**11. The power of the public Administration to enter into agreements, according to the Italian Civil Code; legal enforcement of administrative decisions**

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1. **The capacity of the Administration to make agreements: general principles.**

As a general principle, the Administration (*i.e*., the “aggregate” of all public entities and the Government) is allowed to negotiate and enter into agreements with private individuals and companies. However, the Administration is not held to be entirely free to choose *any* method to entertain relationships with private individuals or companies. In a nutshell, on the one side, the Administration is entitled to make agreements (rather than using authority and imposing decisions on citizens), but, on the other, such faculty is not to be regarded as an absolute freedom, since a number of limitations and constraints should be also complied with.

Article 1, paragraph 1-bis of Law no. 241/1990 sets out the general principle of *contractual autonomy* of the Administration: when issuing decisions other than those based on public authority, the Administration *is generally allowed* to resort to agreements and to other “tools” regulated by the Civil Code. However, if it uses agreements (rather than authority) the Administration is under an obligation to specify the reasons justifying the choice to act under the norms of the Civil Code (in the light of the duty to pursue public interest).

When the Administration acts under the norms of the Civil Code (hence, it decides not to use authority, but resorts to the power to make agreements with citizens), it is subject to the general rules regulating relationships among private individuals (*e.g*., liability regime, etc.). In other words, public entities (such as any other subject acting under Italian law) are subject to the rules contained in the Civil Code. In particular, citizens are generally entitled to have access to internal documents and files (*i.e*., documents used by public entities to make decisions and to exercise their powers); in addition, the Administration’s employees are regulated by “general” labor law (subject to limited exceptions, public entities’ employees are not subject to a specific set of norms, but to the general rules regulating labor relationships).

In addition, the Administration should *preferably* resort to agreements (rather than authority), unless any specific reason should induce to use authority-based powers. On the other hand, *there is no obligation* for the Administration to use authority (nor to act under the norms of the Civil Code): a general evaluation of the interests coming into play should be made, on a case-by-case basis. By way of exception, applicable laws may provide that, in certain situations (*i.e*., areas which are considered as particularly sensitive), the Administration *must*resort to authority.

In general terms, the need to set up relationships with private entities must take into consideration the duty to pursue public interest (which does not necessarily match with a “bilateral” and equal relationship with citizens: in other words, the duty to take care of public interest may suggest to use authority rather than bilateral negotiations with citizens).

In addition, the ultimate aims of the Administration are set out by the law (*i.e*., they are not an option for the Administration). As a consequence, the Administration is not entitled to make agreements establishing new aims for the latter, or ending up with an amendment of its ultimate aims (which, as mentioned, must be set out by the law, not by bilateral agreements). In other words, all agreements entered into by the Administration must be always in accordance with the aims set out by the law.

Most frequently, the activity of the Administration (as far as its agreements with citizens are concerned) relates to *contracts*. The definition of “contract” (“*appalto*”) under the Civil Code does not match with the definition applicable for the purpose of public law. The latter includes all “passive” agreements (i.e., all agreements in which the Administration acts as the payor, while its counterparty acts as service provider, or good supplier), and all agreements regarding the carrying out of public works, the provision of services and the supply of goods.

Other principles governing the contractual activity of the Administration are: impartiality; duty to act in accordance with the applicable law; duty to preserve third parties’ rights; prohibition to create any discrimination.

1. **The applicable regulation**

As mentioned, when the Administration acts under the norms of the Civil Code (hence, it decides not to use authority, but resorts to the power to make agreements with citizens), it is subject to the general rules regulating relationships among private individuals (*e.g*., liability regime, etc.). In other words, public entities (such as any other subject acting under Italian law) are subject to the rules contained in the Civil Code. When the Administration acts under the norms of the Civil Code, the following norms are applicable to the Administration:

- the norms regulating pre-contractual and contractual liability;

- the norms regulating default interest and termination of the agreement, in case that the Administration commits a breach of the agreement;

- the obligation to enter into the final agreement (when a preliminary agreement was entered into);

- the obligation to specifically consent to “*clausole vessatorie*” (*i.e*., particular clauses which need to be specifically approved in order to be enforceable: this is due to such clauses being held as particularly burdensome to one of the parties’ interests).

By way of exception, under article 21-*sexies* of Law no. 241/1990, the Administration is entitled to unilaterally withdraw : “*il recesso unilaterale dai contratti della pubblica amministrazione è ammesso nei casi previsti dalla legge o dal contratto*”. In such situations, the Administration is entitled to freely withdraw from the agreement, without the need to justify its decision in the light of public interest, or specify the reasons justifying its decision to withdraw.

As long as an agreement (rather than a unilateral decision) is to be put in place (typically, a contract), the Administration has to identify and select its counterparty. In this respect, it is important noting that public entities are not entirely free to establish criteria to identify the subjects which whom negotiations should be brought. To that purpose, a proceeding has to followed, in order to get to execution of the final agreement. Such proceeding generally includes the following main stages:

**Phase 1**: the Administration first adopts a resolution regarding the entering into of the agreement. As an alternative, the Administration approves a draft agreement, to be submitted to the counterparty/ies.

**Phase 2**: the Administration selects and identifies the counterparty and the latter is formally entrusted to carry out the works (“*aggiudicazione*”).

**Phase 3**: the agreement is entered into between the public entity and its counterparty. As a general rule, all agreements involving public entities must be made in writing.

**Phase 4**: a formal approval of the agreement is issued. Considering that the agreement has already been signed, formal approval typically has retroactive effects. Unless such formal approval is issued, the agreement may not become enforceable.

1. **Project financing**

Project financing is a typical structure in which public entities make agreements with private entities in order to fulfil public interests. In a project financing scenario, however, actions are not taken by means of a contract (“*appalto*”), but, rather, by means of a different structure. Project financing is typically based on the following elements:

* A company (which is also commonly known as “*special purpose vehicle*”, or “*SPV*”) highlights its interest to carry out public interest works (*e.g*., to build up a parking area);
* To that purpose, the SPV is granted with a concession by a public entity (*i.e*., the entity which is competent to govern and supervise the works at hand). Such concession provides, *inter alia*, for the SPV’s right to build up the project and (once the project will be completed) to manage and exploit the latter, as well as retain substantially all proceeds arising from the project. According to the concession, all costs of the works in question will be entirely borne by the SPV, while the public entity will have no obligation to contribute to costs;
* In order to fund costs relating to the project, a bank loan is made available to the SPV;
* The loan will be primarily reimbursed by the SPV by means of the cash proceeds flowing out of the project. As a consequence, the banks’ right to obtain reimbursement of the loan is based on the expectation that the project will be profitable and originate proceeds for debt servicing.
* The project's assets, rights, and interests will be typically acquired by banks as collateral. In particular, securities will be typically represented by: a mortgage over real estate assets (premises) included within the perimeter of the project; a pledge over the shares held by the SPV’s shareholders in the SPV corporate capital; receivables arising from the project may be assigned to the banks by way of security: therefore, all moneys flowing out of the project would be directed towards the bank and allocated to reimbursement of the loan. In case that the loan is not properly reimbursed, the banks will be entitled to enforce their security rights over the assets pertaining to the project;
* As a general rule, third parties (including banks) will have no right of recourse against the project sponsors (*i.e*., the SPV shareholders, in their capacity as project promoters). All obligations undertaken by the SPV shall be fulfilled by the latter only, while, typically, no request for indemnification or guarantee will be requested from the SPV shareholders (but exceptions are also possible).