7. ***REFERENDA*** **AND THE PEOPLE'S LEGISLATIVE POWERS**

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1. Foreword

Referendum is a typical proceeding regulated by the Constitution. It was conceived in order to enable the people to express their views with respect to a draft laws (typically, ordinary laws which are suggested to be repealed). A referendum may be launched in order to either: (i) repeal an existing law or (ii) amend, supplement or change the Constitution. As it will be described in this chapter, further categories of referendum are also contemplated.

The Italian Constitution also provides for an additional possibility to give the floor to electors: this is the so-called "*people's right of initiative*", *i.e.*, the power of electors to submit a project of law to the Parliament.

Referendums are regulated by both the Constitution and by scattered pieces of legislation (ordinary laws adopted by the Parliament). In particular, according to art. 75 of the Constitution, "*a referendum is not admissible in respect of tax, budget, amnesty and pardon, as well as on the authorization or ratification of international treaties. All citizens eligible to vote for the House of Representatives have the right to participate to referenda. The referendum is approved if the majority of voting rights have voted and the majority of votes validly cast have been reached. The law shall regulate referendums in detail*".

In addition, referendums are regulated by the Law of 25 May 1970, no. 352, setting out the main procedural norms which have to be followed in order to launch a new referendum. According to the applicable rules, referendum promoters must fulfill the following requirements:

- at least 500,000 citizens / 5 members of a Regional Parliament (*Consigli Regionali*) must promote the referendum;
- the referendum must be formally opened by a Decree of the President of the Republic
- the referendum is aimed at repealing a law or an act assimilated to ordinary laws (*e.g.*, a Legislative Decree). No referendum may be proposed with respect to an act other than an ordinary law (or an assimilated act).

2. Scope of referendums

As mentioned, there is a number of items (or matters) in which a referendum is constitutionally prohibited. These are: *tax, budget, amnesty and pardon, as well as on the authorization or ratification of international treaties*. It should be ascertained whether such list is exhaustive, or additional items/matters must be also included, although article 75 of the Constitution does not expressly refer to them. According to the common opinion, the list contained in article 75 of the Constitution does not include all matters in which a referendum is prohibited: the following additional matters should be also held as falling outside the scope of referendums (and, thus, prohibited):

- Laws amending the Constitution
- Constitutional laws
- Law-decrees
- Laws delegating the Government to act
- Laws by which the Parliament approves the Regions' By-laws
- Planning laws
- Laws "implementing" the Constitution
- Laws impacting on fundamental freedoms
- "Framework-laws" adopted by the Parliament (joint competences with Regions, pursuant to Art. 117 of the Constitution).

In addition, in light of specific decisions of the Constitutional Court, a request to set up a referendum should be rejected if it envisages an intervention in the following matters:

- items having constitutional coverage
- laws which are "bound" by the Constitution (which could not be otherwise implemented)
- unclear, confused, cryptic, illogical, contradictory or inconsistent proposals
- "miscellaneous" proposals.

3. Other procedural rules

The applicable legislation provides for the following procedural rules (please consider, however, that the recent constitutional reform will impact on the current legal framework). As regards time schedule, no petition for referendum may be filed during the year before the expiry of the Parliamentary term, or during the six month-period following the formal start of the elections ("*convocazione dei comizi elettorali*"). According to the general opinion, such rule was set out in order to avoid any overlapping between referendums and the general political elections (given that any such overlapping may potentially create distortions on the Parliament renewal; people should be called to express their views on separate occasions, depending on the decision to be made: renewal of the Parliament or repealing existing legislation).

According to certain scholars, the above rules lead to significant limitations to the right to promote a referendum, and should justify proposals aimed at cancelling (or mitigating) such limitations, in order to grant people with wider possibilities to express their views and impact on the legislative process (without the intermediation of the Parliament).

Further, petitions for referendum must be filed with the Supreme Court (*Corte di Cassazione*) between 1 January and 30 September of any year, but no later than 3 months of the date when the sheets (containing the signatures supporting the referendum) were sealed and certified by the competent officer.

The Supreme Court officers, in turn, check that all formal and procedural requirements are met. Promoters may be requested to intervene and provide clarifications or more detailed information on the proposed referendum; irrespective of a specific request by the Supreme Court, promoters may voluntary file deeds or papers supplementing the petition. The Court fixes the "tile" of the referendum (the original suggestion by the promoters might be disregarded or changed, to the extent that the Supreme Court deems that the latter is not appropriate to ensure a clear display of the proposal to citizens).

As mentioned, the referendum is opened by a Decree of the President of the Republic, upon resolution passed by the Government. The referendum date must be a Sunday between 15 April and 15 June of any year.

If the referendum is successful (*i.e.*, the majority of citizens vote in favor), the law in question is formally repealed by virtue of a Decree issued by the President of the Republic. In other words, the law is not *automatically* repealed, as a consequence of the referendum being approved: a subsequent deed (a Presidential Decree) needs to be adopted. This confirms that the referendum must be held as one of the sources of law.

The Decree of the President of the Republic enters into force the day after publication on the Official Gazette. However, the President *may postpone* the effective date (but no later than 60 days of publication of the Decree on the Official Gazette).

On the other hand, if the referendum is unsuccessful, no further petition may be filed on the same subject during the following five years.

4. Referendum as a legally binding instrument

In case that a referendum is launched, unusual scenarios might take place. In particular:

(i) the law which forms the object of the referendum may be voluntarily repealed by the Parliament (or as a consequence of a judgment of the Constitutional Court) *before* the voting date fixed by the referendum promoters/the Supreme Court (so before the referendum actually takes place); or

(ii) even in case that a referendum turns out to be successful (*i.e.*, the majority votes in favor), as a matter of fact, the Parliament ignores or disregards (in whole or in part) the outcomes of the referendum and adopts laws in conflict with the latter.

In the situation under (i), based on the applicable law, it is unclear whether the referendum should take place anyway, regardless of the fact that it could be useless (since the ultimate aim of the referendum has already been achieved). According to the majority of scholars, the referendum proceeding should be stopped (*inter alia*, costs, expenses and other burdens arising from the referendum could be easily avoided, since these would no longer be justified by the need for the referendum to take place).

With respect to the situation under (ii), it should be ascertained whether the referendum is actually binding on the legislative bodies (*i.e*., the Parliament, the Government and the Regions). According to the general view, if the Parliament ignores the outcomes of a referendum (typically, by approving laws in conflict with the referendum outcomes), a conflict between sources of law arises. As clarified in Chapter 2, such conflict should be solved according to the principle of hierarchy and, therefore, the source holding a higher raking should prevail over the other. In the Italian system of sources, the laws of the Parliament hold a higher position (as opposed to referendums): as a first conclusion, therefore, referendums may be overturned by the Parliament, which could disregard the outcomes of consultations and adopt acts in conflict with those. However, conflicts may not be fixed by just resorting to the principle of hierarchy. Other principles may also come into play (*e.g.,* fundamental freedoms or special rights protected by the Constitution: in case that a conflict arises between a referendum "linked" to Constitutional freedoms/rights and an ordinary law, a petition may be submitted to the Constitutional Court: the latter may be requested to issue a judgment declaring that the law of the Parliament is invalid and must not prevail over the referendum).

5. Referendum on strategic matters (referendum "*di indirizzo*")

The Constitutional Law no. 2/1989, promoting a referendum on the approach to be adopted with respect to the EC's evolution towards the Union: "*Ritenete voi che si debba procedere alla trasformazione delle Comunità europee in una effettiva Unione, dotata di un Governo responsabile di fronte al Parlamento, affidando allo stesso Parlamento europeo il mandato di redigere un progetto di Costituzione europea da sottoporre direttamente alla ratifica degli organi competenti degli Stati membri della Comunità?".*

Such referendums are typically launched if the people's opinion is requested on political or general strategic issues (irrespective of any specific law to be repealed).

It is generally held that the above does not create a new kind (or "category") of referendum (in addition to the referendum repealing existing laws and Constitutional referendums).

In general terms, to date, referendums on strategic matters are generally held as deprived of any binding effect. In other words, they are not binding on the political (legislative) bodies. In the above example, the referendum (in which, by the way, the overwhelming majority of citizens voted in favor), no legally binding effect could be envisaged, since, otherwise, this would have triggered a paradoxical consequence: the Italian representatives within the EU Parliament would have been under an *obligation* to procure a shift in the structure of the European Communities into a "Union" (such goal could not be achieved by the Italian members of the EU Parliament, since the evolution of the EU is clearly a historical phenomenon, which does not simply rely on the individuals' will, but, rather, depends on more complex factors, which are often not connected to the individuals' political choices).

6. The Constitutional referendum

Once both Chambers of the Parliament approved (twice) a law amending the Constitution, within 3 months of the relevant publication date, the following subjects may promote a referendum (to confirm or reject the law):

- 500,000 citizens

- 1/5 of members of any Chamber of the Parliament
- 5 Regional Parliaments (*Consigli Regionali*)

However, if, upon the second reading, a 2/3 majority of member of the Parliament approves the law, there is no room for referendum.

7. The people's right of initiative

As mentioned, in addition to referendums, the Italian Constitution also provides for an additional possibility to leave the floor to electors: this is the so-called "*people's right of initiative*", *i.e.*, the power of electors to submit a project of law to the Parliament. If the following requirements are met, a project of law may be submitted to the Parliament (which, however, is not legally bound to transpose the people's suggestion into a law, nor even to take this in consideration):

- 50,000 citizens must promote the draft new law
- a project of law (in its technical sense) must be drafted, article by article
- a report must be attached to the draft law, highlighting the relevant aims and explaining its contents
- the project of law must be filed with the President of either Chamber of the Parliament.

8. THE LEGISLATIVE POWER; THE PRESIDENT OF THE REPUBLIC

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1. The President of the Republic

The President of the Republic is elected by both Chambers of the Parliament jointly. This is in contrast with the rules usually adopted in other legal systems, such as France, where the President is elected by citizens directly.

The Italian Constitution provides for a number of eligibility requirements, which the President has to meet in order to be validly elected. In particular, the President must be an Italian citizen, he must be at least fifty years old and entitled to all civil and political rights (in other words, he must not have been deprived of any such rights, by virtue, for instance, of a judgment issued by a Court).

The term (*i.e.*, the period of time through which the President holds his/her charge) is equal to seven years. A thorough Constitutional debate has been in place with respect to the *rationale* of the rule on the Presidential term: why is the length of such term different from the one regarding the Parliament (*i.e.*, five years)? The answer lies on the need to ensure full independence of the President (as opposed to any other power, including powers and bodies contemplated by the Constitution, such as the Parliament). Since the President may hold his/her charge for seven years (*i.e.*, for two years more than the Parliament), the President will be more able to maintain his/her independence from the views expressed (from time to time) by the political majorities within the Parliament.

According to a general rule, the President may be reelected. However, according to the opinion of scholars, reelection should be avoided as much as possible: such conclusion derives from the need to avoid any "blockage" or any situation where Constitutional players are "crystallized", in contrast with the principle encouraging a continuous shift and turn-over of people holding Constitutional charges.

The office held by the President is generally held as incompatible with any other public charge (including, for instance, the charge as Mayor, member of the Parliament, member of the Government, etc.). Such rule is based on the need to ensure independence of the President from the other powers.

The Presidential charge may be early terminated upon any of the following circumstances:

- death or voluntary resignation
- loss or forfeiture of any requirement to take office / hold the charge (*e.g.*, loss of the Italian citizenship)
- he/she becomes permanently unable to perform his/her duties.

In certain specific (exceptional) situations, the President may be also replaced. These are generally situations where the President is prevented from holding the charge or properly fulfilling his/her duties. Said situations are typically the following:

- the President may be replaced on a temporary basis (according to article 86 of the Constitution), if he/she is temporarily unable to attend his/her duties. According to the general opinion, the President's absence from the Italian territory is not held to as a "temporary inability" to attend his duties (since this usually ends up with a temporary stay in a foreign country, for a limited period of time, provided that the functions of the President are not physically interrupted or prevented). However, in case that his/her absence is expected to last for a significant period of time (due to the need to attend complicated negotiations with foreign countries' representatives, or within the scope of top-rank international organizations), temporary suspension of the President may be evaluated.

- on a permanent basis, in case that the President turns out to be permanently unable to fulfill his/her duties.

If either said situation occurs, the President is replaced by the President of the Senate. In case that the President's inability is permanent, the Parliament must be also promptly convened to appoint a new President. In the meanwhile, however, the President of the Senate will not be entitled to the same powers afforded to the President: the powers of the President of the Senate do not entirely overlap with those which the Constitutions attributes to the President. Irrespective of the President's inability being temporary or permanent, the President of the Senate will be only entitled to carry out provisional acts, which are strictly necessary to ensure political-Constitutional steadiness (until the President's temporary inability ends, or a new President is appointed) and to avoid any interruption in the proceedings in place when the suspension happens. In particular, according to the general opinion, the President of the Senate is not entitled to declare general political elections open (such power should only belong to the President in charge).

Looking back to the Constitutional history, there was only one precedent regarding permanent inability of the President. The circumstances evolved as follows:

- the General Secretariat of the President sent a notice to the Prime Minister and the Presidents of the Chambers, regarding the President health conditions;
- the Prime Minister and the Presidents of the Chambers declared that the President of the Senate should hold the charge as President (pursuant to article 86 of the Constitution);
- the President health conditions turned out to be worse than expected: the Parliament was convened to acknowledge the "*permanent inability*" of the President to fulfill his duties;
- the President voluntarily resigned (so, there was ultimately no need for the Parliament to take any action).

2. Legal and political liabilities of the President

➢ *political liability*

According to a general rule, the President may never be held politically liable. In a broad sense, political liability is triggered by "mistaken" actions by entities or bodies, which are subject to criticisms due to political reasons (actions or decisions are held as inappropriate or ineffective in the merits, or as conflicting with the

view adopted by the political majority in place). By definition, political liabilities may be only incurred by the competent Minister and by the Prime Minister (*i.e.*, by the Government and/or by its members anyway), while they would be never incurred by the President of the Republic. Such conclusion is confirmed by the fact that each Presidential Decree must be signed by the competent Minister (in addition to the President of the Republic): any political liability may be only incurred by the Minister, while the President may never be held liable from a political point of view.

By the way, it is also worth noting that, in recent times (in 2006), article 279 of the Criminal Code was repealed. According to such norm, criminal sanctions could be imposed to anyone raising objections or criticisms against any actions taken by the President of the Republic[1].

- *Legal liability*

With regard to acts done by the President while performing his/her duties, the President is not legally liable (even from a criminal law viewpoint, unless for "*high treason*" or "*attempt to attack the Constitution*"). However, when the President acts as a private individual, he/she may be held liable, but may be only prosecuted after the elapse of his/her term (provided that the applicable statutory limitations have not elapsed yet).

3. The main powers of the President

The powers of the President affect several areas and are connected to multiple powers contemplated by the Constitution. In particular, those powers may be regarded as connected to the legislative power, the administrative power and to the Courts' functions, depending on the case under consideration.

- powers connected to the legislative power

The President declares political elections / referendums open; he/she may appoint five senators in charge for an unlimited period of time ("*senatori a vita*"); he/she may deliver speeches / messages to the Parliament; he/she may request the Parliament to carry out a second-reading of a draft new law (however, in case that the Parliament decides to ignore the suggestion of the President, and submits the same text to the President, the power of the President is held as exhausted and the latter is not entitled to exercise his power to request a second reading again).

The power to declare the opening of general political elections is particularly relevant, since it materially affects performance of the legislative duties by the Parliament. Such power is typically exercised if either of the following circumstances occur: (i) a conflict between the Government and the Parliament arises and remains uncured. In such scenario, the Parliament typically adopts a resolution highlighting that the relationship of trust between the latter and the Government is no longer in place and, therefore, the Government does not have the Parliament support anymore ("*mozione di sfiducia*"). This should compel the Government to resign (this would trigger, in turn, the President decision to open political elections); (ii) facts or circumstances occur, clearly highlighting that citizens no longer support the Government and the activities brought forward by the political majority. In such case, even in absence

[1] According to the ancient article 279 of the Criminal Code, "*chiunque, pubblicamente, fa risalire al Presidente della Repubblica il biasimo o la responsabilità degli atti del Governo è punito con la reclusione fino ad un anno e con la multa da lire duecentomila a due milioni*".

of a formal obligation of the Government, the latter should be induced to consider resignation as an option.

In both cases, the President must hear the opinion of the President of each Chamber of the Parliament (reporting to the President on the main facts and circumstances regarding political debate and outstanding issues, and highlighting, if ever, the opportunity to postpone or suspend the decision to launch political elections), even though said opinions are generally not held as legally binding on the President. The need to gather such opinions is based on the opportunity to consider any political and legal implications of the decision to trigger the Parliament renewal.

As a general rule, the President may not declare the opening of elections within the last six months of his/her term.

- powers connected to the administrative power

The President appoints the Prime Minister and, upon suggestion of the latter, each Minister; he/she ratifies international treaties; he/she is formally head of the Army; he/she settles disputes arising from "extraordinary petitions"; in exceptional situations, he/she may revoke Mayors from charge.

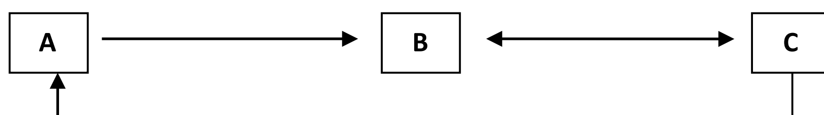
- powers connected to the Courts' function

The President appoints five members of the Constitutional Court; he/she is head of the High Council of Magistrates (CSM); he/she may grant "pardon", cancelling criminal liabilities and/or criminal sanctions (as ascertained or imposed by virtue of a Court judgment).

4. The Parliament

The Parliament is comprised of members who, according to art. 67 of the Constitution, "*represent the Nation*". In this respect, it should be ascertained whether this imply a power to represent *electors*, and, more generally, the definition of "*representative*" in accordance with the Constitution.

According to the opinion of the majority of scholars, "representative" powers under the Constitution are materially different from those regulated by article 1387 of the Civil Code ("*rappresentanza*"). According to the Civil Code, a subject may grant another with the power to represent the latter *vis-à-vis* a third party. By virtue of representative powers (which usually materialize in a document named "*power of attorney*" or "*PoA*"), the representative acquires the power to act in the name of the person grating the power, and all acts and deeds put in place by the representative will be automatically referred to the person granting the power. For instance:



"A" is willing to enter into an agreement with "C". Due to several factors (*e.g.*, "A"'s inability to reach "C", who is based in foreign country), "A" grants "B" with the power to represent him in his relationships with "C". "B", in turn, will approach "C" and will be entitled to make an agreement with the latter: all effects arising from the agreement between "B" and "C" (as far as "B" is concerned) will be *automatically* referred to "A". As a matter of fact, the agreement will be only made between "A" and "C" ("B" will not act as a party to the agreement). "A" is entitled to revoke anytime the powers granted to "B" (as long as the agreement has not been put in place with "C" yet).

As mentioned, under the Constitution, the definition of "*representative*s" is materially different from that contained in the Civil Code. In particular, in the system outlined by the Constitution:

- electors are not entitled to revoke "*representatives*". Once elected, members of the Parliament may not be revoked by the electors.
- the relationship is set up only between electors and the representatives: there is no "third party" (in the above example, there is no party "C").
- members of the Parliament are not bound by any mandate or other tie with their electors: under article 67 of the Constitution, members of the Parliament only represent a "theoretical" entity (*i.e.*, the "Nation"), not *their electors*. As a consequence, these would never be entitled to claim any "breach of mandate" by the members of the Parliament. Representatives and Senators are only expected to make voting decisions in light of their own individual consciousness and political evaluations, which may come into play from time to time.

The Italian Parliament is comprised of two separate Chambers (*i.e.*, the House of Representatives and the Senate). Each such Chamber has specific features, which do not entirely overlap with those of the other. In particular, the Constitution sets out the following:

- different age requirements apply to elect and to be elected;
- the number of members is different, depending on the Chamber under consideration;
- the applicable electoral systems are different;
- all members of the House of Representatives are elected, while some members of the Senate are appointed by the President of the Republic or are automatically declared as members of the Senate (*e.g.*, former Presidents of the Republic);
- the Senate should tend to have closer connections with local/territorial communities (as opposed to the House of Representatives). In particular, according to article 57 of the Constitution, *"The Senate is elected on a regional basis. The number of Senators to be elected is three hundred and fifteen […]. No region may have fewer than seven senators; Molise shall have two, Valle d'Aosta one. The allocation of seats among the regions, in accordance with the provisions of the preceding Article, is made in proportion to the population of the regions […]"*.

A recent reform proposal (adopted by the Parliament in 2015) envisaged to bring along the following changes in the structure of the Parliament (and is likely to have a deep impact on the topics described above):

- a reduction of the overall number of seats;
- the conversion of the Senate into a "*Regional Senate*" / "*Senate based on territorial autonomies*". However, as mentioned, it is questionable whether the Senate is already "connected" to territorial communities (article 57 of the Constitution, to a certain extent, already provides for such principle), and, therefore, whether the incoming amendment is likely to give rise to a material change;

- functions of each Chamber have been better specified and major overlapping should be avoided (*e.g.*, in a nutshell, a Chamber may legislate, the other may have supervisory functions); most "shared" competences between the central State and the Regions will be abolished (this would also have some impact on the procedures regulating performance of the legislative functions);
- the Parliament internal regulations (codifying the procedural norms to be followed by the Parliament, in order to adopt laws, amendments, resolutions, etc.) will be streamlined, in order to ensure a better selection of proposals and projects of law to be discussed within the Parliament (in particular, the Assembly should not be overloaded by bulky amendments or draft laws, which may be submitted with the aim to delay the Parliament work schedule).

Such proposal, however, has been rejected by the referendum held in December 2016.

9. THE GOVERNMENT AND THE PUBLIC ADMINISTRATION: OVERVIEW OF THE ITALIAN ADMINISTRATIVE BODIES

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

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 without expenditure 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. The Government is entitled to take the initiative to submit draft laws 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 draft 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. Depending on the situation at hand, 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, but the addressee is not bound to comply with the opinion (in other words, the addressee 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 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 Administration.

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.

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). 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 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).

3. 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 relevant circumstances) 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 (allegedly) 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 be 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).

4. 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 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.

- 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 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 in the merits (and its checks are irrespective of a request by any other subject).

Without prejudice to the rules described above, no Law Decree 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.

10. 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
2	The applicable regulation
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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.

2. 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.

3. 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).