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COLLABORATIVE AGREEMENTS AND PRINCIPLE OF SUBSIDIARITY

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Chapter I

Interests in collaborative public-private partnerships: the impact of the principle of subsidiarity

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1. In recent years, public bodies, especially those with a local character, have increased the use of collaborative tools to activate relationships with private as individuals or within bodies and to regulate mutual relations with means that pursue common interests.[1]

A strong thrust in this direction certainly comes from actors of the commercial field who first felt the need to share their ideas, pooling competences and resources to enhance their innovative capabilities and competitiveness by targeting the quality of products and services offered on the market. The joint venture, the consortia, the temporary association and the network contract are in fact the oldest models of collaboration which were initially used by enterprises. Today such contractual schemes that establish associative relationships to implement a common purpose are frequently found also in relationships between public

[1] An in-depth investigation of the recent emergence in the legislation and practice of contractual tools that realize associative relationships with communion of purpose has been carried out by R. Cippitani, *I contratti con comunione di scopo* (Torino: Giappichelli, 2020) 1.

bodies,[2] between these, enterprises and non-profit organizations,[3] or else between these and private engaged in the care and management of the territory.[4]

In this way, the multiplicity of fields in which cooperative agreements are becoming increasingly important can be seen, especially in light of the principle of subsidiarity that, in dealing with the general interest, entrusts to private individuals the implementation of activities traditionally reserved for public subjects.[5] Thus, a multi-faceted and heterogeneous cooperation in the fields of health, culture, environment, territory, education, research and many others is no longer just an opportunity to be seized, but it becomes a responsibility to be shared in the implementation of the supreme values expressed by the Constitution, the Lisbon Treaty, including the European Charter on Fundamental Rights and the European Convention on Human Rights, (article 6 TEU).[6]

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[2] Consider for example the collaborative agreements between public administrations referred to in article 15 of legge 7 August 1990 no 241; the program agreements referred to in article 34 of decreto legislativo 18 August 2000 no 267; the agreements for the enhancement of public cultural heritage referred to in article 112 of decreto legislativo 22 January 2004 no 42.

[3] An example are *Consortium Agreement* and *Partnership Agreement*. These are agreements developed in European practice and legislation to support the development and implementation of joint programmes in the field of research, innovation and technological development through collaboration between enterprises, universities and public authorities. For a general framework on this topic, see M. Da Bormida, 'Il consortium agreement nell'ambito dei progetti europei di ricerca e sviluppo' *Diritto di autore e nuove tecnologie*, 135 (2005); R. Cippitani, 'Il Consortium Agreement', in R. Cippitani and L. Fulci, *I programmi comunitari per la ricerca e l'innovazione* (Perugia: Università degli Studi di Perugia, 2007), 247.

[4] See chapter III.

[5] See chapter I.

[6] As has been clearly shown by P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), II, 212, the Treaty of Lisbon explicitly identifies the inviolable human rights contained in the Charter of Nice and the European Convention on Human Rights with the general principles of European Union law which, as such, qualify the Italian legal system and guarantee its cultural and constitutional identity. See, also, Id, 'Il contributo dell'"identità nazionale" allo sviluppo della cultura costituzionale europea' *Rassegna di diritto civile*, 823 (2020).

But see also in the field of cultural heritage and environment, the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) and the Convention on the Value of

On closer inspection, it is precisely with this awareness of the centrality of collaboration that the current legislative innovations adopted in the context of the ecological and digital transition are also moving. Collaboration is the main tool for achieving sustainability and innovation goals therein. This is directly witnessed by the energy communities that realize the common purpose of self-production and sharing of clean energy through aggregation and collaboration between individuals, enterprises and local authorities;[7] by the collaborative networks between enterprises, research institutions, public administrations and citizens that can be financed within the framework of the third Pillar 'Innovative Europe' of the Horizon Europe Programme; or else by the European Technology Platforms that are the cross-border public-private research partnerships.[8]

Indeed, Italy is moving in the same direction where the dissemination of the so-called 'atypical association' negotiating practices can be registered more frequently.[9] We can increasingly observe, in fact, the use of the plurilateral negotiating scheme with communion of purpose,[10] typical of traditional associative models such as associations, foundations, committees, societies and

Cultural Heritage for Society (2005); the United Nations Framework on the Climate Change (1992), the Paris Agreement (2015) and the 2030 Agenda for Sustainable Development (2015).

[7] See European Parliament and Council Directive (EU) of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125; European Parliament and Council Directive (EU) of 11 December 2018 on the promotion of use of energy from renewable sources [2018] OJ L328/82 and Proposal for the European Parliament and Council directive amending Directive (EU) 2018/2001.

[8] See Communication from the Commission, Investing in Research: an Action Plan for Europe, 2003 that identifies the European Technology Platform with a coordinating tool that brings together 'the main stakeholders – research organisations, industry, regulators, user groups, etc. – around key technologies, in order to devise and implement a common strategy for the development, the deployment and the use of these technologies in Europe'.

[9] On this point, F. Galgano, 'Il negozio giuridico', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2002), 199.

[10] See chapter II, paragraph 6.

consortia provided for by the Civil Code, to regulate relationships between the parties established through the agreement, the pact, the convention. In this perspective, the so called 'informal' practices,[11] such as collaborative pacts and declarations of civic use for the care of the territory, are exemplary. In all these cases, even before any legislative prescription, private individuals and local administrations have spontaneously joined forces to realize the common purpose of caring for and enhancing the heritage and the spaces of their community. And they have done so not by constituting an autonomous and separate legal entity, but by signing a pact that identifies goals to be achieved jointly, rights, duties and responsibilities to be shared.

On the basis of the success and broad social consensus acquired by these practices, the Italian legislator is bringing particular attention to the role of collaboration with specific regard to relationships between public bodies, Third sector bodies and private individuals, but also between public bodies and enterprises.

The Third Sector Code introduces co-programming and co-design,[12] as preferred tools of dialogue between such entities and the public sphere, all equally committed to the realization of social goals and solidarity.

The Act on Private Reconstruction,[13] adopted to improve the management of the reconstruction after the experience of the earthquake that struck central Italy in 2016, puts the collaboration at the basis of the relationships between the heterogeneity of subjects involved in the recovery of damaged buildings and, more

[11] See chapter I, paragraph 7.
[12] On this point, chapter II.
[13] Available at sisma2016.gov.it.

widely, in the reconstruction of the social, economic and cultural fabric of the territories.[14] In this perspective, the agreements of scientific collaboration between public bodies and research bodies aimed at studying the area affected by the earthquake for a safer and more efficient design and implementation of the reconstruction, are exemplary. But even more the possibility provided for in the Act to adopt extraordinary programs for the reconstruction of historic centers, on the initiative of the municipalities, involving in the development process the population through consultations.

Adopting the same collaborative logic, the Public Contracts Code, entered into force on 1 April 2023 with the effectiveness of the rules deferred to 1 July 2023, has lastly been renewed.[15] The new Code not only rationalises and simplifies the existing rules on public contracts (public procurement, concessions, public-private partnership), but through the implementation of the collaborative tools it realizes a broader work of reconciliation and integration of a field driven exclusively by economic and competitive market logic with social, solidarity and environmental needs.[16] In this perspective, it cannot be ignored the explicit codification of the

[14] Starting from the first articles, the Act on Private Reconstruction highlights that the reconstruction is governed by the principles of promptness and administrative simplification, as well as legality, impartiality, efficiency, protection of workers involved in the reconstruction, participation and transparency of administrative action. Nevertheless, it is underlined that the reconstruction pursues not only the aim of recovering buildings, but also that of environmental sustainability, energy efficiency, architectural quality and the protection and enhancement of the historical and cultural heritage and landscape, as well as the social goals of economic and sustainable development, circular economy, digital connection.

[15] Decreto legislativo 31 March 2023 no 36 that provides for the new Public Contracts Code implementing article 1 of legge 21 June 2022 no 78. For the first considerations on the new Code, see L.R. Perfetti, 'Sul nuovo Codice dei contratti pubblici. In principio' *Urbanistica e appalti*, 5 (2023).

[16] In fact, the new Code brings particular attention to procedures for investments in green and digital technologies, research and social innovation, and to compliance with the criteria of energy and environmental responsibility in procurement through the definition of minimum environmental criteria, with the aim of pursuing the objectives of the 2030 Agenda for Sustainable Development.

'principle of trust' (article 2 of the Public Contracts Code) that has been placed as a foundation of the relationship between the administration and private individuals. This principle is indeed the essential premise of the collaborative approach, whether it is applied in an economically oriented context (as in case of public contracts) or in the one characterized by solidarity (as in case of the collaborative agreements discussed in the present thesis). All too often, in fact, the lack of trust between the parties, especially when one of them is a public entity, is a source of inefficiency and immobilism and, therefore, an obstacle to the economic, social and cultural recovery of the territory. On the contrary, it requires a dynamic and efficient public administration.[17]

Finally, before moving on to the analysis of the legal profiles of collaborative agreements as agreements with common purpose and to verify the impact of the principle of subsidiarity on their discipline, it is important to highlight a crucial shift in public-private relationships that has been accomplished precisely with the aforementioned reform of the Public Contracts Code.

In this complex and varied context, full of innovative boosts resulting from the progressive implementation of the European and international principles determined by a constitutional legality open to the integration with foreign

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Nevertheless, it allows the contracting entities to reserve the right to participate in the procurement and concession procedures for economic operators whose main purpose is the social and professional integration of persons with disabilities or disadvantages, as well as it provides for the obligation to include social clauses in contracts in order to ensure the employment stability and gender equality. On this point, a wide analysis of the Code's provisions is contained in the Dossier of 16 January 2023 drawn up by Servizi Studi, Senato della Repubblica and Camera dei deputati, available at *camera.it*.

[17] Corte costituzionale 18 January 2022 no 8, available at cortecostituzionale.it. This problem, declined with regard to the excessive bureaucratization and lengthy in the management of reconstruction and revitalization of the areas affected by the 2016 earthquake, is well highlighted by L. Ruggeri, 'L'interesse a continuare a vivere ed abitare nei luoghi colpiti dal sisma tra individuo e comunità' (to be published).

sources,[18] it is necessary to investigate the function and structure of the collaborative agreements. This must be done making use of hermeneutic tools able to grasp the evolution of the legal system and its hierarchy of values.

The investigation can only apply a methodology that analyzes interests,[19] clarifies the nature, graduates the protection so as to propose appropriate solutions to identify the specific applicable discipline.

In this perspective, the aim is to demonstrate in light of the local practices, case-law findings and recent legislative developments how the two spheres, public and private, can, and sometimes would be preferable for them to do so, to regulate through negotiation also non-economic interests. This to confirm the overcoming of any uncertainty on the co-existence of non-patrimonial interests in patrimonial relationships and vice versa[20] in a legal system in which the value-person becomes

[18] On this point, broadly, P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 1992), 41 and 126 where the Author invites to read the Constitution as '*sistema aperto e sensibile alle disposizioni aventi forza normativa (si pensi all'art. 44) da essa stessa autorizzate e tendenti a specificarlo e a completarlo; fermi restando i valori di fondo e le relative guarentigie che la caratterizzano e, come tali, sono intangibili*' ('an open system and sensitive to provisions having regulatory force (think of article 44) authorized by itself and tending to specify and complete it; without prejudice to the underlying values and the related guarantees that characterize it and, as such, are intangible').

[19] The importance of studying the legal relationship in a functional perspective, that is as a regulation of interests, is highlighted by P. Perlingieri, 'Dei modi di estinzione delle obbligazioni diversi dall'adempimento. Art. 1230-1259', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1975), 26 and 36.

[20] In this perspective, the family legal relationships in which very often the patrimonial and non-patrimonial interests coexist are exemplary: see L. Ruggeri, 'I regolamenti europei sui regimi patrimoniali e il loro impatto sui profili personali e patrimoniali delle coppie cross-border', in S. Landini eds, *EU Regulations 650/2012, 1103 and 1104/2016: cross-border families, international successions, mediation issues and new financial assets* (Napoli: Edizioni Scientifiche Italiane, 2020), 117 and Id., 'Comunione dei beni e rapporti con i terzi creditori: profili problematici', in R. Favale and L. Ruggeri eds, *Scritti in onore di Antonio Flamini* (Napoli: Edizioni Scientifiche Italiane, 2020), 1205.

a dominant value with consequent co-existence of non-patrimonial interests in patrimonial legal relationships.[21]

This thesis is, thus, strengthened by the recognition by the new Public Contracts Code (article 6) of the possibility for public administrations to establish with Third sector entities, in the context of the social and general interest activities, relationships of co-administration, devoid of synallagmatic character and based on the sharing of the administrative function with private individuals. Relationships that, as highlighted by the Code itself, are excluded from its scope.

2. The relationship between public and private subjects traditionally characterizes administrative activities in general and forms of its negotiating practice in particular. It is a theme that certainly has well-established origins.[22]

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[21] This co-existence is underlined respectively in relation to the interest of the debtor and the guarantor by G. Romano, *Interesse del debitore e adempimento* (Napoli: Edizioni Scientifiche Italiane, 1995) and L. Ruggeri, *Interesse del garante e strutture negoziali* (Napoli: Edizioni Scientifiche Italiane, 1995).

[22] The issue of the relationship between public and private entities is part of the wider debate developed around the binomial public law-private law that has led scholars to start a constant discussion on the role of private in the performance of administrative functions and above all on the possibility of regulating the relationships thus established by means of negotiation. For several contributions on this topic and further bibliography, S. Pugliatti, 'Diritto pubblico e diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XII, 696; M.S. Giannini, *Istituzioni di diritto amministrativo* (Milano: Giuffrè, 1981), 45; G. Nocera, *Il binomio pubblico-privato nella storia del diritto* (Napoli: Edizioni Scientifiche Italiane, 1989); G. Alpa, 'Diritto privato "e" diritto pubblico. Una questione aperta', in Aa.V.v., *Studi in onore di Pietro Rescigno* (Milano: Giuffrè, 1998), I, 3; Id, 'La distinzione/contrapposizione di diritto privato e diritto pubblico nella giurisprudenza' *Nuova giurisprudenza civile commentata*, 1 (1998); N. Lipari, 'Sull'insegnamento del diritto civile' *Rivista di diritto civile*, 333 (2002); G. Napolitano, *Pubblico e privato nel diritto amministrativo* (Milano: Giuffrè, 2003); M. Tucci, *L'amministrazione tra pubblico e privato e il principio di legalità dall'antichità ai giorni nostri. Aspetti ricostruttivi e prospettive di sviluppo* (Milano: Giuffrè, 2008); P. Perlingieri, *Il diritto civile*, I, n 6 above, 137. For a historical perspective on the evolution of relations between public administrations and private, M.S. Giannini, *Il pubblico potere. Stati e amministrazioni pubbliche* (Bologna: Il Mulino, 1986); G. Melis, *Storia dell'amministrazione italiana: 1861-1993* (Bologna: Il Mulino, 1996); C. Silvestro, *Storia della pubblica amministrazione. Evoluzione storica degli apparati pubblici: dall'unità d'Italia al federalismo amministrativo* (Napoli: Edizioni Simone, 2004); F. Benvenuti, *Scritti giuridici* (Milano: Giuffrè, 2006);

However, a thorough discussion of it in the context of revitalization of those territories affected by disasters and, more broadly, of sustainable local development,[23] cannot escape a preliminary reflection. We must reflect on the 'relevance' of the 'great dichotomy'[24] that today in light of the shifted set-up of

U. Allegretti, *L'amministrazione dall'attuazione costituzionale alla democrazia partecipativa* (Milano: Giuffrè, 2009); P. Mastrogiuseppe and A. Tanese eds, *Attraverso le riforme. Percorsi di cambiamento nella Pubblica Amministrazione italiana* (Roma: Aracne, 2015).

[23] The unified treatment of issues relating to reconstruction and local development, through an integrated approach that takes into account the social, economic, environmental and cultural structure, and that, therefore, directs in this perspective relations between public authorities, companies and civil society, is based on the supranational goals of preventing and reducing natural disasters, which require attention to current environmental issues. In particular, the *Sendai Framework for Disaster Reduction 2015-2030*, adopted on 18 March 2015 within the Third World Conference of the United Nations, provides that to effectively implement the goals, especially that relating to the realization of *build back better* practices, is crucial the adoption of integrated and inclusive economic, structural, legal, social, health, cultural, educational, environmental, technological, political and institutional measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and thus strengthen resilience (p. 12). For its part, the *2030 Agenda for Sustainable Development*, adopted on 25 September 2015 within the 70th United Nations General Assembly (UN Resolution A/RES/70/1), expressly includes among its goals to make communities sustainable and inclusive (goal 11) through urban regeneration, protection and enhancement of the natural and cultural heritage, which must be understood as an integral part of policies aimed at promoting resource efficiency, mitigation and adaptation to climate change, disaster resistance, and thus at encouraging holistic disaster risk management at all levels, in line with the *Sendai Framework for Disaster Reduction 2015-2030*. In the same direction are also moving European policies (European Commission, *The EU Urban Agenda*, 2016; European Commission, *Towards a Sustainable Europe by 2030*, 2019; European Commission, *European Framework for Action on Cultural Heritage*, 2019; Council of the European Union, *A Comprehensive Approach to Accelerate the Implementation of the UN 2030 Agenda for Sustainable Development – Building Back Better from the COVID-19 Crisis*, 2021) and national (*National Strategy for Inner Areas* and *National Recovery and Resilience Plan*). On the necessity of an approach capable of integrating the goals of sustainable development, fight against climate change and reduction and more efficient management of natural disasters, S. Flood, Y.J. Columbié, M. Le Tissier and B. O'Dwyer eds, *Creating Resilient Futures Integrating Disaster Risk Reduction, Sustainable Development Goals and Climate Change Adaptation Agendas* (Switzerland: Palgrave Macmillan, 2022). See, also, V. Thomas, *Climate Change and Natural Disasters. Transforming Economies and Policies for a Sustainable Future* (New York: Routledge, 2017) and T. Karimova, 'Sustainable development and disasters', in S.C. Breau and K.L.H. Samuel eds, *Research Handbook on Disasters and International Law* (Cheltenham: Edward Elgar Publishing, 2016), 177.

[24] The idea of the '*grande dicotomia*' ('great dichotomy') (defined by legal scholars of common law as 'big divide': J.-B. Auby and M. Freedland eds, *La distinction du droit public et du droit privé: regards français et britanniques* (Parigi: Pantheon-Assas, 2004)) goes back to the reflections of N. Bobbio, *Dalla*

values[25] and interests expresses the relationship between public and private no longer based on conflict and separation, but rather marked by mutual permeability and cooperation.

struttura alla funzione. Nuovi studi di teoria del diritto (Milano: Edizioni di Comunità, 1977), 122, 148, according to which '*nella teoria del diritto la distinzione che si presenta, più spiccatamente di ogni altra, col carattere di "grande dicotomia" è la distinzione tra diritto privato e diritto pubblico*' ('in the theory of law, the distinction that appears, more markedly than any other, with the character of "great dichotomy" is the distinction between private and public law. However, as pointed out by the same Author in Id., 'Pubblico/privato' *Enciclopedia Einaudi* (Torino: G. Einaudi, 1980), XIII, 401, it is a category potentially inclusive of the whole reality but at the same time it appears indefinable in an exhaustive and stable way because of its relativity within time and the continuous change of its perception by the subjects. In this sense, also, P. Donati, *Pubblico e privato. Fine di un'alternativa?* (Bologna: Cappelli, 1978), 9, who highlights that each era '*conferisce un significato particolare*' ('confers a special meaning') to this category colouring it with '*determinate funzioni e rapporti in connessione alla totalità sociale*' ('certain functions and relationships in connection with social totality').

Conversely, S. Pugliatti, 'Diritto pubblico', n 22 above, 697, denies the concerns that the clear antithesis between the two branches might compromise the unitary conception of law. The Author observes that the distinction between public and private law, on the contrary, highlights even better '*la fondamentale unità dell'ordinamento giuridico […] poiché è una distinzione interna che, mentre sottolinea gli elementi di differenza, svela il complesso di elementi di identità, che ne costituiscono la base comune*' ('the fundamental unity of the legal order [...] because it is an internal distinction that, while emphasizing the elements of difference, reveals the complex of elements of identity, which constitute its common basis'). In this perspective, therefore, the distinction between the two subjects must be assessed from time to time with reference to concrete situations and the underlying interests since '*l'unitarietà dell'ordinamento comporta che i suoi princípi ispiratori e caratterizzanti siano presenti in ogni sua parte, senza che la separazione tra diritto privato e diritto pubblico finisca con il contrapporre i princípi qualificanti ciascuna branca del diritto*' ('the unity of the legal system means that its inspiring and characterizing principles are present in every part, avoiding that the separation between private and public law counters the qualifying principles of each field of law'), P. Perlingieri, *Il diritto civile*, I, n 6 above, 135.

For a recent reflection on the causes that determined the progressive overcoming of the dichotomy, see G. Alpa, *Dal diritto pubblico al diritto privato* (Modena: Mucchi, 2017).

[25] In this sense, it emerges fully '*la dimensione culturale del diritto*' ('the cultural dimension of law') that, in the dialectical comparison between rules, principles, concrete facts, and the overall socio-cultural reality of which it is an integral part, has been able to enhance the private sphere within the constant tension between the authority of the administration and freedom of the individual. The law, in fact, finding its foundation in the value substratum, cannot be understood only as technique, rationality and formality of the procedures (N. Lipari, 'Intorno ai "principi generali del diritto"' *Rivista di diritto civile*, 28 (2016)). On the contrary, as '*un continuum storico di regole e princípi accolti da una comunità che li pratica e li fa propri*' ('a historical *continuum* of rules and principles welcomed by a community that practices them and makes them its own') it is identified in a given social structure based on values that are '*l'humus del suo diritto*' ('humus of its law') (P. Perlingieri, *Il diritto civile*, I, n 6

In fact, once the 'psychological notion' of interest which identifies it with need or desire has been dismissed, and its normative essence as the 'need for goods or values to be realized or protected'[26] has been established, it is possible to see that interests[27] characterizing the collaborative relationships between administration and civil society express the values of a community. These interests do not constitute an abstract moment detached from the aims towards which the collaboration is directed. On the contrary, they derive on a case-by-case basis from the concrete needs of a community, placed in a certain legal system and a specific time period. Interests that denote the aims are thus nothing more than the mirror of the legal and social reality unitarily understood and, therefore, of the values they are intended to realize.

Within the collaboration, the dynamic dimension[28] of the relationship between public and private emerges fully. It draws its foundation from the entire constitutional framework, and it is axiologically oriented towards the implementation of the supreme person value by it.[29] Such is in fact the true essence

above, 110). See, on the argument, N. Lipari, 'Il diritto quale crocevia fra le culture' *Rivista trimestrale di diritto e procedura civile*, 1 (2015).

The need to 'historicize' and to look at the big partition 'relatively' is highlighted by G. Alpa, 'Pubblico e privato nell'esperienza giuridica' *Rivista italiana per le scienze giuridiche*, 183 (2016).

[26] E. Betti, 'Interesse (Teoria generale)' *Novissimo digesto italiano* (Torino: Utet, 1962), VIII, 839.

[27] For a deep investigation on the concept of interest, see P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996).

[28] To be intended as '*esigenza razionale del diritto come ordinamento*' ('rational requirement of law as a system'): S. Pugliatti, *Gli istituti del diritto civile* (Milano: Giuffrè, 1943), I, III.

This i salso the international perspective of the public-private relationship, intended as a modern form of interaction that adapts in a resilient way to the changing dynamics of society and the legal framework, in which the traditional 'binary' separation between the two spheres can no longer be accepted: J. Weintraub and K. Kumar eds, *Public and private in thought and practice: perspectives on a grand dichotomy* (Chicago: University of Chicago Press, 1997) and lastly S. Valaguzzza and E. Parisi, *Public Private Partnerships. Governing Common Interests* (Cheltenham: Elgar Publishing, 2020), 16.

[29] Like each field of law whose foundation can be found in the constitutional framework, also acts and activities '*non possono non essere influenzati, nei loro requisiti di validità e di efficacia e negli stessi loro*

of the so-called public interest that in a legal system based on solidarity and personalism becomes the means for the realization of the private one. The notion of interest, as the result of a normative assessment,[30] is therefore an essential component of the study of collaborative relationships. As will be shown below, in these relationships not only the interest of the public entity coincides with the interest of the private, but also identifies with the interest of those subjects for whose benefit the collaboration is activated.

In this perspective, the interest enters the negotiating autonomy acts and extends their effectiveness outside the formally involved parties. It follows that the analysis of the concerned relationships, to be undertaken according to the legal criteria and in respect of the hierarchy of values, thus avoiding the risk of getting lost in the legal formalism,[31] can only start from the teleologically oriented investigation of the impact of such interest on their structural and functional

presupposti, dalla gerarchia degli interessi risultante dall'analisi delle norme di una Costituzione rigida, fonte privilegiata dei rapporti personali, economici e sociali' ('cannot be unaffected, in their requirements of validity and effectiveness as well as in their assumptions, by the hierarchy of interests resulting from the analysis of the norms laid down in a rigid Constitution, which is a privileged source of personal, economic and social relations'): P. Perlingieri, *Il diritto civile*, IV, n 6 above, 50-51.

[30] That presupposes the activity of comparison between the interests, looking for an order of preference to be identified on the basis of '*criterio di rilevanza giuridica*' ('criterion of legal importance') that entails a '*valutazione comparativa (che è altresì tipica) circa il merito della tutela giuridica secondo le vedute politico-legislative dell'ordinamento in cui si compie*' ('comparative assessment (which is also typical) on the merit of legal protection according to the political and legislative views of the legal system'): E. Betti, 'Interesse', n 26 above, 839.

[31] Which reduces '*il diritto alla "norma" nel suo paradigma concettuale, considerata in se medesima, come entità assoluta e depurata da ogni elemento nonché da ogni riferimento teleologico: essendo che ogni determinazione concreta del contenuto e ogni considerazione finalistica del diritto deve ritenersi metagiuridica*' ('the law to the "norm" in its conceptual paradigm, considered, as an absolute entity and purified of any element as well as of any teleological reference: since each concrete determination of the content and each finalistic consideration of the law must be considered metajuridical'): in this way S. Pugliatti, 'Diritto pubblico', n 22 above, 699, by recalling the well-known Kelsen's pure doctrine of law (H. Kelsen, 'Diritto pubblico e privato' *Rivista internazionale di filosofia del diritto*, 340 (1924); Id., *Allgemeine Staatslehre* (Berlin: J. Springer Verlag, 1925).

profiles. As a synthesis between public and private demands in the implementation of person's values, the relevance of the interest therefore emerges in terms of the physiological inseparability between public and private[32] and, in the acts of negotiating autonomy concluded between the latter, necessarily intersects with their object, cause, form,[33] structure and the entire formation process.

Such is the reading of the collaborative relationships that must be derived from the principle of horizontal subsidiarity[34] as well as from the whole system

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[32] P. Perlingieri, 'Il diritto agrario tra pubblico e privato', in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 265; Id, 'L'incidenza dell'interesse pubblico sulla negoziazione privata', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 58-59.

In international doctrine the close relationship between the public and private interest is highlighted by J.T. Mahoney, A.M. McGaham and C.N. Pitelis, 'The Interdependence of Private and Public Interests' *Organization Science*, 1034 (2009).

[33] Like the other essential elements of the contract, also the form cannot remain indifferent to the impact of the interest and insensitive to axiological hermeneutics or values. The importance of the form of acts of autonomy, in fact, cannot be limited only to their invalidity or the assessment of their formal compliance with a legislative prescription (with opposite opinion, N. Irti, *Idola libertatis. Tre esercizi sul formalismo giuridico* (Milano: Giuffrè, 1985). On the contrary, as an inseparable part of the act and of its content, it becomes, in the functional perspective, a tool for controlling and safeguarding the interests to be realized (P. Perlingieri, 'L'incidenza dell'interesse', n 32 above, 67-69). On the functional value of the form, E. Betti, *Teoria generale del negozio giuridico* (Torino: Utet, 2nd ed, 1950), 122, whose thought on this point is broadly retraced by G. Berti de Marinis, 'La forma del contratto nel pensiero di Emilio Betti: spunti di attualità', in G. Perlingieri and L. Ruggeri eds, *L'attualità del pensiero di Emilio Betti a cinquant'anni dalla scomparsa* (Napoli: Edizioni Scientifiche Italiane, 2019), 803 and by R. Favale, 'Discussant: Le forme del contratto', in G. Perlingieri and L. Ruggeri eds, *L'attualità del pensiero di Emilio Betti a cinquant'anni dalla scomparsa* (Napoli: Edizioni Scientifiche Italiane, 2019), 835. See, also, M. Giorgianni, 'Forma degli atti (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1968), XVII, 990; P. Perlingieri, *Forma dei negozi e formalismo degli interpreti* (Napoli: Edizioni Scientifiche Italiane, 1987); R. Favale, *Forme "extralegali" e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 1994) and G. Berti de Marinis, *La forma del contratto nel sistema di tutela del contraente debole* (Napoli: Edizioni Scientifiche Italiane, 2013) who analyses the protective function of the form.

[34] Among multiple writings devoted to different profiles and the essence of the principle of subsidiarity in the European and Italian legal system, see P. Caretti, 'Il principio di sussidiarietà e i suoi riflessi sul piano dell'ordinamento comunitario e dell'ordinamento nazionale' *Quaderni costituzionali*, 8 (1993); A. D'Atena, 'Il principio di sussidiarietà nella Costituzione italiana', *Rivista italiana di diritto pubblico comunitario*, 607 (1997); Id, 'La declinazione verticale e la declinazione orizzontale del principio di sussidiarietà', in *Scritti in onore di Alessandro Pace* (Napoli: Editoriale

according to an approach that leaves the boundaries of conceptual dogmatism to rather explore the function of acts and institutions. Even before being expressly regulated, the horizontal subsidiarity had already been prefigured through articles 41, 42 and 43 of the Italian Constitution, to the extent that the economic initiative, the ownership and exercise of essential public services by private were appropriately directed towards social purposes. A non-conflictual space based on a balance between values was, therefore, reserved to private subjects alongside the public ones in the realization of what the reform of Title V of the Constitution enshrined as 'general interest'.

The constitutionalisation of this principle in 2001 strengthened the 'normative' assessment of the collaborative relationships between public and private, that is in light of the interests underlying them, in the perspective of the *depatrimonialization*[35]

Scientifica, 2012), 597; A. Rinella, L. Coen and R. Scarciglia eds, *Sussidiarietà e ordinamenti costituzionali. Esperienze a confronto* (Padova: Cedam, 1999), 1; A. D'Andrea, 'La prospettiva della costituzione italiana ed il principio di sussidiarietà', *Jus*, 227 (2000); P. De Carli, *Sussidiarietà e governo economico* (Milano: Giuffrè, 2002), 1; G.U. Rescigno, 'Principio di sussidiarietà orizzontale e diritti sociali' *Diritto pubblico*, 5 (2002); A. Albanese, 'Il principio di sussidiarietà orizzontale: autonomia sociale e compiti pubblici' *Diritto pubblico*, 51 (2002); V. Cerulli Irelli, 'Sussidiarietà (dir. amm.)' *Enciclopedia giuridica* (Treccani: Roma, 2003), XXXV, 1; L. Franzese, *Ordine economico e ordinamento giuridico. La sussidiarietà delle istituzioni* (Padova: Cedam, 2004), 75; T.E. Frosini, 'Sussidiarietà (principio di)' *Enciclopedia del diritto*, *Annali* (Milano: Giuffrè, 2008), II, 1133; G. Scaccia, *Sussidiarietà istituzionale e poteri statali di unificazione normativa* (Napoli: Edizioni Scientifiche Italiane, 2009), 75, and, recently, D. Ciaffi and F.M. Giordano eds, *Storia, percorsi e politiche della sussidiarietà* (Bologna: Il Mulino, 2020).

In civil law, see P. Femia, 'Sussidiarietà e princípi nel diritto contrattuale europeo', in P. Perlingieri and F. Casucci eds, *Fonti e tecniche legislative per un diritto contrattuale europeo* (Napoli: Edizioni Scientifiche Italiane, 2004), 143; D. De Felice, *Principio di sussidiarietà ed autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008); E. Del Prato, 'Principio di sussidiarietà e regolazione dell'iniziativa economica privata. Dal controllo statale a quello delle autorità amministrative indipendenti' *Rivista di diritto civile*, 264 (2008); M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014), I and II; P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 687 (2016); F. Maisto, *L'autonomia contrattuale nel prisma della sussidiarietà orizzontale* (Napoli: Edizioni Scientifiche Italiane, 2016); Id, 'Sussidiarietà: autonomie e coesione sociale' *Rassegna di diritto civile*, 1360 (2017).

[35] The term *depatrimonialization* indicates 'the awareness that a choice has been made in the legal system, which is slowly taking place, between personalism (overcoming individualism) and

not only of civil law but also of administrative law. An evaluation that moves, therefore, from the examination of the impact of values on the whole relationship, looking for a different balance between the economic and existential aspects in which the first becomes an instrument for the realization of the second.

3. The need to investigate the reasons behind the rapprochement between the two spheres finds its justification in the intention to explore this renewed

patrimonialism (overcoming patrimoniality for its own sake)' with the need to adapt institutes to these values that 'no longer can be a priori intended as external limits or purposes unsuitable to affect the function of the institute and therefore its nature': P. Perlingieri, '*"Depatrimonializzazione" e diritto civile*', in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 176.

dynamic[36] relationship beyond public and private.[37] Its *ratio* is sought, rather than in the composition of particular and general interests, in the mutual convergence of their respective actions towards the realization of common interest.[38] An

[36] It was highlighted by the highest theorist of equal relations conceived on the basis of the idea of co-administration, F. Benvenuti, *Il nuovo cittadino. Tra libertà garantita e libertà attiva* (Venezia: Marsilio, 1994), 128, that '*il problema del nuovo Stato e il problema del nuovo cittadino presuppongono una loro reciproca posizione dinamica e un reciproco avvicinarsi. Quanto più il nuovo cittadino diviene titolare di una sua libertà attiva, tanto più si apre il confine della sua persona; egli conquista in tal modo, oltre al valore della esistenza individuale, anche la coscienza di un essere per gli altri [...] non basta più la difesa della libertà individuale ma occorre che l'individuo vada oltre e cooperi a costruire, insieme agli altri, la rete di relazioni che costituisce la base del principio di una società aperta*' ('the problem of the new State and the problem of the new citizen presuppose a dynamic mutual position and a mutual approach. The more the new citizen becomes the holder of an active freedom, the more the boundary of his person opens; he thus conquers, in addition to the value of individual existence, also the awareness of a being for others [...] it is no longer enough to defend individual freedom, but it is necessary for the individual to go further and to cooperate in building, together with the others, the network of relationships that forms the basis of the principle of open society').

Just in the wake of Benvenuti's insights, the need for a rethinking of roles and powers between institutions, citizens and social bodies has long been raised in doctrine with a view to a closer cooperation and coordination in the achievement of shared goals of general utility: F. Benvenuti, 'Per un diritto amministrativo paritario', in *Studi in memoria di Enrico Guicciardi* (Padova: Cedam, 1975), 807; Id, *Disegno della amministrazione italiana. Linee positive e prospettive* (Padova: Cedam, 1996); Id, *L'ordinamento repubblicano* (Padova: Cedam, 1996); G. Arena, 'Introduzione all'amministrazione condivisa' *Studi parlamentari*, 29 (1997); Id, *Cittadini attivi. Un altro modo di pensare l'Italia* (Roma-Bari: Laterza, 2006); L. Franzese, *Ordine*, n 34 above, 75.

Critically with regard to the concepts of '*co-amministratore*' ('co-administrator') and '*nuovo cittadino*' ('new citizen'), R. Ferrara, *Introduzione al diritto amministrativo* (Roma-Bari: Laterza, 2002), 135, who defines them as '*formule altamente seducenti*' ('highly seductive formulas') that recall '*quadri fantastici dai quali la realtà risulta solo in parte interpretata e spiegata e, più spesso, deformata*' ('fantastic pictures through which the reality is only partly interpreted and explained and, more often, deformed').

[37] The investigation can only take place with a view to overcoming the dichotomy traditionally understood in terms of dialectical encounter between the two categories (G. Napolitano, *Pubblico*, n 22 above, 63), given that '*in una società come l'attuale, diventa arduo, se non impossibile, individuare un interesse privato che sia autonomo, indipendente, isolato dall'interesse c.d. pubblico*' ('in a society like ours, it becomes difficult, if not impossible, to identify a private interest that is autonomous, independent, isolated from the public interest') (P. Perlingieri, *Il diritto civile*, I, n 6 above, 137, and Id, *Profili istituzionali del diritto civile*, (Napoli: Edizioni Scientifiche Italiane, 1975), 55). With this in mind, G. Vecchio, *Le istituzioni della sussidiarietà. Oltre la distinzione tra pubblico e privato* (Napoli: Edizioni Scientifiche Italiane, 2022), 60, notes the inadequacy of public and private categories to grasp the changes in the relationship between the State and society.

[38] The perspective moves from the model of shared administration of G. Arena, 'Introduzione', n 36 above, 29, who imagines between administration and citizens a relationship aimed at getting

effective response to the fragmented needs of the territory and to the concrete needs of its communities, which see the local administration as their immediate reference,[39] requires the establishment of new alliances. These must be capable of overcoming the conflictual dimension through negotiating solutions,[40] 'more attentive to recognize and grasp the social and cultural environment and from this assume suggestions and stimuli for more equitable and productive relationships'.[41]

The relational frameworks between public and private actors that we intend to analyse are part of a *different* administrative function[42] and see the agreement as the

out the latter '*dal ruolo passivo di amministrati per diventare co-amministratori, soggetti attivi che, integrano le risorse di cui sono portatori con quelle di cui è dotata l'amministrazione, si assumono una parte di responsabilità nel risolvere problemi di interesse generale*' ('from the passive role of administrated to become co-administrators, active subjects that integrate the resources of which they are bearers with those of the administration and assume a part of responsibility in solving problems of general interest'). And this on the basis of '*rapporto paritario di co-amministrazione in cui ciascuno mette in comune le proprie risorse e capacità, in vista di un obiettivo comune*' ('an equal relationship of co-administration in which everyone shares resources and capabilities in view of common purpose').

[39] In this way E. Ferioli, *Diritti e servizi sociali nel passaggio dal welfare statale al welfare municipale* (Torino: Giappichelli, 2003), 98, and V. Berlingò, *Beni relazionali. L'apporto dei fatti di sentimento all'organizzazione dei servizi sociali* (Milano: Giuffrè, 2010), 92.

[40] Which are '*destinate ad assegnare al cittadino un ruolo non più servente rispetto all'autorità, bensì proiettato in una dimensione collaborativa e partecipativa*' ('intended to give the citizen a role no longer serving the authority but projected into a collaborative and participatory dimension'): L. Benvenuti, 'Dell'autorità e del consenso', in Id, *Diritto e amministrazione. Itinerari di storia del pensiero* (Torino: Giappichelli, 2011), 225.

[41] In this way B. Manfredonia, *I contratti con la pubblica amministrazione. Interessi, funzioni, interpretazione* (Napoli: Edizioni Scientifiche Italiane, 2020), 51, who carefully analyses contractual relations between public and private and hopes '*che si possa giungere ad un diritto comune, nel quale gli intenti di entrambi i contraenti si proiettino verso relazioni contrattuali tendenzialmente paritarie e rispettose, in quanto tali, dei valori esistenziali e ambientali*' ('that a general common law can be reached, in which intentions of both parties are projected towards equal contractual relations and respectful of existential and environmental values').

[42] A distinction between public-private shared administration model and mere participation of private in the administrative process or other decision-making processes, such as participatory and deliberative democracy, is drawn by G. Arena, 'Introduzione', n 36 above, 45 and Id, 'Amministrazione e società. Il nuovo cittadino' *Rivista trimestrale di diritto pubblico*, 50 (2017). In fact, in case of participatory or deliberative democracy, '*il cittadino "riconosce l'autorità, partecipa dell'autorità, ne diventa esso stesso soggetto" ed "entra in un rapporto attivo con l'amministrazione attraverso l'esercizio di poteri di co-determinazione"*' ('the citizen "recognizes authority, participates in authority, becomes its own

most appropriate instrument to regulate the peculiar arrangement of interests, founded on their communion and characterized by the absence of logic of profit since it is aimed exclusively at the realization of the common good.[43]

subject" and "enters into an active relationship with administration through the exercise of co-determination powers"") (on this point, see F. Benvenuti, 'L'impatto del procedimento nell'organizzazione e nell'ordinamento', in *Scritti in onore di Luigi Mengoni* (Milano: Giuffrè, 1995), 1732). In case of shared administration, instead, private share with administration responsibilities and resources, becoming an active part in solving common problems.

[43] Some instruments already present in our legal system are moving in this direction as well as others whose proliferation, under the influence of European law and foreign experience, is fostering virtuous forms of cooperation. Exemplary thus are agreements born in the context of the phenomenon of urban regeneration whose spread has been stimulated, on the one hand, by regional legislation aimed at rethinking the destination and use of certain buildings and urban spaces through the strategic re-planning of the territory, the so-called macroregeneration (for the impact of regional legislation, R. Dipace, 'La rigenerazione urbana tra programmazione e pianificazione' *Rivista giuridica dell'edilizia*, 237 (2014); Id, 'Le politiche di rigenerazione dei territori tra interventi legislativi e pratiche locali' *Istituzioni del federalismo*, 625 (2017); G. Torelli, 'La rigenerazione urbana nelle recenti leggi urbanistiche e del governo del territorio' *Istituzioni del federalismo*, 651 (2017); A. Giusti, *La rigenerazione urbana. Temi questioni e approcci nell'urbanistica di nuova generazione* (Napoli: Editoriale Scientifica, 2018), 63); and on the other hand, by local practices for the care and management of common goods that, in the wake of extraordinary insights of Elinor Ostrom (E. Ostrom, *Governing the commons: the evolution of institutions for collective action* (New York: Cambridge University Press, 1990)), have been transposed in Italy by the so-called collaborative pacts (G. Arena and C. Iaione eds, *L'età della condivisione. La collaborazione tra cittadini e amministrazione per i beni comuni* (Roma: Carocci, 2015); R.A. Albanese and E. Michelazzo, *Manuale di diritto dei beni comuni urbani* (Torino: Celid Edizioni, 2020); L. Casalini, 'Commons, commoning and community. I patti di collaborazione' *Persona e mercato*, 35 (2022)).

In the same perspective ranks the recent introduction of 'temporary uses' by legge 11 September 2020 no 120 within article 23 *quater* of Testo unico dell'edilizia in order to regulate in conventional way the use of the unused public and private buildings, fostering their valorisation through economic, social, cultural or environmental recovery initiatives (see G. Torelli, 'Le ultime frontiere del recupero e della valorizzazione del patrimonio urbano: gli usi temporanei' *Diritto amministrativo*, 475 (2021)). Among foreign experiences, roots of 'temporary uses' can certainly be traced to the phenomenon of '*urbanisme transitoire*' or '*temporaire*', born in France to counteract urban degradation through the revitalization of public and private spaces affected by urban transformation. Due to the long time required for the planning and implementation of the latter, this phenomenon aims to create a temporary value to the unused spaces by their transitory use pending the completion of the wider project of urban transformation (on the argument, A. Cocquière, C. Fanny, D. Cécile and V. Agathe, *L'urbanisme transitoire* (Île-de-France: Institute d'Aménagement et d'Urbanisme de la région d'île-de-France, 2018).

The use of the term 'agreement', despite its peculiar characterization of agreement without patrimonial importance,[44] based on the shared consensus between public and private subjects[45] to achieve a common purpose, must not lead to limiting its dissertation to the traditional orientation, that sees the agreement and the contract as two opposing categories, where the former is marked by the absence of conflict of interests, and the latter by conflicts.[46] Nor

[44] The gratuitousness profiles of public-private agreements in relation to the exercise of discretionary powers by administration is explored by D. D'Alessandro, *Funzione amministrativa e causa negoziale nei contratti pubblici non onerosi* (Napoli: Editoriale Scientifica, 2018) and Id, 'Profili di gratuità e budgetary efficiency nei contratti pubblici', in G.M. Garuso, D. D'Alessandro and P. Pappano eds, *Contratti delle pubbliche amministrazioni. Questioni attuali* (Torino: Giappichelli, 2019), 321.

[45] The notion of agreement finds in administrative doctrine a specific connotation that makes it not completely referable to the category of contracts, incardinating at the same time '*l'istituto in un sistema disciplinare non del tutto estraneo alle regole del diritto privato*' ('the institute in a system not wholly unrelated to rules of private law'): F. Giglioni and A. Nervi, 'Gli accordi delle pubbliche amministrazioni' *Trattato di diritto civile del Consiglio Nazionale del Notariato* diretto da P. Perlingieri (Napoli: Edizioni Scientifiche Italiane, 2019), 7. On this topic, with different opinions, M. Dugato, *Atipicità e funzionalizzazione dell'attività amministrativa per contratti* (Milano: Giuffrè, 1996), 167 and E. Sticchi Damiani, 'Gli accordi amministrativi', in C. Amirante ed, *La contrattualizzazione dell'azione amministrativa* (Torino: Giappichelli, 1993), 42. This is exactly the background to the administrative case law. Administrative judges in fact point out that agreements between public and private do not take on an eminently civil character since they include in any case the consensual exercise of public authority from which they, therefore, derive their public nature. At the same time, however, they argue that the application of the Civil Code principles on obligations and contracts must be extended to such agreements, while the application of special private law rules must be excluded: Consiglio di Stato 22 February 2018 no 1119; Consiglio di Stato 12 July 2018 no 4251; Consiglio di Stato 2 February 2012 no 616.

[46] Such approach emerges above all from the doctrinal orientations that trace a distinction between exchange contracts and the associative ones, highlighting that while in the first type of contracts the contracting parts 'face each other', as each of them pursues exclusively its own interests, such as to necessarily make conflicting also the performance of the parties deriving from the contract; quite differently, instead, it is configured the associative contractual model through which parties, driven by common interests, direct their performance towards a 'common purpose': F. Messineo, 'Contratto (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 905-906 and Id, 'Contratto plurilaterale e contratto associativo' *Enciclopedia del diritto* (Milano: Giuffrè, 1962), X, 139. On this topic, also, V.M. Trimarchi, 'Accordo' *Enciclopedia del diritto* (Milano: Giuffrè, 1958), I, 297; R. Scognamiglio, 'Accordo', in *Scritti giuridici* (Padova: Cedam, 1996), 69; P. Rescigno, 'Consenso, accordo, convenzione, patto (la terminologia legislativa nella materia dei contratti)' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 3 (1988).

does it seem possible to exclude a priori the contractual nature of agreements for the sole and indispensable patrimonial connotation of the contract,[47] since agreements can have patrimonial content as well.[48]

Conversely, it has been noted that the agreement, as a material basis for any negotiated act based on a shared will, '*non esclude, anzi sollecita l'identificazione concettuale con il contratto se si legge la definizione dell'art. 1321 cod. civ.*' ('does not exclude, indeed encourages its conceptual identification with the contract if one looks at the definition of article 1321 of Civil Code'): G. Vettori, 'Accordi "amministrativi" e contratto' *Contratto e impresa*, 525 (1993). Therefore, also agreements between administration and private '*non sembrano poter giustificare la sottrazione (dei medesimi) al genus dei contratti*' ('do not seem to justify the subtraction (of the same) to the genus of contracts'): E. Bruti Liberati, 'Accordi pubblici' *Enciclopedia del diritto, Aggiornamento* (Milano: Giuffrè, 2001), V, 14.

[47] Otherwise, the cause of the contract would be confused with its object. The notion of the contract as provided for in article 1321 of Civil Code refers to property relations, but this does not mean that also the cause should necessarily be intended in a patrimonial view, since it relates to concrete interests pursued by contractual parties which may be non-economic interests too. It follows that the non-economic nature of the cause cannot exclude the reconstruction of agreements in a contractual key because according to articles 1174 and 1321 of Civil Code, the patrimonial nature of the relation must be determined by reason of the nature of the performance and not of the interest: in this way A. Federico, *Autonomia negoziale e discrezionalità amministrativa. Gli "accordi" tra privati e pubbliche amministrazioni* (Napoli: Edizioni Scientifiche Italiane, 1999), 143-144, who qualifies public-private agreements as bilateral legal transactions.

In this perspective, the pages of Emilio Betti are very current. In his work, E. Betti, *Teoria generale delle obbligazioni, I, Prolegomeni: funzione economico sociale dei rapporti d'obbligazione* (Milano: Giuffrè, 1953) he underlined the relevance in the legal relationships also of the non-patrimonial interest as well as the need to separate the performance from the interest: the first patrimonial and the second not patrimonial. For a revisitation of Betti's insights, see M.M. Francisetti Brolin, 'L'interesse non patrimoniale nella teoria dell'obbligazione. Rileggendo Emilio Betti', in G. Perlingieri and L. Ruggeri eds, *L'attualità del pensiero di Emilio Betti a cinquant'anni dalla scomparsa* (Napoli: Edizioni Scientifiche Italiane, 2019), 225 and Id, *L'interesse non patrimoniale del creditore. Rileggendo Emilio Betti* (Napoli: Edizioni Scientifiche Italiane, 2019).

[48] This is precisely the perspective that is adopted by agreements with a common purpose. On this point, P. Perlingieri, *Il diritto civile*, I, n 6 above, 279, highlights that both exchange legal relations and those arising from contracts with communion of purpose are characterized by a link 'by function'. However, while in the first case each relation is justified according to the other, and therefore as a function of exchange of performances; in the second case, instead, relations built in function of the shared purpose find their justifying reason in the common action of the group and can be sometimes economically evaluable, as in case of commercial companies, and sometimes not, as in case of non-profit associations. On the impact of non-patrimonial interest on the cause of transactions with patrimonial set-up, P. Perlingieri, *Il diritto civile*, IV, n 6 above, 31 and Id, 'L'interesse non patrimoniale e i contratti' *Annali della Facoltà di economia di Benevento*, 19 (2012).

On the contrary, what we intend to enhance here through the agreement is its cause profile, to be identified concretely with the sharing of interests in a collaborative key.[49] Thus, it not only acts as a distinguishing criterion compared to other contractual types which can be concluded with the public administration,[50]

[49] It has been observed in doctrine that, with the exception of cases expressly regulated or cases in which the negotiating activity of public administrations was related to the discipline of the agreements by jurisprudence, the faculty to act *by agreements* has been almost unused due to a lack of awareness of the nature of the public-private relationship to which the agreement is intrinsically linked. For this reason, it is considered that to fill such a gap, consolidating the use of agreements and encouraging their wider dissemination, is precisely the collaborative model that '*può aiutare il sistema a impiegare un altro strumento d'azione finora piuttosto sottovalutato dalle pubbliche amministrazioni, che consente di intessere relazioni collaborative senza che questo venga confuso con i rapporti di natura patrimoniale*' ('can help the system to use another tool of action, rather underestimated by public administrations, which allows to weave collaborative relations without being confused with relations of a economic nature'): F. Giglioni, 'Lezioni per il diritto amministrativo dalla riforma del Terzo settore', in A. Fici, L. Gallo and F. Giglioni eds, *I rapporti tra pubbliche amministrazioni ed enti del Terzo settore. Dopo la sentenza della Corte costituzionale n. 131 del 2020* (Napoli: Editoriale Scientifica, 2020), 94-95.

[50] The reference is to the traditional distinction (dating back to M.S. Giannini, *Diritto amministrativo* (Milano: Giuffrè, 1993), 356) among contracts *iure privatorum*, special contracts and public contracts. The former (e.g., sale or lease) are private law contracts in which the administration, undressing of authority, stands on the same level as private and is exposed to the private law rules. With regard to such contracts, however, it should be borne in mind that the discretionary assessment made by the administration to use the private means, which is considered more appropriate to achieve the aim, it is still functional to the pursuit of the public interest. Therefore, also in the aforementioned contracts it is possible to find the combination of elements of private negotiation acts and those of administrative acts (A. Federico, *Autonomia*, n 47 above, 110), for example, at the stage of preparatory acts (L.V. Moscarini, 'I contratti della Pubblica Amministrazione e la disciplina dell'art. 11 della l. 7.8.1990, n. 241', in G. Barbagallo, E. Follieri and G. Vettori eds, *Gli accordi fra privati e pubblica amministrazione e la disciplina generale del contratto* (Napoli: Edizioni Scientifiche Italiane, 1995), 67). The second type of contracts (including, in particular, public procurement: A. Carullo, 'Appalti pubblici' *Enciclopedia del diritto*, *Aggiornamento V* (Milano: Giuffrè, 2001), 79) is characterised by the simultaneous application of rules contained in the Civil Code and those deriving from special legislation that give the contract a distinctive public connotation that, by virtue of the administration's ability to unilaterally affect the relationship, may also emerge at the stage of its implementation (on this point, see L.V. Moscarini, ibid, 81). Finally, the most controversial type of public contracts (e.g., the concession-contract: M. D'Alberti, *Le concessioni amministrative* (Napoli: Jovene, 1981) and, more recently, G.P. Cirillo, 'I contratti della pubblica amministrazione', in N. Lipari and P. Rescigno eds, *Trattato di diritto civile* (Milano: Giuffrè, 2009), III, 165) is characterised by the coexistence of the administrative measure and contract, and as such is governed mainly by public law rules while to those of private law is reserved only an integrative function.

but it also makes the agreement an alternative to the administrative act,[51] considered for a long time as the only instrument of action of the public administration as well as of satisfaction of private interests.[52] As has been duly pointed out, the progressive strengthening of the subjective positions of individuals, even with common and non-patrimonial interests, that can be activated towards public subjects,[53] has favoured the spread and consolidation of new negotiating phenomena whose regulatory framework, however, cannot just stop at the notion of contract.[54] But it has also put in crisis the distinction between the legal positions whose sharp contrast in terms of subjective rights/legitimate interests now appears reductive and unacceptably purified of any teleological reference. The emergence of negotiating acts and subjective situations that express different and sometimes even new interests (think of the interest in the protection of commons) requires, in fact, the overcoming of protection techniques based on

[51] In this direction, A. Crosetti, *L'attività contrattuale della pubblica amministrazione. Aspetti evolutivi* (Torino: Giappichelli, 1984); G. Falcon, 'Convenzioni e accordi amministrativi (Profili generali)' *Enciclopedia giuridica* (Roma: Treccani, 1988), IX, 1; F. Trimarchi Banfi, 'L'accordo come forma dell'azione amministrativa' *Politica del diritto*, 237 (1993); F.G. Scoca, 'Autorità e consenso', in Aa.Vv., *Autorità e consenso nell'attività amministrativa* (Milano: Giuffrè, 2002), 21, 31; G. Greco, 'Il regime degli accordi pubblicistici', in Aa.Vv., *Autorità e consenso nell'attività amministrativa* (Milano: Giuffrè, 2002), 161; A. Fioritto, *Nuove forme e nuove discipline del partenariato pubblico privato* (Torino: Giappichelli, 2017), 55; F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 11.

[52] D. D'Alessandro, *Sussidiarietà, solidarietà e azione amministrativa* (Milano: Giuffrè, 2004), 146.

[53] With this perspective, A. Gambaro, 'Interessi diffusi, interessi collettivi e gli incerti confini tra diritto pubblico e diritto privato' *Rivista trimestrale di diritto e procedura civile*, 779, 789 (2019) notes the necessary disposal of the traditional '*funzione ordinante della dicotomia pubblico/privato*' ('ordering function of the public/private dichotomy') due to its inability to give a systematic place to collective interests and, more widely, to 'common interests' such as environmental interest, health interest, etc.

[54] Draws a clear line of distinction between public administrations' agreements and the notion of contract referred to in article 1321 of Civil Code in which the agreement, as it is known, is the first and essential element, F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 51.

structural and formal criteria[55] in order to offer through the balancing of values a protection careful to each interest pursued.

Therefore, it is within the scope of this approach that the agreement, unlike the contract, constitutes the 'other modality'[56] in which administrative activity is expressed, demonstrating how it can 'also preside over interest structures with a non-patrimonial or not necessarily patrimonial content, confirming a much wider sphere of administrative function that can be exercised by consent'.[57] Only as a result of such a fusion the distinction between public and private can be overcome, giving a different face to the administration that shares *with* private individuals the

[55] On this point is important the decision of Cassazione-Sezioni unite 22 luglio 1999 no 500, *Il Foro italiano*, 2487 (1999) on the compensation of damage resulting from the injury of legitimate interests. The Court stated that the formal characterisation of the injured party's legal position is not of decisive relief for the configuration of the non-contractual compensation, but the compensation must rather be established on the basis of the concrete interest damaged that is worthy of protection. For some reflections on the decision, see A. Falzea, 'Gli interessi legittimi e le situazioni giuridiche soggettive' *Rivista di diritto civile*, 679 (2000); C.M. Bianca, 'Danno ingiusto: a proposito del risarcimento da lesione di interessi' *Rivista di diritto civile*, 689 (2000); P. Perlingieri, 'Riflessioni sul danno risarcibile per lesione d'interessi legittimi' *Rivista giuridica del Molise e del Sannio*, 115 (2004).

[56] In this way F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 11. For a different opinion, drawn up on the basis of the need to legally classify agreements into the category of a contract governed by private law or an administrative measure or in both categories on the basis of the French figure of mixed act (Y. Madiot, *Aux frontières du contrat et de l'acte administratif unilatéral: recherches sur la notion d'acte mixte en droit public français* (Parigi: LGDJ Editions, 1971)), see R. Ferrara, *Gli accordi tra i privati e la pubblica amministrazione* (Milano: Giuffrè, 1985), 17, and Id, 'Intese, convenzioni e accordi amministrativi' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1993), VIII, 553.

[57] A. Rallo, 'Appunti in tema di rinegoziazione negli accordi sostitutivi di provvedimenti' *Diritto e processo amministrativo*, 298, 311 (1993).

sole purpose.[58] The diversity of its function[59] is then translated into a new way of acting. This new way of acting is dictated by the principles of impartiality, legality,

[58] In this perspective article 43 of the Constitution is significant. Facing with the need to achieve aims of solidarity and social utility in all those services with a character of general interest, it puts the public sphere next to the private one. As highlighted by A. Lucarelli, 'Art. 43', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: Utet, 2006), I, 884, the constitutional legislator was in fact aware of the inadequacy both of '*collettivismo "puro", nel quale i pubblici poteri o collettività dei produttori gestiscono tutte le attività di produzione, sia al sistema in cui il pubblico potere è soltanto il soggetto regolatore di attività di produzione riservate, in ossequio alla regola della concorrenza, interamente ad imprenditori privati*' ("'pure" collectivism, in which public authorities or collectives of producers manage all production activities, and the system in which public power only regulates those production activities entirely entrusted to entrepreneurs in accordance with the competition law'). The effectiveness of this provision has recently been confirmed by the phenomenon of decentralization of the energy market, which entrusts the production of energy, as an essential good of life, to its own 'community of users': on this point M. Giobbi, *Il consumatore energetico nel prisma del nuovo quadro regolatorio italo-eurounitario* (Napoli: Edizioni Scientifiche Italiane, 2021).

[59] The element of 'diversity' and 'novelty' of the administrative function has recently been grasped by the doctrine also with reference to the emerging phenomenon of urban regeneration based on a complex of integrated strategies and actions aimed at recovery and physical, environmental, economic and social regeneration of urban areas affected by degradation or abandonment. It aims in particular at the protection, care, management, reuse and enhancement of goods and the overall environmental structure of which they are an integral part with the aim of giving back to the community the value and identity of the territory, up to configure a real 'right to the city' (such expression was elaborated by H. Lefebvre, *Le droit à la ville* (Paris: éditions Anthropos, 1968). On the emergence of this right, see J.B. Auby, 'Per lo studio del diritto delle città', in G. Della Cananea and C. Franchini eds, *Il diritto che cambia* (Napoli: Editoriale Scientifica, 2015), 205, and F. Giglioni, 'I regolamenti comunali per la gestione dei beni comuni urbani come laboratorio per un nuovo diritto delle città' *Munus*, 271 (2016)). Based, therefore, on the logic of collaboration in view of a common purpose, this phenomenon seems to be undoubtedly characterized by the opening of the function of the government of the territory, traditionally entrusted to local authorities, to its care and management also by the local community. On this topic, E. Chiti, 'La rigenerazione di spazi e beni pubblici: una nuova funzione amministrativa?', in F. Di Lascio and F. Giglioni eds, *La rigenerazione di beni e spazi urbani* (Bologna: Il Mulino, 2017), 13, 31, who identifies the innovative character of the regeneration function within two aspects. On the one hand, within its purposes that combine the renewal of the function of common goods and private involvement in local community management. On the other one, within its implementing tools that significantly reduce the asymmetry between administration and private. See, also, F. Giglioni, 'La rigenerazione dei beni urbani di fonte comunale in particolare confronto con la funzione di gestione del territorio', in F. Di Lascio and F. Giglioni eds, *La rigenerazione di beni e spazi urbani* (Bologna: Il Mulino, 2017), 209; A. Bonomo, 'Rigenerazione urbana e nuove modalità partecipative: una riflessione', *Annali del Dipartimento Jonico*, 12 (2017); A. Giusti, *La rigenerazione*, n 43 above, 137; A. Sola, 'I privati nella gestione delle emergenze ambientali: i patti di collaborazione' *ambientediritto.it*, 2, 13-14 (2019).

and good performance and marked by the duties of subsidiarity,[60] solidarity and collaboration that has lastly found space in paragraph 2-*bis* of article 1 of legge 7 August 1990 no 241.[61] In light of these duties and without ever losing sight of the

[60] Since its introduction with the reform of Title V of the Constitution in the dual meaning, vertical and horizontal, the principle of subsidiarity has gradually entered into legal experience to the point of becoming the key principle on which to base that new vision of relations between institutions and society, between public and private, long desired in doctrine and recently accepted by constitutional jurisprudence (Corte costituzionale 15 Mach 2022 no 72; Corte costituzionale 26 June 2020 no 131) and administrative jurisprudence (Consiglio di Stato 9 March 2022 no 1693; Consiglio di Stato 4 June 2021 no 4287; Consiglio di Stato 5 September 2018 no 5225; Consiglio di Stato 6 October 2014 no 4981).

For some considerations on the impact of the principle of subsidiarity on the administrative function and the extension of its exercise to private, see M.P. Chiti, 'Principio di sussidiarietà, pubblica amministrazione e diritto amministrativo' *Diritto pubblico*, 505 (1995); A. D'Atena, 'Costituzione e principio di sussidiarietà' *Quaderni costituzionali*, 13 (2001); G.U. Rescigno, 'Principio', n 34 above, 5; A. Albanese, 'Il principio di sussidiarietà, n 34 above, 51; V. Cerulli Irelli, 'Sussidiarietà', n 34 above, 1; D. D'Alessandro, *Sussidiarietà*, n 52 above; G. Arena, 'Il principio di sussidiarietà orizzontale nell'art. 118 u.c. della Costituzione', in *Studi in onore di Giorgio Berti* (Napoli: Jovene, 2005), 179; L. Franzese, 'Autoregolamentazione e sussidiarietà: oltre le aporie del nuovo procedimento amministrativo e della visione antagonista del contratto' *Rivista di diritto civile*, 271 (2008); Id., *Percorsi della sussidiarietà* (Padova: Cedam, 2010), 91.

[61] The duty of collaboration, introduced by legge 11 September 2020 no 120 that converted with amendments decreto legislativo 16 July 2020 no 76 laying down urgent measures for digital simplification and innovation, provides that relations between citizen and public administration are based on the principles of cooperation and good faith. It is evident that with this novel the legislator intended to confer an autonomous value and dignity to the principle of collaboration that, over the years, had emerged only indirectly through all those provisions of the law on administrative procedure aimed at encouraging and ensuring the participation of citizens (the express affirmation of this principle can instead be found in article 10 of legge 27 July 2000 no 212 on the taxpayer's rights). In this perspective, comparable to duties of fairness and good faith the application of which has long been extended by case law to the conduct of the administration towards citizens (see Cassazione 11 January 2006 no 264, *Giustizia civile*, I, 518 (2006); Cassazione 21 November 2011 no 24438, *Giustizia civile - Massimario*, 1647 (2011); Consiglio di Stato 23 March 2011 no 3; Consiglio di Stato 6 March 2018 no 1457), also the duty of collaboration thus embodies the archetype of equal relations (on which F. Benvenuti, 'Per un diritto', n 36 above, 807; V. Antonelli, *Contatto e rapporto nell'agire amministrativo* (Padova; Cedam, 2007), 219. See, also, Consiglio di Stato 15 February 2016 no 624 and Consiglio di Stato 12 February 2016 no 621), finding a firm constitutional anchorage in the principle of solidarity.

On the interpretation of contracts between public authorities and private according to hermeneutical criteria of 'general common law', see F. Merusi, 'Il principio di buona fede nel diritto amministrativo', in *Scritti per Mario Nigro* (Milano: Giuffrè, 1991), II, 215; F. Manganaro, *Principio di buona fede e attività delle amministrazioni pubbliche* (Napoli: Edizioni Scientifiche Italiane, 1995), 113; D.

super person-value that is the compass of every legal activity, the axiologically oriented negotiating power of the administration manifests itself in collaborative relationships in the form of the agreement, aimed at identifying 'new guarantees, destined to assign the citizen a no longer servile role towards the authorities, but projected in a collaborative and participatory dimension'.[62]

The originality of the collaborative relationships must therefore be understood in the singular mix between the public interest and the private one. If, on one hand, it presupposes a constant dialogue and support to the private actors who take charge of the interests of the community, and therefore the sharing of skills and resources necessary for this purpose, on the other hand, such mix becomes decisive[63] from an interpretative point of view since it colours all the phases of the relationship and inevitably ends up directing, from time to time, the hermeneutic

Memmo, 'L'attività contrattuale della p.a. e i princípi di diritto comune nella riforma del procedimento amministrativo a seguito della l. n. 15 del 2005' *Contratto e impresa*, 1175 (2006); M. Pennasilico, 'Il ruolo della buona fede nell'interpretazione e nell'esecuzione dei contratti della pubblica amministrazione' *Rassegna di diritto civile*, 1052 (2007); Id, 'L'ermeneutica contrattuale tra pubblico e privato' *I Contratti*, 187 (2014); B. Mastropietro, 'L'attività contrattuale della P.A. tra buona fede e interesse pubblico' *Il Corriere giuridico*, 1498 (2012).

[62] L. Benvenuti, 'Dell'autorità', n 40 above, 225.

[63] In the functional perspective of the relationship between public and private, it is possible to explain the need to overcome the distinction between public and private contracts since '*uno stesso contratto, per certi versi si pensi alla selezione delle parti contraenti, deve avere garanzie di tipo pubblicistico, mentre per aspetti attinenti alla sua esecuzione, rientra nel diritto comune. L'analisi degli interessi in gioco, sotto tale profilo, è determinante*' ('the same contract, with regard to the selection of the contracting parties, must have guarantees of a public nature, while for aspects relating to its execution, it falls within the general common law. The analysis of interests, in this respect, becomes decisive'): P. Perlingieri, *Il diritto dei contratti fra persona e mercato. Problemi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 489, 495-496.

operation towards the application of the 'common law'[64] or, on the contrary, towards its departure.[65]

In light of this premise, the opportunity to preserve this originality appears shareable,[66] abandoning the pretension of establishing the juridical nature[67] of the

[64] In French doctrine, on the need to address the issue of relations between the administration and private from the perspective of the general law common to both spheres, without forgetting, however, the 'specialty' of the action of the first, H. Hoepffner, *Droit des contrats administratifs* (Paris: Dalloz, 3rd ed, 2022), 1. See, also, L. Richer, 'Les marchés publics à l'aune de la réforme du droit des contrats: aperçu général' *Contrats publics*, 20 (2016).

[65] M. Pennasilico, *Metodo e valori nell'interpretazione dei contratti. Per un'ermeneutica contrattuale rinnovata* (Napoli: Edizioni Giuridiche Italiane, 2011), 235, notes with this meaning that '*i princípi e le regole del diritto civile hanno acquisito ormai la fisionomia di una disciplina di "diritto comune", inteso quale patrimonio di esperienze svincolato dalla rigida dicotomia "diritto privato - diritto pubblico"*' ('the principles and rules of civil law have acquired the appearance of a "general common law", understood as a heritage of experience released from the rigid dichotomy "private law - public law""). At the same time, however, the Author points out in Id, 'L'ermeneutica', n 61 above, 188, that '*[…] la tendenziale parificazione tra le posizioni dei contraenti e, dunque, la soggezione della P.A. alle regole "sostanziali" ed "ermeneutiche" di diritto comune non significa certo completa svalutazione di ogni aspetto di differenza. Anzi, la presenza di un'amministrazione pubblica come controparte del contratto si risolve in un dato rilevante ai fini ermeneutici. Se l'interesse pubblico condiziona l'intera attività contrattuale della P.A., assumendo rilievo in tutte le sue fasi, non possono non verificarsi consistenti deviazioni dalla disciplina comune anche con riguardo al regime dell'interpretazione*' ('the tendency of equalization between the positions of contractors and, therefore, the subjection of the public administration to the "substantial" and "hermeneutic" rules of general common law does not mean of course a complete devaluation of differences. On the contrary, the presence of a public administration as counterparty to the contract results in relevant for hermeneutical purposes. If the public interest affects the entire contractual activity of the public administration, assuming prominence in all its phases, there can be significant deviations from the general regulatory framework also with regard to the interpretation').

[66] Otherwise, as noted by F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 17, the meaning of the alternativity of the forms would not be understood.

[67] In this regard, B. Manfredonia, *I contratti*, n 41 above, 60, remarks that '*valutare a priori, la natura giuridica e, di conseguenza, l'opportunità di applicare le norme di diritto pubblico o di diritto privato equivale a stravolgere l'unitarietà e la circolarità del procedimento ermeneutico di interpretazione e qualificazione dell'atto, che si chiarisce soltanto all'esito del procedimento*' ('an a priori assessment of the legal nature and, consequently, the appropriateness of applying public or private law means to disrupt the unity and circularity of the hermeneutical procedure of interpreting and classifying the act, which is clarified only at the end of the procedure'). On the contractual hermeneutics, see V. Rizzo, *Interpretazione dei contratti e relatività delle sue regole* (Napoli: Edizioni Scientifiche Italiane, 1985); M. Pennasilico, 'L'interpretazione dei contratti tra relativismo e assiologia' *Rassegna di diritto civile*, 725 (2005); Id, *Metodo e valori*, n 65 above; Id, *Contratto e interpretazione. Lineamenti di ermeneutica contrattuale* (Torino: Giappichelli, 2021); P. Perlingieri, 'L'interpretazione tra legge e contratto' *Le Corti salernitane*, 152 (2017); Id, *Il diritto civile*,

agreements thus outlined upstream, to concentrate, on the contrary, on the specific interests for whose realization they are responsible and, therefore, on their function which, on one hand, is deeply engraved by the constitutional design based on the values of personality, solidarity and social subsidiarity[68] and, on the other, requires a greater connection with European principles by the complexity and unity of the regulatory system.[69]

The need to investigate the theme from the functional perspective, starting from the interest that characterizes it, moreover, is highlighted by the crisis of the

II, 278 and IV, 92, n 6 above; M. Brutti, *Interpretare i contratti. La tradizione, le regole* (Torino: Giappichelli, 2017), 209; G. Messina, *L'interpretazione dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2022).

[68] Giorgio Pastori frequently uses in his contributions the adjective 'social' instead of 'horizontal'. The Author proposes the vision of social subsidiarity as a reflection of a 'social administration' that answers the question '*non del chi amministra, ma del come si amministra, del modo in cui si configurano le funzioni amministrative*' ('not who administrates, but how namely the way in which the administrative functions are configured'): G. Pastori, 'Amministrazione pubblica e sussidiarietà orizzontale', in *Studi in onore di Giorgio Berti* (Napoli: Jovene, 2005), II, 1752-1753, and Id, 'Le trasformazioni dell'amministrazione e il principio di sussidiarietà' *Quaderni regionali*, 59 (2002). In this sense, the adjective 'social' goes beyond the 'spatial' vision of subsidiarity, evoked by its traditional horizontal connotation and confined to act as a 'distributive criterion' between what is public and what is private, to conform from within '*ciò che è pubblico perché ordinato a finalità e compiti della comunità generale*' ('what is public because oriented to purposes and tasks of the general community'): in this way P. Duret, 'L'amministrazione della società e l'emersione del principio della sussidiarietà sociale' *Amministrare*, 219, 222 (2018) retracing the essential parts of Giorgio Pastori's intellectual heritage.

[69] Through this perspective should by grasped the thesis of the necessary coordination between European and national law, never applicable separately, since both are '*parti integranti di un unico sistema che acquista definitività nei momenti della loro unitaria applicazione, come l'insieme degli ordinamenti dei casi concreti che incessantemente si prospettano quali risultati dell'attività ermeneutica*' ('integral parts of the system that becomes definitive in the moments of their unified application, such as a set of orders of concrete cases that are unceasingly expected as results of hermeneutic activity'): P. Perlingieri, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 317, 339 (2010). For the unity, dynamism and complexity of the legal system, see P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 1992); Id, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188 (2005); Id, 'Il principio di legalità nel diritto civile' *Rassegna di diritto civile*, 164 (2010); Id, 'Una lezione agli studenti della "Federico II". Il "diritto privato" nell'unitarietà del sistema ordinamentale' *Rassegna di diritto civile*, 402 (2019); Id, *Il diritto civile*, II, n 6 above, 59.

distinction itself between public and private subjects. In fact, it is usually traced back to the public or private nature of the subject and therefore to its structure. However, in a society such as the current, characterized by the constant attitude of private individuals to take over the burden of general interests as well as that of the public to realise them by means of negotiation, the nature of subjects loses the centrality in the identification of the discipline in concrete applicable to the legal relationships that they establish. Both the structure and the function contribute to the qualification of a given act, but it is only the latter, 'as a synthesis of the essential and characteristic effects produced albeit in a deferred form, to qualify the case'.[70] Otherwise, then it should be (unacceptably) accepted the thesis of separateness and the private and public discipline applied separately. However, this would be wrong upstream because in both coexist and often intersect provisions inspired by both public and private interests.[71]

4. The increasing diffusion, in legislative and administrative practice, of negotiating forms as privileged instruments to regulate public-private interests[72] is

[70] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 112.

[71] P. Perlingieri, *Il diritto civile*, I, n 6 above, 139.

[72] M. Nigro, 'Conclusioni', in A. Masucci ed, *L'accordo nell'azione amministrativa* (Roma: Formez, 1988), 79, identified its reasons '*(nel)la concezione nuova della pluralità dei centri di potere, una pluralità effettiva, cioè paritaria, sia che riguardi i rapporti tra centri di potere pubblici sia che riguardi i rapporti tra centri pubblici e privati*' ('in the new conception of the plurality of centres of power, an effective plurality, that is equal, whether it concerns relations between centres of public power or whether it regards relationships between public and private centres'). Indeed, a paradigm shift in relations between administrators and administered has been achieved consisting '*nel capovolgimento della concezione del posto e della funzione che spetta ai cittadini nell'ambito di uno Stato che voglia essere ispirato non più a principi di mono-crazia, ma a principi di demo-crazia, i quali non possono ridursi al riconoscimento di posizioni giuridiche passive dei cittadini nei confronti dello Stato e dunque alla loro tutela*' ('in the reversal of the conception of the place and of the function that belongs to citizens within a State that wants to be inspired not more to principles of monocracy, but to principles of democracy which cannot be reduced to the recognition of passive

the result of a slow osmosis process that has significantly blurred the 'rigid' boundaries of the public-private law,[73] pairing over the years. This was too long anchored to the idea that between the two systems, administrative and private, there could be no interference.[74]

The dogma of the one-sidedness and unavailability of public power, necessary corollaries of the imperativeness of the administrative provision, has gradually been replaced by the awareness that the care of the public interest can be pursued

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legal positions of citizens towards the State'). Rather, in the context of functions, they must encourage the recognition of active positions namely the participation: F. Benvenuti, 'Il nuovo cittadino. Tra libertà garantita e libertà attiva', in Id, *Scritti giuridici* (Milano: Giuffrè, 2006), I, 884. Conforming, S. Cassese, *Il sistema amministrativo italiano* (Bologna: Il Mulino, 1983), 132; M.S. Giannini, 'L'amministrazione pubblica dello Stato contemporaneo', in *Trattato di diritto amministrativo* diretto da G. Santaniello (Padova: Cedam, 1988), 126 and Id, *Diritto amministrativo* (Milano: Giuffrè, 1988), 778.

[73] From a perspective careful to the unity of the legal system (on this topic see, broadly, P. Perlingieri, *Il diritto civile*, II, n 6 above), the increasing use of private models in the administrative sector made '*definitiva giustizia […] della pretesa contrapposizione pubblico-privato, non del tutto corretta dal punto di vista storico, e sicuramente e totalmente non corretta dal punto di vista dogmatico*' ('definitive justice [...] to the public-private opposition, not entirely correct from the historical point of view, and certainly and totally incorrect from the dogmatic point of view'): P. Stanzione and A. Saturno, 'Pubblica amministrazione tra diritto amministrativo, diritto privato e diritto europeo', in P. Stanzione and A. Saturno eds, *Il diritto privato della pubblica amministrazione* (Padova: Cedam, 2006), 4.

The decline of the distinction between the two categories in the Italian, French, German, English and European legal systems is evidenced by the several contributions collected in G.A. Bennacchio and M. Graziadei eds, *Il declino della distinzione tra diritto pubblico e diritto privato* (Trento: Quaderni della Facoltà di Giurisprudenza, 2016).

[74] This approach is due to the administrative doctrine hostile to the idea that administrative law could be permeated by principles of general common law, that is the result of the conception of an authoritarian State, in a position of supremacy with respect to the citizen, which exercises its power through administrative activity based on the imperative and unilateral nature of public power (S. Romano, *Principi di diritto amministrativo italiano* (Milano: Libraria, 3rd ed, 1912); Id, *Corso di diritto amministrativo* (Padova: Cedam, 3rd ed, 1937), 13, in which the Author acknowledges that private law contains several general principles which are common to various fields of law, including administrative law, but at the same time he nevertheless considers that the administrative law is fundamental and principal law for public administrations). As it is well known, however, this conception didn't find, and could not have found, acceptance in a legal system, such as the Italian one, marked by solidarity and personalism and, therefore, characterized not by a relationship of subordination of the citizen, but by the constitutionally guaranteed commitment of the State to realize the interest of the person. On this point, broadly, P. Perlingieri, 'L'incidenza', n 32 above, 55.

more effectively through an approach based on agreement, establishing a program 'together'[75] aimed at the best satisfaction of public interests, made possible by the simultaneous realization of private ones, and assuming a mutual commitment to it. In this context, conformed by national and international principles through art. 117 cost., the notion of public interest that encompasses that of private[76] has assumed a central role in the implementation of the values of democracy, solidarity and equality and, therefore, in the safeguarding and promotion of personality,[77] to

[75] Acknowledges the possibility that the public interest can also be satisfied through private's cooperation, G. Falcon, *Le convenzioni pubblicistiche* (Milano: Giuffrè, 1984), 250. The importance and effectiveness of 'collaborative' solutions emerged immediately in all those situations where the administration did not have the coercive power to impose on private acts and behaviours functional to the satisfaction of public interests (such as, for example, urbanization or economic initiatives in specific areas) and, therefore, where only an agreement of mutual commitment (such as that of the administration to grant building permits or to support the activity of the private with specific forms of financial subsidies) could have directed the private's action in that direction. As highlights E. Bruti Liberati, 'Accordi', n 46 above, 2-3, it is obvious that in such situations the agreement, '*con il quale sia la parte pubblica che quella privata si obbligano a porre in essere prestazioni alle quali non sarebbero per legge tenute, consente all'amministrazione di orientare l'attività dei privati assai più efficacemente rispetto a quanto sarebbe possibile ottenere con atti imperativi*' ('by which both the public and private parties undertake to provide services to which they would not be legally bound, allows the administration to direct the activities of private much more effectively than it would be possible by imperative acts').

[76] Far from being understood as a subjective and arbitrary, dogmatic and historical notion, the public interest, instead, necessarily derives from '*valutazioni normative individuate nell'àmbito della sistematicità non descrittiva e formale, ma contenutistica e funzionale degli istituti e dei princípi fondamentali*' ('regulatory evaluations identified in the context of the system that is not descriptive and formal, but content-related and functional to fundamental principles'), P. Perlingieri, 'L'incidenza', n 32 above, 56. In this perspective, the constitutional provisions that identify the function of the legal system in the protection of the 'person-value' (see P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 142), on the one hand impose '*la previsione di strutture rivolte alla configurazione delle situazioni necessarie per la promozione della personalità, giustificando cosí l'esistenza e la funzione dell'Amministrazione Pubblica*' ('the elaboration of structures aimed at the configuration of the situations necessary for the promotion of personality, thus justifying the existence and function of the public administration'): A. Federico, *Autonomia*, n 47 above, 34. On the other, to recognize that the mission of the administration derives from the rights of individuals, precisely identifying the public interest in their realization: U. Allegretti, *Amministrazione Pubblica e Costituzione* (Padova: Cedam, 1996), 11.

[77] Therefore, the public interest '*caratterizzato sempre piú da istanze personali e dall'attuazione di piú equi rapporti sociali fondata sul solidarismo e personalismo quali anime indefettibili del progetto del costituente repubblicano*' ('increasingly characterized by personal demands and the implementation of more equal social

the point of legitimizing the exercise of administrative power through agreements, eliminating any prejudice deriving from the idea 'of the unsuitability of the negotiating paradigm for the implementation of "public purposes"'.[78]

The progressive weakening of the principle of authority,[79] on one hand, and the intensification of the constitutional protection of the person[80] as an individual or part of social formation, on the other, have thus identified in procedural participation, and therefore in negotiation, the place designed for the formation of consent, as a 'natural field of mediation between bureaucracy and participation, between authority and freedom'.[81]

If therefore with the opening of the administrative procedure to private subjects, legitimized by legge 7 August 1990 no 241,[82] we see an effective transition

relations based on solidarity and personalism as indefectible souls of the project of the republican constituent'): P. Perlingieri, 'L'incidenza', n 32 above, 58.

[78] In this way A. Federico, *Autonomia*, n 47 above, 33.

[79] The decline of *autoritarisme* and the increasingly frequent *contractualisation* of administrative action, with a view to overcoming the consolidated division between administrative and private law, since the autonomy of the former can no longer be justified in light of the reforms which affected the latter, is also well highlighted by French doctrine: F. Lichère, *Droit des contrats publics* (Paris: Dalloz, 3rd ed, 2020), 3; J. Martin ed, *L'influence de la réforme du droit des obligations sur le droit des contrats administratifs* (Paris: LexisNexis, 2019), 3; H. Hoepffner, *Droit*, n 64 above, 11.

[80] From this point of view, it is inspiring the vision of P. Perlingieri, *La personalità umana*, n 76 above, 12-13, who had already noted 50 years ago the strong impact of personalism that put in crisis the distinction between private and public. In fact, the person intended as a value characterizes the legal system and ensures its unity so that the State (and therefore the legal system) becomes the means for its effective realization.

[81] In these terms, E. Sticchi Damiani, *Attività amministrativa consensuale e accordi di programma* (Milano: Giuffrè, 1992), 11, and, before, F.P. Pugliese, 'Il procedimento amministrativo tra autorità e contrattazione' *Rivista trimestrale di diritto pubblico*, 1469 (1971) and M. Nigro, 'Il procedimento amministrativo tra inerzia legislativa e trasformazioni dell'amministrazione', in F. Trimarchi ed, *Il procedimento amministrativo fra riforme legislative e trasformazioni della amministrazione* (Milano: Giuffrè, 1990), 161. The role of negotiating autonomy as the only instrument suitable for the definition of a balanced synthesis between private freedom and public administration authority is explored by A. Federico, *Autonomia*, n 47 above.

[82] With the reform of the administrative procedure and with the explicit affirmation of its possible culmination in agreement, it has been reached a valuable balance between public and private

from what has traditionally been defined as administration by measures to the new administration by agreements,[83] it is, however, only with the introduction of the principle of subsidiarity that the role of the private has finally been enhanced by expressly extending the operational scope of autonomy also to non-strictly private interests.[84]

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that found his barycentre within a commonality of interests between opposite parties, allowing to prevent any discussion on the contrast between persons and interests: in this way M. Bertolissi, 'I contratti pubblici. Discorso introduttivo intorno a un sistema che non è un ordinamento', in R. Villata, M. Bertolissi, V. Domenichelli and G. Scala eds, *I contratti pubblici di lavori, servizi e forniture* (Padova: Cedam, 2014), I, 21. The literature on this topic is very broad and, without the claim of exhaustiveness, it is worth to mention about private individuals' participation in the administrative activity and their agreements before legge 7 August 1990 no 241, M. Nigro, 'Il nodo della partecipazione' *Rivista di diritto processuale civile*, 225 (1980); S. Cassese, 'Burocrazia, democrazia e partecipazione' *Jus*, 81 (1985); R. Ferrara, *Gli accordi*, n 56 above, 43; G. Berti, 'Il principio contrattuale nell'attività amministrativa', in *Scritti in onore di M.S. Giannini* (Milano: Giuffrè, 1988), II, 49; A. Masucci ed, *L'accordo*, n 72 above. For further contributions, E. Sticchi Damiani, *Attività*, n 81 above, 33; G. Vettori, 'Accordi "amministrativi"', n 46 above, 525; A. D'Amico, 'L'accordo contrattuale sostitutivo del provvedimento amministrativo tra pubblica amministrazione e privato' *Rassegna di diritto civile*, 23 (1993); G. Barbagallo, E. Follieri and G. Vettori eds, *Gli accordi fra privati*, n 50 above; A. Federico, *Autonomia*, n 47 above, 114; E. Bruti Liberati, 'Accordi', n 46 above, 1; G. Manfredi, *Accordi e azione amministrativa* (Torino: Giappichelli, 2001); F. Parente, *I moduli consensuali di pianificazione del territorio e la tutela degli interessi differenziati* (Napoli: Edizioni Scientifiche Italiane, 2006), 31; P. Stanzione and A. Saturno eds, *Il diritto privato*, n 73 above, 1; R. Morea, *Gli accordi amministrativi tra "norme di diritto privato" e princípi italo-comunitari* (Napoli: Edizioni Scientifiche Italiane, 2008), 39; P. D'Angiolillo, *Accordi amministrativi e programmazione negoziata nella prospettiva del potere discrezionale* (Napoli: Edizioni Scientifiche Italiane, 2009), 33; V. Ricciuto and A. Nervi, 'Il contratto della pubblica amministrazione', in *Trattato di diritto civile del Consiglio Nazionale di Notariato* diretto da P. Perlingieri (Napoli: Edizioni Scientifiche Italiane, 2009), 59; F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 3; B. Manfredonia, *I contratti*, n 41 above, 13.

[83] B. Sordi, 'Pubblica amministrazione, negozio, contratto: universi e categorie ottocentesche a confronto' *Diritto amministrativo*, 483 (1995), notes that notes that the administration and contract have long been considered as two distant planets which, however, on a closer inspection have never been so impermeable as the legal tradition made us believe. For in-depth reconstruction of administrative activity by agreements, see A. Federico, *Autonomia*, n 47 above.

[84] On this point P. Perlingieri, 'La sussidiarietà', n 34 above, 689, notes that actually the article 118 of the Constitution does not introduce something new but makes explicit recognition of the negotiating autonomy and extends its scope also to interests that are not private.

As it is known, in fact, its constitutionalisation, especially in the horizontal dimension,[85] has affected first of all the structure of the competencies and the functions of public administration.[86] As a guiding principle in the relational dynamics between different entities,[87] aimed at regulating the distribution of tasks between individuals on one hand and public authorities on the other, it has immediately operated as a criterion based on which a certain action is conferred with priority to a lower level subject, except for the exceptional and residual

[85] The introduction of the principle of subsidiarity in its horizontal meaning met considerable resistance to the idea of opening to citizens the exercise of activities of general interest, defined as 'cultural regression' embodied in the 'normative translation of liberal individualism' in favour of 'market absolutism': G. Ferrara, 'La revisione costituzionale come sfigurazione: sussidiarietà, rappresentanza, legalità e forma di governo nel progetto della Commissione bicamerale' *Politica del diritto*, 100 (1998). On the contrary, however, it has been opportunely highlighted that actually the intervention based on subsidiary action 'exorcises both the dangers of collectivism and those of individualism': L. Franzese, *Ordine*, n 34 above, 89. For a reconstruction of the events that accompanied the constitutionalisation of subsidiarity, see G. Razzano, 'Il principio di sussidiarietà nel progetto di riforma della Costituzione della Commissione bicamerale' *Diritto e società*, 523 (1997).

[86] Three different directions in which the principle of subsidiarity operates are highlighted by V. Cerulli Irelli, 'Sussidiarietà', n 34 above, 1: as a guiding principle for the distribution of administrative functions between levels of territorial government and their entities, that must be based on principles of differentiation and adequacy; as a guiding principle that directs public authorities' activity to the promotion of the implementation of general interest activities by private; and finally, as principle that, together with the duty of loyal cooperation, must be followed in the exercise of substitute powers by the Government in respect of local and regional authorities and respected by legislator when regulating those powers. Moreover, the Author notes that, although such principle is not expressly mentioned in the constitutional provisions on the legislative and regulatory power referred to in article 117, it affects, indeed, not only the distribution or the exercise of the administrative function, but also the exercise of the legislative function, by virtue of the close connection between the two functions.

[87] According to the 'relational' perspective of A. D'Atena, 'Il principio', n 34 above, 609 and Id, *Costituzione*, n 60 above, 17, the principle of subsidiarity '*ha ad oggetto i rapporti tra entità diverse: tra i diversi livelli territoriali di Governo (Stato, regioni, province, comuni), tra gli enti territoriali e gli enti funzionali (come – ad esempio – le Università degli studi), tra la statualità (complessivamente considerata) e la società civile […]*' ('relates to the relationships between various entities: between different territorial levels of Government (State, regions, provinces, municipalities), between local authorities and functional entities (as - for example - Universities), between State (as a whole) and civil society [...]'). Such relationships are constructed on the basis of the 'decision of preference' criterion that legitimizes the action of the less close part only if the nearest one is inadequate.

intervention of the higher level subject, if the expected result could not be usefully achieved.[88] This 'ascending' vision of subsidiarity, which is credited with having marked the transition from the exercise of public powers in the forms of the welfare state to that of the welfare society,[89] soon assumed the role of a regulatory

[88] Conceived, therefore, as a 'procedural' criterion that does not indicate the competent actor for a specific action, but rather provides instructions on the type of reasoning to be followed for its identification, the principle of subsidiarity '*riguarda la distribuzione tra privati da un lato e pubblici poteri dall'altro dei compiti di erogazione di servizi e benefici, dovendosi stabilire se essi spettano agli uni o agli altri secondo il principio di sussidiarietà (principio che in tal caso, se ritenuto applicabile, dà la preferenza ai privati, salvo che si dimostri che nessun privato è disponibile o riesce a raggiungere i risultati ritenuti ottimali o comunque migliori di quelli raggiunti o raggiungibili dai poteri pubblici*' ('concerns the distribution between private and public authorities of the tasks of providing services and benefits, having to determine whether they belong to one or the other according to the principle of subsidiarity (the principle that in this case, if deemed applicable, gives preference to private, unless it is demonstrated that no private is available or is able to achieve optimal results or otherwise better than those achieved by the public authorities'): G.U. Rescigno, 'Principio', n 34 above, 14, 19. With same perspective, A. Albanese, 'Il principio di sussidiarietà', n 34 above, 66 who, following the reconstruction of subsidiarity as a principle that orders the relations between the individual, society and the State, identifies it as a regulatory tool of sectors that are common to the action of public authorities and society and that, therefore, functions according to a gradual upward pattern, ranging from the individual to social organizations and to the public power. But see, also, T.E. Frosini, 'Sussidiarietà', n 34 above, 1138, who identifies subsidiarity as '*l'intervento compensativo e ausiliario degli organismi sociali più grandi come lo Stato a favore dei singoli e dei gruppi intermedi, ovvero nel non intervento dello Stato laddove i singoli e gruppi intermedi riescono, autonomamente, a raggiungere le finalità preposte*' ('a compensatory and ancillary action of the bigger social entities such as the State for the benefit of individuals and groups, namely as non-action of the State where the individual and groups manage to achieve the purposes independently'). Conforming, A. Rinella, 'Il principio di sussidiarietà: definizioni, comparazioni e modello d'analisi', in A. Rinella, L. Coen and R. Scarciglia eds, 'Sussidiarietà', n 34 above, 3.

For an alternative vision of subsidiarity as a substantive principle, among others, P. Ridola, 'Il principio di sussidiarietà e la forma di Stato di democrazia pluralista', in A.A. Cervati, S. Panunzio and P. Ridola eds, *Studi sulla riforma costituzionale* (Torino: Giappichelli, 2001), 198; A. Poggi, 'Il principio di sussidiarietà e il "ripensamento" dell'amministrazione pubblica. (Spunti di riflessione sul principio di sussidiarietà nel contesto delle riforme amministrative e costituzionali)', in *Scritti in onore di Fausto Cuocolo* (Milano: Giuffrè, 2005), 1103.

[89] A. Ferrara, 'Il principio di sussidiarietà come criterio guida della riforma del regionalismo e del Welfare State', in *Regionalismo, federalismo, Welfare State (Atti del convegno, Roma 9-10 maggio 1996)* (Milano: Giuffrè, 1997), 92-93; L. Antonini, 'Il principio di sussidiarietà orizzontale: da welfare State a welfare society' *Rivista di diritto finanziario e della scienza della finanza*, 99 (2000); G.U. Rescigno, 'Stato sociale e principio di sussidiarietà' *Quaderni regionali*, 381 (2002). See Stefano Zamagni's idea of welfare society based on the essential systematic interaction between three points of the triangle which are political institutions, business community, and organised civil society on the premise that

criterion of the areas of intervention common to administration and society, shaping the action of the former towards the latter negatively or positively.[90]

In other words, the relationship between the public and private spheres has assumed an unprecedented physiognomy: conceived based on the dynamic and promotional vocation of subsidiarity[91] which, on one hand, imposes on the administration the 'duty' to favour[92] civic initiatives aimed at the satisfaction of collective needs, on the other hand, it implicitly requires that this duty be fulfilled by preserving as much as possible the energies, individual or collective, autonomously employed to achieve the set goals.[93]

Therefore, if it is true that in this context subsidiarity serves as an organizing principle of social dynamics,[94] identifying the State as the ultimate guarantor of the general interest,[95] it is equally true that its extent can no longer continue to be

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not only public sphere, but the whole society must take care of the welfare since 'the bearers of needs are also bearers of knowledge and resources': S. Zamagni, *Impresa responsabile e mercato civile* (Bologna: Il Mulino, 2013), 145-146.

[90] According to the authoritative perspective of A. Albanese, 'Il principio di sussidiarietà', n 34 above, 66, the horizontal subsidiarity is divided into two connected parts. The negative part that prevents the public action where the forces of individuals and society are able to satisfy their needs independently. The positive one, that provides public authorities with a duty to act where individuals and social forces are unable to satisfy their own needs. In this perspective, while the negative part of the principle acts as a criterion to define public competences, the positive one, instead, identifies the public action as a support to individuals, defining its way of exercising.

[91] Among different profiles within which the essential core of subsidiarity is articulated, the promotional function intended in terms of removing obstacles to the free activity of citizens and, therefore, its protection and promotion is clearly highlighted by T.E. Frosini, 'Sussidiarietà', n 34 above, 1140-1141. Instead, the dynamic profile of subsidiarity identified precisely in its promotional function of the free private initiative is grasped by F. Pizzolato and C. Buzzacchi, 'Doveri costituzionali' *Digesto delle discipline pubblicistiche* (Torino: Utet, 2008), 319.

[92] See, on this point, G.U. Rescigno, 'Principio', n 34 above, 29-30.

[93] See Consiglio di Stato 1 July 2002 no 1354.

[94] According to the opinion of A. Albanese, 'Il principio di sussidiarietà', n 34 above, 70-71, who proposes the principle of subsidiarity as a 'conciliatory and harmonising vision of social dynamics'.

[95] In this way T.E. Frosini, 'Sussidiarietà', n 34 above, 1139. The Author highlights that while providing for a redefinition and rationalization of roles within relations between State and citizens, the principle of subsidiarity captures a specific idea of the State in which it takes on the role of '*garante*

finished in the duty of abstention or in that of intervention if private action is insufficient.[96]

The essence of the principle of horizontal subsidiarity must instead be sought in a collaboration that can be activated upstream between public and private subjects. Shifting the attention from the 'terminal' phase of private intervention to the initial one,[97] aimed at preliminary and jointly investigating social needs, the interventions necessary to satisfy them, as well as the resources available for this purpose, does not only mean acknowledging the concrete application experiences of subsidiarity, born in some cases even in the absence of the specific *interpositio*

finale dell'interesse generale, dal momento che il suo compito consiste nell'intervenire direttamente per soddisfare un bisogno reale della società, solo quando le collettività e i gruppi sociali, ai quali per primi spetta il compito di intervenire, non sono in grado di farlo' ('the final guarantor of the general interest, since its task is to act directly to satisfy needs of society, only when communities which should act first are not able to do so').

[96] As highlighted by G. Arena, 'La sussidiarietà come libertà solidale e responsabile', in D. Ciaffi and F.M. Giordano eds, *Storia*, n 34 above, 96, it is a vision of subsidiarity that, although resize the public role in achieving social utility purposes, remains connected to the old bipolar scheme and does not even try to grasp the extraordinary potential of changing. On the antagonistic and bipolar perspective of the relationship between citizens and administration, S. Cassese, 'L'arena pubblica. Nuovi paradigmi per lo Stato' *Rivista trimestrale di diritto pubblico*, 601 (2001).

[97] V. Tondi della Mura, 'Della sussidiarietà orizzontale (occasionalmente) ritrovata: dalle linee guida dell'Anac al Codice del Terzo settore' *Rivista AIC*, 6-7, 21 (2018), explores the impact of the subsidiarity principle on the organisation of the social State and highlights that it represents a rethinking of the administration and of the organizational structure of the powers such as to redesign the conception of the activity of general interest too. In fact, the point is not only the way the activity is carried out and completed, but even more, the way it is initially identified: '*oltre a risaltare la fase terminale dell'attività privata, per come sviluppata in relazione all'obiettivo perseguito, merita ancor più la fase iniziale del relativo percorso, da programmare in relazione a tutti gli ulteriori elementi di giudizio indispensabili per una piena soddisfazione della pretesa sociale*' ('in addition to highlighting the final phase of private activity, as developed in relation to the purpose, deserves a particular attention even more the initial phase, to be planned in relation to all the other elements of assessment necessary for a full satisfaction of social needs').

legislatoris.[98] Above all, it also means to give an evolutionary reading[99] which, from the point of view of the principle of subsidiarity, demonstrates how an *ex ante* collaboration itself becomes an instrument of *favor* towards the subsequent realization of the general interest by civil society.

In the perspective proposed here, therefore, it is not about substituting private action for the public service nor 'exploiting' its potential to fill the deficiencies of the latter but encouraging the creation of 'transversal' alliances between public and

[98] In this sense, the model of collaborative pacts is emblematic. It emerged for the first time in the Municipal Regulation of Bologna on the collaboration between citizens and administration for the care of common urban assets as a main tool for the implementation of the so-called shared administration based on equal organizational models and a regulatory structure that seems to come from concrete experience (*ex facto oritur jus*). Since 2014, this new tool for collaboration between citizens and local entities has been used by over two hundred Italian Municipalities that have decided to adopt Regulations for the shared administration of common assets on the basis of the model developed by *Labsus* (Subsidiarity Laboratory) available in www.labsus.org. On this topic, see P. Michiara, 'I patti di collaborazione e il regolamento per la cura e la rigenerazione dei beni comuni urbani. L'esperienza del Comune di Bologna' *aedon.mulino.it*, 1 (2016); G. Arena, 'Amministrazione e società', n 42 above, 43; M.F. Ferroni, 'Le forme di collaborazione per la rigenerazione di beni e spazi urbani' *Nomos*, 1 (2017); M. Bombardelli, 'La cura dei beni comuni: esperienze e prospettive' *Giornale di diritto amministrativo*, 559 (2018); M.F. Errico, 'Modelli di gestione dei beni comuni: i patti di collaborazione' *Il Foro amministrativo*, 2197 (2019); I. Carlotto, 'I regolamenti comunali per la cura condivisa dei beni comuni', in T. Dalla Massara and M. Beghini eds, *La città come bene comune* (Napoli: Edizioni Scientifiche Italiane, 2019), 15.

For some considerations on types of governance models that are richer and more articulate than the collaborative pact, able to include the idea of 'participation' in the political choice of priorities to better address the ecological needs and all long-term needs of communities, see U. Mattei, 'Una nuova stagione nel governo dei beni comuni. Una bozza di lavoro oltre i patti di condivisione' *Rassegna di diritto pubblico europeo*, 87 (2017).

[99] In the field of evolutionary interpretation are fundamental writings of Emilio Betti including, in particular, E. Betti, *Interpretazione della legge e degli atti giuridici. Teoria generale e dogmatica* (Milano: Giuffrè, 1971) where on the page 126 the Author highlights that the legal system '*non è nè qualcosa di bell'e fatto [...] nè un organismo che si sviluppi da sé per mera legge naturale: è qualcosa che non è, ma si fa, in accordo con l'ambiente sociale storicamente condizionato, proprio per l'opera assidua d'interpretazione*' ('it is neither something already done [...] nor an organism that develops by itself by mere natural law: it is something that is not, but should be done, in accordance with the historically conditioned social environment, by the process of interpretation').

private forces[100] that, aware of the complexity and interconnection of social needs, operate by converging in their objectives but still each one preserving its autonomy.

5. The idea of subsidiarity built around the cooperation and integration between public actions and private actions, from a mutual valorisation and support perspective, rather than their 'alternation',[101] finds full confirmation in the prism of the legal instruments found in our system. These are aimed at recovering the social, economic, environmental and cultural value of the communities,[102]

[100] An extensive reading of the principle of subsidiarity, that explores its "'generative" potential', is proposed by G. Farrell, 'La sussidiarietà orizzontale, un principio per la trasformazione sociale?', in D. Ciaffi and F.M. Giordano eds, *Storia*, n 34 above, 51. The idea behind the Author's vision is that of '*considerare il concetto di sussidiarietà orizzontale non come un punto di arrivo per conformare comportamenti e responsabilità del cittadino all'interesse pubblico, ma come il punto di partenza per avviare un processo di apprendimento collettivo […] declinando cioè le responsabilità nella complessità delle interdipendenze verticali e orizzontali e considerando la reversibilità dei diritti come obiettivo dell'inter-riconoscimento e dell'interazione*' ('considering the concept of horizontal subsidiarity not as a point of arrival to align citizens' behaviours and responsibilities with the public interest, but as the starting point for launching a collective learning process [...] by declining responsibilities in the complexity of vertical and horizontal interdependencies and considering the reversibility of rights as the goal of inter-recognition and interaction').

[101] This idea reflects the 'circular' vision of subsidiarity of the economist Stefano Zamagni according to which, unlike the two traditional forms of subsidiarity in which a part of sovereignty is transferred from the State to territorial entities (vertical subsidiarity) or to civil society organisations (horizontal subsidiarity), with the circular subsidiarity, instead, takes place a 'sharing of sovereignty'. According to the Author, this concept of subsidiarity is the essential basis for the construction of the model of civil welfare that postulates the systematic interaction between the three spheres of which every society is composed (public bodies, companies and organised civil society) both at the time of planning of the collective utility actions to be carried out and at the time of their subsequent management. S. Zamagni, 'L'evoluzione dell'idea di welfare: verso il welfare civile' *aiccon.it*, 10-11 (2015).

[102] Significant in this regard is, for example, the addition of paragraph 4 to article 1135 of Civil Code within the reform of the condominium implemented by legge 11 December 2012 no 220 amending the regulation of the condominium. The new provision allows the Assembly to authorise the administrator to participate in collaborative projects promoted by local institutions or qualified private entities, that include the recovery of common parts of building or its demolition and reconstruction, in order to promote the recovery of the existing buildings, urban safety and

goods and resources that form an integral part of them. These are values that, in the light of the constitutional duty of solidarity,[103] are today placed as a conforming parameter of every human activity, public or private,[104] to the point of redrawing the boundaries of negotiating autonomy from the inside.[105]

environmental sustainability of the area in which the building is located. Well, it represents an important attempt by the legislator to promote, following the logic of horizontal subsidiarity, the creation of collaborative-based relationships that finds in terms 'participation' and 'collaboration' with 'local institutions' and 'qualified private subjects' its confirmation.

[103] In this sense, it is possible to capture the 'prescriptive' value of solidarity that, precisely because permeates the entire constitutional text, 'indicates a legally imposed order' according to which 'social cohabitation must be legally built on the basis of the principle of solidarity' and from it 'must take shape': L. Carlassare, 'Solidarietà: un progetto politico' *costituzionalismo.it*, 46 (2016). More broadly on the principle of solidarity see, among others, A. Barbera, 'Principi fondamentali *sub* art. 2', in G. Branca ed, *Commentario della Costituzione* (Bologna: Zanichelli, 1975), 97; G. Alpa, 'Solidarietà' *Nuova giurisprudenza civile commentata*, 365 (1994); N. Lipari, '"Spirito di liberalità" e "spirito di solidarietà"' *Rivista trimestrale di diritto e procedura civile*, 1 (1997); E. Rossi, 'Art. 2', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: Utet, 2006), 56; E. Rossi and A. Bonomi, 'La fraternità fra "obbligo" e "libertà". Alcune riflessioni sul principio di solidarietà nell'ordinamento costituzionale', in A. Marzanti and A. Mattioni eds, *La fraternità come principio del diritto pubblico* (Roma: Città Nuova, 2007), 60; F. Pizzolato and C. Buzzacchi, 'Doveri', n 91 above, 319; R. Cippitani, *La solidarietà giuridica tra pubblico e privato* (Perugia: ISEG, 2010).

[104] P. Perlingieri, 'Persona, ambiente e sviluppo', in M. Pennasilico ed, *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2016), 324, notes that not only contracts should be subjected to the assessment of their compliance with principles and values of the legal system, but any legal act or initiative. In fact, the constitutional principles, and in particular that of social solidarity referred to in article 2 of the Constitution, require to consider all acts of the private autonomy no longer as a value in itself but as an instrument for the pursuit of interests in compliance with fundamental values underlying the legal system (Cassazione, Ufficio del Massimario e del Ruolo, 'Buona fede come fonte di integrazione dello statuto negoziale: il ruolo del giudice nel governo del contratto' *cortedicassazione.it*, 19).

[105] In this way M. Pennasilico, 'Contratto ecologico e conformazione dell'autonomia negoziale' *Giustizia civile*, 810 (2017), with particular reference to the conformative power of environmental interest and its impact on traditional categories of civil law. According to the authoritative perspective of the Author, the environmental interest enters the cause of the contract, underlining the responsibility of parties towards future generations and the power of values, such as environmental one, to conform from within every exercise of the negotiating autonomy. For more see, also, Id, *Manuale di diritto civile dell'ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 11; Id, 'Sviluppo sostenibile e "contratto ecologico": un altro modo di soddisfare i bisogni', in Id ed, *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2016), 287. Instead, on the peculiar conformation of the proprietary situations concerning cultural goods, widely, F. Longobucco, 'Beni culturali e conformazione dei rapporti tra privati: quando la

The importance of such a reflection is reinforced by the recent reform of article 9 of the Constitution which, together with the landscape and historical-artistic heritage, elevates environmental protection to a fundamental principle.[106] As constitutionally protected values, the preservation and conformation of relationships to cultural and environmental interest thus become the expression of a 'new relationship'[107] with individuals, institutions and the entire community, which therefore seems to transcend the strictly individual dimension, endorsing on the contrary, in an intergenerational perspective, the collective one in all its participatory forms.[108]

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proprietà "obbliga"', in E. Battelli, B. Cortese, A. Gemma and A. Massaro eds, *Patrimonio culturale. Profili giuridici e tecniche di tutela* (Roma: Roma Tre-Press, 2017), 211, who highlights, through a systematic reading of the notion of cultural heritage, that the latter is no longer characterised only by rights to enjoy and dispose, but also by duties towards third parties by virtue of the higher collective interests which strongly impact on and shape the subjective legal position of the owner of cultural property.

[106] On the significant breakthrough with regard to the protection of the environment, also in the interest of future generations, made by the reform of articles 9 and 41 of Constitution through legge costituzionale 11 February 2022 no 1, see Y. Guerra and R. Mazza, 'La proposta di modifica degli articoli 9 e 41 Cost.: una prima lettura' *Forum di Quaderni costituzionali*, 109 (2021); M. Cecchetti, 'La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune' *Forum di Quaderni costituzionali*, 285 (2021); G. Santini, 'Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.' *Forum di Quaderni costituzionali*, 460 (2021); D. Porena, 'Sull'opportunità di un'espressa costituzionalizzazione dell'Ambiente e dei principi che ne guidano la protezione. Osservazioni intorno alle proposte di modifica dell'articolo 9 della Carta presentate nel corso della XVIII legislatura' *federalismi.it*, 312 (2020); Id, '"Anche nell'interesse delle generazioni future". Il problema dei rapporti intergenerazionali all'indomani della revisione dell'art. 9 della Costituzione' *federalismi.it*, 122 (2022).

[107] On this topic, the judgement of Corte costituzionale 16 July 2019 no 179 available in cortecostituzionale.it is very important. With particular regard to the soil, and more widely to the environmental interest, even before the reform of articles 9 and 41 of the Constitution it notes the ongoing evolutionary process 'aimed at recognizing a new relationship between the territorial community and the environment that surrounds it'. The Court highlights that this process is the result of the acquired awareness of the essential nature of non-renewable natural resources for the purposes of environmental balance, capable of 'expressing a social function and incorporating plurality of collective interests and utilities, also the intergenerational ones'.

[108] The relationship between autonomy and subsidiarity is grasped by C. Mazzù, *La logica inclusiva dell'interesse legittimo nel rapporto tra autonomia e sussidiarietà* (Torino: Giappichelli, 2014): in the twilight

In this perspective, a close connection emerges between the principles in question and the duties of solidarity and subsidiarity,[109] with two important implications for public-private relationships, in general, and in respect of their effects on third parties, in particular.

In the first place, coherently with the constitutional design aimed at promoting the full realization of the human personality, also in respect of the rights of future generations,[110] emerges the duty to cultivate the interests of the community which,

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of exclusive logics, they are closely linked and mediated by participation that, in the context of public-private relations, is manifested through several forms. For civil law aspects of the impact of the subsidiarity principle on negotiating autonomy, broadly, D. De Felice, *Principio di sussidiarietà*, n 34 above, 58.

[109] In this perspective, the systematic and axiological approach of P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il brocardo *in claris non fit interpretatio*, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985), remains fundamental. According to the Master's teaching, in fact, the individual provisions should never be interpreted and applied separately. Rather, they should be placed and read within the system of which they are an integral part, in the awareness that the combined reading, namely the coordination of the provisions, constitutes a 'constant of the interpretative process' (see Id, *Il diritto civile*, II, n 6 above, 333, 348). For the systematic nature of the interpretation see, among the first, N. Bobbio, *Teoria dell'ordinamento giuridico* (Torino: Giappichelli, 1960), 76 and Id, *Teoria generale del diritto* (Torino: Giappichelli, 1993), 205, where the Author identifies in the 'spirit of the system' the main source of inspiration for the interpretative activity; G. Lazzaro, *L'interpretazione sistematica della legge* (Torino: Giappichelli, 1965), 127; E. Betti, *Interpretazione*, n 99 above, 270.

[110] Following the reform of article 9 of Constitution, the inclusion of the 'interests of future generations' opened the doctrinal debate about the effective content of this concept as well as the configurability of subjective rights for 'potential' subjects, not yet come to existence. See, on this argument, considerations of R. Bifulco, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale* (Milano: FrancoAngeli, 2008), and A. D'Aloia, 'Generazioni future (diritto costituzionale)' *Enciclopedia del diritto* (Milano: Giuffrè, 2016), Annali IX, 365, 370, which, in an attempt to strengthen the eligibility of the rights of future generations, offers an evolutionary interpretation of article 1 of Civil Code. According to the Author, this provision '*deve oggi ritrovare il suo posto e ridefinire i suoi confini alla luce di un disegno costituzionale nel quale la primarietà dei diritti inviolabili dell'uomo, e della loro protezione, le ragioni dell'uguaglianza e della solidarietà, sono dentro una prospettiva che incorpora (o almeno non sembra indifferente a) una dimensione intertemporale, che spinge ad integrare diritti e doveri (verso gli altri, i lontani nello spazio e nel tempo), che contiene gli elementi di una responsabilità anche "future-oriented", prospettica, che tutela e riporta ai suoi principi normativi fondamentali molti beni o elementi appartenenti all'istanza intergenerazionale*' ('must find its place and redefine its boundaries in light of the constitutional design in which the primacy of the inviolable rights of man, and their protection, the reasons for equality and solidarity, lay within a perspective that incorporates (or at least does not

on closer inspection, does not weigh separately on public or private subjects, but it is configured as a shared responsibility[111] in which everyone is required to participate,[112] and which finds its axiological fulcrum in the reciprocal influence

seem indifferent to) an intertemporal dimension, which pushes to integrate rights and duties (towards others, distant in space and time), which also contains elements of "future-oriented" responsibility, which protects and brings back to its fundamental regulatory principles many assets or elements belonging to the intergenerational instance'). See, also, D. Porena, "'Anche nell'interesse'", n 106 above, 136, who interprets 'rights of future generations' in terms of 'responsibility of each generation' to ensure that the next generation has equal chances in life, not inferior to those enjoyed by the previous generation.

For the opinion contrary to the configurability of rights of future generations and the preference to follow the literal text of the Constitution that mentions 'interests', see Y. Guerra and R. Mazza, 'La proposta', n 106 above, 126. Both Authors argue that the approximation of rights to the notion of future generations appears almost a 'legal oxymoron' in light of the 'future' character of generations that contrasts with 'presentism', characterizing the concept of subjective right that 'presupposes a current owner who can act to obtain its protection when injured'.

[111] In the intergenerational perspective, the role of solidarity 'as a motivation for responsibility (and the duty of consideration and respect) towards those who do not yet exist' is highlighted by A. D'Aloia, 'Generazioni future', n 110 above, 357. The Author notes, in particular, that 'the value of solidarity – which the Constitutional Court, in a well-known judgement, has defined as "the basis of social cohabitation configured by the Constituent Assembly" – is in antithesis both to individualism and to presentism, both unconcerned with the vision and meanings of constitutional personalism'. In this regard the opinion of S. Rodotà, *Solidarietà. Un'utopia necessaria* (Roma-Bari: Laterza, 2014), 3, is equally emblematic. According to the Author, the solidarity, even if considered in the present, is actually not unmindful of the past and imposes to look at the future.

[112] In this context, it is also crucial the role of non-profit organisations as spontaneous forms of organised solidarity for the care of the general interest. As indeed pointed out by P. Donati, 'Sussidiarietà, società italiana, beni comuni: perché e come dobbiamo rifondare lo Stato sociale', in D. Ciaffi and F.M. Giordano eds, *Storia*, n 34 above, 77, '*il bene comune diventa una responsabilità non solo delle singole persone e dello Stato, ma anche – in maniera del tutto nuova – delle formazioni sociali intermedie che occupano un ruolo fondamentale nel mediare i processi di creazione del bene comune: processi che non sono più soltanto bottom-up (realizzazione del bene comune attraverso movimenti di società civile che salgono dal basso verso l'alto) o soltanto processi top-down (la creazione di bene comune dall'altro dello Stato verso il basso), ma anche e soprattutto processi orizzontali e laterali fra organizzazioni civili che non dipendono dallo Stato*' ('the common good becomes a responsibility not only of individuals and the State, but also – in a completely new way – of intermediate social organisations that play a fundamental role in mediating the processes of creation of the common good: processes that are no longer just bottom-up (realization of the common good through civil society actions) or only top-down processes (the creation of the common good by the State), but also and above all horizontal and lateral processes between civil organisations that do not depend on the State').

and integration between solidarity[113] and subsidiarity.[114] Contributing to the development of the territory through the care, management and joint valorisation of goods and services, in a way that is attentive to the needs of social, environmental and cultural sustainability, translates on a legal level into an act aligned with objectives and resources.[115] Its implementation refers to the agreement between the parties,[116] giving space to the multilateral negotiating

[113] For the constitutional solidarity more widely in terms of 'cooperation and equality in the establishment of fundamental rights of all, not restricted within the boundaries of a group, nor dissolved in the subordination of each person to the State', the relevance of which can only be grasped in the connection between article 2 of Constitution and the entire constitutional system, P. Perlingieri, *Il diritto civile*, II, n 6 above, 162. See, also, Id, *La personalità umana*, n 54 above, 163-164; Id, *Il diritto dei contratti*, n 63 above, 227; F. Giuffrè, *La solidarietà nell'ordinamento costituzionale* (Milano: Giuffrè, 2002), 55; P. Perlingieri and P. Femia, *Nozioni introduttive e princípi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 72; S. Rodotà, *Solidarietà*, n 111 above, 3, 20, and the review of G. De Gaspare, 'Stefano Rodotà, "Solidarietà. Un'utopia necessaria"' *Rivista di diritto civile*, 154 (2016).

[114] A synergy between principles of solidarity and subsidiarity is noticed by P. Donati, 'Sussidiarietà', n 112 above, 77-78. According to the Author, while subsidiarity acts as an 'operational means' to provide the means and mobilize resources to support and help others, solidarity translates into a 'sharing of responsibility that operates according to the rule of reciprocity'.

[115] For this point it is important the decision of Corte dei Conti-Sezione Regionale di Controllo per la Lombardia 16 April 2019 no 146 in the field of granting advantages to private on the assumption of consistency and alignment between the activity of private and mission of the administration. Or, again, the decision of the same section of 26 February 2013 no 89 in which it is underlined that it is precisely 'the activity carried out in favour of citizens, *id est* of the "administered community", although in form of mediated exercise of institutional purposes of the local authority and therefore in the interest of the latter' to form the basis for the sharing of economic resources by the public sector in support of the private sector.

[116] In this way F. Giglioni, 'Il principio di sussidiarietà orizzontale nel diritto amministrativo e la sua applicazione' *Il Foro amministrativo C.d.S*, 2909 (2009), who analyses carefully the application of the principle of horizontal subsidiarity made by Consiglio di Stato 6 October 2009 no 6094 and highlights that '*trattandosi di un principio che mira a integrare responsabilità pubbliche e responsabilità private, appare evidente che il principale atto giuridico che ne assicura la concreta effettività sia di natura pattizia: sono le intese e gli accordi, variamente denominati, che sanciscono l'alleanza da cui discende la pretesa giuridica da parte di cittadini e associazioni nei confronti dell'amministrazione*' ('since this is a principle aimed at integrating public and private responsibilities, it is clear that the main legal act which ensures its effectiveness is of a contractual nature: agreements and pacts, variously named, which establish the alliance from which derives the legal entitlement of citizens and associations towards the administration').

administrative activity which brings together public and private subjects, the Third sector[117] and, why not, the financial sector,[118] around common interests.[119]

[117] This perspective is granted by decreto legislativo 3 July 2017 no 117 laying down the Third Sector Code, and decreto legislativo 3 July 2017 no 112 revising the regulation of social enterprise. Thanks to such reform, in fact, the legislator created the legal basis for the construction 'of a different relationship between public and private, not simply based on a synallagmatic relationship', but 'on the convergence of purposes and pooling of public and private resources for the joint planning of services and actions aimed at raising levels of active citizenship, cohesion and social protection, according to a relational sphere that goes beyond the mere utilitarian exchange' (in this way Corte costituzionale 26 June 2020 no 131 available in cortecostituzionale.it on which, broadly, A. Fici, L. Gallo and F. Giglioni eds, *I rapporti*, n 49 above; G. Arena, 'L'amministrazione condivisa ed i suoi sviluppi nel rapporto con cittadini ed enti del Terzo settore' *Giurisprudenza costituzionale*, 1439 (2020); L. Gori, 'Sentenza 131/2020: sta nascendo un diritto costituzionale del Terzo settore' *Rivista impresa sociale*, 1 (2020); E. Rossi, 'Il fondamento del Terzo settore è nella Costituzione. Prime osservazioni sulla sentenza n. 131 del 2020 della Corte Costituzionale' *Forum di Quaderni costituzionali*, 49 (2020); M. Galdi, 'Riflessioni in tema di terzo settore e interesse generale. Osservazioni a C. cost. 26 giugno, n. 131' *federalismi.it*, 88 (2020); E. Castorina, 'Le formazioni sociali del terzo settore: la dimensione partecipativa della sussidiarietà' *Rivista AIC*, 355 (2020); A. Gualdani, 'Il rapporto tra le pubbliche amministrazioni e gli enti del Terzo settore alla luce dei recenti interventi normativi' *federalismi.it*, 113 (2021)).

[118] Note, in particular, the doctrine's recent focus on new models of financial negotiation with a social impact that combine the common purpose of the parties to create greater levels of social welfare and the profitability of the financial instrument. These are social impact bonds that, through a network of agreements between public entities, private investors and the Third Sector, are potentially able to generate at the same time savings in public spending, a return proportional to the social purposes achieved for private investors and especially the active commitment of all citizens to the satisfaction of social needs. On the power of social impact partnerships see, most recently, C. Mignone, 'Finanziarizzazione del welfare e funzione degli atti di autonomia' *Rassegna di diritto civile*, 567 (2021); Id, 'Una via costituzionale all'impact investing', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale. Strumenti, interessi, scenari attuativi* (Napoli: Edizioni Scientifiche Italiane, 2020). See, also, A. Costa, P. Leoci and A. Tafuro, '"Social Impact bonds": Implications for Government and Non-Profit Organizations' *Review of business and economics studies*, 58 (2014); A. Del Giudice, *I social impact bond* (Milano: Franco Angeli, 2015); A. Blasini, 'Nuove forme di amministrazione pubblica per negozio: i "social impact bonds"' *Rivista trimestrale di diritto pubblico*, 69 (2015); R. Di Raimo and C. Mignone, 'Strumenti di finanziamento al Terzo settore e politiche di intervento locale nella "società inclusiva" europea. (Dalla filantropia alla finanza alternativa)' *Giustizia civile*, 139 (2017); C. Napolitano, 'Il Social Impact Bond: uno strumento innovativo alla ricerca del suo diritto' *Nuove autonomie*, 555 (2018).

[119] It should be shared on this point the reflection of C. Mignone, 'Finanziarizzazione', n 118 above, 601: '*seppure tra molte, forse troppe incertezze, all'orizzonte si profila – questo sí – un'opera di rifondazione civile dello stato sociale imperniata sulla sussidiarietà come principio ordinante (art. 118 cost.), ovvero sulla regolazione condivisa degli obiettivi d'interesse generale ad opera di una molteplicità di "autonomie", che si integrano e confluiscono nell'ordinamento complessivo*' ('although among many, perhaps too many uncertainties, on the horizon

From this implication, in a consequential logic, a second one follows: the relationships with negotiating content between public and private subjects can no longer be configured as an exclusive instrument for regulating the patrimonial interests of the parties, whether they are intended in the pursuit of public utility (if from the perspective of the public administration) or of selfish ones (moving the view to the perspective of private individuals) as in the case of public procurement, concessions, public-private partnerships and, more broadly, all forms of outsourcing of functions or public services.[120]

As has recently been observed in doctrine, in the latter there is no application of the principles of solidarity and subsidiarity[121] since, in exchange for the remuneration of the activity carried out by the private and conferred by the administration, on one hand, the latter 'remains the only legitimized subject to the

looms - this yes – a civil reconstruction of the social State based on subsidiarity as an ordering principle (article 118 of Constitution), namely on the shared regulation of purposes of general interest by a multiplicity of "autonomies", which integrate and flow in the overall order').

[120] As it is known, the mentioned contractual instruments are governed by decreto legislativo 31 March 2023 no 36, that implements with amendments compared to the previous Code, the European Parliament and the Council directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, public procurement and procurement by entities operating in the water, energy, transport and postal services sectors, as well as reorganises the existing rules on public work, services and supply contracts. They differ in terms of the distribution of economic risk, but at the same time the onerousness and remuneration constitute their common distinguishing feature as they are generally contracts for pecuniary interest, concluded in written form between one or more contracting entities and one or more economic operators, concerning the execution of works, the supply of products, the management or the provision of services and, in the case of public-private partnerships, the implementation, transformation, maintenance and operational management of a work in exchange for its availability, or its economic exploitation, or the provision of a service related to its use.

[121] On this point, F. Trimarchi Banfi, 'Teoria e pratica della sussidiarietà orizzontale' *Diritto amministrativo*, 32 (2020) notes that in such cases, a 'minor' or 'practicable' subsidiarity is not even conceivable as the whole subsidiary relationship fails (for example, this happens when some public tasks are outsourced like in case of management of services by economical operators.

pursuit of the general interest' while 'the private is only its instrument'.[122] It is possible to see in them an effective exercise of the autonomous initiative intended in terms of the last paragraph of article 118 of the Constitution since it is assumed that the activities to be carried out have already been defined upstream by the contracting administration and therefore without any active contribution from the bidders participating in the public procurement.[123]

On the other hand, the function of cooperative agreements is different. It is deeply engraved by the principles of solidarity and subsidiarity, and it pushes itself beyond the particularisms of individual requests: it is coloured with general interests, mainly non-patrimonial, and it evolves from the traditional function of exchange to that of sharing, preordained not to draw mutual benefits, but to regulate the common interest towards which the services of the parties converge.

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[122] G. Arena, 'La sussidiarietà come libertà', n 96 above, 86-87, explains that '*il soggetto privato cui viene affidata l'erogazione di un servizio pubblico si attiva se e in quanto da tale attività ricavi un vantaggio economico; il suo obiettivo non è la massimizzazione dell'interesse generale, secondo quanto previsto dall'art. 118, u.c., bensì del proprio. E l'amministrazione opportunamente fa leva su tale motivazione per ottenere, in una logica di mercato, il miglior servizio possibile al costo minore; se il soggetto prescelto non dà buona prova, l'amministrazione è libera di scegliere un altro privato di cui servirsi*' ('the private entrusted with the provision of a public service is active insofar as from such activity receives an economic advantage; his goal is not the maximization of the general interest, as required by article 118 of Constitution, but of his own. The administration appropriately relies on this motivation to obtain, into a market logic, the best possible service at the lowest cost; if the chosen subject does not give good proof, the administration is free to choose another private').

[123] Among instruments which derive their application power from the principle of subsidiarity, the concessions, even where they take on different names such as conventions, are excluded by F. Giglioni, 'Il diritto pubblico informale alla base della riscoperta delle città come ordinamento giuridico' *Rivista giuridica dell'edilizia*, 3 (2018). The Author points out, in fact, that although it is true that through these tools authorities allow private to take action in the general interest on advantageous terms, however, 'the relationship that is established is almost always the outcome of an initiative that is taken by public authorities that simply decide to use third-party resources to manage their assets'. In these cases, therefore, public authorities legitimately decide on and dispose of their assets, but they do so through the intervention of third parties.

Since they are naturally oriented to prefer the negotiating paradigm, they are indeed a tangible testimony to the complete reversal of the way of conceiving the relational system between the two spheres and they reveal how the administrative activity 'by agreement' represents the privileged form of the Constitution for the exercise of the administrative function. For its part, the collaborative logic laid down as basis of these relationships brings to the centre of the legal system a sense of autonomy more in line with the dynamism of legal relations,[124] which sees its foundation in the principle of subsidiarity.

Therefore, if on one hand subsidiarity becomes the specific foundation of the collaborative paradigm, on the other, autonomy, as an expression of subsidiarity, becomes an 'integrative source and, sometimes, even primary and preferential, in the regulation of relationships'.[125]

6. In this perspective, the collaborative agreements represent a concrete example confirming the wider scope of the negotiating autonomy expressly conferred by the constitutional legislator. It serves as an instrument also for the realisation of general interests and as such does not exhaust its effects in the legal sphere of the parties who implement the act.[126] In fact, the last paragraph of article 118 of the Constitution enables[127] private individuals to regulate the general

[124] The negotiating autonomy that should be thus designed as a power recognized by law to private and public subjects to regulate private or public interests which may be particular or general and not necessarily only own: P. Perlingieri, *Il diritto civile*, IV, n 6 above, 28, 30-31.

[125] P. Perlingieri, 'Relazione conclusiva', in C. Perlingieri and L. Ruggeri eds, *L'incidenza della dottrina sulla giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 440.

[126] P. Perlingieri, *Il diritto civile*, IV, n 6 above, 28.

[127] For horizontal subsidiarity as a rule on legal production which gives private individuals the power to regulate general interests, P. Femia, 'Sussidiarietà', n 34 above, 143; D. De Felice, *Principio di sussidiarietà*, n 34 above, 51; P. Perlingieri, 'La sussidiarietà', n 34 above, 687.

interests with the extension of effects to third parties.[128] This calls even more in question the dogma of relativity of effects referred to in article 1372 of Civil Code.

The principle of subsidiarity declined in the collaborative agreements therefore leads to the rethinking of the last paragraph of article 1372 of Civil Code. By traditional opinion, it expresses the need to protect the intangibility of the others' legal sphere[129] and implies, for this purpose, the exceptional nature of those rules that extend the effects of the negotiating act to third parties.[130] These conclusions, however, can be hardly accepted in the field of collaborative agreements. In fact, they necessarily involve third parties, and indeed identify in them the recipients of benefits resulting from the collaboration itself.

For example, consider agreements with the Third sector which are exclusively oriented towards the pursuit of the others' good, whether it relates to individuals or to the community, through the deeply social activities concerning employment, education, training, health, inclusion, etc. Or the collaborative pacts for the care and management of commons, whose implementation inevitably generates positive effects in the sphere of third parties to them: the goods covered by the

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[128] On this topic, broadly, I. Maspes, *Il contratto e i suoi effetti nei confronti dei terzi* (Milano: Giuffrè, 2022) who with a critical approach towards the principle referred to in article 1372 of Civil Code discusses the '"relativity" of the principle of relativity'.

[129] The difficulties which have traditionally affected the admissibility of the compatibility of negotiating acts with effects towards third parties with the principle of relativity are underlined by U. Majello, *L'interesse dello stipulante nel contratto a favore di terzi*, reprint 1962 (Napoli: Edizioni Scientifiche Italiane, 2010) and Id, 'Contratto a favore del terzo' *Digesto delle discipline privatistiche*, *Sezione civile* (Torino: Utet, 1989), IV, 240.

[130] L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1948), 688; F. Messineo, 'Contratto nei rapporti col terzo' *Enciclopedia del diritto* (Milano: Giuffrè, 1962), X, 196, who points out that the exceptional nature should refer only to the negotiating effects which 'directly' affect the sphere of others, whereas the general admissibility of 'reflected' effects should be admitted. On the latter point see F. Messineo, *Dottrina generale del contratto* (Milano: Giuffrè, 1952), 414-415; E. Betti, *Teoria generale del negozio*, n 33 above, 258; F. Santoro Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 1959), 33.

pact remain freely accessible and usable also by those who are 'not bound' formally to their care.

As has been well highlighted in doctrine,[131] the relativity of effects and the exceptional nature of article 1372 of the Civil Code clearly fade in the presence of superindividual interests (health, environment, culture, etc.) even when their final recipients remain unrelated, namely third parties, to the negotiating act. And this is fully reflected in the last paragraph of article 118 of the Constitution that, in providing for horizontal subsidiarity, encourages private individuals to take care of interests belonging to subjects other than the parts of the negotiating act. Hence the need to look at the relative and variable position of the third in relation to 'external' effects in light of the concrete and legally protected interests. This assessment can only be carried out taking into account not only the negotiating act in question, but also the entire legal relationship of which the third party, despite not having participated in the implementation of that negotiation, can however be part as recipient of its effects,[132] direct or reflected.[133]

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131 P. Perlingieri, 'Relazione di sintesi', in G. Perlingieri and L. Ruggeri eds, *L'attualità del pensiero di Emilio Betti a cinquant'anni dalla scomparsa* (Napoli: Edizioni Scientifiche Italiane, 2019), 1114, who recalls the very topical insights of Emilio Betti on article 1372 of Civil Code expressed when the Italian legal system did not yet know the principle of horizontal subsidiarity.

132 In this way E. Betti, *Teoria generale del negozio*, n 33 above, 258-259, who analyses the position of the third parties in relation to effects of the negotiating act in light of the interests at stake. The Author rejects the use of the formal criterion, according to which the third party would be simplistically identified in 'anyone unrelated to the negotiation', to accept 'a criterion that adheres more closely to the reality of the interests at stake'. He proves the existence of third parties unrelated to the negotiation but not to the legal relationship as a whole. In fact, in these cases the subject affected by the direct effects of the negotiation, with respect to which he remains third, must be classified as part of the relationship and not as the third.

133 The importance of the distinction between direct and reflected effects is well highlighted by P. Perlingieri, *Il diritto civile*, 3rd ed, n 70 above, 623-624 and now in Id, *Il diritto civile*, 4th ed, I, n 6 above, 217-218. While the direct effects find their cause in the fact to which they are directly attributable, those reflected, on the other hand, are attributable to the negotiation only indirectly

In case of the collaborative agreements we can thus distinguish, recalling the classification of Emilio Betti, the position of the third party who is part of the relationship even if unrelated to the negotiation.[134] Think of the agreements on the enhancement of cultural heritage that realize the right to the use of a certain good, whose protection is laid down in article 9 of the Constitution. The negotiating act is implemented by the public administration and private (whether it is the public or private property). The third party, however, as a recipient of the good inevitably becomes part of the wider legal relationship involving a constitutionally guaranteed interest and therefore attributes to it the possibility to protect the exercise of its right if limited or compromised.[135]

It is also possible to distinguish the legal position of the third party involved in the interest to be achieved through the negotiation, which however remains unrelated to the latter. This case can be found in the pacts of collaboration, driven by the convergence of interests towards a common purpose, in which the third is a holder of the right to access and enjoyment of the common good. These may be

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because they are 'effects of the effect'. This distinction is particularly important in interpreting and classifying the negotiating act, since only the direct effects qualify the latter.

[134] E. Betti, *Teoria generale del negozio*, n 33 above, 262 who, on the basis of the different types of interest, distinguishes a) parts of the relationship (even if they are not part of the negotiating act); b) third parties participating in the interest, unrelated to the negotiating act, whose legal position is however subordinate to that of the other parties; c) interested third parties, whose legal position is independent and incompatible with the effects of the negotiating act (as prejudicial); d) indifferent third parties.

[135] It should be noted, however, that the way towards the effective protection of collective interests by means also of preventive nature has already been opened by the European legislator with the introduction of representative actions for consumer protection: see European Parliament and Council Directive (UE) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1. For its comment see G. De Cristofaro, 'Azioni "rappresentative" e tutela degli interessi collettivi dei consumatori. La "lunga marcia" che ha condotto all'approvazione della dir. 2020/1828/UE e i profili problematici del suo recepimento nel diritto italiano' *Nuove leggi civili commentate*, 1010 (2022).

exercised without prejudice to others and respecting the modalities and activities agreed by the parties in the pact for the care and management of that good to which the third party remains unrelated.

Nevertheless, third parties prejudiced by the agreement can be identified. Their legal position, although independent of the agreement, is affected by it: such could be, for example, the injured position of a Third sector entity unrelated to the collaborative agreement concluded by the administration with another entity without respecting the transparency obligations or criteria and procedures for selecting the partner for the collaboration.

Finally, the legal position of the third party indifferent to the negotiating act, the relationship and even the interest, is difficult to identify in the context of collaborative agreements. However, it can be attributed to private, above all to the economic subjects, who do not pursue the solidarity logics, but donate to the Third sector entities.

The particular 'extensive' effectiveness of collaborative agreements is not, however, entirely new to legal scholars. Negotiating acts such as those in favor of third parties,[136] fiduciary negotiation or negotiation related to the others' assets,[137] whose validity has been questioned for years, show that the structural typicality of the negotiating act does not directly contribute to make the latter worthy of the

[136] A. Giovene, *Il negozio giuridico rispetto ai terzi*, reprint 1917 (Napoli: Edizioni Scientifiche Italiane, 2021); U. Majello, *L'interesse dello stipulante*, n 129 above; Id, *Contratto*, n 129 above, 240; L.V. Moscarini, *I negozi a favore di terzo* (Milano: Giuffrè, 1970) and Id, 'Il contratto a favore di terzi', in P. Schlesinger e F.D. Busnelli eds, *Il Codice civile. Commentario* (Milano: Giuffrè, 2012); F. Angelone, 'Contratto a favore di terzi. Artt. 1411-14134', in F. Galgano ed, *Commentario del Codice civile Scialoja-Branca* (Bologna-Roma: Zanichelli, 2004) and, more recently, I. Maspes, *Il contratto*, n 128 above.

[137] L. Cariota Ferrara, *I negozi fiduciari* (Padova: Cedam, 1933); Id, *I negozi sul patrimonio altrui* (Padova: Cedam, 1936) and the review of P. Perlingieri, 'I negozi sul patrimonio altrui di Luigi Cariota Ferrara, sessanta anni dopo', in Id, *Il diritto dei contratti*, n 63 above, 499; M.L. Gambini, 'Il negozio fiduciario negli ordinamenti della giurisprudenza' *Rassegna di diritto civile*, 844 (1998).

legal protection. Such function is assigned to the cause to be identified in the regulation of the concrete interests that the negotiation activity is directed to realize. Therefore, it is necessary to look at the collaborative agreements through the lens of interests, evaluated in light of the principle of horizontal subsidiarity. These do not introduce completely new schemes but adapt existing ones to new interests. The production of *ultra partes* effects constitutes the final aim of the agreement. For its part, third parties retain all their interest in its implementation.

Finally, it should be pointed out that obviously the effects can only be positive. The extensibility of negative effects must be excluded. On one hand, the derogation of the principle of relativity, by virtue of horizontal subsidiarity, extends beyond its exceptional nature,[138] on the other, the principle still plays an important role in limiting the production of negative effects in the legal sphere of third parties. Like contracts, the collaborative agreements may, for example, provide for an internal division of responsibility between the public and private in case the implementation of the agreed programme by one of the parties causes harm to the third party. In such a situation, the principle of relativity maintains the full effectiveness to protect the injured third party. As recently pointed out by the Court of Cassation, clauses that attribute the responsibility only to one of the parties have an exclusively internal effect between the parties by virtue of the general principle referred to in article 1372 of Civil Code. In fact, such clauses cannot be used against the injured third party for the exemption of one party from its liability for damage. This is because the protection of the injured party would undoubtedly be undermined by the possibility of enforcing the claim arising from

[138] V. I. Maspes, *Il contratto*, n 128 above, 121.

the unlawful event occasioned by the implementation of the contract only towards one, rather than the other party.[139]

7. Collaborative agreements are thus placed within the framework of relationships inspired by collaboration and sharing, aimed at promoting the spread of modern forms of leadership attributable to the bottom-up,[140] local development model. They are variously named in our legal system and most often governed by special laws and by the so-called 'informal' practices that, although were born

[139] In this way Cassazione 29 October 2019 no 27612, *Guida al diritto*, 85 (2019) with regard to the compensation of damages arising from the performance of the public procurement contract.

[140] The bottom-up community development model or community based approach, better known in Italy as development 'starting from below' through citizens' initiative, focuses on the idea of the self-organized community, based on close cooperation between all public and private actors, which is reflected in the active involvement of citizens at different stages of the decision-making process in the planning and implementation process of local development strategies: participation, transparency, inclusion, democracy, initiative and cooperation are, therefore, its essential features. The bottom-up model is the core of policies for the economic, social, cultural and sustainable development of territories (see, among the first significant European participatory local development experiences, LEADER – *Liaison entre actions de développement de l'économie rurale*, a means originally designed and implemented in the context of the Rural Development Programmes (RDPs) and subsequently extended to the social, regional and fisheries sectors (ESF, ERDF, EMFF) under the current name CLLD – *Community-led local development*. For a comparative perspective on the implementation of this tool, see G. Gargano, 'The Bottom-Up Development Model as a Governance Instrument for the Rural Areas. The Case of Four Local Action Groups (LAGs) in the United Kingdom and Italy' *Sustainability*, 9123 (2021); M. Kull, *European Integration and Rural Development. Actors, Institutions and Power* (London: Routledge, 2018); European Commission, *Guidelines. Evaluation of LEADER/CLLD*, 2017, Brussels). Furthermore, it is at the basis of strategies for the prevention and management of natural disasters (see S. Haeffele and V.H. Storr eds, *Bottom-up Responses to Crisis* (New York: Palgrave Macmillan, 2020); S.B. Miles, 'Participatory Disaster Recovery Simulation Modeling for Community Resilience Planning' *International Journal of Disaster Risk Science*, 519 (2018); Y. Kaneko, K. Matsuoka and T. Toyoda eds, *Asian Law in Disasters. Toward a Human-Centered Recovery* (New York: Routledge, 2016). For a more general reflection on the relationship between the bottom-up and top-down approach, Md Shahidulla Kaiser, 'Are Bottom-Up Approaches in Development More Effective than Top-Down Approaches?' *Asian Social Science Journal*, 91 (2020).

outside the traditional paths of legality,[141] have acquired a strong legal relevance because of the eminent social function that they can achieve on the territory.

Among the first, for whose application profiles reference is made to the following pages, are the agreements that can be stipulated within the scope of the special partnerships referred to in article 134 of the Public Contracts Code, which can also be activated with private parties to allow the recovery and enhancement of cultural heritage,[142] and that of social partnerships referred to in article 201 of the same Code,[143] which, together with the new agreements on temporary uses, concretize the idea of active citizenship committed to urban decoration

[141] The 'informal' practices, that are the result of social experiences of self-organization which on closer inspection do not find their source of legitimation in a specific regulatory framework, but are in direct application of the principle of subsidiarity, are acknowledged by F. Giglioni, 'Il diritto pubblico', n 123 above, 8. The Author draws a distinction between the 'model of tolerance', the 'model of recognition', the 'model of the original legal qualification' and that of the 'collaboration pacts' which, although concretize different levels of collaboration between public and private, generate 'systems of rules that disregard the law as a formal source to affirm an order more effective for the general interests'.

[142] Following the previous Public Contracts Code (decreto legislativo 18 April 2016 no 50), the second paragraph of article 134 of decreto legislativo 31 March 2023 no 36 keeps for the State, Regions and local authorities the possibility to activate special forms of partnership with public and private subjects to promote the use and enhancement of cultural heritage. For a general overview on special public-private partnerships, F.G. Albisinni, 'I contratti pubblici concernenti i beni culturali' *Giornale di diritto amministrativo*, 510 (2016); M. Croce and S. De Nitto, 'I partenariati per la valorizzazione del patrimonio dismesso, in disuso o scarsamente fruito', in A. Moliterni ed, *Patrimonio culturale e soggetti privati* (Napoli: Editoriale Scientifica, 2019), 188; G. Sciullo, 'Il partenariato pubblico-privato in tema di patrimonio culturale dopo il Codice dei contratti' *Rivista di arti e diritto online*, 154 (2021); P. Guglielmini, 'Lo strumento del partenariato speciale pubblico-privato per la cultura alla luce delle novità introdotte dal decreto "Semplificazioni"' *Queste istituzioni*, 62 (2021).

[143] These are, respectively, horizontal subsidiarity actions and administrative barter, instruments whose concrete implementation methods are referred to the municipal regulations. Both move from the idea of reliance on the private sphere of the realization of works of local interest and social utility activities on the basis of the thrust of creative ideas and projects drawn up by the citizens in view of tax incentives according to a scheme that refers to the logic of barter. For application profiles of social partnerships, also with critical vision, P. De Nictolis, *Il partenariato sociale. Gli interventi di sussidiarietà orizzontale e il baratto amministrativo ex artt. 189-190 Codice dei contratti pubblici* (Napoli: Dike Giuridica, 2021).

interventions, recovery and reuse for purposes of general interest of the unused public and private spaces.[144] Likewise, what emerges in this framework are the agreements for the enhancement of public and private heritage, governed by the Code of Cultural Heritage and Landscape[145] as well as those for co-programming and co-design, recently accepted by the Third Sector Code.[146] It is sufficient to point out here that these are agreements that converge on the functional level, although they differ about the content, the object, the nature and number of the parties, and the methods of their completion or execution. It is sufficient to point out here that these are agreements that converge on the functional level, although they differ about the content, the object, the nature and number of the parties, and the methods of their completion or execution.

[144] As highlighted, the temporary use of real estate 'has the function of revitalizing, for a specific period, degraded or abandoned properties, enhancing them within the transitional period, waiting to become places with new functions'. In some cases, it may evolve from 'transitory' into 'definitive' tool (M.V. Ferroni, 'Rigenerazione urbana e riuso temporaneo dei beni: i beni confiscati alla criminalità organizzata' *Sociologia urbana e rurale*, 74 (2022)) through the preservation over time of its ability to recover the social value of the property. In this perspective, the transformative potential of temporary use is highlighted as it is able to convert the 'criticalities tied to the functional obsolescence (of the real estate) in opportunity for the associationism' (P. Capriotti, 'Dalle pratiche spontanee alla sistematicità del riuso temporaneo: un percorso possibile?', in E. Fontanari and G. Piperata eds, *Agenda Recycle. Proposte per reinventare la città* (Bologna: Il Mulino, 2017), 157).

[145] The reference is made to the articulated discipline contained in the Section II, 'Funzione e valorizzazione', of decreto legislativo 22 January 2004 no 42, the so-called Codice dei beni culturali e del paesaggio, that also contains some legislative indications regarding agreements for the enjoyment and enhancement of public and private cultural heritage.

[146] For the purpose of this research, it is very important the specific inclusion in the Third Sector Code, among the activities qualified as of 'general interest', those relating to the safeguarding and improvement of the environment, the protection and enhancement of cultural heritage and landscape, the organization and management of cultural and tourist activities of social interest and the regeneration of unused public assets. Such a wide choice of activities, in fact, makes the relationship between public and private rather flexible and heterogeneous from the point of view of the interventions to be carried out on the territory and, at the same time, allows to shape the activities of co-programming and co-planning referred to in article 55 of the Code according to specific local needs.

All of them, in fact, in the implementation of articles 2, 3, 9, 18, 42 (paragraph 2) and 118 (last paragraph) of the Constitution, contribute to the realization of the common general interest to be identified, concretely, in the specific cause that characterizes the single institution: the care, management and enhancement of assets in use in special partnerships; the exchange and sharing of resources and skills in horizontal subsidiarity interventions, in administrative bartering and agreements for the enhancement of cultural heritage; the use for a specific time and purpose in temporary uses; the aggregation of resources and services given the common objective in the collaboration between public bodies and Third sector subjects. It follows that the common general interest permeates the causal substrate, guiding, from the outset, the relationship to collaboration: a collaboration that therefore assumes functional importance by differentiating, on one hand, these relationships from the 'competitive' ones and justifying, on the other, a different procedural choice for their formation.[147]

[147] The particular causal connotation of collaborative agreements makes them in fact different and not overlapping with public contracts. This allows to 'to clear the field of misunderstandings, as the collaborative instruments do not avoid the procedures of public evidence, but rather they realise the application of a different public evidence, based on principles of article 12 of legge no 241/1990' as well as those of article 11 of the same law: A. Lombardi, 'Gli strumenti collaborativi tra P.A. e Terzo settore nel sistema delle fonti', in A. Fici, L. Gallo and F. Giglioni eds, *I rapporti*, n 49 above, 51.

If, therefore, for the aforementioned agreements, the question to be resolved concerns their traceability during the creation of articles 11[148] and 12[149] of legge 7 August 1990 no 241, identified in doctrine as archetypal rules for collaborative relations, and therefore the compatibility of the latter with the EU legislation on public contracts on the assumption of the communion of interests and their effective 'third party-ness' concerning the logic of profit; for 'informal' practices a further question arises. Even before explaining their systematic framework, we have to verify, in fact, in light of the principle of legality,[150] what is the source from

[148] A different reconstruction in a more extensive way of the scope of article 11 is suggested by F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 33, 36-37. In light of the systematic interpretation, the Authors point out that the application of the rule in question cannot be limited to cases in which the agreement with private is developed within the administrative procedure. On the contrary, the full effect of article 11 should also be possible for agreements to be reached even before the procedure, in which case it would be the only possible outcome of the procedure. The latter 'relationship scheme is based [...] on the consideration that through agreements private individuals contribute to ways in which public administrations care for public interests thus developing in concrete common interests between parties' with the consequence that its originality would derive precisely from the constant enrichment of public interests through the contribution by private parties. Thus, 'the pursuit of the public interest in the agreement would not be identical to what would have been achieved through a measure because it benefits from the active contribution of the private party too driven by competing interests to the public ones'.

For a similar perspective, applied to the so-called pacts of urban regeneration, see M.F. Ferroni, 'Le forme', n 98 above, 9, who notes that in collaborative cases the common general interest 'precedes and connotes the procedural participation' with the consequence that in the opinion of the Author 'the type of the agreement referred to in article 11 of legge 7 August 1990 no 241 must remain only in the background: namely for a correct interpretation of the case and the choice of a competent judge'.

[149] Paragraph 1 of article 12 provides for the possibility for public authorities to award grants, subsidies, and financial aids, as well as further economic benefits to public and private, upon predetermining the criteria and procedures for their allocation. This provision is particularly relevant in the context of public-private relations as it helps to determine and integrate the content of collaborative agreements by sharing economic resources without any compensation and with the sole goal of facilitating and encouraging an activity for the benefit of the whole community (R.A. Albanese and E. Michelazzo, *Manuale*, n 43 above, 182).

[150] The inevitability of the conformity assessment of the practice (including the 'informal' practice) with respect to the current legal system is argued by P. Perlingieri, *Il diritto civile*, I, n 6 above, 87. Id, 'Prassi, principio di legalità e scuole civilistiche', in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 229, notes that the practice certainly cannot escape

which they are legitimized, given that we are faced with social experiences that assume a specific aspect within the legal system, although not always finding their foundation in the legislative act.

The figure of collaboration pacts is certainly part of such practices, as a prototype of the many collaborative and solidarity relationships between public and private, widely spread throughout the territory.[151] They are based on agreements between public authorities and citizens, which can be activated at the initiative of both parties, based on a general regulation defining the scope of application, the purposes and methods of stipulation.

It is clear that, in addition to the negotiating nature that constitutes its identity,[152] the originality of these agreements must also be understood in the instrument from which they receive legitimacy. The regulation, previously approved by the municipal bodies although it is certainly a formal act from the procedural point of view, it does not actualize a certain provision of the law from the substantive point of view. Rather, as has been authoritatively emphasized, it

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a merit assessment, both social and technical, to be done according to the fundamental values of the legal system and in compliance with the principle of legality. Law and practice, in fact, are the manifestation of the inseparable synthesis between the formal and substantial data as 'the substance transcends the form' but does not go beyond 'the limited range of corrections and logically possible integrations of the formal system, that is within what is logically necessary to make the system coherent and complete'. In this way A. Falzea, 'Efficacia giuridica' *Enciclopedia del diritto* (Milano: Giuffrè, 1965), XVI, 454.

[151] On this point the Report 2021 on the shared administration of commons made by Labsus, available at www.labsus.org, 8-9, where the results of the research showed that out of 252 municipalities, which had approved the regulation on commons before the 30 September 2021, only 62 have made accessible the content of the signed collaborative agreements. Therefore, the global survey carried out on the latter municipalities revealed the existence of 1001 active pacts on the Italian territory, with the highest concentration in Lombardy, Tuscany, Emilia-Romagna and Piedmont.

[152] For the negotiating nature of the collaborative pacts see R.A. Albanese and E. Michelazzo, *Manuale*, n 43 above, 107, 122.

draws its strength from the direct application of constitutional principles,[153] including primarily that of horizontal subsidiarity,[154] 'for which public authorities representing general interests act as a guarantor by their autonomy, which is – above all – normative autonomy'.[155]

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[153] On the preceptive function of constitutional principles it should be recalled the notable work of V. Crisafulli, *La Costituzione e le sue disposizioni di principio* (Milano: Giuffrè, 1952), 189. On the normative nature of the constitutional provisions are essential also works of P. Perlingieri, *La personalità umana*, n 54 above, 131; Id, 'Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti' *Rassegna di diritto civile*, 787 (1999); P. Perlingieri and P. Femia, *Nozioni introduttive*, n 113 above, 13; Id, 'I pincípi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali Sisdic*, 1 (2017); F. Viola and G. Zaccaria, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto* (Roma-Bari: Laterza, 1999), 373 and, more recently, G. D'Amico, 'Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)' *Giustizia civile*, 443 (2016); N. Lipari, 'Intorno', n 25 above, 28 (2016); Id, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017), 93; F. Addis, 'Il valore "normativo" dei principi', in C. Cicero and G. Perlingieri eds, *Liber amicorum per Bruno Troisi* (Napoli: Edizioni Scientifiche Italiane, 2017), I, 1; P. Femia, 'La via normativa. Pietro Perlingieri e i valori costituzionali', in G. Alpa and F. Macario eds, *Diritto civile nel Novecento: scuole, luoghi, giuristi* (Milano: Giuffrè, 2019), 359.

On the direct application of the Constitution in relations between administration and private see A. Pioggia, 'Giudice amministrativo e applicazione diretta della Costituzione. Qualcosa sta cambiando?' *Diritto pubblico*, 49, 75, 78 (2012). With particular reference to the sphere of social rights, the Author reflects on the need to rebuild 'the power of the administration not only, as its tradition suggests, starting from the rules that expressly regulate the exercise of authority [...], but also and above all taking into account the constitutional rights that it aims to realise'. This is because the idea that the power can be instrumental to the realization of rights 'takes away from the legislative instrument the monopoly of the regulation of modalities to satisfy needs that, like those related to social rights, impose non standardizable actions', to be adopted according to the specific needs of individuals.

[154] A close connection between autonomy of local authorities and principle of horizontal subsidiarity can also be inferred from article 3 of decreto legislativo 18 August 2000 no 267, the so called Testo unico delle leggi sull'ordinamento degli enti locali, that in paragraph 5 expressly allows municipalities and provinces to carry out their functions also through activities exercised by the autonomous initiative of citizens. On this point see D. Donati, *Il paradigma sussidiario. Interpretazioni, estensione, garanzie* (Bologna: Il Mulino, 2014), 90.

[155] F. Giglioni, 'Il diritto pubblico', n 123 above, 7-8, identifies the principle of horizontal subsidiarity and the legislative autonomy enjoyed by local authorities as the constitutional basis for the implementation of the principle of legality thanks to the 'direct dialogue' that administrations can establish with the Constitution 'without necessarily having to be mediated by formal legislative sources' and thanks to their ability to 'recognize actions consistent with the general interests they represent, even if carried out by third parties'.

Although through a partially different legal path, the same path of 'informality' has also been successfully accepted in the experience of the municipality of Naples. Starting from the modification of the Statute that, since 2011,[156] recognizes the social value of the common goods and guarantees their wider enjoyment and management by the community, new 'generative mechanisms of self-regulation'[157] have been experimented which, together with the regulations, embody those forms of self-regulation in direct implementation of the Constitution.

In this perspective, it is significant the decision of Corte dei conti 14 November 2017 no 26. The judges established the full legitimacy of the municipal regulations that, in the absence of a legislative provision, allow local authorities to conclude insurance contracts for individual volunteers who are involved in social activities. In fact, on the assumption of the direct application of constitutional principles, including in particular that of subsidiarity which 'operates on the same level with other constitutional principles governing the activities of the public administration, such as principles of legality, impartiality and good conduct', the Court considered that the function of stimulating and promoting active citizenship, whose social value is also recognized for the activities of individual volunteers, can be exercised by the municipalities with methods of collaboration that are based directly on the regulatory autonomy granted by article 117, paragraph 6 of the Constitution'.

156 The resolution of the City Council 22 September 2011 no 24 inserted common goods among the purposes and fundamental values referred to in article 3, recognising their strong social function aimed at promoting the exercise of fundamental rights.

157 F. Pascapè, 'Usi collettivi urbani e rapporto tra membri della comunità e la Pubblica Amministrazione locale nell'esperienza gestionale del Comune di Napoli', in R.A. Albanese, E. Michelazzo and A. Quarta eds, *Gestire i beni comuni urbani. Modelli e prospettive* (Torino: Quaderni del Dipartimento dell'Università di Torino, 2020), 169. See, also, A. Lucarelli, 'Beni comuni' *Digesto delle discipline pubblicistiche* (Torino: Utet, 2021), 21; Id, 'Beni comuni e funzione sociale della proprietà. Il ruolo del Comune', in L. Sacconi and S. Ottone eds, *Beni comuni e cooperazione* (Bologna: Il Mulino, 2015), 111 and Id, 'Beni comuni. Contributo per una teoria giuridica' *costituzionalismo.it*, 1 (2014).

Using the institution of civic uses innovatively,[158] as the oldest form of the collective enjoyment of goods,[159] the administration has identified among the real estate of the municipal government 'spaces for collective civic and urban use'[160] whose use has been regulated by multiple *ad hoc* 'declarations, elaborated in constant collaboration with the community in public assemblies, discussion tables and shared and proactive decision-making processes.[161] The declarations of civic

[158] On the ability of civic uses to contribute, in light of the principle of horizontal subsidiarity, to the elaboration of a discipline of common goods, F. Marinelli, 'Usi civici e beni comuni' *Rassegna di diritto civile*, 406 (2013). The Author, aware of the differences between the two, notes in fact that some characteristics of civic uses can be applied to common goods: in particular, those relating to the intangibility of property rights (to guarantee the non-disposability of assets), the ownership of the good by the community (protected through its administration by users with democratic and participatory forms), its common or widespread nature (with the guarantee of the maximum sustainable access), as well as to the constraint of destination that has the function of preventing a different use of the good from that of its nature.

For a social and legal perspective that grasps the complexity of the discipline of common goods, U. Mattei, *Beni comuni. Un manifesto* (Roma-Bari: Laterza, 2011).

[159] On this topic are fundamental works of A. Palermo, 'Usi civici' *Novissimo digesto italiano* (Torino: Utet, 1975), XX, 209; P. Grossi, *Un altro modo di possedere* (Milano: Giuffrè, 1977); V. Cerulli Irelli, *Proprietà pubblica e diritti collettivi* (Padova: Cedam, 1983) and Id, *Diritto pubblico della "proprietà" dei "beni"* (Torino: Giappichelli, 2022); U. Petronio, 'Usi civici' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 930; M.A. Lorizio, 'Usi civici' *Enciclopedia giuridica* (Roma: Treccani, 1994), XXXII, 1; F. Marinelli, 'I settant'anni della l. 16 giugno 1927 n. 1766: ripensare gli usi civici' *Giustizia civile*, 227 (1997); Id., *Gli usi civici: aspetti e problemi delle proprietà collettive* (Napoli: Jovene, 2000); Id, 'Gli usi civici', in A. Cicue and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2013) and Id, *Un'altra proprietà* (Pisa: Pacini, 2nd ed, 2019). See, also, the latest considerations of G. Di Genio, *Gli usi civici nel quadro costituzionale* (Torino: Giappichelli, 2019); C. Bona, 'Gli usi civici', in G. De Nova ed, *Commentario del codice civile Scialoja-Branca-Galgano* (Bologna: Zanichelli, 2021) and M.C. Cervale, 'Usi civici e domini collettivi. La proprietà rurale e il diritto civile' *Trattato di diritto civile del Consiglio Nazionale del Notariato* diretto da P. Perlingieri (Napoli: Edizioni Scientifiche Italiane, 2022).

[160] This experimental form of reappropriation of public spaces by citizens evokes several reflections on urban space as a common good collected in M.R. Marella ed, *Oltre il pubblico e privato* (Verona: Ombre Corte, 2012), 185. More broadly on the relationship between collective property and community as well as on the need for a deep rethinking of the traditional property categories, S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata* (Bologna: Il Mulino, 2nd ed, 1990).

[161] Firstly, in the resolution of the City Council 25 May 2012 no 400 the local administration drew some guidelines for the destination of buildings owned by the municipality as places of experimentation of cultural enjoyment and promotion of participatory democracy processes. Subsequently, in the resolution of the City Council 24 April 2014 no 258 the administration drew the guidelines for the identification and management of unused assets of the municipality. Following

use are the result of a process of self-government, conceived based on the model of active and responsible citizenship, aimed at building a collaborative dialogue between public and private in terms of the care, the management and the collective enjoyment of the common goods. They identify the value framework within which the relations between the administration, the citizens and the common goods develop,[162] they define their function[163] and are drawn up directly by the inhabitants, to be then adopted by the municipal administration that recognizes them as a source of the right of use and management of the common goods.[164] On the assumption of the close connection between the community's interest in the conservation of civic uses and the democratic principle of participation in decisions at a local level, which has long been sanctioned by the constitutional judges, these declarations,[165] therefore, legitimize practices of widespread

such two acts, multiple declarations have been drawn up, recognized and 'formalized' with resolutions of the City Council 29 December 2015 no 893, 27 June 2019 no 297 and 13 August 2021 no 424. Around 146 management meetings accompanied by 580 worktables have been registered during the entire process: F. Pascapè, 'Usi collettivi', n 157 above, 169.

[162] In particular, is marked the need to free these relationships from the economic logic of the market; to orient them to the interdisciplinarity and sharing of knowledge and ability; to seek consensus in the context of decision-making processes; to preserve, from an intergenerational point of view, the functional utility of the exercise of the fundamental rights of the common goods; and to empower the community through the conscious use of goods in accordance with the rights of community as well as those of future generations.

[163] In this perspective, it is possible to read in the declaration on shared principles of 2019 (available in commonsnapoli.org) that the goods in question are 'for non-exclusive collective use, and as such, go beyond the private approach and traditional forms of both public and private management. The use of spaces takes place in a non-proprietary form and the economies generated are uncompetitive. The activities that take place reject a logic of commodification and do not want to be additional and/or alternative in the provision of essential public services, but they confront and act for the protection and extension of rights to a good life'.

[164] For a complete overview on the process that led the municipality of Naples to rediscover, together with the local inhabitants, the collective uses in their special declination of 'emerging common goods for civic and collective use', see N. Capone ed, *Rapporto sui beni comuni a Napoli. Atti e documenti (2011-20221)* (Napoli, 2022).

[165] See the decision of Corte costituzionale 13 November 1997 no 345 that among the first applies the European Charter of Local Self-Government, drawn up by the Council of Europe in

collective use of the public real estate, subjecting it to a 'special' regime of 'state property reinforced by popular control',[166] as 'common' public goods directly administered by the community, through decision-making and organizational forms based on models of participatory democracy.[167]

Finally, it is interesting to report here some examples of collaborative administrative 'practices'.[168] Although they do not implement any legislative

1985 and ratified in Italy by legge 30 December 1989 no 439, highlighting that the interest of the community in preserving the civic uses finds its protection in article 4, paragraph 6, according to which 'local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly'.

[166] Thus, is stated in the declaration of civic and urban collective use of the Ex Asilo Filangieri, elaborated collectively during a public working table held every week from May 2012 to December 2015 and subsequently transposed by the Municipal Council resolution 29 December 2015 no 893.

The 'specialty' of the regime is confirmed by the recent constitutional case law on legge 20 November 2017 no 168 containing rules on collective domains. With the judgement of 10 April 2018 no 113, judges which was called to clarify the meaning of 'perpetuity' of the forestry-pastoral destination of state property intended for a civic use, established that any change in the destination of the use for different purposes can be considered compatible with the non-disposability nature of such goods only if their new use serves the general interest of the local community and is, therefore, useful to the community.

[167] The expression 'participative democracy' appears for the first time among the theorists of political philosophy, but only recently has aroused great interest among law scholars as it constitutes a virtuous form of involvement of citizens and enhancing their role in local decision-making processes. French doctrine, in particular, identified it in a vision '*épistémologique, qui défend que la combinaison ou la confrontation d'une pluralité de savoirs est bénéfique pour la recherche de la meilleure solution et que les "savoirs citoyens" ont dans ce cadre un rôle important à jouer*' (M.H. Bacqué and Y. Sintomer eds, *La démocratie participative* (Paris: Éditions La Découverte, 2011), 15). This conception is seen by Authors as a tool to overcome the main challenges (administrative, political, economic and environmental) related to the realization of participatory democracy, including awareness of its 'non impositive' character, the need to be implemented in a dimension of territorial 'proximity', as well as the risk of its exploitation in relations between citizens and institutions.

[168] On the concept of administrative practice, conceived 'as an organizational model "open" and deeply innervated by the constitutional demands of democracy and popular participation' namely as a 'model that ascribes to the citizen an irreplaceable function of endorsement, confirmation and consolidation of conducts that really appear deserving of being preserved in authority's acting and deciding', S. Tarullo, 'Buone prassi e continuità dell'amministrazione pubblica. Parte I: la prassi e la pubblica amministrazione' *Diritto amministrativo*, 669 (2012); Id, 'Buone prassi e continuità dell'amministrazione pubblica. Parte II: le buone prassi, l'amministrazione ed il cittadino' *Diritto amministrativo*, 149 (2013).

precepts, they have been considered by the accounting judges to be compatible with the constitutional framework. Moved by the achievement of purposes of general interest and primary objectives of the system, they have the merit of having assumed the function of emancipating those experiences of marked social value that otherwise would have been subject to the risk of being framed even below the threshold of legality.

Among these, we find the jurisprudence[169] that has spoken about the legitimacy of the contributions in favour of private entities that undertake initiatives falling within the tasks of the Municipality and carried out in the interest of the community, concerning the prohibition of expenses for sponsorships, referred to in decreto legge 31 May 2010 no 78[170]. On these occasions, the Court of Auditors observed that the function of the ban must be strictly applicable only to sponsorships that involve an expenditure for the local authority aimed at merely notifying citizens of its presence and, therefore, at promoting its image. On the contrary, in line with the principle of horizontal subsidiarity, the contributions must be legitimately admitted whenever they are otherwise oriented to the cooperation between the public and private bodies, in carrying out an activity consistent with the mission of the Municipality, in a subsidiary form, that is, exercised by the mediation of private entities, recipients of public resources for the benefit of the community.

[169] See, in particular, Corte dei conti-Sezione di controllo Veneto 16 January 2018 no 30; Corte dei conti-Sezione di controllo Piemonte 2 December 2015 no 171; Corte dei conti-Sezione di controllo Lombardia 14 March 2013 no 89; Corte dei conti-Sezione di controllo Puglia 14 March 2013 no 54; Corte dei conti-Sezione di controllo Piemonte 21 December 2012 no 483; Corte dei conti-Sezione di controllo Lombardia 23 December 2010 no 1075.

[170] Article 6, paragraph 9, decreto legge 31 May 2010 no 78, converted with amendments by legge 30 July 2010 no 122 containing urgent measures on financial stabilization and economic competitiveness.

Equally significant, albeit isolated, are the rulings relating to the relationship between the allocation to private parties for social purposes of state-owned properties with subsidized rent and the possible configurability of tax damage to municipal executives deriving from the failure to formalize, renew or delay the relative concessionary measures and, therefore, from the lack of economic performance, otherwise achievable by leasing the goods at free market prices.[171] In the present cases, in fact, in the face of the omission by the managers to provide for the renewal of the concession, that is the reacquisition of the goods, the judgments have been defined by relieving them of any responsibility, on the assumption of the peculiar nature of goods not usable on the market because they are intended to be used for social and cultural purposes and, as such, they are not subject to the application of the fee at full price.

In light of the informal practices reported here, it is possible to observe how the cases of practice, together with the aforementioned declarations of use and the collaboration agreements, do not implement a single law, but 'the current regulatory complex'.[172] In this sense, they constitute the tangible testimony of the

[171] Corte dei conti-Sezione Lazio 29 January 2018 no 52 and Corte dei conti-Sezione Lazio 18 April 2017 no 76. For a more restrictive orientation, see Corte dei conti-Sezione II Centrale d'Appello 12 March 2019 no 78 that classified in terms of 'fiscal damage' the non-enforcement by officials of rents due by associations assigned to the state property, because of the serious impoverishment of the local funds due to the permanent loss of credit. In the present case, it was observed that the renunciation of such fees could not be justified as an economic benefit which could be granted for public utility activities managed by private and associations, in so far as it is contrary to the 'principle of enhancing the value of public real estate, according to which the management of assets must aim at increasing their economic value, in order to increase the revenue of a non-taxable nature'. The only admissible exception concerns cases in which an equivalent or higher general interest is pursued than that achieved by the economic exploitation of public assets.

[172] In this way A.L. Tarasco, *La consuetudine nell'ordinamento amministrativo. Contributo allo studio delle fonti non scritte* (Napoli: Editoriale Scientifica, 2003), 441-442, with particular reference to the customary practice of public administrations.

dynamism of the principle of horizontal subsidiarity,[173] capable of autonomously expressing its preceptive force and at the same time legitimizing relations between public and private by constitutional legality.[174] In this perspective, according to an extensive reading of the principle, the duty of the administration to promote 'autonomous initiative' on one hand, and the effective participation of citizens in the performance of activities of general interest on the other, are also concretized on the level of sources[175] where the legal and social reality meet through self-regulation.[176]

8. Finally, the treatment of the legal profiles connected to the complexity and heterogeneity of public-private collaboration agreements in the light of constitutional legality, meaning these include a broader notion than the traditional

P. Perlingieri, *Il diritto civile*, I, n 6 above, 87, more broadly states that 'the practice does not express an antinomic value to the theoretical one but summarizes in a single totality the experience of Life and Logic. Law and practice are inseparable aspects'.

[173] And more widely of the dynamism and dialectics of law on which N. Bobbio, 'Consuetudine (Teoria generale)' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 442.

[174] The principle of subsidiarity is identified as a competing criterion of legality by F. Giglioni, 'Sussidiarietà e legalità', in D. Ciaffi and F.M. Giordano eds, *Storia*, n 34 above, 289-290. The Author highlights the different attitude that principles of subsidiarity and legality can take in the government of legal relations. Starting, in fact, from the assumption of the diversity of their characterization, one in a dynamic sense and the other in a static sense, he points out that legality responds above all to a need to guarantee the boundaries within which the autonomous action of subjects can unfold, thus defining 'a static and fixed order of coexistence between subjects'. Otherwise, subsidiarity, by sticking to the ability to act together to satisfy common interests (on this point see, also, P. Ridola, 'Il principio di sussidiarietà', n 88 above, 200-201), communicates through a dynamic order, offering subjects the basis for creating links between them.

[175] A.L. Tarasco, 'Forza ed attualità della consuetudine amministrativa in una democrazia liberale' *amministrazioneincammino.it*, 1 (2006).

[176] The act, in fact, 'as a synthesis of self and hetero-regulation', is nothing more than a "'social and legal reality at the same time" (previously P. Perlingieri, 'Interpretazione e qualificazione: profili dell'individuazione normativa', in Id, *Il diritto dei contratti*, n 63 above, 11), that integrates into the legal system and – necessarily – conforms to it': Id, "'Controllo" e "conformazione" degli atti di autonomia negoziale' *Rassegna di diritto civile*, 204 (2017).

schemes of public contracts, must necessarily be addressed within the European framework.[177] Its regulatory and jurisprudential structure has significantly contributed to the rethinking of the role of the public administration[178] and citizens in the realization of the common interest in a more cooperative key.[179]

It should be noted at the outset that in the European context the concept of 'agreement' is widely used in many areas of law and yet there is no single, independent definition of it.

With more specific regard to relations between public and private entities, this notion, especially if understood in its collaborative declension with entities other than companies, appears, at first sight, to be irrelevant since the only instrument

[177] With a view to unity and openness of the legal system, where multiple legal sources (national, European and international) converge and integrate each other, the rules of the European Union, far from constituting a separate legal system, make up a 'regulatory system' of rules and principles (P. Perlingieri, *Il diritto civile*, II, n 6 above, 93) that 'in the systematic totality of national positive law' are an integral part (A. Falzea, 'La Costituzione e l'ordinamento giuridico (1998)' in Id, *Ricerche di teoria generale del diritto e di dogmatica giuridica*, I, *Teoria generale del diritto* (Milano: Giuffrè, 1999), 511.

[178] On the impact of the principle of subsidiarity on the relationship between the European Union and national administrative law in terms of encouraging cooperation and co-administration, S. Cassese, 'L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea' *Il Foro italiano*, 373-377 (1995).

[179] In the international context such process of redistribution of competences and functions, also in head to subjects other than the public administrations, has been characterized with the phenomena of New Public Management and New Public Governance which have the merit to have innovated the idea of the administration, open to establish negotiating relations with all local actors and to involve stakeholders in the decision-making process. For the different profiles that characterize and differentiate the two concepts, see C. Pollitt, S. van Thiel and V. Homburg, *New Public Management in Europe. Adaptation and Alternatives* (New York: Palgrave MacMillan, 2007); S.P. Osborne, *The New Public Governance? Emerging perspectives on the theory and practice of public governance* (New York: Routledge, 2010); C. Pollitt and G. Bouckaert, *Public management reform* (Oxford: Oxford University Press, 3d ed, 2011); D. Levi-Faur ed, *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012); J. Torfing, L.B. Andersen, C. Greve and K.K. Klausen eds, *Public Governance Paradigms. Competing and Co-Existing* (Cheltenham: Edward Elgar Publishing, 2020). For the declination of these phenomena in the French and Italian legal systems, see F. Bottini, 'L'impact du New Public Management sur la réform territoriale' *Revue française de droit administrative*, 717 (2015).

of interaction between the two spheres 'known' to European law is the contract[180] (in particular, the public procurement, the concession and the public-private partnership in its different contractual configurations). As is well known, these are deals which, although they are often referred to as 'forms of collaboration'[181] belong to the category of 'contracts for consideration', concluded between a contracting authority and an economic operator,[182] which therefore respond structurally and functionally to the corresponding legal relationships[183] in which each service is justified by the other and, therefore, by their mutual exchange according to the synallagmatic scheme.[184] They were conceived essentially from

[180] In this way F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 5.

[181] As written in the first European Union documents introducing public-private partnership, the term refers to 'forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service' (European Commission, *Green Paper on Public-Private Partnerships and Community Law on Public Procurement and Concessions*, COM (2004) 327 final, Brussels, 3); or, more specifically, to forms of a 'long-term, contractually regulated cooperation between public authorities and the private sector to carry out public assignments, in which the requisite resources are placed under joint management and project risks are apportioned appropriately on the basis of the risk management skills of the project partners' (European Parliament, *Resolution on Public-Private Partnerships and Community Law on Public Procurement and Concessions*, 2006/2043(INI)). Or, again, according to the definition provided by the Organisation for Economic Cooperation and Development, a partnership is 'an agreement between the government and one or more private partners (which may include the operators and the financers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners' (OECD, *Public-Private Partnerships. In Pursuit of Risk Sharing and Value for Money*, 2008, 17).

[182] See article 2 of the Annex I.1 of decreto legislativo 31 March 2023 no 36 that contains definitions of contracts and the concept of contract for pecuniary interest.

[183] In this way H. Hoepffner, *Droit*, n 64 above, 74.

[184] According to the settled case-law of the Court of Justice of the European Union, contracts for pecuniary interest, such as public procurement, concession and public-private partnerships, are based on 'a contract under which each of the parties undertakes to provide one form of consideration in exchange for another. The synallagmatic nature is thus an essential element of such contracts'. In this way, recently, Case C-367/19 *Tax-Fin-Lex d.o.o.* v *Ministrstvo za notranje zadeve*, Judgment of 10 September 2020, in which is highlighted that the 'consideration need not necessarily consist of the payment of a sum of money, so that the supply of the service is compensated for by

the point of view of protecting the internal single market, as instruments for safeguarding the free competition,[185] on one hand, and as instruments to combat the challenges related to the financing of public infrastructure and services,[186] on the other.

other forms of consideration, such as reimbursement of the expenditure incurred in providing the agreed service'. And this to the extent that, irrespective of the nature of the consideration, 'the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable'. On the notion of the contract for pecuniary interest see, also, Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE) mbH* v *Stadt Köln*, Judgement of 28 May 2020; Case C-328/19 *Porin kaupunki*, Judgment of 18 June 2020; Case C-606/17 *IBA Molecular Italy Srl* v *Azienda ULSS n. 3*, Judgment of 18 October 2018; Case C-51/15 *Remondis GmbH & Co KG Region Nord* v *Region Hannover*, Judgment of 21 December 2016, all available at curia.europa.eu.

[185] On competition law, see G. Amato, 'Il mercato nella Costituzione' *Quaderni costituzionali*, 7 (1992); Id, 'Corte costituzionale e Concorrenza' *Mercato Concorrenza Regole*, 435 (2017); G. Oppo, 'L'iniziativa economica' *Rivista di diritto civile*, 309 (1988); P. Perlingieri and M. Marinaro, 'Sub art. 41', in P. Perlingieri and Aa.Vv., *Commento alla Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2001), 284; M. Giampieretti, 'Il principio costituzionale di libera concorrenza: fondamenti, interpretazioni, applicazioni' *Diritto e società*, 439 (2003); M. Libertini, 'Concorrenza' *Enciclopedia del diritto* (Milano: Giuffrè, 2010), 191; Id, 'La tutela della concorrenza nella Costituzione. Una rassegna critica della giurisprudenza costituzionale italiana dell'ultimo decennio' *Mercato Concorrenza Regole*, 503 (2014); G. Carapezza Figlia, 'Concorrenza e contratto nei mercati dei servizi pubblici' *Rivista di diritto dell'impresa*, 69 (2012); A. Argentati, *Mercato e Costituzione. Il giudice delle leggi di fronte alla sfida delle riforme* (Torino: Giappichelli, 2017); M. Angelone, 'Giudici e Autorità indipendenti: concorrenza e sinergia tra rimedi' *Rassegna di diritto civile*, 406 (2020); C. Iannello, "'Impresa", "mercato" e "concorrenza" fondamenti dell'ordine "costituzionale" neoliberale. Le politiche pro-concorrenziali dall'ambito economico a quello sociale' *Rassegna di diritto pubblico europeo*, 121 (2020); P. Perlingieri, *Il diritto civile*, IV, n 6 above, 193.

[186] Before the express positivization of the public private partnership in the Italian legal system, it was originally introduced into the French legal system by the Ordonnance 17 June 2004 no 2004-559 (repealed by the Ordonnance 23 July 2015 no 2015-889 and now included in the so called *Code de la commande public*) as a financial instrument to mitigate the economic difficulties of administrations linked to the low public budget and the need to renew infrastructure and services (see Ch.-A. Dubreuil, *Droit des contrats administratifs* (Paris: PUF, 2nd ed, 2018), 192). On the basis of the English *Private Finance Initiative* model, the partnership in fact allows the administration to benefit from the anticipated financing of the work or the service to be realized by the private contractor and provides for the delayed payment (see F. Marty and S. Saussier, 'Le phénix renaîtra-t-il de ses cendres? Réflexions sur le recours des collectivités territoriales aux marchés de partenariats public-privé' *Revue d'économie financière*, 129 (2018)).

If it is true that their function undoubtedly achieves the primary economic objectives of the European legal system, since it affects the juridical relationships with legislative characteristics that respond to the competitive needs of the market,[187] however, it does not appear capable of fully grasping the 'new' social reality[188] where the needs of public administrations intersect more and more frequently with those of the community, in search of a collective response, also in terms of legal reality.[189]

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[187] As has in fact been pointed out by Consiglio di Stato within parere 26 July 2018 no 2052, *giustizia-amministrativa.it*, 'such a legal position is the cornerstone of the purposes of European integration, aimed at the creation, extension, enlargement and deepening of a single market (such as to be, in the future, a mere Union "internal market"), with the consequent need to subject to pro-competitive discipline every human activity characterized by an economic relevance, in order to avoid the permanence of spaces subtracted from competition and, therefore, potentially ruled by national rules contrary to the spirit of uniformity underlying the Treaties'.

[188] The necessarily dialectical relationship between law and the social dimension is well highlighted in doctrine. The first, in fact, 'conditioned by economic and social relations, shapes for its part the reality of which it is an integral part'. It should be noted, however, that it would be too simplistic to dwell on a 'merely economic' conception (see P. Perlingieri, 'Economia e diritto' *Annali della Facoltà di economia di Benevento* (Napoli: Edizioni Scientifiche Italiane, 2003), 191) of the social phenomenon: while it is true that a society postulates the rule of law, it is also true that the type of society, the dominant way of life in it, the religious and cultural roots, traditions, the widespread level of civilization end up conditioning the meaning, the content and implementation of legal rules' (P. Perlingieri, *Il diritto civile*, II, n 6 above, 23).

Visionary and truly incisive seems to be today the pages of the French jurists who, more than a century ago, had grasped the need to 'renew the legal science' (J.-P. Chazal, 'Léon Duguit et François Gény, controverse sur la rénovation de la science juridique' *Revue interdisciplinaire d'études juridiques*, 85, 88 (2010)) by opening the traditional interpretive method, '*syllogistique et dogmatique*' (J. Bonnecase, *L'école de l'exégèse en droit civil* (Paris: A. Fontemoing Editeur, 1924); E. Gaudemet, *L'interprétation du Code civil en France depuis 1804* (Bâle: Helbing & Lichtenhahn, 1935) to the '*monde social*' (L. Duguit, *Traité de droit costitutionnel* (Paris: A. Fontemoing Editeur, 1911), and in particular F. Gény, *Méthode d'interpétation et sources en droit privé positif*, 1899 and 2nd ed., 1919; Id, *Sciences et techniques en droit privé positif* (Paris: Société du Recueil Sirey, 1914-1924), I-IV.

[189] The law, as a 'cultural phenomenon', is in fact the continuous 'comparison of the legal system with reality, set of questions and possible solutions', with the consequence that to better understand it, it is not enough just learning laws, but it is necessary to investigate the order in its complexity to understand 'the structure of society, economy, ethics and feelings that animate it, namely its culture': In this way P. Perlingieri, "'Dittatura del relativismo" e "tirannia dei valori"' *Iustitia*, 230-231 (2011). See, also, A. Falzea, 'La prassi nella realtà del diritto', in *Studi in onore di Pietro Rescigno*, I, *Teoria generale e storia del diritto* (Milano: Giuffrè, 1998), 409.

It is therefore clear that the conceptual confusion between 'contract' and 'collaboration' derives from a consolidated European 'pan-contractual' perspective of legal negotiations that extends the application of the contract well beyond traditional national borders,[190] without leaving room for the imagination of the partnership with subjects who pursue purposes unrelated to profit, an 'alternative' to the public procurement schemes.

If we look carefully at the jurisprudence of the Court of Justice, we can see how in the European context the issue of agreements, far from being 'marginal', acquires specific relevance in public-public relations and indeed draws useful coordinates for an easier affirmation even in public-private ones.

According to a consolidated European approach, once fulfilled certain conditions, the agreements concluded between two public bodies (one of which is the university, to entrust directly to the latter the activity of study, consultancy or design) may be classified under national law as collaboration agreements[191] and,

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For a historical and legal perspective that investigates the law through the legal experience of the society, its institutions and relationships between different subjects that compose it, F. Marinelli, *Cultura giuridica e identità europea* (Torino: Giappichelli, 2020).

[190] As highlighted by F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 5, such an extensive approach of the European Union to the interpret the legal acts 'has led to results that do not exclude the application of the discipline of public contracts even to agreements between public administrations and non-profit organizations and even to agreements that do not directly provide for economic exchanges'.

[191] In particular, article 15 of legge 7 August 1990 no 241 allows public administrations to 'conclude agreements to regulate the collaboration in realization of activities of common interest' (see R. Ferrara, 'Gli accordi fra le pubbliche amministrazioni', in M.A. Sandulli ed, *Codice dell'azione amministrativa* (Milano: Giuffrè, 2017), 779; F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 45; C.P. Santacroce, *La stabilità degli accordi tra pubbliche amministrazioni* (Padova: Cedam, 2014), 75; G.M. Esposito, *Amministrazione per accordi e programmazione negoziata* (Napoli: Edizioni Scientifiche Italiane, 1999), 15). See, also, article 30 of Testo unico delle leggi sull'ordinamento degli enti locali that provides for the possibility for local authorities to conclude agreements for a coordinated exercise of functions and services (for the comment, see S. Civitarese Matteucci, 'Art. 30', in R. Cavallo Perin and A. Romano eds, *Commentario breve al Testo unico sulle autonomie locali* (Torino: Cedam, 2006), 177); or again, with particular regard to universities, article 66 of decreto del Presidente della Repubblica

therefore, they remain outside the special discipline of public contracts. The Court observes that whenever the university offers services on the market, even if it does not pursue a leading profit-making aim, it must be qualified as an 'economic operator' and, therefore, subject to the relevant public procurement legislation.[192] However, if the purpose of the public-public partnership agreement is to ensure the performance of a public service function *common* to the two entities, if it is governed solely by requirements related to the pursuit of objectives of general interest and does not place a private provider in a privileged position of advantage over its potential competitors, it may be outside the scope of European law.[193] The public-public agreement, conceived thus on the sharing of tasks and

11 July 1980 no 382 that allows to conclude agreements with public entities for research and consultancy activities.

[192] See Case C-305/08 *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)* v *Regione Marche*, Judgment of 23 December 2009, available at curia.europa.eu.

[193] In this way Case C-159/11 *Azienda Sanitaria Locale di Lecce, Università del Salento* v *Ordine degli Ingegneri della Provincia di Lecce*, Judgment of 19 December 2012, on which J.-D. Dreyfus, 'Toute coopération horizontale inter-administrative n'est pas soustraite au droit des marchés publics' *L'Actualité juridique, éd. droit administratif*, 630 (2013) (with the same perspective, Case C-564/11 *Consulta Regionale Ordine Ingegneri della Lombardia e altri* v *Comune di Pavia*, Judgment of 16 May 2013; Case C-352/12 *Consiglio Nazionale degli Ingegneri* v *Comune di Castelvecchio Subequo*, all available at curia.europa.eu). In the wake of these decisions also the domestic case-law (Consiglio di Stato 16 December 2013 no 6014) excludes the application of the European rules on public evidence to collaborative agreements between administrations referred to in article 15 on the assumption that the same are built on the basis of the communion of interests characterized exclusively by gratuitousness and absence of exchange of benefits.

In doctrine, E. Sticchi Damiani, 'Gli accordi di collaborazione tra università e altre amministrazioni pubbliche' *Diritto e processo amministrativo*, 807 (2012); A. Bartolini, 'Accordi organizzativi e diritto europeo: la cooperazione pubblico-pubblico (CPP) e la disciplina degli appalti' *Urbanistica e appalti*, 1260 (2013); A. Lawrence Durviaux, 'La coopération horizontal' *Revue trimestrielle de droit européen*, 346 (2013); M.E. Comba, 'Cooperazione verticale ed orizzontale tra enti pubblici: verso una "teoria unificata" delle deroghe all'applicazione della normativa europea sugli appalti?' *Diritto pubblico comparato ed europeo*, 298 (2013); S. Foà and M. Ricciardo Calderaro, 'Il partenariato tra università ed enti locali: strumenti pattizi e modello fondazionale' *federalismi.it*, 2 (2016); L. Maurizio, 'Partenariato tra soggetti pubblici con schema di accordo di cooperazione' *Contratti dello Stato e degli Enti pubblici*, 139 (2019).

responsibilities rather than on the mere provision of service behind a fee, clearly recalls the logic of the agreement with a common purpose[194] that, in this case, translates into a mutual collaboration between administrations to coordinate their actions given the common objective of providing free services for the benefit of the community.[195]

The horizontal relationships between the French public entities regulated by the so-called *conventions de coopération* fall within this framework. Depending on the purpose they are aimed at achieving, their conclusion can legitimately be excluded from the public procurement process.[196] This in light of the broader principle of the freedom of organization of public entities by virtue of which the latter enjoy the right to choose, in the pursuit of general interests, to cooperate with other public actors rather than entrust this task to economic operators.[197] In particular, these include local cooperation agreements, which concern the joint exercise of certain powers, a public service or the sharing of human and financial resources.[198]

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[194] For agreements with communion of purpose whose essential profiles can be traced in particular in associative phenomena, see T. Ascarelli, 'Il contratto plurilaterale', in *Saggi giuridici* (Milano: Giuffrè, 1949), 270; P. Ferro-Luzzi, *I contratti associativi* (Milano: Giuffrè, 1971), 242; B. Inzitari, 'Riflessioni sul contratto plurilaterale' *Rivista trimestrale di diritto e procedura civile*, 476 (1973); S. Maiorca, 'Contratto plurilaterale' *Enciclopedia giuridica* (Roma: Treccani, 1988), IX, 7; A. Belvedere, 'Contratto plurilaterale' *Digesto delle discipline privatistiche*, *Sezione civile* (Torino: Utet, 1989), IV, 270. More recently, R. Cippitani, *I contratti*, n 1 above.

[195] Resolution of the Anti-corruption National Authority (ANAC) 21 October 2010 no 7 '*Questioni interpretative concernenti la disciplina dell'articolo 34 del d.lgs. 163/2006 relativa ai soggetti a cui possono essere affidati i contratti pubblici*'. On this point, also, Corte di Cassazione 13 July 2006 no 15893, *Giustizia civile – Massimario*, (2006).

[196] On this topic, J.-D. Dreyfus, 'Mutualisation des services et mise en concurrence – autour des notions de bonne organisation des services et des prestations hors marché' *L'Actualité juridique, éd. droit administratif*, 1865 (2007).

[197] Article 2, paragraph 1 of the European Parliament and the Council Directive 2014/23/EU.

[198] That has to be distinguished from agreements concluded between public entities which, instead, realize the devolution of competences referred to in article L5210-4 of *Code général des collectivités territoriales*.

Such agreements are regulated by *Code général des collectivités territoriales* and they may provide for the joint implementation of actions of general interest or the setting-up, for this purpose, of specific bodies of common interest with a view to strengthening cooperation between the different areas of French territory: metropolises, urban communities and rural areas (articles L5221-1; L5411-1; L5611-1 and 5111-1). This cooperation is built on the aggregation of capabilities and financial resources to provide public services that are not based on the exchange of services, but they are related to the internal organization between entities: therefore, it falls outside the public procurement.[199]

With this perspective also the Court of Justice. In 2009, in the *Commission* v *Germany*[200] case it highlighted that it is not acceptable to absolutely deny public bodies the possibility of implementing forms of cooperation, other than service contracts. Public bodies must be allowed to conclude agreements aimed at mutual assistance in the implementation of a public service common to the parties, provided that it is carried out under more favourable economic conditions and in the absence of financial movements other than those corresponding exclusively to the reimbursement of any charges.

Finally, it should be noted that the openness towards public-public cooperation is not infrequently reflected in the French case-law. Such is the decision of *Conseil d'État* of 4 March 2009 on the agreements concerning the

[199] H. Hoepffner, *Droit*, n 64 above, 282.

[200] Case C-480/06, *Commissione* v *Germania*, Judgment of 9 June 2009 on which J.-D. Dreyfus and S. Rodrigues, 'La coopération intercommunale confortée par la CJCE?' *L'Actualité juridique, éd. droit administratif*, 1717 (2009); F. Linditch, 'La Cour de justice des communautés accepte les prestations inter-collectivités dès lors qu'elles traduisent une véritable démarche de coopération' *La Semaine juridique Administrations et collectivités territoriales*, 2248 (2009); A. Chaminade, 'Des possibilités de coopération accrues pour les collectivités territoriales' *Semaine juridique*, 662 (2010).

participation of public bodies in the so called '*groupements d'intérêt public*'.[201] The latter are legal entities governed by public law with their own financial and administrative autonomy and they consist of public partners who join together to manage or carry out activities of general interest. The relations between entities are regulated by agreements with which they agree to share human, technical and financial resources, for a specific purpose, not for profit and in accordance with the *mission d'intérêt général* common to the participants. In this case, the French judges strengthened the idea that public bodies are not always required to resort to the market to meet their needs. Instead, they may freely use an entity set up for this purpose in cooperation with other bodies without the need for it to participate in public procurement processes. This is to the extent that this entity is effectively jointly controlled by the participating public bodies and aimed at implementing services that meet their common needs.

The decision of *Conseil d'État* of 3 February 2012[202] is a further case-law example related more specifically to public-public contractual cooperation which, however, does not imply the creation of an autonomous legal entity. This decision was strongly criticized in doctrine.[203] However, it has the merit of having traced the boundary between public-public cooperation and the rules of competition to which the former does not fall. In particular, for the French judges the criterion that separates the two cases must be identified in the specific interests: that is, the

[201] Conseil d'État 4 March 2009 no 300481, *Lebon*.

[202] Conseil d'État 4 February 2012 no 353737, *Lebon*.

[203] As it is considered non-compliant with the criteria laid down in European case-law on cooperation between public bodies: see L. Richer, 'Un contrat d'entente intercommunale n'est pas une délégation de service public' *L'Actualité juridique, éd. droit administratif*, 555 (2012) and H. Hoepffner, *Droit*, n 64 above, 284.

absence of for-profit purposes consistent with the parties' conduct which cannot be understood as that of an economic operator in a competitive market.[204]

The European and French case-law previously analyzed are not an isolated case. The negotiation schemes causally defined by the sharing of interests are frequently used even in the most strictly private sphere to formalize those spontaneous aggregations of entities, with or without profit, with a view to the realization of a purpose or a shared project. The peculiarity of such agreements, commonly known as network contracts and temporary associations of purpose,[205] lies essentially in the possibility of implementing a common programme for the subjects involved without the need to constitute an autonomous and distinct subject of law for this purpose.[206] Like the collaborative agreements between

[204] On this topic, also, Conseil d'État 23 October 2003 no 369315, *Lebon* and Conseil d'État 6 April 2007 no 284736, *Lebon*.

[205] The network contract (between companies) and the temporary association of purpose (between non-profit entities) are the example of those models of collaboration, the result of practice, which 'are innovating the scheme of the Civil Code based on the exchange logics' (R. Cippitani, 'Associazione temporanea di scopo e altri raggruppamenti tra i beneficiari di sovvenzioni' *I Contratti*, 843 (2011)). In doctrine such collaborative tools are identified as 'atypical associative agreements' (see F. Galgano, 'Il negozio giuridico', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2002), 199, with particular regard to *joint venture*); or, again, as 'trans-typical agreements' (C. Scognamiglio, 'Dal collegamento negoziale alla causa di coordinamento nei contratti tra imprese', in P. Iamiceli ed, *Le reti di imprese e i contratti di rete* (Torino: Giappichelli, 2009), 61; G. Villa, 'Il contratto di rete', in G. Gitti, M. Maugeri and M. Notari eds, *I contratti per l'impresa* (Bologna: Il Mulino, 2012), 504; F. Cafaggi, 'Contratto di rete' *Enciclopedia del diritto* (Milano: Giuffrè, 2016), IX, 207) that because of a particular configuration and causal connotation do not coincide with a precise form of negotiation, but are placed between the general discipline of the contract and single types of contract.

[206] In case of the network contracts, originally regulated by decreto legge 10 February 2009 no 5 and subsequently by decreto legge 22 June 2012 no 83, 3 organizational models including the one without legal subjectivity are identified (see F. Cafaggi, P. Iamiceli and G.D. Mosco eds, *Il contratto di rete per la crescita delle imprese* (Milano: Giuffrè, 2012)). With regard to temporary associations of purpose, however, it is evident that there is still no formal normative recognition of these collaborative forms and that, therefore, both the jurisprudence and the doctrine (see R. Cippitani, 'Associazione', n 205 above, 844-845) recall by analogy the concept of aggregation in the field of public procurement contracts which 'neither realize the simple society, which postulates a precise

public administrations, therefore, they accept the same logic of sharing of purpose,[207] deviating instead from the model of the exchange contract.[208]

The emergence of collaborative relations *in* the public and private spheres now makes it possible to shift the attention to the level of relations *between* the public and private spheres, in search of a national and European regulatory dialogue that is capable of emancipating new forms of collaboration from the mere function of exchange and, at the same time, combining economic needs with social purposes.[209] Starting from the premise that it does not appear acceptable to

agreement between the parties supported by the *affectio societatis*, nor the irregular or de facto society' (Corte di Cassazione, 9 April 2010 no 8531).

[207] The network contracts are intended as agreements with communion of purpose by P. Iamiceli ed, *Le reti*, n 205 above; G.D. Mosco, 'Frammenti ricostruttivi del contratto di rete' *Giurisprudenza commerciale*, 839 (2010); G. Villa, 'Reti di imprese e contratto plurilaterale' *Giurisprudenza commerciale*, 944 (2010); V. Cuffaro, 'Contratti di impresa e contratti tra imprese' *Il Corriere del merito*, 5 (2010); R. Santagata, 'Il contratto di rete fra (comunione di) impresa e società (consortile)' *Rivista di diritto civile*, 323 (2011); S. Delle Monache and F. Mariotti, 'Il contratto di rete', in V. Roppo ed, *Opere e servizi*, in *Trattato dei contratti* (Milano: Giuffrè, 2014), III, 1235.

[208] The need to identify, in addition to the traditional exchange contract, other types of contract to satisfy interests of parties other than 'exchange' ones is discussed in French doctrine (see M. Latina, 'Contrat: généralités' *Répertoire Dalloz de droit civil*, 14 (2017)). For this purpose, is made a distinction between '*contrat-partage*', whose aim is '*la réalisation d'une distribution, c'est-à- dire d'un partage de valeurs*' (F. Chénedé, *Les commutations en droit privé. Contribution à la théorie générale des obligations* (Paris: Economica, 2008), 115), the '*contrat-alliance*' (J.-F. Hamelin, *Le contrat-alliance* (Paris: Economica, 2012), 77), and the '*contrat-concentration*' (S. Laquette, *Le contrat-cooperation. Contribution à la théorie générale du contrat* (Paris: Economica, 2012) also identifies an intermediate figure, the so called '*contrat-cooperation*'): tutti accomunati dallo spirito di collaborazione che guida l'alleanza tra le parti in vista di un obiettivo comune.

[209] In this perspective, is quite illuminating the hope towards the study of negotiating autonomy acts from the point of view of depatrimonialization proposed by P. Perlingieri, *Il diritto civile*, IV, n 6 above, 51-52. For the better implementation of the latter, in fact, the public interest, which in the cooperation agreements takes the form of the general interest 'common' to the parties, can no longer be '*individuato da un produttivismo mirante all'autarchia, né da una mera tendenza egualitaria e collettiva che accentui l'equa distribuzione rispetto alla produzione dei beni, ma dalla produzione nel rispetto del valore dell'uomo e della sua dignità, in un saggio equilibrio tra esigenze di efficienza e ragioni di giustizia sociale*' ('identified by a productivism aimed at autarchy, nor by a mere egalitarian and collective tendency that accentuates the equal distribution with respect to the production of goods, but by production with respect for the value of man and his dignity, in a wise balance between efficiency needs and social justice

preclude the configuration of public-private relations through agreements a priori, the realization of this possibility however inevitably suffers from the highly protective approach of the European Union[210] towards the preservation of market rules. Therefore, in light of the unity of the regulatory system, it poses the need to frame and make the collaborative model thus outlined more systematic, which finds its *raison d'être* in articles 2 and 118, paragraph 4 of the Constitution.

reasons'): P. Perlingieri, 'Il diritto agrario', n 32 above, 265. See, also, C. Donisi, 'Verso la "depatrimonializzazione" del diritto privato' *Rassegna di diritto civile*, 644 (1980).

[210] This is made evident by judgments in which the Court, in the field of interpretation of the notion of 'agreement' concluded between a public entity and a non-profit entity, has specified that a possible different qualification of the agreement in light of the national law is irrelevant and insufficient to not subject it to the application of rules on public procurement contracts (see Case C-264/03 *Commissione delle Comunità europee* v *Repubblica francese*, Judgment of 20 October 2005; Case C-537/19 *Commissione europea* v *Repubblica d'Austria*, Judgment 22 April 2021; Case C-436/20 *Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)* v *Consejería de Igualdad y Políticas Inclusivas*, Judgment of 14 July 2022, all available at curia.europa.eu).

Chapter II

Co-programming and co-design in the renewed legislative formula of article 55 of the Third Sector Code: negotiation profiles of the 'active involvement' of Third sector entities

Summary: 1. Collaboration between administrations and entities of the Third sector as a convergence between the public, economic and social spheres. – 2. Article 55 of the Third Sector Code: from 'mere' promotion to real cooperation. – 3. Co-programming and co-design in the trinomial solidarity-competition-subsidiarity. – 4. The typical nature of Third sector entities and their *ratio* according to the particular collaborative nature of the public-private relationship. – 5. The impact of the interest on the structure and object of the activity of the entity: the use of entrepreneurial models for non-profit purposes. – 6. Gratuitousness and the communion of purpose as a causal foundation of the 'active involvement' of Third sector entities. The recall of the French *subvention* institute. – 7. The unitary evaluation of the procedural and civil profiles of the co-programming and co-planning agreements.

1. The theme of collaborative agreements between public and private is part of the relations between administrations and non-profit organizations and, on the value level, inevitably translates into trinomial solidarity-competition-subsidiarity.

If constitutional solidarity,[211] projected to take the interest of others as its own,[212] constitutes the free and spontaneous expression of the deep sociality that

[211] The axiological scope of constitutional solidarity with respect to the solidarity of the Civil Code is grasped by P. Perlingieri, *Il diritto civile*, II, n 6 above, 162: whereas the latter 'is only economic, aimed at nationalistic purposes, efficiency of the system and increased productivity', the first 'has political, economic, social purposes, the relevance of which emerges from the link between articles 2 and 3 of the Constitution' and, more broadly, from the whole constitutional system.

[212] The 'horizontal' dimension of the solidarity is identified with inter-individual realtionships by G. Alpa, 'Solidarietà', n 103 above, 366. For the distinction between the 'horizontal' and 'vertical' solidarity, the first laid down in article 2 of the Constitution and concerns social relations, while the second is found in article 3, paragraph 2 of the Constitution and concerns the fundamental role of the Republic in removing obstacles to the full development of personality and the effective participation of all in the political, economic and social life of the State, see S. Galeotti, 'Il valore della solidarietà' *Diritto e società*, 4 (1996); F. Rigano, 'La solidarietà orizzontale e il ruolo fondamentale dell'associazionismo', in B. Pizzini and C. Sacchetto eds, *Il dovere di solidarietà* (Milano: Giuffrè, 2005), 63.

characterizes and directs the individual to the construction of social bonds within the community;[213] individualism, on the contrary, 'historically antagonistic to solidarity […] isolated monad of the relational context',[214] relies on the market, whose rules are dictated to guarantee competition.

The first, the result of a constitutional project built around the human person,[215] an indispensable part of a larger economic project,[216] the second, solidarity and competition, although they must be carefully balanced, appear today mutually linked. The clear boundary between the category of 'being' and 'having'[217] blurs in the Italian-European framework. The impact of solidarity on the market economy and the impact of the market economy on the achievement

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213 Thus overcoming 'the atomistic limit of individual freedom' for which the person would otherwise be called to act by 'utilitarian calculation or by the imposition of an authority', remaining strictly anchored to the 'constraints arising from public duties or from commands of authority': Corte costituzionale 28 February 1992 no 75, *Giurisprudenza italiana*, 1206 (1992) commented by E. Rossi, 'Principio di solidarietà e legge-quadro sul volontariato' *Giurisprudenza costituzionale*, 2348 (1992).

214 In this way E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), 16.

215 See, broadly, P. Perlingieri, *La personalità umana*, n 76 above.

216 Especially since the White Paper of 1985 (see Completing the Internal Market: White Paper from the Commision to the European Council) the Member States are increasingly implementing policies to meet European aims of achieving and ensuring the competitiveness and competition needed to preserve the freedom of economic initiative and to raise product quality on the market and contain their prices (see Corte costituzionale 13 January 2004 no 14 commented by V. Talienti, 'Le politiche statali di sostegno del mercato alla luce del diritto comunitario e delle competenze legislative regionali nel nuovo Titolo V, parte II, della Costituzione con particolare riferimento alla "tutela della concorrenza"' *Giurisprudenza italiana*, 2235 (2004); L.F. Pace, 'Il concetto di tutela della concorrenza, l'art. 117 Cost. e il diritto comunitario: la "costituzionalizzazione" della figura dell'"imprenditore sovvenzionato"' *Giurisprudenza costituzionale*, 4677 (2004); C. Buzzacchi, 'Principio della concorrenza e aiuti di Stato tra diritto interno e diritto comunitario' *Giurisprudenza costituzionale*, 277 (2004)).

217 '*L'"avere", che attiene alle strutture economiche e produttive, all'aspetto patrimoniale e mercantile dell'organizzazione; l'"essere", che riguarda l'esistenza della persona con i suoi diritti e doveri*' ("'having", which concerns the economic and productive structures, the patrimonial and market aspect of the organization; "being", which concerns the existence of the person with rights and duties'): P. Perlingieri, *Il diritto civile*, II, n 6 above, 26.

of social objectives is increasingly disruptive.[218] Thus, while the notion of the entrepreneur in the Civil Code remains unchangingly connoted by 'professionalism', 'economy' and 'organization' given the production or exchange of goods and services,[219] in light of the constitutionally protected values,[220] it is nevertheless coloured with new purposes and aims with social content[221] in the

[218] R. Cippitani, *La solidarietà*, n 103 above, 265-266 and 273. The Author observes that 'it is no longer possible to think of a contrast between solidarity and the market or consider the former as corrective of the latter'. P. Perlingieri, 'Mercato, solidarietà e diritti umani', in Id., *Il diritto dei contratti*, n 63 above, 245, by hoping of rethinking the economy, which can combine economic efficiency and human rights, the market and democracy, asserts conversely that 'the society cannot be reduced to the market and its rules; the law to which the regulation of the society belongs, indicates limits and correction'.

[219] Article 2082 of the Civil Code.

[220] For example, consider the impact on economic relations of value-environment which, alongside social utility, health, security, freedom and human dignity, has finally found the express protection in the Constitutional Charter (legge costituzionale 11 February 2022 no 1) and before in the European 'polluter-pays principle' (article 191, paragraph 2 TFEU) and 'do not significant harm principle' (European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13). On the interplay between the environment, person and market, see M. Pennasilico, *Manuale*, n 105 above, 43 and 161; Id., *Contratto ecologico*, n 105 above, 810; Id., 'La "sostenibilità ambientale" nella dimensione civil-costituzionale: verso un diritto dello "sviluppo umano ecologico"' *Rivista quadrimestrale di diritto dell'ambiente*, 4 (2020); P. Perlingieri, 'Persona, ambiente', n 104 above, 321; E. Caterini, *Sostenibilità*, n 214 above, 9.

[221] The growing awareness of the mutual connection between the success of enterprises and the level of development of the territory in which they operate has encouraged the opening of traditional market logics, based on the maximization of profit, to social and environmental problems. Multiple enterprises, the so called 'socially responsible', are now committed to reconciling their economic strategies with socially and environmentally sustainable development by taking responsibility for future generations for the impact they have on society (see the several works collected in G. Conte ed, *La responsabilità sociale dell'impresa. Tra diritto, etica ed economia* (Roma-Bari: Laterza, 2008); S. Zamagni, *Impresa*, n 89 above). These include, in particular, the benefit companies introduced in Italy by legge 28 December 2015 no 208 with the aim of promoting a greater reconciliation between profit purposes and social benefits (V. Bancone, 'L'impresa "civile". Impresa sociale, benefit corporation e la terra di mezzo' *Le Corti salernitane*, 487 (2018); M. Squeglia, 'Le società benefit e il welfare aziendale. Verso una nuova dimensione della responsabilità sociale delle imprese' *Diritto delle relazioni industriali*, 61 (2020)). The same aim of successfully combining economic efficiency and the social dimension is pursued by the French *Sociétés Coopératives d'Intérêt Collectif* and the English *Community Interest Companies*. Both represent forms of cooperative and social enterprise introduced by the respective legal systems to increase levels of communities' welfare through profits deriving from the

perspective of a civil economy[222] that places the market at the service of the person.[223] For their part, those who traditionally pursue civic, solidarity and social utility purposes by carrying out activities of general interest are no longer strangers to economic activity.[224] In this scenario, therefore, the public-private collaboration

performance of economic activities for social purposes (see *Décret n. 2002-241 du 21 février 2002 relatif à la société coopérative d'intérêt collectif* and *Community Interest Company Regulations 30th June 2005 no 1788*).

[222] Also the 'European' vision of the market demonstrates greater openness towards social purposes to the point of 'functionalizing the principle of the free market' (E. Caterini, *Sostenibilità*, n 214 above, 39) to sustainable development, the promotion of the social market economy and the improvement of the quality of the environment (article 3, paragraph 3 TEU). See on this point the several initiatives of the European Commission: *Social Business Initiative – Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation* COM(2011) 682 final and, more recently, *Building an economy that works for people: an action plan for the social economy* COM (2021) 778 final.

For a comparative analysis of the development in Europe of the concept of 'social economy' and the spread of the relevant legislation in Member States, see A. Evers and J.-L. Laville eds, *The Third Sector in Europe* (Cheltenham: Edward Elgar, 2004); J.L. Monzón and R. Chaves, *The Social Economy in the European Union* (Bruxelles, 2012), available at op.europa.eu; Id, *Recent evolutions of the Social Economy in the European Union* (Bruxelles, 2017), available at www.eesc.europa.eu, 9.

[223] Thus, the link between freedom of economic initiative and the fundamental values of the Constitution can be grasped. If, in fact, the function of the market is necessarily inferred from the 'same values that, immanently, from within bind economic freedom', it follows that 'economic activity, the category of having, can only be instrumental to the realization of existential values, to the category of being' (P. Perlingieri, 'Mercato', n 218 above, 255). As the Constitution itself continues to remind the European legislator, 'there are values and interests that cannot be realized starting from the market and in need, indeed, of being defended by the expansion of its rules: dignity of the person, health […], environment need to be imposed as constraints on the market': (G. Amato, *Il mercato*, n 185 above, 18).

[224] These include social enterprises referred to in decreto legislativo 3 July 2017 no 112 which, although engaged exclusively in the social mission and characterized by the prohibition of distribution even indirect of profits, may use productive and commercial activities as sources of self-sustaining and investment in new projects of social utility. To this end, they can be constituted in any legal form, including forms referred to in Book V of the Civil Code (see on this topic C. Giustolisi, 'La disciplina dell'impresa sociale: l'ipotesi di un ponte tra il terzo e il quarto settore' *Rivista di diritto dell'impresa*, 621 (2019); P. Coppola, 'I nuovi modelli dell'ibridazione e della convergenza del fine sociale nell'economia: la riforma degli enti del terzo settore e l'impresa sociale (prima e seconda parte)' *Innovazione e diritto*, 5 (2018); A. Fici, 'L'impresa sociale e le altre imprese del Terzo settore' *Analisi giuridica dell'economia*, 19 (2018); V. Bancone, 'Il ruolo dell'impresa sociale ai tempi della crisi economica' *Foro napoletano*, 309 (2016); P. Venturi and F. Zandonai eds, *L'impresa sociale in Italia. Pluralità dei modelli e contributo alla ripresa* (Milano: Altra Economia, 2012), 27). In this perspective the new regulation of the Third Sector entities that allows to carry out economic activities is very significant. These are allowed on condition that the constitutive act or the statute of the entity allow

becomes the protagonist of the promotion of the new model of local development that constitutes the synthesis between the public, economic and social spheres, aimed at overcoming the separation between the for-profit and the not-for-profit sector in the perspective of a profitable reconciliation between 'market and social justice'.[225]

However, precisely this mixture between productive activity, which characterizes the entity of the Third sector at the operational level, and the intention of solidarity, which, on closer inspection, from mere motive becomes the causal foundation of its action,[226] invests the delicate relationship between solidarity and competition and, therefore, requires reconsidering of the consensual forms of alliance between the public and private community in a different light, that of the principle of horizontal subsidiarity.[227]

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it, that such activities are secondary and instrumental to those of general interest (article 6 of the Third Sector Code) and that the entities in question are registered, in addition to the Single National Register, also in the Register of Enterprises (article 11 of the Third Sector Code). On compatibility between economic activities and non-profit purposes, A. Fusaro, 'Spunti per un'ermeneutica della Riforma del Terzo settore e dell'Impresa sociale' *federalismi.it*, 229 (2020)).

[225] E. Caterini, 'La tutela giuridica del consumo nell'economia sociale di mercato europea. Dal globalismo ai globalismi' in *Scritti in onore di Vincenzo Buonocore*, II, *Diritto commerciale* (Milano: Giuffrè, 2005), 1007.

[226] The contractual function based on the 'sine-allagmatic satisfactive performance' which, while connoting the contract with patrimonial content, operates outside of competitive reasons, is discussed by E. Caterini, *Sostenibilità*, n 214 above, 96 and 101. The Author underlines that these contracts are to be found in the '"social community" rather than in the market, which is a legal construct'. For a different opinion, see R. Cippitani, *La solidarietà*, n 103 above, 366.

[227] From this point of view, it is significant the doctrine that conceives subsidiarity in terms of the determining criterion of the legal sources, capable of identifying the most 'proficient' normative power to regulate a given subject taking into account the peculiarities of the specific case (P. Femia, *Sussidiarietà*, n 34 above, 145). Thus, unlike the criteria of hierarchy and formal competence, the principle of subsidiarity serves as 'decision-making technique' capable of justifying 'the choice of the most appropriate prescriptions to favour the social utility in the specific case' (F. Maisto, *Sussidiarietà*, n 34 above, 1360-1361). More widely, the horizontal and vertical subsidiarity 'represent a new way of conceiving competence in terms of effectiveness, more functional […] to the implementation of common values' (P. Perlingieri, *Il diritto civile*, II, n 6 above, 102). On this point see, also, A. Moscarini,

2. With the reform of the Third Sector, an ambitious work of revision and reorganization of the existing 'tangle'[228] of special laws according to the unitary and organic perspective of the Third Sector Code has been carried out.[229] It has been an operation of great importance,[230] but not without critical profiles,[231] whose impact, however, goes far beyond mere legislative rationalization.

Competenza e sussidiarietà nel sistema delle fonti. Contributo allo studio dei criteri ordinatori del sistema delle fonti (Padova: Cedam, 2003), 123; P. Perlingieri, *Complessità*, n 69 above, 188; D. De Felice, *Principio di sussidiarietà*, 34 above, 58; F. Criscuolo, 'Autonomia negoziale e autonomia contrattuale' *Trattato di diritto civile del Consiglio Nazionale del Notariato* diretto da P. Perlingieri (Napoli: Edizioni Scientifiche Italiane, 2008), 17.

[228] This expression is of M.V. De Giorgi, 'Il nuovo diritto degli enti senza scopo di lucro: dalla povertà delle forme codicistiche al groviglio delle leggi speciali' *Rivista di diritto civile*, 287 (1999).

[229] See A. Fusaro, 'Gli enti del Terzo settore. Profili civilistici', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2022); A. Propersi and G. Rossi, *Gli enti del Terzo settore. Gli altri enti non profit dopo la riforma* (Milano: Giuffrè, 3rd ed, 2022); M. Gorgoni ed, *Il Codice del Terzo settore. Commento al Decreto legislativo 3 luglio 2017, n. 117* (Pisa: Pacini Giuridica, 2nd ed, 2021); P. Consorti, L. Gori and E. Rossi, *Diritto del Terzo settore* (Bologna: Il Mulino, 2nd ed, 2021); F. Sanchini, *Profili costituzionali del Terzo settore* (Milano: Giuffrè, 2021); D. Di Sabato and O. Nocerino eds, *Il Terzo settore. Profili critici della riforma* (Napoli: Edizioni Scientifiche Italiane, 2019); M. Schirripa ed, *Il Terzo settore e la Stella del no profit* (Napoli: Edizioni Scientifiche Italiane, 2019); A. Fici ed, *La riforma del Terzo settore e dell'impresa sociale* (Napoli: Editoriale Scientifica, 2018); A. Mazzullo, *Il nuovo codice del Terzo settore. Profili civilistici e tributari* (Torino: Giappichelli, 2017).

[230] As has been underlined, the reform represents an opportunity for the Third Sector because it 'creates and establishes a ""Third Sector Law"": A. Fici, 'Introduzione: la riforma come opportunità per il Terzo settore', in Id ed, *La riforma*, n 229 above, 17-18. In this perspective, therefore, the reform favored the overcoming of the complex and fragmented pre-existing regulatory framework and gave the Third Sector a 'dignity equal to that of public institutions and enterprises: C. Borzaga, 'Opportunità e limiti della riforma del terzo settore', in A. Fici ed, *La riforma*, n 229 above, 57; Id., 'I decreti delegati sull'impresa sociale e sul Codice del Terzo settore: la riforma dei "mezzi passi"' *Welfare Oggi*, 19 (2017). This opinion is shared by L. Gori, 'Il sistema delle fonti nel diritto del terzo settore' *Osservatorio sulle fonti*, 1 (2018); M.V. De Giorgi, 'Riforma del Terzo settore e diritto civile' *Ianus*, 9 (2018); in critical sense, M. Rispoli Farina, 'Il codice del Terzo settore tra novità e contraddizioni', in D. Di Sabato and O. Nocerino eds, *Il Terzo settore*, n 229 above, 3.

[231] A choice of legislator to keep the different discipline of some Third sector entities is analysed from a critical point of view by C. Borzaga, 'Opportunità e limiti', n 230 above, 63. With similar perspective M. Rispoli Farina, 'Il codice', n 230 above, 12; P. Consorti, L. Gori and E. Rossi, *Diritto del Terzo settore*, n 229 above, 111 and 123; G. Girelli, 'Il regime fiscale del Terzo settore', in M. Gorgoni ed, *Il Codice*, n 229 above, 473.

It should also be noted that although the reform was adopted in 2017, it is still incomplete from the fiscal point of view. In accordance with European law, the Italian legislature provided for the

The entire regulatory framework is, in fact, deeply engraved by the constitutional values that give the Third sector a specific identity, recognize its undeniable social function[232] and guide its action to this end.[233] Therefore, the opinion of those who see the Third Sector Code as a means for the effective implementation of the constitutional dictate seems widely shareable, identifying

application of the tax provisions from the tax period following the Commission's favourable opinion. Specifically, to date it is still in progress the process, referred to in article 108, paragraph 3 TFEU, to verify the compatibility of the provisions referred to in articles 16 and 18 of the legislative decree on social enterprises and articles 77, 79, paragraph 2 *bis*, 80 and 86 of the Third Sector Code (some of which has already been amended the decreto legge 21 June 2022 no 73 converted with legge 4 August 2022 no 122). On the tax profiles of the Third sector entities see G. Sepio, 'I ricavi "pubblici". Il finanziamento dello stato e la fiscalità del Terzo settore', in C. Beria D'Argentine ed, *Il finanziamento del Terzo settore* (Milano: Giuffrè, 2019), 23; G. Boletto, 'La sentenza della Corte Costituzionale n. 131 del 2020. Il suo (possibile) impatto nel sistema di imposizione dei redditi del Terzo settore' *Impresa sociale*, 7 (2021), and recently A. Giovannini, 'Terzo settore: il profitto sociale come nuovo genere di ricchezza' *Rivista di diritto tributario*, 29 (2022).

[232] The reference is the famous ruling of Corte costituzionale no 75 of 1992 in which, almost 30 years before, the value and the social *ratio* of volunteering was grasped precisely because the same 'is a way of being of the person in the context of social relations, namely a paradigm of social action referring to individuals or associations of individuals'. In this perspective, the Third Sector undoubtedly contributes to the full implementation of the 'person-value' as an individual, as it is conceived in function of the individual and it becomes an instrument of realization (on the centrality of the human-community relationship P. Perlingieri, *Il diritto civile*, III, n 6 above, 84-85; Id., *La personalità umana*, n 76 above, 142 and 145); but also as an integral part of social reality in that, as the Court stated, 'it is the most immediate expression of man's primordial social vocation, deriving from the original identification of the individual with the social formations in which his personality develops and from the bond of active belonging that binds the individual to the community': Corte costituzionale 28 February 1992 no 75. On the essential role of social formations, as the natural 'place' for the development and implementation of human's personality, among others, G. Cotturri, 'Individuo e gruppi sociali. Profili costituzionali', in N. Lipari, *Diritto privato. Una ricerca per l'insegnamento* (Bari: Laterza, 1974), 123; C. Moratti, *Istituzioni di diritto pubblico* (Padova: Cedam, 1991), II, 1058; P. Perlingieri and R. Messinetti, 'Sub art. 2', in P. Perlingieri and Aa.Vv., *Commento alla Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2001), 11-12; P. Perlingieri and R. Di Raimo, 'Sub art. 18', in P. Perlingieri and Aa.Vv., *Commento alla Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2001), 97.

[233] In particular, the express reference to articles 2, 3, 4, 9, 18 and 118 of the Constitution allows to draw up a 'constitutional statute' for the Third Sector which 'on one hand recognises its value and on the other regulates its legal area of action': P. Consorti, L. Gori and E. Rossi, *Diritto del Terzo settore*, n 229 above, 43. With a similar perspective, S. Amorosino, 'Il Terzo settore tra pubblici poteri ed autonomia sociale' *Rassegna di diritto civile*, 304 (2019).

the axiological fulcrum of the reform in the relationship of mutual influence and integration between the principle of solidarity and that of subsidiarity:[234] one in its spontaneity and the other in its relational dimension.[235]

In this perspective, solidarity is not only placed among the founding values of the legal system as the basis of social coexistence,[236] but it also assumes a strong prescriptive value since, in the light of the principle of horizontal subsidiarity, it is configured as a duty of the State in promoting and increasing the cultivation of

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[234] P. Cuzzola, 'Terzo settore e (nuove) regole del gioco: il principio di sussidiarietà', in M. Schirripa ed, *Il Terzo settore*, n 229 above, 49: the Author sees between the two principles a peculiar relationship of complementarity and mutual support in their implementation to the extent that subsidiarity is a form of 'speciation of solidarity, that is to say, a new and specific form of manifestation which originates from solidarity and which spreads as a response to the new complexities that reality manifests. See, also, D. D'Alessandro, *Sussidiarietà*, n 52 above, 81, who sees in subsidiarity the function of 'rationalization of solidarity', that is, of balancing 'freedom, autonomy and needs'. Or again, V. Berlingò, *Beni relazionali*, n 39 above, 89, according to which 'il principio di sussidiarietà orizzontale struttura in termini giuridici la solidarietà perché tende ad ampliare il più possibile la cerchia degli operatori sociali al servizio dei principi consacrati nella Carta fondamentale fin dalle sue prime disposizioni (artt. 1-5)' ('the principle of horizontal subsidiarity structures solidarity in legal terms because it aims to widen as much as possible the circle of social workers at the service of the principles enshrined in the Fundamental Charter from its first provisions (articles 1-5)').

[235] '*La sussidiarietà orizzontale prevede, per la sua realizzazione, che si instaurino rapporti fra soggetti pubblici e soggetti privati in vista del perseguimento di un interesse comune a entrambi, l'interesse generale. Ma questi rapporti, se conflittuali e competitivi, rendono problematica o comunque meno efficiente la soddisfazione di tale interesse; viceversa impostare tali rapporti sulla base del principio di autonomia relazionale consente di creare delle "alleanze" vantaggiose per tutti i soggetti coinvolti e, soprattutto, per il perseguimento dell'interesse generale*' ('for its realisation the horizontal subsidiarity requires the establishing of relations between the public and private entities with a view to the pursuit of a common interest, the general interest. But these relations, if conflictual and competitive, make the satisfaction of this interest problematic or less efficient; on the contrary, setting up such relations on the basis of the principle of relational autonomy allows the creation of "alliances" that are beneficial to all the parties involved, and above all for the pursuit of the general interest'): G. Arena, *Il principio di sussidiarietà*, n 60 above, 179.

[236] On the several 'faces' of solidarity whose deep roots can be found in the French legal experience, see M. Borgetto, *La notion de fraternité en droit public français. Le passé, le présent et l'avenir de la solidarité* (Paris: LGDJ Editions, 1993); J.-C. Beguin, P. Charlot and Y. Laidié eds, *La solidarité en droit public* (Paris: Editions l'Harmattan, 2005), 11; A. Supiot ed, *La solidarité. Enquête sur un principe juridique* (Paris: Odile Jacob, 2015).

the altruistic feeling.[237] On the other hand, subsidiarity 'brings a freely undertaken form of solidarity back to the centre of the system'[238] which finds its widest expression in the Third Sector.[239]

In the implementation of the new Code, the interaction between the principles of solidarity and subsidiarity can be seen in particular in the renewed dynamic relationship between the public and the private[240] sector, where we can witness the creation of new forms of alliances between institutions and social formations,

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[237] P. Cuzzola, *Terzo settore*, cit., p. 49 interprets with this perspective the opinion of D. Caldirola, 'Stato, mercato e Terzo settore nel decreto legislativo n. 117/2017: per una nuova governance della solidarietà' *Rivista di diritto pubblico comparato italiano ed europeo*, 37 (2018) according to which '*nel Codice del Terzo settore la solidarietà spontanea viene in un certo qual modo organizzata, trova gli strumenti e i meccanismi per potersi esprimere, cosi ché il dovere inderogabile dello Stato di rimuovere gli ostacoli di ordine economico e sociale che impediscono il pieno sviluppo della persona, non è circoscritto all'erogazione di servizi e prestazione o all'imposizione di quegli obblighi che concretizzano la solidarietà doveroso, ma si sviluppa anche sul piano della valorizzazione, della promozione e della regolazione delle forme attraverso le quali si esprime la solidarietà spontanea […]*' ('in the Third Sector Code spontaneous solidarity is to some extent organised, it finds the means and mechanisms to be able to express itself, so that the imperative duty of the State to remove the economic and social obstacles that prevent the full development of the person, it is not limited to the provision of services or the imposition of those obligations that transforms solidarity into a duty, but it also develops in terms of valorisation, the promotion and regulation of the forms through which spontaneous solidarity is expressed').

[238] F. Pizzolato and C. Buzzacchi, 'Doveri', n 91 above, 319. This interpretation highlights the dynamic profile of subsidiarity, which is expressed in the promotional function of free private initiative. But more generally, it also regards the promotional function of law (see N. Bobbio, 'Sulla funzione promozionale del diritto' *Rivista trimestrale di diritto e procedura civile*, 1313 (1969)) that is reflected in the freedom and autonomy of private action: 'if it is recognized that the essence of legality is not (only) the imperative and therefore the sanction or coercion, the legal system recovers a reasonable margin of appreciation for actions that are in conformity with and indeed strengthen the social bond, for the dimensions of liberality, donation and spontaneous social initiative'.

[239] In this way R. Di Raimo, 'Date a Cesare (soltanto) quel che è di Cesare. Il valore affermativo dello scopo ideale e i tre volti della solidarietà costituzionale' *Rassegna di diritto civile*, 1082 and 1091 (2014) who identifies three faces of the constitutional solidarity.

[240] The reference is to the reflection, recently retraced by Gregorio Arena, of F. Benvenuti, *Il nuovo cittadino*, n 36 above, 128 where the Author even before the constitutional reform of Title V highlighted the need for the 'new' citizen to take action and to build networks of relationships based on mutual cooperation. This wish, indeed, was fully grasped by the legislator who translated it 'in the constitutional provision pursuant to which the Republic must promote, thereby implicitly recognizing its value, the autonomous initiatives of citizens for the performance of activities of general interest': G. Arena, 'Amministrazione e società', n 42 above, 43-44.

according to a logic of mutual integration and cooperation.[241] The legislator, in fact, not only recognizes and promotes the value and the social function of the subjects of the Third sector but it gives them a fundamental role in the relations with public bodies.[242] The latter, in turn, assume the duty of ensuring the active involvement of these subjects in the achievement of common objectives through specific forms of collaboration that find their discipline in Article 55 of the Code itself.[243]

Article 55 of the Third Sector Code, far from the mere substitution of private action in the function of public authorities as well as the opposite of a close interdependence between the two, proposes the construction of a relationship of mutual collaboration where the two forces operate according to a shared approach: preserving their autonomy on the level of action but still converging on

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[241] In this way D. Caldirola, *Stato*, n 237 above, 3, who sees in the Third Sector Code an opportunity for 'the construction of a new governance based on legal instruments of alliance between non-profit, for profit and public entities' with a view to the implementation of an integrated system of interventions in the general interest that can 'converge different interests towards common objectives'. F. Pizzolato, 'Le nuove forme della partecipazione civica e le autonomie territoriali' *JusOnline*, 40 and 47-48 (2018) observes more in general that '*proprio perché il fine complessivo della Repubblica (art. 3) e quello, articolato, delle formazioni sociali (art. 2) è convergente lo svolgimento della persona, la sua realizzazione esige un'alleanza tra istituzioni e cittadini singoli e associati, di cui la sussidiarietà è l'espressione sintetica*' ('precisely because the overall purpose of the Republic (article 3) and that of social formation (article 2) converge the development of the person, its realization requires an alliance between institutions and individuals of which subsidiarity is the synthetic expression').

[242] Article 1 of the Third Sector Code.

[243] Article 55, paragraph 1 of the Third Sector Code provides for the duty of all public administrations to ensure, in the exercise of their functions of planning and organization at the territorial level of interventions and services in fields of activities referred to in article 5, the active involvement of Third sector entities, through forms of co-programming, co-design and accreditation. It is therefore an 'involvement that must be "insured" and "active". We are therefore not in the field of optional choices, but in that of the mandatory behaviour of the public administration […] "Ensure active involvement" seems, however, to be understood as an obligation, which in any case burdens the administration, to implement appropriate instruments to support the ability of the Third sector entities to involve itself in the various forms of active participation': F. Scalvini, 'Co-programmazione, co-progettazione e accreditamento: profili e questioni applicative', in A. Fici ed, *La riforma*, n 229 above, 263 and 269.

the objectives.[244] It is therefore clear that in the light of such a 'realignment'[245] of powers between the two spheres, the legislator intended to actualize a meaning of subsidiarity that has long been advocated in doctrine[246] and which was finally emphasized by the Constitutional Court in its ruling no 131 of 26 June 2020.

According to the Court, art. 55, and more broadly the entire Third Sector Code,[247] embodies one of the most significant models of effective implementation of the principle of horizontal subsidiarity.[248] On one hand, there is a definite awareness that activities of general interest can also be carried out by an

[244] P. Cuzzola, 'Terzo settore', 234, 27. With similar perspective L. Fernandez del Moral Domíngues, 'Carta delle fondazioni e ordinamento del Terzo settore', in M. Nuzzo ed, *Il principio di sussidiarietà*, n 34 above, 191 and 193-194: according to the Author, the renewed synergy between public and private necessarily presupposes a different role of the citizen who, definitively freeing himself from the traditional role of passive recipient of goods and services, ends up assuming the role of active actor in the implementation of general interests. And such a 'combination of State and civil society activities' can only be built on the basis of integration and complementarity rather than according to the logic of subordination or substitution.

[245] P. Cuzzola, 'Terzo settore', n 234 above, 13-14. The Author makes a profound investigation of the relationship between the renewed discipline of the Third Sector and the principle of subsidiarity. He imagines the Third Sector as 'a territory in which subsidiarity manifests itself as a function of 'realignment' of relations with the State and the market' and therefore as the 'new rule of the game' that allows to 'arbitrate' the game between the 'allies'.

[246] F. Benvenuti, *Disegno*, n 36 above; Id., *L'ordinamento*, n 36 above; A. D'Atena, 'Costituzione', n 60 above, 13; G. Arena, 'Il principio di sussidiarietà', n 60 above, p. 179 ss.; Id., *Cittadini attivi*, n 36 above. Finally, with particular reference to the Third Sector and the implications of the principle of subsidiarity for the organisational structure of the social State, V. Tondi della Mura, 'Della sussidiarietà', n 97 above, 1.

[247] For the rules of the Third Sector Code which recall, even if not expressly, the principle of subsidiarity, P. Cuzzola, *Terzo settore*, n 234 above, 56. More broadly on the constitutional identity of the Third Sector, F. Sanchini, *Profili*, n 229 above, 41.

[248] In this regard, the doctrine underlined that the Third sector entities, as outlined by the new Code, are the 'direct manifestation of the (general) principle of subsidiarity of the "private social"': G. Ponzanelli, 'Terzo settore: la legge delega di riforma' *Nuova giurisprudenza civile*, 726 (2017); or again, that they are 'the "vehicles" for the implementation of the principle of horizontal subsidiarity (article 118, paragraph 4 of the Constitution), namely means for the self-organization of the society': S. Amorosino, 'Il Terzo settore', n 233, 304.

autonomous citizens' initiative.[249] On the other hand, the same subsidiary action is for the first time 'proceduralized'[250] in an articulated identification of forms of partnership between public bodies and subjects of the Third sector including co-programming and co-design.[251]

In particular, the roles are redefined through the expansion of the boundaries of private action: from the 'terminal' phase of carrying out activities of general interest, the attention is shifted to the initial moment of identifying social needs and the relative definition of interventions aimed at satisfying them.[252] From the

[249] As highlighted by F. Scalvini, *Co-programmazione*, n 243 above, 265-566, after the introduction of the principle of subsidiarity, there is almost no 'ordinary legislative production aimed at bringing this principle into the system'. This has happened only now with the reform of the Third Sector.

However, it should be noted, among the jurisprudential efforts aimed at concretizing the scope of the last paragraph of article 118 of the Constitution, the judgement of TAR Liguria 18 November no 1479 which showed that public-private cooperation is the direct expression of the principle of horizontal subsidiarity by virtue of which the public authorities cannot preclude individuals from pursuing the general interest; as well as Corte costituzionale 29 September 2003 no 300 and no 301 commented by T. Lomonaco, 'In tema di fondazioni di origine bancaria, natura e rapporti con il sistema del credito' *Giurisprudenza commerciale*, 477 (2004) and by C. Giorgiantonio, 'Vocazione (commerciale o non profit), vigilanza e governance: il rebus delle fondazioni bancarie' *Il Foro italiano*, 1324 (2006).

[250] From this perspective, article 55 of the Third Sector Code can be understood as a 'general rule identifying possible variations of the principle of horizontal subsidiarity in the field of relations between the Third sector entities and public administration': L. Gori, 'La "saga" della sussidiarietà orizzontale. La tortuosa vicenda dei rapporti fra Terzo settore e P.A.' *federalismi.it*, 186 (2020).

[251] The co-programming concerns the joint identification of needs to be met, the actions necessary for this purpose, the methods of their implementation and the resources available. The co-design, instead, regards the immediately consequential phase in which specific plans of participation are elaborated, finalized to satisfy the needs previously defined. In doctrine, it has been highlighted that between the co-programming and co-design exists a relationship of logical-juridical consequentiality: E. Frediani, 'I rapporti con la Pubblica Amministrazione alla luce dell'art. 55 del codice del Terzo settore' *Non Profit*, 157 and 159 (2017).

[252] In this way V. Tondi della Mura, 'Della sussidiarietà', n 97 above, 21 who, precisely on the basis of such a proceduralising of the activity of the general interest highlights that 'not only the way in which it is carried out and completed it is relevant, but, even more, the way in which it is initially identified. In addition to highlighting the terminal phase of private activity, as developed in relation to the objective pursued, deserves even more the initial phase of its path, to be planned in relation to all the additional elements indispensable for a full satisfaction of the social need'.

perspective in which the subjects of the Third sector, as an expression of the solidarity society and therefore by their closer and more sensitive nature to the needs coming from the social fabric, constitute an important ally for public bodies.[253] They are actually able to quickly grasp and interpret emerging social needs, thus becoming a valuable source of information and organizational capacity that produces positive effects in terms of saving resources, without undermining the quality of services provided to meet the needs of those in need in the society.[254]

The originality and innovative scope of these collaborative forms are therefore to be sought in the recovery of the consensual administrative activity and therefore in the complete overcoming of the idea that only public action is intrinsically capable of carrying out the activity of general interest.[255] Moreover, as the

[253] 'The research of new legal forms and new structures between different subjects (public and private) arises therefore from the need to offer concrete answers to the urgent needs of people and finds fertile ground in the non-profit world, which has so often proved to be the healthiest resource to share to increase the net of social services': M. Tiberii, 'Il rapporto tra enti pubblici ed enti del Terzo settore e la natura giuridica delle convenzioni', in D. Di Sabato and O. Nocerino eds, *Il Terzo settore*, n 229 above, 141-142.

[254] Corte costituzionale 26 June 2020 no 131. In this perspective V. Tondi della Mura, 'Della sussidiarietà', n 97 above, 7: the Author highlights the significant need to coordinate the multiplicity of needs coming from all realities, public and private, as an expression of 'a social set understood no longer in a top-down way, but in the plurality of forms and contents that characterize the community fabric'. The realization of these needs requires an active involvement of both spheres through participation, management, collaboration and control in the provision of social benefits, which presuppose adequate organizational models; collaborative and relational models, aimed at a more complete interpretation of social needs and an equal regulation of interventions'.

[255] The idea that the public service, because it is traditionally linked to the exercise of the activity of general interest, is the exclusive prerogative of public bodies, is therefore lacking. This is primarily because the legislator clearly defines which private entities are 'qualified' to 'share' this public function. Moreover, the same activities of general interest are now in detail identified and constitute the cornerstone of the relationship between the Third sector entities and public entities since both are placed on the same level in relation to the pursuit of the common good and the implementation of activities of general interest: F. Scalvini, 'Co-programmazione', n 243 above, 266.

With specific regard to the administrative activity by agreements, particularly far-sighted appear the reflections of A. Federico, *Autonomia negoziale*, n 47 above, 49. The Author states that 'the principle of impartiality of administrative action and the principle of democracy, inherent in a legal

Constitutional Court points out, it has been seeking to overcome this idea with the introduction into our system of the principle of horizontal subsidiarity as an expression, constitutionally recognized and guaranteed, of that 'original sociality' that characterizes the human person.[256]

On closer inspection, indeed, this primary vocation of subsidiarity is once again being valorized through the renewed legislative formula which sees in the procedural dialogue the keystone of the relational system between the institutions and social autonomy. It is a dialogue which is triggered on the assumption of the active participation of the subjects of the Third sector in the definition of social needs through the co-programming tool and which evolves on a practical level in the realization of the needs themselves through forms of co-planning.[257]

In other words, in light of art. 55 of the Third Sector Code the public power does not finish in the duty of abstention or in that of intervention if the private

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system that postulates the centrality of the value of person, require the balancing of all the interests connected with the action of the public administration, through the participation of the citizens (*rectius* of the persons) in the care of the "public interests"' and this to the extent that 'the administrative power demands, for its correct and effective exercise, the participation of the person administered'. In this way, 'far from altering the characteristics of power in the case in which it is invoked, the involvement of private parties contributes to the determination of the public interest, objective of the exercise of discretion and reason for its attribution to the public administration'. On the close connection between the public and private interest, and therefore on the impossibility of isolating the two interests in light of the unity of the legal system, P. Perlingieri, 'La sussidiarietà', n 34 above, 688: the Author highlights that it should not be shared 'the clear demarcation [...] between negotiating autonomy and initiative pursuant to article 118; indeed, it is the negotiating autonomy itself that finds its foundation in subsidiarity'. Moreover, see G. Oppo, 'Diritto privato e interessi pubblici' *Rivista di diritto civile*, 25 (1994); P. Femia, *Interessi*, n 27 above, 134; R. Di Raimo, *Contratto e gestione indiretta di servizi pubblici. Profili dell'"autonomia negoziale" della Pubblica Amministrazione* (Napoli: Edizioni Scientifiche Italiane, 2000), 182; P. Perlingieri and P. Femia, *Nozioni introduttive*, n 113 above, 69.

256 As was pointed out by Corte costituzionale 26 June 2020 no 131, solidarity relations characterized the social system of the country even before the public welfare systems emerged. This is closely connected with the social and cultural traditions of the country in which individuals have always expressed their solidarity towards others through forms of association.

257 See V. Tondi della Mura, 'Della sussidiarietà', n 97 above, 22.

action is insufficient.[258] Instead, an *ex ante* collaboration, since it aims to investigate social needs in advance to draw a clearer and more conscious picture of the interventions needed and the resources available, becomes itself an instrument for the realization of the general interest, as a common objective in an area of intervention common to both spheres.[259]

3. The strictly collaborative nature of the public-private relationship established by art. 55 of the Third Sector Code, not coincidentally, concerns the delicate relationship between solidarity and competition, the subject of the debate that took place in the aftermath of the implementation of the reform of the Third Sector.

Only in recent times, namely five years after the adoption of the Third Sector Code, the new Public Contracts Code has been approved. On the basis of the decision of Corte costituzionale 26 June 2020 no 131, it finally expressly excludes article 55 of the Third Sector Code from the field of its application. This, however,

[258] To reconstruct the two negative and positive components of the concept of subsidiarity, see A. Albanese, 'Il principio di sussidiarietà', n 34 above, 66.

[259] This entails an important practical consequence: by the introduction of article 55 the subsidiarity is no longer just a criterion governing the relationship between public administration and private, but it is a 'principle of safeguarding the quality of social benefits' as such a participatory structure of the public system favours the growth of services offered and directs the user's choice 'towards the provision of services that are qualitatively more suited to the needs': V. Tondi della Mura, 'Della sussidiarietà', n 97 above, 20. On this topic see also G. Leondini, *Riforma del Terzo settore e autonomie locali* (Torino: Giappichelli, 2019), 14, who grasps in the instruments provided for by article 55 of the Third Sector Code the positive dimension of horizontal subsidiarity: 'such forms of collaboration are an expression of what is defined as the positive profile of the principle of horizontal subsidiarity, which places the accent, rather than on the duty of public authorities to refrain from activities that may be carried out by private parties, on the duty of such powers to support the activity of private aimed at pursuing the general interest'.

does not allow to definitively solve the issue of the nature of co-programming and co-design with respect to European law.[260]

Since its adoption, in fact, article 55 of the Third Sector Code raised doubts about the lack of coordination with the previous Public Contracts Code regarding the regulation of the methods of entrusting social services to Third sector entities, causing the suspicion of conflict between the internal norm and the European regulation.[261] The Special Commission of the State Council, called upon to clarify this interpretative doubt, concluded that based on the primacy of eu-unitary law, the Public Contracts Code, as it transposes European legislation and expressly includes detailed rules on the provision of social services, prevails in any case to the Third Sector Code. Therefore, where the provisions of the latter cannot be interpreted in compliance with the European Union law, they must be disapplied.[262]

The Commission reaches this conclusion by moving from a broad concept of enterprise that, at the European level, is resolved in every objectively economic

[260] The problem now appears even more accentuated because although the Italian legislator excludes article 55 of the Third Sector Code from the scope of the new Public Contracts Code, the recent case-law of the Court of Justice, on the other hand, continues to qualify the relationship of collaboration between the administration and Third sector entities as for pecuniary interest, typical of the public procurement (Case C-367/19 *Tax-Fin-Lex d.o.o.* v *Ministrstvo za notranje zadeve*, Judgment of 10 September 2020 and Case C-436/20 *Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)* v *Consejería de Igualdad y Políticas Inclusivas*, Judgment of 14 July 2022 with regard to subsidies, even if it is only a question of reimbursement of the costs incurred for the activity carried out by the Third sector entity).

[261] The doubt was originally raised by the National Anti-Corruption Authority (ANAC) which asked Consiglio di Stato for the opinion on the law applicable to the entrustment of social services in light of the provisions referred to in decreto legislativo no 50/2016 as amended by decreto legislativo no 56/2017 and decreto legislativo no 117/2017. On this point, broadly, S. Tirelli, 'L'affidamento dei servizi sociali. La concorrenza nella solidarietà', in D. Di Sabato and O. Nocerino eds, *Il Terzo settore*, n 229 above, 157.

[262] Consiglio di Stato 26 July 2018 opinion no 2052.

phenomenon with which the supply of goods and services on the market is realized.[263] The concept of the company, thus understood, also includes all the organizations of the Third sector regardless of their legal status, structural characteristics or non-profit purposes: the reason why, the possibility of derogating from the principle of competition must be precluded to them and, on the other hand, it imposes the application of the competition law in case of activation of the collaborative forms provided for by the Third Sector Code.[264]

If in general, the Commission's perspective is certainly functional to safeguarding the balances of the free market, in the concrete case however it escapes the need to balance the interests involved by generating the unreasonable automatism in the prevalence of one over the other[265] and therefore the risk of

[263] Case C-119/06 *Commission* v *Italy*, Judgment of 29 November 2007, paragraphs 37-41, commented by M. Mattalia, 'Convenzionamento diretto o procedure concorsuali nell'affidamento del servizio di trasporto sanitario' *Il Foro amministrativo C.d.S.*, 1984 (2008); Case C-305/08 *Consorzio Nazionale Interuniversitario per le Scienze del Mare* v *Regione Marche*, Judgment of 23 December 2009, paragraphs 30-45; Case C-74/16 *Congregación de Escuelas Pías Provincia Betania* v *Ayuntamiento de Getafe*, Judgment of 27 June 2017; Case C-622/16 *Scuola Elementare Maria Montessori Srl* v *Commissione europea*, Judgment of 6 November 2018.

[264] A. Albanese, 'I servizi sociali nel Codice del Terzo settore e nel Codice dei contratti pubblici: dal conflitto alla complementarietà' *Munus*, 139, 145 (2019) argues that such a solution amounts to 'substantial renunciation by the advisory body of finding a balance in the system of relations between public bodies and non-profit entities, able to reconcile needs of the market with those of social cohesion and welfare'.

[265] This risk is unacceptable because 'in a legal system inspired by respect for human rights, sociality and solidarity, that is characterized axiologically, interpretation and the consequent qualification can no longer be separated from the normal tools of integration, of adjustment and balancing' (P. Perlingieri, 'Applicazione', n 69 above, 321). In fact, 'what is relevant is the specific case. There are no "minimum [normative] statutes" to be applied formalistically *a priori*, but a plurality of rules and especially principles to be found in the complex Italian-European system of sources' (P. Perlingieri, *Il diritto civile*, IV, n 6 above, 282).

mercantilization of solidarity relationships,[266] incompatible with a system based on personalism and social solidarity.[267]

The same Court of Justice, called to rule on the issue of direct entrustment of the activity of health transport to voluntary associations in a case that involved Italy, averts this danger.[268] As a basis for its decision, the Court noted that the harmonization between competition and solidarity, far from any a priori judgment based on the mere reclassification of non-profit entities in the category of 'economic operators', requires on the contrary an accurate examination of the specific case, since the voluntary activity of citizens has been ascribed by the Italian Republic to a constitutional principle according to which they participate in the realization of general interests with the support of public authorities.[269] In an even

[266] As has been most recently observed, the persistence of a model based on the market determination of the economic values of the circulation of wealth has made it increasingly difficult 'building a system capable of determining compatibility and sustainability between solidarity and profit-oriented circulation': G. Vecchio, *Le istituzioni*, n 37 above, 304.

[267] P. Perlingieri, 'Mercato', n 218 above, 240 and N. Lipari, 'Riflessioni di un giurista sul rapporto tra mercato e solidarietà' *Rassegna di diritto civile*, 24 (1995).

[268] Case C-113/13 *Azienda sanitaria 'Spezzino' e a.* v *San Lorenzo Soc. coop. Sociale e Croce Verde Cogema cooperativa sociale Onlus*, Judgment of 11 December 2014 commented by A. Albanese, 'La Corte di Giustizia rimedita sul proprio orientamento in materia di affidamento diretto dei servizi sociali al volontariato (ma sembra avere paura del proprio coraggio)' *Il Foro italiano*, 151 (2015).

[269] In this perspective, the Court stated that articles 49 and 56 TFEU must be therefore interpreted as meaning that they do not preclude national legislation which 'provides that the provision of urgent and emergency ambulance services must be entrusted on a preferential basis and awarded directly, without any advertising, to the voluntary associations covered by the agreements, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based': Case C-113/13 *Azienda sanitaria 'Spezzino' e a.* v *San Lorenzo Soc. coop. Sociale e Croce Verde Cogema cooperativa sociale Onlus*, Judgment of 11 December 2014 and conforming Case C-50/14 *Consorzio Artigiano Servizio Taxi e Autonoleggio (CASTA) e a.* v *Azienda sanitaria locale di Ciriè, Chivasso e Ivrea (ASL TO4) e Regione Piemonte*, Judgment of 28 January 2016 commented by M. Castellaneta, 'Sì all'affidamento diretto ad associazioni di volontariato a condizione che non ci siano finalità lucrative' *Guida al diritto*, 104 (2016). The need for an accurate balance between economic and social objectives is also noted by Case C-319/07 *P, 3F, già Specialarbejderforbundet i Danmark (SID)* v *Commissione*, Judgment of 9 July 2009 in

more recent case involving Spain, instead, the Court focusing precisely on the pursuit of social goals and the objectives of solidarity considered the Spanish national legislation that reserves to private non-profit entities the right to conclude agreements, under which these entities provide social assistance services to the person in 'derogation' from the Procurement Directive, compatible with European standards.[270] This demonstrates the further attempt at openness and the greater sensitivity of the European judge[271] towards profound cultural and

which it has been observed that 'whereas the Community has not only an economic but also a social objective, the rights deriving from the provisions of the Treaty relating to the free movement of goods, of people, services and capital must be balanced with the objectives pursued by social policy'.

[270] In particular, according to the European judges, such agreements are compatible even if they are concluded in return for reimbursement of the costs incurred by the Third sector entity and irrespective of the estimated value of the services covered by the agreement, even if they derogate from the conditions of article 77 of the European Parliament and Council Directive 2014/24/EU on public procurement. However, the Court stated that this is permissible in so far as the procedure for competitive comparison of the respective bids is carried out between the Third sector entities as long as on one hand 'the regulatory and contractual framework within which the activities of these entities are carried out effectively contributes to the social purposes and to the pursuit of the purposes of solidarity and budgetary efficiency on which that legislation is based and, on the other hand, the principle of transparency, as specified in particular in article 75 of the Directive, is complied with': Case C-436/20 *Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)* v *Consejería de Igualdad y Políticas Inclusivas*, Judgment of 14 July 2022.

[271] Reflects on the opening of the European Union to non-patrimonial purposes that has led to the progressive socialization of European law 'to the point of recognizing, through the Treaty of Lisbon, the dignity of the person as the guiding value in the political reconstruction of Europe (article 2 TEU)' P. Perlingieri, *Il diritto civile*, IV, n 6 above, 254. In the European case-law note in particular Case C-36/02 *Omega* v *Oberbürgermeisterin der Bundesstadt Bonn* Judgment of 14 October 2004 commented by R. Conti, 'La dignità umana dinanzi alla Corte di Giustizia' *Corriere giuridico*, 486 (2005) and by E. Pellecchia, 'Il caso Omega: la dignità umana e il delicato rapporto tra diritti fondamentali e libertà (economiche) fondamentali nel diritto comunitari' *Europa e diritto privato*, 181 (2007); Case C-34/10 *Brüstle* v *Greenpeace*, Judgment of 18 October 2011 commented by F.G. Carapezza, 'Tutela dell'embrione e divieto di brevettabilità: un caso di assiologia dirimente nell'ermeneutica della Corte di giustizia' *Il Diritto di famiglia e delle persone*, 3 (2012). In this perspective, it seems interesting to highlight the 'circular' view of the relationship between Constitution and European Treaties of G. De Vergottini, 'La Costituzione economica italiana: passato e attualità', *Diritto e società*, 333, 343-344 (2010) who points out that 'on one hand, Italy's membership to the European Union has influenced the interpretation and revision of the Italian Constitution, but on the other it has also influenced the other Member States' Constitutions, has produced important innovations in the field of social values within the Community legal system'.

regulatory differences of the Member States[272] that therefore maintain the possibility, in the case of activities and services with a strong social value,[273] to favour organizational models not inspired by the principle of competition but by that of solidarity.[274]

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[272] P. Perlingieri, 'Il rispetto dell'identità nazionale nel sistema italo-europeo' *Il Foro napoletano*, 449 (2014) notes that the adoption of the clause on respect for national identity has profoundly changed the perspective in the relationship between Court of Justice and national Courts: '*se, infatti, in passato le giurisdizioni nazionali costituivano un limite esterno per la Corte di giustizia, in séguito all'entrata in vigore dell'art. 4 TUE, quest'ultima è tenuta ad interpretare le norme di diritto comunitario nel rispetto in massima misura delle identità costituzionali dei singoli Paesi membri. Di conseguenza, nell'applicazione del diritto al caso concreto, la Corte di giustizia dovrà considerare la specifica identità nazionale del Paese membro nel quale il caso si è verificato e non potrà applicare sic et simpliciter un precedente giurisprudenziale ad un caso simile verificatosi in un Paese differente*' ('if, in the past, the national Courts were an external limit for the Court of Justice, following the entry into force of article 4 TEU, the latter is obliged to interpret the European law in full respect of the constitutional identities of each Member State. Consequently, in applying the law to the specific case, the Court of Justice will have to consider the specific national identity of the Member State in which the case occurred and will not be able to apply *sic et simpliciter* a precedent case-law similar to the case occurred in a different Country'). On the protection of the constitutional identity of each Member State, Id., 'Complessità, n 69 above, 188; Id, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 20; Id, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 28; Id, '"Il diritto privato europeo" tra riduzionismo economico e dignità della persona' *Europa e diritto privato*, 345 (2010); Id, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530 (2011). On this topic, see also G. Tiberi, '"Uniti nella diversità": l'integrazione differenziata e le cooperazioni rafforzate nell'Unione europea', in F. Bassanini and G. Tiberi eds, *Le nuove Istituzioni europee. Commento al Trattato di Lisbona* (Bologna: Il Mulino, 2008), 287; F. Vecchio, *Primazia del diritto europeo e salvaguardia delle identità costituzionali. Effetti asimmetrici dell'europeizzazione dei controlimiti* (Torino: Giappichelli, 2012); A. Alpini, *Diritto italo-europeo e princípi identificativi* (Napoli: Edizioni Scientifiche Italiane, 2018), 101; S. Polimeni, *Controlimiti e identità costituzionale nazionale. Contributo per una ricostruzione del "dialogo" tra le Corti* (Napoli: Edizioni Scientifiche Italiane, 2018), 3.

[273] Note that the same recital 114 of the European Parliament and Council Directive 2014/24/EU allows Member States 'because of the importance of the cultural context and the sensitivity of these (social) services [...], a wide discretion so as to organize the choice of service providers in the way they consider most appropriate'. From this point of view, it has been observed that, in light of such recital, the concept of the competitive procedures is changing. It moves away from its configuration as a 'market promotion tool' to become 'a tool for social and territorial integration', encouraging alternative forms of entrustment through a renewed trust of cooperation between public and private': A. Berrettini, 'La co-progettazione alla luce del Codice del Terzo settore e nella penombra del Codice dei contratti pubblici' *federalismi.it*, 17 (2022).

[274] Corte costituzionale 26 June 2020 no 131. P. Perlingieri, *Il diritto civile*, IV, n 6 above, 226 underlined that inviolable human rights cannot be limited to the rights of a producer or consumer

The orientation of the Court of Justice has been accepted by article 57 of the Third Sector Code, on the primary entrusting of emergency medical transport services.[275] At the same time, the national legislator did not provide specific indications about the modalities of activation of the collaboration agreements, such as co-programming and co-design, leaving to the relevant administrations the discretionary power in the definition of the criteria for the identification of the partner entities, as long as the principles of transparency, impartiality, participation and equal treatment are respected as widely as possible.[276]

The content of article 55, however, cannot be reduced to its mere disapplication in court,[277] nor is it considered desirable to find a solution which would give total precedence to one of the two interests at the expense of the other.

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because 'private initiative, even in a market "that works in a fair, transparent and physiological way", would not alone be sufficient to achieve the purposes of solidarity that the Constitution prescribes'. On this point, also, M. Luciani, 'Economia nel diritto costituzionale' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1990), V, 378, who highlights the originality of the Italian Constitution that prefers between economic and social logics the last ones.

[275] See article 57 of the Third Sector Code. For the first applications by administrative judge see decision TAR Veneto 15 October 2018 no 951, *Il Foro amministrativo*, 1726 (2018) and Consiglio di Stato 3 August 2020 no 4905.

[276] Article 55, paragraph 4 of the Third Sector Code.

[277] On the necessity to realize 'an inter-system integration' through the interpretation activity, P. Perlingieri, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 9th ed, 2018), 45-46. See also A. Ruggeri, 'Continuo e discontinuo nella giurisprudenza costituzionale, a partire dalla sentenza n. 170 del 1984, in tema di rapporti tra ordinamento comunitario e ordinamento interno: dalla "teoria" della separazione alla "prassi" dell'integrazione intersistemica?' *Giurisprudenza costituzionale*, 1583 (1991); A. Tartaglia Polcini, 'Integrazione sistematica e assiologia dirimente nel dialogo tra Corte costituzionale e Corte di giustizia', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 421; P. Perlingieri, 'Fonti del diritto e "ordinamento del caso concreto"' *Rivista di diritto privato*, 7 (2010). In case-law, Corte costituzionale 8 June 1984 no 170, *Giurisprudenza italiana*, 1521 (1984) commented by M. Berri, 'Composizione del contrasto tra Corte costituzionale e Corte di Giustizia delle Comunità europee'; Corte costituzionale 10 November 1994 no 384, *Giurisprudenza costituzionale*, 3449 (1994) commented by A. Barone, 'La Corte costituzionale ritorna sui rapporti fra diritto comunitario e diritto interno' *Il Foro italiano*, 2050 (1995); Corte costituzionale 30 March 1995 no 94 commented by A Marzanati, 'Prime note a Corte costituzionale, sent. 20-30 marzo 1995, n. 94' *Rivista italiana di diritto pubblico comunitario*, 559 (1995).

If the hypothesis of the complete subjection of the collaborative relationships to the rules of the Public Contracts Code is preferred to protect competition, because of it, the paradoxical damage to the balance of the budget may be incurred as a consequence, for example, of the high financial charges due to the experiment of the public procurement procedure from time to time. On the other hand, if the way that completely excludes all the rules of public procurement is privileged,[278] the risk is to undermine equal treatment and competitiveness, which are still necessary even among non-profit organizations.

In this context, therefore, the effort aimed at the composition[279] of the interests involved appears more appreciable given the opportunity provided by the Third Sector Code to fully exploit the potential and advantages of the collaboration instruments, but without reaching an excessive limitation of the principle of competition. If we accepted the idea whereby the legislator has given the regulations of the Third Sector Code an autonomous, non-conflictual but harmonious and complementary space,[280] we would immediately understand how there is no subtraction to the euro-unitary discipline but, rather, the application of rules other than the Public Contracts Code stands out. While always in compliance with the European regulatory framework, they manage in practice to more

[278] S. Tirelli, 'L'affidamento, n 261 above, 212.

[279] In view of the unity and openness of the legal system to international sources the interpreter has to coordinate the rules of different origin as well as 'to compose interests and balance values according to an axiological interpretation, respectful of the peculiarities of the cases and of the system as a whole, in the certainty that no source can be considered as self-sufficient because it is part of a complex system of principles and rules': P. Perlingieri, *Manuale*, n 277 above, 45. On the reciprocal permeation between European legislation and national sources as the core of the hermeneutic work of harmonisation and coordination in order to identify the legislation to be applied to the specific case, Id, *Il diritto civile*, II, n 6 above, 107.

[280] Decreto ministeriale 31 March 2021 no 72, 'Guidelines on the relationship between public administrations and Third sector entities pursuant to articles 55-57 of decreto legislativo no 117/2017'.

effectively carry out the 'collaborative' function referred to in article 118, paragraph 4, of the Constitution. As mentioned above, this is also the solution, based on balancing of interests, used by the legislator of the new Public Contracts Code. On one hand, Third sector entities are now expressly included in the concept of economic operator with respect to previous legislation, thus bringing domestic legislation into line with European case-law. On the other, in recalling the principles of solidarity and subsidiarity, the legislator reserves wide space for the autonomy of public administration in the adoption of 'sine-allagmatic'[281] relational models, including the possibility of concluding free contracts,[282] thus making the most of the negotiating autonomy recognized by the last paragraph of article 118 of the Constitution.

Here, in the 'plurality of souls'[283] with which the principle of horizontal subsidiarity is provided, its ability to act in the relations between the public and private community as an 'arbiter' of merit emerges clearly. Because of the economic and social contribution of the Third sector, immediately perceptible at the practical level,[284] it allows the use of different procedural methods, as long as it is upstream justified by compliance with the criterion of typicality of the entities of the Third sector, by the absence of subjective profit, by the common and joint cause as well as carried out in compliance with the minimum requirements for the identification of co-partners and the mandatory principles of administrative

[281] E. Caterini, *Sostenibilità*, n 214 above, 101.

[282] See articles 8, paragraph 1 and 134, paragraph 1of the new Public Contracts Code.

[283] P. Femia, *Sussidiarietà*, n 34 above, 144.

[284] On the complex dynamics between solidarity, competition and subsidiarity that respond to different relational patterns, D. Donati and A. Paci eds, *Sussidiarietà e concorrenza. Una nuova prospettiva per la gestione dei beni comuni* (Bologna: Il Mulino, 2010) and D. Donati, *Il paradigma*, n 154 above.

action.[285] In this perspective, therefore, it does not seem reasonable to a priori deny the negotiating role of collaborative relations with public administrations which, in the case of co-programming and co-design, however, can only take the form of an agreement.[286]

4. As has just been highlighted, the connection of the Third sector entities within the constitutional framework and the peculiar nature of their relationship with public entities make it necessary to identify a legal perimeter, for greater legal certainty, within which the legislative rigour of the Third Sector Code, in the provision of specific requirements and appropriate controls, can be justified by the need to ensure the real 'third party-ness' of non-profit organizations, concerning the purposes of profit underlying the logic of the market. It is precisely in this direction that lies the decision of the Constitutional Court that eliminates any doubts about the possibility of including in the scope of the Code, and therefore admitting the use of collaboration instruments pursuant to art. 55, even entities that, although not qualifiable as the Third sector, carry out non-profit activities of general interest and pursue civic, solidarity and social utility purposes.

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[285] The compliance with principles referred to in legge 7 August 1990 no 241 is expressly mentioned by article 55 of the Third Sector Code.

[286] F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 238: in this regard, the Authors note that the notions of 'co-programming' and 'co-design' indicate 'a direct involvement of another subject in the decision or intervention of which the public administration is institutionally responsible'. Such involvement implies a 'co-responsibility in a collaborative form', which can only take the form of an instrument of negotiation because the subject involved is not the recipient of the decision but, on the contrary, actively contributes to it. These are, in other words, relationships in which 'subjects are involved precisely because they add their own contribution to that of public administrations without necessarily providing for the consideration'. The suitability of the negotiating model to achieve the general interest and to be an instrument for exercising the discretionary power of the public administration is highlighted by A. Federico, *Autonomia negoziale*, n 47 above, 125, 146.

Ruling no 131 of 26 June 2020[287] deals with the question of constitutional legitimacy of article 5, paragraph 1, letter *b* of the regional law of Umbria Region, containing the regulations on community cooperatives,[288] considered in violation of the exclusive legislative competence of the State referred to in article 117, paragraph 2, letter *l*.[289] In the claimant's opinion,[290] the regional legislator when regulating the involvement of such organisational forms through the express reference to article 55 of the Third Sector Code has carried out a substantial operation of homologation of community cooperatives to Third sector entities although the former is excluded from the list of such entities by the mandatory listing of the Code.[291] The Umbria Region, therefore, would have gone beyond its regulatory jurisdiction because it has de facto determined an expansion of the entities of the Third sector which, instead, as subjects of private law, are part of the sphere of the civil system reserved to the exclusive legislative power of the State.[292]

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[287] Corte costituzionale 26 June 2020 no 131.

[288] This provision recognizes the social value and the public purpose of community cooperatives and promotes their active involvement through forms of co-programming, co-design and accreditation provided by article 55 of the Third Sector Code. See article 5, paragraph 1, letter *b* of legge regionale 11 April 2019 no 2 on community cooperatives.

[289] Article 117, paragraph 2, letter *l* of the Constitution.

[290] Appeal on grounds of constitutional legitimacy of Presidente del Consiglio dei Ministri no 70/2019, published in Official Journal 7 August 2019 no 32.

[291] With regard to the definition of the Third sector entities, see D. Poletti, 'Costituzione e forme organizzative', in M. Gorgoni ed, *Il Codice*, n 229 above, 237; F. Greco, 'Categorie di enti del Terzo settore', in M. Gorgoni ed, *Il Codice*, n 229 above, 311; E. Rossi, 'Profili evolutivi della legislazione del Terzo settore', in A. Fici, E. Rossi, G. Sepio and P. Venturi eds, *Dalla parte del Terzo settore* (Bari-Roma: Laterza, 2019), 85; P. Consorti, 'La nuova definizione giuridica di Terzo settore' *Non profit*, 29 (2017).

[292] Thus, it has been reaffirmed by Corte costituzionale 12 October 2018 no 185, commented by E. Rossi, 'La riforma del Terzo settore per la prima volta davanti alla Corte' *Giurisprudenza costituzionale*, 2051 (2018) and by L. Gori, 'Terzo settore, fra misure di promozione e autonomia regionale. Nota a C. cost. n. 185 del 2018' *Regioni*, 198 (2019).

In fact, from a first reading of article 4 of the Third Sector Code, it seems that the possibility of qualifying community cooperatives as Third sector entities is completely precluded. According to this provision, only voluntary organisations, social promotion associations, philanthropic bodies, social enterprises, including social cooperatives, associative networks, mutual aid societies, associations, recognised or unrecognised, foundations and all other private entities other than companies fall within the scope of the Third sector. No specific mention has been made by the legislator about community cooperatives. Such evidence, however, has been easily overcome by the Court since the corporate form is allowed for social companies and social cooperatives, expressly mentioned in article 4.[293] So, it is entirely reasonable to believe that even community cooperatives, when they acquire the qualification of social enterprise or are constituted according to the rules of social cooperatives, also fall within the category of subjects of the Third sector.

In other words, it is sufficient that the community cooperative: is constituted pursuant to articles 2511 *et seq* of the Civil Code; is registered in the appropriate section of the Companies Register;[294] exercises in a stable and main way one or

[293] Article 1 of decreto legislativo 3 July 2017 no 112 states that under certain conditions 'all private entities, including those established in the forms referred to in Book V of the Civil Code, may acquire the qualification of social enterprise. Therefore, this also applies to cooperatives. The sole limit exists with regard to 'companies constituted by one member', to public administrations and to 'entities whose statutes restrict, even indirectly, the supply of goods and services in favour of members only'. Moreover, the same article states that social cooperatives, as regulated by legge 8 November 1991 no 381, automatically become social enterprises.

[294] In view of the possibility of Third sector entities to carry out entrepreneurial activities (article 6 of the Third Sector Code and article 1 of decreto legislativo 3 July 2017 no 112) the legislator provided for the obligation of registration in the Register of Companies which in the case of social enterprises also meets the requirement of registration in the Single National Register, as a necessary condition for obtaining the qualification of the Third sector entity. With regard to the entrepreneurial activities of Third sector entities, A. Mazzullo, *Il nuovo codice*, n 229 above, 77.

more activities of general interest referred to in article 5 of the Third Sector Code; and that, in general, it complies with all the requirements of decreto legislativo 3 July 2017 no 112, in coordination with decreto legislativo 3 July 2017 no 117. Otherwise, if the community cooperatives lack these characteristics, they will not be able to enjoy the 'collaboration' that is typically reserved for subjects of the Third sector.

Through this interpretative process, entirely in line with the strictness of the Code, the Court draws the legal boundary outside of which it is not possible to extend the qualification of the Third sector. The entities belonging to the latter must be strictly understood as legal entities characterized by specific purposes and requirements, as well as underlying a public registration and control system. This conclusion is even more reinforced if we consider the content of article 50 of the Third Sector Code, which provides for the deletion of the organization from the National Single Register[295] if the lack of the necessary requirements is ascertained. The cancellation entails the immediate loss of the qualification of the Third sector and consequently prevents, in addition to the enjoyment of tax incentives, also the possibility of entertaining relations with public bodies based on article 55 of the Third Sector Code. The entities can continue to operate as organizations under common law and any relationships established with the public administration will be synallagmatic and non-cooperative, reserved exclusively for Third sector entities. The same reasoning, however, seems to be applicable even in the specular hypothesis, that is, if an organization, although in possession of all the

[295] A. Fici and N. Riccardelli eds, *Il Registro Unico Nazionale del Terzo settore. Commento al d.m. 15 settembre 2020*, *n. 106* (Napoli: Editoriale Scientifica, 2021).

requirements as a Third sector entity, decides not to register in the National Single Register.

These elements, therefore, represent the necessary prerequisite for the configuration of the collaborative relationship with public bodies in the absence of which, however, the entities that cannot be qualified as Third Sector, although they are naturally conceived in the general interest of the community, they are not referable to the forms of active involvement governed by article 55 of the Code.[296]

The Court's decision is clearly linked to the particular function of obvious social significance that the new collaborative forms are capable of achieving and, therefore, it raises the observance of the requirements provided for by the Code that justify the collaboration itself. In full respect of the autonomy imposed by article 118 of the Constitution a real 'shared administration channel'[297] is created between the Third sector and public bodies, which is autonomous and alternative to market dynamics,[298] where the collaborative tools outlined by article 55 of the

[296] Despite the overall sharing of the perspective adopted by the Court, the risk of an unreasonably discriminatory legislative solution towards excluded entities has been highlighted in doctrine. The non-profit purpose, general interest activity, civic, solidarity and social utility purposes constitute the constitutionally founded criteria from which the definition of the Third Sector is derived. They act as distinctive factors between the entities in question and the overall *genus* of social organizations. Precisely on the basis of such criteria it would be necessary to verify 'whether even others, among the entities that are excluded from the scope of definition, do not present similar characteristics, such as to make constitutionally unjustified an "unfavourable" treatment imposed on them': E. Rossi, 'Il fondamento', n 117 above, 59.

[297] Corte costituzionale 26 June 2020 no 131.

[298] 'The economic reality (and therefore the market itself) has to deal with reasons not related to profit. Sympathy, generosity, a sense of community, religious sentiment are reasons that disprove the dictates of selfish and patrimonial interest (it would not otherwise explain patronage, charitable committees, voluntary organizations, etc.) and contribute to forming a business ethic, inspired by more complex motivations of simple profit maximization [...]'. Thus, non-profit entities, such as 'alternative trade entities' witness this new market approach: P. Perlingieri, *Il diritto civile*, IV, n 6 above, 206. With regard to the forms of cooperation, referred to in the Third Sector Code, as alternative tools for the realization of the collective utility, widely, M. Tiberii, 'Il rapporto', n 253

Third Sector Code constitutes the premise of a relationship built not on mere utilitarian exchange but, unlike the latter, on convergent objectives and the aggregation of resources with a view to greater organizational efficiency of the interventions.

Such interpretation of article 55 provided by ruling no 131 of 26 June 2020, allows us to frame the question of coordination with the Public Contracts Code, and therefore the one relating to the identification of the applicable regulation in the hypothesis of activation of a collaboration between public and private community, from a different perspective. Since it is the result of a balance carried out upstream by the legislator between the introduction of collaborative forms that go beyond the complex tender schemes, and therefore are achievable with greater speed and simplicity, on one hand, and the delimitation of the regulatory sphere of Third sector entities, on the other hand, which only if they meet all the requirements are involved through instruments referred to in article 55 of the Third Sector Code. The need envisaged by the opinion of the Council of State to enhance non-profit organizations and at the same time safeguard the dynamics of the free market finds its point of balance precisely in the freedom left to the administrations to adopt the methods of identifying the partner entities and regulate their respective collaborative relationship in a way that is more suitable to the needs of the concrete case.[299]

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above, 141. See also the considerations on social and solidarity economy as a form of alternative economy of J.F. Draperi*, L'économie sociale et solidaire: une réponse à la crise?* (Paris: Dunod, 2011).

[299] According to opinion of L. Gori, 'Il "coinvolgimento attivo" degli enti del Terzo settore: la prospettiva regionale', in A. Fici, L. Gallo and F. Giglioni eds, *I rapporti tra pubbliche amministrazioni ed enti del Terzo settore. Dopo la sentenza della Corte costituzionale n. 131 del 2020* (Napoli: Editoriale Scientifica, 2020), 153, this task would be primarily up to the regions, capable of concretely declining the discipline of the administrative procedure 'in relation to the individual fields of activity or, in any case, to the specificities of the Third Sector'. Secondly, the local authorities which, in turn, have the

As it was broadly demonstrated by the Constitutional Court about community cooperatives, competition is guaranteed if an indiscriminate extension of the qualification of the Third sector is not admissible, pursuant to article 4 of the Third Sector Code. For its part, the collaborative logic at the beginning of the relationship with public bodies is based on the particular combination of interests to be achieved by the autonomous power conferred on the citizens' initiative by the principle of horizontal subsidiarity.

The joint planning model of the strategic intervention on the territory based on shared interests, of a general nature and without any patrimonial claim, therefore suggests the need to seek more flexible legal instruments. These should be able to emancipate the public-private alliance from the mere function of exchange, enhancing the *ratio* itself of the reform of the Third sector, aimed at bringing back to the centre of attention that original connotation of the *uti socius* person whose action is not determined by economic aims but by a free and spontaneous expression of profound sociality.[300]

In this perspective, rather than imagining the collaboration according to the traditional scheme which identifies the public body as a contracting station which gives the economic operator a complex of activities to be carried out, it seems more compliant to the intended purposes to use an approach that can bring the role of the two spheres on the same operational level where both cooperate,

necessary competences to 'define the procedures for exercising administrative functions by implementing the State's and regional regulation'.

[300] Corte costituzionale 28 February 1992 no 75. With same perspective, Corte costituzionale 31 December 1993 no 500, *Giurisprudenza italiana*, 322 (1994), Corte costituzionale 17 December 2013 no 309, *Giurisprudenza costituzionale*, 4945 (2013) and lastly Corte costituzionale 26 June 2020 no 131.

according to the common purpose,[301] through a constant negotiating activity to which the Third Sector Code itself makes extensive reference through the express reference to legge 7 August 1990 no 241.

Therefore, one cannot help but grasp the meaning of the phrases 'shared administration', 'active involvement' as well as 'public-private collaboration' precisely in such a possibility of acting through forms of negotiating exercise of administrative power which, if it is read through the lens of the principle of horizontal subsidiarity, it indeed legitimizes the exercise of discretionary power through the negotiating paradigm and reveals how 'the administrative activity "by agreements" constitutes the form privileged by the Constitution for carrying out the administrative function'.[302]

5. We have seen how obligatoriness constitutes one of the essential aspects of the 'active involvement' of Third sector entities. This 'subjective' requirement makes it possible to move away from the sphere of public contracts.[303] However,

[301] In this direction, although in relation to relationships between private individuals, moves also the recent experiences of 'sharing economy' which are increasingly characterized by the absence of the logic of profit: D. Di Sabato, 'La prassi contrattuale nella sharing economy' *Rivista di diritto dell'impresa*, 451 (2016); G. Smorto, 'Economia della condivisione e antropologia dello scambio' *Diritto pubblico comparato ed europeo*, 119 (2017); D. Di Sabato and A. Lepore eds, *Sharing Economy. Profili giuridici* (Napoli: Edizioni Scientifiche Italiane, 2018). Similarly, as has already been pointed out, the increasingly frequent relationships between enterprises seem to be based not only on the dialectic between opposing interests but also on the realization of common goals: P. Perlingieri, 'La contrattazione tra imprese' *Rivista di diritto dell'impresa*, 323 (2006); M.R. Maugeri, 'Reti di imprese, contratto di rete e reti contrattuali' *Obbligazioni e contratti*, 951 (2009); F. Briolini, L. Carota and M. Gambini eds, *Il contratto di rete. Un nuovo strumento di sviluppo per le imprese* (Napoli: Edizioni Scientifiche Italiane, 2013).

[302] P. Perlingieri, *Manuale*, n 277 above, 457-458; Id, *Il diritto civile*, II, n 6 above, 194 and Id, *Il diritto civile*, IV, n 6 above, 19.

[303] The legal nature of the subject involved in collaborations referred to in article 55 of the Third Sector Code is identified as an essential element by A. Fici, 'I "presupposti negoziali" dell'"amministrazione condivisa": profili di diritto privato', in A. Fici, L. Gallo and F. Giglioni eds,

to be able to approach the sphere of agreements, the investigation of public-private partnerships must also be completed on a causal and objective level.

About the latter, it should be noted that the legislator of the reform, in addition to having organically identified in article 5 of the Third Sector Code the activities of general interest,[304] has also carried out an important work of opening up non-profit schemes to entrepreneurial activity.[305] Article 6 of the Third Sector Code, in fact, also allows entities in the Third sector other than social enterprises,[306] albeit within the limits of secondarity and instrumentality, to carry out commercial activities. The peculiar ability to combine economic activities, indispensable to the financial self-management of the organization, with social activities, is in turn

I rapporti tra pubbliche amministrazioni ed enti del Terzo settore. Dopo la sentenza della Corte costituzionale n. 131 del 2020 (Napoli: Editoriale Scientifica, 2020), 57. The Author points out that the establishment and management of a Third sector entity in accordance with the provisions of the Code constitutes the supporting element of article 55 with respect to the discipline of the Public Contracts Code. This is because 'the notion of the Third sector entity provided for in the 2017 reform serves as function of "quality certification" of the entities attributable to it. A "protected" certification through the system of previous and ongoing controls set up by the Code, the derived and related legislation'.

304 Among which, of particular interest for the theme of post-earthquake revitalization of Inner Areas are social services, services aimed at safeguarding and enhancing the environmental and cultural heritage, scientific research of particular social interest, the organisation and management of cultural, tourist and sports activities and the recovery of unused public assets.

305 In France *loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire (ESS)* in article 1 defines the social and solidarity economy as '*un mode d'entreprendre et de développement économique adapté à tous les domaines de l'activité humaine*'. On the role of the social and solidarity economy in the French legal system, J. Thierry, *Économie sociale et solidaire: la clé des possibles* (Paris: Les Petits Matins, 2021); R. Daufresne and F. Rousseau, *L'économie sociale et solidaire dans les territoires. Les enjeux d'une coopération d'avenir* (Voiron: Éditions Territorial, 2021); J. Defourny and M. Nyssens eds, *Économie sociale et solidaire. Socioéconomie du 3e secteur* (Pays-Bas: De Boek Supérieur, 2017); R. Holcman ed, *Économie sociale et solidaire* (Paris: Dunod, 2015); D. Heiz, 'La richesse de la loi économie sociale et solidaire – Loi n° 2014-856 du 31 juillet 2014' *Revue des sociétés*, 147 (2015).

306 Whereas the social enterprise presupposes a permanent and principal exercise of 'a business activity of social interest' (article 1 of decreto legislativo 3 July 2017 no 112), all other Third sector entites carry out activities 'exclusively or principally in the general interest in the form of voluntary action or the free provision of money, goods or services' as well as activities other than the latter provided that they are secondary and instrumental (article 6 of the Third Sector Code).

balanced by the prohibition of subjective profit[307] that thus allows the possible profit to be functionalized, transforming it from a purely selfish end into an instrument for the realization of the general interest.

It is clear, therefore, that such a typical configuration of Third Sector entities has the function not only of delimiting the boundaries within which these actors can economically support their statutory objectives but also of offering a legal space within which to enjoy a differentiated discipline by the social nature of the activity carried out, as well as the conscious renunciation of the maximization of profit. At the same time, however, this very attribution of entrepreneurial status places Third Sector institutions in the wider debate on their equalization with for-profit economic operators operating in the traditional profit-oriented market. The issue is of great importance since, in addition to affecting the applicable regulations, including those on relations with public bodies, it raises questions about what concretely are the distinctive features that make Third sector bodies worthy of an autonomous, differentiated and, why not, facilitated regulation.

As has been anticipated, the debate arises within the constant interpretative orientation of the Court of Justice which sees in the enterprise a notion that is indifferent to subjective requirements and purposes. This concept, which is characterized exclusively by the performance of objectively economic activities, overlaps with that of the Third Sector entity on the assumption of the simple offer

[307] The so-called subjective non-profitability is ensured in the Third Sector Code in 3 different ways: in addition to the express prohibition of distribution, even indirect, of profits and operating surpluses to the members of the organization (article 8, paragraph 2 of the Third Sector Code) the legislator has previewed the obligation to invest all the patrimony in the realization of statutory activities to the aims of the exclusive pursuit of civic, solidarity and social purposes (article 8, paragraph 1 of the Third Sector Code). However, an additional guarantee is the devotional obligation imposed on the assets in the event of dissolution of the entity (article 9 of the Third Sector Code), which also prevents the possibility of a postponed distribution of profits.

of goods or services on the market,[308] regardless of the destination of the profits obtained.

By comparing the European conception of enterprise with the internal one, it is possible to note how, in fact, in outlining the figure of the entrepreneur, even article 2082 of the Civil Code does not distinguish between profit and non-profit enterprises. And indeed, like the European interpretative approach, it draws attention to 'cost-effectiveness', as an essential requirement for the configuration of entrepreneurial activity. To differentiate the two statutes, for-profit and not-for-profit, in jurisprudence it was discussed whether this founding element of the company coincides with the notion of profit or whether it should be considered compatible also with the activity aimed simply at not producing losses.[309] On this point, however, the jurisprudential orientation that denies the essentiality of the profit motive for the purposes of entrepreneurial *status*[310] and that, therefore,

[308] However, no equalisation can be made in case of Third sector entities that do not carry out commercial activities. It is not possible to attribute the entrepreneurial character to the activity carried out completely free of charge through the free supply of goods or services: 'business activity exists whenever there is an objective cost-effectiveness of management, understood as proportionality between costs and revenues (so-called objective profit), which translates into the ability to achieve the remuneration of productive factors, or even in the trend towards the suitability of revenues to achieve balance; this requirement should be excluded only if the activity is carried out completely free of charge': Corte di Cassazione 10 February 2022 no 4418, *Guida al diritto*, 9 (2022).

[309] With regard to the compatibility of the cost-effectiveness with the balance sheet, F. Galgano, *Diritto commerciale. L'imprenditore* (Bologna: Zanichelli, 1995), 18.

[310] In this way Corte di Cassazione 19 June 2008 no 16612, *Massimario della Giustizia civile*, 977 (2008) which interprets the notion of entrepreneur in an objective sense: 'recognition must be given to the entrepreneurial nature of the organised economic activity which is linked to a given objective inherent in achieving the remuneration of the factors of production, while the aim of making a profit remains legally irrelevant, which concerns the subjective motive that leads the entrepreneur to carry out his activity […]'. More recently Tribunale di Torino 1 June 2022 no 2376, *Guida al diritto*, 37 (2022): 'for the purpose of recognition of the quality of commercial entrepreneur, only the pursuit of the so-called "objective profit" is relevant, that is, management in accordance with cost-effectiveness criteria such as proportionality between costs and revenues and the suitability of revenues to achieve budgetary balance'.

accepts the European 'broad' notion of an enterprise, has long been consolidated, recognizing this qualification to all the entities that, although inspiring their activity for general purposes, subject it at least to the recovery of investments and, therefore, to the balance of the budget.[311]

The 'economic' approach, therefore, confirms the comparability between the enterprise and the Third sector body only on an objective level. However, it does not take into account the natural and dynamic ability of the economic criterion to comply with the diversity of purposes from which it is moved: these purposes are subjective profit aimed at personal gain, in the case of the 'pure' enterprise and objective profit aimed at self-financing activities of general interest, in the case of the Third sector entity.[312] If this were not the case, it would be necessary to arrive at the paradoxical conclusion that the entire reason of the reform, which introduces *other* forms of involvement and also provides for an articulated framework of tax concessions, is incompatible with the euro-unitary principles because, since these concessions are reserved for a well-defined category of 'enterprises', they violate the prohibition of State aid and therefore harm the principle of competition.[313]

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311 See F. Cavazzuti, 'Rischio d'impresa' *Enciclopedia del diritto*, *Aggiornamento IV* (Milano: Giuffrè, 2000), 1093. A. Mazzullo, *Il nuovo codice*, n 229 above, 50, highlights that actually 'the same Civil Code, in contemplating public enterprises (article 2093), seems to confirm this orientation from the beginning'.

312 The objective profit would not be in fact nothing but a result of 'a management marked to the cost-effectiveness' that has 'the virtue of allowing the continuous development of the activity in a way almost completely independent of the donations that are a fundamental source of financing of the Third Sector entities': M. Anselmo, 'Le attività commerciali nella disciplina fiscale del Terzo settore', in G. Zizzo ed, *La fiscalità del Terzo settore* (Milano: Giuffrè, 2011), 204.

313 As has been observed by E. Grasso and P. Rossi, 'Terzo settore e interesse generale in prospettiva comparatistica europea' *DPCE online*, 2425, 2430 (2019), the contrast between the possible application of tax relief to non-profit-making subjects, on one hand, and their submission

It is therefore clear that, because of the established entrepreneurial nature of the activities carried out on the market by non-profit entities, it must be recognised that the applicable rules cannot disregard the restrictions on the use of profits, duly imposed by the legislator. In other words, the fact that these entities also make profits is not enough for the purpose of total homologation to the traditional enterprise, thus questioning the very reason for their different qualification, as long as these profits are not distributed as profits to the members of the organization.[314]

This reasoning was accepted by the recent ruling of the Constitutional Court 15 March 2022 no 72[315] which, next to the decision 26 June 2020 no 131, constitutes a further opportunity to enhance the constitutional dimension of the Third sector. In one of its passages, in fact, after having intentionally reiterated the singular social function of these subjects, whose action is characterized by freedom, spontaneity and absence of profit, the Court observed how they, precisely because of the renunciation of profit, operate in a 'qualified market, that of the welfare society, distinct from that which responds to the purpose of profit'. This 'diversity' of the market must be sought not on the objective level of the activities carried out, which can coincide with the traditional market, but in an alternative way of contributing together with public bodies to social welfare.

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to competition rules, on the other, 'introduces a short circuit originating due to the considering the fiscal advantage as State aid'.

[314] Case C-174/00 *Kennemer Golf & Country Club* v *Staatssecretaris van Financiën*, Judgment of 21 March 2002, available at curia.europa.eu.

[315] Corte costituzionale 15 March 2022 no 72, commented by A. Giovannini, 'Dovere contributivo e Terzo settore: una nuova lettura per armonizzare il sistema' *Giurisprudenza costituzionale*, 849 (2022) and by L. Gori, 'L'organizzazione delle libertà sociali e la sua peculiare natura di controlimite' *Giurisprudenza costituzionale*, 858 (2022).

Consider, for example, the tax concessions reserved for Third sector entities.[316] The State's renunciation to the tax levy, if it first 'impoverishes' the public coffers, is subsequently compensated[317] by the relative assumption by non-profit entities of the expenses necessary for the exercise of activities of general interest, these are expenses that would otherwise weigh on general taxation.[318] In other words, the 'economic operator' of the Third Sector takes over from the State, bearing the cost of the service in exchange for its de-taxation. This is because while, following the taxation of traditional companies, a part of the income remains in the egoistic availability of the entrepreneur, in the case of Third sector entities, instead, 'it is the entire profit that is subtracted from its availability and aimed at the satisfaction of public needs'.[319] In this perspective, the factors of the absence of subjective profit and the burden of social needs (assumed thanks to the incomes in the form

[316] On which widely, also with critical remarks about the inhomogeneity between rules of taxation for the social enterprise and those for the other Third sector entities, A. Giovannini, 'Terzo settore', n 231 above, 29; F. Montanari, 'Gli enti del Terzo settore (ETS) nel sistema dell'Iva: profili soggettivi' *Rivista trimestrale di diritto tributario*, 371 (2018) and Id, 'Le criticità dell'Iva per le attività di interesse generale nel nuovo Codice del Terzo settore' *Rivista di diritto tributario*, 561 (2018); A. Mazzullo, *Il nuovo codice*, n 229 above, 219.

[317] With regard to the 'compensatory taxation' as a mechanism by which the State, rather than raising the question of recognition of a tax advantage, reasons in terms of fair compensation between what saved thanks to the action of the Third Sector and what from these due in terms of economic capacity, A. Mazzullo, *Il nuovo codice*, n 229 above, 103.

[318] See OECD, *Taxation and Philanthropy* (2020), available at https://www.oecd.org/ where it is underlined that 'tax concessions will be justified where they result in a larger increase in social welfare than that which the government could have otherwise achieved through direct spending'.

[319] A. Giovannini, *Terzo settore*, n 231 above, 38-39.

of objective profit), clearly assume the form of contribution to public spending[320] as an alternative to the traditional tax obligation, in a logic of 'fiscal subsidiarity'.[321]

This interpretation allows us to shift attention from a strictly pro-competitive conception of public-private relations to a more broadly social one in which the facilitative discipline assumes a marked extra-fiscal value, while the form of a dialogue between the two spheres according to the schemes of article 55 of the Third Sector Code constitutes its means of implementation. This perspective is indeed even more valid when read in light of the principles of the Charter of Fundamental Rights of the European Union.[322] The Third sector entities, exclusively designed for the person, have the special merit of being able to generate, above all, added value in terms of mobilising citizens and creating social and relational capital.[323] The development of a country is no longer measured only by the increase in GDP, but also depends on the level of well-being and quality of life,[324] and therefore, on the happiness of people.[325] Thus, solidarity combined

[320] This 'must be seen not only as a settlement of public expenditure, but also as its decrease': A. Mazzullo, *Il nuovo codice*, n 229 above, 103. The Author, starting from the broader constitutional duty to contribute to public expenditure (article 53 of the Constitution), wonders if 'it is not possible, indeed mandatory, to recognize to the Third Sector a capacity of contribution that overlook, indeed precedes the tax' in light of a combined reading of articles 3, 53 and 118 of the Constitution.

[321] On the possibility of contributing to public expenditure in alternative ways, based on the close link between the ability to pay and the principle of horizontal subsidiarity, L. Antonini, *Sussidiarietà fiscale. La frontiera della democrazia* (Milano: Guerini e Associati, 2005), 109; A. Perrone, 'Sussidiarietà e fiscalità: un nuovo modo di concepire il concorso alle spese pubbliche?' *Rivista di diritto tributario*, 437 (2017); G. Boletto, *Le imprese del Terzo settore nel sistema di imposizione dei redditi: tra sussidiarietà orizzontale e concorrenza* (Milano: Giuffrè, 2020), 181 and A. Giovannini, *Terzo settore*, n 231 above, 34.

[322] In particular, Section I and II.

[323] With regard to the ability of the Third Sector to generate 'relational goods', V. Berlingò, *Beni relazionali*, n 39 above, 95.

[324] P. Perlingieri, 'Persona, ambiente', n 104 above, 322.

[325] As studies on the 'Paradox of happiness' teach us, the level of happiness of people is not measured by the increase in income, its variation rather is closely connected with factors other than economic ones, such as personal relationships and active participation in civil society: R.A. Easterlin,

with the dignity and full participation of civil society allows us to fully use the potential of the trinomial solidarity-competition-subsidiarity to raise the quality levels of social welfare without limiting one or the other.

6. Finally, a thorough reflection on the negotiation profiles of the involvement of Third sector entities in agreements cannot neglect the analysis of its key element, which is the cause. Together with the peremptoriness and the absence of subjective profit, it constitutes, in fact, the last piece of justification of a discipline different from that of the Public Contracts Code.

From the reading of article 55 of the Third Sector Code it is easy to see how the first indication of the causal substrate of public-private collaborative relationships is provided by the legislator himself. The use of the terms 'co-programme' and 'co-design', in fact, immediately evokes the idea of an action shared in objectives and aggregated in resources, in which the synallagmaticity and the corresponding performance that are instead the basis of exchange contracts disappear. As the Constitutional Court has amply emphasized,[326] it is a 'new collaborative relationship' that lies 'beyond the mere utilitarian exchange'. The collaboration that is realized, on closer inspection, from the general duty of mutual cooperation between the parties[327] becomes, in this case, the causal basis of the agreement between the administration and the Third sector organization, whose discipline, therefore, must be sought in negotiation cases capable of enhancing

'Does Economic Growth Improve the Human Lot: Some Empirical Evidence', in P.A. David and M.W. Reder eds, *Nations and Households in Economic Growth* (New York: Academic Press, 1974), 89. With regard to the suitability of GDP as a measure of well-being, European Commission, *Measurement of Economic Performance and Social Progress* (2011).

[326] Corte costituzionale 26 June 2020 no 131.

[327] Article 1175 of Civil Code.

this 'specific ability to participate together with public subjects in the realization of the general interest'.

A first normative basis to define the 'involvement' of the Third sector is offered precisely by the category of contracts with the same purpose that for some time in doctrine has been opposed to that of exchange contracts.[328] In them, collaboration represents the qualifying element[329] that in the constitutive phase of the relationship translates into the sharing of goods, resources or personal activity and, in the executive phase, into the realization of the general interest through the convergence of the services of each. This is because of the particular structure desired by the parties, contained in the conventional program established by the agreement.[330] As legal literature has highlighted,[331] contracts with the same purpose, except for 'associative' ones that imply the creation of a collective

[328] In the matter of contracts with communion of purpose, usually identified in articles 1420, 1446, 1459 and 1466 of Civil Code, it has long been discussed in doctrine whether they should be qualified as plurilateral or associative according to the number of parties, two or more. It should be stressed, however, that there is a firm point on which legal scholars seem to agree: regardless, in fact, from the number of parties these are contracts with communion of purpose whose identity of the interests and convergence of the performances turn out, therefore, irreconcilable with the reciprocity typical of the contracts with reciprocal performances. As has been highlighted, in these contracts performances 'are arranged in one direction: that is, in a parallel way' (F. Messineo, 'Contratto plurilaterale', n 46 above, 147); the interests of the parties 'are related and have the same content' (Id, 'Contratto', n 46 above, 909); the function is to orient the performances towards 'a further activity' (T. Ascarelli, *Studi in tema di contratti* (Milano: Giuffrè, 1952), 115) as the whole set of interests is 'aimed at a program' according to which 'the interests at stake are realized through (are "mediated" by) a plan of action (the "program" agreed), and not immediately, through concrete imputations'" (S. Maiorca, 'Contratto plurilaterale', n 194 above, 10).

[329] In this way, T. Ascarelli, *Il contratto plurilaterale*, n 194 above, 271.

[330] D. D'Alessandro, *Profili di gratuità*, n 44 above, 326.

[331] R. Cippitani, *I contratti*, n 1 above, 53.

subject,[332] do not find complete discipline in the Civil Code.[333] Their logic, however, is frequently found in the contractual schemes introduced with special legislation that, as has been seen, encourage collaboration between enterprises (network contract), between public bodies (collaboration agreements referred to in article 15 of legge 7 August 1990 no 241, and cooperation agreements referred to in article 30 of the Consolidated Text of Local Authorities but also between public and private bodies (grant agreement).[334] In all these cases, the legislator

[332] F. Messineo, 'Contratto plurilaterale', n 46 above, 144, highlighted that the plurilateral contract referred to in article 1420 of Civil Code, far from being an autonomous category, is 'a subspecies of the associative contract' referred to in article 2247 of Civil Code and, more precisely, 'an associative contract necessarily with several parties'. Conversely, G. Ferri, 'Contratto plurilaterale' *Novissimo digesto italiano* (Torino: Utet, 1959), IV, 681 who sees in the two contracts, plurilateral and associative, an identity relationship.

[333] F. Messineo, 'Contratto plurilaterale', n 46 above, 141-142, distinguishes between associative contract (which can also be plurilateral if with more than two parts: article 2247 of Civil Code) and plurilateral contract (articles 1420, 1446, 1459, 1466 of Civil Code). The Author points out that the legislator's choice to adopt a few articles regulating the plurilateral contract derives only from the need to protect the parties to the contract, when there are more than two, in case of nullity, cancellation or termination of the contract. This requirement derives from the respect of the general principle of conservation of the contract referred to in article 1367 of Civil Code.

[334] It is a tool, well known in many European countries, through which the public body (funder) contributes to the implementation of a project of general interest by the private sector (beneficiary). Thus, in Spain *ley 17 noviembre 2003, n. 38* defines *subvención* as '*toda disposición dineraria realizada […] a favor de personas públicas o privadas, y que cumpla los siguientes requisitos: a) que la entrega se realice sin contraprestación directa de los beneficiarios; b) que la entrega esté sujeta al cumplimiento de un determinado objetivo, la ejecución de un proyecto, la realización de una actividad, la adopción de un comportamiento singular, ya realizados o por desarrollar, o la concurrencia de una situación, debiendo el beneficiario cumplir las obligaciones materiales y formales que se hubieran establecido; c) que el proyecto, la acción, conducta o situación financiada tenga por objeto el fomento de una actividad de utilidad pública o interés social o de promoción de una finalidad pública*'. In Italy, the subsidy is regulated by article 12 of legge 7 August 1990 no 241, although the debate about its nature, whether administrative act or contract, is still open. For example, R. Cippitani, *La sovvenzione come rapporto giuridico* (Roma: Iseg Gioacchino Scaduto, 2013), 284 and Id., *I contratti*, n 1 above, 45, identifies the cause of the subsidy agreements with communion of the purpose. G. Pericu, *Le sovvenzioni come strumento di azione amministrativa* (Milano: Giuffrè, 1967), I and E. Croci and G. Pericu, 'Sovvenzioni (diritto amministrativo)' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLIII, 243, configures the subsidy as an administrative act. Instead, G. Melino, 'Osservazioni in tema di sovvenzioni' *Nuova rassegna di legislazione dottrina e giurisprudenza*, 881 (1983) discusses the 'contract-administrative act'.

merely regulates some aspects of the negotiations, thus offering a minimum level of regulation. At the same time, however, it thereby gives more space to the 'regulation put in place by the parties'.[335]

Contracts with the common purpose are therefore distinguished by being 'susceptible to a very diverse concrete causal articulation'[336] that in the co-programming and co-design relationships outlined by the Third Sector Code is concretized, in particular, in the realization of a common program, from the identification of needs, interventions and resources to their joint realization. Indeed, they confer a specific relevance to the associative modalities by which the parties cooperate in the implementation of the project, without a real *affectio societatis* being achieved for this purpose. In other words, co-programming and co-design establish a lasting collaboration between subjects who, on the level of action, remain autonomous.

The characterization of collaboration agreements pursuant to article 55 of the Third Sector Code, in terms of the sharing of interests, now allows us to dwell on

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[335] Discusses with regard to these contracts on the 'weak regulatory level' R. Cippitani, *I contratti*, n 1 above, 54. The Author also points out that such contracts would not be 'technically atypical' since the contracts with a common purpose are accepted and mentioned by special legislations implies that in general 'the assessment of the merits of the interest to be pursued has already been done by the legislator or by the public authority (contrary to what happens for atypical contracts in the strict sense, pursuant to article 1322 of Civil Code)'.

It should be noted, however, that it is precisely the specific set of interests achieved by the parties that leads to the verification of the conformity of the act of autonomy, that is, its worthiness, from the point of view of the intended effects in comparison with the legal ones, connected with that act. This control, in fact, 'disregards the particular discipline of the type and is realized, according to the concrete case, through the use at three hundred and sixty degrees of the principles and rules present in the system'. The worthiness assessment, therefore, must be extended to all acts of autonomy, whether they are typical or atypical: P. Perlingieri, *Il diritto civile*, IV, n 6 above, 106 and Id, 'In tema di tipicità e atipicità nei contratti', in Id, *Il diritto dei contratti*, n 63 above, 399. See also E. Minervini, *La "meritevolezza" del contratto. Una lettura dell'art. 1322, comma 2 c.c.* (Torino: Giappichelli, 2019), 29.

[336] With this perspective F. Cafaggi ed, *Il contratto di rete. Commentario* (Bologna: Il Mulino, 2009), 24, with regard to the network contract which is defined by the Author as '*transtipico*' ('transtypical').

further aspects that denote them from the causal point of view in the peculiar public-private relationship. As is clear from the considerations made so far, these are legal relationships that cannot be studied exclusively from a private or administrative perspective. They, on the contrary, place themselves beyond the public and private, 'constituting a laboratory in which their modern synthesis is produced'.[337] It is in this perspective that, in the search for a common discipline, it is necessary to combine the reflection on the cause, which is the communion of purpose, with its distinctive features of gratuitousness and atypicality.

In the relationship of sharing that is established between the public body and the private entity, in which both make resources and benefits available to each other, gratuitousness takes on particular importance. It allows to draw a clear boundary with the typical onerousness of the public procurement, but above all when read through the lens of the cause,[338] it concretely helps to see the commitments assumed by the parties in a different light,[339] which in collaboration agreements may also have patrimonial content.

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[337] R. Cippitani, *La sovvenzione*, n 334 above, 396.

[338] Which must be understood as 'synthesis of the concrete interests that the contract is directed to realize beyond the model, also typical, used' that is the 'individual function of the individual, specific contract put in place, independently from the relative abstract stereotype': Corte di Cassazione 8 May 2006 no 10490, *Il Corriere giuridico*, 1718 (2006) commented by O. Clarizia, 'Valutazione della causa in concreto e superamento del tipo legale', in G. Perlingieri and G. Carapezza Figlia eds, *L'"interpretazione secondo Costituzione" nella giurisprudenza. Crestomazia di decisioni giuridiche* (Napoli: Edizioni Scientifiche Italiane, 2012), 41. In doctrine, V. Roppo, 'Causa concreta: una storia di successo? Dialogo (non reticente, né compiacente) con la giurisprudenza di legittimità e di merito' *Rivista di diritto civile*, 957 (2013); E. Navaretta, 'La causa', in G. Amadio and F. Macario eds, *Diritto civile. Norme, questioni, concetti* (Bologna: Il Mulino, 2014), 599; A. Federico, 'L'uso giurisprudenziale della causa concreta', in G. Perlingieri, O. Clarizia, A. Fachechi and A. Lepore eds, *La giurisprudenza del foro napoletano e gli orientamenti nazionali ed europei in tema di obbligazione e contratti* (Napoli: Edizioni Scientifiche Italiane, 2015), 25; F. Alcaro ed, *Causa del contratto. Evoluzioni interpretative e indagini applicative* (Milano: Giuffrè, 2016).

[339] The need to analyse the nature of gratuitousness in close connection with the concrete cause in the public-private negotiations is felt by D. D'Alessandro, 'L'esclusione della normativa sugli

From the perspective of the Third Sector, co-programming and, in particular, co-design means having a financial capacity that can at least cover the cost of the activities carried out. From the perspective of the administration, this implies the duty to contribute, based on its financial availability, to the related expenses. The relationship that is triggered based on these needs, therefore, seems to fall within the area of onerousness where the performance of one party corresponds to the consideration of the other, with the consequent application of the Public Code Contracts Code. Such is the restrictive interpretation of the nature of gratuitousness provided by the Council of State which, in connecting the nature of co-design to the procurement of social services, highlights how only the relationship of collaboration in which the absence of consideration also includes the mere reimbursements of expenses 'does not create problems of distortion of competition'.[340]

appalti delle convenzioni non onerose per l'amministrazione (fra programmazione urbanistica, interesse pubblico ed interesse privato)' *federalismi.it*, 2 (2017) and Id, 'Profili di gratuità', n 44 above, 321.

[340] With this perspective Consiglio di Stato 26 July 2018 opinion no 2052 which identifies the concept of gratuitousness 'in the non-economic nature of the service because it is managed, in terms of comparison of costs and benefits, necessarily at a loss for the provider' with the consequent exclusion of any form of remuneration, also indirect, of the productive factors (labour, capital), being able to admit only the reimbursement of 'expenses incurred, current and not'. In line with this opinion is the recent decision of Consiglio di Stato 7 September 2021 no 6232 which granted the appeal concerning the gratuitousness of the services entrusted within the dispute between Istituto di Vigilanza and the municipality of Eboli, concerning the reservation of the procedure for the award of the management service of a municipal beach for persons with disabilities to Third sector entities only. In particular, Consiglio di Stato noted that the public notice for the selection of the entity, in addition to free access for disabled persons, their carers and children under the age of 6, it also provided for paid access for any additional accompanying person and reserved the possibility of using the income deriving from the refreshment point on the beach as a source to cover the costs of the service provided. This entailed that the basis on which the requirement of the gratuitousness of the service legitimising the use of the procedures of entrustment with limited selection to the Third sector entities was no longer fulfilled.

A more flexible notion of the requirement of gratuitousness, on the other hand, can be derived from European case law by reasoning on the contrary of what is not considered onerousness by the Court.

First of all, it should be noted that the latter does not exclude the possibility that public-private relations, notwithstanding the public procurement regulation, may be accompanied by the reimbursement of expenses made by the public body in favour of the private entity for the service performed. On the occasion of the 'Spezzino'[341] ruling, in fact, in judging the direct entrustment compatible with European law, in the absence of any publicity, of the emergency health transport service to voluntary associations, the judges admitted this possibility, provided that the associations involved do not derive any profit from their services. This is regardless of the reimbursement of variable, fixed and durable costs in the time necessary to provide them, as well as the employment of workers for this purpose. If that were not the case, as the Court then pointed out, 'such associations would almost be deprived of the effective possibility of acting in various areas in which the principle of solidarity can of course be implemented'.

It is with the IBA *Molecular Italy*[342] ruling that the Court marks the boundary between onerousness and gratuitousness. During the preliminary ruling, the European judges were called upon to reflect again on the notion of contract for consideration and, in particular, whether it can also include a decision of the administration with which the latter grants directly to an economic operator, and therefore without prior execution of a public procurement award procedure, a

[341] Case C-113/13 *Azienda sanitaria 'Spezzino' e a.* v *San Lorenzo Soc. coop. Sociale e Croce Verde Cogema cooperativa sociale Onlus*, Judgment of 11 December 2014.

[342] Case C- 606/17 *IBA Molecular Italy Srl* v *Azienda ULSS n. 3, Regione Veneto, Ministero della Salute, Ospedale dell'Angelo di Mestre*, Judgment of 18 October 2018, available at curia.europa.eu.

cash grant, entirely aimed at the production of drugs intended to be subsequently supplied free of charge to various administrations, exempt from paying any consideration to the operator himself, except for the payment for transport costs as a lump sum. In the Court's view, there should be no doubt about the onerous nature of such a relationship between the administration and the beneficiary of the subsidy: the onerousness presupposes a commitment from each party to provide a service in return for another service. In the present case, the assessment of the onerous nature would derive precisely from the existence of the consideration paid to the supplier of the medicinal product through a subsidy even though the costs of the aforementioned product are not even fully covered by the subsidy.

The judgment shows that in European case law the distinction between onerousness and gratuitousness is identified in the existence of the consideration, with the consequence that only if it is not qualifiable as such, the act would fall within the category of free ones, excluded from the application of the Public Contracts Code. However, the greatest difficulty lies precisely in understanding from time to time what the actual scope of the service is. Nevertheless, if the reasoning of the Court were to be accepted, it would have to be concluded that all services are considerations, aside from the concrete interests of the parties that provide those services. The case of the subsidies in question is the testimony: in them, the provision of the settlor, as a financing entity that collaborates in the realization of the project of the private entity through the granting of a contribution, always presupposes a corresponding provision of the payee. Indeed, for the latter, the effect of attributing an economic benefit that derives from the act of subsidy involves the assumption of a real obligation to implement the

project subject to the financing,[343] under penalty of revocation of it. This obligation, however, far from being understood as a corresponding provision of the act of disposition carried out by the administration, is on the contrary configured as 'an obligation for no consideration'[344] since the asset-relevant interest of the settlor, although it exists and constitutes the very justification of the act,[345] is not concretely realized through the 'exchange of benefits from the beneficiary that impoverishes them'. In other words, the onerousness is lacking: the asset interest of the settlor that justifies the legal effect of the allocation of a sum of money or another economically valuable asset remains only indirectly linked to the beneficiary's provision. This explains the duty of the administration, which was repeatedly reiterated by the Council of State, to justify, also in light of the general interest and the institutional mission of the entity, the subsidies granted to private individuals.[346]

The question of the nature of the subsidies and their relationship with the competitive structure of the European Union has been the subject of a lively

[343] E. Croci and G. Pericu, 'Sovvenzioni', n 334 above, 254.

[344] D. D'Alessandro, 'Profili di gratuità', n 44 above, 327. According to the opinion of E. Croci and G. Pericu, 'Sovvenzioni', n 334 above, 244, the gratuitousness of the subsidies also derives from the absence, in the face of the 'enrichment' of the beneficiary, of the consequent obligation of restitution or of any obligation of payment towards the financing administration.

[345] D. D'Alessandro, 'Profili di gratuità', n 44 above, 328 distinguishes between gratuitous acts and acts of generosity. The Author observes that the difference between the two is given precisely by the lack in those of liberality of the patrimonial interest of the disposer that is, instead, present in the gratuitous acts: 'it is a matter of the cause, since precisely the absence or presence of the patrimonial interest invests the merit of the negotiating act and does not represent a mere individual and possibly legally relevant reason'.

[346] See in particular Consiglio di Stato 27 June 2012 no 3778, *Il Foro amministrativo C.d.S.*, 1628 (2012), according to which in every financing operation made by the public body the economic benefit bestowed to the private is always attributable to a specific purpose of the institution itself. That is to say, funding is aimed at satisfying an institutional interest that goes beyond that of the recipient.

doctrinal and jurisprudential debate in the French legal system as well, in which the subsidy institution constitutes a consolidated form of collaborative relations between the public and private spheres.

Even before the concept of subsidy was defined at the legislative level, in French case law, it was widespread the opinion for which the exclusion of the onerousness of the asset allocation in favour of the private beneficiary, precisely originated from the absence of a direct link between the activities carried out by the latter and the contribution received by the administration.[347] In doctrine, in turn, there have been many attempts to offer a systematic framework for the institution in question. For some, the *subvention* should be placed at an intermediate level between the donation and the exchange contracts.[348] For others, on the other hand, based on the legal effects that the subsidy relationship produces between the parties, we are faced with a form of '*don public*'.[349] Finally, more recently, it has been argued that the *subvention* would not be onerous in nature, but would not be gratuitous either: it would instead be a financial aid, without direct compensation, burdened by a destination.[350]

However, regardless of the legal nature of the subsidy, which clearly is still far from a uniform and shared qualification, the French interpreters certainly have the merit of having drawn a clear distinction between the institution in question and other apparently similar institutions,[351] such as the public procurement of services

[347] Conseil d'État 6 juillet 1990 no 88224, *Lebon*: '*en l'absence d'un lien direct entre le montant des contributions versées au comité et les opérations réalisées par lui, ce dernier me peut être regardé comme ayant effectué de façon générale des prestations de services à titre onéreux au sens du CGI*'.

[348] Q. Epron, 'Le contrat de subvention' *Revue de droit public*, 63 (2010).

[349] C. Blanchon, *Sur la subvention. Contribution à l'étude du don en droit public* (Issy-les-Moulineaux: LGDJ, 2019).

[350] H. Hoepffner, *Droit*, n 64 above, 291.

[351] In particular, Conseil d'État 6 avril 2007 no 284736, *Lebon*.

or the delegation of services for whose discipline we inevitably refer to European regulations. The results of this effort were finally enhanced by *loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire (ESS)* which amended *loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* introducing for the first time the legal definition of the subsidy in the French legal system.[352] In its article 9-1[353] the legislator defines *subvention* as a contribution of any kind, justified by the public interest and intended for the performance of an activity of social utility by the private beneficiary, which cannot constitute the remuneration for services that meet the exclusive needs of the granting body. As is clear from that definition, the subsidy is characterised by two key elements which allow for avoiding confusion with traditionally capital-oriented institutions. On one hand, therefore, it is essential for a legitimate and worthy subsidy that the activities carried out within the framework of the financed project do not concretely constitute a consideration provided to the public entity. On the other hand, it is essential that these activities, the subject of the subsidized project, are of particular interest to the community and, therefore, are in line with

[352] *Loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire (ESS)* is part of a broad process of reform of the social and solidarity economy that has been undertaken in France with the adoption of the *Charte nationale des engagements réciproques* signed on 14 February 2014 by the State, local authorities and associations to strengthen local cooperation in the economic, social, cultural and environmental sectors in implementation of the principles of solidarity and democracy. The Charter, together with the reform law, recognises the essential role that associations play in society and thus establishes the duty of public bodies to support associations' initiatives in their respective territories.

[353] Article 9-1 of *loi n° 2000-231 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* states: '*constituent des subventions, au sens de la présente loi, contributions facultatives de toute nature, valorisées dans l'acte d'attribution, décidées par les autorités administratives et les organismes chargés de la gestion d'un service public industriel et commercial, justifiées par un intérêt général et destinées à la réalisation d'une action ou d'un projet d'investissement, à la contribution au développement d'activités ou au financement global de l'activité de l'organisme de droit privé bénéficiaire. […] Ces contributions ne peuvent constituer la rémunération de prestations individualisées répondant aux besoins des autorités ou organismes qui les accordent*'.

the territorial mission of the entity.[354] The subsidy thus outlined, on closer inspection, is not only defined in its essential features by the gratuitousness of the commitments undertaken by the parties but is also characterized by the evident communion of interests that push them to establish the collaboration: that is to generate social benefits in favour of the community.

It is now understood how the reconstruction through the instrument of the cause of the negotiation profiles of the involvement of the Third sector entities, conceived like the subsidy, based on the communion of purpose and gratuitousness of the services,[355] is indispensable not only to ascertain the adequacy of the regulation of interests envisaged by the parties compared to those actually highlighted,[356] but also its worthiness. Therefore, co-programming and co-design are not attributable, if not partially, to one of the legal types of agreement between public and private provided for in the Italian legal system.[357] The merit of the protection of the interests that they achieve, in the concrete case,

[354] This is very clear from the *Guide d'usage de la subvention* published in 2019 by *Ministère de l'éducation nationale et de la jeunesse DJEPVA – Bureau du développement de la vie associative* which provides that '*dans le cadre de la subvention, la collectivité détermine ce qu'elle soutient et peut fixer, d'un commun accord avec l'association, des objectifs à atteindre. Cela permet une constante adaptation de l'action en fonction des nécessités locales*'.

[355] As stressed by F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 38, this is not 'an economic relationship based on consideration, but a relationship based on the incentive of performance without consideration'. Through this type of agreement, in fact, private individuals participate in the care of general interests 'thus developing in concrete common interests to the parties' (F. Giglioni e A. Nervi, 'Gli accordi', n 45 above, 36) but the contribution in turn offered by the administration is not a consideration for the commitment of the Third sector entity, even if of a patrimonial nature. Rather it is a co-participation in the realization of the positive impact that the initiatives taken by private individuals generate on the local social community (M. Magri, 'Gli accordi con i privati nella formazione dei piani urbanistici strutturali' *Rivista giuridica di urbanistica*, 539 (2004)).

[356] A. Federico, 'L'uso', n 338 above, 25 and Id, 'La causa del contratto tra "regole" e "princípi"' *comparazionedirittocivile.it*, 35 (2018).

[357] On this point see A. Berrettini, 'La co-progettazione', n 273 above, 1, which links co-design to the public-private partnership framework provided for in the Public Contracts Code.

not only exceeds the examination of the fundamental principles[358] for the implementation of which these collaborative instruments are responsible, but also that of the functionalization of administrative discretion that must necessarily compete with the interests pursued.[359] As a 'correlative of the contractual autonomy of private individuals',[360] the exercise of discretion extends, in fact, to the power of the administration to conclude even atypical agreements as long as they achieve interests worthy of protection, such as those in the present case, not conflicting with institutional purposes.[361]

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[358] The axiological view of the worthiness assessment that imposes on the interpreter the need to assess the suitability of the concrete act to implement the fundamental values (see P. Perlingieri, *Scuole*, n 35 above, 29 and Id, *Il diritto civile*, IV, n 6 above, 106) has been accepted by Corte di Cassazione according to which this assessment takes into account the complexity of the legal system composed of national and supranational principles and rules that promote the negotiating autonomy in compliance with dignity of the person and the social utility (articles 2 and 42 of the Constitution): Corte di Cassazione-Sezioni unite 24 September 2018 no 22437, *Responsabilità civile e previdenza*, 163 (2019). It follows that '[…] the lack of worthiness will come instead from the opposition (not of the agreement, but) of the result that the atypical agreement intends to pursue with the principles of solidarity, equality and not prevarication that our system lays at the foundation of private relations': Corte di Cassazione 28 April 2017 no 10506, *Il Foro italiano*, 2725 (2017). With this perspective also A. Nervi, 'La causa del contratto; una questione culturale' *rivistapactum.it*, 87, 92 (2022), who defines the cause '*una sorta di filtro, attraverso il quale l'interprete può verificare la compatibilità tra il dato fattuale (l'operazione negoziale) ed il dato normativo (le norme ed i principi dell'ordinamento giuridico) e, all'esito, munire il primo della tutela elargita dal secondo, oppure espungerlo dall'ambito del giuridicamente rilevante*' ('a kind of filter, through which the interpreter can verify the compatibility between the factual data (the negotiation) and the normative data (the rules and principles of the legal system) and, at the end, provide the first protection provided by the second, or remove it from the scope of the legally relevant').

[359] D. D'Alessandro, 'Profili di gratuità', n 44 above, 327.

[360] V. Mengoli, *Gli accordi amministrativi fra privati e pubbliche amministrazioni* (Milano: Giuffrè, 2003), 49 and 52. See also F. Cangelli, 'Riflessioni sul potere discrezionale della pubblica amministrazione negli accordi con i privati' *Diritto amministrativo*, 277 (2000).

[361] In this way Consiglio di Stato 7 September 2001 no 4680, *Ragiusan*, 99 (2002) pointing out that '*la determinazione di un ente pubblico di concludere un contratto atipico non può essere censurata per il solo fatto che il negozio non corrisponde alla figura tipica disciplinata dal codice civile con un determinato nomen iuris, oppure perché è stato utilizzato quel nomen per indicare un negozio parzialmente non corrispondente*' ('the determination of a public body to conclude an atypical contract cannot be censured for the sole reason that the negotiating act does not correspond to the typical figure ruled by the Civil Code with a certain *nomen iuris*, or because that name has been used to indicate a partially different contract'.

Therefore, in light of these considerations, the boundary between public and private blurs even more sharply. It is not possible to subject co-programming and co-design to the public procurement regulations alone. On the contrary, the applicable rules necessarily range from general rules on the contract to those on the individual types of contract as well as the principles and rules governing the administrative activity. This concerns both the constitutive phase of the relationship as well as the possible pathological one.

7. In their intrinsic diversity in relation to contracts of private law, and public law but also to administrative measures, the collaboration agreements referred to in the Third Sector Code, therefore, present themselves as a proceduralised form of subsidiary action[362] that finds in the administrative procedure the natural place for its implementation. This peculiar configuration of the agreements in question, however, precisely because they are rooted in article 11 of legge 7 August 1990 no 241, is deeply engraved by the presence of both administrative and contractual aspects, which in this way give the relationship between the administration and the Third sector body the role of 'procedural collaboration agreements'.[363] The scope of article 11 seems to go far beyond the positive figure. As has been authoritatively observed, the agreements governed by it represent an 'institutional solution' for all those relationships mediated by negotiability to the point of

[362] Corte costituzionale 26 June 2020 no 131.

[363] This definition was elaborated by ANAC in the guidelines on 'Guidance on Social Service Provision' which, although with express reference to the co-design aimed at defining of innovative and experimental service projects, complex actions and activities to be carried out in terms of partnership between administrations and the social private sector, could instead be well extended to co-programming and, from an objective point of view, to all activities of general interest referred to in the Third Sector Code.

making the provision itself 'the general rule of a certain type of relationship, those of a consensual nature, functionally conditioned, that are deployed between public administrations and private individuals, regardless of whether they find legitimacy in specific regulations'.[364] We must also read in this perspective the agreements on co-programming and co-design, whose framing within article 11, makes it necessary to clarify the relationship with the two types of agreement, supplementary and substitute, provided for in it.

The reflection arises from the examination of article 11 from which it emerges, first of all, that the administration has the right to conclude agreements with private individuals and that therefore the 'involvement' of a Third sector entity could also be denied.[365] Secondly, the sentence that explains that the agreements may be concluded 'to determine the discretionary content of the final measure that is to replace it' tells us that the administration remains in any case free to choose whether to conclude the procedure with the measure, although it is integrated into its content with what was previously agreed by the parties or to replace it with an agreement containing its content and effects. In the case of agreements with the Third Sector, however, it is clear that the choice can only be made on the second solution since a collaboration generated by the final unilateral measure, although 'fixed' by the agreement reached in the procedural context, does not appear compatible with the meaning of the new legislative formula of article 55 of the Third Sector Code. Finally, the need arises to check whether the

[364] F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 34.

[365] However, against the express duty to ensure the involvement referred to in article 55 of the Third Sector Code there is reason to believe that any denial must be specifically justified, also in virtue of the wider obligation to state reasons for the administrative measures provided for by article 3 of legge 7 August 1990 no 241.

co-programming and co-design agreements, as they necessarily result from the final agreement between the administration and the Third sector, can be placed in a phase that precedes the procedure and indeed be the driving force for its establishment to agree on the joint action programme.[366]

Article 55 of the Third Sector Code provides for the possibility of establishing collaborative relationships as long as the identification of Third sector entities takes place after the definition by the administration of the minimum requirements necessary for their participation in compliance with the principles of the law on administrative procedure. With a view to greater certainty and homogeneity of the different collaborations to be established over time and to promote the overcoming of the widespread practice that usually entrusts the identification of these aspects to each individual call or agreement,[367] this fulfilment can indeed be effectively fulfilled through the prior preparation of a specific regulation that predefines procedures and requirements. In addition to satisfying the need for

[366] F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 33, 36, raise the question whether article 11 of legge 7 August 1990 no 241 may also serve as a legal basis for cases in which agreements are concluded outside the administrative procedure or when they are the result of a procedure, but as the only possible outcome of it. See also F. Fracchia, *L'accordo sostitutivo. Studio sul consenso disciplinato dal diritto amministrativo in funzione sostitutiva rispetto agli strumenti unilaterali di esercizio del potere* (Padova: Cedam, 1998), 246; A. Massera, *Lo Stato che contratta e che si accorda* (Pisa: Plus, 2011), 557.

[367] This is stated in the proposal for regulation drawn up by ANCI Emilia-Romagna, 'For a regulation on the collaborative relationship between the municipality and Third sector entities implementing articles 55 and 56 of the Third Sector Code' pursuant to which it was adopted by Azienda di Servizi alla Persona – ASP Ambito IX by resolution of the Board of Directors 20 May 2021 no 36 the 'Regulation on the collaborative relationships between the ASP Ambito 9 and the Third sector entities'.

It should be noted, however, that to date there are very few general regulations dedicated to the relationship between the administration and the Third sector entities. A greater increase instead is recorded for 'particular' regulations regulating the co-design only. Among these, Regulation for the co-design between municipal administration and Third sector entities adopted by municipality of Colorno; Regulation for the co-design between municipal administration, Third sector entities and voluntary associations adopted by municipality of Piacenza.

homogeneity, equal treatment and transparency towards all those who wish to engage in collaboration, the elaboration of a specific regulation is, moreover, fully in line with the regulatory power of the administrations, constitutionally guaranteed and expressly referred to in article 55 of the Third Sector Code, in relation to the organization and performance of the functions assigned to them.[368] The regulation would have the function of establishing in advance the methods of involvement,[369] the same for all collaborations, which could take the form of non-competitive public procedures such as, for example, the publication of the public notice by the administration and the presentation of the related event of interest by the Third sector body; the creation through a notice of a general list of entities, periodically updated, for the subsequent activation of collaborations; or, again, the assumption of the initiative directly by the involved body with the request to the public body to activate the relative procedure. Nevertheless, the same regulation will immediately identify in the agreement the final act that will result in the conclusion of the procedure, fixing its content and effects. This would result in full legitimacy to use article 11 for agreements abstractly configurable outside the

[368] The use of municipal regulations for a more effective implementation of article 55 of the Third Sector Code and the principle of subsidiarity of which the first is a corollary is hoped by G. Arena, 'Sussidiarietà orizzontale ed enti del Terzo settore', in A. Fici, L. Gallo and F. Giglioni eds, *I rapporti tra pubbliche amministrazioni ed enti del Terzo settore. Dopo la sentenza della Corte costituzionale n. 131 del 2020* (Napoli: Editoriale Scientifica, 2020), 30 and 35. In this perspective, the lack of awareness of local authorities on their own regulatory autonomy, which is instead the real defining feature of the discipline referred to in article 55 of the Third Sector Code is highlighted by L. Gallo, 'Esperienze e prassi operative', in A. Fici, L. Gallo and F. Giglioni eds, *I rapporti tra pubbliche amministrazioni ed enti del Terzo settore. Dopo la sentenza della Corte costituzionale n. 131 del 2020* (Napoli: Editoriale Scientifica, 2020), 124.

[369] A. Lombardi, 'Gli strumenti collaborativi', n 147 above, 39-40 attributes, in this perspective, the 'active and promotional directing role' to the administration, which would have to define a regulatory framework within which to coordinate article 55 of the Third Sector Code with principles of the procedure in relation to the definition of its object, the criteria for identifying private subjects, the procedural steps and the modalities of formalization of the final agreements.

procedure, but which will necessarily be specified in it, following the discipline that regulates it.

It is in this perspective that it is possible to see concretely the extent of article 11, duly envisioned in doctrine. Its (literal) interpretation cannot stop before the discretion conferred by the legislator to the administration in deciding whether and with what type of act to conclude the procedure. In the present case, this choice has already been made upstream by the legislator with the introduction of article 55 of the Third Sector Code, but also by the administration itself, in the exercise of its regulatory and discretionary power aimed at its better implementation. Article 11, for its part, has the ambition to enhance the relationships marked by negotiation and, therefore, even when the agreement is posed as 'the only choice imposed by the rule or if the agreement matures *before* the procedure should not be prevented from fully producing the effects of the rule'.[370]

The collaborative agreements, which are therefore 'necessarily' substitutes, placed in the administrative procedure, now intercept the investigation into the discipline applicable in each of its phases before the genesis of the agreement and, subsequently, to the execution of the agreed programme. As it is known, article 11 extends to agreements the application of the principles of the Civil Code in matters of obligations and contracts, unless otherwise provided by law[371] and since

[370] F. Giglioni and A. Nervi, 'Gli accordi', n 54 above, 36.

[371] Paragraph 2 of article 11 if, on one hand, establishes the general principle of subjection of the agreements to the 'principles of the Civil Code', on the other, it provides at the same time for the derogation with through words 'unless otherwise provided'. As highlighted with regard to the analogous expression referred to in article 1, paragraph 1 *bis* by M. Gola, 'L'applicazione delle norme di diritto privato', in M.A. Sandulli ed, *Codice dell'azione amministrativa* (Milano: Giuffrè, 2017), 210 and 222, this 'ultimately equivalent to stating that the administrative action is carried out according to the provisions of the law' even in derogation from the private law, placing the administration in

they are compatible.[372] After overcoming the doubt about the use of the term 'principles' and not also 'norms',[373] in doctrine there has long been discussion about the effective scope of the 'compatibility' clause evoked by the legislator. If, on one hand, it serves as a reminder to recall the immanence of the public interest,

a position of supremacy. Instead, F.G. Scoca, 'Conclusioni', in *Riforma della l. 241/1990 e processo amministrativo: una riflessione a più voci*, 2005, available at www. giustamm.it, notes that legge 7 August 1990 no 241 is confusing 'because on one hand it strengthens the negotiating instrument and on the other it does not set the conditions for private law to be used. Not to mention the problem of defining within what limits private law can be used to replace administrative law'.

[372] According to the strictly public framework of the provision, the 'double' limit to the reference to the principles of the Civil Code would highlight the residual nature of the same and its purely integrative value of the discipline set by article 11 (see F. Tigano, 'Gli accordi integrativi e sostitutivi del provvedimento', in M.A. Sandulli ed, *Codice dell'azione amministrativa* (Milano: Giuffrè, 2017), 663-664, according to which 'the entirely private solution […] seems to be rejected in favor of a at least hybrid solution, straddling public and private law, although the feeling is that the public profile is, in the end, always preponderant'. In case-law, TAR Firenze 13 January 2015 no 56; Consiglio di Stato 3 December 2015 no 5492, *Il Foro amministrativo*, 3081 (2015)). A different view, from a private law side, is offered by F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 68, according to which the rules on obligations and contracts would constitute a general reference framework for agreements pursuant to article 11, which can be derogated both from the law (by means of a special rule) and from the need to ensure the public interest (through the compatibility filter).

[373] Legge 7 August 1990 no 241 refers to 'rules of private law' in article 1, paragraph 1 *bis*, while using the phrase 'principles of the Civil Code' in article 11, paragraph 2. According to the literal interpretation of the two rules, the use of different terminology derives from the nature of the administrative activity: 'authoritative' in the first case and 'not authoritative' in the second (G. Greco, 'L'azione amministrativa secondo il diritto privato', in V. Cerulli Irelli ed, *La disciplina generale dell'azione amministrativa. Saggi ordinati a sistema* (Napoli: Jovene, 2006), 69). However, F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 65-66 pointed out that regardless of the authoritative or otherwise nature of the act, many provisions of Civil Code in the field of obligations and contracts 'have now taken on such a wide scope to rise, at least in many cases, to real fundamental principles of the legal system'. It follows that the reference to the 'principles' referred to in article 11 must be considered inclusive of the entire discipline of the Civil Code: M. Renna, 'Il regime delle obbligazioni nascenti dall'accordo amministrativo' *Diritto amministrativo*, 27 (2010). This perspective has been adopted even before by G. Manfredi, *Accordi*, n 82 above, 106 and by V. Cerulli Irelli, *Corso di diritto amministrativo* (Torino: Giappichelli, 1994), 512 who observed that 'the term "principles" used by the provision does not have a particular technical meaning: these are rules of the Civil Code, which are considered (rightly) as the general discipline of the negotiating activity'. However, a different opinion has been expressed by TAR Napoli 21 November 2018 no 6727, *Il Foro amministrativo*, 2058 (2018) according to which only principles and not also rules should be applied 'because of the irreducible authoritative nature of the power exercised, even with negotiation tools'.

as an essential prerequisite of the entity's negotiating capacity, on the other hand, it remains a vague notion not easy to determine, especially in relation to the criteria to be followed to deduce or deny the application of a given principle. As has also been pointed out,[374] in the field of article 11, non-homogeneous figures of agreement coexist so that the rules of the Code will not be able to find a uniform application. This natural diversity, which makes the application of the principles on obligations and contracts 'asymmetrical', therefore presupposes a precise verification of the applicability of the rules valid for the exercise of negotiating autonomy, due to the specific nature of the agreement and the interests it is aimed at implementing.

More problematic issues, from an interpretative point of view, arise both in relation to the initial moment of discussion of the contents to be consolidated in the future agreement and especially after the conclusion of the latter during the emergence of the pathologies of the agreement itself.

In particular, the opinion is unanimous about the fact that at the stage of the 'negotiations', which before the adoption of the determination referred to in paragraph 4 *bis* of article 11 culminates in the conclusion of the agreement, the duties of fairness (article 1175 of the Civil Code),[375] diligence (article 1176 of the Civil Code) and good faith (article 1337 of the Civil Code)[376] are certainly applied.

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374 Consiglio di Stato 15 May 2017 no 2258.

375 See TAR Torino 28 October 2019 no 1090, *Il Foro amministrativo*, 1651 (2019) which applies article 1175 of Civil Code to urban planning conventions. The application of this provision to the relationships between public and private subjects was lastly expressly sanctioned by paragraph 2 *bis* of article 1 of legge 7 August 1990 no 241.

376 According to the consolidated orientation of the administrative judges, also during the negotiations before the conclusion of agreements referred to in article 11 of legge 7 August 1990 no 241 may exist 'a pre-contractual responsibility of the administration when, with its total guilty behavior, it harms the reliance in good faith of the private on the legitimacy of the measures adopted for the conclusion of the agreement, regardless of the profile of the legitimacy or not of the exercise

Just as the suitability of the collaborative agreement that can constitute, pursuant to article 1173 of the Civil Code, the source of obligations, which weigh both on private individuals and the administration, does not seem doubtful.

There is, however, a margin of uncertainty as to the nature of these. A part of doctrine supports the inapplicability of article 1174 of the Civil Code, according to a concept that cannot be peacefully extended to agreements: that of the necessary patrimoniality that characterizes the service, the object of the obligation, and that would thus draw the border between agreement and contract.[377] Others, on the other hand, by emphasizing the concept of equity of the service, which is clearly different from the patrimoniality of the content of the contract referred to in article 1321 of the Civil Code, highlight the breadth of the concept of obligation so that it includes not only the obligations that private individuals can assume in the pursuit of the common purposes crystallized in the agreement but also those mutually assumed by the administration when they also concern services deriving from the exercise of discretionary power.[378]

It should be pointed out, accepting the latter orientation, that article 1174 of the Civil Code limits the requirement of patrimoniality to the object of the

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of the authoritative power of self-protection': TAR Catania 5 June 2017 no 1293; Consiglio di Stato 18 April 2012 no 2239, *Il Foro amministrativo C.d.S.*, 950 (2012). With regard to the notion of good faith applied to the behaviour of public subjects it has been stressed that it takes shape 'in several rules of conduct, including the obligation to diligently assess the concrete possibilities for a successful conclusion of the negotiation and to inform the other party in good time of the possible existence of obstacles to this outcome': Consiglio di Stato 20 November 2020 no 7237, commented by G.D. Giagnotti, 'La rilevanza della condotta negoziale della P.A. anche nella fase precontrattuale' *Diritto e giustizia*, 13 (2020). With the same perspective TAR Brescia 7 January 2022 no 16, *Il Foro amministrativo*, 84 (2022).

377 F. Tigano, 'Gli accordi integrativi', n 372 above, 664.

378 M. Renna, 'Il regime', n 373 above, 48. With same perspective E. Bruti Liberati, *Consenso e funzione nei contratti di diritto pubblico tra amministrazioni e privati* (Milano: Giuffrè, 1996), 177; Id, 'Accordi', n 46 above, 25; G. Manfredi, *Accordi*, n 82 above, 98.

provision of the obligation which may well correspond 'to an interest, even non-patrimonial'. If, in fact, the agreement pursuant to article 11 also had as its object services susceptible of economic evaluation, the cause of it would, in any case, be determined with the concrete interests pursued which, as we have tried to demonstrate in the previous pages, in this case, do not present traits of patrimoniality. This is the point where the contract and the agreement seem to come together under a single regulatory umbrella: the non-economic nature of the purpose pursued cannot absolutely exclude the reconstruction of the agreement in a contractual key, since patrimoniality 'must be determined by the nature of the services and not by the interest pursued'.[379]

The foregoing considerations give rise to the application of additional general rules on contracts. On this point, indeed, there is still little jurisprudential experience and, however, there are cases in which the administrative judges have imposed, in the scope of agreements pursuant to article 11, the invalidity, pursuant to articles 1343 and 1418 of the Civil Code, of the excessively limiting clause of individual economic freedom as it is contrary to the principles of public order;[380] or, moreover, the invalidity, pursuant to articles 1346 and 1418 of the Civil Code of the entire agreement for the impossibility of its object, deriving from the legal impossibility to obtain the release of the administrative authorization measures

[379] A. Federico, *Autonomia*, n 47 above, 143-144. Such conclusions seem to be reached by the judges of TAR Catanzaro 28 February 2011 no 268 in the matter of agreements between public entities referred to in article 15 of legge 7 August 1990 no 241. In this decision the judges state that the memoranda of understanding between public bodies, although of a political nature, may well be sources of civil obligations 'because the fact that they carry out a programming and organizational function is not an obstacle to the possibility that the interested administrations assume obligations – finalized to such function – that are of economic nature as according to article 1174 of Civil Code'.

[380] TAR Venezia 17 May 2010 no 849, *Il Foro amministrativo T.A.R.*, 841 (2010).

necessary for the use of the asset for the agreed use.[381] Likewise, the orientation regarding the object of the agreement, and of any other negotiating act adopted by the administration, that by article 1346 of the Civil Code must be determined or determinable under penalty of nullity, which seems stable.[382] About the form, finally, this, as prescribed by the same law on administrative procedure, must be written under penalty of nullity (article 11, paragraph 2). This *ad substantiam*[383] requirement constitutes a true and proper prerequisite for the validity of the acts resulting from the negotiating activity of the administration since, together with the determination (article 11, paragraph 1) and the controls to which the substitutive agreements are subject (article 11, paragraph 3), safeguards the fundamental value of the certainty of public relations as well as avoids the risk of illegal agreements.[384]

[381] On this point Consiglio di Stato 12 July 2012 no 4126. In the civil doctrine profiles of the legal impossibility within relationships with public administration were investigated by C. Donisi, *Abusivismo edilizio e invalidità negoziale* (Napoli: Edizioni Scientifiche Italiane, 1986).

[382] Consiglio di Sato 24 July 2019 no 5231: in the present case, the impossibility of the object of the agreement derived from the failure to determine the duration of the agreement. In the opinion of the judges, the duration was not even determinable because no criteria for determining it had been laid down, limiting the agreement to refer, in a very general way, for this profile, to an "additional act" which, being in no way predetermined or predeterminable in its content, actually constituted, as anticipated, not an additional act but a legal act essential to complete the agreement. See also TAR Trieste 18 January 2016 no 15, *Il Foro amministrativo*, 112 (2016) that applied article 1346 of the Civil Code to the agreements between administrations referred to in article 15 of legge 7 August 1990 no 241 with regard to the economic consideration of a municipality. This, being an essential element of the negotiating act, must be correctly identified in the agreement, because the administration cannot take on not determined economic commitments. It follows that the absence of such an element entails the nullity of the agreement.

[383] According to the recent view of Consiglio di Stato 30 December 2022 no 11734, the requirement of the written form must also be extended to any subsequent modification of the common intention of the parties expressed in the agreement originally concluded.

[384] On this point Corte di Cassazione 6 June 2002 no 8192, *Nuova giurisprudenza civile commentata*, 185 (2003); Consiglio di Stato 7 July 2011 no 4083; TAR Cagliari 18 September 2017 no 586.

A more mature jurisprudential approach emerges in relation to the rules on the interpretation of the contract pursuant to articles 1362-1371 of the Civil Code, whose application is also peacefully extended to the agreements pursuant to article 11.[385] In particular, even in the exercise of the discretionary power of the administration, the interpreter is required to reconstruct the common purpose pursued by the parties based on their overall behaviour (article 1362 of the Civil Code), interpreting the clauses of the agreement through each other (article 1363 of the Civil Code), according to good faith (article 1366 of the Civil Code)[386] as well as, by the principle of conservation of legal acts, in the sense in which they can have some effect, instead of in the sense in which they would have no effect (article 1367 of the Civil Code).[387] Nevertheless, with particular regard to collaborative agreements, the closing rule referred to in article 1371 of the Civil Code is certainly considered compatible: the agreements moved by gratuitousness, if (although rather improbable) they remain obscure, should be interpreted in the most favourable sense for who is obliged (which as we have seen can be both the administration and the entity of the Third sector).[388]

Before moving on to the examination of the Civil Code's rules that affect the phase after the conclusion of the agreement, it seems important, finally, to dwell on the relationship between the principle of relativity of the contract crystallized

[385] TAR Perugia 11 September 2013 no 475, *Diritto e giustizia* (2013); TAR Milano 18 June 2018 no 1525, *Rivista giuridica dell'edilizia*, 1362 (2018) with regard to the planning conventions.

[386] TAR Brescia 16 July 2009 no 1504, *Il Foro amministrativo T.A.R.*, 1991 (2009); TAR Milano, 25 January 2021 no 223.

[387] Consiglio di Stato, 31 December 2019 no 8919, *Rivista giuridica dell'edilizia*, 335 (2020) which states that 'in situations of exegetical doubt, the agreements under public law pursuant to article 11 of legge no 241/1990 [...] must be interpreted in such a way as to preserve their validity, pursuant to article 1367 of Civil Code. See also TAR Milano 15 September 2021 no 2000.

[388] TAR Brescia 16 July 2009 no 1504.

in article 1372 of the Civil Code and the aside of article 11, paragraph 1, whereby the agreement between public and private must be concluded 'without prejudice to the rights of third parties'. As has been pointed out, this last legislative clarification assumes that the agreement can produce some effect, although negative, towards third parties: an effect that would instead remain completely unrelated to the legal relationship, if the principle that the 'contract does not produce an effect with respect to third parties' was applied.[389] By trying to apply this assumption to collaborative agreements, it is clear that they are certainly suitable to affect the interests of third parties even negatively, but above all, we want to highlight here their positive impact, since they are conceived upstream in the general interest and, therefore, to produce effects for the benefit of a community of individuals.[390] Article 1372 of the Civil Code, except for the principle of relativity, provides for the possibility that the contract may also produce effects with respect to third parties in the cases provided for by the law. In the case of agreements such as those in question, the legal basis of such legitimacy can only be found in the combined reading of article 11 of legge 7 August 1990 no 241, article 55 of the Third Sector Code, as well as article 118, paragraph 4, of the Constitution.

It should be noted, however, that because of the effects that cooperation agreements can have on third parties, the position of third parties is rather

[389] F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 46. Before, G. Manfredi, *Accordi*, n 82 above, 140.

[390] G. Manfredi, *Accordi*, n 82 above, 140, observes that it is difficult to apply to agreements referred to in article 11 article 1372 of Civil Code. This is because 'it would be difficult to argue that the agreements take care of interests that are exclusively proper to the parties, since with them the administration still pursues public interests – and, not by chance, in the perspective set out above, the consensual activity of public entities is characterized by the binding purpose to the pursuit of those interests'.

uncertain, as it is difficult to identify it with specific rights. Therefore, it seems difficult to derive from the concrete benefits, which derive from the agreement between the administration and the Third sector entity, real rights to be exercised in court. What should not be excluded, however, is that the agreements in question may in any case give rise to interests of some importance to the community, such as widespread, super-individual[391] or 'common' interests. The generality of individuals, members of the community, would be co-owners of situations expressing interests[392] whose care, together with the Third sector, is also taken over by the administration in the exercise of discretionary power. With the consequence that if they were damaged as a result of the conduct of the administration, contrary to the common objectives pursued, they would certainly deserve judicial protection that may be triggered by the Third sector entity itself, as a bearer certainly entitled to exercise the relative action.[393]

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[391] Such reflection with regard to the subsidy agreements is made by R. Cippitani, *La sovvenzione*, n 334 above, 245-246.

With regard to 'widespread interests' see Aa.Vv., *Rilevanza e tutela degli interessi diffusi: modi e forme di individuazione e protezione degli interessi della collettività* (Milano: Giuffrè, 1978); M. Nigro, 'Le due facce dell'interesse diffuso: ambiguità di una formula e mediazioni della giurisprudenza' *Il Foro italiano*, 7 (1987); R. Ferrara, 'Interessi collettivi e diffusi (ricorso giurisdizionale amministrativo)' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1993), VIII, 543; G. Alpa, 'Interessi diffusi' *Digesto delle discipline privatistiche, Sezione civile* (Torino: Utet, 1993), IX, 609; S. Cassese, 'Gli interessi diffusi e la loro tutela', in L. Lanfranchi ed, *La tutela degli interessi collettivi e diffusi* (Torino: Giappichelli, 2003), 569.

[392] These interests would be 'referred, in an indistinct way, to a community or to a more or less wide category of subjects or to a social formation, without any differentiation between individuals that compose it. This in consideration of the social, and not exclusive, nature of the advantage that individuals can draw from the good linked to the interest': TAR Roma 14 September 2021 no 9795, *Il Foro amministrativo*, 1372 (2021).

[393] On this point, prevails the orientation of the administrative case law according to which the possibility of the protection of the widespread interests before the court by local authorities must be assessed from time to time in the specific case and conditioned by three requirements: the entity must pursue, on a regular basis, purposes of protection of the interests to be protected in court, have an adequate degree of representativeness and stability and have a certain degree of proximity to the places concerned (TAR Napoli 4 July 2022 no 4518, *Il Foro amministrativo*, 1023 (2022); Consiglio di

On the other hand, different conclusions are reached by looking at the event from the perspective of the Third Sector entity. Once the agreement is concluded, in addition to the duties towards the administration, the related rights that can well be protected in the codification rules arise as well. This is even though all disputes concerning the formation, conclusion and execution of supplementary or substitute agreements are devolved to the jurisdiction of the administrative judge[394] since the latter is also called upon to ensure forms of effective protection, substantially similar to those of the ordinary judge precisely in light of the reference made by article 11 to the principles of the Civil code.[395] The execution phase of the agreement must therefore be based on the principle of good faith (article 1375 of the Civil Code) whose violation will otherwise give rise to contractual liability pursuant to article 1218 of the Civil Code in charge of the administration.

However, greater difficulties arise in relation to the possible non-fulfilment by the administration of the obligations deriving from the agreement. It has been said that the collaboration agreements, although attributable to the case of article 11,

Stato 16 February 2010 no 885; TAR Roma 30 March 2010 no 5169; Consiglio di Stato, 26 October 2009 no 2549).

A reconstruction in light of the principle of horizontal subsidiarity of the legitimacy to act to protect the widespread interests not necessarily through a representative entity is proposed by B. Gilberti, *Contributo alla riflessione sulla legittimazione ad agire nel processo amministrativo* (Padova: Cedam, 2020).

394 Article 133 of the Code of Administrative Procedure.

395 To confirm this need is the jurisprudential orientation that admitted, in light of the principles of effectiveness of judicial protection (article 1 of the Code of Administrative Procedure) and due process (article 2 of the Code of Administrative Procedure) established in article 47 of the EU Charter, the remedy of forced execution in a specific form referred to in article 2932 of Civil Code within the exclusive jurisdiction of the administrative judge: Corte di Cassazione-Sezioni unite 9 March 2015 no 4683, *Il Foro amministrativo*, 1653 (2015). With the same perspective, in doctrine, M. Renna, 'Il regime', n 373 above, 27.

are characterized by the sharing of objectives, common to the parties, as well as the aggregation of the resources necessary for the implementation of the common project of general interest. This peculiar configuration of the relationship, based on collaboration and not on the exchange of services, would make the general remedies regarding non-fulfilment (for example, articles 1453, 1454, and 1460 of the Civil Code), typical of contracts with corresponding services,[396] unusable. On the other hand, it would not be possible to exclude in such a case the possibility that the private party resorts to the withdrawal, that in accordance with article 1373, paragraph 2 of the Civil Code is always exercisable in contracts with continuous or periodic execution, which are certainly collaboration agreements.[397]

However, it should be noted that such conclusions, although entirely logical, can nevertheless have a significant impact on the concrete possibility of protecting the private party, especially given the inapplicability of the rules on the termination of the contract. If the same private party were to default, the public body could easily resort to the remedy pursuant to article 11, paragraph 4, which reserves to the administration the exclusive power to unilaterally withdraw from the agreement for reasons of public interest that could well be supplemented by the default of the private party.[398] In the opposite case, that is, if the default arose from the behaviour of the administration, the private party would have no other remedies than those provided for by the Civil Code: the termination of the

[396] In doctrine, F. Messineo, 'Contratto plurilaterale', n 46 above, 152 and lastly R. Cippitani, *I contratti*, n 1 above, 160. In case-law with regard to associative relationships characterized by the communion of purpose, Tribunale di Potenza 23 May 2018 no 516.

[397] In general, the programmatic and dynamic dimension of the agreements referred to in article 11 that is projected over time, is highlighted by F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 77-78.

[398] F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 94-95.

agreement and compensation for damage, which, however, would not be usable. What would remain is the residual remedy of the withdrawal referred to in article 1373, paragraph 2 of the Civil Code which, if the judge deemed it applicable in the present case, would offer a different level of protection, given the inherent diversity of its *ratio* compared to the resolution. It is then understood that in such a situation the fullness and effectiveness of protection, as a key principle of the administrative process, would not be easy to implement since, excluding the resolution tool, all possible remedies to protect the legal position of the party protected by substantive, national and supranational law, to which article 1 of the Administrative Procedural Code itself refers to, would not be guaranteed.[399]

The solution must then be sought in the axiologically oriented assessment of the interests that characterize the function of the agreement and taking into account the legal link that arises between the parties at the time of its conclusion. Like the private sector, the administration undertakes, albeit in a 'collaborative' and not an exchange-oriented way, to perform services in support of the former in the realization of the general interests 'common' to the parties, but also to third parties' bearers of them. And this commitment is certainly suitable to produce the obligations pursuant to article 1173 of the Civil Code. These, therefore, if unfulfilled cannot leave the other party unprotected.

Finally, it should be pointed out that, in order to identify the specific rules applicable to co-programming and co-design agreements, we must take into

[399] In the present case, moreover, the judgment against silence and default cannot be appealed either because it 'is limited to the establishment of the obligation of the administration to provide once the time has expired for the conclusion of the administrative procedure (article 31, paragraph 1 of the Code of Administrative Procedure): with this tool cannot be claimed any default but only the failure to conclude the procedure with an express measure': Consiglio di giustizia amministrativa per la Regione Sicilia 13 March 2014 no 121, *Il Foro amministrativo*, 841 (2014).

account that this may vary according to their bi- or plurilateral structure. It is not, in fact, to exclude that the collaboration can be established between more public bodies and more Third sector entities. In this case, the Civil Code's rules on plurilateral contracts shall be considered. These are provisions that pursuant to the principle of preservation of the contract regulate within contracts with common purpose the effects of nullity (article 1420 of the Civil Code), annulment (article 1446 of the Civil Code), unfulfillment (article 1459 of the Civil Code) and the impossibility of the performance (article 1466 of the Civil Code) on the basis of the criterion of essentiality. Thus, if a defect or a cause for termination of the contract affected the bond of one of the parties, this would not affect the operability of the contract between the remaining parties, unless the participation of the first party must be considered essential.

Within collaborative agreements, it is possible to distinguish between two situations in which those rules apply. In case of agreements concluded by several Third sector entities with more than one public body, the failure of one may affect the entire agreement only if it is established that its participation or performance is essential. In the absence of such an assessment, the bond of purpose between the parties remains active and fully effective. On the other hand, in case of agreements concluded between a public body and several Third sector entities or vice versa, the failure of the obligation of the public body, in the first case, or the Third sector entity, in the second, will not affect the agreement with respect to the remaining parties. This is provided that its participation or performance is not essential. However, it would undermine the reason of the collaboration on the basis of which the agreement was concluded because according to the schemes of co-programming and co-design it presupposes the commitment of both the

private and the public. Such commitment would be lacking if the bond failed. The former is in fact the prerequisite for the establishment of that specific relationship of collaboration between public entities and several Third sector entities or between the latter and several public bodies.

Chapter III

Further types of collaborative agreements: the enhancement of cultural heritage and urban regeneration

Summary: 1. Agreements for the enhancement of public and private heritage in light of the Cultural Heritage Code. – 2. Special Partnership and Third Sector Code: a model for the enhancement of the areas affected by earthquake. – 3. Social partnership: the local complementary currency as an application of administrative barter in France. – 4. Collaborative pacts for the urban heritage regeneration: the relevance of the concrete cause. – 5. Concluding remarks

1. The enhancement of cultural heritage,[400] which includes cultural goods and landscape,[401] takes on a particular importance in areas that besides being naturally 'disadvantaged'[402] are also seriously 'damaged' by the frequent natural disasters. In these contexts, historically characterized by a persistent emergency determined by recurring disasters, the place where you live, from the individual home to the city and the environment that surrounds it, plays a fundamental role in the difficult decision of the person whether to abandon or remain in his own land.[403] It is not enough just to 'rebuild', but it is crucial to restore vitality to physical spaces and

[400] See, broadly, A. Buzzanca, *La valorizzazione dei beni culturali di appartenenza privata* (Napoli: Edizioni Scientifiche Italiane, 2019); A.L. Tarasco, *Beni, patrimonio e attività culturali: attori privati e autonomie territoriali* (Napoli: Editoriale Scientifica, 2004), 141.

[401] The notion of cultural heritage is defined in article 2 of the Cultural Heritage Code. It extends, in addition to the immovable and mobile assets of particular artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, also to the immovable areas and the landscape, which are an expression of the identity of a territory.

[402] In particular, these are areas that have for a long time been suffering intense processes of marginalization resulting from depopulation, demographic ageing and the reduction of employment and the supply of local services: see National Strategy for Inner Areas.

[403] The close connection between cultural heritage and community is highlighted by V. Higgins and D. Douglas eds, *Communities and Cultural Heritage* (New York: Routledge, 2021).

natural areas. The effectiveness of the protection of what has recently been identified in doctrine as the right to remain in the land of origin also depends on the level of care of the cultural and environmental heritage.[404]

In this perspective, the enhancement of public and private heritage has a dual function. At the operational level, it concerns an efficient management capable of returning to the cultural and environmental assets that use value that is coessential to them.[405] On the value side, the enhancement undoubtedly contributes, in the implementation of articles 2, 9 and 42, paragraph 2[406] of the Constitution, to the realization of the 'cultural' interest of the community to the enjoyment of goods, as well as the more widely 'social' interest to the promotion of the human personality.[407] In this framework of primary values, the need for the care and

[404] The protection of such right must be found in article 8 of the European Convention on Human Rights: L. Ruggeri, 'L'interesse', n 17 above, and L. Vicente, L. Ruggeri and K. Kashiwazaki, 'Beyond Lipstick and High Heels: Three Tell-Tale Narratives of Female Leadership in the United States, Italy, and Japan' *Hastings Women's Law Journal*, 3 (2021). Instead, the 'right to village' with a specific regard to the Inner Areas is discussed by B. Di Mauro, 'Il diritto dei borghi nel PNRR: verso una (stagione di) rigenerazione urbanisticamente orientata alla conservazione e allo sviluppo dei valori locali' *Urbanistica e appalti*, 458 (2022).

[405] For a new reading of the concept of legal property in light of its 'functional dimension', E. Caterini, 'Il "bene comune" e il valore di godimento. Per una rilettura degli studi di Pietro Rescigno, Pietro Perlingieri e Francesco Lucarelli' *Rassegna di diritto civile*, 593 (2013) in which the Author points out that the 'good', unlike the 'thing' understood in phenomenal terms, 'it is not what it represents as it is, since its profile is marked by the purposes it fulfils in the legal system'. With similar opinion, M. Costantino, 'I beni in generale', in P. Rescigno ed, *Trattato di diritto privato*, *Proprietà* (Torino: Utet, 1982), 5; A. Lucarelli, 'Proprietà pubblica, principi costituzionali e tutela dei diritti fondamentali. Il progetto di riforma del codice civile: un'occasione perduta?' *Rassegna di diritto pubblico europeo*, 11 (2007); P. Perlingieri, 'Normazione per principi: riflessioni intorno alla proposta della commissione sui beni pubblici' *Rassegna di diritto civile*, 1184 (2009).

[406] A connection between the social function of the property referred to in article 42 of the Constitution and the cultural function of cultural heritage referred to in article 9 of the Constitution is highlighted by F. Santoro Passarelli, 'Concetto di bene culturale' *Annali della pubblica istruzione*, 547 (1972).

[407] On the constitutionalisation of the community's interest to benefit from cultural values, see A. Lazzaro, 'Valorizzazione dei beni culturali e funzione sociale' *Diritto e processo amministrativo*, 1215-1217 (2015). More recently, F. Longobucco, 'Beni culturali', n 105 above, 217, reminds us that

valorisation of goods seems to transcend the strictly individual dimension, confirming through the intergenerational perspective the collective one. The disuse or abandonment of spaces, the inactivity of private subjects or the lack of cooperation of public subjects are, in fact, potentially capable of harming not only individual interests but, more widely, the collective interest of the community to the preservation of the overall environmental design of which the cultural and environmental heritage is an integral part.[408]

Well, it is clear that the issue of enhancement inevitably tightens around the relationship between the public and private sphere, giving importance to the duty of individuals to contribute to the enhancement of their assets[409] as well as to the commitment of the administration in the continuous search for cooperative and participatory dialogue with the first.[410] Precisely in this direction some legal

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although the civil study of cultural heritage necessarily involves 'traditional classical instruments of the patrimonial right of goods', we must not however 'lose sight of the fact that property – and above all the "property" of the cultural good – has the ultimate function of serving the human person and society'. The reading of the social function of the property in a personal key, in light of article 2 of the Constitution, result from the doctrinal evolution started by P. Perlingieri, *Introduzione alla problematica della "proprietà"* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1970).

At international level, see A. Connolly ed, *Cultural Heritage Rights* (New York: Routledge, 2015); Y. Donders, *Cultural Heritage and Human Rights*, in F. Francione and A.F. Vrdoljak eds, *The Oxford Handbook of International Cultural Heritage Law* (Oxford: Oxford University Press, 2020), 379.

[408] For an interesting perspective on the concept of 'integrated conservation' aimed at reconciling, with a view to enhancing the historical centres, 'the need to preserve assets representing ancient memories with the need to make the territory functional to the needs of a society in continuous transformation', see S. Giova, 'Centri storici e conservazione integrata', in F. Lucarelli ed, *Ambiente, territorio e beni culturali nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 355.

[409] The general destination of cultural assets for the public enjoyment, even if privately owned, is noted by A. Lazzaro, *Valorizzazione*, n 407 above, 1220. In this perspective, the Author highlights the duty of owners to enhance the cultural and social dimensions of the asset.

[410] Participation and cooperation in the protection and enhancement of cultural heritage is strongly encouraged by the 1972 Convention for the Protection of the World Cultural and Natural Heritage, by the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society and also by the 2030 Agenda for Sustainable Development.

instruments provided for in the Code of Cultural Heritage and Landscape are moving. In light of the principle of horizontal subsidiarity, these adopt the collaborative logic to ensure the best conditions of use and enjoyment of the heritage.[411]

In particular, the Code expressly provides that valorisation can be at the initiative of both public and private parties[412]. To this end it identifies two regimes of negotiation according to the nature, whether public or private, of the good.[413]

The enhancement of public heritage[414] is mainly entrusted to agreements between the State, regions and other local authorities that are part of a vertically integrated system and functionally articulated in the strategic, programming and management phase. In the context of such agreements, aimed at defining common strategies and objectives and developing cultural development interventions, institutional actors may create appropriate legal entities, the so-called cultural programming bodies,[415] to be entrusted with the planning of such actions. Both cases are open to the participation of private[416] owners of cultural assets that could be enhanced, as well as non-profit entities engaged in cultural activities.

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411 Article 6 of the Cultural Heritage Code.

412 Article 111 of the Cultural Heritage Code.

413 On the nature and heterogeneity of the different agreements that can be concluded between administrations and private individuals in the field of cultural heritage, widely, A. Buzzanca, *La valorizzazione*, n 400 above, 101, where the Author analyses agreements on housing development as a model for agreement for the enhancement of cultural heritage.

414 Article 112 of the Cultural Heritage Code.

415 See A. Iacopino, *Modelli e strumenti di valorizzazione dei beni culturali* (Napoli: Editoriale Scientifica, 2017), 193.

416 Which is identified by article 111 of the Cultural Heritage Code as a 'socially useful activity' and is recognized as 'the purpose of social solidarity'. On the contrary, the public initiative is configured in a different way, which must conform 'to the principles of freedom of participation, plurality of subjects, continuity, equal treatment, cost-effectiveness and transparency of management'.

It seems evident, however, that in such cases there is a 'weak' involvement of private individuals. They participate in such agreements only if they are owners of assets and in any case indirectly, namely without becoming an active part of the process culminating in the conclusion of the agreement.[417] In fact, there has been a poor use of article 112 of Cultural Heritage Code at the applicational level. This above all when the valorisation is entrusted to the public-private collaboration through institutionalized legal entities, whose legal status remains indefinite like the role reserved for the private. The rule in question thus shows the effort of the legislator of 2006[418] to innovate the relationship between the administration and the private sector also in the field of cultural heritage through the 'definitive overcoming of heterodirect enhancement policies'.[419] At the same time, however, as we have seen, its weakness emerges both from the subjective[420] and procedural point of view.[421]

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[417] G. Severini, 'Art. 112', in A. Sandulli ed, *Codice dei beni culturali e del paesaggio* (Milano: Giuffrè, 2019), 1023-1024, highlights that the phase of the elaboration of the strategic contents of valorization is necessarily public, even if participated in adhesion by private.

[418] Article 112 of the Cultural Heritage Code was amended by decreto legislativo 24 March 2006 no 156 laying down corrective and supplementary provisions in the field of cultural heritage to decreto legislativo 22 January 2004 no 42.

[419] B. Accettura, 'Politiche di valorizzazione e funzione sociale dei beni culturali. Pratiche di cittadinanza attiva' *federalismi.it*, 12 (2019). G. Severini, 'Art. 112', n 417 above, 1020-1021, points out that the originality of agreements referred to in article 112 of the Cultural Heritage Code derives not only from the entitlement to their conclusion, but also from their recognition as preferential instruments for the enhancement activity and from the reduction of the authoritative power limiting the autonomy of the parties.

[420] B. Accettura, 'Politiche', n 419 above, 12, highlights that the term 'private owners of cultural goods to enhance' referred to in article 112 of the Cultural Heritage Code is actually rather reductive since it 'does not take into account the irreversible semantic extension of the notion of "private" (to which the private cultural property owner, the private enterprise, the private not-for-profit, the individual citizen, social formations, the banking foundations, associations, participation foundations, social enterprises for the protection of general interests are linked)'.

[421] A different opinion is offered by G. Severini, 'Art. 112', n 417 above, 1022. According to the Author, the participation of profit-making subjects who do not own the cultural goods to be

A more central role is attributed to private individuals in the enhancement of their cultural heritage. In relation to these goods, the public-private partnership is expressed in sharing of the essential resources for the enhancement and in joint definition of the modalities underlying its realization. To this end, the legislator provided for a general rule, and a more specific one reserved for the enhancement of goods of exceptional interest declared by the Ministry act. On one hand, therefore, article 104 of the Cultural Heritage Code[422] identifies a particular category of cultural real estate owned by private individuals that can be visited by the public for cultural purposes and whose use is entrusted to the co-determination 'by agreement' between the owner and the Superintendency. On the other, article 113 of the Cultural Heritage Code[423] extends the field of operation of such agreements to all the activities of valorisation carried out by private initiative to which the public subjects contribute economically. In both cases, therefore, agreements for the enhancement are based on the logic of resources sharing and co-participation that accompanies the entire path of concertation between administration and private. However, in case of agreements referred to in article 113 of the Cultural Heritage Code the support measures are granted taking into account the relevance of cultural heritage. While in case of valorisation of the assets of exceptional interest referred to in article 104 of the Cultural Heritage Code, the subsidy is a mere faculty of the public administrations that decide to take part in its implementation.

enhanced should be limited only to the phase following the elaboration of the strategic contents by mere adhesion to them with protocols and similar legal instruments.

[422] See A. Iacopino, 'Art. 104', in A. Sandulli ed, n 417 above, 967.

[423] See G. Severini, 'Art. 113', in A. Sandulli ed, n 417 above, 1033.

The combined analysis of articles 104 and 113 of the Cultural Heritage Code now allows to make some considerations about the relationship of collaboration between public and private thus outlined by the Code of Cultural heritage and Landscape. These provisions, although certainly offer a legal basis for the consensual regulation of relations with 'cultural' characteristics, at the same time they remain rather insufficient in relation to the modalities of conclusion of agreements for the enhancement and to the criteria of choice of the private subjects with which to start the collaboration. Considering that the decision of the administration whether or not to contribute to the enhancement activity promoted by private individuals is entirely at its discretion, as well as taking into account the requirement of exceptional interest (article 104 of the Cultural Heritage Code) or that of particular relevance (article 113 of the Cultural Heritage Code), one wonders, especially in the latter case, which is the criterion for establishing the level of relevance of the asset when it has been recognized upstream by the Superintendence as a cultural heritage.

It is certain that the objective requirement of relevance of a given good, which affects the type and extent of the public body's subsidy, must be assessed on the basis of its importance for public use which is the primary purpose to which the enhancement is oriented. Nevertheless, in the absence of detailed legislation, public support for the enhancement of private assets can only be carried out according to the indications of article 12 of legge 7 August 1990 no 241.[424] The granting of economic advantages shall therefore be subject to the definition by the institution of the criteria and methods to be followed in their determination. It

[424] A.L. Tarasco, 'Art. 113', in G. Leone and A.L. Tarasco ed, *Commentario al Codice dei beni culturali e del paesaggio* (Padova: Cedam, 2006), 708.

follows that the assessment of the relevance of the asset, as an indefectible reason for the subsidy pursuant to article 113 of the Cultural Heritage Code, will depend on its intrinsic characteristics and on further two factors: the 'wealth' of the public body as well as its institutional social mission. The greater will be, in fact, the social impact achievable through the enhancement of a good, a complex of goods or an area, the greater will also be the stimulus to contribute to its realization.

In this perspective, it is therefore possible to highlight how, on the one hand, the almost total reliance on the discretion of the institution of the verification of the relevance of the asset exposes individuals to the risk of unfair and non-objective decisions. On the other hand, however, such regulatory flexibility gives significant space for public-private negotiation. The importance of cultural heritage never stops at its purely aesthetic characteristics, but it is also strongly characterized by the functional ones, that is, by its use value in a given territory and in a given community. This allows the administration interested in co-valorisation to make an *ex post* evaluation of the asset, which looks at the importance that it is able to assume thanks to the interventions that the private sector is committed to achieving. For its part, this allows the private, which with the enhancement undoubtedly realizes the general interest in the accessibility and enjoyment of the cultural good, to grasp that functional value of the good, modelling its use on the basis of needs and the context in which it is located.

2. The Code of Cultural Heritage and Landscape is not the only source of discipline for collaborative relations in the cultural sector. An important piece of legislative coordination in this area has been carried out by the legislator of the

Third Sector reform, with the intention of encouraging partnerships in which the logic of exchange gives way to cooperation by virtue of the common purpose.

On one hand, article 71, paragraph 3 of Third Sector Code gives public bodies the right to grant cultural real estate to Third sector entities for the performance of activities of general interest, with the aim of requalifying unused assets through recovery and management. As can be seen, this is an important opportunity to revitalise public cultural heritage, ranging from recovery, restoration or renovation to their enhancement and management. From an economic point of view, this tool certainly follows the resource-sharing approach. The real estate can be allocated at a favourable rate to the entrusted entity, however, costs of operations carried out within the maximum limit of the fee shall be deducted.[425] Nevertheless, the concession will normally have a duration such as to allow the entrusted entity to achieve the economic-financial balance of the initiative.

On the other hand, article 89, paragraph 17 of the Third Sector Code reiterates more widely the possibility of activating special forms of partnership aimed at the implementation of enhancement activities of public cultural heritage.

The two provisions are closely linked. Both, in fact, have as object the public goods; they are oriented to the recovery of their cultural function and, more widely, of the social one;[426] as well as for the identification of the partner they refer

[425] If the property is used mainly for non-commercial activities of the Third sector entity, it will also be exempt from the IMU and the Regions may decide further reductions or exemptions of IRAP.

[426] P. Perlingieri, *Il diritto civile*, III, n 6 above, p. 299, highlights on this point that 'it is not the good in itself to justify a particular discipline, but it is the "particular social function to which that good actually responds" [...]'. Id., *Introduzione*, n 407 above, 37-38 and Id., 'La "funzione sociale" della proprietà nel sistema italo-europeo' *Le Corti salernitane*, 1085 (2016). More specifically on the social function of cultural heritage, see A. Lazzaro, *Valorizzazione*, n 407 above, 1213; F. Longobucco, 'Beni culturali', n 105 above, 211; B. Accettura, 'Politiche', n 419 above, 1.

to the simplified modalities of the current article 134, paragraph 2 of the Public Contracts Code.[427] This last provision, in particular, constitutes the true fulcrum of the regulatory coordination between the Third Sector Code, the Code of Cultural Heritage and the Landscape and the Public Contracts Code.[428] Although it is systematically placed within the Public Contracts Code, whose structure is strongly characterized by patrimoniality and competitiveness, it outlines a 'special'[429] form of public-private collaboration in the cultural sector. Its speciality can be found in the procedural simplicity that differentiates this type of partnership from the ordinary one,[430] but above all in the *ratio* of the institute that moves away from the price-performance scheme to adopt the collaborative one, based on the full involvement of private.

Article 134 of the Public Contracts Code allows public bodies, in the context of availability of human, financial and instrumental resources, to activate special

[427] The new article 134, paragraph 2 of the Public Contracts Code corresponds to the former article 151, paragraph 3 to which the Third Sector Code continues to refer pending update following the reform of the Code of public contracts.

[428] For a harmonizing view and not merely of compatibility between the three Codes which with regard to the cultural heritage are axiologically oriented to the same social and cultural purposes, C. Napolitano, 'Il partenariato pubblico-privato nel diritto dei beni culturali: vedute per una sua funzione sociale' *dirittifondamentali.it*, 1 (2019).

[429] On the concept of speciality of these agreements, G. Sciullo, 'Il partenariato', n 142 above, 154. For a comparative perspective on the partnerships' regulation in the field of cultural heritage in Europe, M. Pignatti, 'I modelli di Partenariato Pubblico-Privato nella gestione e valorizzazione dei beni culturali come strumento per la creazione di ecosistemi innovativi e di sviluppo economico e sociale' *DPCE online*, 91 (2022).

[430] The ordinary public-private partnership is governed by article 174 of the Public Contracts Code (which corresponds to the former article 180). As indicated by the legislator, this is 'an economic transaction' (there is no explicit reference to the pecuniary interest of the contract compared to the previous rule, but the underlying capital logic does not change) which has the function of finding financial and organizational resources of private individuals for the realization and management of works and services of public interest and in which the entrepreneurial risk is assumed by the private partners of the contract. See C.M. Saracino, 'Il partenariato pubblico-privato', in M. Corradino and S. Sticchi Damiani eds, *I nuovi appalti pubblici* (Milano: Giuffrè, 2021), 989. In jurisprudence, Consiglo di Stato 29 March 2017 no 775.

forms of partnership with private parties with the aim of recovering, restoring, preserving, managing, using and, therefore, enhancing the cultural heritage. For the methods of identifying private collaborators, the rule refers to simplified procedures 'similar or additional' than those provided for by article 8 of the Public Contracts Code. However, it does not indicate which are these procedures. For its part, article 8 of the Public Contracts Code generally allows the administration to conclude 'any' contract, even free, unless expressly prohibited. It follows that it will be the responsibility of the administration to identify the specific procedures that are most appropriate to facilitate the process of the special partnership. This taking into account all those principles that guide the administrative action (transparency, good faith, trust, collaboration) which are indispensable in the exercise of negotiating autonomy too. The wide discretion that the new Public Contracts Code leaves to the administrations in choosing of the modalities of exercise of the negotiating power does not, however, preclude the possibility that they adopt the simplified procedures referred to in the previous Code. In fact, the previous article 19 of the Public Contracts Code, in the field of sponsorship contracts (now regulated together with special partnerships by article 134 of the Public Contracts Code), provided for two possible alternative routes of the path towards the final agreement, depending on whether the initiative was taken by the public body or by the private.

In the first case, the entity expresses the intention to start the collaboration with the indication in the notice of aims and objectives of general interest that will have to be pursued through the activity of valorisation of the cultural and environmental heritage. After the period of publication of the notice (at least 30 days), the agreement can be freely negotiated with regard to the operational and

executive profiles of the project proposal. In the second case, the process path is almost the same with a difference in the initial part. It is, in fact, the private to present a proposal for enhancement that will be made known by the public body and accompanied by the invitation to other subjects to make further proposals. In the absence of the latter, the content of the agreement will be defined, otherwise a procedure will be opened for the evaluation and selection of the most suitable project. Moreover, there is nothing to prevent the involvement of more private subjects, even heterogeneous ones (Third Sector, universities, local enterprises) with respect to the same project without any need to choose through selective procedures only one collaborator.

With this spirit of multilateral collaboration, even before the reform of the Public Contracts Code, the institute under examination was identified as a model for the implementation of the sub-measure B2.2 on the enhancement of public assets in the context of the actions of macro-measure B 'Economic and social relaunch' of the National Plan for Complementary Investments to the National Plan for Recovery and Resilience[431]. The aim is to exploit the 'specialty' of such partnerships to recover and enhance cultural and environmental heritage, even if not subject to the cultural bond,[432] of the municipalities part of the crater 2009-

[431] In particular, see Ordinanza del Commissario Straordinario per la Ricostruzione 30 June 2022 no 30 approving the call for proposals for implementing macro-measure B 'Economic and social recovery', sub-measure B2 'Tourism, culture, sport and inclusion', line B2.2 'Contributions to public entities for Special Public Private Partnership Initiatives for the enhancement of the historical-cultural, environmental and social heritage of the territory' of the Unitary Intervention Programme - Interventions for the areas of the 2009 and 2016 earthquake, the National Plan Complementary to the National Recovery and Resilience Plan.

[432] Ordinanza 30 June 2022 no 30 extends the scope of this 'special' form of partnership to the other areas of intervention covered by measure B2.2 and, in particular, to the enhancement of cultural and environmental heritage and public heritage not subject to such a constraint, which is, however, intended for the pursuit of cultural, tourist and social purposes.

2016 through innovative projects promoted by local authorities and other public bodies in collaboration with enterprises and non-profit world.[433]

The decision to use the special partnership seems really strategic for the areas affected by the earthquake because it gives private individuals a direct role in the process of revitalization of their territory. As emerges from the combined reading of the new articles 134 and 8 of the Public Contracts Code with the text of Ordinanza del Commissario Straordinario per la Ricostruzione 30 June 2022 no 30, it is an instrument characterized by flexibility, gratuitousness, co-participation and operational autonomy, whose positive effects on the community are immediately perceptible but also lasting. The legislator identifies upstream the aims that the collaboration agreement concluded in the framework of special partnerships must pursue and entrust to the joint co-definition through negotiation its specific contents. These, moreover, can be adapted over time by the parties to the new needs of the territory as a result of the change of the pre-existing situations. As a general rule, the agreement does not entail any financial burden for the public sector, except for the decision of the public body itself to co-finance the project by means of grants or by rewarding the partner's commitment by means of a reduction or exemption from local taxes. It is clear that in this last case there will not be a change in the 'collaborative' nature of the agreement. The private partner, in fact, does not perform a performance against the price given by the public entity, he does not have an exclusive right of economic exploitation of the goods covered by the agreement. On the contrary,

[433] In this way article 2 of Ordinanza 30 June 2022 no 30 which expressly encourages the implementation of recovery and enhancement measures through collaborative initiatives between public administrations and private entities, such as enterprises and Third sector entities.

since he is committed to the realization of a specific project for the general interest of the community, he is still required to ensure the full accessibility and fruition of the good and to reinvest the profits in further enhancement activities. Finally, the private partner retains its operational autonomy in the implementation and management of the cultural project, without ever losing the relationship of trust and collaboration with the public body.

This now makes it possible to frame the special public-private partnership more closely from the civil point of view. Besides the discretion of the administration in the identification of the specific procedural modalities, also taking into account the necessity to resort to articles 11 and 12 of legge 7 August 1990 no 241 especially if the institution contributes economically to the enhancement activity, the final collaboration agreement that will result can be in many respects analysed from the private law perspective.

From the subjective point of view, except for cases of partnership referred to in articles 71 and 89 of the Third Sector Code where the partner can only be an entity of the Third sector, article 134 of the Public Contracts Code does not place limits on the categories of public and private subjects. In this way a significant contribution in the development of local partnerships can certainly be offered by the Universities, especially in the phase of identifying the most appropriate enhancement interventions to the needs of the territory as well as in that of their co-programming. As has been observed in doctrine, universities have two fundamental characteristics for an effective analysis of the needs coming from the territory: competence and neutrality.[434] In this perspective, the special partnership,

[434] On the possibility of creating a shared institutional space between the university system and, in particular, private social institutions, see C. Mignone, 'Terzo settore e terza missione: soggetti

based on the sharing of ideas and project resources, is an interesting tool for integration between scientific research and activities oriented towards social and cultural purposes. In concrete terms, it is capable of creating that degree of fusion between theory and practice that is so indispensable for both.

From a functional point of view, as has been stressed,[435] the special partnership is 'applicable to many types and contractual causes'. Both in the case of the partnerships referred to in articles 71 and 89 of the Third Sector Code and in article 134 of the Public Contracts Code, the regulation of the public-private relationship in a conventional way that involves the cooperation of the public body, the private entity or the non-profit entity finds its justification in the realization of the peculiar arrangement of interests, erected on the basis of their communion and characterized exclusively by profiles of gratuitousness and absence of exchange of corresponding services.[436] The flexibility of the special partnership and its openness to the actors of the private sector thus make it possible to identify in this institution a cooperative instrument directly implementing the principle of horizontal subsidiarity, capable of concretizing that idea of an equal relationship in which everyone shares their resources, whether they are only human and material or financial, in view of a common purpose.

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strumenti, casi-studio' *Le Corti salernitane*, 219 (2019). The Author highlights the well-suited role of universities and research entities to serve as "'filter", sensitive to the problems of the territory and equipped with the necessary technical skills to analyse them, but not sensitive directly to their interests and therefore indifferent to possible conflicts'.

[435] Circolare Segretariato Generale 17 June 2016 no 28 'Sponsorship of cultural heritage – article 120 of decreto legislativo 22 January 2004 no 42 – articles 19 and 151 of decreto legislativo 18 April 2016 no 50' and more recently Circolare Direzione Generale Musei no 45/2019 'Explanatory notes and operating models for the realization of special forms of public-private partnership in cultural heritage referred to in article 151, paragraph 3 of the Public Contracts Code'.

[436] An intermediate model between the synallagmatic contract and the associative contract in which the logic of exchange is replaced by the collaboration of the parties for a common purpose is proposed for special partnerships by G. Sciullo, 'Il partenariato', n 142 above, 156.

Finally, with regard to the object of the agreement, it is noted that the provisions of the Third Sector Code analysed refer to public cultural heritage. This means that the enhancement of private property by means of cooperative instruments remains limited to cases set out in the Code of Cultural Heritage and Landscape. However, the usefulness of the special partnership for private goods should not be excluded beforehand. The activity of valorisation, in fact, often suffers from the absence of necessary economic resources, banally transforming the financial unavailability of the owner into inactivity or 'carelessness' of the assets. In this perspective, the special partnership can be transformed into a strategic instrument[437] for the territory as a whole, as a 'common' heritage[438]

[437] In doctrine it is broadly evidenced the evolution of the politics of valorisation of the cultural and environmental assets towards a greater collaboration between the public and private sphere whose relations assume by now a 'multilateral' structure, characterized by the presence of multiple interests: A. Buzzanca, *La valorizzazione*, n 400 above, 16. On the different phases that marked the change of the public-private relationship in this sense, see L. Casini, 'Beni culturali', in S. Cassese ed, *Dizionario di diritto pubblico* (Milano: Giuffrè, 2006), 679; C. Barbati, M. Cammelli, L. Casini, G. Piperata and G. Sciullo, *Diritto del patrimonio culturale* (Bologna: Il Mulino, 2nd ed, 2020), 195.

[438] The notion of cultural heritage has long been at the center of the debate on common goods in an attempt to free itself from the exclusive logic of belonging and give space to the concrete collective use of goods. In this perspective, the mention of the cultural and landscape heritage among the common goods in the proposal of the Rodotà Commission for the positivization of the category of common goods is an example. For a stimulating and inspiring debate that followed this proposal, see U. Mattei, E. Reviglio and S. Rodotà eds, *Invertire la rotta. Idee per una riforma della proprietà pubblica* (Bologna: Il Mulino, 2007); A. Lucarelli, 'Introduzione: verso una teoria giuridica dei beni comuni' *Rassegna di diritto pubblico europeo*, 3 (2007); G. Carapezza Figlia, 'Premesse ricostruttive del concetto di beni comuni nella civilistica italiana degli anni Settanta' *Rassegna di diritto civile*, 1061 (2011); U. Mattei, *Beni comuni*, n 158 above; M.R. Marella ed, *Oltre il pubblico*, n 160 above; C. Salvi, 'Beni comuni e proprietà privata (a proposito di "Oltre il pubblico e il privato. Per un diritto dei beni comuni", a cura di Maria Rosaria Marella)' *Rivista di diritto civile*, 209 (2013); S. Rodotà, *Il terribile diritto*, n 160 above, and recently the several works collected in E. Battelli, B. Cortese, A. Gemma and A. Massaro eds, *Patrimonio*, n 105 above, 11. See also E. Caterini, 'Introduzione alla ricerca interuniversitaria "Diritto e bellezza. Dal bene comune al bene universale"' *Corti calabresi*, 647 (2013). On the concept of common goods in case-law, Corte di Cassazione-Sezioni unite 14 February 2011 no 3665, *Rassegna di diritto civile*, 524 (2012) commented by G. Carapezza Figlia, 'Proprietà e funzione sociale. La problematica dei beni comuni nella giurisprudenza delle Sezioni Unite' and Corte di Cassazione 16 February 2011 no 3811, *Rivista giuridica dell'edilizia*, 881 (2011).

which goes beyond the distinction between public and private goods[439] because it is used in equal measure to enjoy the cultural and environmental values of which it is an expression. In the present case, therefore, it is possible to imagine a scheme in which the owner undertakes to grant in use his property to the Third sector entity for the implementation of recovery and valorisation projects and then to make it publicly accessible and usable. For its part, the administration together with the private undertake to identify through simplified procedures the entrusted entity on the basis of the management project of the property that ensures its proper preservation, use and best value. Finally, the Third sector entity undertakes to implement the interventions and activities planned by sharing, also together with the public body and the private owner, economic resources and managerial and organizational skills.[440]

[439] See the very current insights of M.S. Giannini, 'I beni culturali' *Rivista trimestrale di diritto pubblico*, 25-26 and 31(1976) according to which the cultural good 'on one hand is a material element of economic interests, that is to say, a property belonging to a certain subject who has rights of disposal and rights of use [...] on the other hand it is a material element of intangible public interests, namely of the cultural interests'. It follows that 'the cultural good is public not as a good of belonging, but as a good of using'.

[440] The activity carried out by 'Fondazione con il Sud' (fondazioneconilsud.it) is an example. For pursuing its mission, it acts through the involvement of the Third Sector as well as of the institutional and economic actors of the territory. In particular, in the context of the care and enhancement of cultural and environmental heritage, the Foundation promotes forms of multilateral collaboration for the implementation of actions capable of producing real benefits to the community over time. To this end, in a first step, local authorities and private subjects are invited to make their unused properties of historical, artistic and cultural interest available to the community (through a lease for at least 10 years at reduced rent). Subsequently, the Foundation involves the Third sector entities in co-designing together projects for reusing and enhancing assets selected in the previous phase. At this stage, the establishment of partnerships between Third sector institutions and universities is strongly encouraged. Finally, in the implementation phase of projects so defined it is possible to set up social enterprises (or other bodies) for a more effective collection and management of the resources necessary for the implementation of the planned interventions as well as for further activities of valorisation of the assigned asset. As it is obvious, speaking about public assets, this is certainly a scheme of action attributable to article 71, paragraph 3 of the Third Sector Code. But such a model of action can be also framed into special partnerships referred to in article 134 of the Public Contracts Code if the object of valorisation is a private good.

3. Further cases of public-private collaboration that derive from forms of negotiation referred to in articles 11 and 12 of legge 7 August 1990 no 241 and that only in recent times have been expressly regulated are the horizontal subsidiarity interventions and administrative barter. Both are now placed systematically in article 201 of the new Public Contracts Code (articles 189 and 190 of the previous Code) under a single name of social partnership. Although the legislator of the reform has brought together the discipline of the two institutes with respect to the previous Code, it seems appropriate to highlight here the peculiarities of each of them.

Firstly, it should be noted that both horizontal subsidiarity interventions and administrative barter are part of the wider framework of local regeneration actions aimed at encouraging citizenship to be an active and responsible part of the care of urban spaces and the redevelopment of the real estate of the territory. Their development and dissemination are strongly rooted in the leadership of local authorities and private, whose institutional and civic commitment, even before being positivized in a legal provision, has found acceptance in some jurisprudential orientations.[441] Detailed regulation is entrusted, on one hand, to the regulatory

[441] See in this regard the case of the cinema Sala Troisi in Rome whose case, the subject of the judicial dispute, is referred in doctrine to the institution of horizontal subsidiarity interventions referred to in the previous article 190 of Public Contracts Code (see E. Fidelbo, 'Il caso della Sala Troisi di Roma. Quali insegnamenti trarre dalle sue vicende giudiziarie' *labsus.org*, 1 (2018)). The real estate, owned by the municipality, was granted to a commercial company for cinema projection but from 2013 these were stopped, and the real estate fell into disuse. For this reason, the Heritage Department of Rome reassigned the real estate to a non-profit association through a public call. The legal dispute starts from the challenge of this call, which excluded from competition economic operators limiting the participation in the call only to non-profit entities. The municipality of Rome motivated such limit through Delibera 23 July 2014 no 219 on the basis of the not-for-profit aims, since the assignment of the unused asset at subsidised rent is in no way a condition of entrusting the service to the private, but rather a means of encouraging the implementation of social or cultural projects by inhabitants. TAR Lazio 6 April 2016 no 4158 accepted such motivations and justified

power of local authorities to define the criteria and conditions for the conclusion of social partnerships and, on the other, to the power of the National Anti-Corruption Authority (ANAC) for the preparation of the standard calls and contracts.[442] These tools, finally, fully share with the collaborative model introduced by the Third Sector Code the same solidarity *ratio* that is differently articulated on the basis of the concrete function that they perform.

We immediately must note that the in their new unified configuration of the social partnership the two institutions, as well as the previous Code, are placed in Book IV of the Public Contracts Code dedicated to the ordinary public-private partnership and that the Code does not provide a systematic definition, leaving open the question of their nature. This entails a significant problem of coordination between the institutions concerned and the procedures to be followed, on which their effective level of 'cooperation' or 'competition' depends.

In particular, there are three cases for action: a) the management and maintenance of green areas and rural buildings used for common social and cultural use that have been ceded to the municipality in the context of urban planning conventions (originally part of the horizontal subsidiarity interventions); b) the implementation of works of local interest (originally part of the horizontal subsidiarity interventions that also included cultural heritage); c) the management, maintenance and enhancement of squares and streets or interventions of urban

'the choice of limiting the subjects to be selected, the content of the selection, and finally the advantageous fee and conditions of use, linked to the implementation of the project'. But not only. The administrative judges also considered correct the appeal made by the municipality of Rome to article 12 of legge 7 August 1990 no 241, in so far as the call does not seek to take advantage of a profit opportunity for subjects operating in a competitive market, but rather to offer an incentive to carry out socially useful activities.

[442] Article 201, paragraph 1 of the Public Contracts Code.

decorum and recovery of unused areas and real estate (originally part of the administrative barter).

In the first case, the action is reserved with the right of pre-emption to residents or domiciled in districts where the goods and areas are located, which must establish a consortium that reaches at least two thirds of the ownership of the allotment. In the second case, the intervention must be the result from the initiative of the interested subjects, as individuals or in an associated form, by submitting to the local authority an operational proposal of ready feasibility without charges for the entity: the works carried out are subsequently acquired through original acquisition to the unavailable assets of the competent authority. Finally, in the third case, the main purpose of activities covered by the partnership shall be to restore the viability of unused spaces and buildings so that they can be used for purposes of general interest.

In all cases, article 201 of the Public Contracts Code recognizes in a very generic way forms of tax concessions or exemptions that, however, are not easily qualified with respect to the activity carried out by private.[443] On one hand, in fact, the subjects constituted in consortia for the management of the areas and the real estate can benefit from incentives, presumably in the form of reduction of tributes (article 201 of the Public Contracts Code does not indicate the concrete forms of incentive). On the other hand, the realization of works of local interest is expressly exempt from tax and administrative charges as well as some expenses can be deducted from the income tax of those subjects who have incurred them.[444]

[443] E. Fidelbo, 'Il caso della Sala Troisi', n 441 above, 1, qualifies such relationship as '*quasi-sinallagmatico*'.

[444] In this way article 201 of the Public Contracts Code in so far as it refers to special laws referred to in decreto legislativo 18 April 2016 no 50.

In this 'mutual' relationship, which characterizes the above-mentioned cases, both parties contribute with a certain performance that may also have economic content. It is evident, however, that it would be reductive if not forced the identification of a form of the synallagma, especially if we focus on its concrete function. The entrustment in management of green areas or buildings, as well as the realization of works of local interest are completely detached from the patrimonial interest of the administration or the private entrusted to maximize profits deriving from the activity carried out. Conversely, the activity has a strong social value and the relationship between the administration and the private sector ranks in a dimension of subsidiarity aimed at enhancing solidarity. Precisely in relation to the concrete aims pursued by the parties the facilitation, rather than acting as a consideration, becomes an instrument of encouragement and recognition of the commitment of individuals to perform 'benefits that are not imposed, but assumed in subsidiarity'.[445]

The difficulty that arises, however, in relation to the framing of the social partnership into collaborative relationships derives not so much from the causal point of view as from the procedural one, that is from the systematic placement of the institution itself. It has been included in the part of the Public Contracts Code devoted to the ordinary public-private partnership without, however, explicitly including or excluding it from the application of the common discipline. The opening rule of Book IV, article 174 of the Public Contracts Code, specifies that contractual public-private partnership (as in the analysed cases) includes concession, the financial lease and the availability contract, as well as other

[445] D. D'Alessandro, 'Un commento agli artt. 189 e 190 del nuovo Codice dei contratti pubblici' *labsus.org* (2016).

contracts concluded by the public administration with private economic operators that have the contents referred to in paragraph 1[446] and are aimed at achieving interests worthy of protection. A deep analysis of the provision in question shows that it is the legislator himself who excludes the social partnership, albeit indirectly, from the application of highly pro-competitive rules.[447] Private, as individuals or associated through non-profit entities, cannot certainly fall within the category of economic operators[448] required for the purposes of ordinary partnership. Not even the structure and function of the social partnership have characteristics comparable to those of ordinary partnership. As has been noted,[449] we are faced with a regulatory framework designed for interventions of considerable economic impact, able to affect the balance of the market, which is not in line with the logic of social partnership, the activities of which have a social nature and exclusively local importance. It is, therefore, reasonable and acceptable to leave the privileged path to the simplified procedural procedures. Not by chance paragraph 1 of article 201 of the Public Contracts Code imposes on the local authorities the duty to

[446] Paragraph 1 of article 174 of the Public Contracts Code identifies the key elements of the public-private partnership including the establishment of a long-term contractual relationship to achieve a public interest result; the coverage of the financial needs related to the implementation of the project, which must come significantly from resources found by the private party, also because of the operational risk assumed by the same; the entrusting the implementation and management of the project to the private party, while the public party defines the objectives and assesses their implementation; finally, the allocation of the operational risk related to the implementation of the works or the management of services to the private entity.

[447] Paragraph 3 of article 174 of the Public Contracts Code requires all contractual figures within the public-private partnership to comply with the provisions of Titles II, III and IV of Part II (in the matter of entrustment and execution); the provisions of articles 177, 178 and 179 (in the matter of the modalities of allocation of the operational risk and the duration of the public-private partnership).

[448] Some uncertainty, however, remains in relation to the position of micro, small and medium-sized enterprises that, with respect to previous legislation, are now expressly allowed to participate in social partnerships: article 201, paragraph 3 of the Public Contracts Code.

[449] E. Fidelbo, 'Il caso della Sala Troisi', n 441 above, 1.

prepare with specific general acts the discipline of the activities, the criteria and the conditions for the conclusion of the partnership.

Similar considerations, especially from a systematic and procedural point of view, can also be extended to the management and exploitation of unused spaces and buildings, which were originally subject to the rules of administrative barter. As has been highlighted in previous pages, the latter disappears as an autonomous institution, but its logic is fully incorporated by the new article 201 of the Public Contracts Code. In particular, the provision specifies that private parties engaged in the implementation of the agreed interventions benefit, for this purpose, tax incentives linked to the activities carried out.

Compared to the interventions previously analysed (which follow the old interventions of horizontal subsidiarity), in which the synallagmatic component of the relationship is mitigated, in this collaborative scheme instead the 'exchange of utility'[450] between the administration and the private seems to emerge more clearly. Through a project of urban regeneration and valorisation, the private gets a personal advantage in terms of tax relief compared to tax obligations that, otherwise, should be fulfilled in cash. In doctrine, administrative barter, precisely for its ability to extinguish the obligation, has been traced back to the well-known legal institution of *datio in solutum*.[451] Nevertheless, the strictly contractual nature of the relationship, which is built on the correspondence between services, has been highlighted. The private party undertakes to carry out a set of works and

[450] In this way S. Zebri, 'L'evoluzione del baratto amministrativo tra collaborazione civica e partenariato sociale' *Rivista della Corte dei conti*, 53 (2019) and A. Corrieri, 'Il "baratto amministrativo" tra legislazione e attuazione' *federalismi.it*, 73 (2012).

[451] See R. De Nictolis, 'Il baratto amministrativo (o partenariato sociale)', in P. Chirulli and C. Iaione eds, *La co-città* (Napoli: Jovene, 2018), 61.

services to which an 'exchange value' is assigned on the basis of which the administration in turn undertakes to grant the reduction, or total exemption, of the tax.[452]

The hermeneutic approach so far reported does not seem to fully convince for at least two reasons.

Firstly, *datio in solutum*,[453] as a contract for consideration directly extinguishing the original obligation, has as its precondition the necessary existence of a previous debt. Applying this institution to administrative barter means extending its operational scope also to unfulfilled taxes that have been incorporated into the mass of the public body's active residues, thus allowing the private to meet its debt through one of the activities provided for by letter b) of paragraph 1 of article 201 of Public Contracts Code. However, the negative orientation of the accounting jurisprudence is consolidated on the possibility that the active residues can be subject to barter. As has been pointed out,[454] such a case is potentially liable to affect the budgetary balance of the public body. Nevertheless, article 201 of the Public Contracts Code imposes a close correlation between the type of work to be performed and the tax to be reduced or exempted, which would be lacking if a pre-existing debt were 'bartered'.

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[452] S. Zebri, 'L'evoluzione', n 450 above, 57 observes with the reference to the previous Public Contracts Code that by the introduction of article 190 of the Public Contracts Code the administrative barter 'is detached from the concept of horizontal subsidiarity opening to new developments in a purely contractual way'. On the basis of these arguments, the Author also excludes the applicability to the administrative barter of article 11 legge 7 August 1990 no 241.

[453] Article 1197 of the Civil Code on which G. Biscontini, 'Vicenda modificativa, "prestazione in luogo dell'adempimento" e novazione del rapporto obbligatorio' *Rassegna di diritto civile*, 263 (1989); G. Sicchiero, 'La prestazione in luogo dell'adempimento' *Contratto e impresa*, 1380 (2002).

[454] Corte dei conti-Emilia-Romagna 23 March 2016 no 27; Corte dei conti-Veneto 21 June 2016 no 313; Corte dei conti-Lombardia 24 June 2016 no 172; Corte dei conti-Lombardia 6 September 2019 no 225; Corte dei conti-Piemonte 14 April 2020 no 35.

Secondly, it should be remembered that the scheme of administrative barter, as an expression of horizontal subsidiarity, is aimed at satisfying the collective interests through the activity of private individuals, autonomous and 'disinterested', namely carried out for non-profit purposes. It is in fact in the commitment taken for the care, recovery or enhancement of goods and common areas that the interest protected by the provision is substantiated. Therefore, the specific reason of the institution must be identified in regulating the cases and conditions under which taxpayers carry out such activities spontaneously and in a subsidiary way in view of tax reduction or exemption. In this perspective, as well highlighted by Corte dei Conti,[455] the administrative barter is not limited to introducing an alternative way of fulfilling the tax obligation. It allows the administration to decide on its measure depending on the intervention of social utility to be carried out. This capacity is the result of the balancing of interests operated upstream by the legislator, which therefore justifies the renunciation of the entity to its power of taxation in light of the particularly considerable social value of the participation of private individuals in the welfare of the community.

In light of these considerations, it must therefore be concluded that the relations which are established in the context of the previous administrative barter are not immediately attributable either to the *datio in solutum* or to contracts for consideration. Rather, they are forms of collaboration with particular cause and purposes[456] that make them worthy of a simpler procedural approach, capable of

[455] In this way Corte dei conti-Sezione autonomie 29 January 2020 no 2 that extends the scope of the administrative barter also to 'extra-tax' credits.

[456] On the atypical nature of the partnership scheme of administrative barter, A. Corrieri, 'Il "baratto amministrativo"', n 450 above, 72; A. Manzione, 'Dal baratto amministrativo al partenariato sociale e oltre nel solco della atipicità', in P. Chirulli and C. Iaione eds, *La co-città*, n 451 above, 109.

enhancing that sociability inherent in the logic of the institute. If this were not the case, what would otherwise be the reason for the legislator who even before the reform of the Public Contracts Code had already defined administrative barter as a 'social' partnership?

It has been seen that the administrative barter, also in its new systematic placement, even if gives wide discretion to the entities to regulate modalities and criteria of collaboration with the interested individuals, it has been fully typified with regard to its object and enforceable services in view of the tax advantage. It is interesting to note, however, that the Italian model is not the only possible declination of barter.

This mechanism has long been used in France in the context of the '*systèmes d'échanges locaux*'[457] phenomenon to exchange goods and services with local complementary currency.[458] In 2014, the use of complementary coins was expressly regulated with *loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire* further promoting policies of solidarity and social inclusion. The currency, issued and managed exclusively by non-profit organizations, is in fact devoid of a

[457] This is a phenomenon that expresses a new vision of citizenship, based on relationships of trust and the democratization of the rules governing the market: S. Laacher, 'Les systèmes d'échange locaux: quelques éléments d'histoire et de sociologie' *Transversales, Science & Culture*, 7 (1999); M. Hubaud, 'Une expérience associative dans un système d'échange local' *Connexions*, 77 (2002); R. Lauraire, 'Les systèmes d'échanges locaux et la valeur' *Journal des anthropologues*, 1 (2002); J. Blanc, C. Ferraton and G. Malandrin, 'Les systèmes d'échange local' *Hermès*, 91 (2003).

[458] On the development and dissemination of local complementary currency in France, Y. Broussolle, 'Le développement des monnaies locales' *Gestion & Finances Publiques*, 4 (2019); Y. Lung and M. Montalban, 'La résilience de l'écosystème des monnaies locales en France face à la transition numérique' *Revue internationale de l'économie sociale*, 39 (2020).

The barter system, as forerunner of the barter contract, is now also placed at the base of the phenomenon of collaborative economy, the so-called *sharing economy*: D. Di Sabato, *Diritto e new economy* (Napoli: Edizioni Scientifiche Italiane, 2020), 71; Id., 'Progredire tornando all'antico: gli scambi nella sharing economy', in D. Di Sabato and A. Lepore eds, *Sharing*, n 301 above, 1.

speculative nature, the only purpose of which, therefore, is to exchange goods and services within a given circuit and whose value remains in any case related to the euro. The originality of the local complementary currency is therefore to be found in its ability to update an exchange system as old as effective on the basis of specific territorial needs. The territorial exchange circuits, or even those of a wider scope, can involve all local stakeholders, individuals, enterprises, non-profit organizations and public bodies, in which the same decide the goods or services that fall under the object of barter. Under French law, in particular, public authorities are allowed to conclude agreements with coin-issuing entities for the benefit of privates who are interested in the possibility of paying for municipal services with complementary currency.

In this regard the experience of the Sol system developed in France in 2004 through local collaborative practice is an example. The system connects different regions of the country thanks to an electronic circuit that allows the transfer of complementary coins between participating selling points equipped with card-scanners for this purpose. One of the coins circulating in this circuit is the Sol-Violette,[459] the civic currency of the city of Toulouse. Issued and managed by an association of purpose, the value of each currency corresponds to one euro and once purchased, cannot be converted back. As has already been pointed out, the specific function of this currency is far from speculative purposes. Through the mechanism of decrease of the value over the time, it discourages its accumulation in order to stimulate its prompt and immediate circulation. But not only that. The trait of solidarity that distinguishes it also emerges from the pursuit of further goals, placed upstream of its creation. Behind each Sol-Violette lies a euro

[459] For more information see https://www.sol-violette.fr.

removed from the main financial circuit and moved to a specific account used to offer loans at zero rate to finance social projects on the territory as well as to grant microcredits to people in situations of financial exclusion.

This is clearly a collaborative system with a strong social impact. Its positive effects do not only derive from the real-time exchange between the complementary currency and a good or service but continue to unfold over time in the form of 'ethical investments' which, on closer inspection, reactivate the local economy rather than enrich the financial markets. Sol-Violette, therefore, before expressing an economic value, represents a social value,[460] closely connected to the needs of inhabitants and peculiarities of the territory.

4. The forms of collaboration between public and private entities analysed so far differ, as seen, in relation to the scope, the object and the specific purposes they pursue. At the same time, however, they are closely connected at the axiological level because they are aimed at achieving the same constitutional values through more dynamic and collaborative legal relationships. The identity trait of the different forms of collaboration must therefore be identified in the renewed way of implementing social solidarity through subsidiarity. In other words, by encouraging and supporting upstream the initiative of private, without waiting, until the traditional approach, for their 'failure' in the realization of the general interest.

[460] The social value of Sol-Violette in comparison to 'alternative' currencies including cryptocurrencies is analysed by D.-L. Arjaliès, 'The Role of Utopia in the Workings of Local and Cryptocurrencies', in R. Raghavendra, R. Wardrop and L. Zingales eds, *The Palgrave Handbook of Technological Finance* (Switzerland: Palgrave Macmillan, 2021), 95.

Precisely in this direction moves collaborative pacts that, more than others, welcome and give concrete form to the idea of spontaneous collaboration, born outside the legislative prescriptions, which is activated *ex ante* with the aim of jointly realising general interests. As we know, these are instruments of negotiation between public and private actors that developed around the need to take care of the common goods and whose nature remains controversial. Referring the issue of the legal qualification to the reflections developed in doctrine,[461] what we want to highlight here is their ability to reconcile and harmonize that is in line with the dynamic vision of the public-private relationship.

The collaborative pacts, which born within the debate on common goods[462] in an attempt to free themselves from the exclusive logic of belonging to give space to the collective use of goods, thus have taken on even greater scope. Over the years, thanks also to the continuous spread of municipal regulations for the management and care of common goods, these tools have been used not only to guarantee access to[463] and use of goods and urban spaces, but also to implement

[461] G. Arena, 'Democrazia partecipativa e amministrazione condivisa', in A. Valastro ed, *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali* (Napoli: Jovene, 2016), 239; E. Fidelbo, 'Strumenti giuridici di valorizzazione del rapporto tra patrimonio culturale e territorio: il caso dei patti di collaborazione tra amministrazioni locali e cittadini' *Aedon* (2018); M. Bombardelli, 'La cura dei beni comuni', n 98 above, 559; F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 272; R.A. Albanese and E. Michelazzo, *Manuale*, n 43 above, 107; A. Giusti, 'I patti di collaborazione come esercizio consensuale di attività amministrativa non autoritativa', in R.A. Albanese, E. Michelazzo and A. Quarta eds, *Gestire i beni comuni urbani. Modelli e prospettive* (Torino: Quaderni del Dipartimento dell'Università di Torino, 2020), 19.

[462] See n 438 above. On this topic also A. Nervi, 'Beni comuni, ambiente e funzione del contratto' *Rassegna di diritto civile*, 418 (2016); B. Sirgiovanni, 'Dal diritto sui beni comuni al diritto ai beni comuni' *Rassegna di diritto civile*, 229 (2017); F. Fidone, 'Dai beni comuni all'amministrazione condivisa' *Diritto e processo amministrativo*, 535 (2022).

[463] M.R. Marella, 'La funzione sociale oltre la proprietà' *Rivista critica del diritto privato*, 551, 567 (2013) offers with regard to the property a 'strategic' reinterpretation of article 42, paragraph 2 of the Constitution in an attempt to overcome the distance between 'the common dimension and the linking of the Constitution to the public/private dichotomy'. With same perspective S. Rodotà,

the broader policies of proper management and regeneration of the territory.[464] The collaborative pacts, in fact, intersect closely with the theme of urban regeneration[465] whose main protagonists are urban contexts with areas subject to degradation and disposal. But they can become a strategic solution for the regeneration of extra urban contexts, where the rate of abandonment of buildings and spaces is constantly growing.

Whether they are used in urban centres or in mountain areas, what distinguishes such collaborations is the ability to establish a supportive and responsible relationship between the goods and spaces covered by the pact and the community that recovers the ownership on the basis of the 'principle of sharing (and not exclusion) that this ownership brings with it'.[466] The difficulty in finding a systematic legal placement for these tools derives precisely from their close similarity to typical negotiation models of administrative action from the point of view of the object but, at the same time, from their atypical nature under the causal profile.

'Postfazione. Beni comuni: una strategia globale contro lo human divide', in M.R. Marella ed, *Oltre il pubblico*, n 160 above, 311 and U. Mattei, 'Una primavera di movimento per la "funzione sociale della proprietà"' *Rivista critica del diritto privato*, 531 (2013).

[464] The European Union's policies on the environment and land use move in this direction. In the context of the 2030 Soil Strategy and the 8th General Action Programme to 2030 presented by the European Parliament and Council Decision (EU) 2022/591 of 6 April 2022 [2022] OJ L114/22 it made a Proposal for Regulation on nature restoration. One of the fundamental objectives for the ecological transition and sustainability of the planet is precisely to limit the massive consumption of soil with new waterproofing to promote the opposite reuse of degraded and abandoned areas and adopt solutions to compensate for new land use.

[465] For an international look at the issues of urban regeneration, M.O. Šćitaroci, B.B.O. Šćitaroci and A Mrđa eds, *Cultural Urban Heritage. Development, Learning and Landscape Strategies* (Switzerland: Springer, 2019); N. Wise and T. Jimura eds, *Tourism, Cultural Heritage and Urban Regeneration. Changing Spaces in Historical Places* (Switzerland: Springer, 2020).

[466] A. Giusti, 'I patti di collaborazione', n 461 above, 21.

For the purposes of application, this configuration of collaborative pacts therefore makes it necessary to read them in an integrated way between the 'administrative' and 'private' components. This reading however cannot be separated from the function to which they are assigned. In other words, it is necessary to consider the entire regulatory framework of the interests on which the parties agree, but above all that concrete reason worthy of protection that drives them to engage in their implementation, regardless of formal legal standardisation.[467] In fact, the qualification of the act should not be limited to a merely previous analysis of its characteristics. Instead, as a moment logically and chronologically inseparable from interpretation,[468] it must go beyond by evaluating *ex post* the consequences that derive, with the aim of identifying the discipline that can best implement the interests and achieve the desired effects of the parties.

As is well known, the collaborative pacts derive their legitimacy not only from the principle of horizontal subsidiarity but also from the power of self-organisation of local authorities. The municipal regulations constitute a real regulatory framework that identifies the general interest to be pursued. However, its implementation is not imposed top-down, but is instead 'shared' with private through the joint identification of actions to be implemented with the pact. In the whole process from the adoption of the regulation to the conclusion of the pact, the former is, therefore, in a purely formal sense, the exercise of a typically

[467] As has been highlighted, 'the cause as an essential element of the contract must not be understood as a mere abstract economic and social function of the negotiating act but as a synthesis of the real interests which the contract is intended to achieve, namely as a function of the individual, specific contract, regardless of the contractual type [...]; cause of the contract is the practical purpose of the negotiation, that is, the synthesis of the interests that the same is concretely directed to realize (the so called concrete cause), as an individual function of the single and specific negotiating act': Corte di Cassazione 8 May 2006 no 10490, *Rivista del notariato*, 180 (2007).

[468] P. Perlingieri, *Il diritto civile*, II, n 6 above, 312.

unilateral administrative function. However, we cannot deny in absolute terms that it has some negotiating connotation at least in terms of content. The aims, the object and the activities outlined in it respond exactly to the concrete social needs that are expressed upstream by communities and whose implementation the administration participates on the basis of its regulatory and negotiating power.

Looking now at the object of the collaborative pacts,[469] they may concern both public and private spaces and buildings which, depending on the activities agreed by the parties through the pact, are subject to interventions of care, shared management and regeneration. Moreover, they can be used for the production of services or for temporary development projects pending the final use of the asset.[470] From the civil law point of view, the mentioned activities and the asset on which they fall refer, for example, to the concession of goods (care and management of spaces and buildings), the provision of services (use of space and buildings for the production of services in order to integrate existing services or respond to emerging needs) or, again, to procurement (regeneration of spaces and buildings).

However, what makes them different from the latter is precisely the purpose, wanted and shared by the parties, that they realize. From the point of view of

[469] For the sake of convenience, the analysis takes its cue from the municipal regulation of Bologna on the collaboration between citizens and administration for the care of common urban goods, as a prototype for the regulations developed later on the Italian territory.

[470] This last type of intervention recalls the institute of temporary uses that firstly has been experimented in the Emilia-Romagna Region thanks to legge regionale 21 December 2017 no 24 on the protection and use of the territory and now it is regulated on the national level in article 23 *quater* of Testo Unico sull'Edilizia. The regulation of the public-private relationship is entrusted to the agreement that establishes the duration, the modalities of use, costs, burdens, timing of restoration as well as the obligations deriving from defaults. In this way, the legislator now allows to allocate public and private buildings for uses other than those provided for in urban planning tools, to promote the regeneration of the territory through the recovery of unused heritage by social and cultural activities.

effects, the collaborative pacts do not implement the cases mentioned above. In the care and management of spaces and buildings there is no personal and exclusive enjoyment of the good against a price: on the contrary, the wider usage, access and sharing of the asset must be guaranteed.[471] In the possibility that the pacts offer to use spaces and buildings for the implementation of some services lacks the pecuniary interest of the service, namely the profit that normally the private person would get from similar activity: the services obtained thanks to the use of the common good are in fact characterized by gratuitousness and exclusively social and cultural purposes, whose activation derives from the spontaneous will to collaborate. Finally, in the regeneration of spaces and buildings that includes recovery and transformation the distance from the contract is clearly marked by the absence of the economic relationship of assignment-execution of the work for a consideration.

In all these cases, therefore, the collaborative pacts fulfil a singular function of collective enjoyment of the space or goods made available by the public to the private in the face of the simple duty of the latter to provide for its preservation, maintenance and enhancement through concerted interventions. In the implementation of these interventions, moreover, the same public entity participates, within the limits of available resources, through tax benefits, supply

[471] As pointed out by E. Michelazzo, 'Riflessioni sui patti di collaborazione in rapporto alla concorrenza', in R.A. Albanese, E. Michelazzo and A. Quarta eds, *Gestire i beni comuni urbani. Modelli e prospettive* (Torino: Quaderni del Dipartimento dell'Università di Torino, 2020), 71, 78, in the present case, the care and management of assets entrusted to private individuals does not involve any direct economic exploitation of it. On the contrary, it is possible to achieve 'the indirect effect of creating well-being, even economic, for the community starting from the common good, especially in a perspective of sustainability over time of the actions of care, regeneration and shared management of the good'.

of equipment and protective devices, support in the design, reimbursement of costs incurred, insurance cover and procedural simplification.

From such a particular combination between the object and the cause of the pacts with procedural aspects that denote the path towards their conclusion, it is possible to note how they are attributable both to article 1 and articles 11 and 12 of legge 7 August 1990 no 241, giving the interpreter the opportunity to derive the discipline that best implements and protects the underlying interests.

From the substantive point of view, the collaborative pacts seem to fit perfectly in the non-authoritative acts referred to in article 1, built on the basis of private law negotiating figures. From a procedural point of view, however, the schemes referred to in article 11, simpler but still in line with the fundamental principles of administrative activity, are best combined with their collaborative and economically 'disinterested' logic. Reasoning now in a way exclusively functional to the effective collaboration between public and private and the concrete implementation of the interventions provided for in the pacts, it is noted that a complete assimilation of them to the agreements referred to in article 11 allows automatically the administration to unilaterally withdraw for reasons of public interest. This power would therefore be legitimately exercisable regardless of any clauses in the pact or the provisions of the municipal regulations,[472] effectively undermining the trust that individuals place in the pact and on whose reciprocity they establish the collaborative relationship. On the other hand, the connection of pacts with article 1 gives the space to the application of article 21 *sexies* on the withdrawal from contracts with the public administration, but above all to article 1373 of Civil Code conferring on the parties in equal measure the right to

[472] E. Michelazzo, 'Riflessioni sui patti', n 471 above, 31.

withdraw from the pact[473] as well as the right to provide, by way of derogation from the general rules, specific cases of withdrawal. As has also been pointed out, the use of ordinary withdrawal exempts the administration not only from the obligation to justify it, but also from that to compensate for any prejudice that has occurred to the detriment of the private.[474]

Similar considerations can then be made in relation to the unfulfillment of the collaborative pact. His reading through the lens of article 11 does not allow the immediate use of civil law protection tools, except as a result of the overcoming of the filter of compatibility with the principles on contracts and obligations, which must therefore be checked from time to time in relation to the specific case. Contrary, article 1 according to which the administration, in the adoption of acts of a non-authoritative nature, acts according to the rules of private law gives individuals the opportunity to request the resolution of the pact in case of default of the administration; or, moreover, opens the way to the possibility that individuals act to obtain the exact fulfilment of the obligations assumed in the pact. As a mere example, a necessity in this regard could arise if the administration fails to comply with the commitment made in the pact to guarantee the private insurance coverage against accidents or for civil liability towards third parties

[473] For the comparative analysis of the withdrawal pursuant to article 1373 of the Civil Code and that referred to in article 11 of legge 7 August 1990 no 241, F. Giglioni and A. Nervi, *Gli accordi*, n 45 above, 72.

[474] On this point it was also noted that the obligation to compensate that would otherwise arise following the unilateral withdrawal of article 11 would not be consistent with the overall logic of the pacts because the private individuals who care and manage the common goods do not have with them 'an exclusive and/or productive legal relationship based on profit'. However, this does not exclude in the specific case that there may be a situation in which private parties have incurred different expenses in view of the implementation of the pact's activities, which instead have been nullified and affected by the withdrawal of the public entity: R.A. Albanese and E. Michelazzo, *Manuale*, n 43 above, 233-234.

related to the implementation of activity of care of commons. In such a case, the private has in fact all the interest to the fulfilment of the administration, also in a judicial way if necessary. Otherwise, in the first case, the private would remain without any protection for injuries suffered; in the second, he would be exposed to the double risk of having to answer personally for any damage caused to third parties pursuant to article 2043 of Civil Code or article 2051 of Civil Code, if the damage was caused by things that he had in custody by the virtue of the same pact.[475]

Still with regard to the issue of non-fulfilment, it is also possible to note that the flexibility of civil tools can offer the parties a more easy and immediate way to dissolve the pact without the need to apply to the court. It is not in fact to exclude the opportunity to include in the pact the express termination clause referred to in article 1456 of Civil Code which activates the resolution mechanism with a simple declaration by the interested party to want to use the same against the default of the other party.

Finally, it should be pointed out that the cases of termination by default and the express resolution clause refer to contracts for consideration, the scope of which, however, may well be extended to collaborative pacts, although addressed by different logics. However, it must be borne in mind that if such pacts were plurilateral, because they were concluded between several local actors or several active citizens, the applicable resolution discipline would be the same as the multilateral contracts referred to in article 1459 of Civil Code. It follows that the non-performance of one of the parties will not result in the immediate termination

[475] On the aspects relating to the liability and insurance of the private part of the pact a wide reflection is offered by R.A. Albanese and E. Michelazzo, *Manuale*, n 43 above, 191.

of the contract with respect to the others, unless the non-performance is considered essential.

Whatever the choice of interpretation, in light of the spirit of the collaborative pacts, in the opinion of the writer the interruptive solutions of the relationship should in any case be limited and adopted as *extrema ratio*, preferring the way of reshaping the agreement in a more suitable way to the changed interests. This presupposes both on the part of the administration and the private sector a commitment to continue the negotiating dialogue in search of alternative solutions to the withdrawal, suitable to maintain the collaborative relationship, with less sacrifice of the interests of the parties to the pact as well as of those collective interests whose realisation constitutes its main goal. A dialogue, in other words, based on the principle of collaboration between public and private, lastly provided for in the same article 1, paragraph 2 *bis*, which leads to a reasonable and

proportionate solution,[476] the result of balancing the interests and effects that the adoption of different solutions can produce on the relationship.[477]

5. The need to redesign relationships between public and private subjects in a more participatory and collaborative perspective emerged in urban contexts that among the first experienced collaborative solutions for their regeneration. But not only that. The need to rapidly implement these relationships in relation to specific local needs continues to emerge with great urgency even in Inner Areas, including in particular those of central Italy affected by the 2016 earthquake. In these areas,

[476] On reasonableness and proportionality as key principles of administrative activity see A. Sandulli, *La proporzionalità dell'azione amministrativa* (Padova: Cedam, 1998); S. Villamena, *Contributo in tema di proporzionalità amministrativa. Ordinamento comunitario, italiano e inglese* (Milano: Giuffrè, 2008), 89; F. Astone, 'Il principio di ragionevolezza', in M. Renna and S. Saitta eds, *Studi sui principi del diritto amministrativo* (Milano: Giuffrè, 2012), 371; D.U. Galetta, 'Il principio di proporzionalità', in M. Renna and S. Saitta eds, *Studi sui principi del diritto amministrativo* (Milano: Giuffrè, 2012), 389; L. Lamberti, 'Attività amministrativa e principio di proporzionalità', in G. Perlingieri and A. Fachechi eds, *Ragionevolezza e proporzionalità nel diritto contemporaneo* (Napoli: Edizioni Scientifiche Italiane, 2017), 535. For a more general view, see D.U. Galetta, 'Il principio di proporzionalità nella Convenzione europea dei diritti dell'uomo tra principio di necessità e margine di apprezzamento statale: riflessioni generali su contenuti e rilevanza effettiva del principio' *Rivista italiana di diritto pubblico comunitario*, 743 (1999); A. Ruggeri, 'Ragionevolezza e valori, attraverso il prisma della giustizia costituzionale' *Diritto e società*, 567 (2000); F. Casucci, *Il sistema giuridico "proporzionale" nel diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2001); E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010); G. Perlingieri, 'Sul criterio di ragionevolezza' *Annali della Società Italiana degli Studiosi del Diritto Civile*, 30 (2017) and A. Fachechi ed, *Dialoghi su ragionevolezza e proporzionalità* (Napoli: Edizioni Scientifiche Italiane, 2019).

[477] With this perspective, Consiglio di Stato 22 May 2013 no 964 and Consiglio di Stato 20 February 2017 no 746. Both decisions identified in the principle of proportionality 'a symptomatic element of the correctness of the discretionary power in relation to the effective balancing of interests' that must 'refer to the sense of equity and justice, which must always characterize the solution of the concrete case, not only in the administrative procedure, but also in the legal proceeding before the Court' (see also Consiglio di Stato 21 January 2015 no 284). At the same time, the administrative judges pointed out that 'reasonableness is a criterion within which other general principles of administrative action converge (impartiality, equality, good performance): administration, in accordance with this principle, must comply with an operational rationality in order to avoid arbitrary or irrational decisions'.

the slowness of the reconstruction and its significant repercussions on local services intensified the abandonment of the territory and developed in the population the disinterest in its recovery. According to the latest report on the reconstruction of 2023,[478] after 7 years only 28000 applications for the reconstruction aid have been submitted by private individuals which correspond to 54,9 % of those expected. Unfortunately, this suggests that at the end of the emergency and reconstruction there will be historic villages without services, with damaged or, even if renovated, unused buildings. The real challenge for the areas affected by the earthquake will then be to recover their attractiveness by activating virtuous circuits of collaboration between the administration and local actors.

This is the aim of the different collaborative agreements covered by this research. As we have seen, they constitute a real practical and theoretical laboratory that on one hand brings to the centre of attention the negotiating power of administrations and on the other it stimulates the dissemination of local practices increasingly oriented by the principle of subsidiarity to the self-regulation of general interests.

These are the 'proceduralized' agreements falling into the broader category of the agreements referred to in article 11 of legge 7 August 1990 no 241. However, they differ from the latter because of their necessarily negotiable nature that do not leave space for the discretion of the administration in choosing the type of agreement to be concluded, whether supplemental or substitutive the measure. The collaborative agreements, variously declined on the basis of the concrete local needs to which they must respond and the interests to be achieved, constitute, in

[478] Available at sisma2016.gov.it.

fact, a practical application of article 11 which thus serves as the general legal basis for the exercise of administrative activity 'by agreement'.[479]

Thus, the relevance and the direct impact of the interest on the entire relationship of collaboration must be understood. The latter, therefore, must be unitarily evaluated in its public and private aspects in search of the balance of interests and values that is directed to achieve. The rules applicable on the substantive level must then be identified, no longer separately within administrative or civil law. Rather through a careful assessment of rules and principles of the Civil Code, taking into account the procedural profile of the agreements, but above all, through a functional perspective of the relationship,[480] of the specific interests that they realize. The same notion of the public interest, which has traditionally characterized administrative activity, is now coloured by completely new content, in the full awareness that in a legal system such as the present, there can be no separate public interest from the private:[481] the two interests, instead, necessarily coexist, thus definitively changing also the same public-private relationship which is axiologically oriented by the entire constitutional framework.

Here, a similar fusion between procedural and negotiating profiles has made it necessary to abandon the claim to qualify them upstream, in an administrative or civil sense, to value instead, with a view to overcoming the dichotomy between public law-private law, the specific function to which such agreements are assigned. Whether they are concluded in the context of collaboration with the

[479] In this way F. Giglioni and A. Nervi, 'Gli accordi', n 45 above, 163-164 in relation to the planning agreements.

[480] P. Perlingieri, 'Dei modi di estinzione', n 19 above, 36.

[481] P. Perlingieri, *Il diritto civile*, I, n 6 above, 137.

Third Sector, in that aimed at the enhancement of cultural heritage or, again, the redevelopment of heritage and urban spaces, public-private collaborative agreements converge on the functional level. All of them, in fact, realize the general interest and, to this end, they are causally characterized by gratuitousness, communion of purpose, sharing and aggregation of resources: characteristics that make them inevitably *different* from the synallagmatic relationships, instead characterized by the patrimoniality and exchange of the performances.

The diversity and originality of the collaborative agreements is therefore to be investigated in their concrete cause that, on a closer inspection, is not perfectly identified with any type of negotiation,[482] but it achieves a significant social function deeply engraved by constitutional principles. Solidarity and horizontal subsidiarity, in particular, constitute the widest value substrate that shapes the agreements from within towards 'collaboration' rather than 'competition'. But the impact of subsidiarity does not stop only at the causal profile, but it also involves collaborative agreements under aspects of structure, form and effects.

This highlights the variability of the negotiating structure in relation to the concrete function to be implemented.[483] The form takes on the task of presiding over and ensuring the implementation of the interests and purposes set out in the agreement,[484] but at the same time serves as a tool for protection of the private with respect to the power of the administration to affect, by unilaterally amending, the agreement itself. Finally, the impact of subsidiarity is also evident in relation

[482] This confirms the overcoming of the hermeneutic technique of subsumption, which would instead require the automatic attribution of the concrete fact to the typical abstract case. On this point see P. Perlingieri, 'In tema di tipicità', n 335 above, 391.

[483] P. Perlingieri, *Il diritto civile*, IV, n 6 above, 53.

[484] P. Perlingieri, 'L'incidenza dell'interesse', n 32 above, 67.

to the effects that the agreement produces in the legal sphere of others, making it necessary an axiological reinterpretation of the principle of relativity of effects referred to in paragraph 2 of article 1372 of Civil Code.

The collaborative agreements thus show in many respects the crisis and, therefore, the overcoming of the 'great dichotomy'. Moreover, they constitute the 'evolutionary' implementation of the last paragraph of article 118 of the Constitution. Through collaborative agreements, in fact, public intervention is not limited to the 'failure' of private individuals. The duty to encourage the active participation of citizens, as individuals or as associated, in the realisation of the general interest improves *ex ante*, that is, through collaboration between public and private entities in the identification, planning and implementation of activities that are regulated by the agreement.

As has long been pointed out in doctrine, the scope of the principle of horizontal subsidiarity does not stop at the mere allocation of powers. As a rule on legal production, article 118, paragraph 4 indicates 'who is qualified to regulate because more able to do so',[485] and this also in case of self-regulation through negotiating autonomy. In case of realization of the general interests, the qualified subjects are therefore both public and private, while the collaborative agreements that derive from the negotiating power are in all respects sources of law which derive their legitimacy from the principle of horizontal subsidiarity. To confirm such an assumption are precisely those 'informal' collaborations that, even before benefiting from a specific regulatory framework, born spontaneously relying exclusively on the strength of negotiating autonomy.

[485] P. Femia, 'Sussidiarietà', n 34 above, 147.

The reading of the collaborative agreements through the lens of the principle of horizontal subsidiarity has then allowed to note its real impact on public-private relations in a legal system, such as the Italian one, where the subsidiarity is provided for in the Constitution, compared to one, like the French, in which its positivization is still lacking.[486] Both are based on an articulated administrative organization that has long gone beyond the traditional 'bipolarity' of public-private relations, in the search for a more collaborative approach based on mutual support and cooperation. What differentiates them, however, are precisely the forms of collaboration present in both.

As has been broadly highlighted, in Italy the role of the principle of horizontal subsidiarity goes far beyond the mere distribution of public-private competences. On one hand, it legitimises the exercise of negotiating power outside the legislative provisions and, on the other, it prefers, by virtue of the social interests that they carry out, relations marked by solidarity rather than by the logic of the market. On the contrary, in French law, the absence of such a principle emerges from the small number of public-private agreements that can effectively be defined as 'collaborative'. In fact, there are occasional cases in which the participation of the private is completely detached from the pecuniary vision of the relationship because the private is still seen as a 'delegate' for the realization of social activities. It follows that the idea of co-participation and sharing in the pursuit of social interest fails. Nevertheless, there are few experiences in which the power of self-regulation inherent in negotiating autonomy is enhanced through agreements,

[486] See N. Perlo, 'Le principe de subsidiarité horizontale: un renouvellement de la relation entre l'Administration et les citoyens. Étude comparée franco-italienne' *Revue intirnationale de droit comparé*, 983 (2014).

preferring instead the contract as a tool for the regulation of public-private relationships.

In light of the overall analysis, including comparative analysis, of the collaborative agreements and the role of subsidiarity in the reactivation of areas disadvantaged or damaged by natural disasters, it is possible to draw some conclusions.

First, the focus on the functional profile of the agreement, according to the 'regulatory' approach which investigates the acts of negotiating autonomy through the analysis of interests in light of the hierarchy of constitutional values, has made it possible to explore the discipline applicable to them independently of any prior qualification and with the sole aim of identifying the discipline of the specific case. As has been shown by the deepening of the different agreements in this work, the applicable discipline must be identified from time to time in accordance with the interests and function of the agreement to ensure its better and effective implementation.

Secondly, it has been possible to assess the extent of the effects of agreements which, precisely because they are permeated by particular interests which they are intended to achieve, transcend the parties themselves by extending their effectiveness to third parties. This is perfectly acceptable provided that the interests pursued are worthy of legal protection because, as in the case of collaborative agreements, they undoubtedly fulfil a legally and socially useful function.

Finally, it has been seen how in its 'plurality of souls'[487] the principle of horizontal subsidiarity identifies the public-private relationships by agreement the

[487] P. Femia, 'Sussidiarietà', n 34 above, 144.

most suitable way as well as the privileged form of the Constitution for the realization of the general interest in which the paradigm of negotiations merges with the administrative activity grasping the true meaning of 'collaboration' and 'sharing'.

Thus, once we verified a similar disruptive force of article 118, paragraph 4, the question then arises as to whether the time has not come to reflect on the possibility to 'claim' the general interests before the court by their holders in case the public sphere remains inactive in the face of the duty to 'collaborate' in the promotion of private initiative?

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