DIRITTIFONDAMENTALI.IT
rivista on-line

Dirittifondamentali.it - Fascicolo 1/2018
Data di pubblicazione – 4 aprile 2018

*The main sources of law on the contracts awarded to in-house entities in the light of the New Italian Public Procurements Code.**

di
Vittoria Berlingò**

1. *The Italian Framework of Contracts Awarded to In-house Entities: An Overview On Sources of Law.*

On 14 April 2016, the Italian government adopted a new public procurement Code, replacing Legislative Decree 163/2006 and its implementing Regulation, Presidential Decree 207/2010. It is called the Legislative Decree n° 50 of 2016, last modified by Legislative Decree 19 April 2017, n° 56.
With this modification, the Directive 2014/24/EU on public procurement, together with Directives 2014/23/EU on the awarding of concession contracts and 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, published in the Official Journal of the European Union of 28 March 2014 (L 94/1), are transposed by Italy[1].

*This is last version of a paper presented during International Congress "*Implementation of the European Directives 2014: European model and national systems in a comparative analisys*", Krakow University of Economic, Krakow, June 18, 2016.

**Associate Professor of Administrative Law, Department of Law, University of Messina.

[1] For a comment on the previous framework, see ASTONE F., *The Italian Public Procurement Law from Its Origins to the Directives 2014/UE* in Prawo Zamówień Publicznych 2016, 1(48), 1 ss.; BERLINGÒ V., *The 2014 Directive relating to in-house exemption: the possible reflections on set of the Italian public administration in the reforms in progress*, in *Prawo zamówień publicznych*, 2016, 2(49), 21 ss.

The past Code did not contain any specific provision on the contracts awarded to in-house entities. The only provisions on the in-house arrangements were provided by article 4 of Law Decree 138/2011 in the public utilities sector. By Decision no. 199 issued on 20 July 2012, the Italian Constitutional Court declared the relevant provision unconstitutional.

As a result, from the July 26, 2012, the in-house arrangements are governed by and awarded on the basis of the principles outlined by the European Court of Justice in the 'Teckal' decision (18 November 1999, C-107/98) as interpreted, from time to time, by the EU case law[2].

2. *The Case Law of the European Court of Justice.*

After all, the phenomenon of public companies can be ascribed to those areas, where it is most evident that the functions performed by the European Court of Justice fulfill the role of not only resolving conflicts of interpretation in the implementation of European regulations, but also of coordinating the different levels of government and the responsibility of the European Union[3].

The so-called 'Teckal criteria', outlined by the case law of Luxembourg, was created in response to the general process of disintegration of the monolithic nature of both sources, both the power of interpretation of contemporary legal systems, and also with reference to the sector analyzed here. These criteria have contributed, in the absence of an in-house exemption statutory definition, to assign a meaning of 'value' to the protection of competition, that permeate even the legal framework of each Member State and related competences.

Specifically, according to the case law, the 'in-house' arrangements include contracts entered between contracting authorities and private entities:

(a) over which the contracting authorities exercise a control similar to that which they exercise over their own departments, and
(b) whose activity is carried out on an exclusive basis in favor of the same contracting authority.

3. *The New European Directives 2014 on In-house Exemption.*

The Directives 2014 cut the link between the Court of Justice and the Member States, and, in regaining possession of the legitimate role of 'producer' of the valid rule for the sector in question, they offer an opportunity to bring in a regulatory framework,

[2] See, lastly, GIUSTI A., *I requisiti dell'*in house *fra principi giurisprudenziali e nuove regole codificate*, in *Giur. it.*, 2017, 439 ss.

[3] See CIVITARESE MATTEUCCI S., *Obbligo di interpretazione conforme al diritto UE e principio di autonomia procedurale in relazione al diritto amministrativo nazionale*, in *Riv.it.dir.pubbl.com.*, 2014, 1175 ; SCARCELLO O., *I criteri sistematici come strumento di governo del pluralismo costituzionale UE*, in *Riv.it.dir.pubbl.com.*, 2014, 1205.

greater certainty and stability, an issue of such great importance to the objectives related to the economic and social sustainable development within Europe.

The draft law allows for the implementation of the new Directives, as well as «to revise the current legal framework of public contracts for works, services and supplies», in relation to provisions of in-house, portended a faithful transposition of directives or even a failure to transpose the relevant part, still being able to rely on the direct application, once the deadline for transposition is over.

However, with reference to some of their provisions, the issue of a possible early effectiveness has been raised[4].

In particular, art. 12 Directive 2014/24/EU drew the attention of the interpreter not only from the theoretical point of view, having introduced, for the first time, a legislative definition of the concept of in-house exemption, but also from the applicative point of view, for the consequences of the punctuality and the detail used by the European legislator in providing such a definition[5].

Article 12 of Directive 2014/24/EU - which codifies, as already mentioned, for the first time the in-house exemption in ordinary sectors - is used in its formulation, without any change in terminology, even for in-house exemption on the awarding of concession contracts and on procurement by entities operating in the water, energy, transport and postal services sectors, respectively in accordance with article 17 of Directive 2014/23 / EU and article 28 of Directive 2014/25 / EU[6].

In particular, paragraphs 1, 2, 3 and 5 of article 12 regulate the issue of in-house exemption, providing different types of exemptions, while paragraph 4 contains provisions on cooperation between public sector entities[7].

---

[4] See VELTRI G., *In house e anticipata efficacia della direttiva 2014/24/UE*, in *Urb. e app.*, 2015, 655 ss. It is known as the exception to the rule of non self-executing directives before the expiry of the deadline for transposition, it found space only for those situations where the provision has an unconditional nature, still holding some discretion in the hands of the Member State. After all, in Italy, the supreme body of administration jurisdiction, the Council of State, as see *infra*, has been called to address this issue, with reference to the case of a direct awarding of contracts for ITC services from partners (Ministry of Education, Universities, Research Entities) to a consortium (CINECA Interuniversity Consortium).

[5] CAVALLO PERIN R. - CASALINI D., *Control over In-house Providing Organisations*, in *Public Procurement Law Review*, Issue 5, 2009, 227 ss.

[6] FOÀ S. – GRECO D., *L'*in house providing *nelle direttive appalti 2014: norme incondizionate e limiti dell'interpretazione conforme*, in *federalismi.it*, see also CAVALLO PERIN R., *Il modulo "derogatorio": in autoproduzione o* in house providing, in BONURA H. – CASSANO M., *L'affidamento e la gestione dei servizi pubblici locali a rilevanza economica*, Torino, 2011, 119; CARULLO G., *Riflessioni su alcune aperture del legislatore europeo in tema di in house, anche in prospettiva dei corrispondenti limiti nazionali per le società strumentali*, in *Riv.it.dir.pubbl.com.*, 2014, 991; CARULLO G., *Prime riflessioni in merito alle "nuove" eccezioni relative agli affidamenti tra enti nell'ambito del settore pubblico, alla luce della "vecchia" giurisprudenza sull'in house*, in *Riv.it.dir.pubbl.com.*, 2014, 823.

[7] The cited article 12 regulates not only the in-house exemption, but all cases of so-called public-public cooperation, both vertical (or institutionalized) and horizontal. There are contemplated, then, all so-called "Modules in derogation" to public evidence, that the cases in which the contracting

The first paragraph regulates the so-called 'classic' in-house exemption, the situation whereby one single contracting authority can award a contract directly to a company if the contracting authority exercises a certain level of control over the economic operator providing goods, work or services (the 'control criterion') and, the controlled legal entity must carry out the essential part of its activities with the contracting authority (the 'activity criterion').

Compared to the statement of the so-called 'Teckal criteria' (according to the now landmark ruling of 1999), there are some significant innovations.

Firstly, the prevision specifies, in accordance with the living law, that, «a contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first sub paragraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person»[8].

Regarding the activity criterion, the provision adds legal certainty considering exactly how large a portion of its activities the controlled entity must carry out for its controlling authority in order for the exemption to apply. In particular, paragraph 1, letter b) provides that, to satisfy the condition of prevalence, more than 80 % of the activities of the controlled legal person are carried out by the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority.

There is a significant change regarding the condition of the total public participation in the controlled legal person, as a long-held requirement by Court of Justice of European Union.

The in-house exemption will be applicable in certain cases even if there is direct private capital investment in the controlled legal person. This is so when the conditions in letter c) are fulfilled, i.e. non controlling and non-blocking forms of private capital participation required by national legislative provisions, inconformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

As regards the condition of the total public contribution to the capital of the subsidiary, there is a significant change. In fact, it is permitted, under certain conditions, a minimum participation of private capital. In particular, paragraph 1, letter c) provides that «there is no direct private capital participation in the controlled legal person with the exception of non- controlling and non-blocking forms of private capital

---

authority decides not to outsource the work, service or supply, but to delegate it to his long arm (in-house) or to carry it out in cooperation with 'another contracting authority for only the public interest and without any consideration (public-public cooperation horizontal).

[8] This would be the situation where the administration A exercises control similar over the administration B and this in turn exerts a similar control over the body in house C: in this case is also allowed direct procurement by the administration to the body in house C, even if, formally, there is not a direct relationship between the two subjects.

participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person».

The provision introduces different types of in house arrangements:

First, there is the so-called in-house 'cascata' when «such a control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority». The new sentence regulates the assessment of control where a contract is assigned through more than one 'level' in a vertical chain, e.g. from a mother to her granddaughter.

In addition to what is already stated in the jurisprudence, paragraph 2 regulates, respectively, the issue of co-operation 'inverted vertical' or 'upside down' constellation[9], for the case where the controlled entity, being itself a contracting authority, entrust a contract to controlling entity without public tender; and of 'horizontal' constellation[10], for the case where a party to a contract or a concession to a person B, and both A and B are controlled by another entity C. In particular, the paragraph states: «Paragraph 1 also applies to a controlled where a legal person who is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority».

Paragraph 3, also acknowledges, according to case law as formulated by the Court of Justice of European Union, situations where control is exercised jointly by several contracting authorities.

«A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled:

- the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- more than 80 % of the activities of that legal person carried out in the performance of tasks entrusted to them by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities;

[9] There is a kind of bi-directionality of the in house exemption. The justification of this possibility of direct award would be in the fact that, being the subsidiary appendage of the contracting authority which is entrusted directly to the contract, can be regarded, in any event, a mere form of inter-departmental delegation, although asymmetrical with respect to the traditional one.

[10] There is, therefore, no direct relationship between A and B, but both are in connection with the subject of in-house C, which controls both A and B. In this case, the justification of the possibility of entrusting the contract directly to an entity, which is not controlled, should be tried in the fact that both are controlled according to Teckal criteria by a third party. Indirectly, therefore, they can be said that the relationship between them is a kind of relationship of inter-departmental delegation, although of derived nature.

- and there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person».

For the purposes of point (a) of the first subparagraph, «contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled: the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities; individual representatives may represent several or all of the participating contracting authorities; those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities».[11]

This would be the situation where the administration A exercises similar control over the administration B and this in turn exerts a similar control over the body in house C: in this case direct procurement from the administration to the body in house C is also allowed, even if, formally, there is not a direct relationship between the two subjects.

There is a kind of bi-directionality of the in house exemption. The justification of this possibility of a direct award would be in the fact that, being the subsidiary appendage of the contracting authority which is entrusted directly to the contract, can be regarded, in any event, a mere form of inter-departmental delegation, although asymmetrical with respect to the traditional one.

There is, therefore, no direct relationship between A and B, but both are in connection with the subject of in-house C, which controls both A and B. In this case, the justification of the possibility of entrusting the contract directly to an entity, which is not controlled, should be tried in the fact that both are controlled according to Teckal criteria by a third party. Indirectly, therefore, it can be said that the relationship between them is a kind of relationship of inter-departmental delegation, although of a derived nature.

4. Interpretations of the Italian Council of State with Respect to the Public Procurement Law.

As pointed out by the doctrine, the introduction of the European rules, examined above, has placed, among other things, an important interpretative problem, regarding namely the possible anticipated effectiveness of a European source that has not yet been formally put into force, such as to likely influence the case law of the European Court of Justice, also by virtue of an obligation to cooperate in good faith, incumbent on all Member States[12]. This problem has been effectively addressed firstly by the

[11] See MENTO S., *Il controllo analogo sulle società in house pluri partecipate da enti pubblici*, in *Giorn. dir. amm.*, 2013, ss.

[12] See ANIBALLI L., *Ancora sulla partecipazione privata all'*in house, in *Gior.dir.amm.*, 2015, 787 ss.

second Section of the Italian Council of State in exercise of advisory function, and then, from the Sixth Section of the Italian Council of State in exercise of jurisdictional function, with reference to a case of multi-participated in-house, in whose shareholding structure include the Ministry of Education, Universities and Research, Universities, both public and private, and Research Organizations[13].

The two sections of the Italian Council of State reached diametrically opposite conclusions[14].

The Second Section of the Italian Council of State in exercise of advisory function, with ruling no. 298/2015, considers the direct assignment legitimate, despite a minimum participation of private capital in CINECA, relying on the direct applicability of Article 12 of the new Directive 24/2014/EU on contracts, relating to the letter c) allowing this possibility.

Instead, the Sixth Section of the Italian Council of State in exercise of jurisdictional function, with ruling n. 2660/15, prevented the Directive of being self- executing while awaiting transposition (acknowledgement). In particular, according to the jurisdiction Section, the Directive 24/2014/EU leaves a significant margin of discretion to the Member States with reference to the possibility of minimum private participation. The provisions of cited art. 12, para. 1, letter c), stands as the outstanding participation of private capital, provided that, in particular: a) non-controlling and non-blocking forms of private capital participation, consenting a decisive influence on the controlled legal person; b) private capital participation in the controlled legal person required by national legislative provisions, in conformity with the Treaties.

The administrative judge, in this case, does not even recognize the existence of so-called "duty to stand still", able, in certain cases, to bind the legislature to refrain from taking any measure likely to affect the result. According to the Sixth Section, «the present case falls outside the 'negative' limited legal significance, that may, exceptionally, be given to the Directive before the expiry of the deadline for transposition: the rules on the in house exemption, which, applied in this case, could potentially conflict with the provisions of the new directive, in fact, the rules are already existing in the national legislature (not newly introduced ones by the national

---

[13] For this aspect, see CASSATELLA A., *Partecipazione 'simbolica' alle società in house e requisito del controllo analogo*, in *Giur.it.*, 2014, 1708 ss.

[14] The case law concerns the legitimacy of direct awarding of contracts for ITC services from partners (Ministry of Education, Universities, Research Entities) to a consortium (CINECA Inter University Consortium). The case was resolved in an opposite way by the Council of State, in the exercise of advisory and jurisdictional functions. In exercise of advisory function, the Council of State has been asked by the Ministry of Education, University and Research (MIUR) to decide on the legality of the direct awarding of contracts for ITC services for the university system, the research and education, from the Ministry of Education to CINECA Inter University Consortium. In exercise of jurisdictional function, the Council of State has been called, however, on appeal CINECA, to decide on the legality of the direct awarding of contracts for ITC services by the Italian University of Reggio Calabria in favor of CINECA, whose team corporate the University participates. See, also, F. MANGANARO, *In house e sistema idrico integrato. Un caso di controllo analogo anche senza maggioranza azionaria pubblica*, in *Giur. it.*, 2015, 187 ss.

legislature in breach of the duty to standstill) and besides find their own source in the European Union, having origins from the above mentioned case law of the European Court of Justice, that, over the years, has set strict limits on the implementation of in house exemption. Therefore, one cannot believe that the mere publication of the Directive can determine, before its deadline for transposition, the automatic and immediate overcoming of a European previous legal rule».

For the purposes of this paper, however, more attention must be paid to the additional argument used by the Italian Council of State to exclude the direct applicability of the new European law, even if the new rules were considered self-executing or if it was the deadline for transposition, i.e. the possibility for the legislator to derogate from the provisions of those Directives, providing for more stringent requirements as to legitimize the in-house.

The prefiguration of such possibility would result in the power of national legislature to introduce limits to freedom for the authorities to opt for a self- production management model, rather than to an outsourcing model, despite the new European regulations - in particular the Clause 5 of the Directive on public procurement, the Clause 7 of the Directive on procurement by entities operating in the water, energy, transport and postal services sectors and the Clause 5 of the directive on the awarding of concession contracts – set that «[..] nothing in this Directive obliges Member States to contract out or externalize the provision of services that they wish to provide themselves or to organize by means other than public contracts within the meaning of this Directive».

The interpretation of the Italian Administrative Courts merits a reflection then, regarding an second and even more relevant aspect, the potential accidents on the discipline of those performances, known as local public services, whose coloring (public or private) is waiting – after the repeal of article 23 of Decree n. 112 of 2008 by referendum and the ruling of unconstitutionality on, to contrast with the outcome of the referendum, art. 4 of Decree n. 138 of 2011[15]; and now, as it is known, after the

[15] By art. 23-bis of Decree Law n. 112 of 2008 measures of direct production were considered, albeit to varying degrees, recessive, being able to use them within the limits of a market situation that would hinder the use of competition; situation that the Competition and market Authority, time to time, must test, establishing, consequently, the competition so called 'for the market', in which companies compete to gain entry into the '(public) reserved market' consisting of the assets belonging to the public service. The Italian legal system, despite the outcome of the recall referendum of June 2011, which has done nothing about the rules for which the reform was designed , has chosen a different and radical direction, adopting a regulatory regime that, in place of competition 'for the market', aimed at ensuring a more incisive and full 'market competition', based, rather on a logic of 'outsourcing', than on a logic of 'liberalization'. The next reform of 2011, carried out with the Legislative Decree no. 138 of 2011,influenced, even before its management, the establishment of a public service, establishment no more strictly linked to a public discretionary assessment, but possible, for the services of significant economic value, only if the public administration demonstrates the inappropriateness of grant to the market and the need to carry on the activity connected to the service by its self . In all other cases, the service had to be liberalized, and therefore could be done by any private company, while the public administration retains possibly only regulatory powers. As noted by ROMANO TASSONE A., *I servizi pubblici locali italiani raccontati agli argentini*, in *Dir. econ.*, 2012, 495, the reform had led to extremely strict rules, leaving small spaces, and most often no

ruling of unconstitutionality by Italian Constitution Court n. 251 of 2015 – to be definitively established and clarified in its forms in the implementation of public administration reform, set out in Law n. 124 of 2015[16].

In fact art. 19 of the cited Law n. 124 of 2015, delegating to the reorganization of the local public services, makes explicit reference to the Directives, above mentioned, to set:

- according to the letter c), the objectives of an «identification of the general rules on the regulation and organization of local services of general economic interest, including the definition of the criteria for the allocation of special or exclusive rights, according to the principles of adequacy, subsidiarity and proportionality and in accordance with European Directives; with particular reference to companies operating in public participation in water services, resolution of contradictions regulations in accordance with the principles of European Union law, taking into account the results of the recall referendum on the 12th and 13th June, 2011»;
- according to the letter e), the objectives «for all cases where there are grounds for competition in the market, a identification of management methods or conferring management services in respect of the principles of the European law, including those relating to self production, and the general principles relating to public contracts and, in particular, the principles of self-organization, cost, effectiveness, impartiality, transparency, adequate publicity, non-discrimination, equal treatment, mutual recognition, proportionality».

The instability linked to the 'for layers' evolution of the local public services law, after the draft of Legislative Decree on "Unique Text on local public services of general

---

margin, for autonomous choices of local authorities, basically forced to adopt a unique management model, which is to build on the purpose to offer a predefined structure in every detail. It is understandable that these rigidities screeched in a context characterized by the multiplicity and variety of the types of services and organizational solutions, in physiological adaptation to the inherent diversity of socio-economic contexts in which the Italian municipalities operate. This legislation was, also, to affect, in practice, not so much on the establishment of new services, as on organizational reshaping of the services already activated, and often effectively performed by structures that despite, the law required their dismantlement. On closer check, just because of opposition to the principle of autonomy, the legislation which was introduced and covered in detail, in time, the many management modules of local public services of economic interest have fallen void. This happened at first, under the recalled referendum of 11st/12nd June 2011, regarding the article 23 bis of the Decree Law no. 112 of 2008, built on the model of outsourcing. This happened again by the ruling no. 199 of 2012 of Italian Constitutional Court, which removed the article 4 of Decree n. 138 of 2011 from the framework of legislation Italian. The resulting regulation gaps was only marginally filled by the rule of specific motivational and procedural charges, subsequently introduced by art. 34, co. 20, Legislative Decree no. 179 of 2012, in relation to organizational decisions concerning local public services of economic importance; charges extended to the choice of not to making any external assignment and to provide for their own service delivery.

[16] G. B. MATTARELLA, *La L. n. 124 del 2015 e i suoi decreti attuativi: un bilancio*, in *Gior. dir. amm.*, 2017, 565 ss. For a comment of the reform of pubblic administration, see v. B.G. MATTARELLA - E. D'ALTERIO (a cura di), *La riforma della pubblica amministrazione. Commento alla legge n. 124 del 2015 (Madia) e ai decreti attuativi*, Il Sole 24 Ore, Milano, 2017.

economic interest'" has come to nothing, revolves around the presence of an unresolved systematic 'antinomy', common to the discipline on in-house exemption.[17]

5. The Rules of the New Italian Public Procurement Code.

The issue of in-house arrangements, of public companies, and the selection procedures is disciplined crosswise in multiple provisions of the new Public Procurement Code (art. 1, 5, 30, 192)[18].

Article 5, which finds its place in the title II of Part I, dedicated to contracts excluded in whole or in part from the aim of application of the Code, sets out common principles for exclusion for concessions, public contracts and agreements between entities and contracting authorities within the public sector, and implements general predictions of 2014 Directives, as above mentioned.

It is of equal provisions and purposes, bearing a discipline of principle which only outlines in its essentials the salient features and, as if it were, the lowest common denominator of the vast and complex phenomenon of in house arrangements.

The code sets under what conditions an in-house arrangement without competition is legitimate.

The code does not address the conditions under which public authorities may establish an in -house company.

Regarding, it would have been better that the code was connected to the new discipline of public companies, approved by Legislative Decree 19 August 2016, n. 175 (as modified by Legislative Decree 16 June 2017 n. 100) whose article 16 also offers a definition of in-house exemption.

The issue of the establishment of joint enterprises with public and private participation, and the theme of the public evidence procedure of selection of private partners, are out of the Code.

The Code does not specifically address this issue (the lack had been reported by the advice of the Council State), but the need for public evidence procedure in selecting the

[17] On the reflections of Constitutional Court n. 251/2015 on the public administration reform , see G. D'AMICO, *La sentenza sulla legge Madia: una decisione innovatrice … anche troppo!*, in *Questione Giustizia*, 2017, 1 ss.; S. AGOSTA, *Sulla riorganizzazione della P.A. la Corte apre alla leale collaborazione nel segno della continuità*, in *Quad. cost.*, 2017, 120-121; E. BALBONI, *Sulla riorganizzazione della P.A. la Corte richiede e tutela la leale collaborazione… e «l'intendenza seguirà»,* ivi, 122 ss.; G. RIVOSECCHI, *Sulla riorganizzazione della P.A. la leale collaborazione viene «imposta» nella delegazione legislativa*, ivi, 125 ss.; A. POGGI - G. BOGGERO, *Non si può riformare la p.a. senza intesa con gli enti territoriali: la Corte costituzionale ancora una volta dinanzi ad un Titolo V incompiuto. Nota alla sentenza n. 251/2016*, in *Federalismi.it*, 2016. Lastly, see also B. G. MATTARELLA, *Delega legislativa e principio di leale collaborazione*, in *Gior. dir. amm.*, 2017, 179 ss.,

[18] See DE NICTOLIS R., *Il nuovo Codice dei contratti pubblici*, in *Urb.e App.*, 2016, 535 ss.

private partner is a general principle, and as such has the legislative decree of reorganization of the discipline of public companies.

So a provision for reference, by the Code no. 50/2016, to more comprehensive regulatory body, as the reform of public companies, it has not been included in the following Legislative Decree 19 April 2017, n. 56, so called 'Corrective Decree of the Code'. The article 6 of this Corrective Decree intervenes only on the last of the three in-house assignment requirements listed in art. 5 paragraph 1, specifying that participation in the share capital by private individuals is allowed, if required by law, only if it does not involve non-controlling and non-blocking forms of private capital participation.

Article 192, however, is a specific implementation of additional criteria contained in the qualifying law which requires, in general terms for in house arrangements:

- The set up, by National Anti-Corruption Authority (ANAC), of a list of entities of credit lines in-house or the power to supervise or linking compared to other bodies, such as to allow direct contracts;
- The provision of adequate levels of openness and transparency for the in-house arrangement;
- The provision that in direct contracts in-house may be fully assessed on the economic equality of tenders, given the object and the value of the service.

The provision of Article 192, paragraph 1, provides that it is set up by ANAC, in order to ensure adequate levels of openness and transparency in public procurement, and the list of contracting authorities that operate directly engaging its in-house companies.

The second sentence of paragraph 1 states that the inscription to this list is by demand, according to the criteria set by the Authority with its own act. In fact, on 15 February 2017 the ANAC adopted the Guidelines n. 7 "For registration on the list of contracting authorities and contracting entities operating through direct assignments to their own in-house companies pursuant to art. 192 of the Legislative Decree 50/2016".

The application allows directly engaging the institution, under theirown responsibility.

The opinion of the State Council, according to which the possibility of assigning in-house is based on the allowing law anchored in the single application, and not to corresponding entry on the list (as provided in the preliminary draft), is assimilated, yet, as a precautionary measure, it could predict an inhibitory power of ANAC pending enrollment. Such inhibiting power was not expected.

Article 192, paragraph 2, obliges contracting authorities, for the in-house award of a contract concerning services available on the market in competition, the obligation to give account, in the grounds of the measure of custody, of the lack of recourse to the market reasons and the benefits for the community, the chosen form of management, also regarding the universality and social objectives, efficiency, cost-effectiveness and quality of service and, again and finally, the best use of public resources.

It is a strengthened, motivating burden, allowing a powerful review of the selection made by the Administration, on the first floor administrative efficiency and rational use of public resources.

6. The Relationship Between National and Regional Sources of Law on in-house Exemption According to the Italian Court Constitution.

Finally the taxability of the requirements of the in-house, as inferred from the sources of law detailed so far, excludes that a regional law can define otherwise the conditions necessary to qualify the assignment of a service to a participated company as a self-organization choice, in particular by electing the requirement of the prevailing activity.
The relations between national and regional sources of law, within our legal system, have recently been clarified in favor of the prevalence of the state-level source by the ruling of the Constitutional Court 4 May 2017 n. 93 with regard to some forecasts of the Sicilian legislator[19].
Article 4, paragraph 2, of the Sicilian Regional Law n. 19 of 2015 does not respect the conditions established by European Union law for in-house assignment, in particular, it does not provide that the bodies governed by public law which can be entrusted with the management of the integrated water service, perform their activity mainly against the entrant body.
The following paragraph 9 of the article 4 prescribes that the «exercise of its institutional activity [takes place] prevalently in favor of the public body or bodies holding the relative share capital», but limits this restriction to fully public capital companies already entrusted with time of enforcement of the new law that want to continue to manage the integrated water service.
The Court confirmed the connection of the rules governing the procedures for awarding the service with the exclusive legislative competence of the State established in art. 117, second paragraph, letters e) and s), of the Italian Constitution.

7. Brief Conclusions.

The in-house, no longer constitutes an exception to the rule of public tender, is proposed as a result of the choice of the administration not to appeal to the market; choice that can be reduced to a sphere of autonomy in the broadest sense, such as that due to local authorities under the powers granted to them by the Italian Republican Charter.

[19] On the theme see A. ROMEO, *La disciplina dei contratti pubblici in Sicilia*, in SAITTA F.(a cura di), *Appalti e contratti pubblici. Commentario sistematico*, Padova, Cedam, 2016, e-book.

Moreover, in the performance of tasks of public interest, all public administrations must pursue and ensure the quality, efficiency, economy, and effectiveness of the contract or of the service for the benefit of the community and service users.

The national Courts and the Court of Justice, contrary to what was previously the case, must, in the occasion of syndicate on the existence of the requirements to choose an in-house, address their interpretations in accordance to the rules fixed and pursued also by new sources of law examined.