un simple exemple d'intérêt public parmi d'autres.

En l'espèce, le Conseil d'Etat s'est s'appuyé sur les caractéristiques des prestations fournies, l'étendue des bénéficiaires du service et les modalités de financement de celui-ci par le département pour décider que « *même si des sociétés privées offrent des prestations de téléassistance, la création de ce service, ouvert à toutes les personnes âgées ou dépendantes du département, indépendamment de leurs ressources, satisfait aux besoins de la population et répond à un intérêt public local* ». Cette formulation qui met l'accent sur le fait que les prestations du service public départemental bénéficient aux personnes âgées quel que soit leur niveau de ressources révèle *a contrario* qu'il n'en va pas de même pour les offres des opérateurs privés. On retrouve ainsi le spectre de l'insuffisance de l'initiative privée qui sert à caractériser l'intérêt public justifiant l'intervention du département.

Ceci confirme, s'il en était besoin, que la reconnaissance, par l'arrêt de 2006, de l'existence d'intérêts publics autres que celui tenant à la carence de l'initiative privée ne doit pas être surestimée. Cette carence de l'initiative privée, qu'elle soit quantitative ou qualitative, restera sans doute à la base de la plupart des créations de services publics dans la sphère économique.

L'intérêt général est également au cœur de la suppression des services publics. En la matière, l'administration est maître de décider que l'intérêt général a cessé. Elle dispose donc d'un large pouvoir discrétionnaire pour supprimer un service public, sous réserve que son existence ne soit pas imposée par la Constitution ou par la loi. Si tel est le cas, l'administration conserve néanmoins le pouvoir de modifier les implantations du service public sur le territoire, voire de supprimer certaines d'entre elles.

Par conséquent, l'usager d'un service public n'a, selon la célèbre formule, aucun droit acquis à son maintien (CE, Sect., 27 janvier 1960, *Vannier*, Rec., p. 60). En outre, le

juge administratif n'exerce qu'un contrôle restreint sur la décision de suppression (CE, 16 janvier 1991, *Fédération nationale des usagers des transports*, *Rec*., p. 14). Le Conseil d'Etat a eu l'occasion de procéder à ce contrôle par deux fois au cours de l'année 2010.

Saisi du décret du 30 octobre 2008 ayant pour objet de réformer la carte judiciaire, le Conseil d'Etat a estimé, pour la plupart des suppressions de tribunaux prévues par ce texte, que l'administration n'avait pas commis d'erreur manifeste d'appréciation. Il a toutefois jugé différemment pour quelques-unes d'entre elles. Tel a été le cas par exemple s'agissant de la disparition du tribunal de grande instance de Moulins.

« *Considérant qu'il ressort des pièces des dossiers que, compte tenu de la distance importante séparant les villes de Moulins et de Cusset, de la localisation à Moulins, liée à la qualité de chef-lieu de département de cette commune, des autres services de l'Etat et du conseil général dont le concours est nécessaire au bon fonctionnement du service public de la justice, ainsi que de la présence, à proximité immédiate de cette commune, d'un établissement pénitentiaire de près de trois cents places comprenant une maison d'arrêt importante et une maison centrale de haute sécurité accueillant de nombreux détenus particulièrement signalés, la suppression du tribunal de grande instance de Moulins et le rattachement de son ressort à celui de Cusset sont entachés d'erreur manifeste d'appréciation, sans qu'y fassent obstacle le faible niveau d'activité du tribunal supprimé ni la démographie déclinante des communes composant son ressort* » (CE, 19 février 2010, *M. Molline et autres*, Req. n° 322407).

De la même manière, le Conseil d'Etat a été amené à se prononcer sur la fermeture d'une section de ligne ferroviaire. Il a alors jugé que Réseau Ferré de France n'a commis aucune erreur manifeste d'appréciation en prenant cette décision dès lors que « *le trafic sur cette section de ligne de 960 mètres avait cessé depuis décembre 1980* » et qu'« *aucune perspective de reprise n'était prévue* » (CE, 2 mars 2010, *Réseau Ferré de France*, Req. n° 325255).

Outre le critère de l'intérêt général, l'existence d'un service public repose sur un critère organique qui impose que l'activité soit prise en charge par une personne publique.

Cependant, cette maîtrise ne doit pas nécessairement être directe. Une activité gérée par une personne privée sous le contrôle d'une personne publique peut constituer un service public. En l'absence de texte mentionnant une telle qualification, l'existence d'un service public peut être reconnue si plusieurs conditions posées par le juge administratif sont remplies.

Par son arrêt *Narcy*, le Conseil d'Etat avait posé trois critères cumulatifs. Une personne privée exerce une mission de service public si elle est investie d'une activité d'intérêt général, dotée à cet effet de prérogatives de puissance publique et soumise au contrôle de l'administration (CE, Sect., 28 juin 1963, *Narcy*, Rec., p. 401). Cependant, des doutes sont apparus quant à l'exigence de prérogatives de puissance publique, certains arrêts ayant accepté qu'une personne privée puisse être chargée d'un service public sans disposer de telles prérogatives.

Le Conseil d'Etat a clarifié les choses en 2007. Après avoir rappelé le principe des trois critères cumulatifs, il a admis que, même en l'absence de prérogatives de puissance publique, l'activité d'une personne privée constitue une mission de service public si, *« eu égard à l'intérêt général de son activité, aux conditions de sa création, de son organisation ou de son fonctionnement, aux obligations qui lui sont imposées ainsi qu'aux mesures prises pour vérifier que les objectifs qui lui sont assignés sont atteints, il apparaît que l'administration a entendu lui confier une telle mission* » (CE, Sect., 22 février 2007, *Association du personnel relevant des établissements pour inadaptés* (*APREI*), *Rec*., p. 92).

La clarification n'est toutefois pas totale. En effet, l'arrêt est rendu à l'occasion d'une affaire concernant une personne privée habilitée par un acte unilatéral. Or il ne précise pas si son considérant s'applique aux personnes privées qui se voient déléguer une activité d'intérêt général sur la base d'un contrat. L'incertitude vient d'être levée par le Conseil d'Etat dans son arrêt *Ville de Paris* (CE, Sect., 3 décembre 2010, *Ville de Paris*, Req. n° 338272).

En l'espèce, le juge devait qualifier la convention par laquelle la ville de Paris a mis à la disposition de l'association Jean Bouin un ensemble immobilier comprenant notamment un stade et des courts de tennis. Pour pouvoir se prononcer sur l'éventuelle

qualification de délégation de service public, le Conseil d'Etat devait rechercher si la convention a pour objet de confier à ladite association une mission de service public. Se posait alors la question de savoir si l'exploitation du stade constitue un service public.

Bien que le considérant énoncé en 2007 n'y soit pas réitéré, l'arrêt fait application de la solution *APREI*. En effet, l'association n'ayant pas de prérogatives de puissance publique, c'est sur la base du faisceau d'indices que le Conseil d'Etat recherche si la ville de Paris a entendu confier à l'association l'exercice d'une mission de service public. Il se livre alors à l'analyse du contenu de la convention et de l'intention des parties qu'il privilégie et subsidiairement, à l'étude d'éléments extérieurs à la convention. En l'espèce, au regard notamment de l'absence de contrôle exercé par la ville de Paris sur son cocontractant, le Conseil d'Etat décide que « *l'ensemble des stipulations de la convention du 11 août 2004 et de ses annexes ne traduit pas l'organisation, par la Ville de Paris, d'un service public ni la dévolution de sa gestion à l'association Paris Jean Bouin* ».

Comme pour tout raisonnement fondé sur la méthode du faisceau d'indices, il est difficile d'anticiper la qualification du juge. En l'espèce, la cour administrative d'appel avait jugé que l'exploitation du stade par l'association constituait une mission de service public. Le Conseil d'Etat a estimé le contraire. Il en résulte que les contours du champ des services publics ne sont pas nets. Le même constat peut être fait pour la délimitation des catégories de services publics.

1.2 La délimitation des catégories de services publics

Le champ des services publics s'articule autour d'une distinction ancienne entre services publics administratifs (SPA) et services publics industriels et commerciaux (SPIC). Depuis son apparition il y a près d'un siècle (TC, 22 janvier 1921, *Société commerciale de l'Ouest africain*, *Rec*., p. 91 ; *GAJA*, p. 217), cette dichotomie n'en finit pas de susciter de nombreuses interrogations, notamment en ce qui concerne la ligne de partage entre ces deux types de services publics.

Par deux arrêts du 31 mars 2010, la Cour de cassation s'est prononcée sur la qualification de deux services publics, l'exploitation d'un domaine skiable et la gestion

d'un camping municipal. Cette qualification était déterminante puisque la compétence de la Cour, qui ne vaut qu'en présence d'un SPIC, en dépendait.

Elle a d'abord jugé que « *la SEPAD, chargée de l'exploitation du domaine skiable, est un service public industriel et commercial, et que les liens unissant un tel service à ses usagers sont des liens de droit privé* » si bien que « *la juridiction de l'ordre judiciaire est seule compétente pour connaître du litige* » (Cass., civ. 1ère, 31 mars 2010, n° 09-10560, *Bull. civ*., I, n° 82, p. 76). Il en découle que l'ensemble de l'exploitation d'une station de ski constitue un SPIC, sans qu'il y ait lieu d'opérer une différenciation entre l'exploitation des remontées mécaniques et la gestion des pistes de ski. En statuant ainsi, la Cour prend acte de la position récemment exprimée par son homologue administratif.

En effet, le Conseil d'Etat a procédé en 2009 à l'unification du contentieux relatif à l'exploitation d'une station de ski lorsqu'il a décidé que « *l'exploitation des pistes de ski, incluant notamment leur entretien et leur sécurité, constitue un service public industriel et commercial, même lorsque la station de ski est exploitée en régie directe par la commune* » (CE, 19 février 2009, *Melle Beaufils, Rec*., p. 61). Par cet arrêt, il a entériné une évolution initiée par le Tribunal des conflits et plusieurs cours administratives d'appel et a mis fin à l'éclatement du contentieux entre les deux ordres de juridiction qui résultait de ce que l'exploitation des remontées mécaniques était qualifiée de SPIC tandis que la gestion des pistes de ski constituait un SPA. Il n'aura pas fallu attendre longtemps pour que la Cour de cassation accepte ce bloc de compétence.

Désormais, l'exploitation d'un domaine skiable constitue invariablement un SPIC. Il en va différemment de la gestion d'un camping municipal qui peut être tantôt un SPA, tantôt un SPIC.

La Cour de cassation a en effet jugé dans un second arrêt du 31 mars 2010 qu'« *un camping municipal, créé dans l'intérêt général, constitue un service public administratif et n'a de caractère industriel et commercial que dans les cas où les modalités particulières de sa gestion impliquent que la commune a entendu lui donner ce caractère et que, d'autre part, il incombe à la partie qui se prévaut du caractère industriel et commercial d'un*

service public d'établir ses modalités de fonctionnement et de financement, au besoin après avoir demandé qu'il soit fait injonction à la personne publique de produire les pièces nécessaires » (Cass., civ. 1ère, 31 mars 2010, n° 09-12821, Bull. civ., I, n° 83, p. 77).

Cette décision semble, de prime abord, conforme à la tradition jurisprudentielle puisqu'elle pose une présomption d'"administrativité" du service public fourni par un camping municipal, présomption qui peut être renversée s'il est prouvé que la gestion du service se fait selon des modalités semblables à celles rencontrées dans le secteur privé. Elle reprend d'ailleurs une formulation qui a été utilisée par le Tribunal des conflits également à propos d'un camping municipal (TC, 14 janvier 1980, *Le Crom*, *Rec. tables*, p. 633).

A bien y regarder, la décision peut surprendre. Selon la jurisprudence administrative classique, un service public revêt un caractère industriel et commercial si, au regard de son objet, de son financement, et de sa gestion, il s'apparente à une activité privée. Il s'agit là en principe de critères cumulatifs (CE, Ass., 16 novembre 1956, *Union syndicale des industries aéronautiques*, Rec., p. 434). Or la Cour de cassation affirme, dans la première partie de l'attendu, que le caractère industriel et commercial du service public apparaît si la gestion du camping municipal est semblable à une gestion privée.

Quid de l'objet et du financement ? S'agissant du critère de l'objet d'abord, on peut sans doute répondre que le service fourni par un camping municipal qui consiste à louer des emplacements d'hébergement correspond à n'en pas douter à une activité privée. D'une certaine façon, on peut dire que ce critère est *ipso facto* rempli. S'agissant du critère du financement ensuite, celui-ci n'est pas totalement absent de la décision de la Cour de cassation. Il apparaît dans la seconde partie de l'attendu relatif à la charge de la preuve du caractère industriel et commercial qui pèse sur la partie se prévalant d'une telle qualification. Cependant, il semble relégué au second plan. Ceci s'explique peut-être par un arrêt rendu en 1976 par le Conseil d'Etat dans lequel l'exploitation d'un camping municipal a été qualifiée de service public administratif alors même que son financement, qui était assuré par les redevances versées par les usagers, s'apparentait à celui rencontré dan le secteur privé (CE, 30 juin 1976, *Carrier*, *Rec*., p. 341). Ainsi, en matière de camping

municipal, le critère du financement ne semble pas déterminant tandis que celui des modalités de gestion paraît suffisant pour emporter le caractère de SPIC. La contingence qui caractérisait déjà la qualification des services publics est une nouvelle fois confirmée.

Un flottement analogue entoure la catégorie des services publics constitutionnels apparue en 1986 dans la jurisprudence du Conseil constitutionnel, catégorie qui regroupe les services publics nationaux dont « *la nécessité […] découle de principes ou de règles de valeur constitutionnelle* » (CC, 26 juin 1986, Décision n° 86-207 DC - Loi autorisant le Gouvernement à prendre diverses mesures d'ordre économique et social). Ceci est d'autant plus regrettable que cette qualification entraîne une conséquence importante sur le régime juridique applicable. En effet, il résulte de la décision de 1986 que l'alinéa 9 du préambule de la Constitution de 1946 s'oppose à ce que les services publics constitutionnels fassent l'objet d'une privatisation.

Si la doctrine s'accorde pour y ranger les services publics régaliens et les services publics découlant des droits-créances énumérés dans le préambule de la Constitution de 1946, le Conseil constitutionnel n'en a jamais donné d'exemples. Pourtant, les évolutions de statut qui ont affecté les grands services publics nationaux depuis le milieu des années 1980 lui ont donné l'occasion de se prononcer sur cette qualification à plusieurs reprises.

La transformation de l'établissement public La Poste en société anonyme par la loi n° 2010-123 du 9 février 2010 relative à l'entreprise publique La Poste et aux activités postales (JO, n° 0034, 10 février 2010, p. 2321, texte n° 1) n'a pas échappé à cette règle. Invoquant la violation de l'alinéa 9 du préambule de la Constitution de 1946, les parlementaires à l'origine de la saisine du Conseil constitutionnel se sont attachés à montrer que le service public postal constitue un service public constitutionnel en ce qu'il découle de l'article 11 de la Déclaration des Droits de l'Homme et du Citoyen qui garantit la liberté de s'exprimer et de communiquer. Cependant, sans se prononcer sur le caractère constitutionnel de ce service, le Conseil constitutionnel a rejeté ce moyen en se bornant à dire que la loi « *n'a ni pour objet, ni pour effet de transférer la Poste au secteur privé* » (CC, 4 février 2010, Décision n° 2010-601 DC - Loi relative à l'entreprise publique La Poste et aux activités postales).

Cette solution est certainement incontestable puisque l'article 1er de la loi litigieuse prévoit que « *le capital de la société est détenu par l'Etat, actionnaire majoritaire, et par d'autres personnes morales de droit public, à l'exception de la part du capital pouvant être détenue au titre de l'actionnariat des personnels* ». Elle doit toutefois être signalée dans la mesure où le Conseil constitutionnel s'y est montré moins prolixe que dans ses décisions équivalentes rendues antérieurement.

En effet, s'agissant de la transformation de l'établissement public France Telecom en entreprise publique (CC, 23 juillet 1996, Décision n° 96-380 DC - Loi relative à l'entreprise nationale France Telecom) et des transformations de EDF et GDF en sociétés anonymes (CC, 5 août 2004, Décision n° 2004-501 - Loi relative au service public de l'électricité et du gaz et aux entreprises électriques et gazières), le Conseil a usé d'une formule qui laissait entendre qu'aucun des services publics assurés par ces entreprises ne constitue un service public constitutionnel. On ne trouve rien de tel dans la décision rendue en 2010 si bien que le caractère du service public postal reste en suspens. Par conséquent, on ignore pour l'instant si la privatisation de la Poste sera possible ou si l'alinéa 9 du préambule de la Constitution de 1946 y fera obstacle. Si le législateur décide d'y procéder en rendant minoritaire l'actionnariat public de cette société, le Conseil constitutionnel qui sera sans nul doute saisi ne pourra plus échapper à la question.

Ce qui est certain, c'est que le service public postal constitue un service universel en application du droit communautaire. L'article L. 1 du code des postes et des communications électroniques dispose en son alinéa 4 que « *le service universel postal concourt à la cohésion sociale et au développement équilibré du territoire* ». A ce titre, la Poste, prestataire du service universel postal, est soumise à un ensemble d'obligations relatives à la qualité et à l'accessibilité du service dont les grandes lignes sont énoncées aux articles R. 1 et suivants dudit code. L'article R. 1-1-8 donne en outre compétence au ministre chargé des postes pour arrêter « *des objectifs de qualité applicables aux prestations du service universel qu'il détermine* ».

En vertu de cette disposition, le ministre de l'économie a posé des objectifs de qualité par arrêté du 22 juillet 2008 dont la légalité a été contestée devant le Conseil d'Etat.

Le requérant estimait que l'article 1er de l'arrêté qui définit un objectif tenant à ce que 83 % des envois de lettres prioritaires parviennent à leur destinataire le lendemain du jour de dépôt et 95 %, au moins, le surlendemain de ce jour, contrevenait à l'article R. 1 du code des postes et des communications électroniques, lequel précise que « *les envois prioritaires relevant du service universel postal sont distribués le jour ouvrable suivant le jour de leur dépôt* ». Par son arrêt Broueil du 19 mars 2010 (Req. n° 321842), le Conseil d'Etat a rejeté le moyen au motif que ce dernier article « *ne peut être regardé comme fixant des délais impératifs* ». La solution du Conseil d'Etat doit certainement être approuvée. Si le service universel vise à la mise en place de prestations de qualité, les objectifs imposés doivent demeurer réalisables. Tel n'aurait sans doute pas été le cas s'il avait jugé que l'article R. 1 posait un délai impératif. Il a ainsi opéré une conciliation entre les réalités du service et les obligations qui pèsent sur lui. Ce travail de conciliation entre intérêts divergents se retrouve également lors de la mise en œuvre des règles relatives au régime des services publics.

2. LE REGIME DES SERVICE PUBLICS

Au cours de l'année 2010, les règles relatives aux modalités de gestion des services publics ont surtout fait l'objet de rappels de la part du juge. Une innovation est toutefois intervenue dans ce domaine à l'initiative du législateur. S'agissant des lois du service public qui en régissent le fonctionnement, le Conseil d'Etat a eu l'occasion de faire application du principe de continuité.

2.1 Les modes de gestion

La personne publique qui a la maîtrise d'un service public peut décider d'en assurer la gestion directement par ses propres services. C'est l'hypothèse de la gestion en régie. Elle peut aussi préférer en confier la gestion à une autre personne, privée ou publique. On parle alors de gestion déléguée.

Sans remettre en cause la liberté dont dispose la personne publique dans le choix de son délégataire, la loi n° 93-122 du 29 janvier 1993 dite « loi Sapin » (*JO*, n° 25, 30 janvier 1993, p. 1588) et les évolutions législatives postérieures ont soumis la procédure de délégation de service public à un ensemble de règles de publicité et de mise en concurrence.

Elles ont cherché à établir un équilibre entre respect de la concurrence et libre négociation que le juge ajuste au fil de ses décisions. Sur ce point, l'année 2010 a apporté sa pierre à l'édifice.

Le Conseil d'Etat a d'abord fait application d'un principe récemment posé selon lequel la personne publique délégante doit porter les critères de sélection à la connaissance des candidats. Il a en effet été jugé en 2009 que « *les délégations de service public sont soumises aux principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures, qui sont des principes généraux du droit de la commande publique ; que, pour assurer le respect de ces principes, la personne publique doit apporter aux candidats à l'attribution d'une délégation de service public, avant le dépôt de leurs offres, une information sur les critères de sélection des offres* ». L'arrêt précise l'étendue de cette obligation d'information en ajoutant que la personne publique, qui « *négocie librement les offres avant de choisir, au terme de cette négociation, le délégataire, […] n'est pas tenue d'informer les candidats des modalités de mise en oeuvre de ces critères* » (CE, 23 décembre 2009, *Établissement public du musée et du domaine national de Versailles*, *Rec*., p. 502).

Le Conseil d'Etat n'a pas tardé à vérifier le respect de cette nouvelle formalité. Il l'a fait dans l'arrêt *Département de la Corrèze* évoqué précédemment dans lequel il est précisé qu'« *il ressort des pièces du dossier que le département a rendu publics les critères de sélection des offres* ». (CE, 3 mars 2010, *Département de la Corrèze*, préc.). Mais, il a également réaffirmé qu'« *aucune règle ni aucun principe n'impose à l'autorité délégante d'informer les candidats des modalités de mise en oeuvre des critères de sélection des offres* » (CE, 21 mai 2010, *Commune de Bordeaux*, Req. n° 334845).

Il résulte de ces décisions que les différents critères utilisés par la personne publique pour choisir son cocontractant doivent être connus de tous les candidats. Cependant, leur éventuelle hiérarchisation ou pondération est une donnée qui reste en dehors du champ de cette information et qui n'appartient qu'au délégant. Ceci montre que le Conseil d'Etat entend instaurer un compromis entre l'obligation de transparence et la liberté accordée à la personne publique pour le choix de son délégataire.

Au cours de l'année 2010, le Conseil d'Etat a par ailleurs précisé qu'« *aucune règle n'encadre les modalités de l'organisation des négociations par la personne publique, qui n'est en particulier pas tenue de fixer un calendrier préalable de négociation ni de faire connaître son choix de ne pas poursuivre les négociations avec l'un des deux candidats* » (CE, 18 juin 2010, *Communauté urbaine de Strasbourg*, Req. n° 336120). C'est cette fois la liberté de la personne publique au stade des négociations que le juge administratif a préservé par cet arrêt. Celui-ci prolonge une décision rendue en 2006 dans laquelle il est énoncé qu'« *aucune disposition législative ou réglementaire n'impose à l'autorité responsable de la personne publique délégante de notifier à l'opérateur économique ayant déposé une offre son choix de ne pas entamer de négociation avec lui* » (CE, 15 décembre 2006, *Corsica Ferries, Rec*., p. 566). Le Conseil d'État se refuse donc de limiter, d'une quelconque façon que ce soit, le principe de libre négociation prévu à l'article 38 de la loi Sapin.

D'ailleurs, cette importante liberté laissée à la personne publique dans la procédure de passation des délégations de service public conduisait initialement le juge à s'interdire tout contrôle sur le choix du délégataire. Cette situation a toutefois pris fin en 2008 lorsque le Conseil d'Etat a discrètement accepté d'exercer un contrôle restreint sur la décision (CE, 7 novembre 2008, *Département de la Vendée*, *Rec. tables*, p. 805). Depuis cette date, il n'avait pas eu l'occasion de confirmer son revirement de jurisprudence. C'est chose faite avec l'arrêt précité du 3 mars 2010, *Département de la Corrèze*. Mais sur le fond, le juge estime, comme en 2008, que le choix n'est pas entaché d'erreur manifeste d'appréciation.

Il apparaît ainsi que les règles de mise en concurrence et le contrôle du juge qui encadrent la procédure de passation des délégations de service public ne sont pas très contraignants. Le législateur a accentué cette tendance en 2010 puisqu'il a permis aux collectivités locales de se soustraire complètement à ces règles en leur ouvrant la possibilité de confier la gestion d'un service public à une société de droit privé placée entièrement sous leur contrôle.

La loi n° 2010-559 du 28 mai 2010 pour le développement des sociétés publiques locales (JO, n° 0122, 29 mai 2010, p. 9697, texte n° 1) a inséré un nouvel article L. 1531-1 au sein du code général des collectivités territoriales ainsi rédigé :

« *Les collectivités territoriales et leurs groupements peuvent créer, dans le cadre des compétences qui leur sont attribuées par la loi, des sociétés publiques locales dont ils détiennent la totalité du capital*.

Ces sociétés sont compétentes pour réaliser des opérations d'aménagement au sens de l'article L. 300-1 du code de l'urbanisme, des opérations de construction ou pour exploiter des services publics à caractère industriel ou commercial ou toutes autres activités d'intérêt général.

Ces sociétés exercent leurs activités exclusivement pour le compte de leurs actionnaires et sur le territoire des collectivités territoriales et des groupements de collectivités territoriales qui en sont membres.

Ces sociétés revêtent la forme de société anonyme régie par le livre II du code de commerce et sont composées, par dérogation à l'article L. 225-1 du même code, d'au moins deux actionnaires.

Sous réserve des dispositions du présent article, elles sont soumises au titre II du présent livre ».

Par cette loi, le législateur permet aux collectivités locales et à leurs groupements de créer des sociétés anonymes dont le capital social leur appartient intégralement. Ces nouvelles sociétés dites sociétés publiques locales (SPL), basées sur le modèle des sociétés d'économie mixte locales (SEML), s'en distinguent au niveau du capital social. Alors que pour les SEML, une part minoritaire du capital, qui ne peut toutefois être inférieure à 15%, doit obligatoirement appartenir à des personnes privées ou publiques autres que les collectivités territoriales et leurs groupements qui les créent, le capital des SPL est entièrement détenu par ceux-ci.

Cette différence est déterminante pour l'application des règles de publicité, de transparence et de mise en concurrence posées par la loi Sapin. En effet, dans sa décision rendue sur cette loi (CC, 20 janvier 1993, Décision n° 92-316 DC - Loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques), le Conseil constitutionnel a jugé que les sociétés ayant un capital en partie détenu par une personne autre que la collectivité délégante ne pouvait, sans méconnaître le principe d'égalité, figurer sur la liste des délégataires dispensés du respect des règles de passation imposées par la loi. Il en résulte que les SEML ne peuvent se voir confier la gestion d'un service public qu'après la mise en œuvre de ces règles, ce qui peut être gênant lorsque ces sociétés ont été créées par les collectivités précisément pour gérer ledit service public.

C'est donc pour contourner cette difficulté que le législateur a permis la création des SPL. Dans la mesure où leur capital appartient intégralement à la collectivité délégante, ces sociétés constituent des quasi-régies et bénéficient alors de l'exception dite "in house" qui leur permet d'obtenir la gestion d'un service public en dehors des règles de publicité et de mise en concurrence. L'article L. 1411-12 du code général des collectivités territoriales a d'ailleurs été modifié en ce sens. Il dispose désormais que ces règles ne sont pas applicables aux délégations de service public « *lorsque ce service est confié à un établissement public ou à une société publique locale sur lesquels la personne publique exerce un contrôle comparable à celui qu'elle exerce sur ses propres services et qui réalisent l'essentiel de leurs activités pour elle ou, le cas échéant, les autres personnes publiques qui contrôlent la société, à condition que l'activité déléguée figure expressément dans les statuts de l'établissement ou de la société* ».

Les modes de gestion des services publics sont divers et sont soumis à des règles différentes au moment de leur mise en place. Cependant, les divergences s'amenuisent au stade du fonctionnement du service public puisqu'il existe en la matière un socle commun de principes.

2.2 Les lois du service public

Le fonctionnement des services publics, quelque soit leur nature et leur mode de gestion, est régi par un ensemble de principes juridiques traditionnellement appelés "lois du service public" ou "lois de Rolland" en hommage au Professeur Louis Rolland qui les a théorisés dans les années 1930.

Parmi ces principes régissant le fonctionnement des services publics figure le principe de continuité qui a reçu valeur constitutionnelle en 1979 (CC, 25 juillet 1979, Décision n° 79-105 DC - Loi relative au droit de grève à la radio et à la télévision). Parce qu'il impose que le service ne soit pas interrompu et qu'il soit assuré de manière régulière, ce principe se heurte au droit de grève des agents publics. Par son arrêt du 11 juin 2010, le Conseil d'Etat a dû, une fois de plus, se pencher sur la conciliation de ces deux principes (CE, 11 juin 2010, *Syndicat Sud RATP*, Req. n° 333262).

En l'espèce, la haute juridiction administrative était saisie d'une instruction générale fixant les modalités de participation à la grève émise en 2009 par le président-directeur général de la RATP. La question était alors de savoir si une telle instruction pouvait légalement intervenir alors que le droit de grève des agents du service public de transports terrestres est régi depuis peu par la loi n° 2007-1224 du 21 août 2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs (*JO*, n° 193, 22 août 2007, p. 13956, texte n° 2).

Par sa célèbre décision *Dehaene*, le Conseil d'Etat a reconnu un droit de grève aux agents publics et a donné compétence aux autorités administratives pour réglementer ce droit en lieu et place du législateur si celui-ci n'est pas intervenu en ce sens comme l'exige l'alinéa 7 du préambule de la Constitution de 1946 (CE, Ass., 7 juillet 1950, *Dehaene*, Rec., p. 426, *GAJA*, p. 395).

En cas de réglementation législative existante, il maintient la compétence des autorités administratives s'il s'avère que la législation est partielle et qu'elle ne peut «

constituer à elle seule l'ensemble de la réglementation du droit de grève annoncée par la Constitution » (CE, Ass., 4 février 1966, *Syndicat unifié des techniciens de la RTF*, *Rec.*, p. 81).

Dans son arrêt du 11 juin 2010, le Conseil d'Etat rappelle donc qu'« *en l'absence de la complète législation annoncée par la Constitution, la reconnaissance du droit de grève ne saurait avoir pour conséquence d'exclure les limitations qui doivent être apportées à ce droit, comme à tout autre, en vue d'en éviter un usage abusif ou contraire aux nécessités de l'ordre public ; qu'en l'état de la législation, il appartient ainsi aux organes chargés de la direction d'un établissement public, agissant en vertu des pouvoirs généraux d'organisation des services placés sous leur autorité, de déterminer les limitations qui doivent être apportées à l'exercice du droit de grève dans l'établissement en vue d'en éviter un usage abusif ou contraire aux nécessités de l'ordre public* ».

Puis, il estime que la loi du 21 août 2007 « *ne traite que de points particuliers* » si bien qu'elle ne constitue pas, pour le secteur du service public de transports terrestres, « *l'ensemble de la réglementation du droit de grève annoncée par la Constitution* ». Dès lors, le président-directeur général de la RATP pouvait valablement intervenir pour fixer les modalités d'exercice du droit de grève en sus de celles prévues par la loi de 2007.

Sur le fond, l'instruction litigieuse prévoit que les agents de la RATP ne peuvent rejoindre une grève qu'au début d'une des prises de leur service. Pour juger légale cette disposition, le Conseil d'Etat explique que celle-ci vise à « *prévenir les risques de désorganisation qui résulteraient de l'interruption du travail en cours de service par des agents décidant de rejoindre la grève après le début de leur service* » et ajoute que « *la limitation apportée à l'exercice du droit de grève qui en résulte est justifiée par les nécessités du fonctionnement du service public de transport assumé par la RATP et vise à prévenir un usage abusif du droit de grève* ».

Par la référence faite aux nécessités du fonctionnement du service, le Conseil d'Etat recourt implicitement au principe de continuité pour valider l'instruction. En interdisant aux agents de rejoindre un mouvement de grève pendant leur service,

l'instruction permet d'éviter qu'un train transportant des voyageurs soit immobilisé en raison du départ soudain du conducteur. C'est donc bien le principe de continuité, lequel s'oppose à une telle interruption, qui fonde la légalité de cette interdiction.

En guise de conclusion, on rappellera que le service public irrigue l'ensemble du droit administratif français. Le juge administratif en a fait un élément de définition de nombreuses notions telles que celles d'acte administratif, de contrat administratif ou encore de domaine public. La notion d'ouvrage public vient de s'ajouter à cette liste. A l'occasion d'un avis portant sur la nature des biens appartenant à la société Electricité de France, le Conseil d'Etat a expliqué que « *la qualification d'ouvrage public peut être déterminée par la loi* », puis a ajouté que « *présentent aussi le caractère d'ouvrage public notamment les biens immeubles résultant d'un aménagement, qui sont directement affectés à un service public, y compris s'ils appartiennent à une personne privée chargée de l'exécution de ce service public* » (CE, Avis, 29 avril 2010, Req. n° 323179). Cet avis mérite d'être signalé car le Conseil d'Etat n'avait jusqu'alors jamais défini la notion d'ouvrage public sous la forme d'un considérant de principe si bien que la doctrine avait du se contenter de décisions d'espèces pour en dégager les contours. Il ressort de la définition nouvellement posée que l'affectation au service public suffit, outre le critère du caractère immobilier du bien et celui de son aménagement, à emporter la qualification d'ouvrage public, indépendamment de la nature privée ou publique du propriétaire. Bref, le service public est bien vivace.

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PUBLIC WORKS CONCESSIONS AND SERVICE CONCESSIONS

ANNUAL REPORT - 2011 - ITALY

(June 2011)

Prof. Francesco GOISIS

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1. THE CONCEPT OF CONCESSION AND HOW TO DISTINGUISH IT FROM THE CONCEPT OF PUBLIC CONTRACT : DECLINE OF FORMAL APPROACHES AND SIGNIFICANCE OF THE MANAGEMENT RISK

It is a common observation that to distinguish among concessions and public contracts it is not any longer of use to make reference to the unilateral nature of the concession, as opposed to the consensual nature of the public contract.

By now, Italian law seems to be fully in line with the European law view, according to which concession is a contract. And this is true in relation to public works concessions, as well as to service concessions.

In particular, Italian legal definitions exactly reflect the European law ones: «"Public works concession" is a onerous contract, to be executed in written, related to the realization , or executive design, or final design and realization of public works or of works of public utility, and of works to the former structurally and directly connected, together with their functional and economic management, of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment, in conformity with this code» (art. 3, par. 11, code of public contracts), while service concession «is 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, in conformity with art. 30».

In the case-law, then, it seems to prevail the idea that the contractual relationship established by the public works concession fully belongs to the domain of private law, and, as a result, is, in this respect, equivalent to the relationship established by the public work contract. This with all the consequences as to the performance phase and as to the which court is competent to decide the relative controversies.

In this connection, particular attention is given to art. 142, par. 3, of public contracts code, according to which «Provisions of this Code apply to public works concessions, except to the extent provided for by the chapter». This would implicate a full equivalence among concessions and contracts also in relation to remedies and nature of the relative acts.

As lastly noted, «in accordance to art. 3, par. 11, of public contracts code, the public works concession– that by definitions always comprehends the management of the public work – is a relationship assimilated to a public work contract, from which it differs for the only circumstance that the consideration consists exclusively in the right of

managing the work, or this right with in addition a consideration». Thus, as to the acts related to the performance of the agreement (for example, the termination), «art. 142 of the code extends to the concessions also the provisions on remedies, with particular regard to the rules on judicial competence laid down by art. 244 of the public contracts code, which, in turn, refer to Legislative Decree no. 104 of 2010 (code of administrative justice)»[1]. This with the result that the Ordinary Courts are have jurisdiction to decide the relative controversies. Also in relation to public works concessions it should be distinguished among a public law phase, that is intended to select the contractor and a private law one, in which the contract is due to be performed. In principle, these two phases would be autonomous. Or, to put it better, the public law phase could not be annulled for legal errors in the private law phases (whilst, vice versa, the contract would be affected by the annulment of the concession).[2].

In relation to service concession, wherever it comprehends activities definable as public services, also as a consequence of a specific case of exclusive jurisdiction of the administrative courts existent in that field[3], it appears well clear the idea that significant profiles of public power may survive, notwithstanding a mainly contractual nature of the legal relationship.

In reality, if the distinction between concessions and public contracts does not descend primarily from the formal structure of the legal relationship, this distinction must be grounded on the substantial characteristics of the relationship. In particular, we must make reference to the economic substance of the operation to be realized, in terms of risks assumed by the private contractor.

[1] Council of State, sect. V, 26 January 2011, no. 591.

[2] Council of State, sect. V, 6 December 2010 no. 8554.

[3] Art. 133, par. 1, let. c), code of administrative justice.

The concessionaire must assume a risk different and higher than that of the contractor: not only a service or a good shall be guaranteed in the quality or quantity promised, but also the concessionaire is due to bear a specific entrepreneurial risk, resulting from the concrete degree of profitability of the management of the service (to which, in case of a public works concession, the work is instrumental). This as a consequence of the inexact predictability of the related demand.

In this perspective, we could say that the concession relationship is, at least in principle and in substance, of a trilateral nature: in other terms, it is intended to offer services to subjects different from the conceding Authority, i.e. the users. As the choices of the users are only partially predictable and the concession relationship (to which users are not contractual parties) cannot impose them any level of demand of the service offered by the concessionaire, this fact generates a specific market risk.

This substantial trilateral nature remains also when the consideration of the service is paid integrally by the conceding authority, but it is, still, proportional to the demand of the service from third users (for example, management of public ways, compensated by means of shadow tolls). However, this trilateral nature ceases whenever (as expressly allowed by art. 143, par. 9 of public contracts code), the concession concerns works to be directly and exclusively used by the Administration[4].

These distinctive criteria are applied by the case-law. For example, the Council of State has, coherently, noted, in relation to a public works concession, that «It is well known that, in concessions, the concessionaire provides its service to the public, and, as a result, it assumes the risk of managing the work or service, since it is compensated, at least for a significant part, by the users through a price; in public contracts, by contrast, services

[4] «Public administrations may award by means of concessions works intended to a direct use by the public administration, to the extent they are instrumental to the management of a public service and upon condition that the economic-financial risk of the management of the work remains to the concessionaire».

are provided to the Administration, which is obliged to compensate the activities that the contractor conducts in favor of the latter»[5].

The same Council of State, with regard to a service concession, has held that «While in the event that services are supplied to the Administration a public contract is at stake, the concession establishes a relationship of trilateral nature involving Administration as well as users; more in details, in services concession the costs of the services are borne by the users, while in the public service contract it is up to the Administration to compensate the activity of the private party. As a result, the relationship among the corporation managing a swimming facility, including the ordinary maintenance and custody, in which the compensation is directly received from users and rent fees are paid to the Municipality, is to be considered as a concession»[6].

The most recent, well grounded, analysis of the substantial distinction among public contracts and concessions was however offered in 2010 by the Public Contracts Authority[7]. In particular, with specific regard to public works concessions, an extensive analysis of the concept of management risk was offered.

The Authority observed that, in the light of the legal provisions, «Peculiarity of the concessions is the assumption by the concessionaire of the risk connected to the management of the services to which the work is instrumental, in relation to the tendential capability of the work to self-fund itself, i.e. to generate a cash flow deriving from the management such to compensate the investment made». Wherever such a risk does not exists, a normal public contract is at stake: «In the absence of the risk connected to the management, a public contract, as opposed to a concession, is at stake. In the public contract,

[5] Council of State, sect. V, 24 September 2010, no. 7108.

[6] Council of State, sect. V, 15 November 2010, no. 8040.

[7] Resolution 11 March 2010, no. 2, *Problematiche relative alla disciplina applicabile all'esecuzione del contratto di concessione di lavori pubblici.*

the only entrepreneurial risk may originate from an erroneous estimation of the construction costs, in respect to the compensation to be received for the realization of the work. In the concession, in addition to the risks typical of the public contracts, also the risk of the market of the services to which the work is instrumental and/or the so called risk of availability are at stake». If it so, according to the Authority, the work must be capable of creating cash flows: «Essential element of the public works concessioni is, thus, the capability of the work object of the concession to generate cash flow such to compensate totally or partially the investment».

The most relevant aspect of the analysis offered by the Authority is represented by the attempt to describe the significance of art. 3, par. 15 of the code of public contracts, as introduced by the third Decree amending the code (Legislative Decree no. 152 of 2008). This rule, in exemplifying the relationship that fall within the definition of private-public partnerships (this one defined as contracts characterized by the total or partial funding by private parties in compliance with prescriptions and guidelines of the European Community), has mentioned public works concessions and services concessions. According to the Authority, Eurostat decision of 2004 on public-private partnerships, as referred to by art. 3, par. 15 *ter*, would confirm that «a concession or a private-public partnership may be substantially distinguished from a public contract, based on the allocation of the risk on the private party». In fact, art. 3, par. 15 ter, definitely clarified that concessions (of public works as well as of services) fall «within the definition of private-public partnerships…, in which a total or partial funding is ensured by the private party».

Now, we should analyze whether, as it may seems to be the opinion of the Authority, the compliance to Eurostat decision 11 February 2004 on statistical treatment of works and projects realized in public-private partnerships [8] may be deemed to be a

[8] In *www.epp. eurostat .ec.europa.eu*

precondition, at the same time sufficient and necessary, to classify a relationship as a concession.

In other terms, we should understand whether this decision of Eurostat has acquired, for internal legislative choice, the role of criteria to select not only interventions of public-private partnership that may be classified as off balance, but also of the concessions, as opposed to public contracts.

Two different interpretations of art. 3, par. 15 ter seem possible: one could think that this article refers to concession just for example. In other terms, concessions would be public-private partnership, only insofar as the risk is really transferred to the private party, in compliance to Eurostat decision. By contrast, one could argue that such provision was intended to integrate the definition of concession offered by the previous pars. 11 and 12 of the same art. 3, providing that concession must be characterized by a transfer of risk, at the conditions analytically established by Eurostat, in order to qualify a relationship as off balance.

To reach a conclusion in this respect, it is of crucial importance the circumstance that Eurostat criteria do not reflect a particularly rigorous view, and, as a consequence, do not seem fully consistent with the binding European guidelines: the risks assumed by the concessionaire must be significant, but risk of availability and, respectively, of demand (i.e., of market) are not required necessarily together. This may be explained based on the fact that in cold works directly used by the Administration (as, among others, covered by the Eurostat decision), it is difficult to find a real risk of demand: the Administration is not a third subject, whose choices are only partially predictable, but a part to the contract, from which guarantees on the level of use of the service may well be required. A risk of market, so, tends to be, by definition, absent. . However, the Court of justice, in a last judgment on service concession, has held that «risks such as those linked to bad management or errors of judgment by the economic operator are not decisive for the purposes of classification as a public service contract or a service concession, since those risks are inherent in every

contract, whether it be a public service contract or a service concession.»[9]. In other terms, European judges seem to think that the only risk decisive in the qualification of a contract as concession is the risk of demand, not the risk of availability (i.e., that relative to the quality of the service): « In that regard, it must be stated that the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service...»[10].

In sum, the analytic contribution offered by Eurostat and recalled by the Public Contracts Authority puts us in condition of making it much more concrete a concept, that of management risk of the private concessionaire, that, if viewed only in abstract terms and without a real attention to the substance of the cases, risks to only apparently impact on the reality of the concession relationships. In particular, we appreciate the careful analysis of clauses which could turn out (regardless the legal instrument formally used) to impact on the al location of the risk. However, the conclusions of Eurostat do not seem fully consistent with the current status of the European case-law.

In sum, it does not seem possible to conclude that art. 3, par. 15 *ter*, of the public contracts code has been directed to impose the conformity to criteria laid down by Eurostat decision, as a condition (necessary and sufficient) for a relationship to be qualified as a true concession (as opposed to a off balance partnership). However, the criteria offered by Eurostat seem such to represent a more evolved and precise model, for the purpose of a distinction, often, in concrete, highly disputable.

[9] Eur. Court of Justice, 10 March 2011, in causa C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*, par. 38.

[10] Par. 37.

2. HOW TO DISTINGUISH AMONG PUBLIC WORKS CONCESSIONS AND SERVICE CONCESSIONS

It is not always a easy task to distinguish, in concrete cases, among public works concessions and, respectively, services concessions.

In both o f them, the consideration is mainly represented by the right to manage a service (to which, when a public work is at stake, the work in instrumental).

Art. 14 of the public contracts code, in governing, pursuant to the European law principles, on the basis of the criteria of the main object of the contract, mixed contracts, establishes that «main object of the contract is represented by works if the amount of works has a value higher than fifty per cent, except if, based on the specific characteristics of the contract, works have a mere secondary relevance in respect to services and supplies, which are the main object of the contract ».

This article is applied also to concessions.

And so, case-law underlines that the rule of prevalence of the works on services should be applied in a functional, as opposed to quantitative, perspective. It is necessary to take in count the comprehensive purposes of the relationship to be set up, as well as to the circumstance that the services are of a secondary significance, in respect to works .

In particular, in relation to services of lightening of a cemetery, it has been repeatedly noted, that «the difference between public works concessions and service concessions is to be identified in the instrumentality link connecting the management of the service and the realization of the works». Therefore, «there is a public works concession if the management of the service is instrumental to the realization of the work, as directed to make available the funds necessary to realize the work, while a service concession is at stake where the realization of the works is instrumental, in relation to the maintenance, refurbishing and

implementation, to the management of the public service, whose provision is already possible thanks to preexisting works.»[11].

In other terms, where the management of the service is, in reality, instrumental to compensate the realization of the work, a public work concession s at stake. Where, on the contrary, works are instrumental to make it possible, to create the conditions for, the provision (or a more effective provision) of the public service, a service concession is at stake[12].

Consistently with such an approach, the Council of State explains that, in concrete terms, where it turns out that the fees paid by the users to obtain the service are disconnected from the costs of realization of the works, this represent a significant element that a service concession is at stake. On the contrary, if the fees are intended to compensate the works, a public works concession is at stake. In other terms, it must be considered the circumstance whether «the fees paid by the users» are connected « in a synallagmatic and exclusive way…to the investment necessary to realize the works», or, on the contrary, they are «in reality intended to compensate a unitary and more complex service», i.e. the entire public service.

[11] Council of State, sect. V, 14 April 2008, no. 1600.

In favor of a qualification as service concession for a contract of cemeteries lightening, lastly, Council of State, sect. V, 24 March 2011 no. 1784 and Regional Administrative Court, Lombardia, sect. I, 11 February 2011, no. 450.

[12] In this sense, Council of State, sect. IV, 30 May 2005, no. 2805.

3. THE ISSUE OF THE LEGAL REGIME OF SERVICE CONCESSIONS

In line with the European law requirements, the legal regime of the public works concessions is mostly equivalent to that of public works contracts.

On the contrary, as allowed by European law, the service concessions remains mostly extraneous to public contracts code (i.e., the Italian implementation of public procurements directives)

In particular, art. 30 of public contracts code establishes that «provisions of this code do not apply to service concessions ». Pursuant to the European case-law, it is just provided that «the concessionaire must be selected in compliance of the principles deriving from the Treaty and of the general principles of public contracts, and, in particular, of the principles of transparency, adequate publicity, non discrimination, equality of treatment, mutual recognition, proportionality, by means of an informal tender, to which at least five candidates are invited, if a sufficient number of firms operating in the sector exists, and in which selective criteria are predetermined». However, «Specific legislations providing for more competitive regimes remain in force» (it is, for example, the case of the award of service contracts in the field of local public utilities, in which «competitive selective procedures» are always required for selecting the service providers[13]). Under art. 30, par. 7, just the provisions laid down by part IV on remedies and by art. 143, par. 7, on the financial plan to be annexed to the offer, apply directly to service concessions.

The clear wording of art. 30 has actually proved to represent, in the majority of the cases, an effective barrier against the extension of the provisions of the public contracts code to service concessions, up to the refusal of an analogical application of the code (that does not seem per se not prohibited, since exclusively a direct application is barred).

[13] Art. 23 bis, co. 2, let. a), Law Decree no. 112 del 2008.

And so the Council of State has noted, in relation to deadlines for bidding, that «it is erroneous…the analogical application of the provisions of art. 70 of public contracts on public contracts to the different field of service concessions, as in clear violation of art. 30, par. 1, of the same code»[14]. Equally, based on the same, assumed, illegality of an analogical extension of the provisions of the public contracts code, it has been excluded the necessity of the requirement of supplying a bond as a condition to bid in tenders for selecting service concessionaires[15]. A precondition to extend specific provisions of the code, is, according to the Council of State, the fact that such provisions represent direct means of implementation of European law principles, as identified by the case-law and (synthetically) recalled by art. 30, par. 3, of the public contracts code.

On the other side, in two different cases, the Council of State, although not stating a tendential, direct, relevance of the public contracts code, has allowed the application not only of European law principles, but also of general, internal, principles on public tenders, as reflected in the same code. It is the case of the duty of information of the candidates in relation to the place and timing of the tender operations[16] and of the prohibition of bidding for operators belonging to the same decisional centre[17].

Yet, clearly, the prevailing case-law trend, in its rigorous approach, is due to perpetuate a rigid distinction between the legal regimes, respectively, of service concessions and public service contracts.

[14] Council of State, sect. V, 11 May 2009, no. 2864.

[15] Council of State, sect. V, 13 July 2010, no. 4510.
Lastly, Council of State, sect. V, 20 April 2011 no. 2447 confirms that « regulations governing public works contracts do not apply analogically to services concessions».

[16] Council of State, sect. V, 16 June 2009. no. 3844.

[17] Council of State, sect. V, 20 August 2008, no. 3982.

To what extent this may be consistent with the different treatment of public works concessions (as already noted, subject to the public contracts code and, yet, not easily distinguishable from service concessions, in which works are to be realized by the concessionaire as well) and most of all, with the uncertainties still existent as to the level of risk required to have a concession, instead of a public contract, it is an issue about which it seems easy to agree on the opportunity of further reflections.

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For an annotated bibliography see the Documents area.

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POLICE

ANNUAL REPORT - 2011 - Germany

(August 2011)

Prof. Dr. Dieter KUGELMANN

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1. POLICE FORCES IN THE FEDERAL REPUBLIC OF GERMANY – STRUCTURAL ISSUES

1.1 Federalism

In the Federal Republic of Germany, the competence on legislation in the field of Police is attributed by Article 30 of the constitution, the Basic Law, to the sixteen constituent States, the Laender, each of them having its own Police forces under its own police law. It is one of the most important competences of a Land to decide on the organisation, the tasks and the powers of the Police forces. The competences of the Federation are limited to special fields of Police work by specific provisions of the constitution. However, the federal competences and especially the role of the federal Police Forces are growing. In the field of security, a process of centralisation takes place.

1.2 Separation between Police forces and secret services

As in Germany secret services ought to be strictly separated from Police forces on the organisational level and on behalf of their (limited) executive powers, the law on secret services is a specific area of interest. After the Second World War, the three Western Allied States, France, the United Kingdom and the United States of America, insisted on the rebuilding of Police forces in the Federal Republic of Germany which had to be independent from secret services. This principle of separation is not explicitly laid down in the Basic Law but it can be derived from the constitutional system.

However, recent developments in law and practice having their origins in the fight against terrorism and the use of information and communication technology touch the principle of separation. Police forces gain more powers to act in a secret way, especially in the area of telecommunication interception meaning not only telephone tapping but also

similar measures relating to Internet communication. This kind of powers and measures come fairly close to powers of the secret services. On the organisational level, new forms of cooperation have been developed between Police forces and secret services with the goal to optimise the exchange of information on terrorism and organised crime. Integrated data files are fed with data stemming from the files of Police forces and the files of secret services. The statute on the anti-terror data files provides for the cooperation of law enforcement authorities including prosecuting authorities and secret services in order to fight terrorism. This statute is the best example for cooperation which can be seen positive in the perspective of guaranteeing security but critical in the perspective of the principle of separation between Police forces and secret services.

2. FEDERAL POLICE FORCES

On the federal level, the Federal Criminal Police Office (Bundeskriminalamt, BKA) and the Federal Police (Bundespolizei) are doing police work in different fields of activity. Federal customs authorities have their own police forces dealing with violations of customs law. In 2010, a commission was established by the Federal Ministry of Interior to analyse and improve Police work on the federal level. It submitted a report and suggested a fusion of Federal Criminal Police Office and Federal Police. However, the political discussions led to the result that most of the suggestions of the commission will not be realised and the two most important Federal Police institutions may intensify their cooperation but keep their autonomy and tasks.

2.1 The Federal Criminal Police Office

The German Constitution grants the Federation the power to set up central agencies at federal level for police information and communications as well as for criminal police work. Based on these provisions, Article 73 Nr. 10 and Article 87 of the Basic Law, the Law on the Federal Criminal Police Office attributes to the BKA the task to act as

central contact agency for Police cooperation in Germany. It was founded in 1951, so the BKA celebrates its 60th birthday in 2011.

The Federal Criminal Police Office fulfils the task of maintaining a great number of databases and information networks on the federal level working in cooperation with the Police forces of the federal states (Laender) which deliver most of the data to the BKA. The BKA supports the Police forces of the Laender in law enforcement by processing data and providing information which is its primary function. The international cooperation with Europol or Interpol is as well realized by the BKA as most of the contacts and cooperation within the Police cooperation of the European Union. The BKA serves as national contact point, e.g. for the search of persons or objects under the regime of the Schengen Implementation Agreement and the Schengen Information System. However, the BKA's main task on the international basis is the provision of information and the cooperation with the contact points of other Member States, exchanging data and providing access on the national level for the Police forces of the Laender.

In principle the Federal Criminal Police Office does not have executive powers on its own. Official acts in the course of criminal prosecution must be carried out in close collaboration with officers of the Laender. Only in a few areas of operations the BKA has distinct powers, especially in the fight against terrorism and international organised crime. Inter alia the BKA is capable to obtain information by means of the contentious 'online search' which allows the covert intrusion in information technology and communication systems under strict requirements in the field of the fight against terrorism. Thus the interference with civil rights mostly occurs in the field of personal data.

2.2 The Federal Police

The Federal Police is subordinate to the Federal Ministry of the Interior. Originally it was charged with the border control as the 'Federal Border Police'. Nowadays it carries out extensive and multifarious police tasks. These tasks are laid down not only in the Federal Police Act but also in other legal provisions such as the Residence Act, the Asylum

Procedure Act and the Aviation Security Act. In its role as border police the Federal Police can take action on the European and international level, especially while being part of missions of the European Union.

3. LEGISLATION ON POLICE ON THE LEVEL OF THE LAENDER

As policing is a core competence of the Laender, an ongoing process of legislation in this field in all of the sixteeen Laender can be observed. Every Land has to react on the actual challenges for police work in general and on specific regional challenges. Recently, the following Laender have considerably modified their law on Police:

- Nordrhein-Westfalen, GVBl. 2011, p. 132 ,
- Hessen, GVBl. 2011 I, p. 635,
- Rheinland-Pfalz, GVBl. 2011, p. 26,
- Mecklenburg-Vorpommern, GVOBl. M-V 2011, p. 246

Outlining the common aspects of this legislation in a nutshell, some main topics can be identified. The amendments concern the organistion of police authorities and introduce new provisions related to the management of information and the collection and processing of personal data. These issues are closely related to the jurisdiction of the Federal Constitutional Court, which has edicted several rulings on the powers of police and security authorities to take measures in the field of telecommunication.

4. JURISDICTION OF THE FEDERAL CONSTITUTIONAL COURT ON MATTERES RELATED TO POLICE

The Federal Constitutional Court (Bundesverfassungsgericht) has decided on several questions related to Police within the last years. The most recent leading case is the decision on the retention of personal data (BVerfGE 125, 260 - 1 BvR 256/08, 2 March 2010, accessible by www.bundesverfassungsgericht.de). The Court declared the data retention unconstitutional in the form it has found under the Telecommunications Act (Article 113a and 113b) and the Code of Criminal Procedure (Article 100g). According to those provisions, the providers of publicly accessible telecommunications services had a duty to store virtually all traffic data of telephone, email and Internet services for six months. The law enforcement authorities were granted the power to accede to this data under certain conditions. Such provisions of accession were created not only on the Federal level in the above mentioned Code of Criminal Procedure but also on the level of the Police Forces of some Laender.

The constitutional complaints have challenged the provisions on data retention with respect to the secrecy of telecommunications guaranteed by Article 10 of the Basic Law. In its judgment, the Federal Constitutional Court does not exclude the legal possibility to implement a system of data retention without occasion, but it has found the concrete system in the challenged legal acts unconstitutional. A future legislative formulation of the provisions has to satisfy particular constitutional requiremens which have been worked out in an in-depth-analysis by the Court based on the principle of proportionality. Core aspects are the demands of data security, the use of the data only for paramount tasks of the protection of legal interests, the transparency of data transmission and the guarantee of legal protection.

Nowadays, Police work concerns in various fields and contexts the storage, transmission and use of personal data. Therefore, the decision on data retention is a benchmark decision summing up the jurisdiction of the Federal Constitutional Court and laying down general principles on the management of data for security purposes by law enforcement authorities. Still, the legislative bodies are discussing on a future law on data

retention. This process is linked to the law of the European Union. The directive 2006/78/EC on data retention was implemented in Germany by the provisions violating the fundamental rights of the Basic Law. In the moment, there is no implementation and the European Commission urges the German legislative bodies to enact the necessary laws. On the other hand, the directive itself is to be reformed, respecting the different experiences in the Member States, the technical developments and taking into account doubts that some provisions of the directive may not be compatible with the European Charter of Fundamental Rights.

Highly debated is the question of preventive detention being imposed retrospectively, as the European Court of Human Rights decided that the German law of the time violated the right to liberty under Article 5 and 7 of the European Convention of Human Rights (no 19359/04, 17 December 2009). The Federal Constitutional Court had to deal with constituional complaints against this German legislation and declared the provisions on preventive detention unconstitutional (2 BvR 2365/09, 4 May 2011, accessible under www.bundesverfassungsgericht.de). However, the Court ordered the continued applicability of those provisions for a transitional period, at the latest until 31 May 2013. The Court found violations of the right to liberty of the detainee and the rule-of-law precept (Article 2.2 sentence 2, Article 104.1 and Article 20.3 of the Basic Law).

5. WEB SITES

www.bka.de (parts in English)

www.bundespolizei.de (parts in English)

www. bundesverfassungsgericht.de (press releases in English)

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POLICÍA ADMINISTRATIVA Y SANCIONES ADMINISTRATIVAS

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I

POLICÍA ADMINISTRATIVA

1. DELIMITACIÓN DEL OBJETO DE LA CRÓNICA

Lo que se entienda por policía administrativa no es una cuestión pacífica en la doctrina española. Tanto es así que este término no se utiliza habitualmente y se prefiere el empleo de expresiones próximas tales como actividad administrativa de limitación o de ordenación. En esta crónica nos ocuparemos en general de las cuestiones vinculadas con la actividad administrativa de limitación, entendida como aquella que se caracteriza por la

imposición de mandatos, deberes o prohibiciones, eventualmente coactivos, a los particulares con la finalidad de proteger o garantizar un interés público cualquiera, aunque centrándonos en los ámbitos más directamente vinculados con un concepto reducido de orden público, puesto que la intervención administrativa de limitación con otras finalidades públicas (protección del medio ambiente, ordenación de la economía, etc.) constituye el objeto propio de otras Crónicas.

2. LA INCIDENCIA DE LA INCORPORACIÓN AL ORDENAMIENTO ESPAÑOL DE LA DIRECTIVA SERVICIOS EN LOS INSTRUMENTOS DE INTERVENCIÓN PROPIOS DE LA ACTIVIDAD ADMINISTRATIVA DE POLICÍA

2.1 Aspectos generales

La transposición de la Directiva 2006/123/CE, del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, relativa a los servicios en el mercado interior (Directiva Servicios), al ordenamiento español ha sido aprovechada para realizar un intenso proceso de supresión de controles administrativos previos en el conjunto de la actividad económica y también de modificación del régimen al que tales actividades se someten, yendo mucho más allá de los términos a los que obligaba la mencionada Directiva. Esa transposición ha originado una muy extensa actividad normativa tanto en el ámbito estatal, como en el de las Comunidades Autónomas y Administraciones Locales. El punto de partida fueron dos leyes estatales aprobadas a finales del año 2009:

- La Ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio.

- La Ley 25/2009, de 22 de diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio.

Sobre esta base, a lo largo del año 2010 se han aprobado alguna ley estatal más que profundiza en la misma línea (por ej., la Ley 1/2010, de 1 de marzo, de reforma de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista) y, sobre todo, se han

aprobado numerosas leyes autonómicas y ordenanzas municipales que han trasladado el mismo planteamiento a sus respectivos ámbitos competenciales y territoriales.

En lo que ahora nos ocupa, todo este conjunto normativo ha tenido relevantes consecuencias sobre el conjunto de la actividad administrativa de policía (entendida en el sentido amplio que dijimos) y, en particular, sobre los instrumentos administrativos de control previo al ejercicio de una actividad o función (por ej., puesta en el mercado de un producto; apertura de un gran centro comercial; puesta en marcha de una instalación industrial; inicio de la prestación de un determinado servicio; etc.), y también en la propia normativa reguladora de dichas actividades. Lo tradicional en el ordenamiento español era que la práctica totalidad de esas actividades o funciones estaban sometidas a algún tipo de control administrativo y, en particular, a una autorización administrativa, mediante la que se pretendía una verificación previa de la conformidad de esa actividad o función con la normativa que le era aplicable con el objeto de alcanzar una más efectiva protección de los intereses públicos en juego. Pues bien, en muchos supuestos esa exigencia de autorización se ha suprimido y la actividad o función –más allá de la noción de servicio que recoge la Directiva Servicios- puede ahora ejercerse sin ningún tipo de control administrativo previo. En otros casos, esa autorización ha sido sustituida por otros instrumentos de intervención administrativa mucho menos restrictivos, en particular, por las denominadas *declaración responsable* y la *comunicación previa*. Además, con independencia del instrumento de control administrativo existente, también se han introducido modificaciones en el régimen jurídico de la prestación de estos servicios para adaptarlos a las exigencias de la Directiva y la Ley española que la transpone (por ej., en ciertos servicios vinculados con la seguridad industrial, las Comunidades Autónomas exigían un establecimiento físico en su territorio y tal requisito ha tenido que ser suprimido).

La declaración responsable y la comunicación previa han sido objeto de una regulación general -que deberá completarse en cada caso con lo que el legislador sectorial establezca- en la modificación que la mencionada Ley 25/2009 introduce en la Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. Así, la declaración responsable se define legalmente como "el documento suscrito por un interesado en el que manifiesta, bajo su

responsabilidad, que cumple con los requisitos establecidos en la normativa vigente para acceder al reconocimiento de un derecho o facultad o para su ejercicio, que dispone de la documentación que así lo acredita y que se compromete a mantener su cumplimiento durante el período de tiempo inherente a dicho reconocimiento o ejercicio". Seguidamente, como un instrumento de intervención todavía más laxo, se define la comunicación previa como "aquel documento mediante el que los interesados ponen en conocimiento de la Administración pública competente sus datos identificativos y demás requisitos exigibles para el ejercicio de un derecho o el inicio de una actividad". Estas definiciones se completan con una previsión de especial relevancia: como regla general, las declaraciones responsables y las comunicaciones previas permitirán el reconocimiento o ejercicio de un derecho o bien el inicio de una actividad desde el día de su presentación. Esta previsión aleja a estas instituciones de la clásica comunicación previa con reserva de prohibición que daba a la Administración un plazo para poder reaccionar frente a la actividad o función que se quería iniciar, pues su mera presentación no bastaba para poder iniciarla; y, en general, las separa de los instrumentos administrativos de control previo para llevarlas a otras categorías jurídicas (sistemas de autocontrol, deberes documentales y de información frente a las Administraciones públicas con una finalidad de control, etc.).

Pues bien, si no se quiere que este replanteamiento de la intervención administrativa acabe originando graves perjuicios a los intereses públicos (seguridad, sanidad, protección de los consumidores, medio ambiente, etc.) que el ejercicio de estas actividades o funciones ponen en juego, el esquema debería completarse necesariamente con dos tipos de medidas: por un lado, un fortalecimiento de los controles a posteriori, fundamentalmente la inspección administrativa; y, por otro, una clarificación de las potestades administrativas de reacción frente a actividades o funciones que carezcan de esas declaraciones, o donde éstas se hayan falseado o que ya no se ajusten a las mismas. Sobre este último aspecto, algún paso ha dado la nueva redacción de la Ley 30/1992, pero la confusión y las incertidumbres existentes al respecto todavía son grandes.

Finalmente, por su alcance horizontal, debe mencionarse el nuevo artículo 39 bis de la Ley 30/1992, también añadido por la mencionada Ley 25/2009:

> "Las Administraciones Públicas que en el ejercicio de sus respectivas competencias establezcan medidas que limiten el ejercicio de derechos individuales o colectivos o exijan el cumplimiento de requisitos para el desarrollo de una actividad, deberán elegir la medida menos restrictiva, motivar su necesidad para la protección del interés público así como justificar su adecuación para lograr los fines que se persiguen, sin que en ningún caso se produzcan diferencias de trato discriminatorias".

Se recogen así los principios de congruencia, proporcionalidad, *favor libertatis* y no discriminación. No se trata de principios novedosos, pues estos se encuentran claramente consolidados en la jurisprudencia, recogidos en numerosas leyes sectoriales y, alguno de ellos, incluso proclamado en la propia Constitución Española. Más aún, son principios cuya aplicación se extiende a la práctica totalidad de la actividad administrativa y no sólo a la actividad de policía o limitación. Sin embargo, es aquí donde juegan un papel especialmente relevante como instrumento de control de la actividad administrativa, dada la amplitud con las que las leyes otorgan potestades a las Administraciones públicas en este ámbito. De ahí la relevancia de este reconocimiento legal expreso y de alcance general.

2.2 Su relevancia sectorial

La mencionada Ley 25/2009, además de las previsiones de alcance general que introduce en el ordenamiento español –analizadas, en parte, en el apartado anterior-, también modifica más de 30 leyes de carácter sectorial con los planteamientos indicados (Ley de Colegios Profesionales, Ley de Industria, Ley de Metrología, Ley de Ordenación de la Edificación, Ley del Sector Eléctrico, Ley del Sector de Hidrocarburos, Ley de Ordenación de los Transportes Terrestres, etc.). A lo largo del año 2010, estas modificaciones legales han originado la aprobación de numerosas normas de carácter reglamentario (Reales Decretos y Órdenes ministeriales) con el objeto de adaptar los reglamentos que desarrollaban esas leyes a tales cambios. Así, por ej., en el ámbito de la metrología, el Real Decreto 339/2010, de 19 de marzo, ha modificado el Real Decreto 889/2006, de 21 de julio, que regula el control metrológico del Estado sobre instrumentos de medida, eliminando, entre otras cosas, la exigencia que tenían ciertos sujetos que

intervienen en el ámbito metrológico (por ej., los reparadores) de solicitar su inscripción en un registro público –lo que funcionaba como una verdadera autorización administrativa-, que queda ahora sustituida por la presentación de una declaración responsable.

Además, como se ha dicho, durante el 2010, también se ha producido un proceso similar de aprobación de leyes y reglamentos en el ámbito de las Comunidades Autónomas y Administraciones Locales. Así, por ej., las Comunidades Autónomas han modificado sus respectivas leyes reguladoras de la actividad turística -materia de competencia exclusiva de las Comunidades Autónomas-, con la finalidad de suprimir o simplificar controles administrativos sobre estas actividades (hoteles, guías turíticos, etc.) o adaptar su régimen jurídico a las exigencias de la Directiva. Evidentemente, el análisis de cada una de estas disposiciones excedería con mucho el objeto y la extensión máxima de esta crónica. Nos ocuparemos exclusivamente de dos sectores afectado por sendas leyes estatales: la Ley 1/2010, de 1 de marzo, de reforma de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista; y la Ley 43/2010, de 30 de diciembre, del servicio postal universal, de los derechos de los usuarios y del mercado postal.

a) **Ley 1/2010, de 1 de marzo, de reforma de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista**

En la tramitación de esta ley, el debate fundamental fue el relativo a los grandes establecimientos comerciales. Los requisitos de apertura de estos grandes establecimientos y su propio régimen de funcionamiento ha sido históricamente una materia muy polémica en España, con opciones políticas enfrentadas, que han tenido el correspondiente reflejo en diversas leyes estatales y autonómicas con planteamientos, en ocasiones, claramente opuestos. El punto de partida era que la legislación estatal disponía que la apertura de grandes establecimientos comerciales estaba sujeta a una autorización específica de carácter comercial, en cuyo otorgamiento se debía valorar "especialmente la existencia, o no, de un equipamiento comercial adecuado en la zona afecta por el nuevo emplazamiento y los efectos que éste pudiera ejercer sobre la estructura comercial de aquélla". En definitiva, el núcleo de los criterios que se valoraban tenía una naturaleza económica y es esa precisamente una de las prohibiciones establecidas expresamente por la Directiva Servicios

en los regímenes de las autorizaciones. A partir de ahí, la diversa legislación autonómica era más o menos generosa y, en alguna ley, incluso se preveía una intervención de los competidores en un trámite esencial del procedimiento de otorgamiento. Por tanto, la modificación de este régimen era insoslayable a la luz de las exigencias de la Directiva Servicios.

El nuevo régimen instaurado por la Ley 1/2010 ya no establece la necesidad de una autorización específica para los grandes establecimientos comerciales, aunque admite que la legislación autonómica la pueda imponer. Sin embargo, para el supuesto en que la legislación autonómica decida mantener la necesidad de esta autorización, le impone límites, de tal manera que se prohíbe cualquier finalidad de intervención económica y sólo se permite que dicha autorización tenga como fin "la protección del medio ambiente y del entorno urbano, la ordenación del territorio y la conservación del patrimonio histórico y artístico." Esto es, lo que era una autorización de carácter económico se transforma en una autorización fundamentalmente medioambiental y urbanística. En teoría, este cambio normativo debería facilitar la apertura de grandes establecimientos comerciales en aquellas Comunidades Autónomas donde los regímenes eran más estrictos. Sin embargo, alguna legislación autonómica aprobada durante el año 2010 sobre esta materia (por ej., Andalucía) ha introducido un nivel tal de complejidad en esos requisitos medioambientales y fundamentalmente urbanísticos y de ordenación del territorio, que en la práctica seguirá constituyendo un obstáculo casi insalvable para la implantación de nuevos grandes establecimientos comerciales, de tal manera que la Administración autonómica continúa conservando amplias potestades para decidir en qué zonas pueden ubicarse grandes establecimientos comerciales y en cuáles no.

b) **Ley 43/2010, de 30 de diciembre, del servicio postal universal, de los derechos de los usuarios y del mercado postal**

El objetivo esencial de esta Ley es la incorporación al ordenamiento español de la Directiva 2008/6/CE, por la que se modifica la Directiva 97/67/CE, relativa a las normas comunes para el desarrollo del mercado interior de los servicios postales en la Comunidad y la mejora de la calidad del servicio. Sin embargo, en lo que ahora nos ocupa, esta Ley

suprime la necesidad de que las empresas que pretendan prestar servicios no incluidos en el ámbito del servicio postal universal tengan que someterse a un procedimiento de autorización, bastando que presenten la correspondiente declaración responsable ante la Comisión Nacional del Sector Postal. No obstante, se mantiene la necesidad de obtener una autorización administrativa previa para realizar prestaciones en relación con los servicios incluidos en el ámbito del servicio postal universal.

3. MATERIAS VINCULADAS CON LA SEGURIDAD CIUDADANA

3.1 La distribución de competencias en materia de seguridad pública y el modelo policial español

La Constitución Española atribuye al Estado una competencia exclusiva en la materia de seguridad pública, pero "sin perjuicio de la posibilidad de creación de policías por las Comunidades Autónomas en la forma que se establezca en los respectivos Estatutos en el marco de lo que disponga una ley orgánica." En el ámbito estatal, existen dos cuerpos policiales (las denominadas "Fuerzas y Cuerpos de Seguridad del Estado"): el Cuerpo Nacional de Policía y la Guardia Civil (con naturaleza militar).

Sobre la base del mencionado precepto constitucional, han sido varias las Comunidades Autónomas (entre otras, Cataluña y País Vasco) que, tras preverlo en sus Estatutos de Autonomía, han creado sus propios Cuerpos Policiales. También existen otras Comunidades Autónomas que, aunque lo hayan previsto en sus Estatutos de Autonomía, no han procedido a la efectiva creación de dichos Cuerpos Policiales.

Finalmente, este panorama se completa con la Policía Local, que es un cuerpo policial que puede ser creado por los municipios. Sus funciones son fundamentalmente de policía administrativa, aunque en municipios de gran tamaño, en la práctica, también asumen funciones de seguridad ciudadana.

3.2 El intercambio de información e inteligencia entre los servicios de seguridad de los Estados miembros de la Unión Europea

La Ley 31/2010, de 27 de julio, sobre simplificación del intercambio de información e inteligencia entre los servicios de seguridad de los Estados miembros de la Unión Europea, incorpora a nuestro ordenamiento la Decisión Marco 2006/960/JAI, del Consejo, de 18 de diciembre, con el mismo título. El objetivo de esta normativa es doble: por un lado, alcanzar una mayor cooperación entre los servicios de seguridad de los Estados miembros de la Unión Europea para prevenir y combatir la delincuencia; y por otro, buscar un equilibrio entre la rapidez y eficacia de la cooperación policial y aduanera, y los principios y normas acordados en materia de protección de datos, libertades fundamentales y derechos humanos.

El ámbito de aplicación de la Ley son tanto las operaciones de inteligencia criminal (preventivo), como las de investigación criminal, estableciéndose un régimen específico cuando se quiere utilizar esa información como prueba en un determinado proceso judicial.

Uno de los principios sobre los que pivota el régimen establecido es el de equivalencia, de tal manera que el suministro por las autoridades policiales españolas de información a las de otros Estados miembros no debe estar supeditado a condiciones más estrictas (en particular, en lo relativo a la obtención de autorización judicial para el suministro) que las aplicables a escala nacional entre los distintos cuerpos policiales españoles antes mencionados.

La estructura compleja del modelo policial español que antes se ha descrito obliga a que la Ley regule también quién puede solicitar esa información y a quién deben solicitar esa información las autoridades policiales de otros Estados miembros. En cuanto a los cuerpos policiales que pueden solicitar esa información, la Ley incluye a las Fuerzas y Cuerpos de Seguridad del Estado, a los Cuerpos de Policía de las Comunidades Autónomas y al servicio de vigilancia aduanera (se trata de un servicio que depende del Ministerio de Hacienda, cuyo personal puede portar armas y que asume funciones en la lucha contra el

contrabando y tráfico de drogas). Se prevé que ese intercambio se llevará a cabo a través de cualquiera de los canales normalizados de cooperación policial y aduanera internacionales existentes. Por tanto, lo más llamativo es que no se exige expresamente que los Cuerpos de Policía de las Comunidades Autónomas tengan que utilizar la intermediación del Ministerio del Interior para solicitar dicha información.

En cuanto a la segunda cuestión que planteábamos, se establece que el punto de contacto para las recepciones de solicitudes en España es la Secretaría de Estado de Seguridad del Ministerio del Interior, que será la encargada de darle la correspondiente tramitación.

Finalmente, esta Ley se completa con la Ley Orgánica 6/2010, de 27 de julio, que modifica la Ley Orgánica del Poder Judicial con el objeto de asignar a los Juzgados Centrales de Instrucción, con sede en Madrid y jurisdicción en toda España, las solicitudes de información entre los servicios de seguridad de los Estados miembros de la Unión Europea cuando requieran autorización judicial. Esto es así sin perjuicio de que cuando la información solicitada forme parte de una investigación desarrollada en el seno de un procedimiento judicial abierto, la competencia corresponderá al órgano jurisdiccional que esté conociendo de dicho asunto.

3.3 La prevención del blanqueo de capitales y de la financiación del terrorismo

La Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo, tiene como objetivo la incorporación al ordenamiento español de la Directiva 2005/60/CE del Parlamento Europeo y del Consejo, de 26 de octubre de 2005, relativa a la prevención de la utilización del sistema financiero para el blanqueo de capitales y para la financiación del terrorismo, desarrollada por la Directiva 2006/70/CE de la Comisión, de 1 de agosto de 2006; y el establecimiento del régimen sancionador del Reglamento (CE) 1781/2006, del Parlamento Europeo y del Consejo, de 15 de noviembre, relativo a la información sobre los ordenantes que acompaña a la transferencia de fondos.

En primer lugar, llama poderosamente la atención que el art. 1 de esta Ley establezca que su objeto es "la protección de la integridad del sistema financiero y de otros sectores de actividad económica mediante el establecimiento de obligaciones de prevención del blanqueo de capitales y de la financiación del terrorismo" y que, de manera congruente con ello, los títulos competenciales alegados por el Estado para su aprobación tengan una naturaleza económica ("bases de la ordenación del crédito, banca y seguros" y "bases y coordinación de la planificación general de la actividad económica"). Ninguna mención al objetivo de luchar contra la delincuencia organizada y el terrorismo, ni a la competencia del Estado en materia de seguridad pública. Se trata de un planteamiento que no es congruente con otras medidas similares. Por ej., siempre se ha alegado la seguridad pública como base para el establecimiento normativo de ciertos deberes documentales o de información a actividades económicas que podían ser destinatarias de bienes procedentes de delitos (centros de desguace de vehículos, chatarrerías donde se compran metales como el cobre**,** establecimientos de compra-venta de oro, etc.)

La Directiva 2005/60 es una Directiva de mínimos que además no es susceptible de ser aplicada directamente por los sujetos obligados, por lo que necesita de unas normas nacionales que generalmente son más extensas y detalladas. Además, en el caso español, las previsiones de la Ley ahora anotada son en algunos supuestos más rigurosas que las establecidas por la Directiva. Esa mayor rigurosidad se pone de manifiesto en la propia delimitación del ámbito de aplicación. A este respecto, la definición de blanqueo que recoge la Ley es más amplia que la de la Directiva. Así, en las actividades que la Ley considera blanqueo de capitales se recoge "la conversión o la transferencia de bienes, a sabiendas de que dichos bienes proceden de una actividad delictiva o de la participación en una actividad delictiva, con el propósito de ocultar o encubrir el origen ilícito de los bienes o de ayudar a personas que estén implicadas a eludir las consecuencias jurídicas de sus actos." Esto es, se incluye cualquier actividad definida como delito, con independencia de su gravedad. Por el contrario, la Directiva circunscribe las obligaciones de prevención a los bienes procedentes de un delito "grave". En la misma línea, también se amplía en algo el catálogo de sujetos obligados, añadiendo, por ej., a las personas responsables de la gestión, explotación y comercialización de loterías u otros juegos de azar, respecto de las operaciones de pago de premios. Finalmente, los deberes que se imponen a los sujetos

obligados también se hacen más intensos en algún aspecto concreto (por ej., deber de conservar la documentación por un periodo de 10 años, cuando la Directiva sólo prevé 5 años).

Por otro lado, mediante esta Ley se procede a unificar los regímenes de prevención de blanqueo de capitales y de la financiación del terrorismo que, en España, eran objeto de dos regulaciones legales distintas. Así, la Ley 12/2003, de prevención y bloqueo de la financiación del terrorismo, se mantiene en lo relativo al bloqueo, pero se regulan ahora de forma unitaria los aspectos preventivos tanto del blanqueo de capitales como de la financiación del terrorismo.

4. LA DECLARACIÓN DEL ESTADO DE ALARMA: LA CRISIS GENERADA POR LOS CONTROLADORES AÉREOS

Por primera vez tras la Constitución Española de 1978, el 4 de diciembre de 2010, el Gobierno, mediante el Real Decreto 1673/2010, declaró el estado de alarma para la normalización del servicio público esencial del transporte aéreo. El detonante de esta situación fue el cierre del espacio aéreo español como consecuencia del abandono de sus obligaciones por parte de los controladores civiles de tránsito aéreo, que además adoptaron esta medida de presión laboral haciéndola coincidir con el inicio de una serie de días festivos donde el uso del transporte aéreo es especialmente intenso. No procede ahora que nos ocupemos del análisis de los distintos hitos normativos que a lo largo del año 2010 fue adoptando el Gobierno y el Parlamento con el objetivo de encauzar la prestación del servicio público de tránsito aéreo en España y poner fin así a unos injustificables privilegios de los que gozaba este colectivo de empleados públicos, sino de la grave alteración del orden público que originó su conducta y la respuesta del Gobierno.

En cuanto al supuesto de hecho que ocasionó esta declaración del estado de alarma, es indiscutible que la actitud de los controladores aéreos tuvo como consecuencia la paralización de un servicio público esencial para la comunidad. No obstante, el art. 4 de la Ley Orgánica 4/1981, de 1 de junio, reguladora de los estados de alarma, excepción y sitio, establece que para que la paralización de un servicio público esencial pueda justificar la

declaración de un estado de alarma deben concurrir otras circunstancias que el mismo precepto enumera. El gobierno alegó la de calamidad pública y la de situación de desabastecimiento de productos de primera necesidad. A nuestro juicio, la segunda causa resulta bastante forzada, pues sólo estaba afectado el transporte aéreo y en ningún momento se produjo un desabastecimiento de productos de primera necesidad. El debate se centra en la interpretación del concepto jurídico indeterminado de "calamidad pública". La Ley Orgánica 4/1981 se refiere a "catástrofes, calamidades o desgracias públicas, tales como terremotos, inundaciones, incendios urbanos y forestales, o accidentes de gran magnitud" y esos ejemplos que cita no parecen tener una naturaleza similar al supuesto de hecho que estaba aconteciendo. El gobierno motiva su calificación como calamidad pública por "el muy elevado número de ciudadanos afectados, la entidad de los derechos conculcados y la gravedad de los perjuicios causados". En cualquier caso, deberán ser los tribunales los que decidan si concurría tal situación de calamidad pública, pues la declaración del estado de alarma ha sido impugnada judicialmente.

En cuanto a las consecuencias, la declaración del estado de alarma establecía que "todos los controladores de tránsito aéreo al servicio de AENA (Aeropuertos Españoles y Navegación Aérea) pasan a tener, durante la vigencia del Estado de Alarma, la consideración de personal militar ... y en consecuencia, quedan sometidos a las órdenes directas de las autoridades designadas en el presente real decreto (el Jefe del Estado Mayor del Ejército del Aire), y a las leyes penales y disciplinarias militares". También se discute si esta militarización es una de las medidas que la Ley Orgánica 4/1981 admite en el estado de alarma, pues no se refiere a ella expresamente y lo que prevé es la movilización de personal.

La duración inicial del estado de alarma fue de quince días naturales y fue prorrogado por un mes con la autorización expresa del Congreso de los Diputados.

5. MATERIAS VINCULADAS CON LA SANIDAD: LA LUCHA CONTRA EL TABAQUISMO

La Ley 28/2005 supuso un hito en la lucha contra el tabaquismo, en particular, en lo relativo a la prohibición de fumar en lugares públicos. Se prohibía fumar en los centros de trabajo públicos y privados, salvo en los espacios al aire libre; en los centros y dependencias de las Administraciones públicas; en los centros docentes y formativos; en los centros comerciales; medios de transporte, etc. Sin embargo, se permitía fumar en los bares, restaurantes y demás establecimientos de restauración que no alcanzaran los 100 m2 y, en los que alcanzaban esa superficie, se permitía la habilitación de zonas específicas para fumadores. Igualmente, también se admitían estas zonas específicas para fumadores en aeropuertos, estaciones de autobuses y ferroviarias y otros lugares. Este panorama se modifica por la Ley 42/2010, de 30 de diciembre, que supone una vuelta de tuerca más, eliminando la mayor parte de las excepciones o matizaciones a la prohibición de fumar en lugares públicos que se recogían en la redacción originaria de la Ley 28/2005 (por ej., ahora se prohíbe también fumar en bares, restaurantes y demás establecimientos de restauración cerrados cualquiera que sea su superficie y se eliminan buena parte de las posibilidades de existencia de zonas habilitadas para fumadores que antes se permitían –por ej, la mencionadas de las estaciones de transporte y establecimientos de restauración-).

Pero la reforma da un paso más e incluye algunas prohibiciones de fumar en espacios al aire libre (por ej., recintos de los parques infantiles y áreas o zonas de juego para la infancia; o los espacios al aire libre comprendidos en los recientos de los centros , servicios o establecimientos sanitarios).

Finalmente, la Ley prevé la existencia de unos clubes privados de fumadores, a los que somete a unas estrictas condiciones de constitución y funcionamiento para evitar que se conviertan en una vía para eludir la prohibición de fumar en bares y locales de restauración.

6. BIBLIOGRAFÍA

La bibliografía más interesante y, en cualquier caso, la más abundante, sobre los temas tratados en esta crónica es la relativa a la Directiva Servicios y su transposición. Entre otras muchas obras, pueden citarse las siguientes: AAVV, «La Directiva de Servicios y su transposición al Derecho español», Noticias de la Unión Europea, nº 317, número monográfico, 2011; Ricardo RIVERO ORTEGA (Dir.), Mercado europeo y reformas administrativas. La transposición de la Directiva de Servicios en España, Civitas/Thomson Reuters, Cizur Menor (Navarra), 2009; Rafael JIMÉNEZ ASENSIO, La incorporación de la Directiva de Servicios al Derecho interno, IVAP, Oñati, 2010; Helena VILLAREJO GALANDE (Dir.). La Directiva de Servicios y su impacto sobre el comercio europeo, Comares, Granada, 2009; Santiago MUÑOZ MACHADO, ALas transformaciones del régimen jurídico de las autorizaciones administrativas@, Revista Española de la Función Consultiva, núm. 14, julio/diciembre 2010; Francisco LÓPEZ MENUDO, ALa transposición de la Directiva de Servicios y la modificación de la Ley 30/1992: el régimen de la declaración responsable y de la comunicación previa@, Revista Española de la Función Consultiva, núm. 14, julio/diciembre 2010.

II

SANCIONES ADMINISTRATIVAS

1. PANORAMA GENERAL

En España, la imposición de sanciones por las Administraciones públicas es un fenómeno normal e incluso admitido expresamente por la Constitución. Numerosísimas Leyes reguladoras de distintos sectores establecen, junto con los deberes y límites de los ciudadanos, sanciones que serán impuestas por órganos administrativos en casos de

infracción de tales deberes y límites sin intervención alguna de los jueces penales. Ello no se produce sólo en los ámbitos disciplinarios o en los casos de relaciones de sujeción especial o de contratistas de la Administración o de lesión a los intereses específicos de la Administración y su hacienda, como en el caso del incumplimiento de los deberes tributarios. Tampoco las sanciones afectan sólo a los derechos administrativos (revocación de actos administrativos, pérdida del derecho a obtener ayudas públicas, etc.). Desbordan todo eso, pues las infracciones sancionables por las Administraciones pueden consistir en la transgresión por cualquier persona del ordenamiento, al margen de sus relaciones previas con la Administración y las sanciones pueden afectar al estatuto general del ciudadano (como sucede singularmente en el caso de las multas). En algunos casos, la imposición de sanciones está atribuida a autoridades administrativas independientes, pero no hay ningún obstáculo para que la competencia sancionadora corresponda a los órganos administrativos ordinarios (Ministros, Alcaldes, etc.) y, de hecho, esto es lo más frecuente. Todo esto, a diferencia de lo sucedido en otros países, se ha desarrollado en España sin que sea consecuencia de ningún específico proceso de Adespenalización@ sino como resultado de una evolución histórica con otras causas y vicisitudes.

A cambio de admitir con amplitud las sanciones impuestas por las Administraciones, se ha establecido para tales sanciones administrativas un régimen jurídico similar al de las penas impuestas por los jueces, un régimen que deriva en gran parte de la Constitución (arts. 24 y 25) y que entraña especiales garantías para los infractores. Son garantías superiores a las que se dan frente a los demás actos administrativos perjudiciales y mayores que las que proclama el Tribunal Europeo de Derechos Humanos en aplicación del art. 6 del Convenio Europeo de Derechos Humanos. Se pueden dividir en garantías materiales y formales.

Las garantías materiales se sintetizan en la extensión a este ámbito del principio de legalidad penal (reserva de ley, tipicidad de infracciones y sanciones e irretroactividad en perjuicio del infractor; todo ello consagrado en el art. 25.1 de la Constitución) y en la exigencia de los mismos elementos del delito. Por eso, parafraseando la definición clásica de delito, puede definirse a la infracción administrativa, como hacen los tribunales, como acción u omisión, típica, antijurídica y culpable. Y por eso también rigen aquí

prácticamente las mismas eximentes de responsabilidad que se aceptan en Derecho Penal. Además, aunque las sanciones pueden ser muy variadas según lo que establezcan las Leyes, el art. 25.3 de la Constitución prohíbe que Ala Administración civil@ imponga sanciones que Adirecta o subsidiariamente impliquen privación de libertad@.

Las garantías formales consisten en la absoluta necesidad de procedimiento administrativo previo a la imposición de la sanción y en la posibilidad posterior de impugnación ante la jurisdicción contencioso-administrativa en la que cabe la práctica de todo género de pruebas y que puede revisar la sanción en todos sus aspectos: no sólo puede anularla por completo u ordenar que se repita el procedimiento administrativo sancionador sino también rebajar la sanción hasta imponerla en la extensión que considere adecuada. A este respecto, es importante enfatizar que en España la jurisdicción contencioso-administrativa es plenamente judicial, compuesta por jueces como los de la jurisdicción penal o cualquier otra y con el mismo grado de independencia. No se da en España la posibilidad de revisar las sanciones administrativas ante la jurisdicción penal, como sí se admite en otros Estados. Pero el control que realizan los jueces contencioso-administrativos españoles de las sanciones administrativas es tan completo o más que el que puedan hacer los jueces penales. Por ello no tiene sólida justificación el que en el Derecho europeo (Decisión Marco del Consejo 2005/214/JAI, de 24 de febrero de 2005, incorporada al Derecho español por Ley 1/2008, de 4 de septiembre) se haya establecido un sistema comunitario de reconocimiento mutuo y de ejecución de multas impuestas por órganos administrativos que deja fuera a las acordadas por las Administraciones españolas ya que sólo beneficia a las sanciones administrativas de los Estados miembros cuando Ala persona afectada haya tenido la oportunidad de que su caso sea juzgado por un órgano jurisdiccional que tenga competencias, en particular, en asuntos penales@. De otra parte, tanto en el procedimiento administrativo previo como en el proceso contencioso-administrativo posterior ha de quedar plenamente asegurado el derecho de defensa lo que implica, como mínimo, el derecho a conocer la acusación y la imposibilidad de modificarla sustancialmente, el derecho de audiencia y el derecho a proponer prueba. Se acepta asimismo que en el procedimiento sancionador es de aplicación el derecho a no declarar

contra sí mismo y a no confesarse culpable. También rige en su plenitud el derecho a la presunción de inocencia.

Además, está prohibido el doble castigo (*non bis in idem*) de modo que, incluso aunque un mismo hecho se pueda subsumir en una norma penal y en otra norma sancionadora administrativa, no es posible que se imponga una pena y una sanción administrativa al mismo sujeto, por los mismos hechos y con igual fundamento. En caso de concurso de normas, será siempre de preferente aplicación la norma penal y, por tanto, la actuación del juez penal cuyo proceso paralizará la tramitación del procedimiento administrativo sancionador y cuya sentencia condenatoria impedirá la imposición de sanción por la Administración.

Aunque se parte de reconocer que los mismos principios rigen para todas las infracciones y sanciones administrativas, se acepta una cierta relajación para las sanciones disciplinarias. Pero ni es pacífico el fundamento de la distinción, ni es clara la frontera entre unas sanciones administrativas y otras. En cuanto a la frontera, además de a personas en situaciones de sujeción especial, como funcionarios o presos, se extiende en ocasiones la calificación y el régimen de las disciplinarias a las sanciones impuestas a los usuarios de un servicio público o del dominio público, o a las que imponen los Colegios Profesionales a sus colegiados; lo mismo sucede, por ejemplo, con las sanciones deportivas que acuerdan las federaciones. Tampoco son claras las diferencias de régimen jurídico entre unas y otras. Según se deduce de la jurisprudencia del Tribunal Constitucional, no pueden establecerse diferencias radicales sino sólo cuantitativas o de grado. Por ejemplo, rige para ambos tipos de sanciones el principio de legalidad, aunque de manera algo más flexible para las sanciones disciplinarias; igualmente se admite en ciertos casos, frente a la aplicación radical del *non bis in idem*, que sí es posible la imposición de sanciones disciplinarias y de sanciones penales.

Todas estas garantías materiales y formales no sólo están garantizadas por la jurisdicción contencioso-administrativa sino, en su caso, por el Tribunal Constitucional: en recursos y cuestiones de inconstitucionalidad anula las normas con rango de Ley que vulneren los arts. 24 y 25 de la Constitución; y, como esos mismos artículos proclaman

derechos fundamentales de los ciudadanos, el Tribunal Constitucional también los garantiza por medio del recurso de amparo, aunque esta vía es cada vez de más difícil utilización.

Junto con las numerosas leyes sectoriales que tipifican infracciones y sanciones y establecen, a veces, parte de su régimen, es la jurisprudencia constitucional y la contencioso-administrativa la que conforma el Derecho Administrativo sancionador en España. Sobre todo es esa jurisprudencia, guiada por la doctrina, audaz y al mismo tiempo prudente, la que en mayor medida hace de esa aglomeración de leyes sancionadoras un conjunto relativamente estable y coherente.

Los principios que la jurisprudencia ha deducido de la Constitución Española y muy poco más es lo que plasmó la Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. En concreto, dedica sus artículos 127 a 138 a la Apotestad sancionadora@ de la Administración. Esa es su principal virtualidad: fijar en preceptos legales las reglas que la jurisprudencia había deducido de la Constitución. Poco más aportan.

En este panorama de un Derecho Administrativo sancionador en gran medida elaborado por los jueces sobre premisas constitucionales se comprenderá que no se produzcan novedades que comporten alteraciones drásticas. Desde el punto de vista de la teoría general, no hay ya grandes cambios. Sin perjuicio de reconocer que algunas reformas legislativas en relación con las infracciones y sanciones administrativas han tenido una gran trascendencia política y jurídica para los sectores a que se refieren, poco afectan al panorama general y a la construcción teórica de las sanciones administrativas. Y por lo que se refiere a la jurisprudencia no hay grandes novedades sino aplicación de las mismas ideas a problemas nuevos, algunas precisiones técnicas sobre las consecuencias de unos principios ya asentados y, a lo sumo, moderados avances mezclados con eventuales retrocesos o desviaciones. Destacaremos ahora algunos aspectos de la legislación y de la jurisprudencia del periodo analizado.

2. LEGISLACIÓN

11) Aunque en ocasiones la doctrina ha reclamado una **Ley general sobre las infracciones y sanciones administrativas** y aunque ha habido alguna propuesta oficial y algún movimiento en ese mismo sentido, hoy parece abandonado el intento y en la legislación estatal no hay más regulación general del Derecho Administrativo sancionador que la muy parca de los ya aludidos artículos 127 a 138 de la Ley 30/1992.

21) Por **Ley Orgánica 5/2010, de 22 de junio, se aprobó una profunda reforma del Código Penal** que, aunque queda fuera de nuestro objeto de consideración, puede tener alguna repercusión indirecta en el Derecho Administrativo sancionador. Para nuestro propósito quizás lo más destacable sea la admisión por primera vez de la responsabilidad penal de las personas jurídicas, aunque sólo para unos concretos delitos. Hasta ahora, como en Derecho Penal regía sin excepciones el principio *societas delinquere non potest*, sólo cabía castigar a las personas jurídicas con la imposición de sanciones por la Administración. Ahora, al resultar posibles penas judiciales impuestas a las personas jurídicas, es más factible un cierto repliegue del Derecho Administrativo sancionador en favor del Derecho Penal.

31) De entre las numerosas nuevas Leyes con regulación de infracciones y sanciones administrativas puede citarse la **Ley Orgánica 4/2010, de Régimen Disciplinario del Cuerpo Nacional de Policía.** De su contenido puede destacarse la forma en que regula las relaciones con la jurisdicción penal, aunque no es novedosa sino que más bien refleja lo que se viene admitiendo cuando se trata de sanciones a funcionarios:

> "Art. 18.2. La iniciación de un procedimiento penal contra funcionarios del Cuerpo Nacional de Policía no impedirá la incoación de procedimientos disciplinarios por los mismos hechos. No obstante, su resolución definitiva sólo podrá producirse cuando la sentencia recaída en el ámbito penal sea firme y la declaración de hechos probados que contenga vinculará a la Administración.

3. Sólo podrán recaer sanción penal y administrativa sobre los mismos hechos cuando no hubiera identidad de fundamento jurídico y bien jurídico protegido."

41) Cada vez con más frecuencia las leyes españolas tipifican infracciones administrativas que respaldan normas del Derecho de la Unión Europea. Incluso es éste el que, entre otras obligaciones, impone a los Estados miembros que establezcan sanciones para quienes vulneren los deberes y prohibiciones establecidos por normas europeas. En el periodo analizado, buen ejemplo de ello ofrece la **Ley española 8/2010, de 31 de marzo, sobre productos químicos**. El régimen sustantivo se encuentra en el Reglamento (CE) núm. 1907/2006, del Parlamento Europeo y del Consejo de 18 de diciembre de 2006 y en el Reglamento (CE) núm. 1272/2008, del Parlamento Europeo y del Consejo, de 16 de diciembre de 2008. Ambos Reglamentos disponen que "los Estados miembros establecerán disposiciones sobre sanciones por infracción de lo dispuesto en el presente Reglamento y tomarán todas las medidas necesarias para garantizar su aplicación" (arts. 126 del primero y 47 del segundo). Para dar cumplimiento a este mandato se aprueba la Ley española referida. En realidad, la Ley no añade nada al régimen sustantivo de los productos químicos y todos los deberes de quienes los producen y comercializan son los previstos en los Reglamentos comunitarios. La Ley se limita a tipificar como infracciones administrativas los diversos incumplimientos de aquellos Reglamentos, a prever las correspondientes sanciones, a atribuir la competencia sancionadora y a establecer algunas normas complementarias sobre procedimiento sancionador (medidas provisionales, reparación del daño causado, medios de ejecución forzosa, etc.). Lo que importa destacar es que cada uno de los tipos de infracción se corresponde con alguna prescripción de los Reglamentos europeos. Por ejemplo, se considera falta muy grave Ael incumplimiento de la obligación de adjuntar en la ficha de datos de seguridad, el anexo relativo a los escenarios de exposición, cuando así lo estipule el Reglamento (CE) núm. 1907/2006". A las faltas muy graves corresponde Amulta desde 85.001 euros hasta 1.200.000 euros@ y podrán ser sancionadas, además, con la clausura temporal por un máximo de cinco años. Distinta en parte es la situación cuando son las Directivas las que imponen a los Estados miembros que su régimen material cuente con el respaldo de sanciones. En tal supuesto, como es propio de las Directivas, la norma

sancionadora nacional formalmente tipificará el incumplimiento de otras normas nacionales, aunque éstas sean mera transposición de aquéllas.

En cualquier caso, se pone así de manifiesto que esos mandatos del Derecho europeo de establecer sanciones se están cumpliendo en España normalmente con la previsión de sanciones impuestas por las Administraciones, no por los jueces. También que esas normas europeas que tan genéricamente ordenan el establecimiento de sanciones están llevando a una ampliación quizás excesiva de la potestad sancionadora de las Administraciones.

3. JURISPRUDENCIA

11) Es interesante la jurisprudencia sentada por las **sentencias del Tribunal Constitucional 73 y 122/2010, de 18 de octubre y 29 de noviembre,** sobre sanciones administrativas privativas de libertad a los miembros de la Guardia Civil. Ya hemos recordado que el art. 25.3 de la Constitución prohíbe que Ala Administración civil@ imponga sanciones privativas de libertad. *Sensu contrario* se acepta que la Administración militar sí pueda imponerlas y, en efecto, el régimen disciplinario de las Fuerzas Armadas prevé sanciones de arresto. La cuestión estaba en si esto también era posible para los miembros de la Guardia Civil dada la naturaleza mixta que tiene. La Guardia Civil ha sido definida legalmente como Ainstituto armado de naturaleza militar@. Pero tiene dos tipos de funciones: unas de naturaleza estrictamente policial, que son las que más habitualmente desempeña, y en las que actúa como uno de los Cuerpos de Seguridad del Estado; otras, militares, de carácter excepcional, cuando se le confían específicamente misiones de ese tipo. En concordancia con lo anterior, la Guardia Civil depende del Ministerio del Interior en el ejercicio de sus funciones policiales y del Ministerio de Defensa cuando realizan misiones militares. Esa parcial naturaleza militar permitió que durante cierto tiempo se le aplicara en su totalidad el régimen disciplinario de las Fuerzas Armadas, incluida la posibilidad de arrestos. Después se aprobó una ley que regulaba específicamente su régimen disciplinario, Ley Orgánica 11/1991 de Régimen Disciplinario de la Guardia Civil, pero que también admitía las sanciones privativas de libertad. En concreto, para determinadas infracciones establecía una alternativa de modo que la autoridad podía elegir

entre sanciones privativas de libertad en establecimiento disciplinario militar y otras sanciones (pérdida de destino, pérdida de días de sueldo...). Es exactamente esa previsión la que se considera inconstitucional en parte. Para ello se tiene muy en cuenta la Sentencia del Tribunal Europeo de los Derechos Humanos de 2 de noviembre de 2006 (caso Dacosta Silva c. España). Pero la conclusión se condensa en esto:

> A... para que la previsión legal cuestionada de una sanción privativa de libertad pueda ampararse en el art. 25.3 de la Constitución, debe quedar acreditado que la sanción de arresto ha sido impuesta por la Administración militar, no solamente en sentido formal, sino en sentido material, es decir, siempre y cuando la actuación objeto de sanción se haya desenvuelto estrictamente en el ejercicio de funciones materialmente calificables como militares y no en el ámbito propio de las Fuerzas y Cuerpos de Seguridad del Estado@.

Así, el Tribunal procede a una interpretación conforme con la Constitución de los preceptos cuestionados declarando que no son inconstitucionales si se interpretan en el sentido de que sólo se podrá imponer la sanción privativa de libertad Acuando la infracción haya sido cometida en una actuación estrictamente militar y así se motive en la resolución sancionadora@.

21) Puede detectarse en la **Sentencia del Tribunal Constitucional 135/2010, de 2 de diciembre,** una aplicación estricta de la reserva de Ley para tipificar infracciones administrativas, quizás más rigurosa de lo habitual. Pese a la reserva de Ley, se admite siempre una cierta colaboración de los reglamentos. En principio, es una colaboración modesta pues todos los elementos esenciales de la infracción tienen que estar en norma con rango de Ley y el reglamento sólo puede concretar conceptos y reducir los márgenes de las sanciones dentro de lo previsto en la Ley. Pero no es inusual que esa colaboración reglamentaria se haya entendido, tanto por la Administración como por ciertos Tribunales, con notable laxitud y, al final, sean realmente los reglamentos los que tipifican las infracciones con sólo una base legal vaga. En esta sentencia, el Tribunal Constitucional se muestra mucho más intransigente y, aunque no hay un cambio en la formulación de la doctrina general, sí que lo hay en su aplicación rígida y hasta las últimas consecuencias.

En el caso enjuiciado, la Administración había sancionado a una empresa porque en los animales que comercializaba se detectó una cantidad de sulfametazina superior a la permitida por el Reglamento 2377/90/CE. Esta norma comunitaria nada prevé sobre sanciones. Pero la sanción se impuso de conformidad con el Real Decreto 1749/1998, de 31 de noviembre (sobre residuos en animales), en relación con la Ley General de Sanidad y con la Ley del Medicamento. Ese Real Decreto, que como tal es una norma reglamentaria aprobada por el Consejo de Ministros, tipificó como infracción grave esta conducta en la que encajaba perfectamente el supuesto: Ala comercialización para sacrificio de animales, en el caso de administración de productos o sustancias autorizadas, en los que no se haya respetado el plazo de espera prescrito para dichos productos o sustancias@. Como ese Real Decreto era consciente de que no podía tipificar por sí mismo infracciones, decía que lo hacía de conformidad con el art. 35.b).1 de la Ley General de Sanidad y con el art. 128.2.b) de la Ley del Medicamento. Pero la sentencia comentada analiza esos dos preceptos legales y comprueba que no hay ninguna referencia concreta suficiente para dar cobertura a la previsión reglamentaria. En concreto, el art. 35.1.b) de la Ley General de Sanidad dice que son infracciones sanitarias graves Alas que reciban expresamente dicha calificación en la normativa especial aplicable en cada caso@. Y para el Tribunal Constitucional esa Anormativa especial no puede ser un reglamento. Afirma:

> A... la genérica remisión realizada por el art. 35.b).1 de la Ley General de Sanidad no constituye una norma general habilitante que determina los elementos esenciales de la conducta antijurídica, y bien al contrario deja un campo de acción al reglamento que permite a éste determinar qué infracciones tienen la calificación de graves, mediante una regulación independiente y no obviamente subordinada a la Ley, lo que excede de la mera colaboración reglamentaria admitida en el marco del art. 25.1 de la Constitución Española@.

Verdaderamente la Ley General de Sanidad, aunque sí establece las sanciones, no procede a una seria tipificación de las infracciones, ni en el referido art. 35.b).1 ni en los demás. En el fondo, aunque con algún disimulo, contiene una cláusula general según la cual es infracción sancionable por la Administración cualquier inobservancia de cualquier norma sanitaria. Pese a ello, ha venido justificando que numerosos reglamentos sobre los

más diversos aspectos sanitarios tipificaran infracciones para las que preveían las sanciones establecidas en la Ley General de Sanidad. Tras la sentencia comentada, todo eso deberá cambiar y, si el Tribunal Constitucional consolida esta línea, otras muchas leyes deberán hacer un mayor esfuerzo de tipificación para permitir después una concreción reglamentaria.

31) En sentido contrario al paulatino rigor con el que se impone al Estado la reserva de ley para la tipificación de infracciones, se ha ido flexibilizando respecto a las Administraciones locales. Ello con el argumento de que su autonomía, consagrada en la Constitución y en la Carta Europea de la Autonomía Local, requiere que puedan prever infracciones sancionables pese a que no pueden aprobar nada más que normas de rango reglamentario (ordenanzas). El hito fundamental lo marcó la sentencia del Tribunal Constitucional 132/2001, de 8 de junio, que admitió por primera vez que los Ayuntamientos pudieran tipificar infracciones en sus ordenanzas con la condición de que una norma con rango de ley haya fijado, de una lado, Acriterios mínimos de antijuridicidad@ y, de otro, Alas clases de sanciones@ que puedan prever las ordenanzas para las infracciones tipificadas por ellas. Con ese presupuesto, se modificó la Ley Reguladora de las Bases del Régimen Local. En concreto, se introdujeron tres nuevos artículos. En ellos se permite que las ordenanzas municipales puedan tipificar infracciones por incumplimiento de los deberes establecidos en esas mismas ordenanzas en cuanto se refieran a la Aordenación de las relaciones de convivencia de interés local y el uso de sus servicios, equipamientos, infraestructuras, instalaciones y espacios públicos@. Las sanciones pueden ser de multas de hasta 3.000 euros. La Ley también establece una serie de criterios para calificar esas infracciones en leves, graves o muy graves. Entre otros muchos criterios, aparece el de la trascendencia de la infracción para la salubridad pública.

Del periodo analizado interesa destacar que el Tribunal Supremo parece dispuesto a dar a esa cobertura legal toda la amplitud posible. Es muestra de ello su **sentencia de 30 de noviembre de 2010** (recursos de casación núms. 5179 y 1200/2008) que se ocupa de una ordenanza que regulaba los depósitos de nitratos de origen animal. La sentencia es interesante por diversas razones, sobre todo por aceptar que las ordenanzas regulen cualquier materia en la que tengan competencias los municipios sin necesidad de contar con

una habilitación legal y con el límite de no vulnerar leyes ni de introducir restricciones desproporcionadas. Pero lo que a nuestros efectos importa es que le bastó al Tribunal Supremo encontrar una conexión entre los fines de la ordenanza y la protección de la salubridad pública (aludida en la Ley Reguladora de las Bases de Régimen Local como uno de los criterios para la calificación de la gravedad de las infracciones) para sostener la legalidad de su tipificación de infracciones y previsión de sanciones. Sin entrar en los detalles del caso, sirve para poner de relieve la facilidad con la que se está dispuesto a encontrar una base legal a las ordenanzas sancionadoras y la consecuente relajación de la reserva de ley del Derecho sancionador que esto entraña. Parece que en la tensión entre reserva de ley y autonomía local, los tribunales están dando más peso a esta última.

41) Como las sanciones administrativas tienen un régimen peculiar y con más garantías que los demás actos administrativos, frecuentemente se plantea si una concreta medida administrativa es una sanción o un acto de gravamen no propiamente sancionador. A este respecto, está siendo controvertida **la naturaleza de la pérdida de puntos del carné de conducir** que se instauró en España en 2005 de forma similar a como lo fue en Francia. Sólo *obiter dicta* el Tribunal Constitucional se pronunció en el sentido de considerarla una sanción (sentencia 63/2007, de 27 de marzo). La misma naturaleza le atribuyó el Tribunal Supremo en su sentencia de 4 de junio de 2009: A... pese a que la pérdida de puntos no aparece incluida en el catálogo de sanciones ... es indudable que la pérdida de puntos es una medida que tiene carácter materialmente sancionador...@. En el periodo aquí analizado sólo ha habido sentencias de juzgados y tribunales inferiores, todas ellas considerando que tienen naturaleza de sanción. Pero la doctrina sigue cuestionando esta conclusión (vid., T. CANO CAMPOS, A) Es una sanción la retirada de puntos del permiso de conducir?@, *Revista de Administración Pública*, núm. 184, enero/abril 2011; y M. CASINO RUBIO, ALa disputada naturaleza jurídica de la declaración de pérdida de vigencia del permiso de conducción por extinción del saldo de puntos@, *Documentación Administrativa*, núms. 284-285, enero/agosto 2011).

51) Uno de los derechos de aceptación más problemática es el derecho a no declarar contra sí mismo. Se reconoce con muchas matizaciones para conciliarlo con las potestades administrativas de supervisión e inspección. Frente a esto, es interesante la **sentencia del Tribunal Supremo de 6 de julio de 2010** (recurso de casación núm. 446/2008) que proclama este derecho en términos radicales:

> A... el derecho a no declarar contra sí mismos y a no declararse culpables..., al igual que en los procedimientos judiciales, debe impedir igualmente en los procedimientos (administrativos) sancionadores que los funcionarios fuercen a declarar a los administrados o les obliguen a presentar documentos o pruebas para documentar los procedimientos que instruyan contra ellos bajo la amenaza de nuevas sanciones, lo que es parangonable a admitir que los jueces penales pudieran imponer penas a quienes no colaboran con ellos en buscar las pruebas para su propia condena. Del mismo modo debe ser considerado como fraude al derecho a no declarar contra sí mismo que el silencio o la negativa del inculpado a presentar pruebas sobre los hechos que se le imputan pueda convertirse en todo caso en una presunción en su contra de la veracidad de las imputaciones@.

Además, ha de informarse al imputado o a quien va a ser imputado de inmediato de este derecho. Si no se da esta información, su declaración no será una prueba de cargo válida. La **sentencia del Tribunal Supremo de 16 de diciembre de 2010** (recurso de casación contencioso-disciplinario núm. 55/2010) es interesante porque lo reconoce de forma escrupulosa y respecto a militares y guardias civiles. En el caso, un guardia civil, que comenzó un servicio con veinte minutos de retraso, hubo de redactar por orden de su superior una Apapeleta de servicio@ en la que hizo constar el incidente. Y esa papeleta de servicio fue después prueba de cargo para sancionarle. La sentencia considera que se debió informar al guardia civil de su derecho a no declarar contra sí mismo, a guardar silencio o a relatar en la forma que le pareciera oportuna los hechos. Al no haberse hecho así, esa prueba, según la sentencia, ha sido obtenida con vulneración del derecho fundamental y, por tanto, no es válida ni puede ser utilizada para desvirtuar la presunción de inocencia. Ni siquiera obstaría a ello el que se tratara de un militar: A... cuando un militar es imputado o

razonablemente va a serlo, como era el caso del recurrente, una condición se añade a la de militar: la de imputado actual o futuro. Condición añadida que cambia sustancialmente las cosas, pues lo que se pide al interrogado ya no es información sobre un asunto del servicio ... sino los datos por los que puede ser incriminado.

61) En España, los defectos del procedimiento administrativo, si afectan al derecho de defensa, se suelen considerar determinantes de mera anulabilidad de la resolución; y además se acepta que pueden ser subsanados si en el posterior recurso administrativo o contencioso-administrativo el interesado pudo defenderse. Pero esta doctrina general se ha venido excepcionando respecto a los procedimientos administrativos sancionadores. Respecto a ellos, dado que están en juego derechos fundamentales, se tiende a considerar que los defectos de procedimiento no se pueden subsanar por actuaciones posteriores. La **sentencia del Tribunal Supremo de 21 de octubre de 2010** (recurso de casación para unificación de doctrina núm. 34/2006) supone la consolidación de esta doctrina. En concreto, ante un procedimiento sancionador tributario en el que la Administración no había dado audiencia al inculpado, dice que se produce un vicio de nulidad radical o de pleno derecho y que el hecho de que, después, en recurso administrativo e, incluso posteriormente, en recurso contencioso-administrativo, hubiera podido defenderse, no sana los defectos. Por tanto, los sancionados pueden interponer recurso ante los jueces basándose exclusivamente en ese defecto y los tribunales deben declarar la nulidad de la resolución sancionadora. En la misma dirección, puede citarse **la sentencia del Tribunal Supremo de 11 de marzo de 2010** (recurso de casación 10315/2003) según la cual la fata de motivación de una resolución administrativa sancionadora respecto a la concurrencia de culpabilidad no puede subsanarse por los órganos encargados de resolver los recursos porque a estos les corresponde sólo el control de la decisión sancionadora, no suplir sus defectos y carencias.

4. BIBLIOGRAFÍA

Aunque es algo inusual, en el año 2010, se han publicado tres obras de carácter general en el ámbito del Derecho Administrativo Sancionador:

- M. REBOLLO PUIG, M. IZQUIERDO CARRASCO, L. ALARCÓN SOTOMAYOR y A.M. BUENO ARMIJO, *Derecho Administrativo sancionador*, Lex Nova, Valladolid, 2010 (1024 páginas), que ofrece una sistemática completa de esta materia tomando como punto de partida un amplísimo análisis jurisprudencial.

- Blanca LOZANO CUTANDA (Directora), *Diccionario de sanciones administrativas*, Iustel, Madrid, 2010 (1295 páginas), que presenta en forma de voces esta rama del Derecho Administrativo, contando con la colaboración de cerca de 50 autores.

- Manuel GÓMEZ TOMILLO e Íñigo SANZ RUBIALES, *Derecho Administrativo sancionador. Parte general. Teoría general y práctica del Derecho Penal Administrativo*, Aranzadi/Thomson Reuters, Cizur Menor (Navarra), 2º edición, 2010, (1019 págs). Esta obra presenta como peculiaridad que es el fruto de la colaboración de un profesor de Derecho Penal y otro de Derecho Administrativo.

En cuanto a los estudios sectoriales, cabe destacar los siguientes: T. CANO CAMPOS, *Las sanciones de tráfico*, Aranzadi/Thomson Reuters, Cizur Menor (Navarra), 2011; M. CASINO RUBIO, "Presunción legal de culpabilidad versus prueba indiciaria en la autoría de las infracciones de tráfico", *Revista de Administración Pública*, núm. 182, mayo/agosto 2011.

Finalmente, también deben reseñarse las crónicas de jurisprudencia sobre Derecho Administrativo Sancionador que se publican trimestralmente en la *Revista Justicia Administrativa*, a cargo de L. ALARCÓN SOTOMAYOR, A. BUENO ARMIJO, y M.A. RODRÍGUEZ PORTUGUÉS.

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POLICE ADMINISTRATIVE

APPORTS DE L'ANNEE - 2011 - FRANCE

(Juillet 2011)

Prof. Benoît PLESSIX [*]

1. En France, l'actualité pour 2011 en matière de régime juridique applicable aux activités de police a été profondément marquée par l'adoption de la loi n°2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.

Cette loi dispose, en son article 1er, que « *Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage* » ; l'article 2 de la même loi précise : « *I. Pour l'application de l'article 1er, l'espace public est constitué des voies publiques ainsi que des lieux ouverts au public ou affectés à un service public. - II. L'interdiction prévue à l'article 1er ne s'applique pas si la tenue est prescrite ou autorisée par des dispositions législatives ou réglementaires, si elle est justifiée par des raisons de santé ou des motifs professionnels, ou si elle s'inscrit dans le cadre de pratiques sportives, de fêtes ou de manifestations artistiques ou traditionnelles* » ; enfin l'article 3 prévoit que la méconnaissance de l'interdiction fixée par l'article 1er est punie de l'amende prévue pour les contraventions de deuxième classe.

Cette loi a elle-même une longue histoire. L'Assemblée nationale avait créé en janvier 2009 une mission d'information, présidée par le député André Gérin, dont les

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travaux n'avaient abouti à aucune proposition concrète de texte mais avait porté témoignage de la sensibilité particulière de la société française à l'égard du voile dit intégral. De son côté, le premier ministre avait saisi le Conseil d'Etat, dans la perspective du dépôt d'un projet de loi au Parlement, sur ce sujet d'une demande d'avis sur les solutions juridiques permettant de parvenir à une interdiction du port du voile à la fois large et effective. Enfin, au Parlement, furent déposées des propositions de lois et votées une résolution manifestant la défiance unanime de la classe politique française à l'égard de telles pratiques.

Saisi par les deux présidents d'assemblée (ce qui rare) par le biais d'une saisine « blanche », *i.e.* non argumentée (ce qui n'est pas non plus fréquent), le Conseil constitutionnel a rendu une décision n° 2010-613 DC du 7 octobre 2010 (*AJDA 2010, p. 2373, note M. Verpeaux ; JCP G 2010, n° 42, note B. Mathieu et n° 43, note A. Levade*) déclarant conforme à la Constitution française cette loi d'interdiction de dissimulation du visage. La décision a retenu l'attention des commentateurs par la brièveté et l'incertitude de son argumentation, le Conseil constitutionnel ayant manifestement repris le raisonnement développé par le Conseil d'Etat dans son avis sans pour autant donner un statut normatif clair et net à certains fondements juridiques simplement esquissés.

Tout comme l'avis du Conseil d'Etat avait mis en évidence la fragilité juridique de certains fondements, le Conseil constitutionnel reste muet sur certaines normes qui auraient pu servir de référence à l'exercice de son contrôle de constitutionnalité de la loi déférée mais qui ont sans doute été jugées difficilement opposables à une loi relative au port volontaire d'un vêtement : aucun mot sur la liberté d'expression proclamée à l'article 11 de la Déclaration des droits de l'homme et du citoyen, sur le respect de la vie privée garanti par l'article 2, sur la sauvegarde de la dignité de la personne humaine résultant du premier alinéa du préambule de la Constitution de 1946, et sur le principe de laïcité consacré par l'article 1er de la Constitution.

En revanche, dans son étude précitée, le Conseil d'Etat avait suggéré un audacieux développement du concept d'ordre public, dont on sait qu'il constitue le fondement légal des mesures de police administrative. A l'ordre public classique, matériel et extérieur,

comprenant la sécurité, la salubrité et la tranquillité publiques, ainsi que le respect de la dignité de la personne humaine, le Conseil d'Etat proposait d'y ajouter une sorte d'ordre public immatériel, qui correspondrait à la définition d'un socle minimal d'exigences réciproques et de garanties essentielles de la vie en société.

Or, c'est l'idée que semble avoir repris à son compte le Conseil constitutionnel, sans toutefois faire une quelconque référence à un ordre public immatériel, notion trop conceptuelle et dogmatique pour être figée dans une jurisprudence qui n'en est qu'à son balbutiement, mais dont les imprécisions constituent autant la faiblesse que la force de la décision du juge constitutionnel français. Tout en se fondant sur la liberté (article 4 de la Déclaration des droits de l'homme et du citoyen) et l'égalité entre les hommes et les femmes (alinéa 3 du Préambule de la Constitution de 1946), tout en visant sans surprise la liberté religieuse (article 10 de la Déclaration), ce qui le conduit à formuler une réserve d'interprétation, le Conseil constitutionnel vise également, ce qui est très rare, le très libéral article 5 de la Déclaration des droits de l'homme de 1789, qui dispose que « *la loi n'a le droit de défendre que les actions nuisibles à la société. Tout ce qui n'est pas défendu par la loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas* ». Or, au nombre des actions nuisibles que le législateur doit combattre, il y a « *l'apparition de pratiques, jusqu'alors exceptionnelles, consistant à dissimuler son visage dans l'espace public* », et le Conseil constitutionnel en déduit que « *le législateur a estimé que de telles pratiques peuvent constituer un danger pour la sécurité publique et méconnaissent les exigences minimales de la vie en société* ». Dès lors, l'ordre public intégrant le socle minimum du « vivre ensemble », le Conseil constitutionnel n'a guère eu ensuite de difficultés à juger qu'il n'y avait pas, de la part du législateur, de conciliation manifestement déséquilibrée entre cette sauvegarde de l'ordre public et la garantie des droits constitutionnellement protégés (liberté d'opinion, liberté d'aller et venir). Il conviendra de suivre l'évolution de ce concept d'ordre public immatériel, du reste évoqué implicitement par le Conseil constitutionnel, pour savoir s'il s'agit d'une évolution notable du droit français ou le reflet d'une argumentation juridique de circonstance destinée à valider une loi relative à une pratique largement condamnée par la société française.

2. L'entrée en vigueur du mécanisme de la question prioritaire de constitutionnalité n'a pas été sans concerner le régime de la police administrative.La question de la conformité à la Constitution des dispositions législatives relatives aux gens du voyage a ainsi été posée au Conseil constitutionnel par le biais de cette nouvelle voie au succès immédiat. Il s'agissait plus particulièrement de l'article 9 de la loi n° 200-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage, donnant la possibilité au préfet de procéder à l'évacuation forcée des résidences mobiles en cas de stationnement irrégulier. Dans une décision n° 2010-13 QPC du 9 juillet 2010, *Orient O et a. (AJDA 2010, p. 2324, note E. Aubin ; RFDC 2011, p. 281, note A. Pena-Gaïa),* le juge constitutionnel a déclaré ces dispositions conformes à la Constitution, notamment au principe d'égalité et à la liberté d'aller et venir, et a rappelé à cette occasion, exactement comme dans le cadre de son contrôle de constitutionnalité *a priori*, que « *les mesures de police administrative susceptibles d'affecter l'exercice des libertés constitutionnellement garanties, au nombre desquelles figure la liberté d'aller et venir, […] doivent être justifiées par la nécessité de sauvegarder l'ordre public et proportionnées à cet objectif* ». Or, pour le Conseil constitutionnel, tel est bien le cas en l'espèce, au regard du régime d'accueil des gens du voyage que le législateur veut compatible aussi bien avec le mode de vie itinérant des intéressés qu'avec le respect des règles de sécurité et d'hygiène et les droits des tiers : l'évacuation forcée des résidences mobiles ne peut être mise en œuvre par le préfet qu'en cas de stationnement irrégulier de nature à porter une atteinte à la salubrité, à la sécurité ou à la tranquillité publiques ; elle ne peut être diligentée que sur demande du maire, du propriétaire ou du titulaire du droit d'usage du terrain ; elle ne peut survenir qu'après mise en demeure des occupants de quitter les lieux, etc. Autant de garanties assurant une conciliation équilibrée entre la nécessité de sauvegarder l'ordre public et les autres droits et libertés.

3. Divers évènements de moindre importance, mais souvent médiatisés, ont permis aux juridictions administratives d'appliquer les principes classiques et élémentaires du droit de la police administrative. Le juge administratif a pu ainsi contrôler la légalité d'un certain nombre de décisions administratives qui, comme toutes les décisions en

matière de police, sont potentiellement liberticides et appellent, de ce fait, un contrôle juridictionnel approfondi.

C'est ainsi que le tribunal administratif de Lille a été saisi de la légalité de l'arrêté du maire de la ville de Lille interdisant le spectacle de l'humoriste Dieudonné, connu depuis quelques années en France pour prendre des positions politiques radicales et controversées, notamment à l'égard de la communauté juive. Le tribunal n'a fait toutefois que rappeler les exigences élémentaires d'un Etat de droit lorsque la liberté d'expression est en jeu. Le juge n'a pas même eu besoin de vérifier le degré d'atteinte à l'exercice d'une liberté aussi fondamentale que la liberté d'expression ; il s'est contenté de vérifier le respect d'une condition élémentaire de la légalité des mesures de police. En effet, pour être légale, une mesure de police doit avant tout être fondée sur un risque de trouble à l'ordre public ; comme pour toute décision administrative, les faits doivent être de nature à justifier la décision. En l'espèce, le tribunal administratif a annulé la décision du maire de Lille qui n'avait apporté la preuve d'aucun risque concret et effectif de trouble à l'ordre public. Il importe en effet à l'autorité administrative d'étayer ses allégations par des éléments de fait ou des documents des services de police. Dans cette affaire, le maire s'était contenté de se prévaloir de la seule personnalité de Dieudonné et de l'existence, sur le territoire de la commune, de représentants de groupes aux idées opposées, ce qui ne saurait évidemment suffire à caractériser un risque de trouble à l'ordre public *(TA Lille, 3 juin 2010, M. Colman : AJDA 2010, p. 1536)*.

Un autre évènement fort médiatisé fut l'existence de grèves, à l'automne 2010, dans les établissements pétroliers.

Certes, le droit de grève, qui a valeur constitutionnelle (alinéa 7 du Préambule de la Constitution du 27 octobre 1946), a par ailleurs, dans la cadre des procédures d'urgence instituées devant le juge administratif (plus précisément dans le cadre du référé-liberté de l'article L. 521-2 du Code de justice administrative), le caractère d'une liberté fondamentale.

Mais il faut aussi tenir compte du pouvoir de réquisition que la loi confère aux préfets. En effet, en vertu du 4° de l'article L. 2215-1 du Code général des collectivités territoriales, « *En cas d'urgence, lorsque l'atteinte constatée ou prévisible au bon ordre, à la salubrité, à la tranquillité et à la sécurité publiques l'exige et que les moyens dont dispose le préfet ne permettent plus de poursuivre les objectifs pour lesquels il détient des pouvoirs de police, celui-ci peut, par arrêté motivé, pour toutes les communes du département ou plusieurs ou une seule d'entre elles, réquisitionner tout bien ou service, requérir toute personne nécessaire au fonctionnement de ce service ou à l'usage de ce bien et prescrire toute mesure utile jusqu'à ce que l'atteinte à l'ordre public ait pris fin ou que les conditions de son maintien soient assurées. L'arrêté motivé fixe la nature des prestations requises, la durée de la mesure de réquisition ainsi que les modalités de son application.* » Or, la jurisprudence administrative est venue préciser que cette disposition législative autorise légalement l'intervention du préfet, au titre de son pouvoir de police, pour réquisitionner des personnels d'établissements privés, tels les raffineries et dépôts d'hydrocarbure exploités par de grandes compagnies pétrolières.

Sans doute, pour le juge administratif français, l'article L. 2215-1, 4° ne permet-il pas au préfet de requérir n'importe qui pour n'importe quoi. En revanche, il en va différemment s'il s'agit d'une « *entreprise privée dont l'activité présente une importance particulière pour le maintien de l'activité économique, la satisfaction des besoins essentiels de la population ou le fonctionnement des services publics* », du moins lorsque les perturbations résultant d'une grève constituent une menace pour l'ordre public *(CE, ord. réf., 27 oct. 2010, Fédération nationale des industries chimiques CGT, AJDA 2011, p. 388, note Ph. S. Hansen et N. Ferré, Dr. adm. 2010, comm. 157, note J. Andreani)*. De même, l'intervention du préfet est légale s'il s'agit « *d'assurer l'approvisionnement en carburant des véhicules des services d'urgence et de secours du département ainsi que de prévenir les troubles à l'ordre et à la sécurité publics que générerait une pénurie prolongée* » *(TA Melun, 22 oct. 2010, Confédération générale du travail, Confédération de syndicats professionnels et a., AJDA 2011, p. 388, note Ph. S. Hansen et N. Ferré ; Dr. adm. 2010, comm. 157, note J. Andreani)*.

Les différentes juridictions saisies ont toutefois jugé, sans surprise, conformément aux principes juridiques les mieux établis, que de telles mesures de réquisitions de personnels grévistes d'entreprises privées devaient être imposées par l'urgence et ne devaient excéder ce qui est strictement nécessaire à la préservation de l'ordre public. Pour statuer en ce sens, le juge examine les motifs de la réquisition, sa durée, les prestations requises, les effectifs sollicités.

Ainsi, la réquisition de l'établissement de Gargenville, en raison de ses stocks de carburant aérien et de sa capacité de traitement de kérosène, constituait une solution nécessaire, dans l'urgence, à la prévention du risque de pénurie totale de carburant aérien à l'aéroport Roissy Charles de Gaulle, en l'absence d'autres solutions disponibles et plus efficaces, tout comme pour l'approvisionnement en urgence de la région Île-de-France en essence et en gazole. Par ailleurs, le personnel requis était limité aux équipes de quart nécessaires, notamment pour des raisons de sécurité, à l'accomplissement des fonctions de livraison de carburant aérien, de traitement du kérosène et de livraison d'essence et de gazole correspondant aux nécessités de l'ordre public ; les effectifs concernés ne représentaient qu'une fraction de l'effectif total de l'établissement, alors même qu'ils représentaient l'essentiel des salariés grévistes.

En revanche, le préfet a commis une illégalité en réquisitionnant la quasi-totalité du personnel de la raffinerie Total de Grandpuits en vue, non seulement d'alimenter en carburants les véhicules prioritaires, mais également de fournir en produits pétroliers de toute nature l'ensemble des clients de la raffinerie, dans le but de permettre aux entreprises du département de poursuivre leurs activités ; les stations-service du département étant déjà réservées au profit des véhicules d'urgence et de secours, l'arrêté préfectoral avait eu en réalité pour effet d'instaurer un service normal au sein de l'établissement et non le service minimum que requièrent les seules nécessités de l'ordre et de la sécurité publics.

Le contentieux sportif a également offert l'occasion aux diverses juridictions saisies d'assurer le respect par les autorités administratives de cette conciliation indispensable dans un Etat de droit entre les nécessités de l'ordre public et la protection des libertés.

Le Tribunal administratif de Marseille a été saisi en référé des décisions de la Ligue de football professionnel de fermer les tribunes visiteurs du Parc des Princes aux supporters marseillais. Ces derniers ont d'abord saisi le juge administratif d'un référé-suspension : le juge a accédé à leur demande au motif, notamment, de l'absence de justifications concrètes de risques de troubles à l'ordre public et de nécessité de la mesure de sécurité. Il est intéressant d'observer que le juge n'a guère été sensible à l'invocation par la Ligue de faits de violence entourant des rencontres précédentes. Le juge rappelle ainsi que la légalité d'une mesure de police s'apprécie au regard des circonstances concrètes et présentes : aucun incident n'ayant eu lieu depuis un an, et les forces de police parisiennes n'ayant pas manifesté d'inquiétudes particulières à l'approche du match, une mesure d'interdiction générale et absolue ne pouvait être jugée qu'illégale alors que les troubles à l'ordre public, à supposer qu'ils soient établis, auraient pu être prévenus par un simple renforcement des forces de police *(TA Marseille, 28 oct. 2010, Assoc. Yankee nord Marseille : JCP A 2010, 2346, note X. Haïli)*.

En revanche, de son côté, le Conseil d'Etat juge légaux les décrets procédant à la dissolution de deux associations de supporters du Paris Saint-Germain, pour des actes répétés de dégradations de biens et de violences sur personnes, en application de l'article L. 332-18 du Code du sport. Le Conseil d'État a d'abord conclu à la régularité de la procédure, considérant que les représentants des associations dissoutes ont été informés des griefs formulés à leur égard et qu'ils ont pu présenter des observations écrites, puis, assistés d'un conseil, des observations orales. Il a en revanche jugé que le principe général des droits de la défense n'était pas applicable, en l'absence de texte, dès lors que la décision prise à leur encontre était, non une mesure répressive, mais une mesure préventive « de police administrative » ; d'où la régularité de la procédure, en dépit du fait que l'association n'avait pu répliquer, devant une commission consultative, aux observations présentées par les représentants du Paris Saint-Germain et par ceux du préfet de police ou du directeur général de la police nationale. Sur le fond, le Conseil d'État confirme la légalité des deux décrets de dissolution. Il considère comme avérés des jets de projectiles sur les forces de l'ordre et la participation à des faits graves de violence ayant notamment conduit au décès d'un supporter : ces faits justifient, à eux seuls, la dissolution, car ils constituent un « acte d'une particulière gravité », au sens de l'article L. 332-18 du Code du sport, notion qui peut

s'appliquer à un acte isolé *(CE, 13 juill. 2010, Association Les Authentiks et Association Supras Auteuil 91, JCP A 2010, act. 587)*.

Toujours dans le même ordre d'idées, l'actualité française a été accaparée par la commercialisation des pistolets à impulsion électrique, dont la marque la plus célèbre est Taser. Le Conseil d'Etat a été saisi de la légalité d'un arrêté ministériel qui soumet leur détention à un régime d'autorisation administrative. Le Conseil d'Etat a confirmé que le ministre n'avait commis aucune erreur d'appréciation en classant les produits de marque Taser dans la catégorie des armes de 4e catégorie, eu égard aux dangers sérieux pour la santé que comporte l'usage de ces pistolets à impulsion électrique. En revanche, il a annulé l'arrêté en tant qu'il ne procédait pas au classement de tous les pistolets à impulsion électrique présentant des caractères similaires aux produits de la marque Taser. Le Conseil d'Etat a jugé que les impératifs d'ordre public, le principe d'égalité et le respect des règles de concurrence imposaient que l'autorité administrative s'assure de l'application, dans les mêmes conditions, à toutes les sociétés commercialisant de tels produits, de la mesure de classement des pistolets à impulsion électrique en armes de 4e catégorie *(CE, 3 déc. 2010, Société SMP technologie : AJDA 2010, p. 2345)*.

4. D'autres affaires, beaucoup plus anodines, et se situant sur un plan plus technique intéressant le seul spécialiste de droit administratif, permettent toutefois de témoigner de la contribution constante de la jurisprudence administrative au régime de la légalité des actes de police. Deux exemples peuvent être retenus.

Ainsi, en interdisant la circulation des poids lourds sur une portion d'un chemin rural pour des motifs de sécurité publique, et après s'être assuré que la sécurité des usagers n'aurait pas pu être garantie par des mesures moins rigoureuses ou contraignantes, un maire prend une décision parfaitement légale *(CE, 4 oct. 2010, n° 310801, Commune de Saint-Sylvain-d'Anjou : JCP A 2010, 2338, note J. Moreau)*. Cette affaire présente deux mérites. Elle rappelle que la police rurale du maire est une sorte de dérivé de la police générale : c'est en effet en vertu de l'article L. 161-5 du Code rural, et non sur le fondement du Code général des collectivités territoriales, que le maire, en l'espèce, avait règlementé la circulation sur les chemins ruraux ; le juge traite pourtant cette police rurale de la même

manière que la police municipale générale, et lui applique le contrôle normal approfondi qu'il exerce sur les mesures de police générale depuis la jurisprudence *Benjamin*. D'autre part, la décision présente la particularité, assez rare en pratique, d'admettre la responsabilité sans faute de la commune, sur le fondement de l'égalité des citoyens devant les charges publiques, du fait du préjudice anormal, grave et spécial subi par les propriétaires d'un garage dont le chemin fermé à la circulation constituait une voie de desserte.

Par ailleurs, une affaire de risque d'éboulements de blocs de pierre en provenance d'une falaise surplombant des propriétaires privés a permis au juge administratif d'éclaircir le fondement des pouvoirs de police du maire. L'article L. 2212-2 du Code général des collectivités territoriales, notamment dans son 5°, constitue le fondement classique des pouvoirs de police du maire et l'autorise à intervenir pour prendre les mesures nécessaires et le cas échéant ordonner la réalisation de travaux, à la charge du propriétaire, pour faire disparaître les risques de troubles. En l'espèce, les requérants invoquaient l'application de l'article L. 2212-4 du même Code, qui permet au maire d'enjoindre la réalisation dans l'urgence de travaux d'intérêts collectifs, y compris sur des propriétés privées. En réalité, les propriétaires invoquaient un tel article car il implique alors que les travaux soient pris en charge par la commune, à ses frais. Si les conséquences financières sont clairement différentes, la ligne de partage entre ces deux articles, pour la prévention d'un risque d'éboulement, n'est pas des plus évidentes à tracer. Le juge a toutefois tranché au regard d'un élément résultant des pièces du dossier. Le Conseil d'Etat a en effet jugé que, en l'espèce, les propriétaires privés avaient créé le risque, en implantant une voie sur l'emplacement initialement prévu pour des pièges à bloc, en totale méconnaissance de l'autorisation de lotir. Le juge en a curieusement déduit que le maire était alors légalement fondé à se baser sur l'article L. 2212-2 pour imposer, aux frais des propriétaires, des travaux destinés à rétablir la sécurité : il est en effet peu commun que ce soit les faits de l'espèce et le comportement de l'administré qui déterminent le choix du fondement textuel des pouvoirs d'une autorité administrative *(CE, 22 oct. 2010, Epoux Powell : AJDA 2010, p. 2219, concl. J.-Ph. Thiellay).*

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LA NOTION DE POLICE ADMINISTRATIVE DANS LE DROIT ITALIEN

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SOMMAIRE

1. ELABORATION DE LA NOTION DANS LA DOCTRINE A LA FIN DU XIX ème SIECLE

Dans le droit italien, la notion de police administrative est apparue à la fin du XIXème siècle, lors de la révision de la notion de police, telle qu'elle existait dans la doctrine précédente, italienne et étrangère, et à la lumière des données juridiques issues des Lois administratives spéciales de l'Etat, après l'Unité de l'Italie.

L'étude à laquelle on doit principalement la définition de cette notion est sans nul doute l'essai d'Oreste Ranelletti *Concept de police de sécurité*, datant de 1898.

Comme on le sait, l'expression "police" dérive du grec *politeia*: dans l'Etat absolu, elle était donc employée pour indiquer toute intervention destinée à la bonne gouvernance de la communauté.

Dans l'acception de ce terme, l'activité de police correspondait, substantiellement, à l'activité administrative: elle avait donc une très large extension, potentiellement indéfinie, étant donné que pratiquement toutes les interventions tendant à protéger et à promouvoir le bienêtre de la collectivité rentraient dans cette notion.

Dans l'Etat libéral du XIX ème siècle, cette notion fut redéfinie une première fois.

En effet, l'extension que cette notion avait précédemment n'avait aucune cohérence ni avec les nouvelles orientations constitutionnelles basées sur le principe de la séparation des pouvoirs, impliquant des limites très restrictives à l'action de l'exécutif et de l'administration, ni avec l'exigence, qui y est liée, de protéger la liberté des citoyens d'ingérences excessives de l'Etat.

La coïncidence entre l'activité administrative et l'activité de police disparut donc, et à partir de cette seconde activité on a défini une notion plus restreinte, qui consistait pour l'essentiel, en des limitations établies par l'administration publique à la liberté des citoyens dans le but de protéger et de conserver l'ordre étatique: des limitations, pouvant se traduire de plusieurs façons, par des ordres, des interdictions, des sanctions administratives et des autorisations pour effectuer des activités déterminées.

Ranelletti, dans l'essai que nous avons cité, voulut établir une distinction entre police de sécurité et police administrative.

La police de sécurité fut définie comme l'activité destinée à éviter les violations directes et immédiates des droits des citoyens et des pouvoirs de l'Etat: la police administrative, en revanche, comme l'activité destinée à protéger lesdites positions

seulement indirectement et médiatement, étant directement finalisée à protéger les biens faisant l'objet de ces positions.

2. LA POLICE ADMINISTRATIVE DANS L'ETAT SOCIAL

Comme nous le verrons bientôt, on peut considérer cette distinction comme partiellement dépassée.

Dans le but qui est le nôtre, il est cependant intéressant de souligner que Ranelletti élabora la notion de police administrative grâce à un processus d'abstraction des données provenant des diverses lois spéciales de l'époque, qui prévoyaient des pouvoirs de police sanitaire, de police routière, de police des eaux, *etc*.

Et que, par conséquent, il considérait la police administrative comme "l'ensemble de ces activités… immanentes à chaque branche de l'administration, et qui ont pour but la défense des divers intérêts communs spéciaux, qui sont traités dans chacune de ces branches": c'est à dire comme "une police accessoire à chacune des branches de l'activité de l'administration publique".

L'aspect accessoire de la police administrative aux diverses fonctions de l'administration publique au cours du XX siècle marquera en effet le sort de cette notion: fondamentalement, cette caractéristique a eu pour conséquence que celle-ci a été dans la plupart des cas absorbée en substance dans lesdites fonctions.

Par ailleurs, ce processus d'absorption fut favorisé également par le fait que l'Etat Social s'est imposé.

La disparition des limites de l'intervention publique dans l'économie et dans la société qui étaient la caractéristique de l'Etat libéral comporta un énorme accroissement des fonctions de gestion de l'administration publique: il était donc normal que, dans ce nouveau

contexte, la police administrative passe au second plan, et perde encore davantage d'importance.

Le plus significatif dans ce processus de perte d'importance de la notion est également l'attention de plus en plus réduite que lui accordent les manuels de droit administratif au XX ème siècle.

Par exemple, on trouve déjà cette idée dans le traité le plus répandu au milieu du XX siècle, c'est à dire le Corso di diritto amministrativo (Cours de droit administratif) de Guido Zanobini, qui ne s'occupe pas spécifiquement de la police administrative, puisque, à ce sujet, il préfère renvoyer aux différentes matières auxquelles il fait référence.

On retrouve également des choix analogues dans la plupart des manuels de la seconde moitié du XX siècle, comme ceux de Massimo Severo Giannini, de Feliciano Benvenuti, d'Aldo Sandulli.

Cette notion semblait donc destinée à être abandonnée, puisqu'elle semblait avoir perdu toute utilité effective.

3. LA POLICE ADMINISTRATIVE DANS LE RÉGIME D'AUTONOMIE: EN PARTICULIER DANS LE DECRET DU PRESIDENT DE LA REPUBLIQUE. N° 616/1977

Toutefois celle-ci a retrouvé une utilité bien précise – même si elle était limitée – dans les dernières décennies, à l'occasion de l'application des normes sur les autonomies locales de la Constitution de 1948: application qui, comme on le sait, a été effective seulement à partir des Années soixante-dix du XX siècle.

Dans la Constitution de 1948 la police administrative n'est pas mentionnée: dans le texte original de l'art.117, on parle seulement de la "police locale urbaine et rurale", pour indiquer une des matières du ressort législatif concourant des Régions ordinaires.

En revanche, la notion de police administrative entre de nouveau en jeu à l'occasion de ce que l'on a appelé la deuxième régionalisation, c'est à dire lors du second transfert important de fonctions aux Régions et aux autres organismes locaux qui a eu lieu au cours des Années soixante-dix, établi par le Décret du Président de la République n◦ 616/1977.

L'alinéa 1 de l'art.4 du décret prévoit que "l'État, dans les matières définies par le présent décret, exerce seulement les fonctions administratives indiquées dans les articles suivants, ainsi que la fonction d'orientation et de coordination dans les limites, dans les formes et selon les modalités prévues par l'art. 3 de la loi du 22 juillet 1975, n◦ 382, ainsi que les fonctions pour ce qui est également des matières transférées ou déléguées, se référant aux rapports internationaux et avec la Communauté économique européenne, à la défense nationale et à la sûreté publique".

Corrélativement l'art.9, intitulé "Police administrative", prévoit que "les communes, les Provinces, les Communautés de montagne et les Régions sont titulaires des fonctions de police administrative dans les matières respectivement attribuées ou transférées à celles-ci. Les fonctions de police administrative exercées par les organismes centraux et périphériques de l'Etat sont déléguées aux Régions dans les matières pour lesquelles l'exercice de fonctions administratives de l'Etat et des organismes publics est délégué aux Régions".

Au chapitre II ("Police locale urbaine et rurale") du Titre III ("Services sociaux"), l'art.18 (intitulé lui aussi "Police locale urbaine et rurale") prévoit enfin que "les fonctions administratives relatives à la matière <police locale urbaine et rurale> concernent les activités de police qui ont lieu exclusivement dans le cadre du territoire de la commune et qui ne sont pas propres à la compétence des autorités de l'Etat".

Et l'art. 19 (intitulé "Police administrative" comme le précédent article 9) prévoit l'attribution aux Communes d'une série de fonctions, réglementées par le Texte Unique de Sûreté Publique, le Décret Royal n◦773/1931, et qui jusqu'alors étaient exercées par l'administration publique.

Dans les prévisions du Décret du Président de la République n◦ 616, l'idée était sous-jacente que l'activité administrative inhérente à la Sûreté Publique – c'est à dire ce que l'on définissait, à la fin du XIX siècle, comme police de sécurité – réponde à des exigences unitaires sur tout le territoire national: si bien qu'elle reste toujours réservée à l'administration publique, même abstraction faite des attributions de fonctions aux autonomies locales.

En revanche, la police administrative est entièrement attribuée aux autonomies locales dans les matières qui sont de leur ressort: même par dissociation des activités de Sûreté Publique d'une série de fonctions qui, auparavant, étaient exercées par l'Etat.

Dans ce contexte, la police administrative va donc jouer le rôle de limite pour ce qui est du ressort de l'Etat quant aux questions de Sûreté Publique: fondamentalement, la notion en question commence à faire office de garantie pour les autonomies locales.

Une partie de la doctrine avait cependant souligné que, de cette manière, la notion de police administrative apparaissait comme superflue, puisque la seule notion de Sûreté Publique aurait été suffisante.

De plus, en l'absence de définitions appropriées, les limites des divers concepts employés par le législateur, ordinaire et constitutionnel, sur la question des activités de police, c'est à dire "Sûreté Publique", "Police administrative", "Police locale urbaine et rurale" n'étaient pas claires.

Notamment, les contenus des dispositions du Décret du Président de la République n◦ 616, et les parties elles-mêmes du décret (surtout les paramètres du Chapitre II du Titre III), comprises au sens littéral du terme, donnaient lieu à divers aménagements possibles des rapports entre la notion de police administrative, et celle de police locale urbaine et rurale.

Une première lecture possible semblait indiquer que la police locale devait être considérée comme une partie de la police administrative; une deuxième, que les deux concepts seraient (au mois partiellement) autonomes.

Par ailleurs, cette seconde lecture aurait impliqué un rôle des autonomies locales également pour ce qui est des problèmes de Sûreté Publique de dimension exclusivement locale, à l'intérieur de leurs territoires respectifs.

Ces deux derniers thèmes ont été mis au point par la jurisprudence constitutionnelle des années quatre-vingt et quatre-vingt-dix, à partir au moins de la sentence de la Cour constitutionnelle n◦ 77/1987, qui a affirmé que la notion de "police locale urbaine et rurale" indique les compétences de police attribuées aux Communes par la législation de la première moitié du XX siècle sur la question des organismes locaux, et, en particulier, par le Décret Royal n◦ 297/1911 et par le Décret Royal n◦ 383/1934; tandis que la notion de "police administrative" dans le Décret du Président de la République n◦ 616 indique "une catégorie de fonctions ultérieures", caractérisées par leur côté accessoire par rapport aux fonctions conférées aux autonomies locales.

On peut donc en conclure que la police locale constitue une partie de la notion plus large de police administrative.

Ce qui est confirmé également dans la jurisprudence successive: par exemple, dans l'arrêté n◦ 115/1995, où l'on peut lire que "la <police locale urbaine et rurale> ne représente pas en soi une matière autonome… elle présente au contraire un caractère accessoire et instrumental par rapport à chaque matière à laquelle elle se rattache à chaque fois".

Dans l'arrêté n◦ 218/1988, la Cour Constitutionnelle a contribué ultérieurement à clarifier les concepts d'activité de Sûreté Publique et d'activité de police administrative: "les premières… concernent les mesures préventives et répressives destinées au maintien de l'ordre public et, par conséquent, elles se réfèrent aux activités intégrées traditionnellement aux concepts de police judiciaire et de Sûreté Publique (au sens strict du mot), les autres en revanche concernent les activités de prévention ou de répression destinées à éviter des dommages ou des préjudices qui pourraient être causés aux personnes ou aux choses au cours d'activités comprises dans les matières sur lesquelles s'exercent les compétences régionales (santé, tourisme, carrières et tourbières, etc.), sans que les biens ou les intérêts

protégés au nom de l'ordre public soient affectés ou mis en danger. En d'autres termes, afin de décider si un pouvoir déterminé rentre dans les compétences de police administrative qui ont été transférées ou déléguées aux Régions, il faut appliquer un double critère: a) vérifier si les fonctions de police qui sont contestées se réfèrent à l'une des matières transférées ou déléguées aux Régions; b) s'assurer que les intérêts ou les biens que l'on entend protéger avec les fonctions en question ne rentrent pas dans ceux qui sont compris dans le concept d'ordre public".

4. SUITE: EN PARTICULIER, DANS LE DECRET LEGISLATIF. N° 112/1998 ET APRES LA LOI CONSTITUTIONNELLE N° 3/2001

Une nette confirmation que l'on peut rattacher la notion de police locale à la police administrative provient également de ce que l'on a appelé la troisième régionalisation, c'est à dire la nouvelle et large attribution de fonctions aux autonomies locales décidée par le Décret législatif n° 112/1998: en ce qui nous intéresse ici, ce décret a, en substance, appliqué les principes affirmés par la Cour Constitutionnelle dans les arrêtés que nous avons rappelés.

Tout d'abord, déjà le fait que le Décret législatif n° 112 ait une partie, le Titre V, intitulé "police administrative régionale et locale et régime d'autorisations" est très significatif.

Mais encore plus significatives sont les définitions de "police administrative régionale et locale" et de "sûreté publique" (auxquelles il faut ajouter aussi la locution d'"ordre public") qui sont établies dans l'art.159 du décret: "1. Les fonctions et les rôles administratifs relatifs à la police administrative régionale et locale concernent les mesures destinées à éviter des dommages ou des préjudices qui pourraient porter atteinte aux sujets juridiques et aux choses au cours d'activités relatives aux matières dans lesquelles s'exercent les compétences, même déléguées, des régions et des organismes locaux, sans que ne soient affectés ou mis en ranger les biens et les intérêts protégés en fonction de

l'ordre public et de la sûreté publique. 2. Les fonctions et les tâches administratives relatives à l'ordre public et à la sûreté publique visées à l'article 1, alinéa 3, lettre l), de la loi du 15 mars 1997, n◦ 59, concernent les mesures préventives et répressives visant le maintien de l'ordre public, entendu comme l'ensemble des biens juridiques fondamentaux et des intérêts publics primaires sur lesquels est basée la vie en commun, ordonnée et civile au sein de la communauté nationale, ainsi que la sécurité des institutions, des citoyens et de leurs biens".

Que la police locale soit une activité de police administrative a été par la suite confirmé également par la réforme du Titre V de la Partie II^ de la Constitution del 2001.

La loi constitutionnelle n◦ 3/2001, là où elle a récrit l'art.117 de la Constitution, a prévu que l'Etat a l'exclusivité de la législation dans une série de matières, parmi lesquelles figurent aussi "ordre public et sécurité, à l'exception de la police administrative locale".

Il faut dire que la jurisprudence constitutionnelle a eu la possibilité de éclaircir également que la notion de police administrative dans la législation actuelle des autonomies locales n'est pas superflue.

En effet, la Cour Constitutionnelle a prouvé qu'elle était consciente du fait que la sûreté publique, envisagée dans un sens extensif, pourrait conduire à une compression excessive des pouvoirs des autonomies locales.

Par exemple, dans l'arrêté n◦ 290/2001, afin de mettre au point la notion d'ordre public et de sûreté publique contenue dans l'article.159 du Décret législatif n◦ 112), on affirme qu' "il est opportun de préciser que cette définition n'ajoute rien à la notion traditionnelle d'ordre public et de sûreté publique transmise par la jurisprudence de cette Cour, dans laquelle ce qui est réservé à l'Etat concerne les fonctions destinées en premier lieu à défendre les biens fondamentaux, comme l'intégrité physique ou psychique des personnes, la sécurité de la propriété et tout autre bien revêtant une importance primordiale pour l'existence même du Droit. C'est donc en ce sens qu'il faut interpréter la locution <intérêts publics primaires> employée dans l'art. 159, alinéa 2: non pas tous les intérêts publics dont s'occupe l'administration publique, mais seulement ces intérêts essentiels au

maintien d'une vie en commun civile et respectueuse des lois", et on ajoute qu'"une telle précision est nécessaire pour empêcher qu'un élargissement démesuré de la notion de sécurité et ordre public se transforme en une autorité prépondérante de l'Etat sur toutes les activités, ce qui ferait disparaître toute répartition des tâches entre les autorités publiques de police et les autonomies locales".

Or, la notion de police administrative, dans son acception de police administrative locale, sert de barrière de limitation en cas de lectures extensives de la notion de sûreté publique.

Comme on le constate, par exemple dans l'arrêté n◦ 407/2002: "En effet, il ne semble pas nécessaire dans ce but de vérifier, dans une perspective générale, si dans la législation et dans la jurisprudence constitutionnelle la notion de <sûreté publique> revêt une signification restrictive, car employée en hendiadys avec celle d' <ordre public>, ou au contraire si elle a une portée extensive, distincte de l'ordre public, ou liée à la protection de la santé, de l'environnement, du travail, et ainsi de suite. Il suffit en effet de constater que le contexte spécifique de la lettre h) du second alinéa de l'art. 117 – qui reproduit presque intégralement l'art. 1, alinéa 3 lettre l), de la loi n◦ 59 de 1997 – amène, en raison de la connexion textuelle avec <ordre public> et de l'exclusion explicite de la <police administrative locale>, et sur la base des travaux préparatoires, à une interprétation restrictive de la notion de <sûreté publique>. Celle-ci , en effet, selon une orientation traditionnelle de cette Cour, doit être envisagée, en opposition aux tâches de police administrative régionale et locale, comme secteur réservé à l'État relatif aux mesures inhérentes à la prévention des délits ou au maintien de l'ordre public".

Cette direction semble constante encore aujourd'hui: même au cours des dernières années, certaines décisions de la Cour Constitutionnelle semblaient confirmer une lecture extensive de la sûreté publique (par exemple, les arrêtés n◦ 222/2006 et 21/2010), mais elles ne semblent pas avoir renversé la position traditionnelle.

Enfin, il faut rappeler que, dans la législation actuelle, depuis que la réforme constitutionnelle de 2001 a fait disparaître ce que l'on appelait le parallélisme entre

pouvoirs législatifs et pouvoirs administratifs (les Régions avaient donc des pouvoirs administratifs dans les seules matières attribuées à leur autorité législative), et, en raison du nouvel énoncé de l'art.118 de la Constitution, affirmant le principe de subsidiarité, l'attribution réservée à l'Etat des tâches de Sûreté Publique et d'Ordre public ne vaut que pour les pouvoirs législatifs.

Si bien qu'il n'y aurait pas d'obstacles d'ordre constitutionnel à l'attribution (s'il le faut) de fonctions administratives sur les questions de Sûreté Publique même aux autonomies locales.

Cependant, jusqu'à maintenant, le législateur de l'Etat semble hésiter à décider dans ce sens: même le décret-loi. n° 92 de 2008, qui prévoyait une série de mesures visant à améliorer la sûreté publique, a en effet attribué de nouveaux pouvoirs non pas aux autorités locales mais bien au Maire "en tant qu'officier du Gouvernement".

En d'autres termes, ces pouvoirs sont bien exercés par le Maire: mais non pas comme chef de l'administration locale, mais plutôt comme fonctionnaire de l'Etat. Si bien que, en ce qui concerne les actes émanés ainsi, les organismes de l'administration de l'état conservent une série de pouvoirs qui sont particulièrement importants, et qui peuvent arriver même à l'annulation d'office.

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THE ADMINISTRATIVE POLICE AND PUBLIC SECURITY IN THE DISTRIBUTION OF RESPONSIBILITIES BETWEEN STATE AND LOCAL REGIONS

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Prof. Giuseppe TROPEA

INDEX

1. THE DEVELOPMENT OF THE NOTION BEFORE THE REFORMATION OF THE 5TH TITLE CONSTITUTION.

It is a commonly held opinion that the modifications to the structure of the public administration, connected to the establishment of the social State, have progressively led to

a reduction in the role of the administrative police thus allowing them to play a central role in ordinary development activities.

The concept that excludes an autonomous configuration of the administrative police has been confirmed by the law of the constitutional court, which has underlined the absence of a "separate" subject from the administrative police, that, on the contrary, is characterized by a secondary role, as opposed to a single subject that is referred to time after time (Constitutional court n. 77/1987;n. 218/1988; n.115/1995). In particular, according to the constitutional court, in order to decide if the administrative police can be responsible for a specific power that has been transferred or delegated to the regions, it is necessary to satisfy two criteria: a) verify whether the functions of the police reach the subject that has been transferred or delegated to the regions; b) verify that the interests to be protected by the relevant function are not included in the concept of public order (Constitutional court, n. 218/1988).

According to these outlines, therefore, the administrative police is nothing but a collection of activities that, in an originally less liberal and centrally organized system, were entrusted to the exclusive care of the Authority of public security, as part of a pervasive concept of public control over the activities of private entities.

However, with the progressive transfer of the administrative functions of the state to the local authorities comes a definitive outline of the conceptual limits of the administrative police. The transfer also of secondary functions, that concern all the preventive and repressive measures taken to avoid any damage, harm or disruption derived from the performance of activities covered and regulated under the specific matters assigned to the local authorities (article 9,d.P.R 24 July 1977,n. 616), does nothing but confirm the process of loss of former identity of the administrative police, which prompts the consideration of a non-existent judicial notion significant to the administrative police, or, at least, the non-recognition of an independent conceptual space.

Such an evolution of the concept of the administrative police has been confirmed by Article 158, comma 2, e 159, comma 1, from the D. Lgs.31 March 1998, n.112. On one

side there is assignment to regions and local authorities of functions and tasks of the administrative police in all matters assigned to them, and on the other side the content of the regional and local administrative police is outlined as a complex of functions intended to avoid any damage or harm that could be caused to legal entities by the performance of activities relating to matters resulting from the exercising of responsibilities, including those delegated to the regions and local authorities, without causing harm or putting at risk the assets and interests that are protected according to public order and public security.

In this way, the administrative police has come to be an important litmus test for identifying the impact of the principle of subsidiarity, both vertically and horizontally, bearing in mind past responsibilities included in the powers of the police and which are now subject to liberisation

In order to verify such issues, the development of constitutional law over recent years should be taken into consideration.

2. PUBLIC ORDER, SECURITY AND LOCAL ADMINISTRATIVE POLICE AFTER THE REFORMATION OF THE 5TH TITLE CONSTITUTION.

According to Art. 117, paragraph 2., let. h, of the Const., introduced by the reformation of the 5th Title Constitution of 2001, the State has legislative power over public order and security, excluding the local administrative police; furthermore, modified Art 118 entrusts state law with coordination between the State and Regions for, among other things, the matters referred to in Art 117, paragraph 2., let. H.

It has been asked whether the effect of these hypotheses can be to establish that the administrative police has somehow been elevated to the rank of an independent subject, susceptible to a specific legal framework. Furthermore, it does not appear to be clear how the management of the local administrative police, which has flowed back into the residual

responsibilities of the Regions in Art.117, paragraph 4., Const, can be reconciled with the power of the State to dictate the regulation of the fundamental principles in the event of interference with competing matters. Another question has been concerned with the difficult coordination between the letter h and the letter p of Article 117, which refer to how the State has exclusive authority as regards the fundamental functions of towns, provinces and cities: so if it was considered that one of them could include the local administrative police, the regional assignments would likely be substantially depleted.

It is true that even though we can recognize that the previous organization of responsibilities is still valid following the reformation of Title V, it often seems difficult to trace back certain functions among those of the administrative police or those concerning public safety and security. According to this perspective, the tools of a fair collaboration and coordination, of which Art 118, paragraph 3. Const. talks about, play a fundamental role, even if they have not been adequately exploited until now.

In any case, after the reformation in 2001, the first commentators together with the Constitutional Court, supported a strict interpretation of notions of public order and security. First of all, this interpretation was in accordance with the general thinking concerning changes in the criteria for distribution of legislative power between the State and regions that results in today's State responsibilities being very limited. Furthermore, this interpretation was specifically intended to avoid that public order and security could be seen to be of excessive scope, that is as transversal matters that legitimize an indiscriminate State invasion of exclusive and competitive regional responsibilities. Finally, this restrictive interpretation allows the adoption of rules that, as in the past, unlawfully harm constitutionally protected rights and liberties.

In this way the Constitutional court, with case n. 290 of 2001, states that the expression "primary public interests", used in Art. 159 of d.P.R. n. 112/1998 to define the functions and administrative roles relating to public order and security, must be understood to be not just any public interest which the public administration takes care of, but it

should be regarded as only those interests that are essential for maintaining an ordered civil society.

The question has been raised as to whether in cases of competing jurisdiction, the exclusive jurisdiction should prevail when regulating issues that have direct and immediate importance for the safety of people and their property, so that these facets of the State legislator would have jurisdiction to dictate not only the fundamental principles, but also detailed regulations.

Even in this case, the Court has – at least in the first years after the reformation of 2001 - contradicted this approach. In fact, it has ruled that the jurisdiction of the State according to Art. 117, paragraph 2, let. H, has a transverse character. Consider case n. 6/2004 which states that "the possible effects in terms of public order of the poor functioning of the energy sector" do not justify the provision of "planned limits to the regional powers", but rather they allow the Government to exercise substitute powers according to Art. 120 Const. (see also Const. Court, n.383/2005). Even with case n. 95/2005 giving a strict interpretation to the concepts of public order and security, with reference to some regional laws, by eliminating the obligation to have a document of medical fitness for personnel in charge of production and sale of food and for pharmacy personnel, it was believed that the exclusive legislative jurisdiction of the State according to Art. 117, paragraph 2, let. H, Const., was infringed.

3. ANALYSIS OF THE MOST RECENT JURISPRUDENCE OF THE CONSTITUTIONAL COURT. IN PARTICULAR: URBAN SECURITY

Such a trend has not been confirmed by recent decisions that have frequently favoured the criteria of so-called "prevalence", especially with regard to sectors connected to the prevention (by administrative means) of criminal behavior. It has in fact led to an

extension of cases considered under exclusive State jurisdiction, often to the detriment of regional responsibilities in matters concerning the local administrative police. It is well known, however, that there is a more general trend, as established by the developing case law on the subject of division of legislative responsibilities concerning environmental matters, in respect of which it has recently been highlighted that there is a "re-materialization" of the environment and the reemergence of a supreme "hierarchy" of the State law in regulating the environment as a "system".

With two cases, n.222 and n.237 of 2006, the Court has respectively declared that the jurisdictional dispute raised by the autonomous province of Bolzano against the Order of 9th September 2003 adopted by the Ministry for health for safeguarding the public against the risk of attack by potentially dangerous dogs, is unfounded. Instead, it has welcomed the government appeal against the law of the autonomous province of Trento that regulates the installation of certain gaming equipment in public places. In the first case, according to the Court, the measures taken by the State actually have the predominant aim of public order and security, in so far as the order aims to prevent crimes against the person, because it functions to safeguard the public from the risk of attack from animals that have been trained to be aggressive. In the second case, it is argued that in practice it is in effect specific state legislation that aims to prevent criminal behaviors connected to gambling.

It is clear that if such an approach should take root, the risk that the State legislation could have an invasive effect on the regional authorities could increase. However, this is in a context in which the constitutional case law discussed regional legislation, even in cases, ways and with limits from time to time allowed by the state law (eg. non-custodial measures or compulsory alternatives to detention, measures of an administrative character relating to public order and security, etc.)

In any case, the Constitutional Court has confirmed these assumptions in a situation that has, again, seen the State and the autonomous province of Bolzano in a jurisdictional dispute (case no. 129/2009). This time it dealt with a challenge to the

responsibility of the Commissioner in adopting measures (eg. Article 100 t.u.p.s.) to suspend any commercial activity which resulted in episodes of disturbance of the public order connected to the carrying out of that activity. According to the Provincial administration, the statutory provisions and those whose implementation would be entrusted to the President, in matters assigned to the jurisdiction of the autonomous Province, including those of public enterprises including the functions of public security, where it is not possible to identify a clear separation between duties of the local administrative police and interventions to protect public security. The court does not accept such argument, since the contrary opinion is that in this case there is a clear separation between the goals pursued by means of enacting the contested measure (public security and order) and matters of public enterprises within provincial jurisdiction.

Such an interpretation is substantially upheld in case no. 196/ 2009 on the subject of urban security. In this case, to be censored, again from the autonomous province of Bolzano, Art.6 of l.d.n. 92/2008, modified by Art. 54 t.u.e.l., since this provision, assigns to mayors as governmental officials, powers of public security and public order, it would put a strain on the responsibilities assigned to such sectors by special statutes and implementing regulations of the President of the autonomous Province. Furthermore, a jurisdictional dispute has also been raised relating to m.d. August 5th 2008 that, in defining the concepts of «public safety» and «urban security» provided for in Article 6 from l.d. n. 92/2008, it would infringe the primary legislative power of the Province in matters of «protection and preservation of history, art and popular culture», «protection of the landscape», «road systems», as well as secondary matters of «commerce», «public enterprises», and «public security».

According to the Court in new article 54 t.u.e.l. the powers exercisable by mayors can only be aimed at preventing and combating crime, and not concerned with carrying out the work of the administrative police in matters relating to jurisdiction of the Regions and the autonomous Province. The statute and the implementing regulations, have not changed «the nature of the powers conferred to the Presidents of the provinces, that remain as special duties of the administrative state that are assigned to them, without which it may be

inferred, with a kind of inverted parallelism between administrative and legislative functions, the ownership of the legislative powers of the Province in matters of public security, such as to prevent a shift of the state legislation in these matters».

Accordingly, the court seems to return to the traditional strict approach in matters of public order and security. Nevertheless, even in this case there clearly emerges a willingness to save the state legislation under contest. This occurs in a context , which is that of «living law» of the Order, in which the link with such a narrow concept of public order and security often does not exist. In this sense, the court seems to have taken a stance in favor of the argument that sees urban security as part of public order, public security «minor», rather than rejecting the paraphrasing that sees urban security as an intertwining and point of coordination between different jurisdictions, state and non-state, not only in a narrow sense, (e.g. security) in the prevention and repression of crimes, but also in a broad sense (e.g. safety) in promoting social cohesion. All this leads to establishing a potential undue removal of exclusive or competing regional responsibilities, in respect of matters that may well include urban security. Thought should be given to training and protection and safety at work, social services, cultural activities and education, businesses, and to urban planning and construction.

Furthermore, there is a problem of organization: it alludes to the compatibility with the current constitutional framework of the post of mayor or president of the provincial council, as government officials, an assumption on the basis of which the court has turned its arguments of a centralist nature. However, it appears evident how this discourse could be reversed: this puts in doubt the legitimacy of the old organizational structure, especially after the Reformation of the 5th Title Constitution, so most of the Court's arguments would in the end weaken.

However, with the existing difficulties in improving regional and local jurisdiction in matters of urban security, owing to the aforementioned interpretation of the Court, a more practicable way forward could be that of legislative intervention aimed at the implementation of Art. 118, paragraph 3. Const. However, there are fringes who believe

that the post of major as a government officer has faded, in the light of the inclusion of the local police as a fundamental function of each municipality, on the basis of Art. 21, paragraph 3, of law n. 42/2009 on the subject of fiscal federalism. With regards to this point, consider also Art. 2, paragraph 1, of the governmental l. d.d. dealing with the characterization of the fundamental functions of parts of local authorities and the "code for autonomous local authorities" (A.s. n. 2259) that, in addition to the local police, includes urban security among the fundamental functions.

More recently, the Constitutional Court, with case n. 226/2010, is back on the issue, with reference to the ability to establish the conditions under which towns may avail themselves of the cooperation of private organizations for control of the territory. According to the Regions, law n. 94/2009, implemented by Ministerial Decree August 8th 2009, would exceed the state limits for matters of "public order and security", set out in Art. 117, paragraph 2, let. H, Consitution. The ruling is partially in line with the previous case n. 196/2009, for the most part relating to the reporting of events that could bring harm to urban security. Another issue is raised with reference to "situations of social distress" , which is considered to be a spurious and eccentric part with respect to the *ratio* of the order, and traced back to social security that is within the residual regional duties. This case deserves to be viewed with a favorable opinion - at least on this point – because this i concept of "social distress", a steep bank compared to an inclination, is cultural before being judicial. In fact, the decision is contrary to the substitution of public security compared to social security that seems to characterize the most recent public policies in Italy (and beyond).

4. CONCLUSIONS: IS THE CONCEPT OF SECURITY A NEW TRANSVERSAL TOPIC?

Despite the importance of this stance, the most recent case law of the Constitutional Court continues to significantly support the potential impact of State legislation over regional responsibilities.

In fact, with case n. 21/2010, concerning regional law directed at simplifying the provisions that relate to procedures for installation activities inside buildings, the Court has stated that "the matter of security… does not end with the adoption of measures concerning the prevention and repression of crimes, but it includes the protection in the public interest of personal safety, and therefore the preservation of a good that needs uniform regulation throughout the national territory". In this case, therefore, we cannot trace back the presence of State law in matters of "public order and security", understood to be prevention and repression of crimes, but it seems to theorize a conception of security as a new transversal subject, understood to be "protection in the public interest of personal safety, and therefore…preservation of a good that needs uniform regulation throughout the national territory". The capacity for expansion inherent in this notion is clear: think of all the activities that could be considered potentially harmful so as to endanger personal safety well beyond the field of criminal cases.

Of course, this approach, together with the most traditionally restrictive approach is used to preserve the State jurisdiction, on the one hand by limiting "promotional" responsibilities and social cohesion of regional and local authorities, and on the other hand the inability to transform a "positive" connotation and well-being to the administrative police, linked to the transformations of the social state, that as we have previously observed, has affected the survival of the concept of the police as an administrative matter.

But maybe this could be just another indication of the deep crisis (restructuring?) in the model of a democratic and social State that the majority of Western countries have been going through for a long time.

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BIENS - PROPRIÉTÉS PUBLIQUES - APPORTS DEPUIS L'ENTRÉE EN VIGUEUR DU CODE GÉNÉRAL DE LA PROPRIÉTÉ DES PERSONNES PUBLIQUES

(2006-2010)

APPORTS DE L'ANNEE - 2011 - FRANCE

(Mars 2011)

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INDEX

L'entrée en vigueur du Code général de la propriété des personnes publiques (CGPPP) marque la consécration d'une transformation importante de l'approche des propriétés publiques. Alors qu'elles étaient jusqu'alors perçues avant tout comme des biens publics par leur destination, elles sont désormais envisagées davantage comme des biens

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publics par la qualité de leurs propriétaires. Ce mouvement d'appropriation toutefois pour prendre sa pleine extension se heurte à une résistance domaniale c'est à dire au maintien d'un particularisme lié à l'affectation de ceux de ces biens rangés dans le domaine public et au-delà de la nature publique de la personne propriétaire .

1. LE DÉVELOPPEMENT DE L'APPROCHE PATRIMONIALE

Cet essor a été consolidé et accéléré par l'adoption du CGPPP. La dénomination retenue d'abord , aux lieu et place de l'ancienne appellation de code du domaine, révèle la volonté de ranger dans le champ du droit de propriété tous les biens rattachés aux personnes publiques. En abandonnant le vieux nom de domaine , issu de la Révolution française, pour celui de propriétés publiques le législateur souligne qu'à côté de l'appropriation privée existe une appropriation publique .

Cette codification ensuite n'est pas à droit constant même si d'une part, tout en déplaçant le curseur en faveur du domaine privé, son architecture reprend la distinction héritée de V. Proudhon (Traité du domaine public 1832) entre domaine public et domaine privé ainsi que l'esprit de ses principaux critères tels qu'ils ont été formulés par la jurisprudence et si d'autre part l' évolution du régime dans le sens d'une meilleure gestion et valorisation du domaine était depuis plusieurs années en cours . Ce faisant le législateur reprend la main n'hésitant pas ,même dans quelques cas, comme la circulation des biens domaniaux publics entre personnes publiques, à contredire la jurisprudence antérieure. Il consacre la réorientation du droit domanial sur l'idée de gestion alors que l'ancien cap était plutôt l'ordre public .

En ce qui concerne les critères de distinction l'article L.2111-1 retouche leur formulation avec la volonté d'une part de réduire le champ de la domanialité publique et d'autre part de renforcer la place du domaine public affecté à l'usage direct du public en durcissant les conditions pour qu'un bien affecté à un service public fasse partie du domaine public au point que le premier épaule parfois le second (voir CE, 22 octobre 2010, M. Pustwo :AJDA 2010. 562, note P.Caille ; également C. Lavialle, Que reste-t-il de la jurisprudence Société Le Béton ? RFDA 2010, p. 533). Le juge administratif toutefois

prend son temps pour appliquer la lettre du nouveau dispositif car « *les dispositions de l'article L. 2111-1 ne sauraient avoir pour effet de faire sortir du domaine public des biens qui en faisaient partie avant leur entrée en vigueur* » (CAA Lyon, 29 avril 2008, Sté Boucherie André : AJDA 2008. 2338, note J. Andréani).

Ce décalage apparaît d'abord dans la mise en œuvre du critère de l'affectation au service public .Ainsi l'aménagement du bien à la mission de service public doit désormais, ce qui apparaît plus restrictif, être indispensable et pas seulement spécial . Or les deux adjectifs se retrouvent encore utilisés dans les arrêts sans conséquence apparente puisque, quel que soit celui employé, c'est le juge administratif qui en définitive qualifie les faits.

L'article L.2111-1 remet aussi en cause, pour des raisons notamment de sécurité juridique, la théorie jurisprudentielle de l'aménagement virtuel posée par l'arrêt du Conseil d'Etat du 6 mai 1985, Association Eurolat (Lebon 141 ; AJDA 1985.620, note E. Fatôme et J. Moreau ; RFDA 1986. 26, concl. B. Genevois) qui implique l'incorporation par anticipation au domaine public d'une dépendance dont l'aménagement était programmé. Le recours au présent du subjoonctif signifie que l'aménagement doit être réalisé et non à venir. « *Le domaine public est constitué de biens appartenant aux personnes publiques…affectés à un service public pourvu qu'en ce cas ils fassent l'objet d'un aménagement indispensable à l'exercice des missions de service public* » . Là encore le conseil d'Etat ne se précipite pas pour infléchir sa jurisprudence . Un arrêt du 21 décembre 2006 Centre de rééducation cardio-respiratoire de Menton (req. n°297448) ainsi poursuit la ligne engagée par la jurisprudence antérieure .

En revanche le Conseil d'Etat suit le législateur lorsque ce dernier dans l'alinéa 2 de l'article L.2111 réduit le jeu de la théorie de l'accessoire en exigeant que l'incorporation sur son fondement d'un bien au domaine public ne concerne que ceux « *concourant à l'utilisation d'un bien appartenant au domaine public* ». Ainsi a t-il jugé dans un arrêt de section du 28 décembre 2009, Brasserie du théâtre (AJDA 2010.841,note O. Frérot ; Dr.adm. 2010, n° 22 , note F. Melleray) que « *même si les locaux d'une brasserie sont situés dans le même immeuble que le théâtre municipal et même si la société dispose de communications internes permettant de fournir les prestations qu'elle décide d'assurer au*

buffet ou à la buvette du théâtre, ces seules circonstances ne permettent pas de les regarder comme l'un des éléments de l'organisation d'ensemble du théâtre et par suite comme étant affectés au service public culturel de la commune de Reims ou comme un accessoire du domaine public communal » (dans le même sens CE, 11 décembre 2008, Perreau-Polier :Lebon T. 734). La jurisprudence , il est vrai, sous l'influence de la doctrine depuis 1990 avait commencé à évoluer en ne se contentant plus souvent du seul lien physique pour faire jouer la domanialité publique par accessoire et en exigeant aussi un lien fonctionnel .

Les critères ainsi redéfinis ne valent, autre nouveauté, que pour le domaine public immobilier. En effet le législateur, constatant l'inadéquation de ceux-ci aux meubles , a choisi de façon pertinente d'élaborer un critère ad hoc pour les biens mobiliers susceptibles d'être rangés dans le domaine public dont il consacre au passage l'existence que certains de loin en loin contestaient . De fait le CGPPP retient une définition qui s'appuie sur le point commun aux meubles incorporés dans ce domaine par la jurisprudence antérieure telle qu'elle s'est développée depuis la deuxième moitié du XIX° siècle à savoir l' intérêt particulier qu'ils présentent pour la culture . L'article L. 2112-1 y classe ainsi ceux qui offrent « *un intérêt public du point de vue de l'histoire, de l'art, de l'archéologie, de la science ou de la technique …* ». Une tête maorie naturalisée propriété d'un musée en fait à ce titre partie (CAA Douai ,24 juillet 2008, Commune de Rouen : AJDA 2008. 1896, concl. J. Lepers ; JCP Adm. 2008. 2245, note C. Saujot).

Le législateur enfin s'est lancé à la suite de la reformulation desdits critères dans une énumération non limitative des principales dépendances immobilières des deux domaines qui elle, de par son caractère singulier, n'est pas susceptible d'interprétation et doit être strictement appliquée par le juge . Ces dispositions révèlent que l'extension du domaine privé ne résulte pas seulement de la nouvelle définition des critères mais aussi du basculement dans celui-ci de catégories entières de dépendances dont certaines répondent pourtant aux critères indiqués. Seuls en effet l'ensemble des lais et relais marins sont incorporés au domaine public maritime alors qu'ils ne l'étaient qu'en partie jusqu'alors (L.2111-4). Pour le reste, outre les chemins ruraux déjà rangés dans le domaine privé, le CGPPP y fait entrer désormais les immeubles à usage de bureaux de l'ensemble des personnes publiques et pas uniquement ceux de l'Etat (L.2211-1), ce qui représente un

changement considérable qui posera sans doute à terme des problèmes de définition, ainsi que les bois et forêts des personnes publiques relevant du régime forestier (L.2211-2) .Dans ce dernier cas le législateur confirme la jurisprudence du Conseil d'Etat ONF/Abamonte du 28 novembre 1975 (Lebon 602 ; D.1976.356, note J-M. Auby ; Rev. adm. 1976. 36, note F. Moderne).

En ce qui concerne maintenant le régime du domaine public le CGPPP, dans un souci de valorisation de ce patrimoine, a d'abord organisé les modalités jusqu'alors souvent informelles de transferts de gestion des biens domaniaux publics entre personnes publiques. L'article 2123 dans ses différents alinéas définit le régime des transferts liés à un changement ou à une superposition d'affectation . En principe une convention doit régler les modalités techniques et financières de ces dévolutions . Elles sont effectivement à titre onéreux .L'alinéa 6 de cet article précise que le transfert de gestion prévu aux alinéas 3 à 5 donne lieu à une indemnisation à raison des dépenses ou privation de revenus qui peuvent en résulter pour la personne dessaisie. Réciproquement si la personne publique propriétaire reprend son bien avant le terme prévu, la bénéficiaire pourra aussi, sauf clauses conventionnelles contraires, prétendre à une indemnité égale, sous déduction de l'amortissement effectué, aux montants des dépenses exposées pour les équipements et installations réalisées conformément à l'affectation.

Le régime de la protection du domaine public a été aussi amendé afin qu'il n'entrave pas sa gestion . Si dans cette perspective le principe d'inaliénabilité a été réaffirmé par l'article L.3111-1, il a ensuite fait l'objet d'aménagements. Cette règle n'ayant pas en effet de valeur constitutionnelle peut être écartée par la loi. Le Conseil constitutionnel a en ce sens validé une disposition de la loi du 8 décembre 2009 (Cons. const. n° 2009-594 DC 3 décembre 2009) qui transférait gratuitement la propriété des infrastructures de transport de la région Ile de France du Syndicat des transports d'Ile de France à la Régie autonome des transports parisiens (cf F. Hoffmann, « La propriété publique à l'épreuve de la circulation des biens entre personnes publiques »,Dr. adm., n° août-septembre 2010). Cette circulation qui permet de confier à la personne la mieux placée la gestion du bien doit être facilitée dans la mesure où le législateur « *ne prive pas de*

garanties légales les exigences constitutionnelles qui résultent de l'existence et de la continuité des services publics ».

En premier lieu l'inaliénabilité ne vaut donc qu'entre personnes publiques. L'article L. 3112-1 et 2 dispose en effet : « *Les biens des personnes publiques qui relèvent de leur domaine public peuvent être cédés à l'amiable ou échangés, sans déclassement préalable, entre ces personnes publiques lorsqu'ils sont destinés à l'exercice des compétences de la personne publique qui les acquiert et relèveront de son domaine public* ».

En second lieu l'inaliénabilité, traditionnellement comprise comme empêchant la constitution de droits réels civils sur le domaine public, ne l'interdit plus car l'article L.2122-4 autorise l'établissement de servitudes « *par conventions passées entre les propriétaires(qui) peuvent grever des biens des personnes publiques relevant du domaine public dans la mesure où leur existence est compatible avec l'affectation…* ».

En troisième lieu l'article L.2141-2 du code introduit au profit de l'Etat et de ses établissements publics une procédure de déclassement anticipé d'un immeuble relevant du domaine public artificiel qui permet, dès que sa désaffectation a été décidée, sur la base d'un déclassement simplement formel d'aliéner le bien alors même qu'il continuera à être utilisé conformément à son affectation. L'acte de vente toutefois doit stipuler que celle-ci sera résolue de plein droit si la désaffectation n'est pas intervenue dans un délai maximum de trois ans . Ces nouveautés visent à assurer une plus grande souplesse dans la gestion des dépendances du domaine public afin d'en optimiser l'exploitation .

Le CGPPP dans la même logique a codifié la jurisprudence et les lois relatives aux occupations privatives du domaine public. Celles-ci constituent l'instrument principal de valorisation du domaine public traité là comme un patrimoine productif dans la mesure où il permet à des opérateurs économiques de capter la clientèle importante de ceux qui l'utilisent. Les personnes publiques ont donc intérêt à attirer des entreprises sur leur domaine public car elles y investiront, l'aménageront et leur paieront des redevances d'occupation. Toute occupation privative donne lieu en effet , rappelle l'article L.2125.1, au

paiement d'une redevance qui tient compte des avantages de toute nature procurés aux titulaires des autorisations. Ce sera le cas d'une dont le montant comporte une part fixe et une part variable contrepartie des avantages conférés (CAA Versailles, 15 octobre 2009, EDF : Contrats et marchés publics 2010.39, obs. F. Llorens) . Les exceptions au principe de gratuité étaient rares . Une loi récente n°2009-526 du 12 mai 2009, codifiée à l'alinéa 2, leur a ajouté l'occupation privative par des associations à but non lucratif qui concourent à la satisfaction d'un intérêt général .

Ces occupations toutefois ne peuvent être que temporaires et précaires. C'est dire que les dérogations législatives, reprises par le CGPPP, conférant des droits réels à certains occupants en réalité ne leur délivraient que des droits réels administratifs et non civils de sorte qu'elles se contentaient, ce qui est déjà beaucoup, de donner une valeur à leurs droits qui devenaient, sous certaines conditions, cessibles donc monnayables et hypothécables . Leur suppression avant l'échéance du terme dans l'intérêt général demeurait et demeure possible contre le versement d'une indemnité couvrant le préjudice direct, matériel et certain né de l'éviction anticipée.

Le CGPPP et la législation subséquente ont simplement élargi ce dispositif. D'abord la capacité à délivrer les autorisations de l'article L. 2122 alinéa 5 et ss a été ouverte aux collectivités territoriales (art. L. 2122-20) alors que l'Etat de son côté et les chambres consulaires ont obtenu par la loi n°2010-853 du 23 juillet 2010 la faculté de conclure des baux emphytéotiques administratifs, compétence jusqu'alors réservée aux seules collectivités territoriales. Ensuite les occupants du domaine public de l'Etat ont également acquis par l'article 121.1 de la loi n° 2009-526 du 12 mai 2009 (devenu l'article L.2122-13) le droit de réaliser des constructions en ayant recours pour leur financement au crédit-bail (pour une analyse critique des divers régimes d'occupation cf P. Delvolvé, Les dispositions relatives aux droits réels sur le domaine des personnes publiques : l'incohérence, RFDA 2010, p . 1125).

Le Conseil d'Etat dans un arrêt Société Jonathan loisirs du 31 juillet 2009 (Lebon T 739 ; BJCP 2009. 482, concl. N. Boulouis) a rapproché sur un point du régime législatif dérogatoire des autorisations celui de droit commun des autorisations contractuelles non

constitutives de droits réels administratifs . Il a en effet jugé, tranchant une controverse, que le co-contractant victime d'une résiliation dans l'intérêt général « *est en droit d'obtenir réparation du préjudice direct et certain résultant de la résiliation de la convention d'occupation domaniale avant son terme tel que la perte de bénéfices …et des dépenses exposées pour l'occupation* ». En revanche la non cessibilité de son titre interdit de réparer le dommage lié à la valeur que celui-ci peut engendrer par exemple en étant le support d'un fonds de commerce . Egalement le Conseil d'Etat a jugé qu'un contrat portant occupation du domaine public non constitutif de droits réels n'était pas irrégulier par le seul fait qu'il ne fixe aucune durée à l'occupation (CE, 5 janvier 2009, Association Sté centrale d'agriculture,d'horticulture et d'acclimatation des Alpes-Maritimes : Lebon 20 ; Dr. Adm. 2009, n° 53, note F. Melleray ; RJEP 2009 ,n° 42, note C. Maugüé ; BJCP 2009. 224, concl. N. Escaut, note R. Schwartz).

En ce qui concerne enfin le régime du domaine privé qui s'applique désormais à davantage de dépendances le CGPPP l'a peu fait évoluer comme si cette extension à elle seule suffisait . La principale nouveauté a été de reconnaître que les immeubles à usage de bureaux appartenant à l'Etat peuvent être aliénés alors qu'ils continuent à être utilisés par ses services. Dans ce cas l'acte d'aliénation comporte des clauses permettant de préserver la continuité du service public (article L .3211-2). Cette solution vaut aussi pour les établissements publics administratifs de l'Etat (article L.3211-13).

La jurisprudence en revanche a évolué pour maintenir le principe d'application du droit privé à ce domaine sous peine de fragiliser son élargissement . Rappelons que le Conseil d'Etat dans un arrêt du 5 décembre 2005 Commune de Pontoy (Lebon 548 ; BCL 2/06, p.96, concl. E. Glaser, obs. B. Poujade) avait déplacé le centre de gravité de ce régime vers le droit public en jugeant que « *la juridiction administrative est seule compétente pour connaître des demandes d'annulation d'une délibération d'un conseil municipal ou d'un arrêté du maire , même si l'objet de ces décisions est d'autoriser ou de passer un contrat portant sur la gestion du domaine privé de la commune et n'impliquant aucun acte de disposition de celui-ci* ».

Cette extension unilatérale de la compétence du juge administratif a été controversé de sorte que le Conseil d'Etat a de lui-même saisi le Tribunal des conflits pour qu'il tranche cette difficulté. Ce dernier est revenu sur la solution adoptée par le Conseil d'Etat et a fait retour à la position traditionnelle où l'acte de gestion du domaine privé est considéré comme un acte patrimonial . Il a en effet jugé dans une décision du 22 novembre 2010 (AJDA 2010. 2288, note C. Biget ; JCP Adm 2011. 2041 note J-G Sorbara) que « *la contestation par une personne privée de l'acte, délibération ou décision du maire, par lequel une commune, gestionnaire du domaine privé, initie avec cette personne, conduit ou termine une relation contractuelle, quelle qu'en soit la forme, dont l'objet est la valorisation ou la protection de ce domaine et qui n'affecte ni son périmètre ni sa compétence, ne met en cause que des rapports de droit privé et relève à ce titre de la compétence du juge judiciaire ;qu'il en va de même de la contestation concernant des actes s'inscrivant dans un rapport de voisinage* ». Egalement dans le sens de la compétence du juge judiciaire le même tribunal a décidé conformément là à une jurisprudence séculaire que la gestion du domaine privé n'était pas une activité de service public (T. confl., 15 janvier 2007, Mme Ourahmoune : Lebon 591).

Enfin dans une réponse à une QPC (Cons. const. n° 2010-67/86 QPC Régions Centre et Poitou-Charentes : JCP A 2011. 2002, note P.Yolka ; Dr. Adm. 2011. n° 30, note J. Marchand) du 17 décembre 2010 le Conseil constitutionnel a décidé qu'une disposition législative transférant à l'Association nationale pour la formation professionnelle des adultes à titre gratuit et sans aucune condition ou obligation particulière des biens immobiliers appartenant à l'Etat…méconnaît la protection constitutionnelle de la propriété des biens publics . Il confirmait ainsi une position adoptée dès 1986 dans sa décision sur les privatisations d'entreprises publiques afin de préserver la valeur des propriétés publiques (Cons. const. n° 86-207 DC des 25 et 26 juin 1986 ; AJDA 1986. 575, note J. Rivéro).

2. LA RÉSISTANCE DOMANIALE

Cette résistance se révèle dès la lecture du plan du CGPPP qui est en effet construit sur la distinction issue de V. Proudhon des deux domaines comme si par son organisation interne le législateur avait voulu faire ressurgir sous la propriété publique le domaine . Cette

résilience se manifeste de deux façons : d'abord à travers le maintien de prérogatives étatiques sur l'ensemble des propriétés publiques, ensuite par la conservation d'un particularisme du régime de ces biens au regard des évolutions actuelles du droit positif .

2.1. Le maintien des prérogatives domaniales de l'Etat

La première prérogative est celle dont l'Etat dispose sur le domaine public appartenant aux autres personnes publiques et qui peut apparaître comme une survivance de la propriété éminente . Elle est susceptible d' être mise en œuvre en premier lieu par le législateur qui, en raison de la non constitutionnalisation de la règle d'inaliénabilité, est compétent pour réaliser unilatéralement des transferts de propriétés publiques, y compris celles incorporées au domaine public, non seulement du patrimoine de l'Etat à ceux des autres personnes publiques mais aussi entre les patrimoines de ces dernières en dépit du principe de libre administration des collectivités territoriales . Le Conseil constitutionnel a ainsi eu l'occasion de valider par la décision précitée du 3 décembre 2009 un transfert d'infrastructures de transport ferroviaire :

« *Considérant que le principe d'égalité devant la loi et les charges publiques ainsi que la protection du droit de propriété, qui ne concerne pas seulement la propriété privée des particuliers mais aussi la propriété de l'Etat et des autres personnes publiques, résultent, d'une part, des articles 6 et 13 de la Déclaration de 1789 et d'autre part, de ses articles 2 et 17 ; que le droit au respect des biens garanti par ces dispositions ne s'oppose pas à ce que le législateur procède au transfert gratuit de dépendances du domaine public entre personnes publiques ; Considérant que ces transferts ne portent aucune atteinte à la libre administration des collectivités territoriales qui sont membres du Syndicat des transports d'Ile de France* ».

Une seconde prérogative des autorités administratives étatiques a été consacrée par le CGPPP malgré les critiques que la doctrine lui a adressées depuis sa reconnaissance par l'arrêt du Conseil d'Etat du 16 juillet 1909 Ville de Paris (Lebon 707, concl. Teissier ; S.1909. III . 97 , note critique M. Hauriou) jusqu'à la période contemporaine . Le législateur en effet a donné raison au Conseil d'Etat en conférant expressément à l'Etat la

compétence de modifier unilatéralement l'affectation des biens domaniaux publics appartenant aux autres personnes publiques . L'article L.2123-4 dispose en effet que « *lorsqu'un motif d'intérêt général justifie de modifier l'affectation de dépendances du domaine public appartenant à une collectivité territoriale, un groupement de collectivités territoriales ou un établissement public, l'Etat peut…procéder à cette modification en l'absence d'accord de cette personne publique* ». Toutefois pour tenir compte de la logique de valorisation des biens publics et dans un souci de protection de la qualité de propriétaires des personnes publiques l'alinéa 6 de cet article ajoute que dorénavant ce transfert forcé de gestion donnera lieu à « *indemnisation à raison des dépenses ou de la privation de revenus qui peuvent en résulter pour la personne dessaisie* ».

Un récent arrêt du Conseil d'Etat du 23 décembre 2010 Ministre de l'écologie, du développement et de l'aménagement durables (JCP Adm. 2011. 2044, note P. Yolka) renforce les pouvoirs du préfet, représentant de l'Etat, sur les parties du domaine public protégées par le régime des contraventions de grande voirie . Il s'agissait de savoir, lorsque l'occupation sans titre du domaine public donne lieu à l'édification d'un ouvrage public, qui est compétent pour décider, le cas échéant, sa démolition étant entendu que, hors cette hypothèse, cette compétence appartient au juge, en principe administratif (CE, 29 janvier 2003, Syndicat départemental de l'électricité et du gaz des Alpes-maritimes : RFDA 2003. 477, concl. C. Mauguë, note C. Lavialle) et exceptionnellement judiciaire (T. confl., 6 mai 2002, Epoux Binet : AJDA 2002. 1129, note P. Sablière ; CJEG 2002.646, note B. Genevois). Le Conseil d'Etat a jugé en l'espèce que l'appréciation de la nécessité d'ordonner la destruction dudit ouvrage relève du préfet : « *que c'est au seul préfet qu'il appartient d'apprécier si une régularisation de la situation de l'ouvrage public demeure possible et si sa démolition entraînerait, au regard de la balance des intérêts en présence, une atteinte excessive à l'intérêt général, soit avant d'engager la procédure de contravention de grande voirie en transmettant au juge le procès-verbal, soit après l'engagement de la procédure dont il peut se désister* » .

Enfin il convient de relever le caractère toujours très particulier du domaine public maritime naturel, aussi bien en métropole qu'outre-mer . Il demeure une propriété exclusive de l'Etat et reste soustrait, avec le domaine public fluvial naturel, au régime législatif

dérogatoire des occupations privatives constitutives de droits réels administratifs (article L. 2122-5).

2.2. Le maintien d'un particularisme domanial

Le CGPPP met fin à une première controverse doctrinale issue notamment mais pas seulement d'une jurisprudence qui a pu parfois paraître hésitante quant à la possibilité d'user de voies d'exécution forcée contre les personnes publiques qui ne règlent pas leurs dettes. Lorsqu'un particulier est défaillant ses biens peuvent être saisis. Il n'en allait pas de même pour les biens appropriés par les personnes publiques en raison des privilèges attachés à la qualité publique de la personnalité juridique . L'article L.2311-1 consacre formellement la jurisprudence dominante antérieure en affirmant que « *les biens des personnes publiques sont insaisissables* ». La concision de la disposition met fin à toute interprétation conduisant à exclure de son champ d'application certains biens tels ceux des établissements publics industriels et commerciaux comme cela a pu un moment être soutenu .

La jurisprudence de son côté a eu ensuite l'occasion de trancher solennellement là encore en faveur du particularisme domanial deux débats portant sur la nécessité ou la possibilité d'utiliser certains procédés de gestion ou d'aliénation des propriétés domaniales. Un concerne l'obligation de recourir à des procédés de publicité et de mise en concurrence avant de passer un contrat portant occupation du domaine public qui par ailleurs ne délègue pas à l'occupant la gestion d'un service public à celui-ci . Le CGPPP n'a pas consacré cette exigence pourtant aujourd'hui introduite dans les procédures de passation de nombreuses catégories de contrats administratifs sous la pression du droit communautaire et réclamée par de nombreux auteurs . Le Conseil d'Etat, dans un considérant de principe de son arrêt Ville de Paris rendu par la Section du contentieux le 3 décembre 2010 (Dr. Adm. 2011, n° 17, note F. Brénet et F. Melleray) a maintenu le caractère non formaliste et donc dérogatoire de la procédure de passation des concessions domaniales. Il a en effet considéré qu' *« aucune disposition législative ou réglementaire ni aucun principe n'imposent à une personne publique d'organiser une procédure de publicité préalable à la délivrance d'une autorisation ou à la passation d'un contrat d'occupation du domaine public, ayant dans*

l'un ou l'autre cas pour seul objet l'occupation d'une dépendance ; qu'il en va ainsi même lorsque l'occupant de la dépendance domaniale est un opérateur sur un marché concurrentiel ».

Un second débat a été tranché par le Conseil d'Etat dans un sens conforme à son arrêt controversé du 3 novembre 1997 Commune de Fougerolles (Lebon 391 ; RFDA 1998. 12, concl. L. Touvet ; AJDA 1997.1010, note L. Richer). Il s'agissait de savoir si une collectivité territoriale peut céder pour un franc ou euro symbolique ou en-dessous de sa valeur une propriété publique en contradiction d'une part avec la nécessité d'assurer , comme nous l'avons noté, la protection de son droit de propriété et d'autre part avec l'article L.1511-3 du CGCT adopté postérieurement qui plafonne le montant des aides octroyées aux entreprises par les collectivités territoriales notamment sous forme de rabais sur les prix de vente . Dans son arrêt du 25 novembre 2009 Commune de Mer (AJDA 2010. 51, note P. Yolka ; Dr. Adm. 2010. n° 2 et n°23 , note F. Melleray ; Contrats Marchés publ. 2010. n° 41, note G. Eckert ; JCP Adm 2010. 2091, note C. Chamard-Heim), reprenant l'esprit de sa décision de 1997, il valide, avec une formulation qui a pu être critiquée, la vente d'un immeuble communal non à une entreprise mais à une association à un prix inférieur à celui du marché « *lorsque la cession est justifiée par des motifs d'intérêt général et comporte des contreparties suffisantes* » (dans le même sens concernant la cession gratuite d'un terrain à un particulier : CAA Marseille , 22 novembre 2010, Ville de Marseille : req. n° 08MA03509). La spécificité du domaine permet son instrumentalisation au service des missions d'intérêt général des personnes publiques.

La Cour européenne des droits de l'homme vient enfin dans un important arrêt de sa Grande chambre du 29 mars 2010, Depalle c/ France (RFDA 2010.543, note R. Hostiou) de donner quitus au régime français de la domanialité publique en ce qu'il interdit pour les occupants privatifs la possibilité d'acquérir des droits réels civils sur le domaine public et permet de les en déloger, le cas échéant, sans indemnité avec obligation de remettre les lieux en l'état lorsque leurs titres ne sont pas renouvelés . Alors même qu'elle reconnaît la valeur d'un bien à la maison des requérants, la Cour considère que l'Etat a pu , compte tenu de son implantation sur le domaine public maritime, réglementer son usage au point de refuser le renouvellement de leur titre d'occupation, de les en expulser et de la

détruire sans qu'il y ait eu en l'espèce privation de propriété au sens de la seconde phrase du 1° alinéa de l'article 1 du Protocole n° 1 de la Convention européenne des droits de l'homme . L'exigence de remise en état des lieux consécutive au non renouvellement du titre d'occupation des requérants est justifiée par la volonté d' « *encourager le libre accès au rivage (et le) souci d'une application cohérente et plus rigoureuse de la loi Littoral* » . Elle est donc un moyen proportionné au résultat recherché. On peut se demander toutefois si la même solution aurait prévalu si la maison avait été implantée sur une dépendance du domaine public moins consacrée que le domaine public maritime naturel .

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STATE ASSETS (PUBLIC OWNERSHIP) IN THE FEDERAL REPUBLIC OF GERMANY

ANNUAL REPORT - 2011 - GERMANY

(July 2011)

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1. LEGAL PROVISIONS

A characteristic of state assets in Germany is their lack of systematic statutory regulation. The Constitution of the Federal Republic of Germany—the *Grundgesetz für die Bundesrepublik Deutschland (GG)*—does not contain a general state assets law, just like its predecessor, the so-called Weimar Constitution of 1919. There are but scattered sections concerning separate and specific issues of the topic. Efforts on creating a general regulation did not lead to success. Due to its federal system, Germany consists—apart from the federal level as a whole (hereinafter referred to as Federation = *Bund)*—of sixteen constituent states (*Länder*), each of which has a constitution of its own. The aforesaid deficiency of an encompassing statute regulating the state assets is present in both the constituent states and the Federation.

The *Gundgesetz* contains state assets rules fragmentarily. The articles 134, 135, 135a concern the transition of the pre-constitutional[3] assets into the estate of the *Bund*, the *Länder*, the local authorities or other public corporations. Art. 89 (1) and art. 90 (1) of the *Grundgesetz* determine the *Bund* as the owner of the waterways, highways and roads of the former German *Reich* (Empire).

Below the constitutional level, a major legal framework for state assets both of the *Bund* and the *Länder* is established by the respective budgetary law. It provides, inter alia, the terms and conditions under which state assets shall be administered and can be privatised or alienated. Besides, there are innumerable non-constitutional statutes regulating separate and specific issues.

[3] I. e. the time before May 24, 1949 (effective date of the *Grundgesetz*) concerning primarily the assets of the former German Reich.

2. STATE ASSETS SYSTEMATICS

1.1 Distinction between the two main forms of state assets

In German law, there is a generally accepted classification of state assets which can be traced back to *Lorenz von Stein*'s idea of a dualism in the state's asset base.[4] According to this dichotomy, state assets are differentiated into fiscal assets and administrative assets:

— Administrative assets encompass the entire property supplying the state with the resources necessary to accomplish its public tasks and to comply with its public obligations.[5]

— Fiscal assets do not serve public purposes immediately. In many cases they are "dormant capital" which can help meeting the implementation of the state purposes in the future.

The distinction frequently proves difficult, especially because there is a fluent passage and an overlapping between the two concepts. Hereafter, the outlining of examples and legal consequences may provide a clearer comprehension of the two different categories.

1.2. Administrative assets

The components forming the administrative assets have the distinctive feature of directly serving a public mission by means of physical utilisation. The purpose to be answered is determined by an act of dedication *(Widmung)* carried out by the respective proprietor (i.e. the Federation *[Bund]* or the constituent state *[Land]*). The specific dedication legally binds the proprietor to the declared purpose.

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4 *Lorenz von Stein*, Lehrbuch der Finanzwissenschaft (Finance Textbook), 1871, p. 154 ff.

5 The "state inventory" according to *Paul Laband*, Das Staatsrecht des Deutschen Reiches (Constitutional Law of the German Empire), vol. II, 1891, p. 854.

The dedication may be subject to statutory regulation, though this is not necessary. It may be done in a formal way, as for instance the dedication of a street to public use by an administrative act. An object can be dedicated, however, by implied conduct as well. An official vehicle or building, for example, is subjected to the public purpose by simply being taken into use.

Within the administrative assets there is a subdivision into internal and external administrative utilisation:

— internal administrative assets serve to accomplish administrative tasks within the administration;

— external ones are placed at the disposal of the public for the specific purpose delineated by the dedication. Examples of external administrative assets are public streets and squares or schools, museums, theatres, hospitals, etc. It is the state's obligation to ensure the public access to these institutions.

1.3. Fiscal assets

Fiscal assets bear merely a mediate relation to public tasks and duties. Here again a subdivision is made:

— The first group contains the entirety of economically utilised assets which improve the functioning and efficiency of the state's actions, thus enabling the state to pursue objectives of structural and social policy. Examples are publicly owned companies, stocks, cash and bank balances or loan claims. In this regard the state competes with the private economy sector; a fact which runs the risk of having a significant effect on the constitutional commitment to free enterprise and fair competition.

— The second group of fiscal assets comprises real estate (e.g. forests) and movable property as long as they have not been dedicated to a specific public use.

1.4. State assets under civil law

The issue of ownership both of the fiscal and the administrative assets itself is regulated by German civil law. In this respect, the state or another public corporation is the owner, tenant, hirer, etc. of its assets just as a private person would be. As to the administrative assets, however, public law supplements and superimposes the strict application of the civil law as far as the commitment to the specific public purpose or duty is concerned.

3. STATE ASSETS DEVELOPMENTS

3.1. Financing function of fiscal assets

In comparison with past centuries, the function and utilisation of fiscal assets have fundamentally changed. In former times, the fiscal assets were of central significance to the provision of the state's revenue (or, even earlier, of the income of the monarch). Since the early 20th century the public expenditure has been increasing immensely. Nowadays, the benefits obtained from fiscal assets are marginal with respect to the state's overall budget. The major source of revenue has shifted to taxes, contributions and fees.

3.2. Guiding function of fiscal and administrative assets

The financing function of fiscal assets has been successively replaced by the idea of political guidance, a key item also of administrative assets. The targeted use of the financial resources can help the state to resolve political issues, above all by means of public enterprises (control over monopolies, services for the public such as transport or the Sparkassen, i.e. municipal banking establishments in the financial and lending business). As already mentioned, economical interventions by the state face criticism since they tend not only to lack consistence with the constitutional idea of free market economy but also are questionable in terms of effectiveness.

3.3. Privatisation

The administrative assets are a plain necessity to keep public processes running. Yet, as from the nineteen-eighties, Germany has adopted the anglo-american trend towards privatisation. Transferring services of general interest from the public sector to the private sector has become a way the state increasingly chooses in order to fulfil original governmental functions.

Privatisation involves several problems. One of them is the tendency of privatised companies to hive off governmental control. Enterprise policy and state policy tend to drift apart because private corporations are constrained by the plain economical circumstances whereas the state is subject to its constitutional and statutory obligations. The latter are usually not in accord with the "laws" of the free market.

Prominent privatisations on the federal level have been the transition from the Deutsche Bundesbahn (German Federal Railways) to the Deutsche Bahn AG (German Railways) or from the Deutsche Bundespost (German Federal Post Office) to Deutsche Post AG (German Postal Service), Deutsche Telekom AG (German Telecommunications plc), and Deutsche Postbank AG (German Postbank).[6]

3. FISCAL ADMINISTRATION

Administrative assets are under the rule of the public body in charge of the connected task or duty. Fiscal assets, however, are controlled by the fiscal administration which is also the administration responsible for the imposition and collection of taxes. The fiscal authorities in the Federal Republic of Germany are divided into the federal level (*Bund*) and the level of the constituent states (*Länder*). These levels are in principle strictly separated and independent from each other. This structure results from art. 108 of the *Grundgesetz* and the *Finanzverwaltungsgesetz* (German Financial Administration Act).

[6] All of them are by now stock corporations/public limited companies.

Within the fiscal administration of the Federation *(Bund)*, the Federal Ministry of Finance *(Bundesministerium der Finanzen)* is the highest authority. Under its supervision there is a number of upper authorities which carry out specific tasks for which the federal government is responsible. As for the immovable fiscal property, the federal government founded the *Bundesanstalt für Immobilienaufgaben* (Federal Agency for Real Estate Management—in abbreviated form BImA) in 2005. The BImA replaced the former management conducted by different authorities within the fiscal administration. As an independent outsourced agency the BImA is expected both to increase productivity and to cut costs. The BImA derives immediately from the state, but is by no means as affiliated in the administrative structure as a regular state authority. Although it is not a case of privatisation but a decentralisation, the BImA is nevertheless another example of how the state keeps disposing of his original tasks and duties.

The administration of the fiscal assets of the *Länder* resemble the federal pattern in principle but feature differences in detail.

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BIENES Y OBRAS PÚBLICAS

INFORME ANUAL- 2010 - ESPAÑA

(Junio 2011)

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ÍNDICE

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1. INTRODUCCIÓN

En la presente crónica, que comprende todo el año 2010 y que se extiende a las novedades que se han producido hasta la fecha en el corriente año al objeto de incluir en lo posible la información disponible más actualizada, se han seleccionado las novedades más significativas en materia de bienes y obras públicas, tanto a nivel estatal como autonómico, habidas en el periodo. En materia de bienes públicos y en el ámbito de la legislación estatal, las modificaciones más importantes afectan al uso y aprovechamiento del dominio público, viniendo referidas (i) al uso y aprovechamiento del subsuelo, del medio marino y del espectro radioeléctrico, (ii) a determinados aspectos relacionados con las concesiones en el dominio público portuario y aeroportuario, así como (iii) a la regulación de otros aspectos puntuales, como la desafectación de bienes de dominio público para la instalación de servicios comunes de las viviendas. En cuanto a la normativa estatal que afecta propiamente a las obras e infraestructuras públicas debe destacarse la incorporación al derecho interno de la regulación sobre infraestructuras críticas aprobadas en el seno de la Unión Europea, mientras que el resto de la normativa acaecida viene referida a la modificación de determinados aspectos relativos a la contratación, lo que no obsta para que demos debida cuenta de ello en lo que afecta directamente al desarrollo y ejecución de las obras públicas. Por su parte, en cuanto a la producción normativa de las Comunidades Autónomas en materia patrimonial, las novedades vienen referidas (i) a la aprobación de diversas leyes de cabecera reguladora de sectores concretos de bienes, (ii) a la aprobación de normas de régimen local que contienen disposiciones relativas al régimen de los bienes municipales y (iii) a la modificación de aspectos puntuales o particularidades en materia de bienes públicos. Respecto de la normativa autonómica en obras públicas, cabe decir lo mismo que para la del Estado, siendo necesario dar cuenta de las modificaciones en materia de contratos por cuanto que indirectamente se incide en el desarrollo y ejecución de las infraestructuras públicas.

2. LEGISLACIÓN EN EL ÁMBITO ESTATAL

2.1 En materia de bienes

Una de las mayores novedades del periodo viene referida a la utilización del dominio público subterráneo con la finalidad de almacenamiento permanente de gases perjudiciales vertidos a la atmósfera, incorporándose al derecho interno la normativa comunitaria en la materia. Así, la **Ley 40/2010, de 29 de diciembre, de almacenamiento geológico de dióxido de carbono**, traspone la Directiva 2009/31/CE del Parlamento Europeo y del Consejo, de 23 de abril, por la que se estableció el marco regulador relativo al almacenamiento geológico de dióxido de carbono (CO2) emitido por las instalaciones industriales, y que se presenta como una tecnología de transición consistente en su captura y posterior confinamiento permanente. En este sentido, la Ley 40/2010 establece la base jurídica para el almacenamiento geológico de CO2, en condiciones seguras para el medioambiente, regulando únicamente la actividad de almacenamiento, si bien realiza previsiones puntuales en relación con la captura y el transporte. El legislador español ha optado en este caso por realizar la transposición elaborando una norma específica, en lugar de incorporar la regulación a la Ley 22/1973, de 21 de julio, de Minas. Se trata de utilizar el subsuelo para el almacenamiento permanente de CO2, sirviéndose para ello de todas las estructuras subterráneas en España, incluyendo su mar territorial, zona económica exclusiva y plataforma continental. En este sentido, la ley declara que son bienes de dominio público las formaciones geológicas que formen parte de los lugares de almacenamiento existentes en el territorio del Estado y en el subsuelo del mar territorial y de los fondos marinos que estén bajo la soberanía del Reino de España, con lo que tales formaciones geológicas gozan del carácter inalienable, imprescriptible e inembargable propios de los bienes demaniales. En cuanto a su regulación, se rigen por lo dispuesto en la Ley 40/2010, y supletoriamente, por la Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas.

También la **Ley 41/2010, de 29 de diciembre, de protección del medio marino**, responde a la necesidad de incorporar al ordenamiento español los requerimientos establecidos en la normativa europea, en este caso contemplados en la Directiva 2008/56/CE (Directiva marco sobre la estrategia marina). La Ley 41/2010 establece en este

sentido el marco normativo de protección del medio marino que hasta ahora contaba con una regulación sectorial dispersa en el derecho interno. Consecuente con el carácter ambiental de la norma, el objetivo principal de la Ley es lograr un buen estado del medio marino, para lo que se sirve de la técnica de la planificación como instrumento mediante el que se ordenan las actividades que se llevan a cabo en él. Así, el ámbito de aplicación de la Ley alcanza a todas las aguas marinas, incluidos el lecho, el subsuelo y los recursos naturales, sometidas a soberanía o jurisdicción española, excluyéndose expresamente actividades cuyo único propósito sea la defensa o la seguridad nacional así como las aguas costeras definidas en el artículo 16 bis del Texto Refundido de la Ley de Aguas, aprobado por Real Decreto Legislativo 1/2001, de 20 de julio (esto es, las aguas superficiales situadas hacia tierra desde una línea de una milla náutica mar adentro) en relación con aquellos aspectos del estado ambiental del medio marino que ya estén regulados en el citado Texto Refundido o en sus desarrollos reglamentarios, debiendo cumplirse en cualquier caso los objetivos ambientales establecidos en virtud de la Ley 41/2010. En lo que hace propiamente a la utilización de los bienes públicos, en atención a su consideración como bienes de dominio público, la ley establece el uso común general de la utilización de las aguas marinas, incluidos el lecho, el subsuelo y los recursos naturales, que será libre, pública y gratuita para los usos compatibles con su naturaleza de bien de dominio público, de conformidad con lo establecido en la Ley 22/1988, de 28 de julio, de Costas, y con la preservación de su integridad, sin perjuicio de las facultades de las Comunidades Autónomas de establecer normas adicionales de protección del medio ambiente en su territorio. Fuera del uso común general, el resto de los usos, explotaciones y aprovechamientos se somete a autorización correspondiente según la legislación sectorial aplicable, que deberán planificarse de acuerdo con la estrategia de la demarcación marina correspondiente o de manera que sean compatibles con ésta.

Por su parte, la **Ley 2/2011, de 4 de marzo, de Economía Sostenible,** que aborda transversalmente y con alcance estructural muchos de los cambios legislativos que se consideran necesarios incentivar y acelerar el desarrollo de la economía española, de entre la gran cantidad y variedad de normas dispuestas a tal propósito contempla un aumento del aprovechamiento del espectro radioeléctrico por distintas vías: por una parte, se permite el uso de la banda de 900 Mhz a los sistemas UMTS además de los tradicionales sistemas

GSM; por otra, se habilita más espacio en el espectro radioeléctrico para prestar servicios de comunicaciones electrónicas aprovechando la liberación de la banda de frecuencias de 790-862 MHz; y por último, se amplían las bandas de frecuencia en las que se puede efectuar la transferencia de títulos habilitantes o de derechos de uso del dominio público radioeléctrico.

En otro orden de cosas, dos disposiciones han venido a incidir directamente sobre determinados aspectos de las concesiones en el dominio público portuario y aeroportuario. La primera de ellas, la **Ley 33/2010, de 5 de agosto, de modificación de la Ley 48/2003, de 26 de noviembre, de régimen económico y de prestación de servicios en los puertos de interés general,** si bien tiene como objeto principal la adopción de nuevos criterios relacionados con la gestión económica de los puertos, así como otros dirigidos a reforzar y profundizar en la liberalización de los servicios portuarios y de la actividad económica y comercial que allí se desarrolla, introduce varios cambios en lo que hace al régimen del dominio público afectado a la actividad portuaria. El primero de ellos se refiere a la modificación de determinados aspectos relativos al desenvolvimiento de las concesiones, que afectan a la revisión, división, unificación y rescate, con lo que se pretende que queden regulados con mayor seguridad jurídica todos los supuestos que pueden presentarse a los concesionarios y a la Autoridad Portuaria. En este sentido, junto a la posibilidad de dividir la concesión, la nueva regulación reconoce al titular de dos o más concesiones la posibilidad de solicitar su unificación en las condiciones que señala la ley. El segundo cambio introducido en la regulación de las concesiones se refiere a la ampliación de los supuestos en que procede el rescate de la concesión, para acoger los casos en que el dominio público otorgado fuera necesario total o parcialmente por razones de interés general vinculadas a la seguridad, a la protección contra actos antisociales o a la protección del medio ambiente, así como cuando no sea posible alcanzar un acuerdo con el concesionario en el procedimiento de revisión de la concesión. Por lo demás, la Ley 33/2010 da una nueva redacción a la definición de las aguas interiores que contiene la Ley 27/1992, de 24 de noviembre de Puertos del Estado y de la Marina Mercante, que originalmente estaban definidas como aquellas "*situadas en el interior de las líneas de base del mar territorial, incluyéndose los ríos, lagos y aguas continentales*". La nueva redacción matiza la definición en cuanto a las zonas que se entienden incluidas, de manera que se

entiende por aguas interiores marítimas españolas "*las situadas en el interior de las líneas de base del mar territorial*", incluyendo "*las de los puertos marítimos y cualesquiera otras comunicadas permanentemente con el mar hasta donde se haga sensible el efecto de las mareas, así como los tramos navegables de los ríos hasta donde existan puertos de interés general*".

La segunda disposición que ha afectado al régimen de los bienes afectos a las grandes infraestructuras, en este caso el dominio público aeroportuario, es el **Real Decreto-ley 13/2010, de 3 de diciembre, sobre actuaciones en el ámbito fiscal, laboral y liberalizadoras para fomentar la inversión y el empleo.** De entre las medidas de impulso de las políticas de recuperación de la economía española contiene aquellas tendentes a impulsar la liberalización de los servicios aeroportuarios, separando las funciones de gestión propiamente aeroportuaria de las de navegación aérea, de manera que ordena la creación de la sociedad "AENA Aeropuertos, S.A", que asumirá las funciones y obligaciones que anteriormente ejercía la entidad pública empresarial AENA en materia de gestión y explotación de los servicios aeroportuarios, continuando existiendo AENA con su misma naturaleza y régimen jurídico pero ejerciendo las competencias únicamente en materia de servicios de navegación aérea. Para facilitar la sucesión de las funciones que ahora pasan a prestarse por la nueva sociedad "AENA Aeropuertos, S.A", el Real Decreto-Legislativo 13/2010 establece que se integren en su patrimonio todos los bienes de AENA que no estén afectos a los servicios de navegación aérea, para lo que se determina la pérdida de su condición demanial, sin que por ello se entienda alterado el fin expropiatorio, por lo que no procederá su reversión. Las actuaciones necesarias para proceder al cambio de naturaleza de tales bienes se encomiendan al Ministerio de Economía y Hacienda, de manera que finalmente queden integrados en el patrimonio de "Aena Aeropuertos, S.A.". Finalmente, dado que el tránsito de la demanialidad a la condición de bienes patrimoniales exige depurar el régimen jurídico por el que habrán de regirse las concesiones anteriormente otorgadas, que ahora recaen sobre bienes de la nueva sociedad mercantil, el Real Decreto-Legislativo establece que "*Las concesiones demaniales otorgadas por la entidad pública empresarial AENA sobre bienes de dominio público aeroportuario se transformarán en contratos de arrendamiento, manteniéndose las mismas condiciones, términos y plazos vigentes siempre que preste su conformidad el concesionario en el plazo*

otorgado al efecto por "Aena Aeropuertos, S.A." que no podrá ser inferior a 30 días. Si el concesionario no se mostrase conforme o no contestase en plazo quedará extinguida la concesión y se procederá a su liquidación".

Para finalizar este apartado debemos referirnos a otra de las medidas relacionadas con el régimen del dominio público que incorpora la citada **Ley 2/2011, de 4 de marzo, de Economía Sostenible**, en este caso referida a la previsión de desafectación demanial de bienes que sea necesario ocupar para la instalación de servicios comunes de las viviendas. En tal caso, se considera causa suficiente para la desafectación de los bienes de dominio público y su enajenación a la comunidad o agrupación de comunidades de propietarios correspondiente la exigibilidad legal de tales servicios y su inclusión en planes, programas o instrumentos de rehabilitación, siempre que se resulte inviable otra solución -técnica o económicamente- y que se respeten los estándares urbanísticos para espacios libres y dotaciones públicas así como la funcionalidad del dominio público.

2.1 En materia de obras públicas

En el periodo considerado la producción normativa ha estado en cierta medida condicionada por un entorno económico muy deteriorado que ha llevado a adoptar numerosas y heterogéneas medidas orientadas a contrarrestar en lo posible los efectos adversos de la situación económica actual. En materia de obras públicas este entorno económico se ha hecho sentir con mayor intensidad, pues dado que uno de los mecanismos de lucha contra la crisis es la contención del gasto público parece inevitable que el Estado procure controlar el impacto que sobre las cuentas públicas puedan tener determinadas inversiones, sobre todo aquellas que puedan comprometer cuantías significativas de gasto futuro con posible incidencia en la Contabilidad Nacional y en el nivel de deuda. Este es el sentido de dos medidas con incidencia directa en la ejecución de las obras públicas contenidas en **el Real Decreto-ley 8/2010, de 20 de mayo, por el que se adoptan medidas extraordinarias para la reducción del déficit público**. La primera de ellas viene referida al ámbito del sector público estatal en relación con los contratos de colaboración entre el sector público y el sector privado y los contratos de concesión de obra pública, tipificados en la Ley 30/2007, de 30 de octubre, cuyo valor estimado exceda de doce millones de

euros, para los que se impone como trámite previo a su autorización la emisión de informe del Ministerio de Economía y Hacienda, con carácter preceptivo y vinculante, que se pronuncie sobre las repercusiones presupuestarias y compromisos financieros que conlleva, así como sobre su incidencia en el cumplimiento del objetivo de estabilidad presupuestaria. La segunda de las medidas de control del gasto público relacionada con la ejecución de obras públicas se refiere a la prohibición a los ayuntamientos de recurrir al crédito, público o privado a largo plazo, para financiar sus inversiones desde la entrada en vigor de la norma hasta el 31 de diciembre de 2011.

Asimismo, del contenido de **Ley 2/2011, de 4 de marzo, de Economía Sostenible** puede percibirse, al menos en parte, una voluntad clara de contención del gasto público en las inversiones en infraestructuras, al introducirse en materia de contratación una importante modificación de la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público, a la que añade un nuevo Título V en el Libro I, que establece un régimen muy estricto y pormenorizado de los presupuestos que habilitan para proceder a modificación de los contratos, endureciendo las condiciones y requisitos que deben darse respecto de la regulación anterior.

En este contexto económico, y pese a tratarse de un documento que carece de valor normativo propio, es preciso referirse al denominado **"Plan Extraordinario de Infraestructuras"** del Ministerio de Fomento, presentado en abril de 2010 por el Gobierno de la Nación, y al que debemos referirnos siquiera sea por la trascendencia práctica que tiene sobre la estrategia ministerial en la programación de la ejecución de determinadas infraestructuras, como se pone de manifiesto en los anuncios de licitación insertados en los diarios oficiales que se refieren expresamente al referido "Plan". Debe señalarse al respecto, que este "Plan Extraordinario de Infraestructuras" contiene una serie de principios y criterios orientadores de la estrategia ministerial de ejecución de las obras, sin que pueda hablarse en propiedad de un instrumento de planificación, pues en este sentido el documento vigente es el Plan Estratégico de Infraestructuras y Transportes 2005-2020 (PEIT) aprobado por Acuerdo del Consejo de Ministros de 15 de julio de 2005. No obstante, la trascendencia práctica del "Plan Extraordinario de Infraestructuras" consiste en la exteriorización de la voluntad del Ministerio de aplicar un concreto modelo concesional

para la construcción de determinadas infraestructuras adelantándose su ejecución respecto de lo previsto inicialmente en el PEIT, estableciéndose el pago de las infraestructuras una vez que se hayan finalizado y puesto en servicio, de modo que se posponga su repercusión sobre las cuentas públicas hasta el 2014, sin que se altere el compromiso del Gobierno de disminución del déficit para el año 2013. El documento señala expresamente que para cumplir el objetivo de que la obra no compute en el déficit público "*siguiendo los criterios fijados por Eurostat, se transfieren al concesionario los riesgos de construcción y de disponibilidad"*, lo que supone que el concesionario ha de financiar íntegramente la obra. En cuanto a las obras a ejecutar por este sistema, el documento prioriza la ejecución de los proyectos incluidos en el PEIT que se encuentren en avanzado estado de tramitación, previéndose que el 70% de las inversiones se ejecuten en infraestructuras de ferrocarril y el 30% restante en infraestructuras viarias.

Por otra parte, y sin que en este caso la novedad legislativa traiga causa del contexto económico, debe destacarse la reciente aprobación de la **Ley 8/2011, de 28 de abril, por la que se establecen medidas para la protección de las infraestructuras críticas** y su desarrollo reglamentario aprobado por **Real Decreto 704/2011, de 20 de mayo**. Se trata en este caso de la incorporación al ordenamiento español de las previsiones contenidas en la Directiva 2008/114, del Consejo, de 8 de diciembre, sobre la identificación y designación de Infraestructuras Críticas Europeas y la evaluación de la necesidad de mejorar su protección, en la que se establece que la responsabilidad de protegerlas corresponde a los Estados y a los operadores de las mismas, imponiendo las obligaciones que deben llevar a cabo los Estados. La regulación contenida en la Ley 8/2011 responde, pues, a la necesidad de establecer determinadas actuaciones relacionadas con la seguridad nacional, estableciendo determinadas medidas de protección de las infraestructuras críticas que permitan una eficaz coordinación de las Administraciones Públicas y de las entidades y organismos gestores o propietarios de infraestructuras que presten servicios esenciales para la sociedad. Las infraestructuras críticas están definidas en la Ley como aquellas "*infraestructuras estratégicas cuyo funcionamiento es indispensable y no permite soluciones alternativas, por lo que su perturbación o destrucción tendría un grave impacto sobre los servicios esenciales*", por lo que, considerando el alto grado de interrelación entre las distintas infraestructuras, la perturbación de una de ellas podría generar fallos en cadena

de las demás, lo que podría originar graves disfunciones en materia de seguridad. Las principales técnicas de protección que establece la Ley 8/2011 son el Catálogo Nacional de Infraestructuras Estratégicas y el Plan Nacional de Protección de Infraestructuras Críticas, creándose además el Centro Nacional para la Protección de las Infraestructuras Críticas, como órgano ministerial encargado del impulso, la coordinación y supervisión de todas las actividades que tiene encomendadas la Secretaría de Estado de Seguridad en relación con la protección de las Infraestructuras Críticas en el territorio nacional.

3. LEGISLACIÓN EN EL ÁMBITO DE LAS COMUNIDADES AUTÓNOMAS

3.1 En materia de bienes

En el ámbito legislativo de las Comunidades Autónomas en materia de bienes, las novedades más importantes pueden englobarse bajo las siguientes categorías: en primer lugar, debe destacarse la aprobación de distintas leyes de cabecera para determinados sectores de bienes cuya competencia corresponde a las Comunidades Autónomas, como es el caso de la **Ley 9/2010, de 30 de julio de Aguas de Andalucía, Ley 9/2010, de 4 de noviembre de Aguas de Galicia, y Ley 5/2011, de 10 de marzo, del Patrimonio de Aragón**; en segundo lugar, la aprobación de leyes autonómicas de régimen local en las que se regulan, como es lógico, los principios esenciales por los que se rigen los bienes locales, lo que se contiene tanto en la **Ley 5/2010, de 11 de junio, de autonomía local de Andalucía como en la Ley 8/2010, de 23 de junio, de régimen local de la Comunidad Valenciana**; y en tercer lugar, es necesaria la mención del resto de normas autonómicas aprobadas en este tiempo que han introducido alguna modificación o particularidad en materia de bienes públicos, como es el caso de la **Ley 10/2010, de 27 de diciembre**, **de la Comunidad Autónoma de Canarias,** de modificación de la Ley 12/1990, de 26 de julio, de aguas y la **Ley 5/2010, de 27 de diciembre de medidas extraordinarias para la sostenibilidad de las finanzas públicas de la Comunidad Autónoma de la Región de Murcia.**

Las tres leyes autonómicas citadas, que regulan sectores completos de bienes, responden a la voluntad de regular de manera completa su régimen jurídico, desarrollando en este sentido las competencias derivadas del nuevo texto de sus respectivos Estatutos de Autonomía tras el proceso de reforma llevado a cabo de manera generalizada por las Comunidades Autónomas. En el caso de las leyes de aguas de Andalucía y Galicia, los textos respectivos incorporan además los requerimientos derivados la Directiva 2000/60/CE del Parlamento Europeo y del Consejo, de 23 de octubre de 2000, por la que se establece un marco comunitario de actuación en el ámbito de la política de aguas (Directiva Marco de Agua), articulándose medidas para la gestión eficiente de las aguas que permitan el uso sostenible del recurso, sirviéndose para ello, como viene siendo tradicional, de la Planificación Hidrológica.

Sobre la regulación de los bienes locales llevada a cabo por las leyes autonómicas, comenzando por la **Ley 5/2010, de 11 de junio, de autonomía local de Andalucía,** hay que señalar que si bien contiene normas sobre el régimen de bienes no llega a derogar completamente la Ley autonómica de cabecera en la materia y su reglamento de desarrollo, aunque sí aporta algunas novedades, como la presunción de patrimonialidad de bienes y derechos en su adquisición sin perjuicio de su posterior afectación al uso o servicio de interés general, presunción que tradicionalmente se ha predicado de manera genérica respecto de los bienes si no consta su afectación a un uso o servicio público o su aprovechamiento por el común de los vecinos, pero sin que se especificara la presunción en el momento de la adquisición. En otro orden de cosas y como consecuencia del espíritu de reforzamiento de la autonomía local se elimina el requisito de aprobación previa de la Comunidad Autónoma tanto para los actos de disposición de los bienes de las entidades locales, cualquiera que sea su importe, así como para la desafectación de los bienes locales. Por su parte, bajo el rótulo "mutación demanial externa", se establece la posibilidad de adscribir bienes demaniales a servicios o competencias de otras Administraciones, sin que por ello se altere el carácter demanial ni la titularidad del bien, siempre que exista reciprocidad, es decir, que la Administración a la que se adscribe el bien prevea en su legislación la posibilidad de afectar bienes demaniales de su titularidad a las entidades locales de Andalucía. En este sentido y en idénticos términos, la Ley 5/2010 añade un nuevo artículo a la Ley 4/1986, de 5 de mayo, de Patrimonio de la Comunidad Autónoma

de Andalucía, para permitir la afectación de bienes y derechos demaniales del patrimonio de la Comunidad Autónoma de Andalucía a las entidades locales de Andalucía y a otras Administraciones Públicas.

En lo que atañe a la regulación de los bienes locales por la **Ley 8/2010, de 23 de junio, de régimen local de la Comunidad Valenciana**, cabe reseñar que se modifican aspectos procedimentales que no quedaban suficientemente aclarados en la normativa aplicable hasta la fecha, como el de la autorización por parte de la Generalidad de las enajenaciones de bienes de los entes locales; se fija el plazo para dictar resolución expresa, se determina el sentido del silencio administrativo y se regula la cesión de uso de bienes patrimoniales. En lo que se refiere a la tutela autonómica respecto de los actos de disposición de bienes por la entidad local, y como contraste con la regulación contenida en la ley andaluza 5/2010, la ley valenciana 8/2010 somete a previa comunicación a la Consejería competente en materia de administración local la enajenación, gravamen o permuta de bienes inmuebles, debiéndose además obtener su autorización si el valor del bien excede el 25% de los recursos ordinarios del presupuesto anual de la corporación, estableciéndose una duración máxima del procedimiento de seis meses, siendo negativo el sentido del silencio.

En cuanto las demás novedades introducidas en materia de bienes públicos por el resto de la normativa autonómica, cabe referirse por una parte a **Ley 10/2010, de 27 de diciembre, de la Comunidad Autónoma de Canarias, de modificación de la Ley 12/1990, de 26 de julio, de aguas**. La modificación se lleva a cabo para responder al emplazamiento de la Comisión Europea realizado conforme al art. 260 del Tratado de Funcionamiento de la Unión Europea, relativo a la necesidad de que se incorpore a la Ley 12/1990 una delimitación de las demarcaciones hidrográficas en las que se incluya la franja costera, se designe la autoridad competente de cada una de ellas y se prevean los mecanismos de coordinación entre las autoridades estatales y autonómicas que operan en este ámbito. Por otra parte, la **Ley 5/2010, de 27 de diciembre de medidas extraordinarias para la sostenibilidad de las finanzas públicas de la Comunidad Autónoma de la Región de Murcia,** contiene dos previsiones respecto de los bienes públicos, referidas a la simplificación del proceso de enajenación de los bienes inmuebles

destinados a oficinas o edificios administrativos al objeto de facilitar la ejecución del plan de optimización de inmuebles diseñado por Gobierno regional: en primer lugar, se establece la facultad del Consejo de Gobierno de enajenar inmuebles reservándose la Comunidad el derecho de uso temporal por cualquiera de las fórmulas admisibles en derecho; en segundo lugar, se elimina el trámite de desafectación demanial de tales inmuebles, ya que la autorización por parte del Consejo de Gobierno para la enajenación de los citados bienes les atribuye la condición de bienes patrimoniales directamente, y en consecuencia, son alienables según la nueva redacción. Idéntica medida se ha establecido por el **Decreto-Ley 6/2010, de 23 de noviembre, de medidas complementarias del Decreto-Ley 5/2010, de 27 de julio, por el que se aprueban medidas urgentes en materia de reordenación del sector público de la Comunidad Autónoma de Andalucía**, que modifica la ley de patrimonio autonómica para recoger esta modalidad de desafectación implícita en el acuerdo de enajenación.

3.2 En materia de obras públicas

Habría que traer aquí de nuevo las consideraciones realizadas anteriormente sobre la incidencia que la evolución negativa de la economía ha tenido sobre el desarrollo y ejecución de las obras públicas estatales, al desenvolverse las Comunidades Autónomas en el mismo contexto económico y tener las mismas obligaciones de contención de déficit. En este sentido, la **Ley 6/2010, de 17 de junio, de la Comunidad Autónoma de las Islas Baleares por la que se adoptan medidas urgentes para la reducción del déficit público** es significativa de la similitud que existe entre las medidas que se están llevando a cabo por algunas Comunidades Autónomas para controlar el gasto público y las adoptadas por el Estado para su ámbito propio. Así, en lo que afecta a la puesta en marcha de expedientes de contratación de determinadas obras públicas, la citada Ley 6/2010 establece el control de los contratos que por su importancia puedan incidir en el equilibrio presupuestario, de manera que, al igual que se prevé en la norma estatal, antes de aprobar el expediente correspondiente a la preparación de los contratos de colaboración público-privada o de concesión de obra pública, tipificados en la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público, los órganos de contratación de la Administración de la Comunidad Autónoma de las Illes Balears y de todos los entes instrumentales que integran el sector

público deberán incorporar un informe de la Consejería competente en materia de hacienda y presupuestos sobre las repercusiones presupuestarias y los compromisos financieros que implique el contrato y sobre la incidencia de éste en el cumplimiento del objetivo de estabilidad presupuestaria, informe que se establece con carácter preceptivo y vinculante. Debe hacerse notar que a diferencia de lo previsto en la norma del Estado que impone la emisión del informe cuando el valor estimado del contrato exceda de doce millones de euros, la Ley 6/2010 no impone cuantía mínima a partir de la cual deberá solicitarse el informe.

También en la Comunidad Autónoma de las Islas Baleares se han adoptado otras medidas legislativas inmediatas orientadas a facilitar la inversión pública y privada necesaria para afrontar la situación de crisis económica, que se contemplan en la **Ley 4/2010, de 16 de junio, de medidas urgentes para el impulso de la inversión en las Islas Baleares.** De entre ellas, en lo que se refiere a las obras públicas, interesa resaltar las medidas relativas a las inversiones declaradas de "interés autonómico" por el Gobierno de las Islas Baleares por su especial relevancia para el desarrollo económico y social en su ámbito territorial. El efecto principal de tal "declaración de interés autonómico" es la de reducir de todos los plazos a la mitad, tanto los ordinarios de trámite administrativo (salvo los relativos a presentación de solicitudes y recursos), como los urbanísticos y licencias, así como los trámites ambientales que fueran exigibles, sin perjuicio, en este caso, de la legislación básica del Estado.

Finalmente, como normas autonómicas cuya finalidad propia es la ordenación y desarrollo de las infraestructuras, cabe citar la aprobación de estas disposiciones: **Ley 4/2010, de 30 de abril, por la que se revisa y actualiza el Plan Regional de Carreteras de La Rioja**, que según su exposición de motivos, "*por tratarse de un instrumento de gestión, permitirá ordenar, planificar actuaciones y programar inversiones, es decir, gestionar la totalidad de la red viaria"*; **Ley Foral 13/2010, de 17 de junio, del Plan Extraordinario del Plan de Inversiones Locales del periodo 2009-2012,** de la Comunidad Foral Navarra**;** y **Decreto 307/2010, de 23 de noviembre**, por el que se aprueba la revisión del Segundo Plan General de Carreteras del País Vasco para el periodo 2005-2016.

4. JURISPRUDENCIA.

La jurisprudencia de los tribunales del orden Contencioso-administrativo de este periodo no contiene novedades relevantes, manteniendo la línea seguida en anteriores pronunciamientos para los distintos sectores de bienes que conforman el patrimonio público. Respecto de los pronunciamientos del Tribunal Constitucional, cabe citar por una parte la doctrina contenida en el **Auto 104/2010, de 20 de julio**, en el que se otorga primacía a la protección del patrimonio histórico sobre el interés general que subyace en la ejecución del planeamiento urbanístico, que debe ceder ante la defensa de la preservación de valores histórico-artísticos. Por otra parte, cabe resaltar la **STC 31/2010**, sobre el Estatuto de Autonomía de Cataluña, que en relación con el artículo del Estatuto relativo a las competencias que atribuye a la Generalidad sobre el régimen local, incluye el régimen de los bienes de dominio público, comunales y patrimoniales, lo que, según la demanda, niega la competencia del Estado para dictar las bases sobre los bienes locales. A juicio del TC, el art. 132 CE, *no impide que las Comunidades Autónomas puedan ser también titulares tanto de bienes de dominio público como de bienes patrimoniales, no existiendo obstáculo constitucional para que la Comunidad Autónoma establezca el régimen de dichos bienes en las distintas áreas de competencia autonómica en las que haya atribuido competencias a los entes locales*.

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LE FEDERALISME DOMANIAL

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SOMMAIRE

1. LA TRADITION NORMATIVE DU DOMAINE ET DU PATRIMOINE DE L'ETAT

L'une des plus anciennes traditions du système juridique italien exige que tous les biens du domaine public soient gérés par les seuls organismes ayant le territoire dans leur structure juridique, et agissant pour le bien-être de la population.

Donc, selon l'organisation publique actuelle, les biens domaniaux appartiennent seulement à l'Etat, aux régions, aux provinces et aux communes.

La nature juridique de ces organismes, évidemment, implique avant tout le contrôle du domaine ouvert à l'usage public et le devoir de garantir cet usage pour tous: il s'agit, pour l'Etat, d'un domaine exclusif, maritime, hydrique, militaire (art. 822, co. 1, cod. civ.) et d'un domaine éventuel, étendu aux biens qui pourraient appartenir à des particuliers et qui, seulement au cas où ils appartiennent à l'Etat, font également partie du domaine public (art. 822, co.2, cod. civ.).

Ici le livre III du code civil (1941) énonce: «les routes, les autoroutes, les chemins de fer; les aérodromes, les aqueducs; les édifices d'intérêt historique, archéologique et artistique, selon les lois en la matière; les collections des musées, des pinacothèques, des archives, des bibliothèques; enfin, les autres biens qui sont par la loi soumis au régime propre au domaine public».

L'art. 824 précise que: «Les biens appartenant aux catégories indiquées au deuxième alinéa de l'art. 822, s'ils appartiennent aux provinces et aux municipalités (et même aux régions, aujourd'hui,) sont soumis au régime du domaine public. Au même régime sont soumis les cimetières et les marchés municipaux».

A ce point-là, il faut considérer que la règle intermédiaire - l'art. 823 Cod. civ. – mentionne la "condition juridique" des biens domaniaux en termes d'inaliénabilité absolue, à moins d'une éventuelle constitution de "droits au profit de tiers….dans les modalités et dans les limites établies par les lois qui les concernent", en se rapportant, évidemment,

avant tout, aux concessions domaniales régies par les lois spéciales sur les biens en question.

Cette tradition juridique n'a pas été dérogée - en ce qui concerne le point de vue subjectif de la propriété domaniale - dans l'actuelle phase législative de mise en place du fédéralisme domanial.

En réalité, ce dernier permet un passage des biens domaniaux et du patrimoine indisponible, art. 826, 828 e 830, alinéa 2, de l'Agence du Domaine, un organisme du Ministère de l'Economie et des Finances, aux collectivités territoriales qui les demandent (qui du reste étaient déjà titulaires d'un propre domaine : les municipalités possèdent même un domaine spécifique, à savoir les cimetières et les marchés).

Comme nous allons le voir, la situation est tout à fait différente pour ce qui est de l'aliénabilité des biens transférés.

2. *NOVUM* DU FEDERALISME DOMANIAL: UNE DEFINITION RENVERSEE

On peut observer avant tout que la définition de fédéralisme domanial, ainsi que la définition de fédéralisme fiscal, est née dans la doctrine du droit financier des Etats-Unis; ces derniers présentent, comme on le sait, une structure organisationnelle d'Etat fédéral. C'est pourquoi on appelle fédéral dans ce pays tout ce qui ne concerne pas d'une façon directe les différents Etats, mais le gouvernement central.

Tout à fait à l'opposé, à commencer par notre système constitutionnel, à savoir une république qui, tout en reconnaissant pleinement et même en encourageant la promotion de l'autonomie locale, ***est une et indivisible*** (art. 5 Cost.), le concept juridique de fédéralisme se réfère avant tout à une technique de passage des responsabilités et des

fonctions de l'Etat aux régions, aux provinces et aux communes, en leur reconnaissant une pleine autonomie, aussi bien pour les charges fiscales que pour les dépenses[1] .

La Constitution italienne, réformée au titre V par la loi constitutionnelle n. 3 de 2001, prévoit à l'art. 119, pour les communes, les provinces, les villes métropolitaines et les régions, non seulement l'autonomie financière pour les recettes et les dépenses - c'est à dire le pouvoir de calculer et d'appliquer les impôts et les revenus et de disposer «de coparticipations au produit des recettes étatiques rapportables à leur territoire (co. 1), mais aussi un «domaine et un patrimoine qui leur sont propres, attribués selon les principes généraux déterminés par la loi de l'Etat» (alinéa 6).

La règle constitutionnelle n'est pas auto applicative, comme l'a souvent précisé la Cour constitutionnelle (Cour Cost., nn. 241/2004, 423/2004 et 102/2008), ce qui fait que la loi de l'Etat est arrivée pour la mettre à exécution, lorsque l'on a pensé qu'il était temps de mettre en place le fédéralisme politique, c'est-à-dire la transformation de l'Etat unitaire en Etat fédéral (il s'agirait du premier cas dans l'histoire politique), en partant de l'exaltation du système juridique régional, en ce qui concerne le transfert gratuit du domaine public et, dans le projet, en ce qui concerne le sub-système fiscal (… qui n'est pas encore mûr).

3. LA LOI DE DELEGATION ET LA LOI DELEGUEE: MISE EN VALEUR ET ALIENABILITE DES BIENS

[1] Le fédéralisme fiscal est, donc, «une réaction à l'excès de localisme et a l'excès de différences entre les cllectivités locales et entre les Etats dans un Etat fédéral»; la réaction manifeste la tendence à affirmer «l'exigence d'uniformité et de centralisation relativement à l'excès de différenciation et de décentralisation». A ce sujet, voir la synthèse très claire de V. RAELI, *Il federalismo fiscale e il ruolo della Corte dei Conti*, en *Federalismi* 2011 et la bibliographie que nous citons.

La première caractéristique qui se dégage de la réglementation sur le fédéralisme domanial est l'entrée en vigueur, comme un ballon d'essai, des règles sur le transfert gratuit de l'Etat aux municipalités, aux provinces et aux régions des biens domaniaux et du patrimoine indisponible, une sorte d'anticipation du fédéralisme fiscal, qui s'est arrêté à la loi de délégation du 5 Mai 2009, n. 42, ***Délégation au Gouvernement en matière de fédéralisme fiscal, dans l'application de l'art. 119 Cost***.

C'est dans ces conditions que voit le jour le premier décret législatif délégué (par la loi n. 42/2009, art. 2 et 19) n. 85/2010: ***"Attribution aux municipalités, provinces, villes métropolitaines et régions d'un patrimoine"***.

Il faut donc analyser la loi n. 42/2009, qui, à l'art. 198, intitulé "Patrimoine des municipalités, provinces, villes métropolitaines et régions", prévoit le contenu et les limites de la délégation au gouvernement pour la constitution d'un grand patrimoine des collectivités territoriales.

Comme on l'a observé récemment, le phénomène qui soutend le fédéralisme domanial est le résultat d'une réévaluation du critère intrinsèque à la valeur des choses, des biens, en clarifiant les responsabilités.

Le "recensement raisonné des biens", inclu dans le processus en question, finit par obliger les ministères "à rendre publiques les motivations pour lesquelles ils retiennent un bien en leur propriété, et pourvoit au déplacement juridique vers le gouvernement territorial qui peut mieux gérer et mieux valoriser ce même bien dans l'intérêt général »[2] .

[2] L. ANTONINI, *Il primo decreto di attuazione della legge n. 42/2009*: *il federalismo demaniale*, en *Federalismi* n. 25/2009.

Il est bien vrai que les biens de tous étaient sur le point de devenir les biens de personne. Peu persuasive semble d'ailleurs la définition que l'A. - en glosant sur le Rapport du gouvernement au décret délegué - offre à la «logique du code civil 1942, où on se limite à définir à qui revenait la titularité du bien".

En réalité, dans cette autospoliation de l'Etat, il faut voir un essai -- racheté en principe à travers la valorisation imposée à la collectivité territoriale -- de revivifier le bien public plutôt que de le voir dépérir dans un régime de propriété publique de l'Etat, où il serait de plus en plus négligé en raison des circonstances financières.

C'est dans ce cadre que s'insère le devoir de la collectivité locale de mettre en valeur et d'exploiter le bien transféré, même avant que sa vente ne soit décidée par le conseil municipal, provincial, ou par la région.

La valorisation est préalable en vue de ce même transfert et l'art. 4, dernier alinéa, donne aux municipalités le pouvoir d'ajouter au transfert du bien de l'Etat le pouvoir d'entreprendre une variation du plan d'urbanisme pour favoriser la valorisation fonctionnelle, après l'attestation de congruité de la valeur marchande effectuée par l'Agence du Domaine (ou par l'office du territoire, pour les biens publics du patrimoine), par délibération municipale.

Un effet direct de variation urbanistique ne peut advenir sans l'intervention de la région, après la publication de l'arrêté n. 340 du 2009 de la Cour constitutionnelle qui protège la compétence régionale concurrente sur les variations aux plans d'urbanisme des municipalités.

Le soin particulier que l'on accorde à la discipline de valorisation du bien à transférer est justifié, vu que l'administration centrale recevra de l'éventuelle vente du

Au contraire, le code civil discipline (art. 823), la *condition juridique* du domaine, ce qu'il est impossible de prétendre aujourd'hui du legislateur, vu les programmes d'aliénation de plus en plus fréquents, une longue série de lois speciales, antécédentes au code civil, offre une discipline fonctionnelle des biens publics tout à fait adaptée à notre époque.

Voir le t.u. des eaux et des installations électriques de 1933, la loi Croce-Bottai 1939 sur les biens culturels, le code de la navigation - droit encore vigueur - les lois sur les routes et les autoroutes, sur les aérodromes, etc..

bien, désormais local, 25%, à destiner à l'amortissement de la dette publique: donc, le cointérêt de l'Etat pousse le législateur, dans ce cas particulier, à augmenter la recette de la vente éventuelle du bien transféré. Il ne faut pas oublier que, comme le prévoit l'art. 2, alinéa 2 du décret législatif, les collectivités territoriales en difficulté financière peuvent obtenir le transfert des biens du Domaine, mais ils ne peuvent pas les vendre ; cela conformément au fait que l'on considère comme un objet de sanction les difficultés financières des collectivités locales.

C'est toujours à la valorisation que l' on peut reconduire la prévision de l'envoi du bien transféré aux fonds communs de placement immobilier (réglés par le décret législatif du 24 Février 1998, n. 58).

Ces fonds, auxquels peut participer aussi la Chambre des dépôts et des prêts (art. 3, 6.4 bis, décret loi n. 5/2009) sont divisés en parties attribuables à chacune des participations, privées ou publiques; et ils sont administrés par une société de gestion de l'épargne. La gestion ainsi réorganisée est aussi protégée contre toute action exécutive des créanciers de la société de gestion, ainsi que des créanciers de chacun des organismes participants.

4. L'OPERATION FINANCIERE DU TRANSFERT DES BIENS DE L'ETAT AUX COLLECTIVITES TERRITORIALES

Le fédéralisme domanial a donc introduit un panachage des institutions et parfois des concepts traditionnels, en attribuant la propriété de certains biens du Domaine - avant tout identifiés et répertoriés par le Ministère de l'Economie et des Finances - à des municipalités, des provinces et des régions «qui les demandent».

Toutefois, la classification de ces biens à l'intérieur de l'organisation de la collectivité locale qui les reçoit dans son patrimoine disponible – à l'exception des biens du domaine maritime, hydrique et aéroportuel, qui conservent la même condition juridique

domaniale au sein de la collectivité territoriale - ouvre la porte à l'exercice du pouvoir discrétionnaire de vente du bien même, probablement pour satisfaire les exigences financières du nouveau propriétaire public.

À cet égard , on remarque que le rapport technique - financier du Bureau de comptabilité sur le texte de l'art. 6 du décret législatif général 2010, n. 85, consacré à la valorisation des biens à travers des fonds communs de placement immobilier, se réfère à tous les biens transférés aux autorités locales qui, une fois effectuée la valorisation, entre autres à travers des procédures de variation des plans d'urbanisme, peuvent être vendus directement, ou moyennant les fonds communs de placement, participés ou non par la Chambre des dépôts et des prêts.

La vérification de l'aptitude des établissements publics territoriaux à recevoir chacun des biens demandés en transfert suit des règles, fondées par la loi de délégation, sur les principes de territorialité, subsidiarité, proportionnalité adéquate, simplification, capacité financière, relation avec les compétences et les fonctions, mais aussi mise en valeur de l'environnement.

L'avantage pour la population représentée par la communauté territoriale destinataire du transfert gratuit du bien domanial, qui devient municipal, est direct, mais aussi indirect: en effet, les nouveaux propriétaires du domaine pourront, à travers la valorisation en termes de qualité des édifices indirectement utilisés par l'Etat, mettre à disposition et administrer, au profit des citoyens, les biens du domaine maritime et hydrique, délimités, cependant, par l'intérêt régional - les aéroports d'intérêt régional (art. 698 Cod. navig.), les mines et les édifices de l'Etat autres que ceux que nons venons de citer.

Le fédéralisme domanial, évidemment, pourrait résoudre, en effet, sicut est in votis, les problèmes de l'asphyxie administrative qui pèsent sur tous les biens domaniaux situés dans le territoire national, pour soutenir les dépenses administratives dont les finances publiques doivent se charger en utilisant des ressources qui ne cessent de s'amenuiser.

Les anciennes maisons des cantonniers étaient, par exemple, les sièges de l'entretien du domaine routier de l'Etat; si aujourd'hui elles ont toutes été vendues, démolies, ou, pire encore, abandonnées, c'est parce que les cantonniers, les ouvriers des routes n'existent plus, et que les travaux d'entretien des voies publiques, décidés à la fois par les bureaux de l'Anas ou par des établissements publics propriétaires des routes, exigent désormais des activités, des machines et des matériaux de type industriel. La propriété des domaines côtiers de l'Etat a souffert de la négligence de l'administration et a connu une véritable détérioration, due surtout aux défaillances financières de l'Etat, très fréquentes et bien connues: par exemple, le personnel des bureaux de capitainerie de port, pour la plupart émigré vers le nouveau Ministère de l'Environnement (et de la protection du territoire et de la mer) lorsque celui-ci a été fondé en 1986, n'a pas été suffisamment réintégré, ce qui a entraîné l'abandon de vastes zones du littoral.

Cependant cette situation problématique ne pouvait pas justifier la solution prévue par le Ministère de l'Economie et des Finances, qui visait à attribuer aux anciens gérants d'établissements balnéaires, et aux nouveaux entrepreneurs demandants, un droit de surface sur la zone côtière jusqu'à 300 mètres de la mer, pour une période de 90 ans.

Les réactions de la Commission européenne et de l'opinion générale italienne ont, d'abord, poussé le ministre à réduire à 20 ans la concession de la superficie, et, ensuite, à supprimer la règle qui avait été insérée dans le décret-loi "Développement" n. 70 de 2011.

On peut observer, à cet égard, qu'en France, où le problème de la jouissance publique de la côte n'est pas moins sérieux qu'en Italie, il existe depuis 1975 (à l'initiative du premier Ministre Jacques Chirac) le bureau du Conservateur du littoral, qui administre, avant tout, un littoral long de 5533 km.

Par une loi votée par l'Assemblée nationale le 3 Janvier 1986, la bande côtière jusqu'à 100 mètres de la mer a été interdite à toute nouvelle construction, même s'il s'agit

de constructions provisoires. Et on a doté le Conservateur du littoral d'un budget de 30 millions d'euros pour acquérir, avec droit de préemption, des propriétés immobilières mises en vente par leurs propriétaires dans les environs de la côte[3] .

Les accords économiques et financiers prévus par le décret législatif par rapport au cadre juridique de la valeur d'échange du bien domanial qui est passé sous la propriété de la communauté territoriale, semblent équilibrés: les redevances de concession ou de location que les collectivités territoriales touchent pendant la gestion des biens transférés, seront défalquées des allocations financières que l'Etat leur reconnaîtra à l'occasion de la mise en place du fédéralisme fiscal; au contraire, en cas d'aliénation du bien transféré – au prix estimé par le Ministère de l'Economie et des Finances, comme nous l'avons déjà précisé – la collectivité territoriale garde pour elle-même 75% du prix net, tandis que 25% demeure à disposition du dit Ministère pour l'amortissement de la dette publique.

Le deuxième alinéa de l'art. 5 du décret législatif n. 85/2010 prévoit l'exclusion de la «fédéralisation» des édifices utilisés par l'administration publique, des ports, des aéroports d'importance nationale ou internationale, de tous les réseaux d'intérêt de l'Etat, y compris l'énergie et les chemins de fer, les «biens appartenant au patrimoine culturel» à l'égard desquels, cependant, on précise : «sauf ce qui est prévu par la loi applicable», précision qui renvoie non pas aux délégations législatives du littoral en faveur des régions et des municipalités, mais au régime de l'aliénabilité des biens culturels.

A cet égard on doit observer que l'art. 6 du décret législatif, reprenant les éléments essentiels de la loi n. 86/1994, - l'une des premières lois "organiques" sur l'aliénation des édifices de l'Etat, y compris les édifices culturels - prévoit l'attribution, par

[3] L'institution de ce précieux fonctionnaire responsable de la gestion des biens domaniaux, caractérisée par une plus intense convergence d'intérêts généraux de toute la communauté, a conduit il y a quelque temps la république française à acheter pour le prix de 26.8 milions d'euros, en exerçant le droit de préemption, une extension di 3.000 hectares de plages, dunes, lagunes et étangs sur le littoral de la Camargue, entre le delta du Rhône et la mer Méditerranée.

l'Etat, des fonds immobiliers participés par les collectivités locales et, après leur demande, des biens en transfert gratuit.

A travers les fonds immobiliers, les collectivités peuvent obtenir des fonds pour acheter (surtout par des contrats avec des particuliers) d'autres biens «fonctionnels à la valorisation du patrimoine immobilier» et peuvent vendre des biens qui appartenaient à l'Etat, à travers la discipline des quote-parts.

5. LES BIENS CULTURELS DANS LE FEDERALISME DOMANIAL

Les biens culturels ont été «exclus dans tous les cas» (art. 5 "Typologie des biens") par la procédure spéciale de transfert fédéraliste, même si la règle «sauf dispositions de la loi en vigueur» a fait de nouveau émerger une indisponibilité absolue au transfert uniquement à propos des biens du patrimoine non disponible en dotation à la Présidence de la République et des biens utilisés, à n'importe quel titre, par le Sénat, la Chambre, àla Cour constitutionnelle, et également par les organismes relevant de la Constitution (art. 5, alinéa 7, rappelé par l'alinéa 2).

Cependant le décret législatif prévoit (art. 5, alinéa 5) une règle, qui peut paraître superflue, selon laquelle «dans le cadre des accords spécifiques pour la valorisation et dans le cadre des programmes et plans stratégiques de développement culturel qui s'en suivent, définis selon l'art. 112, alinéa 4, du code des biens culturels et du paysage, visé au décret législatif 22 Janvier 2004, n. 42, l'Etat pourvoit, d'ici un an de l'entrée en vigueur du présent décret, au transfert aux régions et aux autres collectivités territoriales, selon l'art. 54, alinéa 3, du code cité, des biens et des choses indiqués par les susdits accords de valorisation». Le terme d'un an, évidemment, n'est pas du tout péremptoire.

Nous sommes, en fait, face à la même disposition qui, en régime ordinaire, permet le transfert, sans charges pour l'Etat, aux régions, provinces et municipalités, des

biens culturels d'appartenance publique demandés pour la valorisation - coordonnée, harmonisée et intégrée – d'après des "accords sur base régionale" qui prévoient des temps et des modalités d'exécution et d'élaboration des formes de gestion les plus appropriées aux biens transférés. Or, le législateur du fédéralisme domanial semble avoir voulu donner la plus grande impulsion possible à une procédure qui tardait à être appliquée, en améliorant la motivation du transfert par son inclusion dans la stratégie des «Programmes et des plans stratégiques de développement culturel», qui appartiennent, bien sûr, à chaque région, de manière différente en qualité et quantité.

Donc, on peut définir remarquable cette règle sur la valorisation "stratégique" des biens publics culturels qui passent gratuitement au système juridique régional; il s'agit d'un moment de soutien de l'ordre fédéraliste ***in fieri*** de l'organisation des activités administratives visant à la bonne marche de l'administration et donc des responsabilités publiques à base régionale.

Aucun revenu utile dans la négociation de la finance publique n'est ici prévu: cependant les prévisions générales de l'aliénabilité des biens culturels publics, qui font partie du code des biens culturels et du paysage déjà depuis 2004, pourraient être appliquées - même s'il faudra attendre - dans le cas de la circulation des biens culturels dans le circuit fermé des collectivités territoriales, dans le cadre de la valorisation et de l'insertion dans les programmes culturels, après l'entente entre l'Agence du Domaine et le Mibac - Ministère pour les biens et les activités culturelles - ainsi que l'explique en détail le Secrétaire du dit Ministère, à travers sa note circulaire n. 18/2011.

Dans ce règlement, le transfert des biens culturels à une communauté territoriale est contrôlé au moyen de différentes étapes de procédure: la première étape régit la phase d'introduction de la requête du bien de la part des collectivités qui demandent aussi bien à la direction régionale du Mibac qu'à la filiale régionale de l'Agence du Domaine, les édifices qui les intéressent, en illustrant à l'Etat les buts et les stratégies qu'elles entendent poursuivre en acquérant la propriété en question.

La deuxième phase voit la constitution de la ***première table technique*** au niveau régional, pendant laquelle la direction régionale du Mibac présente son évaluation préliminaire, concernant d'une part l'aptitude de la collectivité territoriale recquérante, et d'autre part la pertinence de la propriété à être valorisée selon les critères prévus par la loi.

Dans la première phase, la direction régionale pourrait aussi tenter d'impliquer d'autres municipalités, qui, bien qu'elles soient théoriquement aptes, n'ont pas demandé le transfert de biens domaniaux.

Après la première phase, que l'on pourrait nommer phase de recevabilité abstraite des requêtes, à l'exclusion des organismes et des biens impropres, s'ouvre la seconde phase de la table technique, au cours de laquelle, de l'évaluation positive des programmes de valorisation présentés par les collectivités territoriales, qui clôt l'instruction, l'on passe au copartage et à l'acceptation par les deux protagonistes du transfert, le Mibac et, de concert, l'Agence du Domaine.

L'accord de valorisation de chaque bien est signé avec la collectivité territoriale et c'est l'Agence qui doit s'occuper de formaliser le transfert, par des actes publics contenant toutes les conditions nécessaires, même résolutives.

La troisième phase nous permet d'observer que les biens culturels transférés conservent leur nature domaniale et restent assujettis au code des biens culturels et du paysage, pour ce qui est de leur protection et de leur sauvegarde ;d'ailleurs, ces biens feront l'objet d'un contrôle périodique confié à la Direction territoriale des Beaux Arts.

Par contre, en ce qui concerne l'aliénabilité, c'est justement le code des biens culturels qui accorde l'aliénation après autorisation du ministre, sauf pour les biens archéologiques, les biens situés dans les musées, les pinacothèques, les bibliothèques et les archives, les monuments nationaux, déclarés tels par la loi ; et enfin, les biens particuliers énumérés par l'art. 13 cod., c'est à dire les fresques, les études d'artistes, les armoiries de famille, les niches votives et quelques autres biens particuliers.

L'aliénabilité du Domaine est représentative des besoins financiers qui incombent sur la gestion du bilan et des dépenses accrues qui pèsent sur les organismes publics, avec en tête l'Etat. Mais la vente des biens culturels, prévue - nous le répétons - par le code des biens culturels et du paysage et non par le décret sur le fédéralisme domanial – devenue encore plus facile que la vente des autres biens publics, suscite de fortes perplexités à propos de la légitimité de la prévision même de la loi.

En effet, il s'agit d'une catégorie juridique dont l'***ubi consistam*** est un témoignage matériel de civilisation, composée de biens qui appartiennent, pour cela, au peuple, encore plus que les biens domaniaux en général, surtout s'ils ont été bâtis par l'Etat et par les collectivités territoriales pour des besoins sociaux - eux aussi très importants -- mais qu'il est impossible de rapporter à l'essence des biens culturels.

Bref, il est paradoxal que les biens culturels, justement, en droit positif exclus du pur et simple transfert en faveur des collectivités territoriales, une fois qu'ils ont été transférés, puissent être vendus plus facilement que d'autres biens publics.

Il suffirait, en effet, d'introduire une variation du programme culturel proposé par une région et concordé avec le Ministère, qui, par exemple, orienterait fermement vers l'art contemporain la formation des jeunes générations de la région, pour racheter le bien culturel, transféré quelques années plus tôt par l'Etat après avoir concordé un programme de valorisation de l'art et de la civilisation du moyen-âge; et il suffirait aussi de demander l'autorisation de sa vente au Mibac, puisque certains biens ont perdu au fil du temps leur utilité culturelle d'origine, même si cette utilité première avait été la motivation principale de la demande de transfert.

6. LA PLUS GRANDE RIGUEUR DANS LE TRANSFERT ET LES ACTIVITES RECOGNITIVES DE L'AGENCE DU DOMAINE (ART. 4, CO. 17, D.L. N. 70/2011)

Par la règle fixée à l'art. 4, alinéa 17 et – pour la phase transitoire – à l'art. 18 du d.l. n. 70/2011 , qui modifie l'art. 5 du décret législatif n. 85/2010, l'Agence du Domaine est chargée d'effectuer une "activité récognitive" sur l'exécution concrète des "accords ou des ententes" entre l'Etat et les collectivités territoriales au moment du transfert du bien domanial en faveur de ces dernières.

Le rapport technique de l'Agence est envoyé au Ministère de l'Economie et des Finances, qui, par décret spécial, fixe "les termes et les modalités pour la cessation des effets des accords ou ententes précités, sans aucun effet sur la finance publique".

Ce sous-processus, de même que le décret ministériel, introduit une innovation restrictive essentielle dans la procédure générale de transfert des biens domaniaux de l'Etat aux collectivités territoriales, car il renforce le contenu de l'accord visant à améliorer la conservation et la valorisation de la propriété transférée, moyennant une sanction de cassation en cas de violation de l'accord ou de l'entente découverte à l'occasion d'une récognition de l'Agence du Domaine.

C'est pour cela que la modification de la loi, qui en première application prévoit un délai précis dans lequel les collectivités territoriales peuvent présenter leur "demande", visé à l'art. 5, à savoir trente jours à partir de la publication du décret du Mibac où sont indiqués les cas de caducation de l'accord avec restitution du bien à l'Etat, peut être considérée comme le résultat d'un choix heureux du législateur.

De cette nouvelle discipline restent exclus les accords et les ententes qui ont été réalisés, ne serait-ce que partiellement, à la date du 14 Mai 2011.

Une fois le bien assigné, les administrateurs des collectivités territoriales doivent être conscients qu'ils risquent une sanction de cassation directe et immédiate en cas de violation de l'accord ou de l'entente avec l'Etat ; cette sanction est appliquée sous la forme la plus solennelle du décret du président du Conseil des Ministres (d.p.c.m.) sur proposition du ministre de l'Economie et des Finances et de concert avec le ministre pour les réformes fédéralistes, le ministre pour les rapports avec les régions et la cohésion territoriale ainsi

que d'autres ministres compétents en la matière, d'ici 90 jours de l'adoption du décret ministériel déjà cité.

Cette sub-procédure a pour but d'obliger, bon gré mal gré, les collectivités territoriales à valoriser les biens, en respectant l'obligation acceptée, même si le programme de la vente semble être en contradiction quant à la prescription de valorisation qui a accompagné son transfert.

A part les différences de valeur que l'on peut constater, on peut dire que notre sous-processus de vérification des conditions du transfert du bien domanial aux collectivités territoriales reprend le processus qui concerne les biens culturels ; en effet, ces derniers ne peuvent être transférés (fédéralisés) qu'après la signature d'un protocole d'entente concernant leur valorisation par l'action de l'***accipiens***.

Le but du décret-loi «Développement » est d'aligner les deux sous-procédures – qui améliorent le transfert visant la valorisation – quant aux obligations de l'organisme territorial receveur ; cependant, entre le transfert des biens culturels et le transfert ayant pour objet des biens domaniaux appartenant à d'autres catégories, il reste un élément qui fait la différence : la collectivité recevant le bien domanial (sauf les biens du domaine maritime, hydrique et aéroportuel, qui conservent leur condition juridique), lorsqu'il s'agit d'un bien domanial non culturel, le classe directement dans son propre patrimoine disponible.

Cela entraîne des conséquences évidentes à propos de l'aliénabilité immédiate et possible (d'un bien qui avait été domanial dans la propriété de l'Etat), sans autorisation ministérielle spécifique préalable.

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CONCESSIONS OF PUBLIC GOODS AND THE PRIVATIZATION PROCESS

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Prof. Gabriella DE GIORGI CEZZI

ÍNDEX

1. INTRODUCTION

In the Italian legal system, public utility which are intended for the public and unavailable domain may be pursued through an exclusive use by the Administration itself,

through a *general* purpose, by any public or private entity, and through a *particular* use, by public or private entity which is reserved for a certain use of the property.

This reserve of the right to use may result from the law or from an administrative measure such as the concession, and can exclude other individuals from any use of that property, or just from particular uses of it.

In line with the principles expressed in art. 823 Civil Code, the state property rights may be subject to a third party only in the manner and within the limits set by the rules of public and private law. It seems, however, that, especially for assets not available, the foreclosure towards the use of private law instruments is destined to fall due to the favor of the law no. 15/2005, expressed in the text of art. 1, paragraph 1-bis of law no. 241/1990, for the private tools of administrative activity that do not adversely affect the purposes of public interest aim of the property.

2. THE ADMINISTRATIVE MEASURE OF CONCESSION FOR PUBLIC DOMAIN

As for the ways of use for the assets governed by public law, particular attention must be paid to the administrative concession, which normally takes the configuration of the concession-contract.

This case is complicated by the convergence of a unilateral and authoritative act, the concession, and a supplementary agreement with contents of private nature, that is a bilateral contractual relationship source of mutual rights and obligations between the public body and the private.

The owners of the concession exercise special rights on properties and activities usually unavailable to private and reserved for public bodies. In some cases, dealers get some real monopoly rights on property awarded.

It follows that, those who use, in particular via, public properties because of a concession measure, holds a right of exclusion on third parties from the use of the same properties, right that can protect both with the means and the measures of common law, as with the executive powers of self-defense. The concession is in fact characterized by the transfer from a public to a private of public power, ie those particular situations that provoke subjective unilateral acts of authoritative character.

Public properties subject to concession are "public property in an objective sense, " originally given to the public power. As Massimo Severo Giannini wrote: "If a river channel change, the new channel is public. If a flood creates a beach, where the first was water, it is now public. As soon as the road comes to life, it is public good" [1]. The public nature of these assets, therefore, still remains after the concession measure.

3. CRITICAL POINTS IN THE CONCESSION DISCIPLINE

The discipline of administrative concessions is characterized by a series of critical.

The choice of the concessionary, first of all, should be transparent and based on the criteria of objectivity. In the practice of concessions, however, this is rarely the case: sometimes, in fact, even the law that sets out in detail the subjective and objective requirements of future concession, allowing, in essence, a finding in advance.

In many cases the decision is entrusted to the wide discretion of the grantor. In a few cases, announce tenders for the selection of the concessionary. The latter, for example, have taken shape in port services and water integrated services, but in too many areas there

[1] M.S. Giannini, *Diritto pubblico dell'economia*, Bologna, 1977, 24.

is none yet track. The resistance depends shortcomings in the law, either by a lack of practice[2].

The supervision on concessionaries in second place, should be continuous and specialized. In fact, except for some cases where there is a specific control of public authorities (for example, in the energy sector control over the granting missionaries is pervasive and is largely entrusted to the Authority for Electricity and Gas, an independent highly qualified body), there are not adequate public bodies for regulating and controlling the management procedures of the asset granted: is the case, for example, of highways, airports, railways.

With respect to the property aspects and, in particular, the license fees, that is, the premiums paid by licensees to public administrations, difficulties arise, first of all, from the competence order in this subject, that are often heterogeneous and a-systematic. As for the port concessions, for example, the determination of fees rests with individual port authorities. For the concessions on natural resources, furthermore, the skills are characterized by a high degree of decentralization, burdened by substantial irrationality. The public water, for example, is mostly state property, but the competences are decentralized to the regions and local authorities, both with regard to the levying of charges and the collection of the same. We can apply some common criteria set by state law dating (RD 1775/1933), but they are very general, providing that the fee is proportioned with the amount of water withdrawn or the extension of irrigated land.

[2] With reference to sea state concessions in this regard, the European Community launched January 29, 2009 n.2008/4908 the infringement procedure against Italy, asking that public tendering procedures for the granting of concessions.

Common state criteria, to be fixed with you an interministerial decree, are also provided for the concession in the field of integrated water services (Legislative Decree no. 152/2006).

The maritime domain is state property: also in this field management is decentralized, but the State directly determines the fees. This has a significant impact on the uniform definition of the fees paid by concessionaries.

As for the concession measures relating to mineral resources, the skills to determine the royalties belong to the regions, except for so-called royalties on the production of hydrocarbons.

Where skills are regional, the general state criteria are also in this field relied on dating rules (in particular, rd 1443/1927) and this is unsatisfactory, because bound to the surface subject of the concession.

The discipline of concessions of public properties, in short, needs a rationalization about the legislative and administrative skills, concerning the establishment and collection of license fees.

3.1 The reform of bathing concessions in the light of the "Development Decree" of 2011.

Pending its conversion into law by the Chambers, the Decree Law of 13 May 2011, No 70, introduces substantial and, in some respects, controversial changes on the regulation of maritime state concessions for touristic and hotel purposes, contained in the Code of Navigation.

The system of competences in such concessions is structured, as defined by the Code, as follows: the region performs the functions of planning and addressing for the purpose of tourism and recreation, including bathing establishments. But Commons are

responsible for the issue and renewal of state-owned maritime concessions, permissions on the beaches, the permission for the operation of maritime trade on public lands and the cleaning of beaches.

In case of several applications, art. 37 of the Navigation Act established the so-called "right to insist, " ("law of persistence") and preference was given to previous concessions already granted, compared to the new instances.

The EC, however, launched on January 29, 2009 , the infringement proceeding No. 2008/4908 against Italy, asking that the concessions were put outlawed. Italy has therefore had to repeal the "law of persistence" by Act No. 25 of 26 February 2010 (Article 1, paragraph 18) by extending the duration of existing concessions until December 31, 2015.

Until now, the decision on concessions has been characterized by a period exceeding four years, in order to shield them against possible cancellation, in whole or in part, as a result of the maritime authority discretion (article 42 Code Nav.).

The concessions over four years, or that otherwise have difficult facilities to remove, in fact, are revocable only for specific reasons related to public use of the sea or other reasons of public interest, according to the maritime authority discretion.

On expiry of the extension determined by law no. 25/2010, therefore, in the event of failure to renew the license without an appropriate competitive process, will apply the art. 49 Cod Nav. according to which 'except as otherwise established in the concession, when come to an end the concession, works non-detachable, built on state-owned area, are acquired to the State, without any compensation or refund, prejudice to the possibility of the licensing authority to order the demolition with the return of public property in the former condition'.

To deal with this inevitable solution, the decree in question is intended to allow the existing buildings along the coasts (including the bathing establishments) can be protected by applying them to the 'surface rights' for ninety years, and providing for an annual payment determined by the Land Agency on the basis of market values.

From a first reading of the provisions of development decree, however, emerge a number of contradictions with the current rules contained in the Code of Navigation, as well as in the Civil Code: the surface rights, governed by articles 952 ff. of the Civil Code, consist in building and maintaining a building above (or below) of a ground owned by others. You can sell the property of the existing construction separately from land ownership, transferring only the surface rights. If, moreover, it is expected that the right has a term, at the expiry of that period the surface right is extinguished and the owner of the ground would become the owner of the building.

The two legal situations (the concessionary and the owner of surface rights) are therefore not comparable, as this would lead in the expire of any power of revocation, especially the lack of reasoned "public use of the sea or for other reasons of public interest" by the competent maritime administration.

This would have, therefore, difficult situations to adjust with the principles of the legal order, in which the holder of surface rights that occludes access with its facilities or the only visibility of the sea on land owned by the State, can not have recalled for any reason, the decision granting in his favor, as required by art. 42 of the Navigation Act.

4. THE PROCESS OF DEVELOPMENT AND DISPOSAL OF PUBLIC REAL ESTATE

In an attempt to put a stop to the process of gradual devaluation of the public real estate, Governments that have taken place in recent years have taken various and disharmonious actions to enhance and/or sale of public assets that have recently resulted in the Legislative Decree no. 85 of 2010, that is a law that stands not only for being the first intervention really organic in this matter, but also because, in a highly innovative logic than previous reforms, expresses the will of the lawmaker to create a real "federal state property. "

The activity of selling properties owned by the state since the early eighties was included in the ordinary management of state assets, the legislation then in force gave a connotation of public and social nature, rather than economic and productive, aiming to achieve the primary objective of meeting the public interest.

Far more significant is the intervention performed by art. 9, co. 6 of the Law of 24 December 1993 no. 537, which provided for the adoption, by appropriate DPR of rules intended to dispose of public assets, including those covered by the concession, not intended for general or collective environmental and cultural interest, with priority for the alienation of land and buildings of improper or unnecessary utilization. The rule also required the provision of social security institutions dedicated program for the disposal of its housing stock by income, beginning with the living one.

Since then, manifested a tendency, confirmed in the legislation of the next decade, to prefer interventions aimed at streamlining and enhancing the use of public property, anticipating the sale of only those that are not strictly functional purpose of the institutions or can not be managed efficiently.

5. THE PRIVATIZATION AND SECURITIZATION OF PUBLIC DOMAIN

It is in D.L. September 25, 2001, No. 351 that may instead find that the main regulatory framework of the privatization processes, as well as the starting point of measures to enhance the public trust.

Article 1 of the Decree requires the Property State Agency to identify, through its executive decrees, individual assets belonging to the State Assets (distinguishing between public real and patrimonial estate), assets of public non-territorial, non-instrumental properties previously allocated to companies in total public participation, direct or indirect, recognized as State-owned and, finally, assets located abroad, to be submitted to the processes of reorganization, management and development. They are chosen on the basis of

records available in the archives and public offices and on the basis of lists drawn up by the public bodies.

The privatization process can also be performed using securitization, a form of devolution of public property introduced and regulated by the same decree. With the technique of securitization can easily convert non-tradable goods (eg. public owned buildings), in financial tools more easily placed on markets.

Goods are sold to vehicle company (in this case indicated by the acronym SCIP[3]) that the seller pay the fee obtained through the issuance and placement of bonds as a "starting price".

After the company manages and sells real estate on the market[4].

[3] About the nature of SCIP, some jurists have advocated the possibility of these companies to qualify as public bodies. In fact, such an attempt of classification is at least doubtful, expected that the vehicle companies are established exclusively for the execution of securitization transactions, and real estate management is allocated at original owners bodies. It is to be excluded, therefore, that the same may be involved, such as contracting administrations, in tenders for works, supplies and services relating to the properties transferred to them. Furthermore, considering that the car companies have the sole and exclusive corporate purpose is to make the securitization to dispose of public property, the nature of these activities can only be commercial and, therefore, incompatible with the concept of a public body.

[4] The SCIP, although they can't freely enjoy and dispose of the assets to be securitized, but only alienate them with the obligation to back the increase in revenues, is seen by the majority doctrine, following the above procedure, the owner of those assets. To confirm this assumption, consider that the activities necessary for implementation of securitization transactions, what, precisely, the issue of securities representing ownership, assume ownership of the property.

The application of this system has led to the creation of the State Asset Company, governed by art. 7 of D.L. no. 63 of 2002, as converted by Law no. 112 of 2002.

The aim targeted by the Government was to set up new and more effective asset management arrangements and enhancement of the state budget, creating a more efficient allocation and use of resources.

The institutional purpose of this society is to promote, manage, and dispose of the assets of the state in compliance with the requirements, constraints and aims of public goods and the entire system of protection currently in force.

The legislature has also governed the procedures for monitoring the movement of actions to guarantee the satisfaction of the public interest, in the aim to protect the public property.

Procedures for transferring properties from State assets to the budget of the society are governed by article 7, para. 10 of Law no. 112/2002. The competent Ministry is granted freedom of choice regarding the decision between the transfer or the trust of the assets.

It should be noted that in the latter case the goods would remain in state ownership, thus ensuring both a more streamlined process of devolution and the positive returns even in terms of tax.

6. THE REAL ESTATE INVESTMENT FUNDS AND THE "NEW PHASE" OF THE ENHANCEMENT PROCESS.

The exploitation process can be accomplished through the promotion of real estate mutual funds, carried out by the Ministry of Economy and Finance, in accordance with art. 4 of the D.L. no. 351, as amended by art. 4 of D.L. July 12, 2004, No 168.

The conferment or transfer of real estate, of autonomous administration of State Monopolies and public non-territorial bodies (provided to non-residential purpose) gives life to the fund. The Minister of Economy and Finance identifies such goods with one or more decrees, regulating even in the identification or establishment of the company management, operation and placement of fund units, criteria for allocation of proceeds from the sale of shares.

It should also be recalled that the Finance Act 2007 introduced a new article 3 bis in -DL no. 351/01, which stipulates the possibility of implementing concessions or leases of property from third parties identified under the criteria set by the same decree, for consideration and for a period not exceeding fifty years.

The objective is therefore to retraining and redeployment of assets through recovery, renovation and restoration. This allocation is done through a public procedure and for a period that is capable, at least potentially, the achievement of the economic-financial balance (but not more than fifty years).

The present rules on valuation of assets of public assets included in the budget law for 2007 was later re-integrated by the Finance Act 2008 (Act No. 244 of 2007, art. 1, paragraphs 313-319), with the introduction of the "Plan for the enhancement of public goods for the promotion and development of local systems", formed by all the programs comprise all of the Enhancement Unit Programs, in order to enable significant local development processes through the recovery and reuse of public property assets, consistently with local, economic and social development guidelines, and with the territorial and urban sustainability and quality objectives.

The new phase of the process of privatization of state-owned properties, therefore, can be seen at in terms of separation, on the subjective level, between ownership and management: the owner is and remains public, the subject who is entrusted with the administration - in all its aspects, including proper management - is defined by law "public economic entity".

Unlike the past, manage the real estate no longer means maintaining public function that naturally or artificially given originally to the individual asset, or compromising the destination through the processes of real alienation. The public good is no longer just an instrument for the realization of public purposes, but, rather, is "the object of the activity". as such, the lawmaker will find the best and most efficient use, in relation to public interests identified by law, through processes of rationalization and enhancement consisting mostly assignments for government use free of charge, concessions or leases for public or institutional aims.

With the Finance Act 2010 (Act No. 191 of 2009), finally, have been made new to the framework set out above in respect of recognition, sale and enhancement of public property. In particular, article. 2, co. 222 has the aim to bring together the procedures on leases payable, and to rationalize assets used by the public administration. To this end we have a series of reporting requirements to the Agency relating to property used by national public administrations and reporting requirements by other public administrations. For all the public administrations who use or hold, for whatever reason, real estate owned or owned by their same administration, there is an obligation to transfer to the Treasury Department of the Ministry of Economy and Finance the list containing the identification of such goods.

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LE PAYSAGE

REPORT ANNUEL - 2011 - ITALIE

(Octobre 2011)

Prof. Girolamo SCIULLO

INDEX

1. ENCADREMENT GÉNÉRAL

Dans la tradition juridique italienne la discipline du paysage ne s'identifie pas avec celle du territoire, (urbanisme ou, en termes plus récents, gouvernement du territoire)[1], mais présente des aspects particuliers et spécifiques.

[1] Cour const., 30-05-2008, n. 180, et 7-11-2007, n. 367, en www.cortecostituzionale.it.

La raison de cela se trouve dans l'évaluation"culturelle et d'identité" réservée aux valeurs du paysage, toute à fait semblable à celle qui est reservée aux biens culturels.

Ce n'est pas par hasard que la l. 22 juin 1939, n. 1497 - qui pendant plus de soixante ans a représenté la normative fondamentale en matière de paysage - utilisa les mêmes instruments juridiques, la contrainte et l'autorisation, employés par sa contemporaine l. 1° juin 1939, n. 1039, pour la tutelle des objets d'intérêt historique-artistique.

D'autre part la l. n. 1497 a prévu aussi en tant qu' instrument le <<plan du paysage et du territoire >>, c'est-à-dire un mécanisme juridique -le plan - qui dans le système de droit italien est devenu avec la l. 17 août 1942, n. 1150, le moyen fondamental pour la discipline du territoire.

En bref l' on peut affirmer que le rapport entre le paysage et le territoire naît et se maintient en termes de "différence", pour la diversité de discipline, mais aussi de "intégration", pour l'appartenance comune de l'objet et la liaison entre les instruments relatifs de discipline.

La distinction entre paysage et territoire est présente aussi dans la Constitution républicaine: l'art. 117, qui détermine la compétence législative de l'État et des Régions à statut ordinaire, distingue la <<*tutelle du environnement* >> et la <<*valorisation des biens de l' environnement*>> du <<*gouvernement du territoire*>>, (alinéa 2, lett. *s* et alinéa 3)[2].

[2] Cour const. n. 180/2008, cit., et 5-05-2006, n. 182, en www.cortecostituzionale.it.

2. PAYSAGE ET BIENS DU PAYSAGE

Pour la compréhension de la discipline normative il faut tenir compte du fait que le terme paysage présente plusieurs significations juridiques[3].

Biens du paysage

Il s' agit de choses immobiles individuelles ou bien d' ensembles de choses immobiles définies comme biens du paysage par une mesure ponctuelle de l'administration publique, par le plan du paysage ou directement par la loi. Leur discipline est contenue actuellement dans le d.lgs. 22 janvier 2004, n. 42 et suiv. mod., c'est-à-dire le Code des biens culturels et du paysage (CBCP).

Paysage

Il s'agit de la "forme du territoire", ou de la "forme du Pays". Il y a des notions différentes du paysage:

a) une notion générale, semblable à cette contenue dans la Convention européenne sur le paysage, signée à Florence le 20 octobre 2000: paysage comme <<*territoire expressif d'identité*>> (art. 131, alinéa 1, CBCP);

b) deux notions spéciales du paysage "en sens culturel", la première dictée à fins de sauvegarde et qui comprend les biens du paysage et d'autres contextes significatifs du paysage (art. 135, alinéa 4, lett *c*, et art. 143, alinéa 1, lett. *e*, CBCP); la deuxième, dans la finalité de valorisation du territoire, qui comprend aussi de <<*nouvelles valeurs du paysage*>> (art. 131, alinéa 5, CBCP);

c) finalement, enlevant *b* de *a*, une notion de paysages de la "vie quotidienne", par rapport auquel le plan du pausage doit aussi fixer des<<*objectifs proportionnés de*

[3] Cour const., n. 367/2007, cit.

qualité>> et déterminer des<<*lignes de développement urbain et de constructiont*>> dont on tient compte dans l'aménagement territorial et urbain (art. 135, alinéa 4, lett. D, CBCP).

3. LA DISCIPLINE JURIDIQUE

La discipline juridique est structurée par le CBCP par rapport aux significations différentes du paysage déjà illustrées.

Pour les biens du paysage relèvent l'identification et *l'autorisation*.

a) Pour les choses immobiles indiquées par l'art. 136 CBCP, par exemple celles <<qui ont des caractères importants de beauté>> l'identification, c'est-à-dire la <<déclaration d'intérêt public considérable>> sous le profil paysager qu' elles présentent, est opérée par l'Administration Publique, à conclusion d'une procédé spécial qui commence avec une proposition formulée par une commission constituée par chaque Région. La proposition est objet de publication et par rapport à celle-ci s'ouvre une phase de participation de la part du propriétaire/détenteur de la chose et des autres intéressés, sujets publics et privés. La déclaration appartient à la Région, après avoir évalué la proposition et les observations avancées, artt 138-140 CBCP.

Une variante de tel procédé est constituée par la proposition et par la déclaration formulées par le Ministère pour les biens et les activités culturelles (MIBAC)(art. 138, alinéa 3 et art. 140 CBCP.

b) Toujours relativement aux choses indiquées par l'art. 136 le CBCP prévoit que leur détermination puisse être indiquée dans le plan du paysage (art. 134, alinéa 1, lett. *c*, et art. 143, alinéa 1, lett. *d*).

c) Pour les choses immobiles indiquées par l'art. 142, par exemple <<*les territoires côtiers compris dans une bande de profondeur de 300 mètres de la ligne du rivage*>>) la détermination des biens du paysage est opérée directement par le CBCP(art.142).

L'identification comporte que les biens soient soumis à un régime de contraintes. Par le même acte, en effet, ou bien par un acte suivant ou de toute façon dans le contexte d'un plan du paysage doivent être déterminées les prescriptions d'usage visant à assurer la conservation des valeurs exprimées par le bien du paysage (art. 138, alinéa 1, art. 140, alinéa 2, art. 141 et art. 143, alinéa 1, lett. *b-d* CBCP).

Par conséquence le propriétaire, ou le tenant ne peut pas détruire le bien ni introduire des modifications qui portent préjudice aux ces valeurs (art. 146, alinéa 1, CBCP). En tout cas il ne peut pas acheminer des interventions sur le bien sans avoir obtenu une autorisation spéciale (art. 146, alinéa 2, CBCP).

L'autorisation paysagère constitue un<<*acte autonome et présumé par rapport à la permission de construire ou à d' autres titres qui autorisent l'intervention de construction urbaine* >> (art. 146, alinéa 4, CBCP).

La décision d'autorisation appartient à la Région qui peut en déléguer l'exercice aux organismes locaux (il s'agit de la Commune d'une façon générale) (art. 146, alinéa 6, CBCP). L'autorité périphérique du Mibac (surintendant) concourt à ce procédé par son avis obligatoire et, en général, contraignant (art. 146, alinéa 5, CBCP).

Le CBCP établit qu'en certains cas l'autorisation n'est pas obligatoire. Il s'agit d' interventions sans importance sous le profil du paysage mentionnées par l'art. 149 et, dans le cas de biens soumis à des contraintes *ex* art.142, quand le plan du paysage les prévoit en présence de certains conditions (art. 143, alinéas 4 -7).

Dans le cas du paysage comme 'forme du territoire' c'est le plan du paysage qui relève. Il y a deux types de plan du paysage: ce qui s'occupe exclusivement de paysage et celui qui appartient au caractère de << développement *territorial et urbain avec considération spécifique des valeurs du paysage*>>, équivalents quant au *nomen* et au régime juridique (art. 135, alinéa 1, CBCP).

Le plan accomplit quatre fonctions fondamentales: connaissance systématique du territoire régional entier, sauvegarde, aménagement et gestion des éléments du paysage relatifs (art. 135, alinéa 1, CBCP). Ces fonctions se concrétisent dans les aspects suivants:

- vérifier les <<*aspects et les caractères spécifiques*>> du territoire considéré et délimiter les <<*domaines relatifs*>> (art. 135, alinéa 2, CBCP);

- préparer pour chaque domaine une spécifique normative d'usage, en fixant au même temps des objectifs de qualité adéquats (art. 135, alinéa 3, CBCP);

- établir, toujours pour chaque domaine, les prescriptions de sauvegarde des caractéristiques du paysage et de requalification des zones dégradées;

- déterminer les lignes de développement (programmes) pour le développement de la construction urbaine (art. 153, alinéa 4, CBCP).

En ce qui concerne les biens du paysage, le plan vérifie l'existence des immeubles soumis aux contraintes par acte administratif ou *ex lege*, en conformité avec les prescriptions d'usage existantes ou en défaut de celles-ci en les déterminant, et il peut identifier d' autres biens du paysage rentrants dans les types prévus par l'art. 136 (art. 140, alinéa 2, et art. 143, alinéa 1, lett. *b-d*, CBCP).

Les prévisions du plan du paysage appartiennent à un ordre de 'supériorité' par rapport à celles de tous les autres plans qui ont une incidence sur le paysage, soient ils de caractère économique ou de caractère territorial et urbain, (art. 145, alinéa 3, CBCP)[4].

L'élaboration et l'approbation du plan du paysage appartiennent à la Région (art. 135, alinéa 1, et art. 144 CBCP). Néanmoins le concours de l'État est prévu dans le procédé par une <<entente [intesa]>>, dans laquelle sont définies les modalités d' élaboration en

[4] Cour const., n. 180/2008 et n. 182/2006, cit.

commun du plan, et par un <<accord [accordo]>> sur le projet de texte (art. 143, alinéa 2, CBCP).

Les deux accords sont 'nécessités' par rapport aux prévisions du plan relatives aux biens du paysage, (art. 135, alinéa 1, CBCP). En ce qui concerne telles prévisions le plan est approuvé en voie substitutive par l'État en cas d'inertie de la Région (art. 143, alinéa 2, CBCP).

Dans l'élaboration du plan la concertation institutionnelle et la participation individuelle et sociale doivent être assurées (art. 144, alinéa 1, CBCP).

4. INNOVATIONS RÉCENTES

Parmi les innovations récentes de la discipline du paysage l'on doit signaler les normes du D.P.R. 9 juillet 2010, n. 139, qui a discipliné le procédé d'autorisation simplifié pour les interventions d'entité légère, selon l'art. 146, alinéa 9, CBCP.

La simplification, relative à environ quarante types d'interventions énumerées dans l'annexe, a un caractère documentaire -concernant la documentation que le requérant doit présenter (art. 2)- et procédural.

En particulier l'art. 4 prévoit que l'autorité compétente à l'autorisation (d'une façon générale l'organisme local) vérifie préalablement si l'intervention est conforme à la discipline en matière d'urbanisme et de construction urbaine, et qu'en cas de non conformité déclares irrecevable la demande, sans évaluer la compatibilité avec la discipline du paysage (alinéa 2).

Dans le cas que la compatibilité de la construction urbaine ait été établie, telle autorité doit conclure le procédé sans acquérir l'avis de l'autorité périphérique du Mibac, si elle estime que l'intervention ne soit pas conforme à la discipline du paysage (alinéa 4). Au contraire c'est à l'autorité du Mibac de conclure le procédé en rejetant la demande si elle ne partage pas l'évaluation positive exprimée par l'autre autorité (alinéa, 8).

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QUESTIONS RECENTES EN MATIERE DE DROIT DES ETRANGERS

APPORTS DE L'ANNÉE - 2011 - ITALIE

(Août 2011)

Prof. Cecilia CORSI

INDEX

1. INTRODUCTION

La réglementation de l'immigration et les règles relatives au statut juridique des étrangers se trouvent dans le décret législatif n°286 du 25 juillet 1998, consolidant toutes les dispositions (ci-après « décret législatif n°286 » ou « texte consolidé ») résultant de l'échelonnement de la réforme de 1998[1] ainsi que des durcissements ultérieurs survenus principalement en 2002 avec la loi dite Bossi-Fini[2]; avec les règles principalement conçues pour renforcer l'expulsion (en 2004[3]); avec de nouveaux durcissements règlementaires adoptés en vertu des lois sur la sécurité publique (en 2008 et 2009[4]), et enfin avec le décret-loi n° 89 du 23 juin 2011 converti en loi n°129 du 2 août 2011, transposant la directive relative au retour des ressortissants de pays tiers en séjour irrégulier.

La loi n°40 du 6 mars 1998 représente la première réforme systématique approuvée par le parlement en matière d'immigration. Elle a fourni un nouveau règlement couvrant tous les aspects relatifs au statut des étrangers: l'entrée, le séjour, l'éloignement, une partie du droit du travail, le rassemblement familial, la protection des mineurs, la santé, l'éducation, le logement, la participation à la vie publique et l'intégration sociale. Comme indiqué dans le rapport accompagnant le projet de loi, le gouvernement s'était fixé trois objectifs principaux: combattre l'immigration clandestine et l'exploitation criminelle des flux migratoires; mettre en place une stratégie annuelle d'entrées limitées, programmées et réglées; et mettre en voie l'intégration des immigrés résidant légalement en Italie.

[1] La l. n°40 du 6 mars 1998, appelée «loi Turco-Napolitano».

[2] L. n° 189 du 30 juillet 2002, «Amendement à la loi sur l'immigration et l'asile».

[3] D.l. du 14 septembre 2004 convertie en l. n° 271 du 12 décembre 2004, «Règlementations urgentes en matière d'immigration».

[4] D.l. n° 92 du 23 mai 2008, convertie en l. n° 25 du 24 juillet 2008, «Mesures urgentes en matière de sécurité publique» et l. n° 94 du 15 juillet 2009, «Dispositions en matière de sécurité publique».

En 2002, après un débat houleux qui ne s'est pas limité aux salles du parlement, la nouvelle majorité de centre-droite a apporté certaines modifications à la loi de 1998: ces dernières ne viennent pas à changer le cadre global de la réforme précédente mais à apporter des modifications, qui, quoique importantes, se limitent principalement au droit d'entrée et de séjour pour raisons professionnelles et à ladite «police des étrangers», se focalisant essentiellement sur les modalités d'expulsion. En particulier, l'expulsion avec accompagnement à la frontière est devenue la façon «normale» d'exécuter un ordre de refoulement; la période d'interdiction de réadmission dans le pays a été rallongée (de dix ans) et les sanctions relatives à la violation de cette interdiction ont été renforcées. La mesure suivante a également été introduite: lorsqu'il n'est pas possible de placer l'étranger dans un centre de rétention, ou lorsque le refoulement avec conduite à la frontière n'a pas été possible, le préfet de police peut ordonner à l'étranger de quitter le territoire dans un délai de 5 jours. Sauf motif légitime, tout manquement à se conformer à cet ordre donne lieu à un constat d'infraction, assorti de l'arrestation obligatoire et immédiate de l'étranger et d'un procès en comparution immédiate. Une nouvelle forme de délit a ainsi a été introduite par le fait de se trouver sur le territoire italien après une décision d'expulsion.

En 2004, à la suite de certaines décisions de la Cour constitutionnelle[5], le législateur est à nouveau revenu sur le texte consolidé, d'une part, en adaptant la procédure d'expulsion immédiate avec accompagnement à la frontière aux garanties prévues par l'art. 13 de la Constitution (statuant que le juge doit confirmer l'expulsion immédiate de manière contradictoire avant l'exécution de la sanction elle-même)[6], et d'autre part, contournant sensiblement l'arrêt n. 223/2004[7], à régler à nouveau la sanction qui s'applique à celui qui,

[5] Arrêt du 15 juillet, n. 222 et arrêt du15 juillet 2004, n. 223.

[6] L'accompagnement à la frontière étant une mesure coercitive affectant la liberté de la personne, est couvert par les garanties du troisième alinéa de l'art. 13 de la Constitution.

[7] Comme déjà mentionné, le manquement à l'ordre du préfet de police de quitter le territoire suite à une ordonnance de renvoi était, selon la loi de 2002, sanctionné par une contravention. L'arrêt n. 223/2004 avait statué

sans motif justifié, ne se conforme pas à l'ordre du préfet de police de quitter le territoire national du fait de la mesure d'expulsion, transformant la simple infraction administrative en délit, celui-ci étant assorti de peines très lourdes (peines d'emprisonnement allant de une à quatre, ou, en cas de récidive, de un à cinq ans).

Il apparaît avec évidence que le thème de l'immigration et en particulier l'expulsion des étrangers avec accompagnement a été au centre des débats politiques ces dernières années. Il a malheureusement souvent été utilisé à des fins électorales ou propagandistes, tout comme les récents changements du cadre législatif (voir infra par. 2 et 2.1) introduits dans le cadre de mesures plus générales relatives à la protection de la sécurité publique, celles-ci étant dépourvues de toute systématisation, instrumentalisant le droit pénal, et dont certains aspects sont difficilement compatibles avec le cadre constitutionnel et européen, faisant écho à une rhétorique politique plutôt qu'une réflexion sur les réformes du cadre législatif.

Dans le cadre de ce rapport de synthèse nous porterons notre attention sur les questions qui ont suscité le plus de controverse et sur lesquels sont intervenus, d'une part la Cour constitutionnelle et d'autre part la Cour de Justice de l'Union européenne, cette dernière ayant forcé notre gouvernement à finalement appliquer la "directive retour" grâce à son jugement du 28 avril dernier (voir infra). Nous renvoyons le lecteur à la bibliographie pour des commentaires ponctuels sur toutes les modifications les plus récentes.

D'autres aspects du droit des étrangers mériteraient un examen critique, en commençant par la question de la programmation des flux d'entrées avec toutes ses

que l'arrestation obligatoire de l'étranger restant illégalement sur le territoire était illégitime, nos lois ne prévoyant pas des mesures préventives limitant la liberté personnelle en cas de simples contraventions, l'arrestation était donc sans recours sur le plan du droit judiciaire.

Le législateur, en violation substantielle du raisonnement de la Cour, a «saisi l'occasion» pour revoir les mesures punitives en transformant le fait de rester illégalement sur le territoire national suite à l'ordre de renvoi en délit.

contradictions et faiblesses et aux nombreuses régularisations qui ont caractérisé la politique italienne relatives à l'entrée à des fins professionnelles. Dans le même ordre d'idées, la politique de l'intégration, tant en ce qui concerne le débat sur la reconnaissance éventuelle des droits politiques et en particulier le droit de vote aux résidents de longue durée, ainsi que la reconnaissance et la jouissance des avantages sociaux mériteraient un compte-rendu.

En ce qui concerne le rapport de 2011 il est surtout opportun de s'attarder sur les questions les plus actuelles concernant la légalité du séjour et à l'éloignement des étrangers, celles-ci ayant non seulement fait l'objet d'interventions législatives récentes mais également de jugements de la Cour constitutionnelle et de la Cour de Justice de l'Union européenne.

Une autre question, parmi les nombreuses questions concernant l'immigration sur lesquelles il est opportun de se pencher dans ce rapport (voir infra par. 4) du fait des décisions récentes de la Cour constitutionnelle liées au traitement des étrangers irréguliers, est celle qui touche à la compétence du législateur (national ou régional) à régler le statut juridique des étrangers. Un contentieux a opposé l'état et les régions concernant les dispositions prévues au deuxième alinéa de l'article 117 de la Constitution a) et b) devant la Cour constitutionnelle, litige dans lequel l'état, en première instance, a réclamé sans succès la pleine et exclusive compétence en matière de traitement des étrangers même pour des matières qui relèvent de la compétence régionale. Ensuite, il a cherché (sans succès) à bloquer les dispositions législatives régionales prévoyant des mesures d'assistance pour des étrangers, y inclus ceux en infraction avec le droit de séjour.

Au-delà de la portée juridique de ce contentieux, le différend politique sous-jacent est également évident car certaines régions, politiquement non alignées avec le gouvernement de centre-droite ont tenté, à travers leur législation sur l'intégration des étrangers, de contrecarrer l'orientation poursuivie par le gouvernement central, refusant de créer une « terre brûlée » autour des étrangers qui séjourneraient irrégulièrement sur le territoire national en leur donnant accès aux services sociaux fondamentaux. Signalons qu'en réalité la loi nationale n°94/2009 a modifié le second alinéa de l'article 6 du décret

législatif n°286 afin d'empêcher l'accès des étrangers en situation irrégulière aux services publics excepté les services d'urgence ou de soins de santé essentiels même prolongées (voir art. 35 du texte consolidé) ainsi que ceux relatifs à l'obligation de scolarisation.

Il faut finalement rappeler que la question de l'immigration a été plus que jamais au cœur des débats puisque l'Italie s'est trouvée confronté à un flux exceptionnel de personnes originaires de pays du nord de l'Afrique. Cette situation difficile a fait l'objet de débats houleux non seulement entre les gouvernements italiens et français mais également vis-à-vis des institutions communautaires auxquelles l'Italie avait demandé un plus grand engagement dans la gestion de la crise[8].

Par un décret du Président du Conseil des Ministres (d.p.c.m.) du 12 février 2011, le Gouvernement italien a déclaré l'état d'urgence suivi par une ordonnance (n°3924/2011) du Président du Conseil des Ministres le 18 février 2011 définissant les mesures à prendre afin de gérer l'état d'urgence humanitaire. Finalement, avec le d.p.c.m. du 5 avril 2011, en application de l'art. 20 du texte consolidé[9], des mesures de protection temporaire pour raisons humanitaires ont été prises, permettant de délivrer des permis de séjour pour raisons humanitaires.

[8] Voyez aussi la communication de la Commission sur la migration du 4 mai 2011, COM(2011) 248/def. présentant une série de propositions vivant à assurer une stratégie cohérente de l'Union européenne.

[9] En réalité, l'art. 20 prévoit que, nonobstant les dispositions du texte consolidé, le Président du Conseil des Ministres peut adopter un décret établissant les mesures de protections temporaires à prendre en cas d'importantes exigences humanitaires, à l'occasion de conflits, de désastres naturels et d'autres évènements graves dans les pays hors de l'Union Européenne.

2. DECISIONS RECENTES EN MATIERE DE SECURITE PUBLIQUE : QUESTIONS DE CONSTITUTIONALITE ET DE COMPATIBILITE AVEC LA LEGISLATION DE L'UNION EUROPEENNE. LA CIRCONSTANCE AGGRAVANTE DE CLANDESTINITE

Les modifications apportées aux règles du statut des étrangers à travers les lois de 2008 et 2009 sur la sécurité publique ont encore renforcé un peu plus le rôle du droit pénal comme instrument de la lutte contre l'immigration illégale moyennant des sanctions plus sévères, non seulement contre ceux qui facilitent l'entrée et le séjour irréguliers d'immigrés, mais également contre les immigrés eux-mêmes.

Une première modification de la loi introduite avec le décret de 2008 a été la dite « circonstance aggravante de clandestinité », en vertu de laquelle une nouvelle circonstance aggravante a été ajoutée à l'article 61 du Code Pénal: « le contrevenant ayant commis un crime alors qu'il se trouvait en situation irrégulière sur le territoire national ». Les doutes sur la constitutionalité de cet article ont été immédiatement mis en avant, tant et si bien qu'on a simplement parlé de « droit pénal basé sur une typologie d'auteur » et la Cour constitutionnelle a confirmé l'inconstitutionnalité de l'article par son jugement n. 240 du 8 juillet 2010.

La Cour a relevé que les comportements antérieurs des sujets ne peuvent justifier des mesures pénales qui se basent sur une qualité personnelle, la transformant en « signe distinctif » et permettant de les traiter de manière différente au sein d'une catégorie de personnes donnée. Par ailleurs, La disposition contestée est contraire à la logique qui veut que la culpabilité est déterminée par la gravité de la lésion ou par la gravité de la mise en danger du bien juridique, celui-ci étant protégé par des normes pénales qui sanctionnent les délits au cas par cas, alors que ladite mesure prévoit une présomption générale et absolue de la dangerosité du migrant irrégulier et prévoit un durcissement des peines qui ne s'applique qu'à une typologie d'auteur, indépendamment de l'évaluation des conditions dans lesquelles l'infraction a été commise. Enfin, la violation des lois sur le contrôle des flux migratoires ne peut introduire automatiquement et anticipativement une présomption de

dangerosité de la personne responsable, mais doit être le fruit d'une analyse au cas par cas des circonstances objectives et subjectives.

2.1 Le delit d'entree et de sejour illegal sur le territoire national

L'un des innovations les plus controversées introduite par le loi nationale n° 94/2009 a été la prévision d'une nouvelle catégorie de crime : « de l'entrée et du séjour illégal des étrangers » (art. 10bis du texte consolidé). Il s'agit d'une contravention punissable, assorti d'une amende de 5.000 à 10.000 Euros, qui est appliqué à tout étranger se trouvant sur le territoire national en violation des lois sur l'entrée et le séjour. C'est le juge de paix qui est compétent et qui opère avec une procédure caractérisée par une rapidité considérable et un certain nombre de dispositions permettant d'expulser l'accusé : la loi prévoit en effet que le juge de paix, en prononçant la sentence pour le délit en question peut substituer l'amende par une expulsion. Comme cela a été mentionné, il s'agit encore d'une nouvelle version d'une mesure d'expulsion, cette fois ordonnée par un *juge honoraire* qui fonctionne en parallèle à l'expulsion administrative ordonnée par le préfet.

Cette mesure a fait l'objet d'un recours devant la Cour constitutionnelle, qui l'a validée dans son jugement n. 250 du 8 juillet 2010 rejetant la question sur la constitutionalité de cette mesure, affirmant que la punition d'un comportement est un choix législatif non contesté par la Cour (sauf s'il est manifestement illégitime et arbitraire) et que dans le cas présent il est évident que le bien juridique protégé est l'intérêt de l'état en matière de contrôle et de gestion des flux migratoires et que cette sanction ne s'appuie pas sur une simple condition personnelle ou sociale mais un comportement spécifique, c'est à dire la transgression de règles et que la Cour n'est pas habilitée à juger sous des aspects de rapports coûts/bénéfices

Le jugement de la Cour n'a cependant pas clos le débat juridique et politique entourant cette mesure qui continue à soulever pas mal d'incertitude, spécialement au regard de la législation européenne qui, avec la directive 2008/115/CE du 16 décembre 2008 a adopté des mesures et des procédures communautaires encadrant l'éloignement des

ressortissants étrangers en séjour irrégulier[10], applicables aux Etats membres. Le crime fait partie intégrale de cette répression pénale, qui, comme l'a observé la Cour de Justice de l'Union européenne, risque de compromettre l'objectif d'instaurer une politique efficace de rapatriement[11]. La disposition de l'art. 10*bis* a, entretemps, été confirmée par le très récent d.l. n° 89/2011 du 23 juin 2011 (voir plus bas à ce sujet).

3. LA DIRECTIVE RETOUR ET L'ARRET DE LA COUR DE JUSTICE DU 28 AVRIL 2011, AFFAIRE C-61/11

Comme déjà mentionné, la directive 2008/115/CE règlemente le mode de rapatriement, défini comme « le fait, pour le ressortissant d'un pays tiers, de rentrer - que ce soit par obtempération volontaire à une obligation de retour ou en y étant forcé ». Le processus de retour doit être graduel, allant d'un départ volontaire et, en dernier ressort, à un départ coercitif avec détention et accompagnement à la frontière.

A la date limite de la mise en œuvre, l'Italie n'avait pas encore donné suite à son obligation de transposer la directive et a donc continué d'appliquer les art. 13 et 14 du texte consolidé, en vertu desquels, l'expulsion était, en principe, assorti d'un arrêt motivé, immédiatement exécutable et à défaut de pouvoir accompagner le migrant irrégulier à la frontière, le préfet de police ordonnait la rétention dans un centre d'identification et

[10] Dans son arrêt n. 250/2010 la Cour a rejeté (sans entrer dans le fond) la question de constitutionalité par rapport à l'art. 117, premier alinéa de la Constitution de la mesure contestée par rapport aux mesures prévues dans la directive 2008/115/CE, dans la mesure où la date limite de transposition de la directive (24 décembre 2010) n'était pas encore atteinte.

[11] Voir l'ordonnance du Juge de paix de Mestre 16 mars 2011, sous www.penalecontemporaneo.it qui a soulevé un renvoi préjudiciel à la Cour de Justice de l'Union européenne sur l'art. 10 bis du texte consolidé.

d'expulsion (CIE)[12]. Dans le cas où il n'était pas possible de retenir l'étranger dans un de ces centres ou au cas où la rétention n'avait pas donné lieu à un accompagnement à la frontière, le préfet de police ordonnait à l'étranger de quitter le territoire national endéans les 5 jours. L'étranger qui restait de manière illégale et non justifiée sur le territoire en violation de l'ordre du préfet de police était puni d'un emprisonnement de un à quatre ans (art. 14, alinéa 5ter avant d'être modifié par la d.l. n° 89/2011).

Cette disposition a fait l'objet d'une demande de décision préjudicielle par la Cour d'appel de Trento[13] à la Cour de Justice de l'Union européenne. Cette dernière, dans son arrêt du 28 avril 2011, (Affaire C-611/11) a statué que « la directive 2008/115/CE du Parlement européen et du Conseil du 16 décembre 2008, relative aux normes et procédures communes applicables dans les Etats membres au retour des ressortissants de pays tiers en séjour irrégulier, notamment ses articles 15 et 16, doit être interprétée en ce sens qu'elle s'oppose à une réglementation d'un Etat membre, telle que celle en cause dans l'affaire au principal, qui prévoit l'infliction d'une peine d'emprisonnement à un ressortissant d'un pays tiers en séjour irrégulier pour le seul motif que celui-ci demeure, en violation d'un ordre de quitter le territoire de cet Etat dans un délai déterminé, sur ledit territoire sans motif justifié. »

En considération de l'effet direct des dispositions (art. 15 et 16), il s'en est suivi que la loi en question n'a plus été appliquée par les juges et les autorités administratives, et il n'y a eu aucun doute sur le fait que l'art. 14, alinéa 5 ter et quater de cette même loi avait subi une modification radicale avec la mise en œuvre de la directive suivant l'interprétation de la Cour de Justice Européenne. En effet, il est apparu que toutes les dispositions du texte

[12] Rappelons qu'en 2008, le nom des centre à été changé de « séjour temporaire et d'assistance » en « centres d'identification et d'expulsions » pour souligner leur unique rôle, c'est-à-dire l'éloignement de l'étranger.

[13] Ordonnance du 2 février 2011 adopté dans le cadre d'une procédure pénale contre un étranger déjà condamné en première instance à un an de prison pour s'être trouvé sur le territoire italien sans motif et en violation d'un ordre d'éloignement émis par le préfet de police d'Udine.

consolidé sur l'immigration relatives à la procédure d'éloignement étaient directement affectées par la législation européenne, surtout en ce qui concerne l'absence du caractère graduellement plus coercitif qui devrait caractériser la procédure d'expulsion[14].

3.1 Le decret-loi n° 89 du 23 juin 2011, converti en loi n° 129 du 2 aout 2011

Une intervention législative était maintenant évidente et avec le d.l. n°89/2011 du 23 juin, convertie avec quelques modifications par la loi n°129/2011 du 2 août 2011, ont été prises « les mesures d'urgence pour achever la mise en œuvre de la directive 2004/38/CE sur la libre circulation des citoyens de l'Union Européenne et pour la transposition de la directive 2008/115/CE sur le retour des ressortissants de pays tiers en séjour irrégulier. ». Le décret-loi a renouvelé quelques articles du texte unique en matière d'éloignement des étrangers.

En un mot, les principaux changements introduits en ce qui concerne l'éloignement des étrangers sont, d'abord, que l'expulsion n'est plus une mesure obligatoire pour le préfet, mais est décidée au cas par cas sur base d'un examen des conditions particulières de l'étranger et il est accompagné à la frontière dans des hypothèses précises (hypothèses que le législateur a déterminées, mais de manière fort large). Et quand il n'y a pas d'expulsion forcée avec accompagnement à la frontière, l'étranger peut demander au

[14] Voir Tribunal de Rome, arrêt du 9 mai 2011 dans www.asgi.it; Tribunal de Varèse, décret du 30 mai 2011, dans www.asgi.it; Cour de Cassation, Sect. I, arrêt du 11 mai 2011, n. 18586; Cour de Cassation, Sect. I, arrêt du 1 juin 2011, n. 22105, dans www.cortedicassazione.it.

préfet de lui accorder un délai allant de 7 à 30 jours pour un départ volontaire ou l'inclusion éventuelle dans un programme de retour assisté[15].

En revanche, en ce qui concerne l'expulsion avec reconduite à la frontière (voir art. 13, aliéna 4 du texte consolidé), elle peut donner lieu à une rétention dans un centre d'identification et d'expulsion[16]; la rétention a une durée initiale de 30 jours mais peut être prolongée par le juge de paix pour une durée de 30 jours. Passé ce délai, le préfet de police peut proroger la durée par périodes maximales de 2 mois chacune jusqu'à un maximum de 18 mois.

Au cas où la rétention n'est pas possible ou le séjour dans la structure n'a pas abouti à l'éloignement, le préfet de police peut ordonner à l'étranger de quitter le territoire dans les 7 jours. La violation de cet ordre, saufs motifs justifiés, donne lieu à une amende et un nouvel ordre d'expulsion[17]. Ce nouvel ordre est immédiatement exécutable (et ne prévoit plus un délai pour un départ volontaire) et le texte du décret-loi paraît permettre une répétition de l'ordre de rétention dans les CIE. Ce mécanisme pourrait soulever des questions de conformité par rapport à l'art. 15 de la directive 2008/115/CE sur base duquel la rétention doit être purement instrumentale à la procédure d'éloignement et étrangère à toute intention punitive.

[15] Au cas d'un octroi d'un délai pour un éloignement volontaire, l'étranger doit démontrer la disponibilité de ressource nécessaires et le préfet de police impose une ou plusieurs des conditions suivantes: remise du passeport, obligation de demeurer en un lieu déterminé, obligation de se présenter régulièrement au bureau de police.

[16] Quand il n'est pas possible de procéder immédiatement à l'expulsion, le préfet de police ordonne l'internement de l'étranger dans un centre d'identification et d'expulsion le plus proche pour le temps strictement nécessaire. Parmi les situations qui légitiment ce traitement il y a, entres autres, le risque de fugue (art. 13, quatrième alinéa *bis*), ceux attribuables à la nécessité de secourir l'étranger, ou d'effectuer des enquêtes supplémentaires quand à son identité, sa nationalité, l'acquisition des documents de voyage ou la disponibilité d'un moyen de transport approprié.

[17] Art. 14, alinéa 5 *bis* e *ter*, comme renouvelé par le décret-loi.

Rappelons enfin que les délais fixés par le décret-loi en ce qui concerne l'interdiction de réadmission, fixés à dix ans, ont dû être adaptés aux dispositions de la directive et ramenés à une durée comprise entre 3 et 5 ans.

L'adoption du décret n'a sans doute pas encore résolu tous les problèmes de conformité de la législation italienne à la législation européenne et des interventions futures de la Cour de Justice de l'Union européenne ou de la Cour constitutionnelle ne sont pas à exclure : il s'agit entre autres des modalités concernant les mesures résiduelles, dont le champ d'application est encore trop large, ainsi, par exemple, la simple absence de documentation qui constituerait un risque d'évasion et qui peut donner lieu à une éloignement coercitif (voir art. 13, quatre alinéa *bis*). Dans l'optique du législateur européen, la priorité devrait être donné au départ volontaire, le recours aux mesures coercitives étant l'exception.

4. LE PARTAGE DES COMPETENCES LEGISLATIVES ENTRE L'ETAT ET LES REGIONS EN MATIERE D'ASSISTANCE AUX ETRANGERS

Comme déjà mentionné dans l'introduction, un problème supplémentaire qui doit être traité, et qui a, par ailleurs, fait l'objet de décisions récentes de la Cour constitutionnelle surtout en ce qui concerne la question du traitement des étrangers qui ne sont pas en règle avec la loi sur le séjour, relève de l'identification du législateur compétent pour règlementer le statut juridique des étrangers et le statut juridique de l'immigration.

Avec la réforme du titre V de la Constitution, la compétence dans les matières relatives au droit d'asile, au statut juridique des ressortissants de pays hors de l'Union

Européenne[18] et les questions d'immigration ont été exclusivement attribuées à l'Etat (art. 117, deuxième alinéa, lettre a) et b)). Doit-il en être déduit que chaque cas qui touche au statut d'un non citoyen et à l'immigration sera de la compétence de l'Etat? Ou des espaces de compétences régionales peuvent être identifiés dans les cas qui empiètent sur des matières de compétence régionale?

Je me réfère en particulier aux services sociaux, une matière où les régions sont compétentes (art. 117, aliéna quatre de la Constitution) et pour lesquels il serait opportun de se demander si les régions peuvent maintenir un pouvoir législatif vis-à-vis des étrangers.

La région Emilia Romagna, (loi régionale n°5 du 24 mars 2004, « norme pour l'intégration sociale des citoyens étrangers ») a été la première région à légiférer suite à la réforme du titre V. Le Gouvernement a contesté cette loi devant la Cour constitutionnelle, celle-ci contenant des mesures concernant l'immigration, tout comme le droit d'asile et le statut juridique des citoyens ressortissants hors Union Européenne, mesures qui touchent à des matières exclusivement réservées au pouvoir législateur de l'Etat (art. 117, alinéa deux, lettre a) et b).

Dans son arrêt n. 300 de 2005, la Cour rejette le recours du gouvernement contre la l.r. Emilia Romagna, affirmant que la loi nationale (décret législatif n°286/1998) prévoit qu'une série d'activités relatives à la réglementation du phénomène de l'immigration et de ses effets sociaux sont exercées par l'état en coordination avec les Régions et que la dite loi confie directement certaines compétences à ces dernières. Selon la Cour, l'intervention publique ne se limite pas au simple contrôle des entrées et des séjours des étrangers, mais inclut nécessairement d'autres domaines comme l'éducation, la santé, le logement, toute des questions où les compétences nationales empiètent sur les compétences régionales. La

[18] La condition des citoyens des pays membres de l'Union européenne est régie par les traités et les normes de l'Union européenne et le même art. 117 régit la compétence de l'Etat et des régions par rapport à la formation et le respect de la législation européenne.

Cour a rendu un arrêt similaire (n. 156 de 2006) lors du recours du gouvernement contre la loi de Friuli Venezia Giulia n° 5/2005 du 4 mars 2005, (« mesures d'accueil et d'intégration sociale des immigrés étrangers »).

La Cour constitutionnelle a récemment eu l'occasion d'intervenir à plusieurs reprises sur cette problématique, notamment l'approbation de la l.r. n° 29 Toscana du 9 juin 2009 «mesures pour l'accueil, l'intégration, la participation et la protection des citoyens étrangers en région Toscana », la l.r. n°32 Puglia du 4 décembre 2009, « mesures pour l'accueil, la coexistence civile et l'intégration des immigrés dans les Pouilles » et la l.r. n° 6 Campania de l'8 février 2010, « mesures pour l'inclusion sociale, économique et culturelle des personnes étrangers en Campanie ». Le Gouvernement a introduit des recours devant la Cour constitutionnelle contre ces trois lois, en particulier en ce qui concerne les dispositions qui, sous certaines conditions, prévoient des formes d'assistance, y inclus à des personnes qui enfreignent la loi sur le séjour. Pour le gouvernement, ces normes dépassent les compétences régionales dans la mesure où elles facilitent le séjour de étrangers et auraient influencés le respect des lois réglant l'entrée et le séjour des étrangers qui sont réservées à l'Etat conformément à l'art. 117, alinéa deux, lettres a) et b) et auraient même enfreint les lois sur la sécurité publique et des lois pénales, également réservées à l'Etat conformément à l'art. 117, aliéna deux, lettres h) et l) [19].

La Cour constitutionnelle, avec les arrêts du 22 juillet 2010, n. 269, 22 octobre 2010, n. 299 et 25 février 2011, n. 61 a rejeté les réprimandes gouvernementales, soulignant que le texte consolidé reconnaît aux Régions des compétences spécifiques en matière de prestations sociales aux étrangers. D'autre part, elle a relevé que les mesures régionales bénéficiant les étrangers en séjour irrégulier ont comme objectif le respect des droits fondamentaux sans aucune incidence sur la politique d'immigration, le statut juridique des

[19] Art. 117, deuxième alinéa, lettre. h) ordre et sécurité publique….; lettre. l) juridiction et droit judiciaire; droit civil et pénale, justice administrative.

étrangers présent sur le territoire régional ou national ou sur le statut des bénéficiaires, et n'enfreignent donc pas sur la sphère de compétence nationale.

Par conséquent, la Cour a entièrement légitimé les politiques d'intégration et d'assistance menées par certaines régions, pour lesquelles la satisfaction de besoins fondamentaux doit prévaloir sur la question de la régularité du séjour de l'étranger.

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ECONOMIC FREEDOM, FREEDOM OF ENTERPRISE AND THE PROTECTION OF COMPETITION

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1. ECONOMIC FREEDOM AND FREEDOM OF PRIVATE ENTERPRISE IN THE ITALIAN CONSTITUTIONAL EXPERIENCE

In the Constitution of the Italian Republic the guarantees relating to the economic sphere revolve around two basic principles: the freedom of private economic enterprise (Article 41) and the protection of private property (Article 42). On these principles the Constituent Assembly has built the idea of economic pluralism (meaning enterprises and property can be private, public or subjected to public controls) and have emphasized the social dimension of economic guarantees (see the limit of "social usefulness" and the safeguard of "security, freedom and human dignity", in Article 41 It.Const., and the limit of "social function" for the private property , in Article 42 It.Const.). The social dimension of economic guarantees can justify forms of restraint of economic freedom and private autonomy even in the economic sphere. The debate on the basic principle inspiring the notion of "Economic Constitution" has developed in the Italian constitutional experience around the interpretation and implementation of these parameters [1] .

The Constitutional Court has clarified the role and extent of the freedom guaranteed by the first paragraph of Article 41 It.Const. that includes not only the freedom to start up a business, but also the ability to carry out and to dismiss it freely and also includes the freedom of economic agents to compete in the marketplace.

The Court was also able to define the boundaries of the "values" included in the general notion of "social usefulness", a concept which must be related to the protection of common goods (environment, health, other social interests). As for the limits derived from respect for "the freedom, dignity and security of persons", they can justify regulations that affect the launch and development of economic activity (permits, licenses, concessions

[1] For a complete analysis of the European debate, especially on the origins of "Wirtschaftsverfassung" in German constitutional history, see L. CASSETTI, *Stabilità economica e diritti fondamentali. L'euro e la disciplina costituzionale dell'economia*, G.Giappichelli, Tourin, 2002; more recently, F. PIZZOLATO (a cura di), *Libertà e potere nei rapporti economici. Profili giuspubblicistici*, Giuffrè, Milan, 2010.

etc.). To these limits must be added the "public controls" that allow both private and public economic activities to be directed and co-ordinated towards social ends (Article 41, par.3 It.Const.).

The choice regarding the tools that may limit the freedom of enterprise and the establishment of controls for social purposes are the result of the decision of parliamentary law to which the Italian Constitution reserves the right to define in practice the solutions that cannot however degrade, up to the point where it is functionalized, the guarantee of economic freedom codified in Article 41 It.Const. [2].

1.1 Public controls to avoid the formation of monopolies: antitrust rules in the service of the national market

The perception of the substantial difference that separates the direct intervention through the public regulation and the control of respect for competitive rules in the national market and therefore the maintenance of equal conditions for all economic agents was ingrained in the Italian system with the establishment of the national Antitrust Authority (Autorità Garante della Concorrenza e del mercato) created in 1990 by the Law No. 287 to implement the guarantee of Article 41 It.Const. and in line with the European antitrust rules and practice (Article 1, Law n.287/1990).

The activity of the Antitrust Authority is not limited to the control and sanction of abusive acts and behavior that distort competitive rules (abusive agreements, abuse of a dominant position, anti-merger control), but has also highlighted, in the development of

[2] A wide analysis on constitutional judgements on economic freedom is available in the volume edited by V. BONOCORE, *Iniziativa economica e impresa nella giurisprudenza costituzionale*, ESI, Naples, 2006, 10 (for further references, see the doctrine mentioned in footnote no. 1).

consultative powers, the negative effects and distortion of competition in the internal market due to State or regional legislation and, occasionally, local regulation[3].

Twenty years of antitrust decisions have not only outlined abusive formations of private economic power that damage the competitive market, but have also put into question the kinds of regulation (state, regional and also local rules) that impede the development of business in fair market conditions by the introduction of restrictions, reserves and conditions for opening economic activities.

Ultimately, the national antitrust legislation and its enforcement operate for purpose of the constitutional guarantee of economic freedom by imposing (in the private sphere as well as the public) compliance with those conditions that make the market an area of social and economic relationships based on the principles of freedom and equal opportunities.

2. "THE PROTECTION OF COMPETITION" AS A "TRANSVERSAL" SUBJECT-MATTER INTRODUCED IN THE REFORM OF ITALIAN REGIONALISM (CONST.LAW NO. 3/2001). THE "UNILATERAL" DEFENSE OF STATE REGULATION

With the constitutional reform of Italian regionalism (Const.Law No.3/2001) the constitutional discipline of the economy is enhanced by rules which grant legislative powers to the State in subject-matters relating to economic policy instruments. The reformed Article 117, para.2, let.e) It.Const. has assigned to the Parliament the task of legislating on "competition protection" as well as other key functions for the management

[3] Article 21, Law n.287/1990 has attributed to the Antitrust Authority the power to make reports to the Government and Parliament on laws, regulations and general administrative measures which may distort competition or the proper functioning of the market. According to Article 22 the authority may express advisory opinions on legislative and regulatory proposals and on the problems relating to competition and the market.

of the economy (such as currency, savings protection, State taxation, fiscal system and the regulation of financial markets) .

With the aim of strengthening regional autonomy, the reform of 2001, after having stated the exclusive legislative power of the State, has in reality given a range of responsibilities in certain strategic sectors of the economy (industry, commerce, tourism, crafts) to the regional legislative powers (the so called "potestà legislativa regionale residuale) (Article 117, para.4 It.Const.) and has given the concurrent legislation of State and regions the discipline of "incentives and support for production activities" (Article 117, para.3 It.Const.).

The idea of transforming the regional system into a "federal" one was originally based on the pillar of "fiscal federalism", in the sense of real autonomy of revenue and expenditure for regions and local entities according to the reformed Article 119 It.Const., which only recently has been implemented due to the entering into force of Law No. 42/2009. In the framework of new fiscal powers and new responsibility for the regions Article 119, para.5 It.Const. has introduced a single clause on the direct intervention of State regulation: this rule permits the adoption of "special" State measures (funding and incentives) addressed to individual local realities and based on "specific" socio-economic conditions (e.g. to deal with economic and social imbalances).

The text reformed in 2001 did not include a general clause that would justify, in the name of national interest and uniformity of regulation, the action of State laws to govern and correct, especially in adverse economic conditions, the balances of the national economy, based on the model of the *Commerce clause* in the U.S.A. Constitution (according to Article I, Section 8, para.3, the Congress shall have powers to regulate commerce with foreign nations and among the several States and with the Indian tribes).

The Italian Constitutional Court has "created" a similar clause in its jurisprudence through the judicial review of legislation that resulted from the complaint of the State and

regions (giudizio sule leggi in via d'azione)[4]. According to the fundamental Judgement No.14/2004, the exclusive legislative competence of the State on the "protection of competition" is not a traditional subject-matter, but a legal regime. State legislative powers may introduce not only measures that prevent the formation of private monopolies (antitrust rules), but can also introduce a whole range of measures aimed at reducing imbalances and the promotion and improvement of conditions, for the sufficient development of a competitive market, or to establish competitive assets[5].

As such, the "protection of competition" may cut transversally many subject-matters attribueted to the legislative powers by the reformed Constitution, especially those regarding economic policies. This result, however, is lawful only if the intervention of the State laws has "macro-economic impact" meaning that it regards profiles and economic interests which must be treated in order to ensure uniform regulation throughout the national territory. When these conditions are met the transversal interpretation of "competition protection" may have the effect of limiting the area of economic matters in which influence is conferred to the regions in terms of legislative power (concurrent, with State laws, or residual)[6].

[4] According to the reformed Article 127 It.Const., "The Government may question the constitutional legitimacy of a regional law before the Constitutional court within sixty days of its publication, when it deems that the regional law exceeds the competence of the region. The region may question the constitutional legitimacy of a State or regional law or measure having the force of law before the Constitutional court within sixty days from its publication, when it deems that said law infringes upon its competence".

[5] In this case the Constitutional Court has interpreted the State's function in protecting competition with reference to the experience of European antitrust policy which includes not only the application of antitrust rules by the EU Commission, but also involve the possibility of direct State intervention in the economy (in the EU law aids granted by the States are forbidden because they may distort competition, but are allowed under certain specific conditions: See Article 107 of the Treaty on the Functioning of the European Union): on this comparison see critically, R. CARANTA, *La tutela della concorrenza, le competenze legislative e la difficile applicazione del titolo V della Costituzione*, in *Le regioni*, 2004, 1007; L. CASSETTI, *La Corte e le scelte di politica economica: la discutibile dilatazione dell'intervento statale a tutela della concorrenza*, in *federalismi.it*, n.5/2004, 6; A.PACE, *Gli aiuti di Stato sono forme di "tutela" della concorrenza?*, in *Giur.cost*., 2004, 262.

[6] See Const.Court Judg. No.14/2004: for a complete overview of the debate raised by this important decision See, R. Bifulco, *La tutela della concorrenza tra parte I e parte II della Costituzione (in margine alla sent.14/2004 della Corte costituzionale)*, in *Le regioni*, 2008, 791 ss. and here for other bibliographical references.

However, the premise of the test on the reasonableness, proportionality and adequacy of State measures, in the name of protection and "active promotion" of competition, have not been applied in a linear and coherent way in the constitutional jurisprudence of the last seven years.

In fact, based on a wide interpretation of the State function in defense of competition, the Court declared unlawful State laws containing sectorial regulatory mechanisms lacking any significant macro-economic impact or protectionist measures related to specific areas of the national market, or legislative action to boost employment in some deprived areas of the country[7].

In conclusion, the promotion of competition also resulted in those State measures which, taking care to promote growth and employment, sometimes result in the direct intervention of public authorities in a specific productive sector or in a specific region of the country, that can affect, in the name of specific economic and social needs, the competitive functioning of the market.

Decidedly more episodic are the decisions by which the constitutional judges, upholding the complaints of the regions, have declared unconstitutional or censored State measures because of the lack of a truly overall impact on "the general economic equilibrium"[8].

[7] On this constitutional jurisprudence, see critically, M. LIBERTINI, *La tutela della concorrenza nella Costituzione italiana*, in *Giur.cost.*, 2005, 1429 ss.; R. CARANTA, *Mercato e autonomie*, in A. VIGNUDELLI (a cura di), *Istituzioni e dinamiche del diritto. Mercato amministrazione diritti*, G. Giappichelli, Tourin, 2006, 107 ss.

[8] Const.Court Judg. No.77 and 107/2005.

3. WHAT PROSPECTS FOR ECONOMIC DEVELOPMENT BASED ON A SYNERGY BETWEEN DIFFERENT LEVELS OF GOVERNMENT?

What are the consequences of the interpretation offered by the Constitutional Court as regards the objective of the reform of 2001 to develop decision making autonomy of local government in order to stimulate economic development that is built and maintained responsibly at a regional and local level?

In the first application of the test on the adequacy of State laws on the matter of competition protection, the Court has effectively safeguarded the regional regulation of local public services: in the Judgement No.272/2004, the reasonableness of the rules on the participation of public enterprises in the public competitive tendering procedure has led judges to declare unlawful those norms as they contain self-application rules, which are overly detailed and therefore able to infringe unjustifiably on the regional powers in the organization of local public services.

However, this initial orientation was contradicted by more recent jurisprudence. In 2007 the Court judged as lawful State rules on public contracts (Codice dei contratti, appalti e furniture – Legislative decree no.163/2006) which contain an extremely detailed discipline on public procurement in the name of the prevalence and supremacy of the interest to protect competition among economic operators: this interest would be only satisfied by State regulation that guarantees uniformity and equal conditions among enterprises in the national market. The regions could not claim any competence in order to discipline local procurement procedure.

The balancing test of these rules was carried out in very summary terms: "the need for uniformity", considered as an essential characteristic of competition, in the field of public procurement prevents the Court from judging the true reasonableness of State measures and their eventual impact on the "general economic equilibrium".

The uniformity of the rules laid down to ensure competitiveness in tendering procedures is in no manner balanced with other constitutional interests or values. That means the uniformity of discipline in the field of public procurement becomes an absolute value bound to prevail on any instance of differentiation proposed by the regional legislature that would adapt the discipline of the Code of public contracts to the need of local business (see Const.Court, Judg. No. 401/2007; Judg.No 283/2009).

The same criteria applies to decisions regarding the State rules for the liberalization policies related to some economic sectors that have recently been opened up to full competition between private traders: also in this case the solution taken by the national Parliament was deemed an expression of the State's role in protecting competition. In particular, the rules governing liberalization must respect single, uniform State regulation and cannot be outlined at local level, even assuming that regional solutions in the field of trade were inspired by a more efficient policy to promote the competitiveness of the local market [9].

Even recently the Court has reaffirmed that regional pro-competition rules are admitted, but only if their impact is marginal and indirect and they do not conflict with the goals of State standards that govern the market and protect competition and production.

On this basis, the regional norm including the liberalization of Sunday opening tied to the setting of a midweek day for being closed for business has been withdrawn. This kind of restriction (imposing midweek closing) was considered unconstitutional by the Court because of the risk of jeopardizing trade liberalization policies carried out by the Legislative Decree No.114/1998, which provides for a more strict regulation of business hours (Const.Court, Judg. No.150/2011, para. 7.1.).

[9] See L. BUFFONI, *La "tutela della concorrenza" dopo la riforma del titolo V: il fondamento costituzionale ed il riparto di competenze legislative* , in *Le istituzioni del federalismo*, 2003, 383; C. MARZUOLI, *La tutela della concorrenza*, in G. CORSO e V. LOPILATO, *Il diritto amministrativo dopo la riforma costituzionale*, *Parte speciale*, Milan, 2006, vol.I, 3 ss.; L. CASSETTI, *Potestà legislativa regionale e tutela della concorrenza* (10.12.2001), in *federalismi.it*.

The idea of a State which shows the "high road" to the regional autonomies as the best guarantee of competitive markets, while at the same time closes concrete possibilities to adapt State rules to the local productive system, is justified in part by the tendency of the regional legislator to reduce competition, sometimes by means of protectionist measures, in clear contradiction with the value of economic freedom expressed in Article 41 It.Const. (Const.Court, Judg. No. 124/ 2010) [10].

It cannot be denied, however, that constitutional jurisprudence has created a new "State centralism" on behalf of uniformity and absolute prevalence of pro-competitive State measures. This appears to be in stark contrast with the spirit of federalism that would be based on differentiation and the empowerment of the powers and responsibilities of local government.

In conclusion, in the uncertain Italian federalism the clause on the protection of competition has definitely put in the hand of central government choices and policies that do not always have a real impact on economic equilibrium and that often preclude the ability to process a local policy shared with central government.

Without an effective and coherent judicial review of the Constitutional Court on the proportionality of State rules, regional and local regulations are losing spaces, even where the latter have sometimes attitude to introduce better instruments for the protection of competition.

[10] In this Judgement the Const.Court held as unconstitutional the provisions of the Calabria region in reserving a share of 20% of authorization for renewable resources to local firms or to companies that spend part of their investment in the same region.

4. DELAYS AND RELUCTANCE IN APPROVING THE "ANNUAL LAW FOR MARKET AND COMPETITION" (ARTICLE 47, LAW NO 99/2009)

In reality, the legal interpretation of the constitutional clause on the exclusive power of the State in the protection of competition trusts the central government with an important task in which State power also does not seem to excel.

The delay and reluctance of the Parliament to approve the first annual law on competition and the marketplace reveal this paradox: the trust placed by the Constitutional Court in almost positive virtues of the uniformity that affects State rules on the regime of competitive market does not seem well placed.

Two years after the entering into force of the Law No. 99/2009 there is still no sign of the "annual law for market and competition" to be adopted in implementing Article 47 of the above mentioned law.

An annual law would have the task of bringing to the attention of the political agenda every year a range of measures necessary to open up to competition fields still largely subject to authoritative regulation and to administrative praxis that do not facilitate the conduct of business activities.

The basic norms of the annual law for market and competition will have their immediate application in the light of the numerous reports and advisory opinions given by the Antitrust Authority in the last twenty years.

It is easy to imagine how such instrument, once it has come into force, may have positive impact on the market of public utilities (where is necessary complete the liberalization of gas and start up the liberalization of local and regional railways) and on the balance of energy resources (liberalization in the field of fuel distribution), equally strategic for the economic development.

As the national Antitrust Authority has promptly pointed out in its latest Annual Report (2011), over the last five years there has been a standstill in the liberalization policies launched by the government in 2006-2007 and it is clear that "the absence of high profile pro-competition measures reflects on the current legislature"[11].

In particular, in the regulation of professions, the opening of the market for the distribution of pharmaceuticals, and the liberalization of regional railways, the signals coming from Parliament are far from clear: there prevails a substantial reluctance to open these key strategic markets to revitalize the national economy .

Therefore, there is the need for a renewed and effective commitment of the State legislature in order to truly make effective the guarantee of competition which supports the effectiveness of constitutional principle relating to economics.

It is now also essential to restore institutional spaces for a debate on the fair cooperation between different level of government for a better and more efficient protection of market and competition , possibly through the strengthening of dialogue between the regions and the advisory powers of the national Antitrust Authority, or through the active involvement of the regions in the preparation of the annual law on competition and the marketplace[12].

5. RECOMMENDED WEB SITES

www.agcm.it (National Antitrust Authority-Autorità Garante della concorrenza e del mercato)

[11] AGCM, Relazione annuale sull'attività svolta, Rome, 31 March 2011 (report available at www.agcm.it).

[12] As suggested by B. CARAVITA, *Tutela della concorrenza e regioni nel nuovo assetto istituzionale dopo la riforma del titolo V della Costituzione*, in *federalismi.it,* n.20/2010, 9.

www.giurcost.org e www.cortecostituzionale.it (Judgments of the Constitutional Court)

For an update on laws and jurisprudence (national and european), analysis of doctrine on freedoms, law and economics, regionalism and federalism, see the following online journals:

www.federalismi.it Rivista di diritto pubblico italiano, comunitario e comparato

www.associazionedeicostituzionalisti, Rivista telematica giuridica dell'AIC (Association of Italian Constitutional Law Professors)

www.apertacontrada.it (Riflessioni su Società, Diritto, Economia)

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FREEDOM OF RELIGION AND THE ECHR

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1. FOREWARD

This brief report aims at explaining the relationships and potential inconsistencies between the national and the ECHR level of protection of freedom of religion through an analysis of two cases: Lombardi Vallauri and Lautsi.

The first part of the report deals with the protection given to freedom of religion by the Italian Constitution (IC) and, more in general, by the national legal system, with particular regard to the individual dimension of religious rights (IC, art. 19). The second part deals with art. 9 ECHR, in light of the Strasbourg Court case-law. After that, we will treat the two mentioned cases, in order to show the delicate and complex relationships between

national and European level when dealing with the display of crucifix in state schools classrooms and with the appointment of teachers in catholic Universities.

The analysis of the two areas (conventional and national) and reciprocal relationships will be necessarily synthetic. It will nonetheless testify the difficulty of finding a stable balance between the rights related to the religious dimension (individual and group) and other conflicting interests of the State; a difficulty which grew a lot since the first recognition of these liberties.

2. Freedom of Religion in the Italian Constitution: General remarks

The 1948 Italian Constitution represents a clear break from the regulation of the religious phenomenon contained in the *Statuto Albertino*. The latter provided for the Apostolic Roman Catholic religion as the 'only State religion', placing it in a privileged position. This recognition, however, did not originally entail any repression against other cults: under the *Statuto*, the practice of other religions was tolerated and other religious believers could not be discriminated in the enjoyment of civil and political rights for religious reasons.

In the Fascist period, a number of statutes and regulations imposed the mandatory teaching of the Catholic religion (r.d. 2185/1923) and the crime of public insult of State religion (r.d. 3288/1923): later on, the privileged position of the Catholic Church was firmly established in the *Patti Lateranensi* of 1929. During the fascist period, other religions were allowed, but were subject to significant limitations: they had to profess principles compatible with 'public order' and 'morality', and they were subject to a strong Government control.

The 1948 Constitution openly rejected the previous policies elected by the fascist Government. Religious freedom is protected and regulated in four articles: articles 7 and 8

(and 20), concerning the institutional and collective dimension of religious freedom and article 19, concerning its individual dimension. The framework is completed by articles 2 and 3 of the Constitution, promoting the 'personalistic principle' and the prohibition of discrimination on religious grounds, among others.

Articles 7 and 8 (and 20) establish the principle of secularism, placing it among the fundamental principles of the constitutional order: art. 7 establishes the sovereignty and mutual independence of the State and the Catholic Church, each in its own order, and art. 8 guarantees 'equal freedom' – not equality, by the way – to all religious confessions. With these provisions, the Constitution retains the historical privileges of the Catholic religion, providing at the same time for instruments (the conclusion of agreements between confessions and State, for instance) to promote equality of other religious denominations. This article, together with the protection of the individual sphere of freedom of religion (art. 19), establishes the principle of secularism which, according to the Constitutional Court case law (decision No. 203 of 1989), means a 'guarantee for the protection of freedom of religion in a context of cultural and confessional pluralism'.

Applying the secular principle, the Constitutional Court has repeatedly declared unconstitutional a number of statutes containing discriminations against religious confessions without agreements with the State (Const. Court no. 195/1993), concerning religious oath (Const. Court no. 149/1995 and 334/1996) and blasphemy (Const. Court no. 440/1995 on the crime of blasphemy). This way, the Court tried to prohibit any discrimination among religious confessions and to protect the constitutional fundamental principles of equality and secularism.

Art. 19 guarantees the individual dimension of religious rights, establishing that all persons have «the right to profess freely their own religious faith in any form, individually or in association, to disseminate it and to worship in private or public, provided that the religious rites are not contrary to public morality».

So declined religious freedom consists of rights that relate primarily to its external dimension, even though it is comprehensive of the freedom of conscience and of atheism, which are implied in the freedom to believe.

The individual dimension is closely related to the collective one. On the one hand, some individual rights (for instance the right to celebrate a holy day) exist only if the religious group is recognized through an official agreement signed with the State. On the other hand, other individual rights can be conditioned or limited by denominational organizations, which can fire (or refuse to appoint) workers and teachers when their personal religious beliefs are proven not to be consistent with the organization's official ideology (Const. court 195/1972 known as Cordero case).

The Italian Constitutional court also recognizes that the right to profess a cult in public or private places cannot be limited by statutes requiring special and stricter land permissions compared with the ones applicable to catholic places of worship (Const. court no. 59/1959).

Under the umbrella of art. 19, personal data concerning religious beliefs are considered 'sensible/sensitive data' to be protected by the Code of Privacy (d.lgs. 196/2003, art. 4); more generally, article 19 of Constitution, again, should provide for the secular principle also with regard to the critical issue concerning the display of the crucifix in public school, hospitals and courts (see below).

3. Freedom of Religion in the ECHR and the Case Law of the Strasbourg Court

Art. 9 of the ECHR establishes, in the first paragraph, that «Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance».

The second paragraph provides that «Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others». Two different dimensions are generally derived from the ECHR article: one is internal and the other is external.

The first relates to the right to believe and not to believe and has great significance: the right cannot be subject to limitations by the State on the ground of its obligation of neutrality, which means that the State must refrain from any interference in the sphere of individual consciousness. The external dimension, envisaged by the second paragraph, concerns the actual practice of worship, the right of teaching, observing, and professing a creed.

This dimension can be conditioned and limited only by law and for purposes established by the ECHR. Furthermore, any limit or restriction to these liberties must be necessary and proportional in accordance with the idea of democratic and pluralistic society recognized in the ECHR case law.

The ECHR's protection of religious rights is granted not only to individuals but also to groups, because of their importance in the concrete realization of individual rights and interests in the religious sphere.

From this viewpoint, States must ensure, under the principle of neutrality and religious pluralism, equal treatment to any confessions (cases of Jehovah's Witnesses v. Russia, 2010 and Jehovah's Witnesses v. Austria, 2008) as well as no interference in the internal organization of churches with regard to the appointment of religious ministers (Serif v. Greece case, 1999).

Consequently, a margin of appreciation for member States in regulating relationships between State and religions is certainly permissible, but it has to be reasonable and proportional in order not to limit the principles of neutrality and pluralism

in religious and cultural matters. Applying this balancing test, the European Court of Human Rights recognized the compatibility of French law prohibiting Islamic veil in public school (Dogru v. France, 2008; Kervanci v. France, 2008; Ghazal v. France, 2009; Aktas v. France, 2009), in accordance with the French principle of *laicité*. In the judgment Arslan v. Turkey, on the same basis, the Court declared incompatible with the ECHR (because disproportional and unreasonable) a Turkish statute establishing the arrest of people wearing religious costumes in places open to the public.

So doing, Strasbourg judges tried to find a case-by-case approach that strikes a balance between the margin of appreciation of the States and the protection of rights recognized in art. 9 of the Convention: States can provides higher standards of protection of freedom of religion than those requested by the Court, but they cannot lower them, establishing limitations and conditions not consistent with the principle of neutrality and pluralism imposed by ECHR.

Two different cases, originated in Italy, exemplify the delicate and complex balance between the margin of appreciation of the State and individual rights.

4. THE CASES OF LOMBARDI VALLAURI AND LAUTSI

A number of well-known decisions of the Italian Constitutional Court (no. 348 and 349 in 2007, confirmed by no. 311 and 317 of 2009, no. 93 of 2010 and no. 80 and 113 of 2011), acknowledged to the ECHR, as interpreted by the Strasbourg Court, the rank of sub-constitutional sources of law with priority over acts of Parliament (*norme interposte*). In so doing, our Constitutional judges recognized that statutes and regulatory acts have to be consistent with the European Convention and the Courts judgments as a consequence of the reference contained in article 117 of Italian Constitution.

From this perspective, the Lombardi Vallauri and the two Lautsi decisions constitute an excellent testing ground to verify the actual alignment between national protection of religious freedom and the conventional one.

The Lombardi Vallauri decision (October 20, 2009) concerns the non-renewal of a teaching position as a lecturer at the Milan Catholic University as a consequence of the withdrawal of the approval by the Holy See. This decision was taken because of certain personal opinions expressed by professor Lombardi Vallauri which were contrary to the catholic doctrine.

Given that the Vatican approval is a necessary condition for the teaching in this denominational University, the Faculty Council had excluded the application of professor Lombardi Vallauri. The plaintiff, then, asked the Italian administrative court of first instance to quash the decision because of its incompatibility with the Italian Constitution. The administrative court of first instance (TAR Lombardia, sez. II, 7027/2002) and the administrative court of Appeal (Consiglio di Stato, sez. VI, 1762/2005) rejected his application. Exhausted the internal remedies, the plaintiff decided to bring an action before the European Court of Human Rights, lamenting, *inter alia*, the infringement of art. 9 on religious freedom.

In their decision (2009), the European judges recognized the need to protect the religious orientation of the denominational organization, in accordance with the Cordero decision of the Italian Constitutional court (1972). However, the European court asked the University to demonstrate that there was a strict and effective *liason* (relationship) between Lombardi Vallauri's personal opinions and his teaching activity. Because the University failed to prove this, the Court declared the University decision illegal and in violation of the freedom of expression (art. 10 ECHR) and of the right of due process (art. 6 ECHR), since the plaintiff was denied the right to defend.

The Court stated that, while a limitation of individual conscience and freedom of expression is compatible with the ECHR n order to protect the organization's ideology (and therefore, ultimately, the *rights of others*), the actual link between the contested position

taken by the teacher, in contrast to the doctrine of the Church, and his teaching has to be proven.

The Lautsi case (i.e. the two decisions made by *Sec. II* of the ECHR Court on November 3, 2009, and by *Grande Chambre* on March 18, 2011) arises from the action brought by Lautsi against the School Council's decision to keep the crucifix in the classrooms despite the removal request submitted by the applicants in the name of freedom of religion and freedom from religion.

The appeal against the decision was brought before the administrative courts of first instance, that raised (before the Constitutional Court) the question of constitutional legitimacy of the provisions providing for the display of the crucifix (art. 119 r.d. 1297/1928 tab. c and art. 118 r.d. 965/1924). After the inadmissibility pronounced by the Constitutional Court, because of the regulatory nature of the attacked provisions, the judge decided to dismiss the action based on the following grounds: (a), the crucifix should not be just a religious symbol, but also an historical and cultural one; b) the principle of secularism in force in the Italian legal system should not preclude the display of the crucifix, which would be an expression of an essentially secular culture, promoter of the principles of freedom, equality and solidarity; c) his being 'expression of some secular principles' would confirm the crucifix an 'affirmative and confirmative symbol of the Republic's principle of secularism' and hence respectful of religious freedom (TAR Veneto, sec. III, 1110/2005). The *Consiglio di Stato*, in the appeal against the ruling of the TAR, upheld the decision and the reasoning of the first instance court (Cons. State, sez. VI. 556/2006).

The appellants then applied before the Strasbourg court, complaining about the violation of art. 9 ECHR and article. 2 of the additional Protocol No. 1 concerning the right of parents to educate their children according to their philosophical and religious beliefs. The second section, recognizing the crucifix as a eminently religious symbol, declared its exposure in the classrooms incompatible with the mentioned ECHR principles. However, two years later, the *Grande Chambre* (with 15 votes in favor and two dissenting opinions)

overruled the decision: in the course of a process which had, as third parties or in support of Italy 20 ECHR member States, the Strasbourg Court recognized a different meaning of the secularism principle and, leaving to Italy a wide margin of appreciation, held the crucifix in public places compatible with the freedom of religion by reason of its essentially passive (and inactive) nature.

This second decision, as well as the first one, raised many criticisms. In particular, if the first decision was deemed to have limited too much the State margin of appreciation, the decision of the *Grande Chambre* seems unconvincing in its argumentative path: it recognizes the compatibility of the exposure of the crucifix in the light of the margin of appreciation, for instance, without taking into account that in Italy its exposure is far from undisputed, as witnessed by the split between ordinary courts and administrative courts. The crucifix in classrooms also seems incompatible with the secular principle of impartiality, as emerges from the constitutional case law; according to critics, further, the essentially passive nature of the crucifix, as meant by the European Court in order to avoid a violation of religious freedom, seems to draw a very questionable and unprincipled distinction among religious symbols. Compared to the ECHR principle of neutrality, it is not easy to explain how both the Italian exposure of the crucifix and the French law banning the Islamic veil could be compatible. If the purpose of securing religious pluralism and neutrality of the institutions is threatened by the presence of a teacher wearing the Islamic veil, why a symbol imposed in each public school classrooms should not be regarded as a systematic and *per se* violation of the same principles?

Overall, the decision does not seem to show the argumentative accuracy that the importance of issues imposes. It also happens to legitimize the current Italian legal regulation of the crucifix, failing to trigger a new reflection on the issue and precluding the search for solutions that may be more sensitive and respectful of the Constitutional principles and the religious and cultural pluralism.

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