**10. The Government and the Public Administration:**

**overview of the Italian Administrative bodies**

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1. **The Government**

According to the Constitution, the Government is comprised of the following:

- the Council of Ministers, which includes its President (*i.e*., the Prime Minister) and the single Ministers. Ministers may be, in turn, with or withoutexpenditure power;

- the Sub-Secretaries of State;

- the Vice-Ministers;

- the Deputy-Ministers (*sottosegretari*);

- the Vice-President (which is not expressly contemplated by the Constitution, but it has been often set up in accordance with a customary rule).

The Government is generally vested with the following powers:

- Decision-making powers: in particular, the Government is entitled to take the initiative to submit a draft new law to the Parliament; additional decision-making powers may be granted to the Government by an act of the Parliament (in particular, within the typical scheme of “Legislative Decrees”, the Parliament delegates the Government to put together a set of norms, within the limits of the criteria and general principles set out in the act of delegation); further decision-making powers are attributed to the Government in the ordinary exercise of administrative powers (*i.e*., ensuring that laws are applied); the Government is also generally entitled to issue regulations. Please also refer to paragraph 4 below, regarding the Government decision-making powers and its power to legislate (on delegation of the Parliament).

- Power to issue optional/mandatory/binding opinions. In particular, depending on the situation at stake, a subject (*e.g*., the Parliament, the President of the Republic, a public entity, etc.) may be required to obtain a governmental opinion. The nature (and legal implications of the opinion may change depending on the relevant factual background: in certain cases, the legislation mentions “*optional opinions*”, while sometimes it refers to “*mandatory*” or “*binding*” opinions. Optional opinions are those which are not necessarily required to be obtained: asking for an optional opinion is left to the discretion of the addressee. When a “mandatory” opinion is to be issued, a request for opinion must be filed, by the addressee is not bound to comply with the opinion itself (in other words, the addresses has to request the opinion, but, once the opinion is issued, he/she may disregard its contents and behave as he/she deems appropriate in the relevant context). When a “binding” opinion is required, the addressee must ask for such an opinion and, once the latter is issued, he/she must comply with the suggestions so released (the actual contents of the opinion are legally binding on the addressee);

- duty to supervise and control bodies falling under the definition of “*public administration*”;

- power to define the general views of the public administration.

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| ***The Prime Minister*** Art. 95 of the Constitution specifically envisages the status of the Prime Minister. In particular, such provision sets out the following: “*The Prime Minister directs the general policy of the Government and is responsible for it. He makes sure that the political and administrative policies are uniform and homogeneous, and promotes and coordinates the activity of the Ministers”*. The Prime Minister is also entitled to the following powers (and is subject to the following duties/obligations):- power to address directives to the Ministries;- duty to coordinate and harmonize the Ministries’ activity;- power to suspend any act of the Ministries and to submit it to the Council of Ministries, for a more thorough evaluation.On the contrary, the Prime Minister is not entitled to:- define the Government general views (such power belongs to the Council of Ministries);- revoke the Ministries (such power formally belongs to the President of the Republic, upon suggestion of the Prime Minister). |

The Government (and, more specifically, the Prime Minister) is typically supported by the following additional bodies (which are not necessarily contemplated by the governmental structure: the initiative to set up the bodies below relies on a specific decision of the Government, from time to time):

- the “Cabinet”;

- the “Agencies”;

- the Inter-Ministerial Committees (*e.g*., the so-called “C.I.P.E.”);

- the “General Secretariat” / Departments;

- extraordinary Commissioners;

- the Committee of Ministers.

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| ***The “Cabinet”****The “Cabinet” is an ancillary body supporting the Prime Minister in specific policy areas, in connection with the Constitutional duties attached to the latter (see article 95 of the Constitution). It is usually comprised of Ministers identified by the Prime Minister (in other words, the Cabinet may be defined as a group of Ministers: some members of the Government will be requested to form part of the Cabinet, while other Ministers will not be also members of the Cabinet). As a consequence, considering that certain Ministers will be also members of the Cabinet, those may play a different (and more significant) role within the Government. Such situation may trigger some inequality among Ministers: those excluded from the Cabinet may be also in a position to play a weaker role within the Government.**In certain situations, the Cabinet might also give rise to a sort of “directorate”, where key decisions are made. Although decisions should be made by the Government (since the Constitution and the applicable legislation so require), these would be* de facto *made by the Cabinet: this could also end up with a lack of transparency (the ultimate decisions would be made by a restricted group of Ministers and then formally “ratified” by the Government: this could be in contrast with the Constitution and with the need to ensure full transparency of the Government activity: in particular, if key decisions are ultimately made by the Cabinet, who will bear the relevant liabilities? It is unclear whether these would be borne by the Government – since the decisions would be formally made by the latter – or by the Ministers forming part of the Cabinet – since, as a matter of fact, the decisions in question would be made at a Cabinet level).*  |

In addition to the Cabinet, the Prime Minister may be also supported by:

- “Agencies”, which may be set up and entrusted to gather information on specific technical matters and report to the Prime Minister, in order to enable the latter to make more effective strategies and decisions. Agencies may be also entrusted with a limited decision-making power within the scope of the relevant activity area;

- the General Secretariat;

- administrative departments;

- extraordinary Commissioners, who may be entrusted to take care of sensitive and urgent situations (*e.g.*, managing companies controlled by the State, in case that the relevant business activity – which is usually connected to the care of a public interest – is not properly conducted: in such situation, a Commissioner may be appointed to inspect and possibly replace the management in charge);

- one or several Vice-President(s), assisting and replacing the Prime Minister, as the situation may require.

**2. The main Constitutional provisions affecting the activity of the Government and of the Administration**

The Constitution dedicates multiple provisions to the activity of the Government and of the Administration as a whole. Such provisions are also aimed at providing citizens with possible means of protection against any possible abuse by the Administration.

Art. 95 Constitution

*The Prime Minister’s office is regulated by a law of the Parliament, which also determines the number,
attributions and organization of the Ministers.*

Art. 97 Constitution

*Public offices are organized according to the provisions of the law, in order to ensure the proper conduct and impartiality of the Administration.*

Art. 97 Constitution

*Civil servants and the Administration personnel are hired by means of competitive examinations, save for the situations envisaged by the law.*

Art. 51 Constitution

 *All citizens of either sex are eligible to take office as civil servants, according to the conditions established by a law of the Parliament.*

Art. 98 Constitution

*The law may set out limitations to the right to be enrolled with political parties, for members of
the Courts, military personnel in office, civil servants, police agents and diplomatic representatives.*

Citizens are, then, protected against any possible influence deriving from the overlapping between administration and political engagement: should civil servants be entirely free to undertake a political engagement (*e.g*., by getting enrolled with a political party), the action taken by the administration could be somewhat influenced by the political views “supported” by such members of the Administration, and this could negatively affect the need to ensure impartiality and proper conduct of administrative functions.

Art. 23 Constitution

*Citizens may not be compelled to perform any action unless within the scope of a law of the Parliament.*

Art. 13 (and following) Constitution

*The citizens’ fundamental freedoms may be limited only in cases and manners provided for by law.*

Art. 5 Constitution

*The Republic conforms to the principles of “autonomy and decentralization”*.

The above principles imply, *inter alia*, that citizens are entitled to have access to the Administration internal documents and files, in order to inspect and double-check whether the decisions impacting on their individual situations have been properly made (in accordance with the applicable procedural rules). In the light of the information gathered during the inspection, citizens may opt to sue the Administration before Court, and claim invalidity of a decision made by a public entity, and possibly request for damages to be restored. Public entitles are generally not entitled to deny the citizen’s right to inspect their internal document and files.

Art. 52 Constitution

*The rules regulating military personnel conform to the general principle of democracy.*

Notwithstanding the Constitution provides for the principle of democracy, in certain situations, some conflict may arise. For instance, it is generally held that persons belonging to the military personnel may not freely exercise the right to strike, to set up trade-unions or labor associations, to express their opinions and political views, and to make political propaganda (unless such freedom is exercised outside the scope of their functions and workplace). In such situations, the general principle stated by the Constitution (*i.e*., the “principle of democracy”) is counterbalanced by other (conflicting) interest and principles (such as the principle of military hierarchy and the set of rules regulating the activity of military forces).

1. **Liability of civil servants and of the Administration**

As a general principle, the State / public entities may be liable for procuring unjust damages (according to article 2043 of the Italian Civil Code). In addition, the State / public entity may be also held *jointly* liable *with the civil servant* (who acted in the factual circumstance) to restore damages caused to citizens (pursuant to article 1292 of the Italian Civil Code). In addition, the Constitution sets out the following general principles.

Art. 28 Constitution

*Civil servants and State employees are directly liable, according to criminal, civil and administrative laws, for breach of the citizens’ rights. Civil liabilities may be incurred by both the State and other public entities.*

Art. 113 Constitution

*Citizens are always entitled to challenge acts of the Administration in breach of the citizens’ rights (“diritti soggettivi” or “interessi legittimi”) before the ordinary or administrative Courts. Such right may not be excluded or limited for particular categories of acts. The law shall determine which Court is competent to cancel acts of the Administration upon the conditions and with the consequences provided for by a law of the Parliament.*

According to a general rule, citizens are not entitled to challenge *political* acts or decisions made by public entities (*e.g*., the appointment of Ministers, if those are held as inadequate or inappropriate to hold the charge; the decision to open political elections; the order to execute/ratify an international treaty; any other political decision, to the extent that it may be subject to criticisms in the merits). In other words, no one is entitled to sue a public entity (or a body contemplated by the Constitution, such as the Parliament), to claim restoration for damages suffered as a consequence of a *political decision* being inappropriate or ineffective, or mistaken in the merits: this pertains to a subjective evaluation of the underlying facts, therefore political decisions may not be challenged just because the claimant purely disagrees on the (political) evaluations made of the merits.

When it comes to the Government, some liability may attributed to Ministers, either jointly or on an individual basis, depending on the relevant circumstances. According to article 95 of the Constitution, a Ministry may be held individually liable for acts (or omissions) falling within the scope of his/her branch of Administration (*i.e*., the branch falling under his/her competence and responsibility), while all Ministers are jointly liable for acts falling under the scope of competences of the Council of Ministers (as a whole).

1. **The decision-making processes. The power to enact norms and regulations**

The Government may issue acts belonging to any of the following categories: (i) Law Decrees (which must be in accordance with art. 77, paragraph 2, Constitution); (ii) Legislative Decrees (see art. 77, paragraph 1, Constitution); (ii) Regulations. We will analyze below the main features of such acts, as well as the main conditions which must be met in order to ensure that they are validly issued.

***Law Decrees***

Law Decrees are a special kind of act, which is drafted and submitted by the Government to the Parliament. The latter, in turn, is requested to convert that into ordinary law. In order words, the initiative is taken by the Government, which submits a fully complete text to the Parliament, for conversion. The main conditions which must be met, regarding Law Decrees, are the following:

- an “*extraordinary situation of urgency and need*” must be in place (and it must remain in place as long as the proceeding leading to conversion of the Law Decree into an ordinary law is under way).

Due to historical reasons, the Government has been often using Law Decree even in absence of an “*extraordinary situation of urgency and need*”. The Parliament did not always raise objections to such practice (which is not in line with the conditions set out by the Constitution). If ever, even in case that the Parliament does not object to an illegitimate use of Law Decrees by the Government, the Constitutional Court may issue a judgment declaring the act of the Government invalid (see below).

- the Decree must be submitted to the Parliament on the same date when it is enacted. In other words, the Government is not entitled to postpone the filing of the Law Decree with the Parliament, which must receive that as soon as it is approved by the Council of Ministers.

- the Law Decree is issued by the Government “*under its responsibility*”: the Government (or any of the Ministers, as applicable) will bear all legal and/or political liability in connection with the Law Decree. Approval by the Parliament (and counter-signature by the President of the Republic) will not entail any relief from liability in favor of the Government/Ministers.

- the draft Law Decree must be converted into law by sixty days of the relevant publication date. If it is not, the whole proceeding must be re-started from scratch.

- each Chamber of the Parliament has a given deadline (usually five or six days) to obtain an opinion of the competent Parliamentary Commission; then, the Law Decree is voted by the Assembly.

- a same Law Decree must not be submitted by the Government twice. If a Law Decree was rejected, or was not converted into law by the Parliament (within the applicable deadline), the Government is not entitled to draft a new Law Decree with substantially the same contents or legislative proposals.

- as mentioned, not only the Parliament, but also the Constitutional Court is competent to assess whether the condition regarding the “*extraordinary situation of urgency and need”* is met. However, the Constitutional Court generally focuses its controls over legal and technical aspects (and intervenes upon request of another subject), while the Parliament essentially evaluates the general political conditions (and its checks are irrespective of a request by any other subject).

Without prejudice to the rules described above, no Law Decrees may be enacted in the following sectors (which are held to be particularly sensitive: therefore, the Parliament is felt as the only body competent to resolve upon those):

. regulation of the legal relationships arising from a draft Law Decree which was not converted into law by the Parliament;

. restoration of any provision which was declared unconstitutional by the Constitutional Court;

. regulation of the matters covered by article 72, paragraph 4 of the Constitution (*e.g*., matters impacting on the Constitution; authorization to ratify international treaties; approval of annual balance sheets; etc.).

It is generally held that the Parliament may ignore a draft Law Decree submitted by the Government (in other words, the Parliament is under no obligation to consider or to approve a Law Decree submitted by the Government). Essentially, the competence to exercise legislative powers lies with the Parliament (even though, as mentioned, the Government may take part in the process leading to the creation of new law).

By the way, if the Parliament rejects the draft Law Decree (which, then, will not enter into force and will not become legally binding), such Law Decree might have already triggered some (irreversible) effects (for instance, citizens might have already conformed to the rules contained in the Law Decree, even before final approval of the Parliament): in such case, legal issues may arise when it comes to regulate the effects created by the (unconverted) Law Decree, considering that the Parliament’s decision has no retroactive effect.

Last, the majority opinion allows for the right of the Parliament to propose amendments to the Law Decree (within the context of its conversion into ordinary law).

***Legislative Decrees***

Legislative Decrees are a special kind of act, which is based on a delegation by the Parliament in favor of the Government. In essence, the latter is delegated to issue a legislative act in compliance with the principles and limitations set out by the Parliament in its delegation act. This is typically used to create “Codes” or “Consolidated Acts” (*i.e*., wide sets of norms gathering and recollecting scattered or fragmented pieces of legislation on a same subject). Typical examples are:

* the “*Italian Finance Act*” (Legislative Decree of 24 February 1998, no. 58), regulating the activity of financial intermediaries and, in particular, the provision of investment services and placement of financial products ; and
* the “*Consolidated Banking Act*” (Legislative Decree of 1 September 1993, no. 385).

Legislative Decrees may be opted for in case that either: (i) a mere recollection of existing norms is needed; or (ii) existing norms needs to be recollected and amended or updated.

The main conditions to which Legislative Decrees are subject are as follows:

1- the general principles and guidelines(which are binding on the Government)are set out by the Parliament;

2- the Parliament will set out deadlines and time limits by which the Government is required to act;

3- the Parliament act outlines in detail a specific subject-matter in which the Government is requested to legislate.

In case that the Government does not issue any delegated act (and therefore ignores the Parliament delegation), the delegating act is automatically forfeited and (subject to limited exceptions) is not able to give rise to any legal effect (since the “core” act, *i.e*., the act of the Government, is missing).

***Regulations***

As mentioned, the Government is also entitled to issue regulations. Regulations play an important role in the following sectors.

- *deregulation*. In case that the legislation in force is to be streamlined or simplified, or the aggregate number of decisions/measures/laws needs to be reduced or shrunk, the Parliament may leave the word to the Government, which may be entrusted to adopt one or more regulations repealing or amending the existing legislation, according to the general principles stated by the Parliament.

- *implementation of EU law into domestic law*. In certain situations, EU law (specifically, EU directives) may be implemented by virtue of regulations of the Government. EU law does not necessarily need to be implemented by means of ordinary laws of the Parliament (a regulation may be sufficient, depending on the specific goal to be achieved: in particular, if a EU directive binds the Member States to achieve a goal which, under Italian law, may be effectively gained by means of a regulation, an ordinary law is not necessary). Implementation through regulations may generally be more effective and less time consuming than ordinary laws.

- *“reserved” matters*. Certain matters are expressly “reserved” to the Government and must be subject to a regulation adopted at a Government-level.

Regulations are usually sorted by category. The most important types of regulation are:

- *enactment regulations*, which are adopted by the Government in case that a law of the Parliament only contains very high-level principles, needing a second-level regulation specifying technical aspects or details;

- *regulations supplementing laws (or assimilated acts)*, which are adopted in case that ordinary laws need to be supplemented or completed. This is a kind of second-level regulation, which assumes that a first-level act (*i.e*., an ordinary law of the Parliament) was adopted;

- *organizational regulations*, which are typically adopted by each single Minister to regulate the branch of Administration falling under his/her responsibility. Please consider, on the other hand, that, according to article 95 of the Constitution, *“the Prime Minister’s office is regulated by a law of the Parliament, which also determines the number, attributions and organization of the Ministers*” (as a consequence, the room left to organizational regulations is fairly limited);

- *“authorized” regulations*, which are adopted by the Government upon delegation of the Parliament.