THE *IN HOUSE PROVIDING* AS A SELF-ORGANIZATION MODEL FOR THE PUBLIC ADMINISTRATION

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ABSTRACT: *Recognizing the opportunity for Public Administration to directly commit a public local service is an attempt to conciliate the Competition Policy of the European Law and the self-organization power recognized to Public Administration. PA is not obliged to lift these services out, but only to respect the public contract regulation if PA decides to turn to market as the most suitable solution to grant the affordability, the efficiency and the efficacy of the administrative action.*

The In house providing is the result of the enhancement of the self-organization power recognized to Public Administration: it assumes that a public subject has the power to externalize some activities in order to fulfil many public interest tasks, promoting the creation of new organizational models as instruments that could determine and increase innovation processes, improve workers performances and their wellness, as well.

However, this operation must be organized in order not to compromise any rules that regulate a correct market operation, and so not violating any rules contained in the Competition policy Treaty.

This paper will talk about the most important steps in this institution evolution, to highlight the negative approach about its use by the Italian legislator - and so the national Courts - that considers this practice a derogatory instrument of the competition policy. Even if the European guidelines about contracts have fixed the principle of "free administration by public authorities", the Italian legislator imposed many limits to the use of the In house providing in the new public contracts guideline (art. 192, comma 2, d.lgs n.50/2016), highlighting a basic adversity against this system and promoting a derogatory and exceptionally perspective of its nature.

KEYWORDS: *In house, public procurement, public administration, free competition, digitalization, local services.*
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1. INTRODUCTION

The notion of "In house providing" appeared for the first time at EU organizations level in 1998 in the White Paper about contracts[1]: it represents the self-production of goods, services and work by the Public Administration when the PA gets a good or a service not recurring to a third party through a contract, and so to market.

This model is opposite to the *outsourcing*, or *contracting out*, the so-named "externalization", used by the PA to turn to a private party the production/supply of goods and services it needs for the fulfilment of administrative functions.

The i*n house* it's an exception referring to the competition principle that is a fundamental principle of the Treaty on the Functioning of the European Union; meanwhile it represents a management model for public local services, with a main role in the administrative organization. The *in house* societies[2] are built on a negotiating method, but they only have a society appearance: actually they do hinge upon PA and cannot be considered independent and external bodies.

The *in house* society phenomenon is part of the regulation for public companies. Art. 3, paragraph 1, lett. *t*), of the legislative decree 18 April 2016, n. 50, better known as the "Code of public contracts", establishes that the contracting authorities can exercise a predominant influence on public companies, either directly or indirectly, as owners or by virtue of having a financial participation in them or, again, according to the rules that regulate these companies.

In the aforementioned article, it is specified that the contracting authorities can exercise a dominant influence when, directly or indirectly and - with regard to the company - alternatively or cumulatively, they: hold the majority of the subscribed capital; have control of the majority of the resulting votes from the shares put into

[1] See *White Paper on Public Procurement in the European Union*, COM (98) 143 final, 1.3.1998, point 2.1.3., P. 11, nt. 10, according to which these are contracts "*awarded within the Public Administration, for example between central and local administration, or between an administration and a wholly-owned subsidiary*".

[2] This is that particular legal phenomenon that has found widespread in recent decades and that also goes under the name of *in house providing*, which originated with the provision of art. 113, paragraph 4, of the Consolidated Law on Local Authorities (Legislative Decree No. 267/2000), as reformulated by art. 14 of the legislative decree n. 269/2003 (converted with amendments by law n. 326/2003). Under certain conditions, it expressly allows the assignment of public services, rather than third-party companies to be identified through public procedures, to capital companies set up for that purpose and wholly owned by public shareholders, provided that they carry out the most important part of their business with the institution or bodies that control them and provided that they exercise control over the company similar to that exercised over their services. A wide literature has developed on the subject of in-house companies and on the characteristics that distinguish them. Among the most significant contributions see: R. URSI, *The Companies for the management of local public services with economic relevance between outsourcing and in house providing*, in Dir. Amm., 2005, pp. 179 ff .; R. CAVALLO PERIN - D. CASALINI, *In house providing: a halved company*, in Dir. Amm., 2006, pp. 51 ff .; V. PARISIO, *Public services, administrative judge and in house providing*, in Dir. Esoc., 2007, pp. 367 ff .; S. DETTORI, *The in-house society between public interest and the market: reconstructive ideas*, ES, Naples, 2008; F. GOISIS, *New community and national developments on the subject of house providing and its borders*, in Dir. Amm., 2008, pp. 579 ff .; C. IAIONE, *In-house companies. Contribution to the study of the principles of self-organization and self-production of local authorities*, Jovene, Naples, 2012; C. IBBA, *In-house company: notion and applicative relevance*, in Munus, 2015, n. 1, pp. 1 ss.

circulation by the company; can indicate more than half of the members of the board of directors, management or supervision of the company[3].

In addition to the Code of public contracts, art. 2 of the legislative decree 19 August 2016, n. 175 - the Consolidated Law on public participation companies - classifies public companies with corporate form in: public controlled companies, such as those in which one or more public administrations have powers of control; companies with public participation, such as those under public control and those directly owned by public administrations or companies under public control; *in-house* companies, such as those over which an administration exercises the same control or several administrations exercise a similar joint control; listed companies, such as those with public participation that issue shares listed on regulated markets or those that have issued, within 31st December 2015, financial instruments, other than shares, listed on regulated markets or those owned by one or the other, except in the event that they have control or participation by public administrations.

2. THE PUBLIC PROCUREMENT PROCEDURE AS A WARRANTY INSTRUMENT FOR FREE COMPETITION, EQUALITY AND POSITIVE TREND PRINCIPLES

Since the beginning, the European integration process has entailed a strong focus on the role played by public administrations, due to the consistent influence exercised on the demand for goods and services. Public spending for resources and products functional to the performance of institutional activities affects production levels to the point that, in different ways, the same public bodies negotiating behaviour can assume the function of real instruments of economic policy (Cusumano & Gattuccio, 2006).

Therefore, as any economic activities the contractual activity of public administrations must respect the fundamental principles contained in the Treaty on the Functioning of the European Union (TFEU): it may take to a limitation of the choices made by the public client, as well as preventing possible abuses and / or privileges in favour of national operators as the result of protectionist policies of the Member States.

In the framework outlined by the provisions of the Lisbon Treaty, the main aim of creating a unique market has been pursued with the introduction of rules aimed at granting a common regulatory framework to the subject of public procurement. The aim of this regulatory process, certainly, was to facilitate the strengthening of the conditions of full competition between the operators interested in the supply of goods and services for public clients, thus supporting the economic freedom solemnly established in the Treaty[4].

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[3] About public companies, see CAMMELLI-DUGATO, *The study of companies with public participation: the plurality of types and the rules of private law. A methodological and substantial premise, in Studies on the subject of public participation*, CAMMELLI and DUGATO, Turin, 2008, 1; FOX, *The regulation of public companies and the evolution of legislation*, in www.giustamm.it, n. 12/2014.

[4] It is a constant affirmation of the Court of Justice that the procurement directives set the goal of "excluding both the risk that national bidders or candidates are preferred in the awarding of contracts by the contracting administrations, and the possibility that a entity financed or controlled by the State, by local authorities, or by other bodies governed by public law, let itself be guided by considerations other than economic ones "(see Court of Justice, 22 May 2003, C-18/01, in CDS Administrative Court , 2003, 2497 with a note by L. PERFETTI, see also: Court of Justice 3 October 2000, C-380/98, in Urb. And app. 2001, I, 45).

This regulation evolution has led to arrange increasingly rigorous and binding procedures. Indeed, while initially a first regulatory body was provided on the subject of works, services and supplies with the so-called "First generation" directives, around the 70s, as well as in the excluded sectors, later the constant violation of the ads obligations and the recourse to non-competitive tenders have brought out the need to consider a more convincing regulation of the tender mechanisms, better specified in the "Second generation" directives. The reference goes to directives 93/36 / EEC for supplies, 92/50 / EEC for services, 93/37 / EEC for works and 93/38 / EEC for excluded sectors.

This process ends with the preparation of a coordinated paper – at the beginning contained in the 2004/18 / EC directives for ordinary sectors and 2004/17/EC directives for special sectors, then flew into the latest 2014 / 23-24-25 / EU[5] directives: this gives the opportunity to overcome any discrepancies and inconsistencies between tender systems that first were governed by sector regulations, such as the simplification of the procedures, with interventions aimed to make the assignments more rapid.

The basic prerequisite for the application of European legislation on public procurement is the existence of a contracting activity of public administrations. Indeed, they set a series of procedural and substantive warranties aimed at preventing any discrimination in the stipulation of onerous reciprocal negotiation, so that the behaviour of the administration, as buyer of goods and services on the market, is based on maximizing economic efficiency and impartiality, ensured by full competitive conditions.

For these reasons, European integration process requires the definition of organizational models of the Public Administration that are compatible with the protection of competition and economic freedoms established into Lisbon Treaty, as necessary conditions for realizing a free open economy market (Irti, 1998).

The competition rules pervasiveness has undoubtedly influenced many aspects concerning the action of public bodies. It supports organizational transformations suited to the conformation of the PA to the market, not through the clear separation between the latter and public interests, but through mixtures of public and private profile, that sometimes are not totally clear[6].

Nevertheless, this process certainly does not imply the subtraction from the PA of the power of specifying what services can be acquired through negotiation with private operators and what, instead, can be generated by means of their own organizational divisions. The derived legislation about public procurement does not constitute an instrument of liberalization, but only a system of competition warranties that works downstream of the PA's decision to outsource the acquisition of certain resources[7].

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[5] The latest generation directives have been implemented in our system with Legislative Decree 18 April 2016 n. 50 (Code of public contracts).

[6] E. SCOTTI, in *Public Organization and Market: mixed companies, in houseproviding and public private partnership*, in Dir. Amm. 4/2005, 919, shows how the mixture of public interest and market has given rise to different phenomena in which there are private moments (related to the organization) and public moments (related to the activity). Moreover, he highlights the existence of society public bodies that perform tasks unrelated to the market or actual administrative functions, just as there are companies that perform services of general economic interest or companies that perform services without connotations of collective interest.

[7] The conclusions of the Advocates General Cosmas (Case C-107/98 Teckal), Lèger (Case C-94/99, Arge) and Kokott (Case C-458/03) are all in this sense.

Therefore, *in house* commitment constitutes a concrete explanation of a free self-production, which appears to be a fundamental element of that public organizational autonomy considered unrelated to Community law[8]. In this sense, any outsourcing imposition could lead to a clear violation of the client administration public autonomy, as well as of the same legal competence under private law[9].

3. NOTION AND ORIGIN OF THE INSTITUTION

In house providing is an institution with a praetorian origin, developed by the Court of Justice of the European Union. It establishes that a Public Administration makes use of third legal entities, e.g. corporations, subordinating them to its control, in order to obtain certain goods or services, or to provide a certain specific service to the community[10].

More specifically, instead of outsourcing the fulfilment of a specific service or work, each Public Administration has two options: on the one hand, in application of the principle of self-organization, it can entrust the activity or function to an internal structure; on the other hand, it can take advantage of an entity with an autonomous juridical subject, substantially comparable to one of its bodies even if it is formally dissimilar, as it owns many features that make it being considered as an internal articulation of the entrusting body.

These characteristics have been identified and consolidated in the jurisprudence of the Court of Justice of the European Union to be finally codified, with some innovations, in the European directives on public contracts of 2014. According to Italian law, the elements that characterize the *in house* assignments are contained in the act that has implemented the European directives of 2014, i.e. the Code of public contracts (Legislative Decree 50/2016), that provides, in art. 5, the exclusion of contracts awarded by a contracting authority to a legal subject under public or private law from its scope of application, if there are the following conditions:

a. control by the entrusting body over the assignee similar to that exercised over its own services (requirement of similar control). Article. 5 specifies the notion of similar

[8] Nevertheless, it has been argued that the power of choice on management models, although recognized at the Community level (see the mentioned Green Paper on public-private partnerships) and constitutional (see art. 114 on the autonomy of local authorities), must however be tempered by the due respect from the principles of free competition. In this regard, among others, see L. AMMANNATI, *The Expansive Strength of the In-House Awarding Model. The gas sector between assimilation to the general discipline of local public services and uncertainties of the community model*, in Riv.It. Dir. Pubbl. Community, 2005, 1709 ss.

[9] R. CAVALLO PERIN - D. CASALINI, *In house providing: a halved company*, in Dir. Amm. 2006, 62. On the contrary, he believes that direct assignment may be incompatible with the EU legal system, not because it is in contrast with the rules of competition, but because it is not a suitable instrument to ensure the maintenance of safe public finances (art. 4, III of the Treaty) as well as an efficient allocation of resources (art. 98), G. MARCHEGIANI, *Some considerations on the subject of Community law concerning concessions and the so-called "In-house assignments*", in Riv. It. Dir pubbl. Community, 2004, 987.

[10] The *in house* assignment was defined as "an institution placed beyond the border that marks the territory of competition, as a model that justifies direct assignments of tasks by deactivating the logic of competition and the market"; v. F. Fracchia, *In house providing, code of public contracts and spaces of autonomy of the public body, in The law of the economy*, n. 02/2012, p. 244.

control, i.e. the exercise of "a decisive influence both on the strategic objectives and on the significant decisions of the controlled legal entity". It clearly allows the forms of *in house* assignment with similar indirect control or "cascade" (i.e. through subjects that are themselves controlled), overturned (when the controlled entity entrusts a contract to the controlling entity), with similar joint control (in the case of control being exercised by several subjects, all represented in the organs of the controlled legal person, that can have a decisive influence on the strategic objectives and significant decisions, with no conflicting interests between the controlled and the controlling bodies). In essence, the link between Public Administration and companies must be so penetrating that it cannot be distinguished, if not only formally, from the centre of imputation of social choices concerning the activity directly entrusted to the *in house* company. To guarantee this constraint, in companies statute and deed of incorporation there is the obligation of expressing stringent powers of management and control for the controlling-granting body, that allows the latter to establish strategic lines and to influence immediately and effectively the trustee's decisions.

Gradually, both European and national jurisprudence have identified many instruments of control in addition to those provided for by civil law, specifying that the control must concern both fundamental activities and those of extraordinary administration, as well as the pursuit of the objectives of public interest assigned and company bodies. What has been specified, above all, is that, in order to guarantee "the same control", it is necessary to verify whether there is a "sort of indirect administration in the management of the service, which remains firmly in the hands of the granting body, through a absolute control over the activity of the contractor company that is institutionally designed to absorb operations in favour of this (...). The organizational structure must allow the public body to exercise the most complete interference and control over management, as well as the economic-financial trend, such as what it could have done with a service that it directly managed"[11].

It was the pronunciation n. 26283 of 2013 of the Court of Cassation to United Section (Caranta, 2008) (Piperata) to believe that an *in house* company does not consider itself different from the PA, but just like its *longa manus*, as one of the proper services of the same administration. In this case, the consequence is that any damage caused to the corporate assets is considered as a damage caused by the public body, not distinguishing between the entity and the company assets, whose relationship can be configured in terms of asset separation but not of separate ownership (Bruno, 2014) (Lucarelli, 2014). In other words, the concept of "same control" passes from total control to power of direction and control, which can be established on the basis of statute norms or shareholders' agreements. This notion is subsequently specified by the Court of Justice that admits the possibility of a "similar joint control" by several public shareholders, users of the services of the instrumental company[12].

[11] Council of State, section IV, 25.1.2005 n. 168 and Regional Administrative Court of Campania, section I, n. 2784/2005.

[12] C. giust. CE 13 November 2008, C-324/07, in Foro amm.CdS 2008, 2899 (s.m.). Similarly, C. giust. CE September 10, 2009, C-573/07, in Foro amm.CdS 2009, 2233, with a note from MORZENTI PELLEGRINI, direct foster companies of local public services and «same» control exercised jointly and differently through «extra- code», which reaffirms the need for total public control, also jointly by more public parties, not having the same control for the sole statutory provision of the abstract possibility of offering services to private third

Considering the similar control and the predominant destination of the activity, the *in house* entity cannot be considered "third" with respect to the controlling administration, but must be considered as one of the services of the administration itself, while maintaining autonomous and distinct its nature with respect to its organizational apparatus. Consequently, it is not necessary for the administration to put in place public procedures for awarding works, services and supplies contracts;

b. the performance of a majority share of the assignee's activities (quantified by the directives and the code in a percentage of activity exceeding 80%, calculated as a rule on the average turnover of the last three years) "in the performance of the tasks" entrusted by the controlling company (requirement of the main activity). Referring to letter b) of paragraph 1, art. 12 of the directive on public procurement 2014/24 / EU, 26 February 2014, the prevalence requirement, that must be found with the requirement of similar control and that of fully public participation, can be considered satisfied if «more than 80% of the activities of the controlled legal person are carried out in performing tasks entrusted by the controlling contracting authority or by other legal persons controlled by the contracting authority in question". Therefore, it will be sufficient to carry out an activity in favour of the Public Administration that exceeds eighty per cent of the total performed[13], implementing the decisions taken by the controlling body or in favour of other legal persons in order to consider the requirement of prevalence as satisfied[14]. To calculate this percentage, both the legal nature of the relationship established, contract or concession, and the place where this activity is actually carried out are not considered.

The introduction of a limit value was an innovation compared to the interpretative guidelines that were consolidated before the entry into force of today's procurement legislation.

In fact, the Court of Justice has always admitted the possibility that, despite the similar control exercised by the contracting body, the *in house* institution could carry out part of its activity also in favour of other operators, but only if it had "a marginal role"[15];

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parties. In this regard, the TAR of Lazio Region, in the decision of 16.10.2007 n. 9988, reiterated, satisfied the condition of the existence of a share capital participation entirely in public hands, the non-necessity of the possession of the share capital by a single public body and also the irrelevance of the percentage measure in the participation (or multiple co-participation) of public bodies, provided, of course, that the other conditions, of essential importance, envisaged by art. 113 of Legislative Decree 267/2000, which requires that the same corporate capital holders exercise control over the company similar to that exercised over their own services.

[13] Or "The costs incurred by the legal entity or contracting authority in question in the fields of services, supplies and works for the three years prior to the award of the contract" may be taken into account otherwise, if the measure for the three years prior to the award is not available or no longer relevant, it will be necessary to demonstrate that the size of the asset has a credible value".

[14] In a recent sentence the Court of Justice has specified how, in order to determine the threshold value, we must not take into account the activities provided in favor of non-participating public administrations (as they do not have any power of control over the *in house* subject), highlighting as it is necessary, to configure the requirement of prevalence, to calculate both the turnover related to the activity carried out at the reference bodies (even before the award of the contract) and any agreements in place between the shareholder municipalities, aimed at formalizing the exercise of similar control over the subsidiary; *v. Corte Giust., Section IV, judgment of 8 December 2016, C-553/15 and M. Salerno, "in house" contracts, new posts by the Court of Justice, in Il Sole 24 Ore, 8 December 2016.*

[15] *Corte Giust., Section I, judgment 11 May 2006, C-340/04.*

c. the absence of private participations in the controlled assignee, unless they are not provided for by legal provisions, on the basis of the changes introduced by the directives, (even if the directives - and the Consolidation bill on subsidiary companies - speak of "prescribed" investments) and avoiding that a private participation could be conditioning (requirement of public ownership).

Italian law adds further provisions not derived from European legislation regarding *in house providing*: art. 192 provides for the establishment of a list in the ANAC(*Italian National Anti-Corruption Authority*) electronic list of bodies operating through *in house* companies, that can be consulted after a specific request presented by the interested parties and after an accurate verification of the requesting subject requirements by ANAC officers.

Since the beginning, the Council of State has specified how such registration has a declaratory nature and, consequently, does not constitute an element that legitimizes or not the direct assignment procedure, differently from what is clearly stated in art. 5 mentioned above[16]. This means that, in the presence of all legal requirements, the application for registration on the list allows *ex se* – and without the need to wait for an explicit act by the supervisory authority in charge - to proceed with the direct assignment, except for the power of control that will subsequently be implemented by the Authority itself. In this sense, ANAC has specified how contracting administrations, regardless the forwarding of the registration application, can proceed with the assignment procedure without a prior public procedure «in the presence of the legitimating conditions defined by art. 12 of Directive 24/2014 / EU, incorporated in the same terms in art. 5 of Legislative Decree no. 50 of 2016 and in compliance with the provisions of paragraphs 2 and 3 of art. 192[17] ». The same provision also requires an assessment of economic congruity in the offer of the *in house* subjects in case of awarding available services on a competitive regime market. This assessment must be supported by a motivation indicating «the reasons for the failed recourse to the market and the benefits for the community of the chosen form of management, with reference to the universality and sociality objectives, efficiency, cost-effectiveness and quality of service , as well as optimal use of public resources[18]".

The *in house* regulatory framework is completed by a provision on the obligation to publish all deeds relating to assignments between parties in the public sector and a provision dedicated to project companies for the construction of public works through agreements between multiple administrations (art. 193).

At the base of this institution establishment, there are practical reasons that characterize all the jurisprudence of the Court of Justice, starting from the Teckal judgment (18 November 1999, case C-107/98[19]). First of all , the guidelines of the

[16] In fact, the Italian legislator has not wanted to expand the list of the substantial requirements that allow in house subject to entrust the self-production to his own internal articulations, through the introduction of the obligation of an enrolment with enabling effectiveness; Cons. State, Comm. Spec., Opinion 1 April 2016, n. 855.
[17] *National Anti-Corruption Authority, Chairman's announcement of 3 August 2016*.
[18] Article 192 paragraph 2 of Legislative Decree 18.4.2016, n. 50.
[19] Cf. Court of Justice, 18 November 1999, C-107/98, Teckal, in www.curia.europea.eu/juris, point n. 50.

institution under examination were outlined up to the most recent pronouncements[20], in order to harmonize the principles relating to competition protection, as per the EU Treaty, recognizing the power of self-organization to each individual States Public Administrations, and regularizing the direct awarding of public contracts in the presence of a series of indexes that prove the existence of a relationship between the contractor and the trustee.

4. THE *IN HOUSE* MODEL FOR MANAGING PUBLIC LOCAL SERVICES

At the moment, publicly owned companies are wide spread[21]. They do represent subjects used by the State and / or the public body for managing public services[22], but also subjects to whom the Public Administration entrusts the exercise of administrative functions, as well as subjects who exercise, in effect, an entrepreneurial activities[23]. For this reason, this phenomenon can be considered significantly important for the interests treated and the number of users served. These companies operate in different sectors: from local public transport to tax collection. Generally, the *in house* model is used in relations to local public bodies and the so-called municipalized, e.g. constituted by multiservice companies that offer several public services (such as waste collection and transport, cemetery services, road maintenance).

The Consolidated Text of Local Authorities defines local public services as the activity of production of goods and provision of services by local authorities, aimed at achieving social goals and promoting economic and civil development of local communities[24].

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[20] Previously, other judgments of the Court had drawn the theme only for *obiterdictum*. The conclusions of the Advocates General were more interesting. In particular, in the Arnhem case (judgment of 10 November 1998, proceeding C-360/96), Advocate General La Pergola emphasized that the economic dependence of a capital company with respect to the reference entities (from which it was established) resulted in the a consequence that the first could not be considered extraneous to the organizational structure of the partner institutions of which it constituted a mere indirect body. In the Ri.Sancontro case of the Municipality of Ischia (sentence 9 September 1999, proceeding C-108/98), the Advocate General Alber specified that the quality of a joint-stock company was not enough to exclude that it was part of the public administration. Therefore, he concluded that it should be the national judge - case by case and on the basis of a functional analysis based on the factual circumstances - to verify that the corporate body in charge of the service was part of the same trustee. In the present case, the Court did not consider the mere financial plot sufficient to establish an "in house" relationship between the public entity and the management company (the Municipality of Ischia held 51% of the share capital of Ischia Ambiente SpA, while 49% was held by GEPI SpA which in turn was 100% controlled by the State). In fact - the judges stated - in addition to the financial interlacement, it is necessary to ascertain the presence of an assignment of tasks between bodies in order to ascertain the existence of an "in house" service.

[21] "The Italian economy is characterized by a widespread presence, of particularly significant dimensions also in international comparison, of companies owned by public bodies ". See Public Participation Companies, Documentation and Research no. 237 of 27 May 2011 of the Chamber of Deputies.

[22] ALPA-CARULLO-CLARIZIA (edited by), Municipal Spas and Public Service Management, Milan, 1998.

[23] Among the companies where the Ministry of the Economy holds an administrative role there are: *Anas, Cassa depositi e prestiti, Coni servizi, Consip, Consap, Enav, Istituto poligrafico dello Stato, Rai, Sviluppo Italia*. Among those that carry on entrepreneurial activity, we can mention *Enel, Eni, Ferrovie dello Stato, Finmeccanica, Poste Italiane*. On this topic, see GOISIS, *A company with public participation*, in CASSESE (edited by), *Dizionario di diritto pubblico, Milan*, 2006, 5600 ss.

[24] Art. 112 legislative decree 267 of 2000. ITALY-MAGGIORAROMANO, *The municipal system*, Milan, 2005, 727 ss. and NAPOLITAN, *Public services*, in CASSESE (edited by), Dictionary of public law, 5517 ss.

Public services are distinguished in services of economic relevance and services without economic relevance. This is a fundamental subdivision, since it makes the feasible regime for the single possible type of service management[25].

Consolidated jurisprudence[26] confirms the European orientation: the public authority can attend to the tasks of public interest thanks to its own instruments, without being forced to call any external entities that are not part of its own services, and can do so in collaboration with other public authorities[27]. In this sense, it has been argued that *in house providing* is not to be considered an extraordinary and residual hypothesis of management of local public services: it represents one of the normal organizational forms of the institution, with the consequence that the decision regarding the management methods of local public services is considered the product of a largely discretionary choice[28].

Therefore, jurisprudence has held that the legal system does not favour neither the *in house*, nor the full expansion of competition in the market and for the market, nor public-private partnership. The legal system puts the concrete choice back to the single entrusted body, with the consequence that the local public services of economic importance can be managed «indifferently through the market (that is, at the outcome of a public tender by identifying the trustee subject) or via a public-private partnership (ie by means of a mixed company and therefore with a "double-subject tender" for the choice of the partner and for the management of the service), or through the direct assignment, *in house*[29]».

The same principle - self-organization or free administration of public authorities - is reiterated by art. 2 paragraph 1 of the European Parliament and Council Directive 26.2.2014, n. 2014/23 / UE about the awarding of contracts: «this directive recognizes the principle that national, regional and local authorities can freely organize the execution of their work or the provision of their services (...) These authorities may decide to carry out their public interest tasks using their own resources or in cooperation with other contracting authorities or to confer them to external economic operators".

Art. 7 of the draft legislative decree containing "Consolidated text on local public services of general economic interest", in implementation of the reform law n. 124/2015, articles 16 and 19, pursuant to that, in the event that the administration assesses that the SIEG (*Services of general economic interest*) must be clearly taken over by the

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The latter defines public services as those "services that meet the fundamental needs of the community, such as line transport, telecommunications, radio and television, post office, electricity and natural gas", all of which are typically entrepreneurial activities - in the past they were "removed from the principle of free economic initiative and subjected to a regime of reserve and public management".

[25] The need for this differentiation has emerged in the European Community and has been implemented through art. 14 Legislative Decree September 30, 2003, n. 269, converted into l. 24 November 2003, n. 326. CAIA, *The social services of local authorities and their management with reliance on third parties. Classification premises*, in www.giustizia-amministrativa.it, DELLO SBARBA, *Local public services*, Turin, 2009, 11 et seq., LIGUORI, *Local public services*, Turin, 2007, 31 ss., TESSAROLO, *The new organization of local public services*, in www.dirittodeiservizipubblici.it.

[26] See, ex multis, C.d.S., Section V, 15 March 2016 n. 1034.

[27] In this sense, CJEU, judgment of 6 April 2006 in case C-410/14 (ANAV).

[28] See Council of State, section V, September 30, 2013, n. 4832; sect. VI, 11 February 2013, n. 762, section V, 10 September 2014, n. 4599).

[29] See TAR of Lombardy, Brescia, Section II, 22 March 2016, n. 431.

administration itself or entrusted to external companies, it may use four discordant forms of management, including the *in house* form, through: assignment by public procurement procedure, according to the provisions on public contracts; assignment to a mixed company, whose member is chosen by public tender according to EU regulations and the one contained in the delegated decree on the subsidiary companies pursuant to art. 18, l. 124/2015; *in house* assignment, according to EU regulations and those concerning public contracts and subsidiary companies; management in economy or through a special company, in the case of services different from those in the network.

This allows us to propose a series of considerations that can only be mentioned here, except for one of them: the importance of directing the Public Administration to the correct and linear use of resources and, therefore, to the achievement of efficiency levels for pursuing public interest goals.

5. *IN HOUSE* CONTRACTS BETWEEN ETHICS AND DIGITALIZATION OF THE PA

The digitalization of the public administration represents one of the main innovations that has affected the organization of the activity, both in relation to the relationships with the users of administrative services and in the framework of the regulation of the single procedures.

The term e-government refers to the process of informing the public administration, that is, according to the Communication of September 26th 2003 of the European Commission, «*the use of information and communication technologies in public administrations, combined with organising and acquiring new skills in order to improve public services and democratic processes and to strengthen the public policies support*»[30].

In this context, the topic of *in house* IT companies is once again topical, as these are increasingly an integral part of the system of digital innovation of the Public Administration demand.

Recently the European Commission has adopted the Communication COM (2016) / 179 of 19.4.2016 that established the basic principles that must be inspired by the action for e-government for the period 2016-2020 (ec.europa.eu). The objective that the action of implementing new technologies in the Public Administration sector has to pursue must be inspired by the values of maximum transparency, efficiency and inclusiveness, so that public services can be provided as personalized and intuitive as possible to all citizens and businesses in the EU, as indicated by the European Commission. The instrument to ensure the accomplishment of these goals, according to the Commission's approach, must be found in the principle of free access to data and services of public administrations, both nationally and across borders.

[30] Communication from the European Commission of 26 September 2003 "The role of e-government for the future of Europe". In doctrine, the most recent contributions include Aa.Vv., *E-Government in Italy: current situation, problems and prospects*, in Issues of Economy and Finance, Bank of Italy, 2016; F. Bassanini, *Twenty years of administrative reforms in Italy*, in Review of Economic Conditions in Italy, 3/2009, 369 ff .; D. Coursey - D.F. Norris, *Models of E-Government: Are They Correct? An Empirical assessment*, in Public Administration Review, 3/2008, 523 et seq .; M. Gascò, *New Technologies and Institutional Change in Public Administration*, in Social Science Computer Review, 1/2003, 6 ss.

Thinking about these intentions, we must interrogate about the concrete conditions in our country so that the planned goals can be realized. If in the realization of the most recent e-government goals and strategies the right of access in digital mode and the simplification of administrative procedures are the support of a digital citizenship[31], it should be remembered that transparency - in terms of digitalization - often it is perceived by the Offices as an obstacle to the correct flow of the action.

In fact, on a practical level, the rules that impose communication obligations also imply such working rhythms that concern more with the data and documents to be published rather than with the phase of production of the documents and the data themselves.

Within this scenario, the relationship between transparency and ethics of the Public Administration is undeniable: allowing anyone to verify the behaviour of Public Administrations has a persuasive and dissuasive scope against the public agent - persuades him to work well and dissuades him from work unethically. The aim of this system is to reduce cases of bad ethics in public work, i.e. "bad administration".

From another point of view, the action of promoting the digitalization of the PA - especially in the case of entrusting *ICT* services to *in house* companies, puts significant problems in terms of security, management and custody of the collected and held data. Moreover, for what concern transparency and, in particular, with reference to the publication of data and documents on the Public Administration websites, the legislator establishes important regulations to protect these elements privacy. Article. 7 bis, co. 4, Legislative Decree 33/2013 (Transparency Code[32]) takes care of defining the cases in

[31] "Digital citizenship" is a set of rights / duties which, thanks to the support of a series of tools (identity, domicile, digital signatures) and services, aims to simplify the relationship between citizens, businesses and public administration through digital technologies. The latest innovations in digital citizenship have taken place with Legislative Decree n. 217 of 13 December 2017, published in the Official Journal on 12 January 2018 that says that the supplementary and corrective provisions were issued to the legislative decree 26 August 2016, n. 179, concerning changes and additions to the Digital Administration Code, dating back to 2005, pursuant to article 1 of the law of 7 August 2015, no 124, concerning the reorganization of public administrations, called the Charter of digital citizenship.
The Digital Citizenship Charter sanctions the right of citizens and businesses, "*also through the use of information and communication technologies ... to access all data, documents and services of interest in digital mode ... in order to guarantee simplification in access to personal services "and" reducing the need for physical access to public offices*".

[32] D. Lgs.n. 33/2013 art. 7-bis Re-use of published data.

1. The obligations to publish personal data other than sensitive data and judicial data, referred to in article 4, paragraph 1, letters d) and e), of the legislative decree 30 June 2003, n. 196, entail the possibility of dissemination of the same data through institutional sites, as well as their processing in a way that permits indexing and traceability through web search engines and their re-use in accordance with article 7 - in compliance with the principles of processing of personal data.

2. In addition to this decree, the publication in the institutional sites of data relating to owners of political bodies and offices or positions of direct collaboration, as well as managers of administrative bodies, is aimed at achieving public transparency, that integrates a purpose of significant public interest in compliance with the regulations on the protection of personal data.

3. Public administrations may order the publication on their institutional website of data, information and documents that are not obliged to publish pursuant to this decree or based on specific provisions of law or regulation, in compliance with the limits indicated by the Article 5-bis, by making an anonymous indication of any personal data present.

which publishing is mandatory. In addition to this mandatory nature, the first element that is important to highlight is the total lack of an arbitrary evaluation by the institution: the balance between preferring the exposure of the personal data or the privacy protection has already been regulated by the legislator, that opts for the maximum publicity.

This principle is also established in a very recent ruling of the Constitutional Court[33], which clearly shows that: «*The obligations to publish personal common data, different from sensitive data and judicial data (the latter taken from the publication obligations), therefore involve their dissemination through institutional sites, as well as their processing in ways that allow indexing and traceability through web search engines, and also their re-use, in compliance with the principles on processing personal data*».

These considerations lead administrations to take special precautions in providing external IT services, with strict monitoring protocols on the activity carried out by the provider in charge of keeping the data.

A 2013 provision by the Guarantor Authority for the protection of personal data is emblematic. In relation to the possibility for the Ministry of Education, University and Research to «*proceed with the direct assignment of IT services concerning the university, research and scholastic system to the CINECA Consortium, attended by the Ministry itself, by Universities and by public research bodies, according to the in house model*»[34], the State Council requested the Ministry to acquire the "notifications" of the Guarantor Authority for the protection of personal data «*with regard to the interference with the subject of processing personal data*»[35].

The Authority, with its own provision n. 548 of December 5, 2013, noted that «*In processing personal data related to the performance of institutional duties, each holder, even public, can use external subjects, entrusting them with certain activities that remain in the sphere of ownership of the administration itself and which do not involve fundamental decisions on the purposes and methods of data use. In this case, it is*

4. In cases where laws or regulations provide for the publication of deeds or documents, the public administrations shall make non-pertinent personal data non-intelligible or, if sensitive or judicial, not indispensable with respect to the specific purposes of transparency of the publication.
5. The information concerning the performance of the services of anyone in charge of a public function and the relative evaluation are made accessible by the administration of belonging. The news concerning the nature of the infirmities and personal or family impediments that cause abstention from work, as well as the components of the evaluation or the news concerning the employment relationship between the aforementioned employee and the administration able to reveal any of the information, are not ostensible, except in the cases provided for by law referred to in article 4, paragraph 1, letter d), of legislative decree n. 196 of 2003.
6. All the limits to access and disseminate information pursuant to Article 24, paragraphs 1 and 6, of the law of 7 August 1990, n. 241, and successive modifications, of all the data of which to the article 9 of the legislative decree 6 September 1989, n. 322, of those provided for by European legislation on the protection of statistical confidentiality and those that are expressly qualified as confidential by national and European legislation on statistics, as well as those relating to the dissemination of data suitable to reveal the state of health and sexual orientation stay in force.
7. Referred to in Article 27 of the law of 7 August 1990, n. 241, the Commission continues to operate even beyond the expiry of the mandate envisaged by current legislation, without charges for the State budget.
8. Aggregation, extraction and mass transmission of documents stored in databases available on the Internet are excluded from the scope of application of this decree.

[33] Constitutional Court Judgment n. 20/2019 of 21 February 2019.
[34] MIUR prot. n. 0013899 of 9 July 2013.
[35] Resolution of the Council of State of 12 March 2013, n. 1168/2013

necessary for the administration - as data controller - to designate the external subject, in charge of carrying out certain activities that involve the processing of personal data, as a "controller", with a specific written document that analytically specifies the tasks entrusted to it (articles 4, paragraph 1, letter f) e g), 28 and 29 of the Code). (...) In this context, in relation to the issue under consideration and for the purposes of compliance with the aforementioned legislation, the Ministry may ask for the contribution of the CINECA Consortium for the performance of certain activities that involve the processing of personal data, having decided to designate the Consortium itself "responsible for the processing of personal data". This designation implies that the CINECA Consortium is identified by the Ministry as a subject that, based on experience, ability and reliability, provide suitable guarantees of full compliance with the provisions in force concerning personal data, including the safety profile». At the end, the Guarantor invites the Ministry to analytically specify on a written paper the tasks assigned to the Consortium and to supervise, through periodic checks, the actual compliance with its own instructions.

The opinion provided by the Guarantor for a similar issue and, more precisely, regarding the guarantees that must be given to ensure the protection of the data collected during the management of the services by *SOGEI SpA* - a body of the Ministry of Economy and Finance, in charge of Information and Communication Technology (provision No. 68 of February 13, 2014) - is more complex and articulated. More specifically, the assignment contract provides for a series of activities, including internal network management, Internet management, SOC security operation centre, identity and access management systems, software application development and maintenance, as well as the central servers with *legacy* and *open* type technology management, as well as storage systems. E-mail services and IT assets management are also included in the contract.

For these activities assignment, the Guarantor, after having detected - in the contract- some critical aspects concerning the failure or incomplete definition of the aspects related to the security and the protection of personal data, makes a series of recommendations for the resolution of such critical issues.

Moreover, the Court of Auditors has recently expressed some reflections on the necessity to carry out an economic-financial evaluation about the convenience of proceeding to the assignment of services to *in house* companies rather than to realize the same services inside the PA, thus reporting the issue in terms of the economic convenience of this organizational choice compared to any other options[36].

The convenience should also be calculated considering the possibility for the public body to internalize the activity of acquiring IT products and services on the market. To evaluate the choice to proceed or not with direct assignment to a *in house* company a further element should be considered: the cost of the service organized and managed into PA, especially if the company must find external resources through a system of contracts and assignments to carry out the entrusted activity.

[36] Resolution n. 194/2018 Court of Auditors, Regional Control Section for Lombardy

6. CONCLUSION

At the end of the discussion, it can certainly be affirmed that recognizing the possibility of directly assign a local public services represents an attempt to reconcile the European law principles on competition protection with the power of self-organization recognized to PA. In fact, there is no obligation of outsourcing for the PA, but only a constraint to compliance with the rules on public contracts if it decides to opt for the market, following a discretionary assessment by a more qualified body to interpret the needs of the community, and so identifying the most suitable solution to guarantee the economy, efficiency and effectiveness of the administrative action.

However, in the light of Community law, the "direct assignment" is justified thanks to the relationship between the contracting authority and a subject that cannot be considered "third" in relation to PA. In this hypothesis, there is not a recourse to market, but a "self-production" activity.

So, the *in house providing* is the result of the enhancement of the Public Administration self-organization principle, so that the public entities are empowered to privilege delegation instruments in performing tasks of public interest, creating new organizational models to determine and increase innovation processes, improve performances and contribute to the well-being of workers.

Following the process of digitalization of the Public Administration, in our country we assisted to many IT companies birth and spreading, which have become increasingly a part of the digital innovation system for the Public Administration. The entrustment of digital services to these companies favours the planning of new innovative services and the enhancement of the ICT heritage of the territory, in the face of the reduction of organizational complexity in a quick and smart perspective.

On the other side, this necessarily requires a punctual analysis by the PA: on the one hand, it must guarantee a balance between the need to ensure greater efficiency and cost-effectiveness in the provision of services; on the other hand, it must guarantee the compliance of competition laws, as well as those set up to guarantee the transparency and security of personal data in order to overcome a general mistrust of the Italian legislator with respect to the use of this institution.

Therefore, the choice between the system of awarding the service by public tender and the *in house* model assignment must be preceded by the comparison of the public objectives to be pursued and the implementation methods, having regard to the time required, human and financial resources to be employed and to the quality level of the services based on the principles of economy and maximization of utility for the PA (*Best Value*).

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