

***Procedures of entrusting of Local public services
between Internal Law and community principles***

Giuseppe De Luca

To my dear brother, Mauro

INDEX

Introduction

The “state of art” between public competitions, mixed societies and in house providing

The governmental and regional normative competences in the matter of constitutional jurisprudence

The company model in local public services without economical relevance

The company model in local public services with economical relevance

The discipline of the financial law for the year 2009

The community and Italian set-up: only a formal and ambiguous adaption

The “analogous control” as expression of local autonomy: a different reconstructive hypothesis

Synthesis and conclusions

Normative, bibliographical, documental and jurisprudential references

Introduction

The matter of public services intersects with almost all the fundamental problematics of administrative law and organisation .

This matter is therefore full of problematics which transversely concern legal, social and economic thoughts converging into a political one in a last analysis. The entire matter has always been more and more sealed due to the intervention of European institutions, in this way reducing the difficult harmonization of different legal languages if not even of different socio-economical layouts.

Finally there is to be considered that it is probable that the importance of the relationship between different normative levels (community, state, regional) has been showed in no other fields as strongly as it occurred after the constitutional reform in 2001.

The aim of this piece of work is really that of examining multiple and variegated elements of a surely composite scene, trying to “pull the strings” and to “come to a conclusion” on the discourse, in the limits of my possibilities and of a work of synthesis, formulating a different or at least unusual reconstructive hypothesis about it.

Furthermore, in order to do so I shall stray from the prevalent prospective of juridical sciences of the last years: this in fact privileges themes of implementation, interpretation and alteration of the outset rules (in particular, of constitutional ones), but only with a rare impact of these in the reality of the regulations.

Therefore the considerations which follow have recourse, other than to the typical material of juridical reflection, also to a series of other data coming from inquiries run by students of other disciplines.

The “state of art” between public tenders, mixed societies and in house providing.

Remaining on the theme of local public services, the managerial models used have always had the intent of giving a social answer to the need of services, expressed by collectivity: it was taken note that the market on its own was not able to give such an answer. “At the beginning.....it was the municipalizations” however remaining the possibility for private operators to run the public service in concession. Law 142/1990 reformed instruments of management: it introduced the PLC with a majority of public capital, it transformed the old city-owned enterprise into a special one (a public economic authority functionally linked to the Municipality, but given juridical personality), finally it introduced an institution for those public services which don't have industrial relevance.

The Consolidation Act 267/2000 basically reproduced the lay-out of Law 142/90 outlining the following aspects:

- local public services run in economy, when due to modest dimensions or because of characteristics of the service, it would not be appropriate to establish an institution or a company;
- local public services run in concession to third parties, in the presence of technical, economical reasons and of social opportunities;
- local public services run by a special enterprise, also for the management of multiple services of economical and entrepreneurial relevance;
- local public services run by an institution, for the practicing of social services without entrepreneurial relevance;
- local public services run by joint-stock companies or companies with limited responsibilities and prevalent local public capital constituted or shared by the official authority of the public service, when appropriate, in relation to the nature or territorial field of the service, to the participation of several public or private parties;

-local public services run by joint-stock companies without any binding force of the majority public property.

Article 35, paragraph 1 of Law number 448 of the year 2001 entirely substituted the pre-existing text of Article 113 of the Legislative Decree 267 of the year 2000. Paragraph 1 of Article 113 of the Consolidation Act, as stated in Law 448/01, eliminated the preceding distinction between “services of economical and entrepreneurial relevance” (old Article 113, letter c) and “services without entrepreneurial relevance” (old article 113, letter d), and it distinguished between “services of industrial relevance” and “services without industrial relevance” (new article 113b). With this, if on one hand the new discipline determined a more penetrating interference of the State in the matter, on the other hand it didn't solve the matter on the content of the concept of “public local service” (not even through the attempt in reconstructing the definition in the light of private law in Articles 2002 and 2195 of the Civil Code) postponing everything until the adoption of a new implementive regulation of the law.

Of importance was also the second part of the new paragraph 1 of Article 113 of the Consolidation Act which stated verbatim “The dispositions provided for each single and national sector, which activate community regulations, remain firm”, ruling in this way the residuary ad subsidiary application of such a regulation, also for those sectors of local public services where there were specific disciplines.

A further novelty of the rule consisted in the fact that, for industrial type exercises, the property of networks became necessarily public, once separated from the management of these and of the distribution of the service; furthermore the party supplying the service of industrial relevance could only be located through the fulfillment of public tenders.

At a brief distance from the legislative intervention of Law 448/2001, the general discipline of the local public services was dictated by Article 14

of the Executive Order number 269/2003, then converted with Law number 326/2003 and

then again by Article 4 paragraph 234 of Law 24 December 2003, number 350.

On one hand, the principle of public property of networks and of the necessary infrastructures for the allocation of the services was confirmed; on the other hand, however, the new discipline meant taking a step back by considering the affirmation of the absolute principle of public tendering, which inspired the preceding legislative intervention, as it transformed the fulfillment of public tenders as a general rule for the assignment of the services to one of the possible procedures allowed, alongside two hypothesis of direct entrusting among which the so-called in house providing.

In fact paragraph 5 of Article 113 predicted that the management of the service could be “ - entrusted to companies with individual capital through the fulfillment of public tenders with procedures of public evidence; - to companies with mixed public/private capital in which the private shareholder would be chosen through the fulfillment of public tenders with a procedure of public evidence.....; - to companies with entirely public capital on the condition that the public body or the public bodies, in charge of the social capital, practice the same control on the company as that practiced on their own services and that the company carries out the most important part of its own activity with body or bodies which control.”

The governmental and regional normative competences in the matter of constitutional jurisprudence

The novelties introduced by Law number 326/2003 had also influenced the matter of the management of local public services without economic relevance, adding to the already predicted forms (institutions and special companies and also consortium ones) the criteria of entrusting to so-called in house companies and abrogating the law that made the

assignment of the service to third parties possible, with the selective mechanisms of public tenders, in case of survival of technical, economical or socially useful reasons (Article 113b, paragraph 4).

A further reappraisal of the general situation then came from the Decree of the Constitutional Court number 272 of the year 2004. Such a judgment was born from an appeal of the region of Tuscany with which the declaration of unconstitutionality of the regulations was asked for, for having introduced a detailed discipline of local public services, although this matter was not provided for among those reserved for the exclusive legislation of the State: in particular it couldn't be included nor in the determination of the essential levels of services concerning civil and social rights (Article 117, paragraph 2 letter m of the Constitution), nor in the determination of the "fundamental functions of municipalities, provinces and metropolitan cities" (Article 117, paragraph 2 Letter m of the Constitution), nor finally susceptible of connection to the "tutelage of public tendering" (Article 117, paragraph 2 Letter e of the Constitution).

The Constitutional Court, examining the censures adopted, made a distinction between services of economical relevance and services without economical relevance (Articles 113 and 113b of the Consolidation Act number 267/2000).

For what concerns the former, it excluded, as affirmed by the applicants, that the discipline was part of the legislative governmental competences in the matter of "determining the essential levels of the services concerning civil and social rights" (because of their typical economic character), or in that of a "fundamental functions of municipalities, provinces and metropolitan cities" (it is not possible to consider management of the services as an explication of a personal and indefectible function of the Local Authority). But, differently from what was affirmed in the petition, it brought the discipline to the "tutelage of public tendering" again.

However, being a so-called “function matter”, which therefore, although reserved to the exclusive competences of the State, having a so-called “transversal” nature, as able to connect to a series of other interests among which some included in the concurrent or residual competences of the regions, it was fundamental to rely on the criterion of proportionality-appropriateness in order to evaluate each time according to the different laws impugned, whether the tutelage of public tenders legitimized or not the intervention of the governmental legislator.

According to this last criterion, therefore, some questions of constitutional legitimacy were repelled; however others were taken into consideration due to the fact that the level of detail contained in the laws resulted to be disproportionate as regards to the aim of tutelage of public tendering, suppressing unduly regional autonomy.

This same identical criterion brought the court to think about those public services without economical relevance.

In light of these considerations, in fact, the discipline of the management of local public services “without economical relevance”, of which to the censured Article 113b of the mentioned Consolidation Act, couldn't certainly be referred to for exigencies of tutelage of the liberty of public tenders and therefore, under this profile, it emerged as an illegitimate suppression of regional and local autonomy.

For all these reasons constitutional illegitimacy was declared of it.

Non economic local public services therefore resulted insusceptible of governmental organizational discipline, apart from those laws through which there was the aim to fix the essential levels of services (Article 117, letter m of the Constitution).

Therefore local services which, in relation to the entity supplying, to the characters and modalities of the service, and to the receiver, appear without “economical relevance”, there shall be space for a specific and suitable discipline of regional and also governmental origin.

The first effect of the court's sentence was that of overcoming the typical features of organizational modules of non economical services with a consequent liberty of the local authority with regard to the choice of the type of managerial modality to use.

In fact with Judgment 274/2004 the peremptory and typified listing of the forms of management of non economical local public services failed to keep; however the annulment of the juridical act was only born from having acknowledged the matter as of exclusive regional competence.

Consequently it re-expanded, for local autonomies, the possibility to freely regulate the matter of the public local services without economical relevance, or to carry out these services with the different management modalities included in the Consolidation Act 267/2000.

In particular we refer to the discipline of special companies and establishments (Article 114 of the Consolidation Act), of joint-stock companies with a minority participation of local authorities (Article 116 of the Consolidation Act) to the references contained in Article 42 of the Consolidation Act about the concession of public services, the entrusting of activities and services through agreement and the participation of Local Authority in capital societies.

Those deriving from the general capacity of private law of Local Authority are to be added, as well as those deriving from sector regulations.

Although Article 113b of the TUEL (Regulations of Local Authorities of the Consolidation Act) has been abrogated, however Articles 30, 31, 32 and 114 of the Consolidation Act conserve their efficiency; these articles respectively discipline conventions and syndicates between Municipalities for the management of services, the Unions of Municipalities, institutions and special companies.

In this way the Institution would still be useable, other than the other private-law figures not contemplated in the Consolidation Act as foundations, associations, recourse to forms of partnership planned by a regional legislator, or the entrusting to third parties with the modality of regional creation, but anyway respectful of constitutional and community principles of transparency, parity of conditions and inexpensiveness.

The company model in local public services without economical relevance

Judgment number 272/2004 of the Constitutional Court has declared constitutionally illegitimate the pre-existing discipline of those services without economical relevance, as already mentioned.

The actual possibility of running those services without economical relevance through societies with capital has been left without a specific law of reference; therefore the reasoning on the usability of a company instrument for these services, results to be at the state of a purely hermeneutic nature.

In order to formulate an opinion on whether societies with capital in public services without economical relevance are useable or not, it is first of all necessary to consider a few significant rules of positive law.

Firstly, Article 116 of the Consolidation Act 267/2000 dictates the discipline of societies with a minority participation on the behalf of Local Authorities. This law reckons that Local Authorities can establish societies without a bond of the public majority property for the exercise of public services without economical relevance and for the realization of activities necessary for a correct execution of the service.

However for services without economical relevance, some interrogatives may appear on the contrast that, at least in theory, may place itself between the lack of economical relevance of the service, and therefore of the activity to run, and the cause of the corporate business deal, its' economical function, and therefore the aim of lucre.

In this case the company carries out the activity on the basis of an equivalent remunerative of the Public Authority and therefore it imposes itself on the market jointly to other parties who can render the same service as that of the Public Authority.

When there is an equivalent remunerative, in other words when the service has an economical relevance for the entrepreneur, it is possible to retain that the discipline of the entrusting to third parties is attracted to the discipline reserved to services of economical relevance as in Article 113 of the Consolidation Act.

To sum up, for example, a cultural service can also assume economical relevance according to the organizational and managerial choices that the Authority operates on it.

The Authority in the hypothesis can decide whether to run it according to modalities in abstract appropriate to guarantee the necessary incomes to cover the costs or to assure the coverage of costs having recourse to the general taxation system or to political prices.

It is retained that this actual matter may be an object of regional legislative intervention: that is, the individualization of special competitive procedures for those public services that, even not having an abstract eligibility to be remunerative on the market they are however generally rendered by companies that draw an income from them by the effect of a special market, which was created through civil service, and which the choices of “externalization” of civil service have contributed to create.

In these cases, the in house entrusting formula may find, for the sake of argument, a favor in the regional legislation (but it is necessary to wait). In fact, often societies that run local public services without economical relevance, derive from the transformation of old ones which have been “municipalized”; moreover there are the institutions, special companies and partnerships set up especially for the management of the services: in this case the regional regulator may retain the direct entrusting of services

to a shared society the best way of protecting the interests of users in particularly delicate sectors.

For example, thinking about some social or cultural services, on one hand the exigency of an efficacious and efficient management could bring to the choice of a partnership model, on the other hand sometimes the need to exercise a very penetrating control on the administrator for what concerns the prospectives, and also the strategic ones, of services from a qualitative, quantitative, tariff and price containment point of view, is very strong.

It is also possible to refer to the more and more widespread presence of co-operative realities in some territorial areas, realities intrinsically characterized by a mutualistic goal, in sectors like that of services for parties, in the educative field, in the field of assistance to the elderly, etc.

The regional legislator may therefore recognize these matters as interlocutors privileged by public administration, if not for other, at least for the strong social rooting which distinguishes them from a private enterprise which purely and simply operates on the market to gain profit. In these cases the direct entrusting of the management of public services without economic relevance to these matters would take place through a concessive relation and an accessorial fiduciary convention.

The company model in local public services with economic relevance

The stated Article 113 of the Legislative Decree 267/2000 provides that the supplying of public services of economical relevance should take place with respect towards the regulations of the European Union, with the conferment of the legal ownership of the service to:

- a) capital societies individuated through the carrying out of public tenders with procedures of public evidence;
- b) societies with mixed public/private capital, in which the private shareholder must be chosen through the carrying out of public tenders with procedures of public evidence, which are a guarantee of the respect of internal and community laws for what concerns public tendering

according to the features of destination issued by competent authorities through specific orders or circulars

or otherwise to:

c) societies with an entirely public capital, at the condition that civil service holders of the social capital, exercise a control on the company, similar to the one exercised on its own services and that the company accomplishes the most important part of its' own activities with public bodies to control.

As for letter a) disciplining the carrying out of public tenders under public evidence for the individualization of the society allottee of the service, it is first of all to be noticed that the reserve for capital societies must be neglected in force of the judgment of the Court of Justice, Executive Committee 18 December 2007, code – 357/06, which recognized the violation of the *par condicio* between the different company models.

Instead the most discussed points have been those in which Article 113 provides for the two mentioned possibilities of direct entrusting of public services to companies with mixed public/private capital and to companies subjected to the same control on behalf of local authorities, in alternative to the carrying out of public tenders with procedures of public evidence.

The opportunity to shed light came from the decision of the fifth section of the Council of State, rubricated as number 5587, dating back to 23 October 2007, with which the cause subjected to the vote of section judges was left to be examined by the Plenary Assembly.

In fact the magistrates of the supreme administrative meeting have been called to overcome the hurdles mentioned concerning mixed societies and the so-called in house providing.

However it seems as though, at least according to who is writing, there is such a mighty effort for a small result.....

In particular during the examination of the Plenary Assembly, the following points were referred to:

- which were, from a legal point of view and in the same way as the European and national regulations, the conditions fixed for the legitimate in house entrusting,
- which were the essential outlines of the notion: “analogous control”
- if a company’s private participation with a purely financial character could be compatible with European Community regulations for the only fact that a selective procedure for the individualization of a private shareholder could consent, transparently and impartially, to choose the enterprise which had formulated the most advantageous offer under a technical-economical profile;

But the Plenary Assembly has probably lost a unique occasion to practice its’ power of “*nomofilachia*”(the duty to ensure the exact and even interpretation of International Legislation; one of the principle functions of Supreme Court of Appeal) at its best with an interpretation of the law which could clear out the ground from any sort of misunderstanding, also in order to stop the “haemorrhage” of procedures of infringement carried out by the European Community.

According to who writes, the veil behind which the supreme Jurisdictional Administrative Assembly hid itself, was that of wanting to focalize its view on the model of mixed societies elaborated by section II of the State Council with council number 456/2007.

In fact, regarding this, the Plenary Assembly noticed how a similar model represents only one of the possible solutions of the problematic linked to the respect of the community regulations in the formation of mixed companies and the direct entrusting of services to these.

Therefore it affirmed that in the absence of precise indications from the regulations and community law, a univocal solution or a definitive model of a mixed company is not at an elaborative state, also for “the risk – these are words said by the Council of State – of giving rise to “*praeter legem*” interpretations, which probably wouldn’t be guaranteed by the Court of Justice”.

So much attention sincerely seems “suspicious”, and only if we think about the normative and jurisprudential state on this subject in Italy , this is surely, according to me, a real “*praeter legem*”.

And in fact the increasing number of infringement procedures mentioned and started off by community organs is not fortuitous.

For example, on 3 April 2008, the European Commission started the procedure of infraction, number IP/08/502 towards Italy; questioning the entrusting of the Water Service on behalf of the ATO (Optimum Territorial Sphere, Province of Milan) 2 Center Marches, Ancona to the multiservice PLC company 2.

Still, we can take note of the procedure of infringement number IP/08/685, started off by the European Commission on 6 May 2008 , regarding the entrusting, on the behalf of the Municipality of Rocca Priora in Lazio, of the services of urban hygiene and the management of pharmacies to joint-stock companies – holding the Municipality of Rocca Priora a 0,038% of the capital of the trustee society.

Finally, there is the need to mention the procedure of infringement IP/08/123 started on 31 January 2008 by the European Commission towards the Italian Republic for what concerns the awarding for the organizational service of waste on the behalf of the Municipality of Contigliano, also in Lazio, to the AMA Services joint-stock company.

At the Assembly of 7 May 2008, with resolution number 16, that same Authority for the Surveillance of Public Contracts for work, services and supplying has started a procedure directed to ascertain eventual non-observances of the regulations in entrusting the integrated water service with regard to cases of public societies which have received the service through direct entrusting, according to the mechanism of in house providing, in particular, the Authority has taken into account the entrusting carried out by the ATO 2 Centre Marches, Ancona to the Multiservice Joint-Stock Company and that on the behalf of the ATO, City of Milan to the Metropolitan Joint-Stock Company of Milan.

The argumentations adopted by the Supervisory Authority and by the Commission are multiple, but all referable to conjectured violations of the principles of free public tenders and equality of treatment of the dealers on the market, assuming the absence, in contested cases, of all or some of the so-called “Teckal” requisites (in particular, of the so-called analogues control); requirements which are also current, in those cases which are objects of inquiry, in an extremely formal acceptance aiming only to a virtual and not substantial respect of the *ratio* regulations.

The discipline of the Financial Law for the year 2009

The matter of local public services has recently experienced the umpteenth normative reassessment aiming to acknowledge the principles established by the community law: a reform which was born with law by decree number 112 on 25 June, then converted into Law number 133 on 6 August 2008.

Article 23b of Law 113/08, after having established the general principle, in paragraph 2, that states that the entrusting of public local services must be carried out with a public tendering procedure of public evidence, in the following paragraph 3 it provides the possibility of derogating from this rule when “particular economic, social, environmental and geomorphologic characteristics of the territorial background of reference which do not permit an efficacious and useful recourse to the market” survive.

The entrusting, in those cases disciplined by paragraph 3 of Article 23b, must occur at any rate “in obedience of the principles of the community discipline”. Added to the criteria which define the relation between Local Authority and trustee companies elaborated by the Court of Justice are the exogenous ones concerning the “particular economic, social, environmental and geomorphologic characteristics of the territorial background of reference”, in order to further extend the ambit of application of direct entrusting through the “in-house” modality. However the legislator wanted to avoid that the recourse to territorial characteristics

could represent the pretext for a nonchalant application of the community principles concerning analogous control: thus, for this reason, a noteworthy procedural addition, useful, in the intentions of the legislator, to meticulously screen the actual sustenance of those such particular economic, social, environmental and geomorphologic characteristics in order to render the recourse to the market indeed uneconomical, has been provided for. In fact the Local Authority which intends entrusting a local public service according to Article 23b, paragraph 3, of Law 133/08 must present a request of opinion from the Guarantor Authority of Co-operation and from the Market accompanying the request with relevant information and documents in case of need, and in particular:

- a report containing the results of the enquiry of the market in which the convenience of direct entrusting compared to the experiment of a procedure of public evidence results in comparative terms,
- the deed of partnership, the Statute and the information concerning the field of activity of the trustee company,
- information concerning the economic characteristics of the sector or market in order to justify the “in house” entrusting,
- indications regarding the principal applicants.

However it is to be observed that no sanction is expected. But, the negative opinion of the Authority is published on a specially provided Bulletin: in order to favor its knowledge on behalf of the potential applicants, interested in contesting the subsequent choices of administration in case of unreasoning divergences from the opinion given by the Authority.

The in-house form of management, which in its actual formulation (Article 113, paragraph 5, letter C of the *TUEL-Consolidation Act of the Local Authority*) has been retained “in principle complying with community law” by the Court of Justice (judgment 6 April 2006, in Trial Code 410/04), and is therefore reformulated through the reference in “situations which do not permit an efficacious and useful recourse to the

market due to peculiar economic, social, environmental and geomorphologic characteristics of the territorial background of reference”; and anyway through the opinion of the Guarantor Authority of public tendering of the market.

However, those indicated above only represent the most qualifying points of the law immediately applicable.

Instead the most significant part of the reform, as already pointed to, sends back to one or more governmental regulations which have the duty of delineating the new rules of the sector.

Besides, the mentioned rules will have to provide for the individualization of generally applicable ones for the entrusting of all local public services of economic relevance in those matters of waste, transport, electric power and gas, as well as water.

Therefore the legislator only acknowledged the “*minimum*” unavoidable principles affirmed by the Court of Justice, referring to the original source in order to regulate the downright choices.

This vagueness however made the task of having to evaluate the impact of the novel on Article 113 of the Legislative Decree 267/2000 more arduous.

The text of Article 23b, paragraph 1 reckons that “the dispositions contained in the present article can be applied to all local public services and prevail over the related disciplines of the sector which are incompatible with them” therefore without worrying about explicitly indicating the abrogated parts of the preceding discipline.

It shall be the issuing regulation to establish it.

However it is necessary to ask oneself if, in the transitory phase, Article 113 of the TUEL is or isn’t, and until what extent, compatible with the actual general dispositions which, as said, prevail on the “incompatible” ones.

In this respect we can observe that Article 23b extended the reference to the two typical modalities of direct entrusting, that is that of the in house management and of the mixed companies attended by local authority and by a private shareholder chosen through a public tender, in addition, setting out the observance of the conditions and principles elaborated by community law.

It is difficult to say which could be the possible derogations from the public tender: that is if, other than in house entrustments, the entrusting to mixed public/ private societies is still a practicable way. According to the text of Article 23b dismissed by the reunited Commissions of Balance and Finances of the Chamber, the situation which has just been described was completed with the alternative faculty provided for local Authority of opting – in the presence of the same circumstances and with analogous modalities - not for the in house entrusting, but for the direct entrusting in favor of companies with a mixed public and private participation, also quoted on the Stock Exchange, attended by local authority, on condition that the private shareholder should be chosen with a procedure of public evidence, in which conditions and duration of the management of the service ought to be already established, as well as the modalities of liquidation of the shareholder at the moment of expiry of the entrusting of the service.

However in the text of the new Article 23b in force, the subject does not find an explicit disciplining, as the legislator only refers to it with a generic reference to the “respect of the principles of the community discipline (paragraph 3)”, which is a necessary condition in order to legitimate a derogation from the modalities of ordinary entrusting.

The dispositions expunged at the last minute would have surely limited the vagueness of the novel, already inherently programmatic and of principle for the mentioned reference to the following source of regulation.

Therefore the umpteenth chance of accurately defining the outlines of the discipline has been lost.

It seems as though the legislator wants to postpone the opening to a real competitive system as much as possible, and that he proceeds “in fits and starts” more for the need to acknowledge the community urges than on the basis of an organic and completed plan.

This last consideration can maybe explain why, in spite of the importance of the matter, the legislator appealed to urgent decreeing, to then “adjust the aim” in the seat of conversion, for the most part inside a law, the Financial Act, for its heterogeneous nature.

The community and Italian set-up: only a formal and ambiguous adaption

The sector of local public services has been traditionally marked by the pressure of really strong political interests.

Therefore in this ambit, the possibility of a direct entrustment of the service constituted the ill-concealed instrument through which it would be possible to proceed surreptitiously with the choice of a satisfying company, without the use of suitable comparative selective procedures.

The above mentioned regulations of which Law 448/2001, now abrogated, stipulated the recourse to a public auction as a rule, but it also consented the recourse to private treaties or private contracts when special circumstances in relation to the nature of the services recommended it.

This last system, distinguished by the absence of any selective procedure and by the remarkable extent of the conditions required for the application, resulted very practiced. Thus the entrusting of the public service presented itself, mostly, as linked to a fiduciary conception of the contract that by now cannot find citizenship in our regulations, as the fundamental principles of community origin and the general ones on public rules for drawing up contracts (this too invested by a progressive process of community adaption which converged into the new and

“troubled” Legislative Decree 163/06 and subsequent amendments and inclusions) impose the use of competitive selective procedures, also for the concessions of public services.

Already in 2000 the European Commission (see communication dating 29 April in the Official Gazette of the European Union, Code 121/00) dealt with the aspect concerning the procedures of choice of the concessionary and affirmed the enforceability of the general laws of the Treaty concerning the rights of establishment and of free supply of services, as well as the principles obtainable from them like those of non discrimination, mutual recognition and proportionality, excluding the fiduciary characterization of the Concessionary Institute.

In particular, the principle of equality of treatment requires that the rules are known by the potential concessionaries and are potentially applicable to everyone in the same way.

The fixation of non discriminating conditions is necessary for the access to the activity which basically requires the obligation of activating the principle of competition through a public tender. The rules of the public tender can be chosen and modeled freely, provided that the selection of the candidates takes place according to definite and objective criteria.

In synthesis, if the concessionary module constitutes an element capable of attenuating the rigid mechanisms of public evidence, nevertheless the European regulations impose that the concession to public services are assigned subsequently to a procedure directed to guarantee the competitive comparison between potential candidates interested, even if different from the rigid mechanisms of public evidence peculiar of the contracts, which could result not to be in line with the management of services of general interest.

The Constitutional Court, with judgment 19 June 1998, number 226, affirms that “even if it indefectibly detains to the tender the institutional profile of the contractor’s choice , finalized to the best realization of public interest, according to the principles of competition it is not possible

to ignore that the principle of acquisition of the service at the most favorable conditions for public administration does not remain extraneous not even at the concession of public service”.

The attempts of getting round the rigidity of the community set-up did not lack, highly contributing maybe even in a decisive manner to the letter, of a not perspicuous clearness, of the told Article 113 of Legislative Decree 267/2000 where it provides for the two mentioned possibilities of direct entrusting of public services, in alternative to the fulfillment of public tenders with procedures of public evidence, to: “companies with mixed public/private capital, in which the private shareholder must be chosen through the fulfillment of public tenders with procedures of public evidence which ought to have given guarantee of respect of the internal and community regulations dealing with public tenders according to the guidelines issued by competent authorities through orders or specific circulars”

or to:

“companies with an entire public capital on condition that public administration holders of the social capital practice an analogous control on the company to that practiced on their own services and that the company carries out the most important part of its own activity with public bodies to control”.

However for what concerns the first possibility the nonchalant application of the rule in practical experience (for example the entrusting of services on the behalf of local authorities to companies shared by them under the only assumption constituted by the presence of private capital) have been put off quite quickly by the numerous jurisprudential arrests which followed one upon the other on the matter; these judgments have clarified of what type a private shareholder should be according to what is evoked in the regulation.

In this way it has been specified that in the ambit of the entrusting of public services, the model of a “mixed company” is practicable (in the

perspective of compatibility with the community system and provided that suitable reasons are recognizable in order not to proceed with an integral external entrusting) in presence of adequate guarantees, that is: 1) that there is a substantial equalization between the public tender for the entrusting of the public service and the public tender for the choice of a shareholder who emerges as an “industrial or operative shareholder” that materially contend to the execution of the public service or of its phases; 2) that a renewal of the procedure of selection is expected when the period of entrusting expires, in this way avoiding that the shareholder becomes a “stable shareholder” of the mixed company, possibly anticipating that, ever since the acts of public tendering for the selection of a private shareholder the modalities for his or her release are clarified.

A similar predetermined course also regarded the ill-concealed attempts to use the normative lever of analogous control to justify direct entrustments of public services to companies shared by local authorities, however without these claiming the power of control and direction requested by the law on these companies.

On this matter successive jurisprudential, national and community in depth analysis have considerably limited the applicative possibilities offered by the latitude of the normative datum.

The Law of the Court of Justice of the European Communities (Case Code-107/98 - Teckal, Code-26/03 - Stadt Halle and RPL Lochau; Code-231/03; Code 458/03; Code-29/04; Code-410/04; Code 340/04; Code 220/05) outlined the contours of the institute of in house providing, specifying that the total public participation is a necessary but not sufficient condition for the compatibility of the model with the community regulations.

These can be legitimately derogated if there were proof that local authority can in actual fact exercise suitable means of control on the in house company, to a more in depth extent than that provided for by civil law.

The revelatory indications of the so-called analogous control are identifiable as follows: - the Board of Directors of the in house company must not have relevant managerial powers and public authority must be able to exercise major powers compared to those that the corporate law recognizes to the social majority; - the enterprise must not have “acquired a commercial vocation that makes controlling precarious” on the behalf of the public authority.

On the other hand attempts in trying to get round or better to remedy the distance of the concrete corporate reality of the normative datum did not lack, trying to “fill it up”, to “shorten” it through a relaxed use of the corporate agreements.

In fact these agreements have been used to modify the impact of the constitutive regulations of the shared company, without, conversely, going through the most muddled and expensive procedure of a statuesque alteration.

In this way experience has so offered a variegated case survey of corporate agreements aiming to concede to local authority or to local authority holders of the parcel of shares representing a further and superior power of control compared to those originally recognized by the corporate statute; all this in order to integrate the extremes of the analogous control required by the law.

The “analogous control” as expression of local autonomy: a different reconstructive hypothesis

Even in recent times, authoritative stances and jurisprudential judgments based on a different orientation, especially in the community ambit, mainly careful to grasp the substance of the different circumstances of the concrete case.

It is true that the Council of State, in the quoted opinion of section II number 456 of 18 April 2007, explicitly affirmed that “The figure of in house providing emerges as an exceptional model, of which the requisites

are to be interpreted restrictively as they constitute a derogation to the general rules of community law”; however this statement (as also the judgments of the Court of Justice mentioned in the judgment above), from an attentive reading of the judgment itself, seems to descend directly from the consideration that “the reorganization of the institute is to return also to the phenomena of distortion in recourse to this model, which we tend to abuse of through the phenomenon of the so-called company bonds and indirect controls, as well as through activities carried out towards third parties”.

In fact, the in house reconstruction which is an exception to a general rule, in reality in a similar context finalized to avoid abuses and distortions which, it’s undeniable, have taken place in the standard procedure; therefore the requisites of the Teckal model are to be, under this point of view, interpreted restrictively in order to avoid the innate – and typically Italian – inclination towards evasion and bypassing of regulations. In any case Local Authorities, as exponential authorities (Article 1 TUEL) of the concerning local collectivities, are representative of these, since the administrators are elected by the communities involved.

Therefore these are periodically subject to political evaluation of the collectivity of reference, through vote. It does not seem unreasonable to observe how improbable it is that, in order to favor an authority controlled by them, local administrators can assume punitive measures for the collectivity that elected them.

Here, in hindsight, it should be pinned to the attention that: in reality, we are not in the presence of a situation of conflict of interests; on the contrary – however distortions have been surely registered – the Public Body, where it is determined to offer services directly to its own community, it does it in order to play a direct role in the management of the service, from the inside, with the conviction, right or wrong it may be, of better safeguarding in this way, the interests of the collectivity of reference.

In conclusion, it is possible to affirm that community regulations do not intend only to safeguard, in this ambit, the liberty of competition, but also want to preserve the autonomy of the local authorities, in particular referring to the faculty to them given of banding together in order to directly and internally manage services of general economic interest even if through distinct juridical structures.

Therefore an approach to the in house reality based on purely formalistic criteria seems to collide with the general principles of community and constitutional regulations, having to take care of the substantial reality of the different concrete cases.

The matter of free public tendering therefore represents only one of the themes linked to that of in house management that, in reality, are also based on the diverse principle of liberty of auto organization of the local authorities and of auto production of the services.

Seeing clearer, the double role (the controlled – the controller) carried out by Local Authorities which auto produce the services, perceived by some as negative, is born from a political choice: that of an Authority that, being subject to political judgment of the collectivity of reference, intended to intervene directly in order to assure a series of public services to its own members.

Synthesis and conclusions

It seems as if we can almost certainly observe that the difficulty of opening these sectors to competition derives from the fact that we are dealing with fields in which firstly, the wholesale competition may land up being harmful for citizens who are users: this is easy to understand if we take into consideration the case in which the assignment to the best tenderer (as favourable the offer may be ex Article 83 of the Legislative Decree 163/06 and subsequent amendments and inclusions) turns out to be negative; moreover it is not easy to resolve a contractual relation juridically and install another one without there being solutions for

continuity or relapse such as quantitative ones during the fulfilment of services.

Overall we must take into consideration that the carrying out of public tenders for the entrusting of the service administration of general interest is a matter of great complexity; also due to the fact that the majority of the Municipal Districts, especially the smaller ones, cannot afford to possess all the technical-administrative competences necessary. The fact that in these sectors there is the existence of those conditions which favour situations of natural monopoly, which only the recourse to a single manager could leave to exploit, is not to be left out.

On the other hand recent normative acquisitions to do with “Optimal Territorial Fields” really seem to give disposals in this way.

Certainly it is not possible not to take into consideration the risk that, with the closure of the competitiveness, Local Authorities may be assigned three roles: as regulators and at the same time as consignors and often even as shareholders of the manager.

Some retain that a similar situation could be overcome by the creation of local and/or regional authorities, capable of carrying out regulation activities independently without Local Authorities. This hypothesis comes across a contraindication due to the fact that it is the Local Authority who is the exponent of general interests of the local community; therefore it would be inaccurate and inefficient to entrust such a role to a typically technical matter.

Thus, in this case it would be desirable that the authority were in every case the expression of political power. A medium solution could be that of a consortium, which is an association or convention between authorities, which aggregate in order to practise regulation on an optimal territorial basin, on the other hand, just as what is happening with the water services in many Italian regions thanks to the pressing of the new Environmental Code.

Instead, for the big cities, authorities may become a third subject provided with autonomy, but nominated by local administration and subjected to its directions.

Instead, according to the supporters of completion, an alternative could be that of prediction the overcoming by Local Authorities, of situations of dominion towards public utilities, through the assignment of the controlling property.

Thus, municipal districts should principally develop the role of “representing the demand”, which means interpreting necessities of all citizens and taking distance from administration and, therefore, from a total or major part of the property of the manager to participate in the partnership. An obligation of resignation of the participations who detained at any role in limited companies, predicted by Local Authorities, has anyway been predicted by the Financial Law of 2008; however, as it often happens in our country, the eighteen month term, initially established for the resignations has been extended by the so-called *milleproroghe* (a thousand extensions) until the end of 2010 with good peaceful expectations for the reform.

However the idea of political administrative detachment of the services is not to be excessively emphasised. In fact even such a hypothesis involves a contraindication: that of loosing every possibility of controlling and finalizing the management to social aims, with the risk, for example, of an explosion of the rates and expenses for citizens/clients/consumers. In effect the contrast of interests between citizens, who ask for efficiency in services (which are services of a high qualitative level), and the enterprises, which pursue the efficiency (which involves remunerative services), is evident.

Finding the right balance point between these two requirements, and tracing the correct boundary line between them, constitutes the most difficult challenge to face, a challenge made even more difficult due to the different nature of interests involved.

Normative references:

- Articles 1, 113, 115, 116, 120 Legislative Decree 18/08/2000, number 267
- Article 35 Law 28/12/2001, number 448
- Article 14 Legislative Decree 30/09/2003, number 269, converted into law on 24/11/2003, number 326
- Article 4, paragraph 234, Law 24/12/2003, number 350 (financial law for year 2004), Official Gazette 29/12/2003, number 229, Ordinary Supplement 196
- Title II Legislative Decree 163/06 and subsequent amendments and inclusions
- Legislative Decree 163 of year 2006 and subsequent amendments and inclusions from article 83
- Legislative Decree 163 of year 2006 and subsequent amendments and inclusions from head III
- Article 23b Law by decree 25 June number 112 converted into law on 6 August 2008 number 133
- Guarantor Authority of Competition and Market-Communication on the procedures of application of Article 23b of the Law by Decree number 112/2008, converted, with modifications, into law on 6 August 2008 number 113

Bibliography:

- Fonderico, G., *The Manuel of the Commission for the Activation of guiding/ directive/ leading services*, “Journal of Administrative Law” number 8/2008.
- Mangiameli, S., *Local Public Services*, Giappichelli, Turin 2008.
- Marchi, G., *Local Public Services between State and Regional Legislative Authority*, “Journal of Administrative Law” number 1/2005.
- Monassero, L., *In House Providing and Public Tendering: The Parliamentary bill, procedures of infringement promoted by the EU Commission, the positions of the Guarantor Authority of Public Tendering and the Market, the preliminary inquiry of Authority for public contracts*, text obtained from the web site <http://www.dirittodeiservizipubblici.it/>, June 2008, (p. 1-5).

- Nico, M., *The Law on Local Public Services begins, here are the novelties on public tendering and in house entrusting*, text obtained from the website <http://www.dirittodeiservizipubblici.it/>, October 2008, (p. 3 ff.).
- Sciullo, G., *State, Regions and Local Public Services of judgement number 272/04 of the council*, text obtained from the website <http://www.lexitalia.it/>, August 2004, (p. 1-2).

Documentation:

- European Commission communication of 27 April 2000 in the Official Gazette of the European Communities Code 121/00
- European Commission, 26/O6/2002: opening of the procedure of infringement on the law regarding the matter of management of Local Public Services, as the ex Article 35 Law 448/01 was modified.
- European Commission, 21/05/03, number COM (2003) 270, “Green book on services of general interest”, text obtained from the website <http://www.dirittodeiservizipubblici.it>
- European Commission, 30/04/04, number COM (2004) 327, “Green book on public/private partnerships and on community rights of public contracts and concessions”, text obtained from the website <http://www.dirittodeiservizipubblici.it/>
- Procedure of infraction IP/08/123 started by the European Commission on 31 January 2008
- Procedure of infraction Number IP/08/502 started by the European Commission on 3 April 2008
- Procedure of infraction number IP/08/685 started by the European Commission on 6 May 2008
- Authority for the Surveillance on the public Contracts of work, services and supplies, meeting of 7 May 2008, decision number 16

Jurisprudential references:

National Law:

- Constitutional Court, judgement 19 June 1998, number 226
- Constitutional Court, 27/07/2004, number 272 (on the constitutional illegitimacy of Article 14, paragraph 1, letter e) and 2, legislative decree 269/08, converted into Law 326/03, on the matter of the management of Local Public services, as well as of Article 113, paragraph 7 and of Article 113b of the Consolidation Act 267/00, model of Article 35, Law 448/01), text obtained from the website <http://www.dirittodeiservizipubblici.it>
- TAR Apulia, Bari, III, 08/09/2004, number 885
- TAR Apulia, Bari, I, 23/11/2005, number 5013
- TAR Sicily Section I – Judgement number 2511/07
- Council of State - Section II, council number 456/07 of 18/04/2007
- Council of State – Section V – Judgement number 5587/2007
- Council of State – Section V – Judgement number 156/2008.
- Council of State – Plenary Assembly Judgement number 1 of 3 March 2008

Community Law:

- Court of Justice of the European Communities (Case Code-107/98 – Teckal, Code-26/03 – Stadt Halle and RPL Lochau; Code 231/03; Code 458/03 – Parking Brixen ; Code-29/04; Code-410/04; Code 340/04; Code 220/05)
- European Court of justice, Section I, 11/1/2005 Code number 26/03 (with the impossibility of direct entrusting of a service to a company present in the contracting administration if private enterprises participate in it, even if in a minority way), text obtained from the website <http://www.dirittodeiservizipubblici.it/>
- Court of justice Executive Committee of 6 April 2006, Case Code-410/04 – ANAV (National Road Haulage Authority for Voyagers) c/o the Municipality of Bari