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Italian administrative Courts, competition and services of general economic interest of local relevance: a general overview

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Il saggio si concentra sul ruolo chiave del giudice amministrativo, alla luce dell'art. 133 del Codice del Processo Amministrativo, d.lgs. n. 104 del 2010. Il giudice amministrativo agisce come garante delle regole di concorrenza nel settore dei servizi di interesse economico generale (SIEG) di rilevanza locale, insieme alle istituzioni europee, per la piena ed efficace attuazione del diritto europeo.

The essay focuses on the key role of administrative courts, in light of art. 133 of the Code of Administrative Court Procedure, legislative decree no. 104/2010. They act as guarantors of competition rules in the field of services of general economic interest (SGEIs) of local relevance, together with the European institutions for the full and effective implementation of EU law.

Summary: 1. Introduction.- 2. A short Overview of the Italian Administrative Justice System.- 3. Administrative Courts and Services of General Economic Interest (SGEIs) of Local Relevance.- 3.1. The Notion of SGEIs Before and After the Enactment of Consolidated l. no. 201/2022.- 3.2. Outsourcing and In House Provision of SGEIs.- 3.3. Administrative Courts and Independent Authorities.- 4. Conclusions.

1. Introduction

In recent times, administrative courts have reached an important role as

guarantors of the competition rules when local governments decide how to manage services of general economic interest (hereafter SGEIs) that are of local relevance.
Litigations concerning this matter have gradually recognised these courts as the most suitable, in light of article 133 of the Code of Administrative Court Procedure, legislative decree no. 104/2010 (hereafter the Code)[2]. The Code establishes that the management and supply of public services disputes fall under the exclusive jurisdiction of administrative courts. Therefore, they decide as much on legitimate interests, as it is customary, as on subjective rights, to ensure a suitable review of the proper balance between economic freedoms and public interests[3].
The exclusive jurisdiction of administrative courts, excluding that of ordinary courts, established in light of the very close connection between subjective rights and legitimate interests, allows for the avoidance of serious consequences that would otherwise arise from mistakenly appealing to the wrong court.
All the most important reforms of administrative justice (legislative decree no. 80/1998; law no. 205/2000; law no. 69/2009 and legislative decree no. 104/2010) were made first and foremost in the field of exclusive administrative jurisdiction which has become a sort of "special reforms reference center".
Ordinary courts, on the contrary, remain competent to decide all matters concerning penalties and fees, the status and the legal capacity of persons, the internal affairs of undertakings and companies (even those owned by the State), and, in any case, all matters not involving authoritative powers, which fall outside the exclusive jurisdiction of administrative courts[4].
The aim of this essay is to ascertain whether administrative courts can effectively fulfil the role of guarantors of the legal balance between competition and public interest, in light of the legal tools and competences acknowledged by the Code.
A first question that arises quite naturally is why the administrative courts were chosen instead of ordinary ones, although the latter often have to scrutinise business activity.
The choice of (exclusive) administrative jurisdiction can be explained by the public nature of the interests at stake, to be balanced with economic freedoms, especially with reference to the strict relation between public services supply,

citizenship and human development[5].

Another possible answer could be that administrative courts can ensure an effective and sharp review of the decisions taken by public administrations, including those of independent authorities, without replacing them, as we will see.

Ordinary courts have always maintained an attitude of (perhaps excessive) deference towards administrative decisions, especially those taken by independent authorities, in compliance with art. 2, art.4 and art. 5 of the l. no. 2248/1865, which is still in force in Italy. In fact, in the Italian legal system, ordinary courts, except in exceptional circumstances, cannot annul or revoke administrative measures, in accordance with the principle of separation of powers, nor they can compel the administration to carry out a specific action.

On the contrary, administrative courts, generally annul the unlawful administrative decisions, and in special cases, where jurisdiction is extended to the merit (art. 134 of the Code), they can adopt a measure, including a discretionary one, in place of public administrations. The exclusive jurisdiction (art. 133) allows the judge to protect not only legitimate interests, but also subjective rights, through the use of a special procedural technique that offers similar guarantees to those provided by ordinary courts for subjective rights.

After the entry into force of the Code, administrative courts can use all the evidence tools of the Civil Court Procedure Code, with the exception of the oath and confession. Furthermore, these courts ones have strong precautionary powers (art. 55 et seq. of the Code) that allow them to take a wide variety of precautionary measures in a very short time.

After the promulgation of the Code, all actions can be challenged before administrative courts, ranging from the traditional action for annulment of unlawful administrative measures to damage claims for unlawful administrative acts[6].

The Code, in art. 34, also provides for an action aimed at obliging public administrations to perform in a specific way as well, but only when discretionary powers are not involved. This is a boundary that administrative courts must never cross, as they cannot replace public administrations' assessments of discretionary powers in compliance with the principle of separation of powers[7], except in the very special case where administrative courts enforce the "*res*

judicata" in compliance with art. 112 and art. 114 of the Code.
Precisely for these reasons, in the Italian legal system, administrative courts have become the most important judges of economic litigations involving public interests, including those related to the activity of the independent authorities.
To better analyze the matter, it is preliminarily useful to give a very short overview of the Italian system of administrative justice.

2. A short Overview of the Italian Administrative Justice System

The Italian system is based on the principle of the separation of powers: therefore, the legislative, executive, and judicial powers are exercised by different independent bodies, although their actions are coordinated.
The judicial system is divided between ordinary jurisdictions (civil and criminal courts) and special jurisdictions (administrative courts, military courts, court of auditors and tax courts).
Italy has a two-tiered system of administrative courts: the Regional Administrative Courts (*Tribunali Amministrativi Regionali*, or TAR), established in each region[8] and, in Rome, the Council of State[9] (*Consiglio di Stato*), which serves as the second and final court of appeal.
Judgments of the Council of State (and those of the Court of Auditors as well) can be challenged before the Court of Cassation only for lack of jurisdiction of administrative courts, in accordance with art. 111 of the Constitution.
The nature of the legal interest infringed by an administrative measure is the criterion (*causa petendi*) for the allocation of jurisdiction between ordinary and administrative courts[10] if the legislator does not establish the exclusive jurisdiction of administrative courts. In general terms, administrative courts are the "natural judge" of legitimate interests, while ordinary courts are the "natural judge" of the subjective rights.
It is the Court of Cassation that will take the final decision on the allocation of jurisdiction and, unfortunately, the constantly increasing number of conflicts has resulted in widespread legal uncertainty.
This is undoubtedly the weak point of our system, based on the elusive criterion of the "*causa petendi*", as the concept of legitimate interest is not easy to define[11].

As scholars have pointed out, in light of the case law of the Constitutional Court and of the Court of Cassation, a legitimate interest is a legal interest recognized for an individual. It consists of granting this individual the possibility to participate in the administrative procedure and to challenge the unlawful administrative measures before administrative courts[12]. Therefore, legitimate interests are a dynamic legal position as they can influence the concrete exercise of administrative power. On the contrary, subjective rights represent a subjective legal position directly protected by law, correlating to an obligation, which does not require the concrete exercise of power by the public administration for their protection. This is a "static" position that does not allow the participation in the making of administrative action.
In any case, in compliance with art 30 of the Code, the compensation for infringed legitimate interests (for example, an unlawful refusal to issue a building permit) is considered an essential part of the "technique" for the protection of the legitimate interests and, therefore, falls within the jurisdiction of administrative courts.
In compliance with art. 7 of the Code, administrative courts have the general authority to quash unlawful administrative decisions (except political acts) because of: lack of jurisdiction/competence, abuse/excess of power and breach of the law.
In general terms, administrative courts review only the legality, not the advisability or merit, of administrative measures. Therefore, administrative discretionary choices and assessments fall outside their competence, in accordance with the principle of the separation of powers, except in special cases listed in art. 134 of the Code. In the review of administrative unlawful decisions, administrative courts make reference to the principles of reasonableness and proportionality[13] and check if the decisions are taken in light of a complete investigation and representation of the factual situation previously conducted by public administrations.
Generally speaking, administrative courts cannot order the taking of a specific measure except in cases of bound competence, in compliance with art. 34 of the Code.
Ordinary courts, on the contrary, cannot quash or suspend unlawful administrative measures, but they can disapply them.

In Italy, as in France and most European countries, the bodies of administrative justice are separate from those of ordinary justice: administrative and ordinary judges belong to two different orders[14], in compliance with our Constitution (art. 100, art. 103, art. 108, and art. 125).
It is, therefore, a system based on a jurisdictional dualism, which is currently strongly criticized by some scholars[15] who suggest setting a monistic system where all administrative litigations would fall under the review of specialized sections of ordinary courts to better protect legal rights and avoid the conflicts of jurisdiction. But when the exercise of economic activities is subject to administrative discretionary measures, administrative courts seem "naturally" suited to match economic freedoms with the public interest.
The Italian Constitution, which came into force on January 1st, 1948, establishes in its art. 100 the dual role of the Council of State as both a consulting body and a court of second instance for judgements from Regional Administrative Courts. This duality of consultative and jurisdictional functions has never been challenged before the European Court of Human Rights[16] as a possible infringement of art. 6 and art. 13, and therefore, of the judge's independence and impartiality, especially when the Council of State General Assembly (*Adunanza Generale*) is involved. Anyway, this duality has strengthened the ability of administrative courts to maintain the balance between authority and freedom and has made them guardians of the rule of law principle, public freedoms, and increasingly of fundamental rights.
Administrative courts perform the essential function of clarifying the "rationale" behind different legal provisions by setting the legal reference framework. This aids public administrations in finding the correct interpretation[17] to better fulfil their mission. Today, however, that function tends to expand to the point of supplanting the legislator[18], due to the increasing numbers of sources of law intersecting at the various levels.

3. Administrative Courts and Services of General Economic Interest (SGEIs) of Local Relevance

In the Italian legal system, the organization, management and supply of services of general economic interest[19] (SGEIs) are closely intertwined with the functions

of administrative courts. These courts mainly review the municipalities' discretionary choices concerning the management of SGEIs. In accordance with art. 133 of the Code, administrative courts assess the local administrations choice of the selected model for the service, after verifying if an economic activity can be classified as a public service and, more specifically, as a public service of economic interest.

The case law of administrative courts has been crucial in ensuring the correct implementation of EU law on SGEIs, especially the European competition rules, which remain on uncertain ground in Italy. Local entities have consistently shown a tendency to contract public services without conducting tender procedures in order to favor local businesses.

Before the promulgation of the Consolidated l. n. 201/2022 (hereafter, c.l. 201/2022)[20], which provides the general framework for the provisions concerning SGEIs, administrative courts were always tasked with establishing clear guidelines for local governments. In light of previously imprecise and mutable legislation, these guidelines were necessary to ensure compliance with EU law and to properly select the different models provided by Italian law. Owing to the absence, until 2022, of a general framework law on SGEIs, administrative judgments gradually became the essential point of reference for creating a strong and complete system of rules and principles meant to be followed in the future, beyond the specific case at hand.

This has sometimes implied a request for a preliminary ruling before the European Court of Justice pursuant to art. 267 TFEU, and, in doing so, administrative courts have become guarantors of the link between European and national systems.

Administrative courts and the Council of State in particular, have often spurred the legislator to modify laws and regulations to implement European Court of justice judgments. This follows a sort of circular process: the (European) lawmakers issue a measure, the courts interpret it and adapt it to the case at hand, and their interpretation gradually leads the national legislator to modify the measure (if necessary), which is then freshly re-interpreted by the courts. In this process, administrative courts have been supported by decisions from the Constitutional Court[21].

With regard to SGEIs, the European Court of Justice maintains an approach that

seeks economic criteria for their definition [22]. The service must be compensated at source, and there must be a supply of such services in a market [23]. If the service is deemed to be of economic interest, local administrations are obliged to apply the models strictly as outlined, in accordance with competition rules.
The framework for the supply of public services has always been rather fuzzy, consisting of general rules and provisions whose meanings have inevitably been left to the interpretation of administrative courts and legal literature as well. This synergy of efforts has been quite fruitful, since in most cases it is impossible to tell whether case law has influenced the literature or vice versa.
The promulgation of c.l. 201/2022 has partially changed this framework as Article 2 provides for the definition of SGEIs of local relevance and that of network SGEIs. This definition is the end point of the above combination.

3.1. The Notion of SGEIs Before and After the Enactment of Consolidated l. no. 201/2022

To better understand the impact of c.l. 201/2022 on the organization management of SGEIs, it is quite useful to analyze the situation before 2022.
In light of Constitutional Court's judgment no. 325/2010, SGEIs and "local public services of economic relevance" (*servizi pubblici locali di rilevanza economica*) have been treated as essentially one and the same.
The notion of SGEI derives from art. 14 and 106 (2) TFUE, Protocol 26 and art. 36 of the "Nice Charter", as well as from the case law of the European Court of Justice. It refers to a revenue-producing activity that public authorities wish to safeguard as being in the public interest as due to its connection to the socio-economic welfare of the population with its conditions of supply and management governed by the principles of continuity, transparency, and equal treatment. It is up to the State to specify when a given service qualifies as SGEI and is therefore distinct from a normal business activity [24]. This determination is based on a broadly political decision, which also concerns the direct management (self-handling) or outsourcing of the service, with the aim of improving the socio-economic standing of the community [25]. Public authorities are responsible for ensuring the regular provision of the service, even if they do not provide it directly. It is essential, therefore, that the service caters to undifferentiated users,

even when enjoyed individually; it must be subject to service obligations imposed by the public authority, including its pricing in the form of fees and tariffs.
Administrative courts have played a key role in establishing the distinctive traits of public services "with" and "without" economic relevance. In the former case, only two criteria apply: a) the service must be capable of joining or creating a significant market, even if it does not exist yet but has the potential to grow; b) the provision of the service must be economically viable, such that its costs, at least for a certain period of time, are covered by revenues in whatever form they may take (including government funding). These criteria, now transposed in c.l. 201/2022, had been applied on a case-by-case basis[26].
Only the management and supply of these services can influence the market and thus fall under competition law, coming within the exclusive legislative competence of the State (art. 117 Constitution), unlike those without economic relevance, which are, therefore, outside the scope of this essay.
Services without economic relevance can be organized by local governments at their own discretion, in accordance with the actual needs of the citizens. Nevertheless, a formally private-law model may be chosen and used to protect public interests and achieve greater efficiency. Unfortunately, the result is often the creation of hybrid entities governed by unclear provisions, which are source of legal uncertainty.
The promulgation of c.l. 201/2022 will not significantly alter the key role of administrative courts. The degree of discretionary power granted to local administrations to define an activity as SGEI will be reduced, as the legislator has given clear definitions and guidelines to manage it.
In addition to the SGEIs already listed and provided for by law (gas and electricity service, water service, etc.), every municipality, in order to better meet the socio-economic needs of the population, may decide to classify certain activities as SGEIs. This decision may also be guided by the principle of subsidiarity, as stated in Art. 118(4) of the Constitution. This is a sort of "political" decision with important consequences for the municipalities, involving a very high degree of discretion. It can be reviewed by administrative courts only if it is blatantly illogic or grossly disproportionate, without any substitution for public administration's assessment. The administrative judge, as it is customary, will scrutinise the motivation behind the decision and the

procedure followed to make it.
In compliance with art. 4 of c.l. 201/2022, its general provisions on SGEIs, with some exceptions (such as the distribution of natural gas and electricity, municipal pharmacies, local public transportation) will complement insufficiently detailed provisions and will override any specific provisions that conflict with them for every SGEI.
In light of the key role of those general principles, administrative courts will perform the difficult task of reviewing how public administrations apply art. 4. The boundary line between provisions that are in contrast with, and those not totally compatible with article 4 is not well drawn, and not once and for all. The assessment of compatibility, or lack thereof, again requires comprehensive reasoning as it will impact the rationale of c.l. 201/2022, which aims to develop a homogeneous system to better facilitate economic growth.
Nowadays, the problem of distinguishing between services with or without economic importance is no longer topical, while a new one is at stake. Once again, administrative courts and legal doctrine will work together to find proper solutions. To solve this new problem, the judge, unlike in the past, will perform the role of guarantor mainly by scrutinising European and national principles. As a result, he becomes the "*dominus*" of their content, but with the risk of also becoming the new legislator.

3.2. Outsourcing and In House Provision of SGEIs

Administrative courts case law has always been fundamental in clarifying the ways to manage the SGEIs[27].
The entry into force of c.l. 201/2022 will probably reduce the number of litigations, as it lists the different models of outsourcing and direct management (in house provision) of SGEIs, in compliance with the principles of European law.
These models are well known, having already been provided for in the previous legislation.
In compliance with art. 14 of c.l. 201/2022, local authorities can choose among different organizational models, all valid, in light of the European principle of "free administration of public authorities". This means that the choice to

outsource the services is entirely equivalent to the in house provision of services.
If outsourcing is chosen, local administrations may select a supplier in the open market through public tendering, governed by European law and principles, in compliance with the Italian public procurement code (legislative decree no. 36/2023 *Codice dei contratti pubblici*). Art. 15 of c.l. 201/2022 expresses a strong preference for concession over public procurement contracts, aiming to transfer all the risk of the service management to the supplier.
Art. 14 of c.l. 201/2022, supplemented by art. 17 of legislative decree no. 175/2016 (known as the "Consolidated law on public companies", *Testo unico delle società pubbliche*) provides for a joint undertaking, an institutional public-private partnership by establishing a mixed company, which will award SGEIs only if the private partner had been previously chosen through a specific double-objective tendering process that considers both the partner's capacity as partner and the specific tasks it is asked to perform, such as know-how.
Candidates must therefore demonstrate their suitability to become shareholders, as well as their technical ability to provide the service, along with any economic advantages arising from their bid. The public-private partnership, whose private partners have been selected via a double tender, is considered equivalent to a supplier chosen via competitive bidding[28].
Thanks to the interpretative efforts of administrative courts[29] the double tender procedure has prevented Italy from breaching European competition rules.
In compliance with art. 14 of c.l. 201/2022, supplemented by art. 17 of legislative decree no. 175/2016, local administrations may decide to establish an "in-house company" to manage the SGEIs directly. In this case, however, the company has to meet the conditions set by European and national law. First of all, the ownership is entirely public; in-house companies cannot have private investors, unless this is provided for by law but then only in a minority position, as they cannot exert any influence on the governance of the company. Additionally, the control exercised by the local authorities must be equivalent to that which they exert over their own departments and the company must carry out the essential part of its activities with those authorities[30]. In short, the "in house" company is sort of a "*longa manus*" for the local administrations.
In light of art. 17 of c.l. 201/2022, the "in house company" will obtain the service based on a report published on the website of the local administration, which

explains and confirms the possession of the qualifications required by European law for managing SGEIs. The report must define the specific content of the public service and universal service obligations, indicating the economic compensations, if applicable. The decision not to outsource the SGEIs, "to escape from the market" and to establish an "in house company" must be strongly justified, clearly referencing all the benefits of that choice for users at local administrations as far as costs and quality are concerned. This choice will be constantly monitored to ensure that it remains the most advantageous option
In accordance with art. 17 of c.l. 201/2022, with the exception of network SGEIs, local administrations may decide to provide them using their own means and resources (*gestione in economia*), which is a form of self-provision. Alternatively, they can establish a special municipal undertake, entirely of a public law nature, a sort of subsidiarity body (*azienda speciale*) totally controlled by the local administrations. The difference with the "in house company" is that the latter is formally a private entity, as it has the form of a private company.
In short, the local authority can choose how the service will be managed, but its decision must be duly justified and, above all, publicised on the website of the local administration.
As we have mentioned, European law maintains a form of neutrality with regard to the different way to manage SGEIs; therefore, it does not require them to be outsourced. Nevertheless, Italian law actually provides a large number of incentives[31] if the local authority decides to outsource rather than manage the service itself or by establishing a costly "in house" company. Furthermore, it is undeniable that the indiscriminate use of in house provision of SGEIs could create monopolies, which are prohibited under European law[32].
Administrative courts have been playing a very important role in deciding whether local authorities have lawfully establish an "in house company", especially in clarifying the concepts of "similar control" and "essential part of the performed activities"[33]. Taking each case individually, courts first confirmed that the ownership is wholly public, then examine the articles of incorporation and by-laws to determine whether the "in-house company" is so tightly controlled by local authorities that it can be considered a sort of extension of the authorities themselves. To establish that the "essential part" of its activity serves local authorities[34], courts will consider the company's revenues, organization, resources

and personnel. The activity of the "in house company" must be perceived as beneficial by the population, which support the costs directly by paying an established fee.

The application of open-ended concepts such as "similar control" and "essential part" requires a creative effort by the courts. In so doing, they safeguard full compliance with European law, particularly with competition rules. Administrative courts determine how and when the power to choose the SGEIs supplying model is properly exercised ensuring it does not breach European competition rules and thereby guiding the administration's future actions[35].

The Council of State has stressed that although the principle of exceptionality no longer applies to the "in-house" procurement of services of economic relevance, the fundamental choice between outsourcing or in house provision of the public services is not entirely free but must respect the established principles for discretionary decision-making[36]. This means that the administration, and subsequently the court, must ensure that a proper comparison of the public and private interests at play has been made; that, in light of the population's needs, the most efficient and economical model has been chosen; and that the reasoning behind the decision is comprehensive. Thus, administrative courts could easily annul such a decision if it is clearly illogical, irrational, or breaches the principle of the sustainability of public debt (art. 97 Constitution) or distorts the facts. Both options – self-provision and outsourcing – must also be evaluated in terms of sustainability[37].

Administrative Courts have played a key role in defining the potential influence of art. 118(4) of the Constitution, which governs the principle of "horizontal" subsidiarity (*sussidiarietà orizzontale*), on the choice of how to manage SGEIs. In particular[38], administrative courts' case law has firmly asserted that the principle of subsidiarity pursuant to art. 118(4) of the Constitution cannot be interpreted as a restriction on adopting the "in-house model" because it merely encourages, rather than require, the cultivation of independent private initiative.

Administrative courts perform yet another important task when they are called upon to rule on damage compensation from a party that has been erroneously excluded from the award of a public service, in accordance with art. 30 of the Code.

Administrative courts also play an equally important role when ruling on public-

private partnerships[39], as this model is allowed only if the parties share mutual interests. Such partnerships are subject to the same degree of ambiguity as the "in-house model".

3.3. Administrative Courts and Independent Authorities

Administrative courts have an even more important task when they rule on the measures taken by Independent authorities especially Italian Competition Authority (*Autorità garante della concorrenza e del mercato*), the Telecommunications Authority (*Autorità delle Telecomunicazioni*) and the Italian Regulatory Authority for Energy, Networks and Environment (*Autorità di regolazione per l'energia, le reti e l'ambiente*).

Administrative courts, as guardians of legality at a predominantly formal level, initially exercised merely a "weak" review of these acts, in light of the principles of reasonableness and proportionality, in addition to the check concerning the complete representation of the factual situation.

Subsequently, the review has become more rigorous, particularly regarding sanctioning measures, to guarantee the full jurisdiction principle[40].

Administrative courts can quash Independent Authorities measures only if there is proof of a completely irrational use of a general economic concepts or categories (e.g. "abuse of a dominant position"). Nevertheless, given the highly qualified knowledge of their judges, administrative courts can re-evaluate the economic assessment made, substituting their own interpretation of undefined economic concepts (e.g. the concept of a "competitive market"). This process does not imply a new exercise of the regulatory function, which is not allowed, but rather the straightforward application of technical evaluations. When sanctions are at issue, the administrative judicial review performed on acts goes beyond merely formal; the administrative courts are required to evaluate whether the principle of proportionality has been observed and whether the severity of the sanction is reasonable in relation to the infringement.

It is worth recalling that art. 21*bis* of l. no. 287/1990 granted the Antitrust authority the standing to challenge anti-competitive measures taken by public administrations before administrative courts. This is an exceptional standing meant to strengthen the Independent Authority's role. As such, it can challenge,

for instance, non-compliance with the conditions for setting up an "in-house company" or the infringement of State aid regulations. Administrative courts thus become the fulcrum for the protection of competition[41].

Art. 21 of l. no. 287/1990 has not provided for a jurisdiction of an "objective" nature that would contrast with the "subjective" nature of administrative jurisdiction as established in the Italian Constitution. This is because Authority's standing aims to protect a qualified, differentiated position, in particular the proper functioning of the market, which is considered an essential condition for private economic freedom.

4. Conclusions

In light of the Code, administrative courts now ensure protection of legitimate interests and subjective rights that is equivalent to, if not stronger than that provided by ordinary courts, especially when exclusive jurisdiction is at stake.

The choice of the exclusive jurisdiction allows the administrative judge to balance economic freedoms with the public interest inherent in the organization and management of SGEIs.

The Code gives him precise legal tools to better review unlawful discretionary administrative measures, especially those taken by Independent Authorities. This is done in accordance with the principles of reasonableness and proportionality, in addition to a wide range of actions that can be brought before administrative courts, and help the judge in interpreting the general principles contained in c.l. 201/2022.

By ensuring the legality of local administrations' acts in accordance with competition rules and principles, administrative courts play a key role as guarantors of the full implementation of European law provisions, together with the European institutions.

Therefore, the choice of exclusive administrative jurisdiction appears to be highly coherent with the special nature of SGEIs, which are strictly linked to the socio-economic development of citizen, and with the nature of the "meta-individual" interests involved. These interests, also protected by our Constitution, in art. 117, include the consolidation of competition rules and principles and market stability, which are undoubtedly of a public law nature.

1. This essay is dedicated to Prof. Michel Pâques (University of Liège) and will be published also in the "Liber Amicorum" du Professeur Michel Pâques.
2. The text in English can be read at www.giustizia-amministrativa.it.
3. See M. D'Alberti, *Il diritto amministrativo tra imperativi economici e interessi pubblici*, in *Diritto Amministrativo*, 1, 2008, pp. 51-ss., and M. D'Alberti, *Poteri pubblici, mercati e globalizzazione*, Il Mulino, Bologna, 2008, *passim*.See the important Constitutional Court judgment no. 204 of 2004 and no. 191 of 2006, available at www.cortecostituzionale.it.
4. One example could be the litigations concerning payments of tariffs between the provider and local authorities.
5. See A. Pioggia, *Administrative Citizenship and Public Services: is the Constitutional Project Still Possible in the Perspective of the Union* in D. Sorace, L. Ferrara, I. Piazza (a cura di), *The changing administrative Law of an EU Member State*, Giappichelli, Torino, 2024, pp. 114-120. The Author in her contribution aims at investigating if public services are still the tool for the establishment of an administrative citizenship. In her view public services should serve to "form" the community, shaping to the administrative citizenship of its members.
6. Note that, in accordance with art. 30 of the Code, the interested party can request compensation for damages without any prior annulment of the unlawful act. This is a development from the administrative courts' case law, formed before the Code. It should also be noted that, traditionally, damage compensation fell within the jurisdiction of ordinary courts.
7. See Council of State (*Adunanza Plenaria*), judgment no. 8 of 2021, at www.giustizia-amministrativa.it. In the literature, also for the bibliography, see A. Travi, *Lezioni di giustizia amministrativa*, Giappichelli, Torino, 2024, pp. 194-220. See also M.A. Sandulli (a cura di), *Giudizio Amministrativo. Principi e regole*., Giuffré, Milano, 2024.
8. Regional Administrative Courts were provided for in 1971 (l. no. 1034/1971, now repealed by the Code). There are 20 of them, with 8 detached branches. For the list, please see www.giustizia-amministrativa.it.
9. The Council of State was established in 1831 (by Carlo Alberto) with only advisory functions for the king. It was in 1889, with the creation of the IVth section, followed afterwards by the Vth and VIth, that the Council of State began to exercise the two functions (consultative and jurisdictional) as it does today. See V. Parisio, *Il Consiglio di Stato in Italia tra consulenza e giurisdizione alla luce della Convenzione europea dei diritti dell'uomo*, in V. Parisio (a cura di), *Diritti interni, diritto comunitario e principi sovranazionali,* Giuffré, Milano, 2009, pp. 237-258. See also P. Aimo, *Le origini della giustizia amministrativa,* Giuffré, Milano, 1990.
10. This criterion and its historical development is well described by G. Treves, *Judicial review in Italian Administrative Law,* in *University of Chicago Law Review,* 26, 1958, p. 424. See also A. Travi, *Lezioni di Giustizia Amministrativa,* Giappichelli, Milano, 2024, pp. 119-

seq. See M. Clarich, *Manuale di giustizia amministrativa,* Il Mulino, Bologna, 2024, pp. 99-107.

11. On the notion of legitimate interests, and for a complete description of the historical developments of the administrative jurisdiction in Italy, see G. Treves, *Judicial review,* quot., pp. 422-425. See also A. Police, *Administrative Justice in Italy: Myths and reality*, in *Italian Journal of Public Law*, vol. VII, 1, 2015, pp. 34-ss.
12. See Constitutional Court's judgment no. 204/2004, available at www.cortecostituzionale.it.
13. In compliance with the model stated by the Court of Justice of the EU. It involves an examination of the relationship between results and means used by the administration. These means must be the least constraining possible for the individual. Note that the lack of logic must be abnormal or macroscopic. See S. Cognetti, *Principio di proporzionalità: profili di teoria generale e di analisi sistematica*, Giappichelli, Torino, 2010, and A. Sandulli, *La proporzionalità dell'azione amministrativa*, CEDAM, Padova, 1998. D.U. Galetta, *Il principio di proporzionalità fra diritto nazionale e diritto europeo (e con uno sguardo anche al di là dei confini dell'Unione Europea)*, in *Rivista italiana di diritto pubblico comunitario,* 6, 2019, pp. 903-927. For a critical approach to the way judicial review is performed by administrative courts, see G. Della Cananea, *Judicial Review of Administrative Action in Italy: beyond Deference*?, in G. Zhu Editor, *Deference to the Administration in Judicial Review*, Springer, 2019, pp. 271-293. See also D.U. Galetta, P. Provenzano, in G. Della Cananea, M. Andenas (a cura di), *Judicial Review of Administration in Europe. Procedural Fairness and Property*, Oxford University Press, 2021.
14. There are about 9.000 judicial judges, spread across three levels, while there are less than 400 administrative judges, spread across two levels.See G. Comporti, *The administrative jurisdiction in Italy: The Path Towards a Specialty to serve Full Protection of Rights* in D. Sorace, L. Ferrara, I. Piazza (a cura di), *The changing administrative Law of an EU Member State*, Giappichelli, Torino, 2024, pp. 89-112. See also E. Silvestri, *Administrative justice in Italy,* in *BRICS Law Journal*, 3-2, 2016, pp. 67-79; R. Perna, *The Italian system of the Administrative Justice at a glance,* in *www.giustizia-amministratuva.it,* 2012.
15. See L. Ferrara, *Lezioni di giustizia amministrativa*, Giappichelli, Torino, 2024.
16. The importance of a continuous dialogue with the ECHR and the European Court of Justice is made evident by G.D. Comporti, *The administrative jurisdiction in Italy,* quot., pp. 91-98. In the author's opinion, this dialogue could lead to reinterpret and update the traditional specialty of the public administration and its judge in a critical way.
17. F. Saitta, *Interprete senza spartito? Saggio critico sulla discrezionalità del giudice amministrativo*, Editoriale Scientifica, Napoli, 2023.
18. We should recall that, in compliance with art. 99 of the Code, the Council of State Plenary Assembly (*Adunanza plenaria*), determines the law true interpretation, which is strictly binding only for the section that asks for its ruling (not for the Regional Administrative Courts) as Italian legal system is not based on the principle of *stare decisis*. The *rationale* of

art. 99 is to fully implement the principle of effective judicial protection by an homogenous interpretation of law.

19. For the notion of SGEIs, see, among others, S. Valaguzza and R. Villata, *Pubblici Servizi*, Giappichelli, Torino, 2022; A. Di Giovanni, *I servizi di interesse generale tra poteri di autoorganizzazione e concessione di servizi*, Giappichelli, Torino, 2018; D. Sorace, *I servizi pubblici economici nell'ordinamento nazionale e europeo*, in E. Bruti liberati, F. Donati (a cura di), *La regolazione dei servizi di interesse economico generale*, Giappichelli, Torino, 2010, pp. 11-ss.; F. Trimarchi, *I servizi pubblici nel diritto comunitario*, in *Riv. It. Dir. Pubbl. Com.*, 18-5, 2008, pp. 1073-ss.; R. Caranta, *Il diritto UE sui SIEG,* in *Le regioni*, 2011, pp. 1175-ss.
20. You can read it (in italian) at www.normattiva.it*,* the consolidated l. no. 201/2022 has been commented in R. Chieppa, G. Bruzzone, A. Moliterni (a cura di), *La riforma dei servizi pubblici locali*, Giuffrè, Milano, 2023. See also, F. Fracchia, *Le società a partecipazione pubblica: un quadro di sintesi (dal t.u.s.p.p. alla disciplina sui servizi pubblici per giungere al nuovo codice dei contratti pubblici),* in *Il diritto dell'economia,* 1, 2024, pp. 77-ss.
21. The Constitutional Court has intervened several times on the matter of SGEIs and the protection of competition. See judgments 199/2014, 169/2014, 199/2012, 325/2010 and 272/2004, all available at www.giurcost.org.
22. See A. Pioggia, *Administrative Citizenship and Public Services:* quot., pp. 114-120.
23. See F. Trimarchi, *I servizi pubblici nel diritto comunitario: nozione e principi*, in *Riv. It. Dir pubbl. Com.*, 5, 2008, pp. 1070-ss.
24. See General Court ruling of 12 February 2008, Case T- 289/03, at www.curia.europa.eu.
25. See Constitutional Court judgments 229/2013 and 325/2010, available at www.cortecostituzionale.it, and TAR Lombardia (Brescia division) judgement no. 423/2014, available at www.giustizia-amministrativa.it.
26. For the concept of public service of economic relevance, see Council of State (Session V) judgments 5409/2012, 6529/2010, 5620/2010 and 790/2010, all available at www.giustizia-amministrativa.it.
27. G. Piperata, I *Servizi pubblici locali tra rimunicipalizzazione e demunicipalizzazione*, in *Munus*, 1/2016, pp. 5-14; Id., *Tipicità e autonomia nei servizi pubblici locali*, Giuffrè, Milano, 2005, pp. 71-ss.
28. See CJEC, (3rd Chamber), 15 October 2009, *Acoset SpA v. Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others*, ECLI:EU:C:2009:628.
29. See Council of State (*Adunanza Plenaria*) judgment 1/2008 and Council of State (Session II) 457/2007, available at *www.giustizia-amministrativa.it.* See S. Antoniazzi, *Società miste e servizi pubblici locali. Esperienze nazionali e modelli europei*, ESI, Napoli, 2017, pp. 224-252; M. Dugato, *La società a partecipazione pubblica tra efficienza e responsabilità*, in *Munus,* 3, 2016. See also M. Allena, and F. Goisis, *The 2016 Italian Consolidated Law on Public Entities Owned Companies: Towards a More Consistent Private Law Approach,* in *The Italian Law Journal,* 2017, 533-ss.

30. On the conditions required of in-house companies, see, including for the relevant case law, G. Scarafiocca, *L'in-house providing di nuovo all'attenzione delle Corti. L'occasione per uno sguardo d'insieme*, in *Federalismi*, 4, 2021, pp. 276-303; G. Greco, *Gli affidamenti in house di servizi e forniture, le concessioni di pubblico servizio e il principio della gara*, in *Rivista italiana di diritto pubblico comunitario,* 2020, pp. 1467-ss. C. Volpe, *L'affidamento in house. Questioni aperte sulla disciplina applicabile*, in *www.giustamm.it,* 2014.On the characteristics of judicial review, see V. Parisio, *Servizi pubblici. Giudice amministrativo e in house providing*, in *Dir. Soc.*, 3, 2007, pp. 367-ss. Id, *Services of General Economic Interest, Integrated Water Service "In house" Management in light of Directive 2014/23/EU: A General Overview,* in *Munus*, 4, 2018, pp. 1135-1162. See CJEU, 12 May 2022, *Comune di Lerici v. Provincia La Spezia*, Case C-719/20, ECLI:EU:C:2022:372; Council of State, sec. VI, ord. 7.3.2022, n. 1620, available at www.giustizia-amministrativa.it; TAR Liguria, sec. II, 3.10. 2020 n. 683, available at *www.giustizia-amministrativa.it.*
31. F. Trimarchi*, I servizi pubblici nel diritto comunitario: nozione e principi*, in *Riv. It. Dir pubbl. com.*, 2008, p. 1073.
32. M. Mazzamuto, *L'apparente neutralità comunitaria sull'autoproduzione pubblica: dall'in house al partenariato pubblico-pubblico*, in *Giurisprudenza italiana*, 6, 2013, pp. 1416-1420. The author explains that, in a true leap of logic, the idea has emerged that the "free" choice of self-provision extends to the free choice of maintaining a monopoly. See Council of State, VI, 11.2.2013 n. 762; Id. V, 27.5.2014 n. 2716, available at www.giustizia-amministrativa.it.
33. See CJEC, 18 November 1999, *Teckal Srl*, Case C-107/98, ECLI:EU:C:1999:562. See also TAR Abruzzo/Pescara (I) judgment 165/2014 at www.giustizia-amministrativa.it.
34. Council of State (V) judgments 4832/2013 and 5082/2009, available at www.giustizia-amministrativa.it.
35. See Council of State (V) judgment 2716/2014, Council of State (V) judgement 552/2011 and TAR Toscana (I) judgement 7397/2011, available at www.giustizia-amministrativa.it.
36. See C. Marzuoli, *Gli enti territoriali e la scelta del modello di gestione dei servizi pubblici locali*, in *Munus*, 1, 2011, pp. 143-158; S. Sorrentino, *La scelta del modello di gestione dei servizi*, in *Munus*, 2, 2016, pp. 489-ss.; Council of State, sec. V, 2256/2018; Council of State, sec. VI judgment 762/2013 available at www.giustizia-amministrativa.it.
37. See G. Bottino, *Il nuovo art. 97 della Costituzione*, in *Riv. Trim. Dir. Pubbl.*, 2014, pp. 747-ss.
38. TAR Umbria judgment 987/2003; TAR Sardegna (I) judgment 2407/2007 and TAR Lombardia (IV) judgment 2842/2008, all available at *www.giustizia-amministrativa.it.* See, for an opposite perspective, S. D'Atena, *Sussidiarietà orizzontale e affidamento 'in house'*, in *Giust. Cost*., 6, 2008, p. 5009, who writes that art. 118(4) requires, rather than encourage, the cultivation of independent initiative.
39. For the concept of public-private partnership, see CJCE, 9 June 2009, *Commission of the European Communities v. Hellenic Republic*, Case C-489/06, ECLI:EU:C:2009:165.

40. See V. Parisio, *Contrôle juridictionnel des actes des Autorités indépendantes Italiennes: un bref aperçu*, in *Federalismi.it*, 19, 2018. Administrative courts as soon as they review the legality of measures taken by an Independent Authority become the forum for litigation of economic interest and therefore have a significant impact on Italy's economic life.
41. See V. Parisio, *Services of General Economic Interest, Integrated Water Service,* quot., pp. 1140-ss.