Essentials of the Laws of the Belt and Road Countries

Italy, Spain, Turkey

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Introduction to the International Academy of the Belt and Road

Founded in January 2016, the International Academy of the Belt and Road (IABR) is the first research institution concerning the Belt and Road Initiative in Hong Kong, China, and is committed to setting up an international platform for academic and professional communication. Experts of countries along the Belt and Road from various areas, such as law, economics, finance, investment, politics and international relations, are invited to share their views and conduct research on relevant issues in the implementation of the Belt and Road Initiative. The IABR has held several international forums on the Belt and Road, and compiled Essentials of the Laws of the Belt and Road Countries series and *Dispute Resolution Mechanism for the Belt and Road Initiative*. The IABR aims at providing expert services to corporations and institutions involved in the Belt and Road Initiative.

Professor Guiguo Wang serves as the President of the Academy, while Dr Alan Yuk-Lun Lee and Dr Priscilla Mei-Fun Leung serve as Vice Presidents. The IABR has an International Advisory Board with 26 experts and scholars, 42 fellows and 7 associate fellows from all over the world. The IABR endeavours to contribute to education and training of specialists so that Hong Kong could take full advantage of its unique position to develop international economy and keep world peace.

Dr Priscilla Mei-Fun Leung has taught at the School of Law, City University of Hong Kong for 24 years and is specialised in Chinese Law, Hong Kong Basic Law and conflicts of law amongst the Chinese mainland, Hong Kong and Taiwan.

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Dr Leung has published different articles and books on the above areas both in English and Chinese, including the China Law Reports series (in English), the China International Economic and Trade Arbitration Commission Awards series (in English) and *Hong Kong Basic Law: Hybrid of Chinese Law and Common Law* (published in 2007 in English). Her publications also include *Comparative Studies of Family Law between Chinese Mainland, Taiwan and Hong Kong* published by the Joint Publishing House in June 2003 (in Chinese) and *Legal Reform of China* (co-ed.) in 1994.

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Introduction

The modern Italian legal system was born when Italy was unified in 1861. It was then a monarchy, but soon after the Second World War Italy was transformed into a republic and a constitution enacted. Despite its relative young age, the Italian legal system has very ancient Roman origins. It assumed its own unique character around the eleventh century, through the rediscovery of the ancient heritage of Roman law in Bologna by Irnerius and by the School of Glossators. Their first attempt was to restore the original text of Justinian's *Corpus Iuris Civilis.*

The Italian legal system is codified. In its modern meaning a code is not a mere collection of laws but a complete and readily intelligible systematic statement of the existing law. Influenced by the French Revolution (1789) and the French Civil Code (1804), and after the Italian Unification (1861), the first civil code was enacted in 1865.

At the crossroads of the nineteenth and twentieth centuries, Italian scholars were fascinated by Pandectists' thoughts, developed in Germany since the first half of the nineteenth century culminating in the German Civil Code (BGB), which entered into force into 1900. The German Civil Code supplied the Italian legal scholars with the apparatus of legal concepts and expressions which they used and are still using to draw "general theory" of private law and its principles relating to legal subjects or persons, things or property and real rights, acts in law, private autonomy in constituting freely legal relationships and acts.

The German influence is well reflected in the new Italian Civil Code of 1942, which is still in force. It is a perfect fusion between the French and the German civil codes, with a great originality. The new Code put into practice the questioned idea of merging legislation concerning civil matters and those concerning commercial ones, founding the discipline of every economic activity on the concepts of "entrepreneur" and "enterprise". As a consequence, the old Commercial Code was

repealed in 1942 and its content was included in the Civil Code (Book five).①

Against this background, it should be pointed out that the more recent developments show the heavy influence on legal rules of European Union Law and international agreements. An effort has been made to take account of these developments, which can sometimes transform the traditional rules in a radical way.

① For a general overview, see A. Miranda, *A Short Introduction to the Italian Legal System, Historical Background and Modern Legal Thought*, Vol. 1 (Torino, 2014).

cooperative company with limited liability.

Moreover, a cooperative bank may take the form of a cooperative bank or a credit cooperative bank. In the first, capital must necessarily be divided into shares and must adopt a limited liability regime.

It is worth remembering that the second paragraph of Article 28 of the Consolidated Law on Banking states that "cooperative banks and credit cooperative banks do not apply controls on cooperative companies provided by the Civil Code". For this reason both cooperative banks and credit cooperative banks come under the exclusive supervision of the Bank of Italy.

Cooperative banks must provide credit facilities to small and medium-sized commercial and industrial enterprises. The Consolidated Law on Banking provides for the application to cooperative banks of rules which are applicable to cooperative societies.

Unlike cooperative banks, a credit cooperative bank provides credit facilities primarily to its shareholders.

A cooperative bank may turn into a joint-stock company or merge with other organisations in order to transform itself into a joint-stock company. In this case the cooperative bank must guarantee the right of withdrawal to all shareholders. A credit cooperative bank cannot transform itself into a joint-stock company, but may participate in mergers, which involve cooperative banks or joint-stock companies, with prior approval of the Bank of Italy, in the interest of creditors or for reasons of stability.

Chapter 5 Infrastructure

Erik Longo

This chapter concerns the regulation of infrastructures within the Italian legal system, providing a general overview of the rules on infrastructures and an analysis of transport by air, rail, road, and sea. It aims to present the general organisation of Italian rules on the construction and management of infrastructures and other related services; and to illustrate the main changes that took place in these sectors during the last 10 years. For the sake of clarity, this report depicts the framework legislation with brief reference to sectorial peculiarities. ①

5.1 Definitions

There is no single definition for infrastructures and the term generally conjures up large-scale man-made physical resources for public use. ② Infrastructure refers to networks and services for transport (by air, waterways, rail, and road), communications (by telegraph, post, and radio) and utilities (by grids or pipelines). From a legal point of view, infrastructure goes together with concepts such as "public works" or "public contract" or "public procurement", all being applicable to planning, building, and management of infrastructure.

Within the Italian legal system, the words infrastructure (*infrastrutture*) and public works (*oper epubbliche*) are by definition imperfect, since they are used in different statutes with different meanings and in different contexts. This complexity

① See further Davide Maresca, *Regulation of Infrastructure Markets: Legal Cases and Materials on Seaports, Railways and Airports* (Heidelberg: Springer, 2013). Gabriella M. Racca, "Public Contracts Annual Report-2012-Italy", *Ius Publicum Network Review*, 1 (2012), http://www.ius-publicum.com/repository/uploads/07_09_2012_11_04_RaccaEN.pdf. Antonio Carullo and Giovanni Iudica, *Commentario Breve Alla Legislazione Sugli Appalti Pubblici E Privati* (CEDAM, 2012). Angelo Mari, "Le Infrastrutture" in Sabino Cassese(ed.), *Trattato Di Diritto Amministrativo. Diritto Amministrativo Speciale* (Milano: Giuffrè, 2003), 1861.

② See for more: Gerold Ambrosius and Christian Henrich-Franke, *Integration of Infrastructures in Europe in Historical Comparison* (Heidelberg: Springer, 2016), 8-9.

has led scholars to suggest that it is impossible to make an orderly presentation of the subject.① There are now signs of a clearer distinction between the words infrastructure and public works, the former having a broader definition, and the latter a narrower one.② While the first represents a static thing, the second is the dynamic aspect of building a physical resource; together they represent an area of primary and secondary legislation, which is among the most economically and socially relevant to any nation.③

5.2 The implementation of EU law and the Public Works Code

Legislation on infrastructure appears fragmented in many laws, almost one for each type of major infrastructure. However, since the legislation on public works and infrastructure operates in the context of EU law, principles derived from EU directives represent the common denominator on these topics.④ Since the Seventies, with the implementation of the Council Directive 71/305, O. J. (L 395) 33(EEC), the Italian legislation has grounded rules on public works and infrastructure on two pillars: the definition of the activity to carry out; and the selection of the contractor from a tender process or a restricted procedure (public procurement).⑤

A process of harmonisation of systems has taken place in the EU, and legislation on infrastructure is quite similar among European Union members, at least in principle, facilitating capital investments from foreign investors. In Italy, and elsewhere, infrastructure can be delivered either by "public procurement" or through "public-private partnership".

The D. Lgs. 16 aprile 2006, n. 163, G. U. May 2, 2006, n. 100 (It.), the so-called "Public Works Code" (PWC), provides the general regulatory framework of

① Massimo Severo Giannini, "Punti Fermi in Tema Di Opere Pubbliche," (1986) Riv. trim. appalti 1 no. 19.

② See Angelo Mari, "Infrastrutture", in *Dizionario di Diritto Pubblico Diretto da Sabino Cassese* (Milano: Giuffrè, 2006), 3134.

③ The Council Directive 93/37, Art. 1, 1993 O. J. (L 199) 54(EC), defined a "work" as "the outcome of building or civil engineering works taken as a whole—e. g. a hospital, theatre or bridge—that is sufficient of itself to fulfil an economic and technical function, i. e. fully equipped and completed".

④ The principles of publicity, transparency and equal treatment.

⑤ A complete reconstruction of the European legislation can be found in Maresca, *Regulation of Infrastructure Markets: Legal Cases and Materials on Seaports, Railways and Airports*, 1-59.

public procurement regarding works, services and supplies.① It is applicable to the State, regional and local authorities (or associations formed by local authorities), and any other body governed by public law.

The PWC has been amended several times with corrective statutes.② To enforce its general dispositions, the PWC confers power to the government to issue a Regulation. In 2010, with the Decreto Presidente Repubblica [D. P. R.] 5 ottobre 2010, n. 207, G. U. Dec. 10, 2010, n. 288, the Italian government has set out the award and execution of public contracts and works aiming to improve Italian infrastructures, enhance market competition, simplify administrative procedures, and prevent criminal infiltration in public contracts.

The application of European rules in the field of infrastructure has induced Italian administration to change its approach to public contracts. European directives envisage a different balance between discretion and strict adherence to formal rules, administrators having more space for flexibility and ability to prevent the commission of bribery and other breaches of the criminal code. The PWC expresses this new balance in several ways, such as the principle of the economically most advantageous offer as opposed to that of the lowest price; gradual specification of the bid evaluation criteria; and discretionary assessment, including consultation with the tenderer. However, this discretionary approach leaves room for a huge number of administrative regulations in order to set up the rules of the single tender.

Another important thing to consider is the strict formalistic approach of Italian administrators, which has led normally to excluding tenderers even for a small mistake in the bid. A recent tendency of administrative courts is to ignore such trivial

① This delegated legislation implements European Parliament and Council Directives 2014/23, 2014 O. J. (L 94) 1, on the coordination of procedures for awarding of concession of contracts, 2014/24, 2014 O. J. (L 94) 65 (replacing the previous Directive 2004/18), on the coordination of procedures for awarding public works, supply and services contracts (the so-called Consolidated Public Sector Directive), and 2014/25, 2014 O. J. (L 94) 243 (replacing the previous Directive 2004/17), on coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors (Utilities Directive). The entire sector of public contract was ruled by the L. 11 febbraio 1994, n. 109, G. U. Feb. 19, 1994, n. 41.

② D. Lgs. 26 gennaio 2007, n. 6, G. U. Jan 31, 2007, n. 25 [It.]; D. Lgs. 31 luglio 2007, n. 113, G. U. Jul 31, 2007, n. 176 [It.]; D. Lgs. 11 settembre 2008, n. 152, G. U. Oct 2, 2008, n. 231 [It.]. The most part of the provision amending the PWC have been stimulated by infringement procedure of the European Commission. See Marcello Clarich, "The Rules on Public Contracts in Italy after the Code of Public Contracts", (2013) *Italian Journal of Public Law* [*IJPL*] 5 no. 1, 45.

errors. ①

5.3 The "making" of infrastructure

We now set out the general rules a public authority must follow in planning, building and managing an infrastructure. The main part of these rules is found in the PWC, which are supplemented by other sector-specific or ad hoc laws.

Under the umbrella of EU legislation, national, regional, and local entities must collaborate in order to plan, build, and manage an infrastructure. However, the integration among different bodies is normally a difficult task with consequences for long-term strategies and investments. As a consequence, decisions of administrative justices play a relevant role in solving problems over competences and financial issues among the institutions involved in the decision-making process. A way to overcome such issues is normally the enactment of ad hoc laws,② which create specific procedures for infrastructural interventions, or the empowerment of a "stakeholder conference" (*conferenza dei servizi*) in order to accelerate and simplify particularly complex administrative procedures that require the approval of different public administrations representing diverse public interests. ③

5.3.1 Public procurement: tenders and procedures

The PWC is applicable to public procurements relating to several "special fields" (i.e., gas, thermal energy, water, transport, mail services and exploitation of geographical areas) as well as to public procurements relating to "ordinary fields" (i.e., any matter other than special matters as described above). With reference to the ordinary fields, the PWC provides different regulations depending on the value of the relevant procurement. In particular, public procurements having a value below the following thresholds are subject to a simplified procedure (which includes, among others, an easier framework for the advertising of the call for tenders and reduced procedural terms):

① Marcello Clarich, "The Rules on Public Contracts in Italy after the Code of Public Contracts", (2013) *Italian Journal of Public Law* [IJPL] 5 no., 52.

② The most important example of this attitude is the Legge [L.] 21 dicembre 2001, n. 443, G. U. Dec 27, 2001, n. 299, [It.] the so-called 'Target law' (leggeobiettivo), aiming to finance major strategic infrastructures in Italy for the years 2001—2013.

③ See Art. 14, L. 7 agosto 1990, n. 241, G. U. Aug. 18, 1990, n. 192 [It.]. The stakeholders' conference is open also to private parties under certain rules and circumstances.

- 137,000 euro for public supply and service contracts other than research and development services awarded by central government authorities.
- 211,000 euro for any other supply and service contract.
- 5,278,000 euro for public works contracts. ①

For procedures above these levels, contracting authorities must, before advertising for tenders nationally, dispatch notices to the European Commission by electronic means, using the format and methods specified in Annex X to the PWC. ② In theory, an operator who is specialised in one EU country can join the competition (increasing competition among European players being the aim) in the other European countries on the ground of the freedom of movement and freedom of establishment. The major barrier, though, is represented by sectorial and local specific provisions, which are sometimes far different from the practice in other countries, requiring legal, economic, and technical knowledge.

The PWC is also applicable in the fields of defence and security (i.e., the supply of weapons, ammunitions, military equipment, sensitive equipment and relevant services) only as far as they are not otherwise regulated by D. Lgs. 15 novembre 2011, n. 208, G. U. Dec. 12, 2011, n. 292 [It.], which has implemented in Italy the European Parliament and Council Directive 2009/81, 2009 O.J. (L 216) 76.

Contracting authorities can use several types of contracts to carry out an infrastructure. Firstly, they can use the so-called "direct administration", which is a procedure applicable for sums not exceeding 50,000 euro, where works are carried out with the administration's own resources with no recourse to the market. Secondly, administrations can outsource to third parties the construction of infrastructures. ③ In this case, the administration can award the public work using a large variety of contracts. According to the PWC the administration can choose from among three main procedures: ④

① Cf. Art. 28 of the PWC. The rules to be followed in works below the threshold are in Articles 121-125.

② See Art. 66 of the PWC.

③ There are two other regimes applicable to the selection of contract: one for "strategic infrastructures", aimed at giving high priority to these projects; the other, introduced by L. 28 gennaio 2009, n. 2 for projects within the National Strategic Framework.

④ See Arts. 53-62 of the PWC. In addition, the administration can use the "Competitive dialogue" and the "Design competition".

a. Open procedure (*procedura aperta*). The administration advertises a call for tender containing an accurate description of the subject of the contract, pursuant to which interested parties present their offers. Whether they satisfy the requirements of the tender would be determined when the bids are assessed.

b. Restricted procedure (*procedura ristretta*). This procedure allows the administration to identify the enterprises to invite to make an offer on the basis of predetermined objectives and non-discriminatory criteria. A key rule concerns adjudication. Both procedures can use either the rule of the "lowest price" or the "economically most advantageous offer" criterion. ①

c. Negotiated procedure (*procedura negoziata*). This procedure is marked by a significant discretion that the administration wields. In this case the administration gains the power to consult their chosen economic partners and negotiate the conditions of the contract with one or more of them. As a consequence, this procedure represents an exception, being admissible only when specific conditions apply (chiefly lack of time or scarcity of offers).

On the ground of the above rules, a public authority that is entitled or responsible to deliver an infrastructure can launch a tender, and use public funds for the construction and maintenance of an infrastructure and its related services.

This is the most common framework used in Italy, where public procurement has been predominant as a way to deliver infrastructure. Specific articles dedicated to general contractors within the PWC have incentivised this tendency. It is important to remember that tender procedures apply to both public procurement (PP) and public private partnership (PPP) contracts, which are considered below. The best offer remains the rule to follow, even in the case of a private initiative, when the idea and the preliminary design are provided by private parties. In general, any feasibility study envisages a "Value for Money Analysis" in comparing the efficacy of PP and PPP, to determine which option is more suitable.

5.3.2 The public private partnerships

By definition PPPs are collaborations between administrations and private firms that aim at providing infrastructure and services traditionally delivered by the public

① By the first criterion the lowest price is awarded the contract; by the second, in addition to the price, the administration must also assess other parameters specified in the call for tender (e. g. the quality of the work, the resources used, the time for completion, etc.).

sector. PPPs widen the scope for the involvement of private entities in the management of infrastructure, creating a long-lasting public-private collaboration.

The use of PPPs to deliver public infrastructure in Italy is quite a recent practice, starting in the early 1990s with the construction of the TAV railroad (*Treno Alta Velocità*). ① In Italy there is no specific legislation on PPPs. A large volume of laws concerning this practice in different sectors has been issued over the last 20 years to introduce public-private partnership schemes similar to those prevalent in the UK, and to fine-tune and harmonise them with the existent legislation in accordance with European Directives. ② Art. 3, para. 15*ter* of the PWC defines PPP as a contract between a contracting authority and one or more operators aimed at the execution of works and the supply of services. The public-law aspects of PPPs (namely the procedure for awarding the contract) govern the PWC, while civil laws govern the bulk of relationships between administration, contractors, sponsors, and other private parties.

For this reason, the Italian legislation does not provide a standard procedure for PPP project appraisal and prioritization. This raises an issue as infrastructure is designed, approved and managed locally but funded by the central State. This often gives rise to a mismatch between design and delivery of infrastructure, as tenders can be launched but unfunded because of different priorities of local and central authorities.

A project can be proposed by government's authorities, local authorities and even by a private initiative where a public interest is recognised. The proposal made by private investors can be accepted and used as a pilot to launch a tender for a specific infrastructure.

Looking at the procedure, the public administration is involved with different structures and levels of responsibility in the assessment and development of PPPs. In particular, at the pre-tender stage, the PPP-supporting unit, the UFP, is involved in the project approval, by verifying and establishing the feasibility of the project. After approval, the tendering procedure is generally managed by a dedicated administrative

① Sergio Massimiliano Sambri, *Project Financing. La Finanza Di Progetto Per La Realizzazione Di Opere Pubbliche*, vol. 3 (Padova: CEDAM, 2013), 5.

② Sandro Amorosino, "La Finanza Di Profetto Nel Quadro Del Partenariato Pubblico-Privato: Profili Introduttivi" in Mariani, Menaldi, and Associati (eds.), *Il Project Financing: Analisi Giuridica, Economico-Finanziaria, Tecnica, Tributaria, Bancaria, Assicurativa.*

task force. After signing the PPP contract, the responsibility for the contract management is usually assigned to a specific team, created by either national or local administration. Furthermore, the supervision of the contract is delegated to a central government unit, presently the National Anti-Corruption Authority (see below).

Since the PPP procedure is different from other procedures of awarding contracts, the payment mechanism follows different rules. Because of European rules, it is possible to distinguish between "hot" and "cold" assets. The first is used to indicate self-liquidating works, in which the private partner will recover his costs and profits by providing the service, such as by collecting road tolls. Cold assets require public authority to pay the private partner for the service provided. As a consequence of this distinction, for the bulk of infrastructure we now use the adjective "warm", to indicate the mix of public-private revenue mechanism used for financing infrastructure. ①

Depending on the arrangement structure, the PWC allows both contractual PPPs (concessions, sponsoring, and financial lease) and institutional PPPs (companies owned by both administrations and private parties). ② The latter is normally used for complex infrastructures. Based on this distinction in the Italian legislation it is possible to distinguish between three main types of PPPs:

(a) Public works concession. There are two main procedures in a concession. Firstly, the "work concession under public initiative" (Art. 144 PWC) whereby the administration invites tenders to a restricted/open procedure on the basis of a preliminary draft, a business plan, and a concession contract. Here the administration evaluates the received bids applying the rule of the most economically advantageous tender. Secondly, the work concession under private initiative (Art. 153 PWC) whereby the project is designed and presented by a promoter on the basis of a Prior Information Notice (PIN) made by the administration. After the selection of the best proposal, the administration puts out the promoter's proposal to tender and identifies a concessionaire. Under PWC's and sectorial rules, PPP schemes applicable for work concessions are Build-Operate-Transfer (BOT), Design-Build-Operate-Transfer (DBOT), Design-Build-Finance-Operate (DBFO), Design-Build-Finance (DBF, defined General Contractor [GC] scheme, where GC is also involved in the search for funding).

(b) Service concession. While these contracts are of the same nature as public services contracts, the provision of services consists solely of the right to manage and exploit the services (Art. 30 PWC). In this case the PWC provides for an awarding procedure inviting at least five private parties.

(c) Other forms of PPPs. In this third residual category are the other forms of PPPs, which are governed by specific sectorial provisions. These schemes are based on the incorporation of joint private-public companies.

① Laura Martiniello, *Italian Ppp at a Glance* (Rome: UTFP, 2008).

② For recent examples using this type of intervention, see Nunzia Carbonara and Roberta Pellegrino, "Ppp for Public Infrastructure in Italy: Opportunity and Challenges", (2014), *Managerial Finance*, 40 no. 11, 1084.

5.3.3 Recent regulatory changes to promote PPPs

During the last five years, the Italian government has introduced several financial stabilisation measures to promote the growth of PPPs. In particular, while implementing the austerity doctrine of the European Union, five acts signalled the strong effort of the government to attract foreign capital. Indeed, to foster investment, specific legislative measures were introduced to simplify procedures, to provide information transparency and to correct imperfections in the PPP legislative framework.

The Decreto Legge[D. L.] 70/2011, converted into L. 12 luglio 2011, n. 106, G. U. Jul 12, 2011, n. 160 [It.], enlarges the possibility to activate projects not contemplated in the three-year programmed planning issued by single administrations.

The D. L. 201/2011, converted into L. 22 dicembre 2011, n. 214, G. U Dec 27, 2011, n. 300 [It.], shortens the proceedings applicable to the approval of works of strategic interests by the inter-ministerial Committee for Economic Planning (CIPE) by indicating that the relevant assessment must be made on the basis of a preliminary design and by allowing a relatively short period of time for the subsequent approval of the final design.

The D. L. 1/2012, converted into L. 24 marzo 2012, n. 27, G. U Mar 24, 2012, n. 71 [It.], concerning urgent measures on competition, infrastructure, development and competitiveness introduces a streamlined procurement process including an ad hoc contract to procure infrastructure assets (*contratto di disponibilità*), a new form of PPP, as well as the ability for project companies to issue bonds to finance infrastructure projects. Moreover, this statute has set out incentives to use PPP in several sectors, such as tourism, jail infrastructures, and has

amended the discipline on the emission of project bonds.

The D. L. 83/2012, converted into L. 7 agosto 2012, n. 134, G. U. Aug. 11, 2012, n. 187 [It.], sets out measures devoted at favouring the construction of roads, railways, and ports with the use of PPPs. It introduces a favourable tax regime in order to promote the placement of project bonds and a total exemption for investors with residence in white list countries. Moreover, this act opens up the possibility of special-purpose vehicles (SPVs) engaged in infrastructure funding programs to acquire private resources through the issue of securities with a tax regime similar to those for government bonds for a period of three years after the law has been approved.

D. L. 69/2013, converted into L. 9 agosto 2013, n. 98, G. U. Jun. 21, 2013, n. 144 [It.], has amended the PWC to stimulate the participation of private parties (e. g. banks) in financing activities, and reformed the rules on strategic infrastructures.

D. L. 19 giugno 2015, n. 78, converted into L. 6 agosto 2015, n. 125, G. U. Aug 14, 2015, n. 188 [It.] incentives the use of PPPs in the area of hospitals.

5.4 Legislative powers

With regard to institutional factors, it is necessary to bear in mind that for more than a century after the unification of Italy, primary and secondary legislation on infrastructure has been only a matter of state competence. With the Constitution of 1948 and its implementation, the process of regionalisation/devolution has recognised some competences to regions and local authorities. With the sign of the Treaties the creating European Community and then the European Union, Italy has devolved competences on regulation of economic activities to European institutions. The EU membership has produced another important consequence: state legislature has conceded many regulatory powers to independent authorities; some of these authorities have also powers to perform investigations and audit, and some are authorised to fine firms and order them to take certain measures. Therefore, rules on infrastructure now stem from different sources: EU, the State, regions, independent authorities, and local governments.

5.4.1 Distribution of legislative powers among the State, regions and local authorities

The Italian Constitution recognises the State and regions as the only Italian

authorities with legislative power. The other authorities only have powers to issue regulations in the exercise of powers delegated by national or regional authorities. Art. 117 (2) of the Italian Constitution (amended in 2001) gives to the State legislative powers on general aspects of the legal system, such as civil, criminal, civil procedure and criminal procedure codes. This provides national uniformity on a core of matters related to the construction, maintenance and management of infrastructures. According to Art. 117 (3) of the Italian Constitution, regions have powers listed in a specific list of matters and specifically on "governance of territory", "civil ports and airports", "major transportation and navigation networks", "regulation of communications", and "production, transport and national distribution of energy".① All these competences authorise regions to participate in the making of rules on infrastructure and public works. However, in the last 15 years the Constitutional Court has weakened the interpretation of these clauses of regional competence, marginalizing the role of regions in the field of public works. The Court yielded to State legislature, giving more importance to powers on civil and criminal law, on "protection of competition", and on constitutional mechanisms devoted to assuring national unity, notwithstanding the other constitutional provisions that favour regional autonomy. In particular the Court allowed the State to assume the powers which were exercised previously by the regions in order to assure respect of European obligations and to protect economic unity, with greater vigour, at the peak of the economic and financial crisis.② As a consequence, regions have a significant role only within the framework of State legislation on the construction and maintenance of infrastructure. A fine example of this scheme lies in Art. 4 of the PWC, which declares that "the regions and the autonomous provinces of Trento and Bolzano shall exercise their legislative powers out of respect for the constraints deriving from EU legislation and matters listed in exclusive, legislative competences of the State".

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① Louis Del Duca and Patrick Del Duca, "Emergence of the Italian Unitary Constitutional: System, Modified by Supranational Norms and Italian Regionalism" in Daniel Halberstam and Mathias Reimann (eds.), *Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems* (New York: Springer, 2014).

② Tania Groppi, Irene Spigno, and Nicola Vizioli, "The Constitutional Consequences of the Financial Crisis in Italy" in Xenophon Contiades (ed.), *Constitutions in the Global Financial Crisis* (Farnham: Ashgate, 2013).

As for powers of local authorities, the Constitution gives them only administrative powers delegated by the State and the regions, especially on planning concerning investments and services.

The puzzle of powers on infrastructure has been considered the main obstacle to the proper functioning of tendering procedures and a serious limitation for attracting foreign investments. Therefore, the potential conflict of interests that may arise in the field of public works induced the "Ministry of Infrastructures and Transports"① to act as the leader also in planning concerning regional and local investments and services. As already mentioned, all these factors forced the State to issue specific laws to plan, finance, and regulate either a single project or a group of infrastructure projects of national interest, even if the space of the investments was limited to the territory of one single region.

5.4.2 Independent authorities

In addition to territorial entities, there are other independent regulatory agencies that are responsible for secondary legislation in some areas of public works and infrastructures, and administration. In the exercise of their power, authorities are fully independent from government, regulated businesses and infrastructure operators.

From a legislative point of view, these authorities have delegated powers to issue quasi-legislation on matters related to EU powers, such as market and other economic issues. Some of these authorities also have powers to perform investigations and audit, and some are authorised to fine the relevant parties and order certain measures.

The most important authority with powers on infrastructures today is the National Anti-Corruption Authority (ANAC). The L. 6 novembre 2012, n. 190, G. U. Nov. 13, 2012, n. 265 [It.], has identified, in the Italian context, the ANAC, and other institutions that are responsible to act collectively for the prevention and control of corruption and illegality in the public administration. The ANAC's mandates and functions were extended and reinforced by the L. 11 agosto 2014, n. 114, G. U. Aug. 18, 2014, n. 190, which, among other measures,

① After the reform of the D. Lgs. 30 luglio 1999, n. 300, G. U. Aug. 30, 1999, n. 203, in 2009 the name of the "Ministry of Public Works and Transports" has been changed to the "Ministry of Infrastructures and Transports."

provides for the dissolution of the Authority for the Supervision of Public Contracts (AVCP) and its organisational and functional integration with the ANAC.

D. L. 6 dicembre 2011, n. 201 converted, with amendments, into L. 22 dicembre 2011, n. 214, G. U. Dec. 27, 2011, n. 300 created the "Transport Regulation Authority".① The Authority is in charge of transport regulation, including access to infrastructure, service regime and, based on a more recent entrustment, passengers' rights across all transport segments including airports, railways, toll highways, ports, and public local transport.

It must be noted that all these authorities operate alongside the Italian antitrust authority (AGCM), which is in charge of ex post regulation of cases relating to every breach of rules on competition.

5.5 Remedies

Italian legislation on public contracts and works provides for judicial remedies depending on the object of the claim. Controversies regarding irregularity in procedures are settled in Regional Administrative Courts (*Tribunali Amministrativi Regionali*-TAR). Appeals against decisions of the regional administrative courts must be brought before the Council of State (*Consiglio di Stato*).② Any other dispute between the parties arising out of a public contract (including, for example, any dispute as to its validity, enforceability, interpretation, performance and termination) should be filed before an ordinary judge who has territorial competence.

5.6 Specific areas

In addition to general legislation, such as the PWC, each area is governed by specific and sectorial rules concerning public procurement and carrying out of infrastructures. Here are listed only the most relevant laws governing each sector.

5.6.1 Toll roads

Italian toll roads are governed by the so-called "concession scheme". In general, a concession is a kind of public-private partnership under which a public

① The Authority became fully operational on Jan. 15, 2014.

② Rule on the administrative due process are now included in the D. Lgs. 2 luglio 2010, n. 104, G. U. Jul. 7, 2010, n. 156[It.], the so-called "Code of Administrative Due Process".

authority (*autorità concedente*) grants specific long-term rights to a private or joint public-private party (*concessionario*) to construct, overhaul, maintain, and operate an infrastructure. Concessions are governed by primary and secondary legislation, by directives from the CIPE, and by the concession's contract. Today the general framework of rules on concessions is set out in the L. 3 ottobre 2006, n. 286, G. U. Nov. 28, 2006, n. 277.

5.6.2 Railways

Italy has suffered for many years from a lack of economic competition among public and private firms in railways. This sector has been considered a matter of national interest and a national monopoly. Therefore, rail services have been carried out as a monopoly by a state-owned company (*Ferrovie dell ostato*). It is not without difficulties and challenges that Italy has implemented European Directives designed to encourage competitiveness and market opening. ① The last EU Parliament and Council Directive 2012/34, 2012 O. J. (L 343), establishing a Single European Railway Area (Recast) has been transposed by the D. Lgs. 15 luglio 2015, n. 112, G. U. Jul 24, 2015, n. 170.

5.6.3 Airports

Special laws govern airports, too. Yet, here the pillars of legislation are provided by the Italian Navigation Code, approved by the Royal Decree [R. D.] Mar. 30, 1942, n. 327 [It.] as recently amended by D. Lgs. 9 May 2005, n. 96 and D. Lgs. 15 March 2006, n. 151. According to Arts. 705 and 706 of the Code, construction and management of airports is awarded to concessionaires whose tasks are administering and managing, in accordance with criteria of transparency and non-discrimination, the airport infrastructure, as well as coordinating and controlling the activities of the various private operators in the airport.

In the field of airports, the D. Lgs. 25 luglio 1997, n. 250, in G. U. Jul 31, 1997, n. 177 [It.] established the Italian Civil Aviation Authority (ENAC) as the national authority tasked with overseeing technical regulation, surveillance, and control of the civil aviation field. All concessionaires are subject to verification for the purposes of certification issued by the ENAC, in accordance with the rules for constructing and running airports.

① Council Directives 2001/12, 2001/13 e 2001/14, 2001 O. J. (L 75) 25-130.

5.6.4 Ports

L. 28 gennaio 1994, n. 84, G. U. Feb 4, 1994, n. 28 [It.] regulates organisation, functioning and regulation of ports. This legislation adapted rules on ports to the European principles of freedom of competition and prevented the creation of a dominant position in the relevant market thus illegitimately abusing, or being able to abuse, such position with detriment to other competitors. Moreover, the law set forth rules for reclassification of ports. In particular, Art. 4 modified the old criteria of classification of ports based merely on the volume of traffic of each of the last three years with another classification based on two main categories: (a) ports or specific port areas dedicated to military or national safety functions; (b) ports dedicated to commercial purposes as well as to serve industrial and petroleum activities, passengers traffic, fishing industry, pleasure and tourism yachting.

5.6.5 Environmental protection

Environmental policy and regulations are mainly covered by D. Lgs. 3 aprile 2006, n. 152, G. U. Apr. 14, 2006, n. 88, the so-called "Environmental Code". This act implements and enforces the bulk of Directives on environmental protection issued by the European Community and now the European Union since 1970s. All territorial entities (state, regions, and local authorities) must follow the Environmental Code.

5.7 Follow-ups

The L. 28 gennaio 2016, n. 11, G. U. Jan. 29, 2016, n. 23 [It.] gives power to the government to implement the European Parliament and Council Directives 2014/23, 2014/24, and 2014/25, 2014 O. J. (L 94) 1-374 on public procurement and the award of concession contracts. The law sets forth the guidelines and the steps for the implementation of the new EU Directives. By Apr. 18, 2016, a first legislative decree shall be approved to implement the new EU Directives and identify the parts of the Code in force, which are not in compliance with them. Within Jul. 31, 2016, the implementation process shall be completed though the approval of a second D. Lgs. aimed at reorganising the entire sector of the public procurements and concessions with a new code. The new Code will (a) abrogate the PWC and the regulation in force, (b) contain the provisions of the first decree, and (c) supplement the first decree though a more detailed regulation of specific aspects of

the new EU Directives. Following the approval of the new Code, the ANAC, in accordance with the Ministry of Infrastructures and Transports, will adopt general guidelines in order to regulate aspects not directly subjected to legislation.

Chapter 6 Management and Treatment of Labour

Filippo Olivelli

6.1 The sources and the labour market

Italian legislation concerning labour law takes into consideration the precepts of the Constitution, according to which Italy is a democratic republic founded on labour (Art. 1 of the Constitution), recognises the right of all citizens to work (Art. 4, para. 1 Const.) and, in order to make this more effective, the Constitution requires the Republic to remove economic and social obstacles that prevent the effective participation of all workers in the political, economic and social organisation of the country (Art. 3, para. 2 Const.).

As a result of Italy surrendering part of its sovereignty to the European Union, other sources of international character operate in Italy; from this point of view is of special importance the Treaty on the Functioning of the EU, which itself in terms of Art. 151 (ex Art. 136 TEC) aims at: the promotion of employment, improved living and working conditions, proper social protection, social dialogue, development of human resources and the fight to marginalisation.

To realise these objectives, in 2010 the EU launched its Europe 2020 Strategy, with the aim of raising the rate of employment rate, increasing investments in research and development, reducing the rate of early school leaving, reducing the number of people in poverty and achieving other more technical or engineering objectives.

The national sources and the international precepts complement each other and make the discipline of the Italian labour law a very complex articulation of public, private and collective elements.

This complexity is well represented by the discipline inherent in the organisation of the labour market, meaning the particular phase in which there is a meeting of the demand and supply of labour generating active policies of labour.