ISSUES AND PROBLEMS CONCERNING PUBLIC SERVICES IN THE ITALIAN LEGAL SYSTEM (Athens, October 20, 2017)

1. PREAMBLE – The public services sector is extremely complex and deeply related to some broad topics of administrative and public law. I refer to such issues as:

a) the "perimeter" of public administration, namely to what extent the life of a community could or should be administered by the public authorities;

b) public intervention in the economy and the State's role in promoting citizens' wellbeing;

c) the possibility of employing legal forms of private law by public bodies and the matter of competition between public and private operators in a generally open market.

It is not possible to analyze here even one of these topics. I believe that a productive exchange between jurists from European and non European countries, gathered here today, could start from a general description of the issue of public services in the national contexts, highlighting the biggest issues and identifying, if any, points of contact and convergence or divergence among the different countries.

There is one thing that I would like to say right away: public services pertain to some fundamental and at the same time daily aspects of the life of a community. Communities express needs, interests, and necessities. The task of a citizen-oriented administration is to provide a suitable response to these needs.

2. THE CONCEPT OF PUBLIC SERVICE TODAY. THE POLITICAL CHOICE OF CARRYING OUT A SERVICE – Historically the concept of "public service" originated in France in order to mark a difference from the notion of "public function", emerging as an activity not pertaining the "essential" tasks of the State and therefore not characterized by the exercise of authoritative powers: public services are carried out in the interest of the community, pursue the approval of the recipients, and often consist in providing "services" to the public or to the individual.

In fact, the distinction is not so clear. Often, the features of services and authoritative powers coexist, since they are both instrumental for the provision of the service. This coexistence is a sufficient but necessary reason – according to

the Constitutional Court – to entrust the matter of public services to the exclusive jurisdiction of administrative courts.

The Italian legislation, but also the European one, do not include a clear definition of public service. It is probably not possible to provide a systematic definition.

Today, in the Italian doctrine, the so-called subjective theory of public service – according to which the service is public when carried out by a public body – has been abandoned, in favor of the so-called objective (or mixed) theory. In this view, what defines the public service as such is the correspondence of the activity to a general interest by the community. This determines the public relevance of the activity, that is therefore subjected to the rules of administrative law, regardless of the public or private nature of the provider of the activity.

What is sure, is that the submission of a certain activity to the system of public services is grounded on a political decision; namely, of carrying out an activity falling within the public authority's aims (directly or through concession to the private sector).

In this regard, I would like to highlight two aspects:

a) This is particularly true for the local public services. In fact, Municipalities are traditionally regarded as the closest entities with reference to the communities of citizens, and therefore considered as entities designed for general purposes, namely institutions whose competences may change in relation to the needs of the community;

b) The “meaning” of public intervention in the economy has changed: firstly, because from direct intervention, through which a public institution provides the service to the citizen or to the community, we have moved to intervention focused on a regulatory function, namely to determine common rules for public and private subjects who provide the service. Secondly, because the decision itself of carrying out or not a service as “public” depends on several conditions, national and European, mainly of a financial nature, which have greatly mitigated the freedom of political choice in deciding what public service is.

According to a certain distinction, public services are divided between economically relevant services and socially relevant services. However, this distinction has a purely formal value, because most of the services to the person, or social services in general, could be and often are carried out by private sector players within a market system, for example school meals or assistance to the disabled.

We know that the European legislation allows the national laws to opt out of the regulations on competition when entrusting economic services of general interest (SIEG) (art.106 TFUE), permitting the direct entrustment, where the strict application of the rules on competition might undermine the special mission of the public body.

However, the Italian legislator recently decided to restrict the possibilities for direct entrustment and the exceptions to the regime of competition, permitting the direct entrustment only when resorting to the market generates fewer advantages for the users or for the use of public resources. This approach recurs also for the decision on entrusting to *in house* or to special companies, a decision that the law requires to be explicitly justified, considering the opening to the market as the preferable option.

Currently, the only constraint to freedom of choice between *in house* and resorting to the market is an appropriate statement of reasons. The Council of State (July 18, 2017 no. 3554; May 12, 2016 no.1900) has clarified that the public institution is free to choose the preferred form of management, because, after events related to a referendum and a Constitutional Court's decision, the rules that imposed to the *in house* stricter limits than the European ones have been repealed. Nevertheless, the Council of State performs a logic and adequacy check on the motivation behind the selected kind of management. In fact, in giving its advice on the new contract code, the Council of State has specified that the public institution has to justify first why it does not resort to the market through a tender, then why it does not use the tool of public-private partnership, and eventually it can select the *in house* one, arguing that direct management is more convenient.

3. THE RULES OF PUBLIC PROCUREMENT WITH REGARD TO PUBLIC SERVICES – The main rules concerning p.s.

A-The universal service obligations and the contract of service – A relevant issue in providing a service is the duty by the provider of a public service to guarantee a minimum quality standard of the service and its accessibility even by the so-called marginal users, namely those people who, for instance because of geographic reasons, might be escluded by the service provision because not economically profitable for the operator (for instance, the postal service or local public transportation in isolated areas): this duty is what we call "universal service obligations".

The obligations of universal service pose a delicate legal problem, including a duty of compliance with European rules on State aids. In general, universal

service obligations are borne by the operator, and this would rather determine for the operator a loss. This is why the service contract provides for a "compensation" for the operator.

The legal qualification of such a compensation, and in particular its relationship with State aid, is highly debated in jurisprudence. The criterion that seems to prevail in the case-law, even in the European one (ruling Altmark 2003), is that the "compensation", for instance a financial contribution, does not represent a State aid when it is the compensation for the service provided in fulfillment of the service obligation imposed on the provider.

We find the provision for the universal service obligations in the "contract of service", that regulates the relations between public authority and provider.

A legal issue that has not been yet definitively solved in the case-law, is whether the violation of the universal service obligation can be claimed, according to the service contract, only by the public body that is a party of the contract, or also by the user. This introduces the issue of the protection of the users.

B-The protection of users –Paradoxically, the privatization process of many public services has made things less simple. In fact, if the service is managed directly by a public body, it can be assumed that also the organization of the service may be challenged before an administrative court. On the other hand, where the service is managed by a private sector agent or anyway in a private sector form, the organization of the service will mainly be considered as referred to the private autonomy of each entrepreneur and therefore subtracted to the jurisdictional control.

It is also in the light of the above that, through the legislative decree no.198 of 2009, the *class action* towards public administrations and tenderers in operating public services has been introduced. When the dysfunction in the provision of the service has become repeated and systematic, individual citizens or associations can recur to the administrative judge to obtain (not a monetary compensation for the damage, but) the removal of the organizational dysfunctions by the operator. The court's decision will order the administration to adopt, within a reasonable time, the appropriate measures to «restore the correct functioning or the correct provision of a service»; if not adopted by it the provider, the corrective measures are adopted by the judge, directly or through a commissioner.

C-The forms of entrustment of service management – It has been said that the public service can be managed directly by the public body or by entrusting to the private sector. Let's try to briefly detail these aspects.

The first kind of management is therefore the direct management of service, through the structures of the institution or, more likely, through a special company or an *in house* company. In this preliminary selection of the forms of management we can see the conflict between self-production of the service and opening to the market.

The alternative to direct management is resorting to the market. In particular, it can be considered suitable for both economically relevant services and social services, also because sometimes a public body may not be able to directly provide services to citizens, such as healthcare, education, and so on. In this case, it will resort to the market, necessarily through a tender, but will take on itself the task of regulating the conditions of the service and controlling the compliance with the conditions in the carrying out the service by the private operator.

In order to prevent that some particularly relevant services are entirely entrusted to private operators, sometimes the legislator creates a public-private competition in the market, as it happens today in the healthcare sector (but to some extent also for education, where there is a mixed system that allows even private institutions to operate in the sector).

Special attention is deserved by the decision to entrust the provision of the service to joint ventures of public and private subjects, with the participation of the institution to which the service itself can be referred. In this case, it is not disputed that the selection of the private actor that become part of the company has to take place through a tender. Less certain and still debated is whether entrusting the service to the company requires an additional tender (the so-called double object tender).

Another issue is whether the joint ventures of a local authority can take part in tenders held by other local institutions for the provision of the service. In principle, the negative thesis prevails, because it is deemed that this would result into a form of unfair competition. Recent decisions by regional administrative courts, however, raise questions about this interpretation.

Finally, the Italian Constitution (art.43) allows to establish a public monopoly in those business sectors that the State defines of "overriding general interest". This is a measure of last resort, which allows reserving to the State, public entities or communities of workers or users "certain companies or categories of firms, referred to essential public services or energy sources or monopoly situations".

D-The network systems – A sensitive aspect regarding public services, especially national ones, is the interpenetration between ownership and management of the service, when network services are involved, in which the network infrastructure actually represents a sort of natural monopoly (railways, telecommunications). In

Italy, today this issue is basically solved by supporting the separation between network ownership and management of the service, entrusting the network to an institution or a company which will have to regulate and allow the service operators to access the infrastructure without discriminations.

4. CONCLUSIONS

As we can clearly perceive, the field of public services is characterize by an inner complexity, which is why it is so tricky to provide a systematic definition and a coherent description of the topic. The claim to attain a form of legal taxonomy starting "from the top" is very common among jurists, maybe because a systematic approach is "reassuring", it gives us certainties. But law is the practical science whose purpose is oriented to offer citizens an apparatus capable of delivering quality services.

Given the above, since markets are increasingly open and individuals circulate increasingly more, I believe that even in this sector it is essential to identify convergences and common rules that are able to respond to the transnational needs of people and of economy, rather than focus on the out-of-date nationalist and protectionist demands that too many States still support.

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