THE IN HOUSE PROVIDING COMPANIES IN THE ITALIAN LEGAL SYSTEM. THE GOAL OF PRIVATISATION AND THE EFFECTS OF PEOPLE’S WILL

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Abstract: This article prospects the dynamic phenomenon of the in house providing and analyses the extension that the related principle, forged by the European Courts, has had in the Italian system over the last decade, interpreting the main relevant trends of Italian Institutions, with the purpose of identifying the current rules governing this subject. Providing a general overview of the fragmented and, often, conflicting legislative relevant reforms, this work shows how the in house criteria, general principle for the carrying out of public services and instrumental services pursuant to European Law, has firstly become a secondary and residual criteria, due to legislative interventions pursuing the declared goal of privatization and reduction of public debt, and subsequently has returned back to its initial position as an effect of the referendum of 2011. In highlighting such fluid legislative scenario, a particular focus is given to the key role played by AGCM and by Italian Courts in such dynamic subject, whose decisions have not only helped to clear out the actual scope of the in house principle - despite of highly segmented laws - but also restored the compliance of Italian rules with the principles of European Law, protecting the will expressed by citizens with the referendum.

1. THE IN HOUSE PROVIDING PRINCIPLE: AN INTRODUCTION

The in house providing phenomenon is certainly one of the most successful European law subjects of the ones that represent an active part of Italian legal practice.

This success is primarily due to the fact that the principle forged by the European Courts has become a stable segment of the legislation and pragmatic experience in the Courts and relationships between the public administration and citizens, especially the ones providing services of general economic interest. The content of this principle is widespread knowledge among scholars and lawyers.

When a company is classified as in house, the public sector is entitled to assign it a public contract, both a contract based on services granted to the administration itself and a concession for services of general interest. The in house requirements are the following three: (i) the shares must be entirely owned by the administration; (ii) the company must be subject to the same control as the administration exerts over its public offices; (iii)
the activity of the company must be mostly directed at the benefits and interests of the shareholder Administration.

2. **THE RATIONALE OF THE PRINCIPLE**

As mentioned above, this exception to the mandatory tender rule can involve two different contracts and it is well worth pointing out that this difference is of utmost importance for the Italian legal system: on the one hand it regards the common tender ruled by the European directives Nos. 17 and 18/2004; on the other hand it is valid for the concession of public services, which is characterised by the fact that services are rendered directly to the citizens, frequently on the basis of a contribution of the Administration aimed at providing them at a reduced ticket.

The rationale of the in house principle comes from the fact that the company is substantially considered as an Administration office. That means that the assignment of the contract is apparent, given that it is only the result of an economic self-production. Therefore, there is no market sensitive relationship between the Administration and the state-owned company, just as there is none with its public offices. The lack of an impact on the market explains why the announcement of a tender would be redundant.

The pragmatic approach of European law reveals its own effect even in this topic.

3. **THE IN HOUSE AS A GENERAL PRINCIPLE IN ITALY AND AN EXCEPTION TO PUBLIC PROCUREMENT LAWS**

The origin of the in house providing subject leads to the first question related to the Italian System.

At present, under Italian rules, the direct in house assignment is provided as a specific exception to the duty of applying public tenders, based on stated provisions, whose first example involves the managing of the local services of general economic interest, according to article 113 of decree No. 270/2000 (the so called “testo unico degli enti locali – Single local authority text”).

The first problem lies in the extent of the principle, for some rulings by the Administrative Courts stated that the in house subject, as an exception, could not apply to situations not specifically provided for with formal rules.

Despite these decisions, the in house seems to maintain its validity beyond specific provisions, as a general principle, as occurred for example in several cases related to the State Government and the Regions. We might mention RAI SpA, the Finance Ministry’s

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3 European Court of Justice, Teckel, C-107/98, No. 107/1999. For an overview of the in house phenomenon in the European and Italian Courts let me refer to F. CINTIOLI, Concorrenza, istituzioni e servizio pubblico, Milano, 2010.


5 Recently, for the treatment of the in house company as a public office, linked to the Administration on the basis of a hierarchical relationship, see Court of Cassation, November, 25, 2013, No. 26283/2013.

6 Regarding the in house as an exception to the tender rule: Council of State, Adunanza Plenaria, No. 1/2008; Council of State, Division VI, No. 1514/2007.
concessionaire entitled as the public services national broadcaster, and SOGEI SpA, which provides the Tax Administration with a complex software and hardware data system able to register all taxpayers.

Indeed, even though the opinion aimed at limiting the scope of the principle is entrenched in a current criticism of the in house companies (i.e. the way it was run and the frequent wrongdoings committed by Municipalities and Regions: see below), we cannot but consider that the in house providing exception is a principle forged by the European Courts and is currently part of the European legal System, so it has the particular supremacy of the European regulation.

In short, the assumption of a whole ban of the in house pattern in the Italian system despite only the single rules provided by national law might be treated as an infringement of the Treaties.

4. LOCAL SERVICES OF GENERAL ECONOMIC INTEREST AND THE SPREAD OF IN HOUSE COMPANIES SINCE 2003

However, the in house system would not have been as popular before Italian Courts and lawyers as it has been in the last ten years, if it had not been used as one of the three main solutions to the entrustment of local services of general economic interest.

The reform of article 113 of the fundamental regulation on the so called “local authorities” (enti locali), decree No. 270/2000, issued in 2003, provided three different ways to manage these services: (i) awarding the contract to a private company through a public tender; (ii) direct assignment of the contract to a mixed public-private company, whose private shareholder had been chosen through a public tender; (iii) a direct assignment to an in house company.

The in house principle was thus drawn from judicial decisions to become part of the legislation and this meant a remarkable assessment of this legal subject.

Indeed, according to the political science assumption that public powers, when free to run, are always expanding their scope of action, in most of the cases Local Authorities were choosing the third option. By taking the in house option, the Administration would keep the direct control of the public services, avoiding any actual privatisation of this sector.

5. CRITICISM OF THE IN HOUSE-PROBLEM AND PRIVATISATION

The subsequent increase of the in house pattern has raised many concerns and criticism.

Firstly, the internalisation of the local services of general economic interest, in the end sounded like a substantial contradiction of privatisation, publicly stated as the main goal of the 2003 reform.

Secondly, it made clear to everybody that the in house company could be often conceived as a tool aimed to circumvent the administrative rules which provide all the common limits to public bodies, especially the ones regarding

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both hiring the employers and the respect of the budget’s debt limit (art. 119 Italian Constitution). The *in house* company was substantially a public office, subject to the direct influence of local politics, but at the same time, from a formal point of view, it should be run as a private undertaking, free to avoid the strict legislation imposed on public bodies pursuant to the constitutional principle of Administration’s impartiality (article 97 Italian Constitution).

The *in house* company thus became a “problem” and even journalists and pundits were dealing with this issue in the most popular newspapers. In fact, like every stereotype, even this wide criticism might have been wrong in certain sporadic cases, as some of the *in house* companies, especially in the northern part of Italy, were managed in compliance with the regulation and without such evident misleading. We should also mention the support given to privatisation provided by the Italian Industrial Association (the so-called Confindustria), which was looking at the local public services as a fruitful and potentially profitable business field.

This framework enables us to understand why the Italian legislation introduced a reform in 2008 whose first goal was the reduction, if not the very elimination, of *in house* companies. In more general terms, the political purpose was to establish privatisation, even though it would not create liberalisation. Indeed the reform allowed the private party to replace the *in house* company to manage the service as a monopolist, on the basis of exclusive rights (*i.e.* it provided only the administrative concession instead of the authorisation).

6. **ARTICLE 23 BIS. THE LIMITS ON PUBLIC SERVICES IN *IN HOUSE* COMPANIES. THE ITALIAN COMPETITION AUTHORITY’S ROLE**

The key point of this course of action was article 23 bis of decree No.112/2008. It added new restrictions to the limits coming from the Teckal ruling.

The *in house* assignment of the services of a general economic interest contract would be compliant with the law only if it were supported by an economic and factual analysis, based on the conditions of the particular local service, even considering all the geographical aspects.

The article conferred this analysis to the Italian Competition Authority (“Autorità garante della concorrenza e del mercato”, or AGCM), given that this Public Body was considered the most appropriate in order to ascertain the real condition of every single market. The AGCM indeed, on the one hand, was able to assess this issue with the correct (market friendly) approach, and, on the other hand, had the resources and skills among its officials needed to deal with this difficult task.

Basically, in the wake of this reform the AGCM was taking a tough stance, as a “watchman of privatisation”.

By doing so, AGCM was partially distancing itself from the main goal conferred by the European and Italian legal systems, which is of course liberalisation and the promotion of competition rather than privatisation (see articles 101 and 102 EUFT, and Italian regulation No. 287/1990). Nonetheless, the AGCM was keen to accomplish the mission, supporting the Italian Parliament’s national goal.
The method followed by the AGCM in carrying out the economic analysis is worth mentioning.

The dossier filed by the Municipality and aimed at achieving the AGCM’s approval, even if based on an apparently complete economic analysis of the reasons for the in house solution, has not been considered at all sufficient. According to all the precedents issued under article 23 bis, in order to establish that an in house assignment was complying with the law, the AGCM stated that it was necessary to demonstrate beforehand that a call for tender was useless, due to the nonexistence of a profit perspective and a real private interest.

The way to ascertain this condition would thus be the announcement of a call for a preliminary declaration of intent by private companies. It seemed like assuming that, in order to avoid the procedure of a tender to award the public services contract, the Administration was required to conduct a shorter tender aimed at having any preliminary interest from the market.

7. THE IN HOUSE INSTRUMENTAL COMPANIES

In the meantime, the Italian legal system has offered a parallel topic which is linked to the in house principle.

It is related to the so called “instrumental companies”, which are state-owned companies whose aim consists in providing the shareholder (i.e. the Administrative Body which held the majority or the entire company’s equity) with various services. The difference between the company we discussed before and this company lies in the direction of the services: the former looks at the citizens, who are the beneficiaries on the common ground of services of general economic interest, the latter the shareholder, whose internal organisation is provided with these goods.

Criticism raised over the in house public services phenomenon evolved into a wider disapproval of the state-owned company issue, assuming privatisation as the main goal to be achieved once again. This widespread mood triggered regulations such as article 13, decree No. 223/2006, which substantially banned the instrumental companies from acting freely in the market in contracts and businesses different from the services aimed at supplying the Administration-shareholder. The state-owned instrumental companies (i.e. the ones held at a local and regional level) were thus treated as a minor subject in the legal system, on the ground of a reduction of legal capacity. They could not (and even now cannot) enter into a contract which is not aimed at supplying, even though indirectly, the Administration-shareholder, and all contracts stipulated as a result of this narrow field are not valid for they are hit by the toughest fine in terms of nullity.

At the same time, with article 3, clause 27, act No. 244/2007, the legislation prohibited the creation of new state-owned companies at a local level, allowing only the companies which were born, according to their own statute, to exclusively achieve the same Administration’s official aims. A specific duty was thus imposed.

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8 Among others, see for example AGCM, Opinion, June, 11, 2009, No. AS573.

of supplying only services and goods connected to the public interest as interpreted by the single Municipality or Region. By avoiding the spread of state-owned companies and reducing their impact on the market, the Italian legal system was identifying them as a Public Body’s office, which had to focus on the public interest and the administrative goals rather than business and profit. In the end, the result is an entity similar to the in house company: more a public office than an enterprise.

8. THE CONSTITUTIONAL COURT RULING OVER THE INSTRUMENTAL COMPANIES

This legislation even received the Constitutional Court’s approval. In its ruling the Court wanted to clarify the ratio of the reforms on the instrumental companies, arguing that the risk must be avoided of having companies acting in the market as if doing business in a condition of apparent competition, while, on the other hand, they are exploiting some of the privileges granted to the administrative bodies.

According to the Court, these companies would not be real enterprises and were nothing but “administrative-companies”. Their action would have affected the normal market and competition relationships and (in the Court’s opinion) this could have explained the reason why the Parliament was so determined to put a stop to the phenomenon.

Therefore, at the end of the new century’s first decade, we had a really contradictory scenario, based on two different courses of action: on the one hand a remarkable spread of in house companies among Municipalities and Regions, both entitled to supply public services and “instrumental” services; on the other hand, pieces of legislative reform which have boosted privatisation and banned the proliferation of state-owned companies, by limiting the in house assignment and the instrumental companies’ free action in the market.

The Italian Competition Authority was given a crucial role in this framework.

If not exerting the power to fine abuses of dominant positions, the AGCM nonetheless had considerable powers of advocacy, linked to mandatory procedures which were the only way to award procurement contracts to in house companies.

The AGCM was thus attracted to a political goal in order to enforce privatisation. By doing so, the AGCM has possibly moved on towards a joint vision of both privatisation and liberalisation. For example, it suggested the authorisation rather than the concession deed as the way to entrust the private party, in order to eliminate, if possible, the monopoly in the local public services sector, allowing more than a single undertaking in each of these markets.

This development took place not without a number of difficulties, due to the fact that this particular mission – privatisation – belonged only to national politics and not European regulation. Even the Authority’s independent organisation seemed to be at times influenced, for the AGCM was expected to give a crucial

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contribution to the solution of the (political) in house dilemma.

9. THE REFERENDUM AND ABROGATION OF ARTICLE 23 BIS

The scenario suddenly changed due to an unexpected circumstance. Both the influence of the economic and Eurosystem sovereign debt crisis and the chronic instability of Italian politics gave rise to one of the frequent people-supported bids for a referendum calling for the abrogation of a national law.

In the last years the referendums, promoted on very different issues, have not reached the threshold required by article 75 of the Italian Constitution, which is the majority of the registered voters. But this time things had changed.

The subject, among others, of the referendum held on June 12th and 13th 2011, was the abrogation of article 23 bis – i.e. the key-point of the legislative framework aimed at reducing the in house companies and the boosting of the privatisation of local public services.

The political campaign did not correctly identify the subject of the abrogation as often happened. The slogans passed through the media were about the risk that article 23 bis could privatise water sources, “taking away a public good from the public property”. Whatever the opinion about article 23 bis, this generalisation was wrong for two reasons: (i) the privatisation affected only the organisation and the management of the enterprise and not the water sources at all, which remained absolutely state-owned; (ii) article 23 bis was the crucial point of a project which had a scope not limited to water public services, involving all the local services of general economic interest. However, this time the Italians cast their vote, the referendum obtained the majority threshold and article 23 bis was abrogated.

10. THE CONSTITUTIONAL COURT’S RULING IN THE WAKE OF THE REFERENDUM

The Constitutional Court had a crucial role in the events which followed the referendum.

First, the Court stated that the effect of the referendum was the application of European law. This would mean the full validity of the in house principle as one of the ways to run the local public economic services. All the limits focused on privatisation, including the advisory role of the AGCM, were suddenly invalidated.

Then, Italian Government and Parliament tried again to insert legislation against the spread of the in house companies and in favour of the privatisation of local public services.

We are referring to article 4 of decree No. 138/2011. The legislative had a substantial respect for the referendum, for it avoided modifying the water services regime. The other local services were thus the subject of further reform.

It provided: (i) confirmation of the limits to the in house assignment, in an even tougher way; (ii) the liberalisation goal, in addition to the former privatisation one, supporting even the competition among two or more private parties as suppliers of public services and eliminating the local monopolies when unnecessary; (iii) confirmation of the AGCM’s role both in

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13 Constitutional Court, No. 24/2011.
limiting, through a strict economic analysis, the *in house* award and assessing when a monopoly and exclusive right in concession (instead of a system of competition among several authorised parties) might be allowed.

The introduction of article 21 bis, act No. 287/1990 is also worth mentioning; it was inserted by decree No. 1/2012 (the so-called “Italy’s growth” decree), which entitled the AGCM to challenge every administrative decision contrary to competition before the Administrative Court.

The issue deserves a more detailed analysis, not compatible with the limits of this essay, owing to the extent of the scope of power.

We could just point out that, during the parliamentary debate, one of the main purposes of article 21 bis was intended to give the AGCM the power to obtain judicial annulment of the *in house* awards which were being granted by the Administration despite its contrary advice.

The next step was again on the side of the Constitutional Court, more than a year later 14. Examining article 4, the Court argued that, under article 75 of the Constitution, the effect of the referendum abrogation was to remove not only the formal legal deed which was subject to the vote, but essentially the regulation that it had expressed. Given that assumption, the Court held that the people’s will of 2011 wanted to eliminate the restriction to the *in house* assignment in the local public services sector and the support for privatisation. The subsequent conclusion was based on the fact that article 4 had basically introduced the same project rejected by the referendum, so it was entirely annulled by the Court.

The issue pondered by the Court is exactly on the scope of article 75 and the scope of the referendum’s effect. On the one hand, the topic examined by the decision lies in the duration of the abrogation effect, given that in such a case we are not only discussing a single law but an entire political project of the privatisation of a crucial sector of the national economy; on the other hand, the debate could be triggered by the fact that article 4 had provided a wider content than article 23 bis, leaving some of the services (i.e. water sources) out of its scope, including the subject of liberalisation as well as privatisation and the openness to local competition rather than mandatory monopolies.

Whatever the opinion, the Court has issued its decision and has allowed the Administration to use the *in house* technique whenever it complied with the (softer) European principles.

### 11. AGAIN THE IN HOUSE INSTRUMENTAL COMPANIES

We can now return to the other area we discussed: the instrumental companies.

Indeed, despite the “defeat” on the ground of the local public services, Government and Parliament seemed keen to promote privatisation as a way both to boost growth and cut public spending. The only solution was to look at the instrumental companies and focus on these subjects in order to enhance privatisation.

By doing this, the Government had to adopt a different approach from the one followed in the 2006-2008 reforms. It would not be enough to limit the scope of their action. It would be

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14 Constitutional Court, No. 199/2012.
necessary to eliminate the *in house* instrumental companies in order to replace them with private parties. The legislative was again influenced by the various stakeholders, including Confindustria, which was aiming at creating new privatised sectors to allow private Italian companies to find a wider field of development.

As usual, unfortunately, article 4, decree No. 95/2012 (the so-called “spending review decree”), was not exactly a perfect example of drafting.

On the one hand, article 4 (clause 1) imposed the instrumental companies’ dissolution by a short period of time or, instead of this, the trade of the Administration’s shares in favour of private parties. It provided some exceptions, first relative to the services of general interest, and, secondly, to particular cases for which the state-owned company model was judged absolutely necessary by the AGCM’s economic analysis.

On the other hand, the same article (clause 8) referred to the *in house* instrumental companies, establishing new limits to their development and action.

The contradiction between a dissolution imposition and, even though reduced, the permanent action of the *in house* companies, was easy to perceive.

Indeed, among other examples of a lack of clarity in the legislative’s words, due to the amendments enacted during the Parliament’s examination, it was not clear whether the mandatory dissolution of the companies was expected to affect the *in house* companies. Indeed, it seemed that clause 8, specifically related to the *in house* pattern, also assumed a separate treatment of these enterprises, in order to allow them to keep their position in the system and avoid dissolution.

After months of uncertainty, the Constitutional Court’s verdict once again solved part of the problem, first of all holding that the instrumental companies’ dissolution would not involve the Regions’ companies, protected by the Regional constitutional autonomy, secondly, that clause 8 should be considered as a separate matter, in order to ensure at least the *in house* companies entrusted with the public services supply 15.

Then, the Administrative Court, especially the “Corte dei conti”, seemed to confirm the non-involvement of the *in house* companies in the dissolution rule imposed by article 4, clause 1. Several reasons were given to support this solution:

(i) first, the need to be consistent with the result of the referendum, avoiding the assessment of a different regulation between the *in house* public services and *in house* instrumental companies, for it would have been difficult to justify;

(ii) secondly, the consistency with decree No. 223/2006, whose article 13 had obliged the instrumental companies to concentrate their activity in the Administration’s interest, excluding a total ban on them and giving them legitimacy in the system;

(iii) thirdly, the necessary deference to European principles, which do not exclude the creation and development of state-owned companies, nor tend to limit the *in house* phenomenon 16.

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15 Constitutional Court, No. 229/2013.

Finally, article 4, decree No. 95/2012, was abrogated by law No. 147/2013, clause 562.

12. CONCLUSIONS

Following this course which started more than six years ago, the in house company seems to be getting back into the starting position. The in house principle is a ruling in compliance with the system and one of the valid solutions for the Administration, both for arranging the services of general economic interest and for organising instrumental services. When the assignment complies with the in house criteria it is not necessary to announce a public tender or to call for the market players. The public tender is indeed absorbed by an internal management of the services. It is a solution that stands exclusively on the Administration’s side and is therefore far from the public procurement matter.

On the other side of the issue stands the goal of the privatisation of the local services, which is a political and national tool that has remained inevitably unachievable. When the legislative did its best to privatisé and the AGCM seemed willing to support the goal, the referendum and the will of the people set out an apparently definitive obstacle. Of course, to exactly define the duration of the effect of the referendum, especially if compared with a wider perspective of privatising public assets, is a different matter that might come back into the fore in the near future.

Finally, this story is a very interesting overview of the Italian system, both for the legal matters and the politics.

In this scenario we have, first of all, the complexity of Italian segmented laws, worsened by outmoded parliamentary rules and affected by huge last minute amendments, which inevitably trigger doubts and uncertainty. Secondly, we may underline the AGCM’s role and talent. The AGCM has proved to be, if not the sole, one of the few Italian Institutions capable of dealing with economic matters and supporting economic reform even beyond the specific role provided by European regulation No. 1/2003 and the specific antitrust mission. Thirdly, both the AGCM’s essential support and the crucial role played by the Courts – the Constitutional Court and Administrative Courts in particular – highlights the weakness of Italian politics. Even though the issue discussed before was affected by an unexpected event (i.e. the referendum), all the steps which have filled in the scenario demonstrate how difficult it has been for Parliament and Government to introducing and implement a reform aimed at privatising a crucial sector of the Italian economy.

It is a wide problem perceivable in various matters and it could explain the reason why the debate over constitutional reform in Italy stays in the fore as one of the main goals of the Italian Institutions, needed to enhance checks and balance in the system and free the Courts from too cumbersome a task in order to fix the regulations and assess political principles.
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