

## Chapter 2

# The Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process

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**Abstract** Analysed in this chapter are the characteristics of two main integration processes that Italy has experienced. Firstly, the country's unification as a nation more than one hundred and fifty years ago. Secondly, and more recently, together with other EU Member States, the constitution of a Legal Order. In both cases, the integration process is not meant to be homogeneous as far as various entities and activities are concerned, nor is it based mainly on general and abstract rules. Rather, it relies on administrative acts and different forms of administrative cooperation.

The administrative integration process involving different contexts within unified Italy as a kingdom, from 1865, shows recurring asymmetry because of the multiple levels of integration needed – something which was achieved by involving many different institutions in such a process. Likewise, the ongoing European Union integration process is not resulting from one single relationship, but from a number of parallel relationships between various institutions working in different sectors, and pursuing integration by designing and following their own path and timing.

In newly unified Italy the administrative integration process was not always structural (as for ministries, etc.). Also, it was only functional at times (as for the authorities of each jurisdiction, central banks, etc.). Arguably, however, functional integration was no less effective than structural integration. The 1865 Unification Laws of Italy, in fact, have been thoroughly studied and praised, and rightly so, de-

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spite the fact that their impact onto the newly unified country was limited because of their abstract definition, which required subsequent asymmetrical activities by administrative bodies to put them into practice, thus make them effective.

Examining the approach adopted by the Italian administrative bodies after 1865 as a case study, we may argue that only closer cooperation between today's national and European institutions would allow them to succeed in pursuing integration as a shared goal. All this regardless of whether that integration should take place through traditional instruments (such as the controls that used to be performed by the prefect in Italy, but are now a prerogative of the EU Court of Auditors) or network organisations (such as ETCGs, transnational purchasing groups, or cross border central purchasing bodies).

A parallel between the two different administrative integration processes outlined here will be drawn and discussed in this chapter.

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### 2.1 The integration process in Italy 150 years ago and in Europe now: parallels and asymmetry

Nobody compares the physical ability of a youth with the maturity of an elderly person. Nonetheless, it may be worth taking into account Italy's long and challenging experience of integration with the more recent process being undertaken by the European Union to find analogy and differences through appropriate comparisons.

That is why understanding the relation between two main integration processes that Italy has experienced can bring to the fore the complexity of issues faced in the past and arising in the present. Italy's first integration process stemmed from the birth of the country as a nation in 1861-1865.<sup>1</sup> The second

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<sup>1</sup>L. 17.03.1861, n. 4761, on the Italian Kingdom, and the law of Administrative Unification: l. 20.03.1865, n. 2248, all. A-F.

one (more recent and still in progress) involves the participation of Italy as a Member State of the European Union.

Although a lack of complete symmetry among the different sectors and institutions can be observed within the integration processes in question, both of them can be regarded as aimed at meeting relevant needs in the historical periods in which they saw inception.

Over the last twenty years administrative law has seen many sectors and institutions become subject to the EU discipline, and in some cases the integration process is evident. Aside from leading to the creation of the Euro as single currency, the EU discipline – either conceived as a detailed discipline with specific provisions such as directives and regulations, or as a discipline based on principles – has been of great importance for agriculture, the environment, public procurement, health, education, and many activities of general economic interest.

Conversely, undeniable is the inexistence of common provisions on administrative procedure despite the fact that attempts have been made to create them.<sup>2</sup>

The same applies to the effectiveness of administrative acts and norm on public assets.<sup>3</sup> Also evident is the absence of common provisions on contractual obligations.<sup>4</sup> The same applies to European business activities.<sup>5</sup>

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<sup>2</sup>The EU Parliament's resolution 15.1.2013 provided recommendations to the Commission for an EU legislation on administrative procedures (2012/2024(INL)). See also the subsequent European Parliament resolution, 9.06.2016 for an open, effective and independent European administration, (2016/2610(RSP)).

<sup>3</sup>Cfr. *reNEUAL Model Rules 2014* and in particular Hofmann, Schneider and Ziller (2014); de Leonardis (2016); Craig (2013); Galetta (2011); Della Cananea (2009); Glaser (2014); Stelkens (2014); Harlow (2006).

<sup>4</sup>On the unfinished European Civil Code see Alpa (2007); Ciatti (2012); Schulze and Stuyck (2011); Cámara Lapuente (2003); for a purpose of an “alternative model of the EU's constitution”, on common provisions see Dawson and de Witte (2015). For exceptions see the *Vienna Convention on the Sale: United Nations Convention of 11 April 1980*, ratified by law 1.12.1985, n. 765; Directive n. 1999/44/CE, of the European Parliament and the Council 25.5. 1999; Ajani (2012); Alpa, Conte, Perfetti; von Westphalen (2012); Sánchez-Lorenzo (2013); Ragno (2008).

<sup>5</sup>On the so-called *Lex mercatoria*, on the sectors see Directive n. 2006/123/EEC of the European Parliament and the Council 12.12.2006, *Bolkestein*; Directive n. 2011/83/EU of the European Parliament and the Council, *on consumers*; Directive n. 2006/112/EEC of the Council 28.11.2006, *on VAT*; art. 54, § 2, TFEU; Directive n. 2012/30/EU of the European Parliament and the Council 25.10.2012, *on the safeguard of shareholders and third parties towards limited companies*; Directive n. 2009/133/EEC of the Council 19.10.2009, *fiscal regime for mergers, divisions, etc and for the transfer of incorporation of SE or SCE*; on anti-discrimination: Directive n. 2000/43/EEC of the Council 29.6.2000 *on race or ethnic group*; Directive n. 2000/78/EEC of the Council 27.11.2000, *on employment and working conditions*; Directive n. 1999/70/EEC of the Council 28.6.1999, *on fixed-term work contracts AGREEMENT CES, UNICE e CEEP*; Directive n. 2011/7/EU of the European Parliament and the Council 16.2.2011, *on delays on commercial*

All these subject matters would have been relevant also for public administrations.<sup>6</sup>

The absence of a common disciplinary framework for the aforementioned domains is even more noticeable because public and private law (*alias* administrative and commercial law at the heart of public or private law for economics) are generally perceived as the pillars of the juridical unity to pursue within the European market.<sup>7</sup>

The EU single market has always been considered to have a shared juridical culture, deriving either from legislative or judicial sources. Such a single market should thus be ruled by a shared discipline envisaging exemptions and exceptions, but not depending on the nationality of companies, individuals, and/or territoriality.

It should be remarked, however, that the non-homogeneity noticeable at a closer analysis of the integration process in exam, cannot be regarded as a normal feature of any integration process.<sup>8</sup> As already mentioned, since its unification 150 years ago Italy has experienced an integration process seeing many “parallel” interpretations of the same 1865 Civil Code being kept in force for almost sixty years by the High Courts (*Corti di Cassazione*) in Turin, Florence, Naples, Palermo, and Rome, the latter from 1878 (R. d. 24 March 1923, No. 601).

## 2.2 Administrative integration and plurality of unifications

Similar tools and models recur in the two integration processes in exam.

First and foremost, mention should be made of the designation and greater relevance of the institutions responsible for the implementation and management of a new comprehensive legal order – a phenomenon that could be observed at first in the Kingdom of Italy, and later on in the European Union. In both cases new institutions driving a unification process have been juxtaposed to pre-existing ones.

Meanwhile the transition into the new legal order has been made possible thanks to the ‘little steps’ forward that were taken by administrative authorities,

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*transactions*. Finally, see Gnes (2012); for a global perspective on the role of the EU in the global economy, see Alesina, Spolaore, Wacziarg (1997); more recently Spolaore (2014), Jowell (2015).

<sup>6</sup> Cimini (2016); Craig (2011).

<sup>7</sup> Ziller (2014); for an historical reconstruction see Alesina, Spolaore, Wacziarg (1997).

<sup>8</sup> For the identification of the enhanced cooperation procedure (art. 20 TEU and art. 326 ff. TFEU) as an useful tool of differentiated integration: Fabrini (2013). For a theoretical approach see Pierson (1994); Sandholtz, Stone Sweet (1997); Spolaore (2014); Spolaore (2013).

either in Italy or in the European Union. The reason underpinning that kind of operating mode is essentially structural, and directly owes to the theory of judicial acts of Continental public law.

The effectiveness of Italy's post-unification legal order owes to its concrete definition, which historically pertains to the administrative or judiciary system rather than legislation itself. Being an ensemble of abstract norms, the latter actually follows or precedes the concrete evolution of a legal order dictated by administrative acts or judicial facts.

Actually, the Italian laws on administrative unification followed the unification the Public Administration authorities such as ministries and their central and peripheral bodies, for instance the Ministry of Internal Affairs, Foreign Affairs, Public Works, Agriculture, and Industry and Commerce.<sup>9</sup>

The effective unification of the aforementioned institutions was implemented – following purging or voluntary adhesion – by newly appointing staff who had already been employed in pre-existing states.<sup>10</sup>

Furthermore, local public authorities were subjected to governmental control while embassies were either suppressed or merged. All this was achieved through concrete administrative acts, which opened way establishing new ministerial institutions and a new system of local authorities stemmed.<sup>11</sup>

Administrative acts thus became tools for the integration of newly appointed personnel once working for the states existing before the unification of Italy. That often entailed relocating people throughout the territory of the Italian Kingdom, which contributed to fostering national identity as well as a sense of belonging to a shared culture.<sup>12</sup> Such a phenomenon appears to have been happening within the European Union too.<sup>13</sup>

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<sup>9</sup> Cudia (2014).

<sup>10</sup> Cassese (2016); Cassese, von Bogdandy, Huber PM (2017); Melis (2015); Cassese (2014); Sandulli, Vesperini (2011); Calandra (1978).

<sup>11</sup> Royal decree (r.d.) 11.1.1861, *Aumento della pianta numerica degl'Impiegati del Ministero dell'Interno*, in *Celerifera*, 2394-2395; r.d. 6.11.1861, *Nuova pianta del Personale del Ministero degli Affari Esteri*, in *Celerifera*, 2179; r.d. 14.02.1861, *Nuova pianta numerica e stipendi degli Ufficiali ed Impiegati nel Ministero della Pubblica Istruzione*, in *Celerifera*, 589-590; r.d. 20.1.1861, *Nuova pianta numerica degl'Impiegati del Ministero di Grazia, Giustizia ed Affari Ecclesiastici*, in *Celerifera*, 490-49; r.d. 21.12.1860, *Pianta organica e Quadro di riporto del Personale del Ministero dei Lavori Pubblici*, in *Celerifera*, 241-245; r.d. 8.3.1861, *Aggiunta alla pianta numerica del Ministero di Agricoltura, Industria e Commercio*, in *Celerifera*, 525-528; r.d. 5.1.1861, *Nuova pianta numerica del personale dell'amministrazione centrale delle Finanze*, in *Celerifera*, 433-435. Iudica (2016); Gagliardi (2016); Chiariello (2016); Apicella (2016).

<sup>12</sup> Grüner (2016); De Vinci (2016); Melis (2004).

<sup>13</sup> See EUCJ, 9.9.2003, C-285/01, *Burbaud c. Ministère de l'Emploi et de la solidarité*. Gagliardi (2016); annotation of judgements, Kessler (2003); Icard (2003); Pongérard-Payet (2003); Muir, (2003); Luby (2004); Weiler (2012); more precisely, Drumaux, Joyce (2018).

From a theoretical standpoint, integration through the administrative system can be regarded as a process driven by institutional relationships, or better by a plurality of unifications of different institutions.<sup>14</sup> Such an interpretation allows us to understand why there is frequent asymmetry within an ‘alignment’ pursued to implement a comprehensive legal order effectively and timely. Actually, what we can observe is not one single relationship between legal orders, but rather a series of parallel relationships between institutions (and consequently their legal orders).

Each of them experienced a *reductio ad unitatem*, more or less marked as a result of an aim of political and territorial cohesion that may vary depending on the role played by the institutions in question (European Central Bank [ECB], European and national Courts of Auditors, etc.) and the sectors in which they operate (finance, agriculture, etc.), respectively.

Therefore, it may be appropriate to describe unification as a plurality of processes of integration (involving ministries, local authorities, etc.) accompanied by a plurality of *reductio ad unitatem* processes. All this has not always taken place structurally (as for ministries, etc.), but sometimes only functionally (involving judicial bodies, central banks, etc.) as the latter mode is not less effective than the former.

It should be added that it may not be necessary to define a specific sequence of procedural phases of the integration process in that the legal order arising therefrom is something original, inextricably linked to the historical period in which it sees inception, and peculiar of the institution it relates to.

Italy’s 1865 unification laws bear witness to the most famous episode of the Italian administrative integration process. Those laws, which would have opened way to configuring the Italian institutions over the years, are still rightfully celebrated although they only provided the abstract definition of unification.<sup>15</sup>

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<sup>14</sup> Aside from the aforementioned civil jurisdiction it is worth mentioning the unification of the Italian banks of emission (1893), which, after the unification of the Italian Kingdom, kept into existence five issuing institutions for thirty-two years. See Luzzatto (1968); Costa Cardol (1989).

<sup>15</sup> Benvenuti (1969). See also *Amministrare*, Issue no. 1/2015, entirely dedicated to the administrative unification laws, with contributions by Aimò (2015); Bonini (2015); Tosatti (2015); Mori (2015); Soresina (2015); Merusi (2015); Polsi (2015); Consito (2016); Tigano (2016); Papadopoulou (2017) regarding the theories that have developed concerning the democratic legitimacy of the European Union. For a critical view of the theory of the triple legitimacy in Europe and its relationship with the participation of the (European) citizen, see Weiler (2017). On the role of citizens, see Van de Walle (2018); Regulation n. 1408/1971/EEC of the Council 14.6.1971, *on social security of workers (employees and self-employed persons) and their families moving within the Community*.

### 2.3 Asymmetric effectiveness of administrative integration within different relevant sectors in the EU

In 1971 the EU issued their first Procurement Directives, which in Italy would become a law only six years later (law 8 August 1977, No. 584).<sup>16</sup> The complexity of the Italian regulatory system on procurement, however, required a much longer period (more than twenty years) for the effective implementation of the aforementioned directive. Actually, the main changes in the Italian procurement system owe to the European Union Court of Justice (EUCJ).<sup>17</sup>

The EUCJ, in fact, provided an interpretation of the directive and “configured, in accordance with the European legal culture” some important legal institutions (i.e., bodies governed by public law) and concepts (i.e., in-house providing mode, cooperation between public administrations, relevant market; public service and goods providers; construction and/or public service concession, and other). All this with a view to clarify and better define the EU Procurement Directive so that it could be implemented effectively in all the EU Member States.

By providing an interpretation that is reminiscent of the “the best pages in the book of history” of the Constitutional Courts of the EU Member States’ National, the EUCJ proved being able of thoroughness and innovativeness, which are necessary to successfully pursue any integration process.

Indeed, the legislative and judicial integration in question is generally regarded as one of the most successful and advanced, and other sectorial aspects are also praiseworthy. Nonetheless, still low is the percentage of contracts above the EU relevance threshold (20%) in Italy.<sup>18</sup> Furthermore, the EU cross-border participation is also negligible (1.6%).<sup>19</sup>

Far from being structural, the reason underpinning such an outcome depends on the nature of the administrative acts and on the role of the functions

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<sup>16</sup> Directive n. 71/304/EEC of the Council 26.7.1971; Directive n. 71/305/EEC of the Council 26.7.1971, later law 8.8.1977, n. 584.

<sup>17</sup> Directive n. 92/50/EEC of the Council 18.6.1992, public procurement of services; Directive n. 93/37/EEC of the Council 14.06.1993, public procurement of works; Directive n. 93/36/EEC of the Council 14.06.1993, public procurement of supplies. Racca and Cavallo Perin (2014); Ponzio (2016).

<sup>18</sup> EU Commission, Commission staff working paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, I, [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/er853\\_1\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf), 27.

<sup>19</sup> EU Commission, *Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions*. Making Public Procurement work in and for Europe, COM(2017) 572 final, Strasbourg, 2017, <http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0572&from=EN>.

in charge of defining the organizational framework of the Member States within the EU legal order: because the EU directives are general and abstract while the EUCJ's judicial acts only apply as case-law, the jurisdiction in question can be implemented effectively only to some extent.<sup>20</sup> The integration process actually depends on the public administrations, managing the procurement process (outsourced) and defining the threshold of each contract (thus deciding whether it is within the scope of the EU directives). Consequently, the implementation of the European single market is impacted by public administration demand and policies. Integration in relevant markets, in fact, essentially depends on the cooperation among national public administrations and EU institutions through administrative cooperation leading for example to the creation of cross border public demand sides and other aggregated public demand strategies.<sup>21</sup>

## 2.4 Integration among public administrations: organizational capacity and principle of subsidiarity

Since the unification of Italy, many institutions and rules have remained nearly the same.<sup>22</sup> In the public procurements sector a European set of rules, not at all standing aloof from the cultures of the Member States, has emerged.

As mentioned earlier, the “in house providing mode”, the “administrative cooperation”,<sup>23</sup> the “aggregation of public procurement”, and the “concession of works and services and all the forms of suppliers selection” all represent

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<sup>20</sup> Racca (2015).

<sup>21</sup> For the affirmation of an “obligation to cooperate” on national central administrations (art. 197 TFEU): Directive n. 2006/123/EC of the European Parliament and the Council of 12.12.2006, on *internal market services*, wh. no. 105, art. 29, par. 1°; Art. 17, Regulation n. 450/2008/EC of the European Parliament and the Council of 23.04.2008, *Community customs code*; Racc. 2009/524/EC of the Commission of 29.06.2009, *measures to enhance the functioning of the internal market*. See Lottini (2012); Lafarge (2010); Sutherland (1992). See art. 298, TFEU on the existence of an “*open, effective and independent*” *European administration*. See D’Angelo (2016); de Leonardis (2016); European Parliament, *Towards an EU Regulation on Administrative Procedure?*, 2010 in [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/432743/IPOL-JURI\\_ET\(2010\)432743\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/432743/IPOL-JURI_ET(2010)432743_EN.pdf).

<sup>22</sup> See the “*Europeanization of administrative law*”: Schwarze (2012); Harlow (2006). The purpose is to find common principles and values to create a global administrative law of the EU, which is “generally regarded as the most sophisticated of international political regimes, possessing the most developed transnational legal order.”

<sup>23</sup> Artt. 6 and 197 TFEU. Auby, Dutheil de La Rochère (2014a and 2014b); Chiti (2011); Chiti E (2010); Bassi (2004).



continuity in administrative law culture, which stemmed in national contexts yet has flourished in a European field of knowledge.<sup>24</sup>

Indeed, the Public administration's organizational capacity is a key factor in pursuing and achieving the EU cultural goals steered toward integration. Public administrations may also play a significant role in market integration, to some extent, through the innovation of their contractual strategy and the reconfiguration of their purchasing power.<sup>25</sup>

The EU Directive forbidding Member States to prohibit to use the framework agreements of another Member State thus implies the possibility for a national Public administration to apply such provision effectively, and reshape their cross-border procurement strategy.<sup>26</sup> Such a general and abstract provision, however, requires administrative acts to be issued by contracting authorities so as to meet public needs or demand, and define the EU Member States' procurement strategies.

The cooperation among the Public administrations of different Member States can take place in various ways, for example it may be occasional or permanent, convention-based or structural as happens with European Groups of Territorial Cooperation (EGTC).<sup>27</sup> Aside from ECTCs, cooperation is also possible through «other established entities under EU law» or «bodies governed by public law».<sup>28</sup> It should be remarked that this kind of cooperation is likely to require to overcoming legal and language barriers, and also the applicability of a national law which is not that in force where the contract shall be fulfilled.<sup>29</sup> The effectiveness of a legal order and above all its level of integration, therefore, essentially depends on the organizational capacity of the public administrations involved in its sphere of application.<sup>30</sup>

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<sup>24</sup> See Cavallo Perin (2014); Merusi (2013).

<sup>25</sup> Such as the subdivision in national lots noticed to all the participating undertakings, which are encouraged to search for synergies with others: law 17.2.1884, artt. 3, 38. Rostagno (1887); Harlow, Rawlings (2007).

<sup>26</sup> Directive n. 2014/24/EU, art. 39, § 2. Ponzio (2016); Racca (2014a); Racca (2015); D.Lgs 18 April 2016, n. 50, art. 43.

<sup>27</sup> Directive n. 2014/24/EU, art. 39, § 5. Cavallo Perin, Racca (2016).

<sup>28</sup> See the case of the *European Health Public Procurement Alliance – EHPPA*, consortium created under French law in 2013 in order to facilitate cooperation and exchange of information, <http://www.ehppa.com/what-ehppa>.

<sup>29</sup> Directive n. 2014/24/EU, wh. no. 73, recalling Regulation n. 593/2008/EEC, on the applicable law for contractual obligations, so-called Rome I. See. Racca (2014c); Ponzio (2014). Regulation n. 1082/2006/EEC of the European Parliament and the Council 5.7.2006, in *OJEU*, amended by Regulation n. 1302/2013/EU of the European Parliament and the Council 17.12.2013 (in force from 22.6.2014). Carrea (2012); Cocucci (2008); Dickmann (2006); Engl (2007).

<sup>30</sup> Racca, Cavallo Perin (2011); Cudia (2010); Portaluri (2016); Primerano, Lamberti (2016); Dimopoulos (2004).

Organizational capacity and the principle of subsidiarity apply as requirements to national and EU public cooperation networks as well.<sup>31</sup> This entails that the competences of each institution that is part of a network shall be defined, and also that the appointment of any institution as subject managing functions or services depends on their suitability, which is to be measured based on the aforementioned principles (Art. 5, TEU; Art. 118, paragraph 2, Constitution of Italy).

In a broader view, the cooperation among different national and/or European public administrations with relevant competences can give shape to networks operating in different sectors of interest. Although to a different extent, integration among Public administration is desirable in every sector, as is the legitimization of the action of each institution involved. The latter shall be regarded as part of a network, defined either by a national legal order or the European one.

A correct assignment of competences underpins the efficiency and efficacy of any action aimed at pursuing public policies. Above all, it actually puts into practice the legal order based on which competences are given, thus determining its effectiveness. Public administrations of the Member States may therefore turn into public organizations under the aegis of the European Union while still being national Public administrations.<sup>32</sup>

It should also be remarked that the effectiveness of the EU legal order, as well as that of every EU Member State, can be achieved with no need to have the same level of integration of public administrations within each relevant sector.<sup>33</sup>

From a juridical standpoint, the EU legal system implies that the capacity and subsidiarity of national organizational structures must be attained in the pursuit of European Union policies (Art. 5, TEU).<sup>34</sup> The lack of organizational capacity of a national institution justifies the application of the principle of

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<sup>31</sup> Case law: i.e., EUCJ, 8.02.2018, C-144/17, *Lloyd's of London C. Agenzia Regionale per la Protezione dell'Ambiente della Calabria*; EUCJ, 30.01.2017, C-360/15 and C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort C. X BV*; EUCJ, 20.12.2017, C-277/16, *Polkomtel sp. z o.o. C. Prezes Urzedu Komunikacji Elektronicznej*.

<sup>32</sup> Nigro (1957). On European administration as an "integrated organisation" of national and Union administrations see Saltari (2007); Porchia (2008); Chiti (2013); Franchini (2013); Cimini (2010). The "administrative capacity" of national administrations "to implement European law" is a "matter of common interest" (art. 197, TFUE); cfr. Chiti E (2010).

<sup>33</sup> Agriculture, currency, healthcare, education, consumer protection. D'Angelo (2016); Romeo (2016); Racca (2018); Racca (2017); Cavallo Perin, Racca (2016).

<sup>34</sup> *Ex multis*, EUCJ, 7.02.2018, C-304/16, *The Queen (app. by American Express Company) C. The Lords Commissioners of Her Majesty's Treasury*, 43; EUCJ, 20.12.2017, C-81/16 P, *Regno di Spagna C. CE*, 20; EUCJ, 6.09.2017, C-643/15 and C-647/15, *Slovakia and Hungary C. Council*, 38 ss.; EUCJ, 2.06.2016, C-27/15, preliminary question, *Do. Po.*, and EUCJ, 8.09.2016, C-225/15, *Pi.Pi. C. CRGT*.

subsidiarity either through the attribution of competence from a specific organization or through EU public cooperation networks.

## 2.5 Administrative protection of fundamental rights in the integration processes<sup>35</sup>

The administrative protection of individual rights is an example of integration among public institutions within the EU that has recently concerned healthcare and education in particular (Charter of Fundamental Rights EU, Art. 14 and Art. 35; Art. 6 TEU).

In the EU the legal and institutional protection of the rights to healthcare and education beyond borders has been regarded as resulting from the freedom of movement within the EU, granted to workers at first, and then to Member State citizens (Art. 45 TFEU and Art. 20 and 21 TFEU).

As mentioned in an earlier paper, it has been argued that the right of EU citizens to access good healthcare and education has been granted by means of legal instruments typical of the “Common Market”,<sup>36</sup> no matter whether as an unwanted or unavoidable effect.<sup>37</sup>

The ‘freedom of movement’ right has been granted to workers and service providers (supply side) applying the non-discrimination principle (demand side).<sup>38</sup> That implied granting those people the right to access healthcare and education in their Member State of destination.<sup>39</sup> As a result, the “portability

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<sup>35</sup> Donato (2016); See on the concept of irrelevance among legal orders: Santi Romano (1918); for the different individual rights see Habermas (2015); Lehning (2001); Spolaore, Wacziarg (2009).

<sup>36</sup> *Amplius* Cavallo Perin (2013).

<sup>37</sup> For the overcoming of the *status of* “marketbürger” by the European citizen: Ferrari (2007). The references above are linked to a monumental jurisprudential work – at first by the Court of Justice – which has acknowledged to European citizens the opportunity to get education and healthcare anywhere in the Europe Union. Thus, taking increasing advantage of an Internal Market or of a soft competition not only between institutions but even between the different systems existing in the Member States, according to an institutional occurrence opened to new interpretation the laws of the Treaty on the Functioning of the EU (TFEU, Art. 2 paragraph 5; and Art. 6).

<sup>38</sup> *Inter alia*: Iliopoulou (2007); Gagliardi (2012); Vesperini (2011); O’Leary (2011); Barnard (2010); Spaventa (2007); Condinanzi, Lang, Nascimbene (2006).

<sup>39</sup> *European Health Strategy*, COM (2007) 630 of 23.10.2007; Art. 22, Regulation n. 1408/71/EEC of the Council 14.6.1971, on social security of workers and their family members; art. 20, Reg. 883/2004/EEC of the European Parliament and the Council 29.4.2004, social security systems; Dir. 2011/24/EU of the European Parliament and the Council 9.3.2011, *rights of patients to transboundary healthcare*. See EU CJ, 28.4.1998, C-158/96, *Kohll c. Union des caisses de maladie*; C. giust., 12.7.2001, C-157/99, *Smits e Peerbooms c. Stichting Ziekenfonds VGZ e Stichting CZ Groep Zorgverzekeringen*; EU CJ, 16.5.2006, C-372/04, *Watts c. Bedford Primary*

of social rights” in the EU territory entitles all European citizens to have accession to the services granted in the Member State where they may move into.<sup>40</sup>

The EU competence on areas of actions such as healthcare and education is limited to “carry[ing] out actions to support, coordinate or supplement the actions of the Member States”, as set out in the Treaty on the Functioning of the European Union (TFEU, Art. 6).

Nonetheless, the EU competence should be interpreted as the faculty to put in place anything that is missing – in terms of healthcare and education – in the Member States by supporting them so as to make them able to provide for what they cannot grant on their own, but could do by relying on a network of organizations selected by the EU. In this perspective, the EU competence to provide for support, coordination, and supplement where needed, allows for a selection of institutions to be joining the network.

The Public Administration has been required to improve the effectiveness of their action in new ways. For instance, by ensuring the coexistence of different communities within their territory so as to foster development and enable each and every individual to exercise their fundamental rights.<sup>41</sup> Now as ever, administrative acts building on the analysis of ‘big data’ and adopted by a good, efficient, and far-seeing Public Administration can prevent and settle conflicts.<sup>42</sup> That may ultimately lead to actually ensuring the fruition of individual rights.<sup>43</sup>

These days some remarks set forth in the Italian Constitution, therefore, appear as true as ever: to avoid prejudice to the constitutional legal order, the

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*Care Trust*; EUCJ, 19.4.2007, C-444/05, *Stamatelaki c. Organismos Asfaliseos Eleftheron Epangelmaton (OAE)*; EUCJ, 5.10.2010, C-512/08, *Commission c. France*; EUCJ, 5.10.2010, C-173/09, *Elchinov c. Natsionalna zdravnoosiguritena kasa (NZOK)*. See Saitta (2016); Costamagna (2011); EUCJ, 13.2.1985, C-293/83, *Gravier c. City of Liege*; EUCJ, 21.6.1988, C-39/86, *Lair c. University of Hannover*. From the affirmation of the economic freedom of movement of goods, capital and persons – the EU supranational legal order, of the Single Market, has certainly created the right of people to obtain everywhere the typical social rights to education and healthcare. Cfr. Conticelli (2012); Cerrina Feroni (2012); for a first systematic overview on the issue: Consito (2009); Esteban, Mayoral, Ray (2012); Montalvo, Reynal, Querol (2005).

<sup>40</sup> Monti (2010); Consito (2012). European accreditation affirms a responsibility of the EU for the quality of this recognized services and, consequently, EU provides also for a selection of national organizations capable of ensuring “a high level of human health protection” (TFEU, Art. 168, paragraph 2), “quality education” (TFEU, Art. 165, paragraph 1), “the development of a European dimension of Education” (TFEU, Art. 165, paragraph 2), aimed at “the improvement of public health, the prevention of illness and diseases and the elimination of sources of danger to physical and mental health” (TFEU, Art. 168, paragraph 1, 2<sup>nd</sup> sentence).

<sup>41</sup> Taylor (2001).

<sup>42</sup> On the State as “protagonist of the 150 years” with the performance of provisions and the exercise of functions “at the service of development”: Melis (2015).

<sup>43</sup> Cfr. Ranelletti (1904); Chiappetti (1973); Benvenuti (1994).

Public administration as a whole and its constituent institutions shall not keep being inadequate for a long time (Const., Art. 118, paragraph I) otherwise maladministration may become systemic (Const., Art. 97, paragraph II). The key role of the Public Administration in protecting fundamental rights must thus be acknowledged: only the potential and concrete effectiveness of Public Administration can lead to the effectiveness of the constitutional legal order as a whole.

It has been affirmed that there is no good Public Administration without a Constitution (Italian Const., Art. 97, paragraphs I and II).<sup>44</sup> Nonetheless, we may also argue that there is no Constitution without good Public Administration, which shall essentially be regarded as a capable and efficient organization turning abstract yet fundamental rights into reality.

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<sup>44</sup> Allegretti (1996); Allegretti (1993). In the sense which emphasises “the standpoint of the administration as interest to service or anyway as objective result which all offices must strive to achieve” see Trimarchi Banfi (2007). In general, on the right to a good administration see Chevalier (2014); Rabinovici (2012); Trimarchi (2011); Ponce Solé (2011); Galetta (2010); E. Chiti (2005).

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