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## Summary

The paper was study is aimed at giving an overview of the evolution of the self-regulatory mechanisms in Italy.

A brief overview of the Italian system of sources of law show that the model of the sources of law rooted in the Italian constitution is typically positivistic and centred on the pivotal role of the Parliament, the only body empowered to make legislation, either directly or by delegation of its normative powers to the Government, within expressly specified limits.

What space, if any, does exist for the self-regulatory rules?

If one of the most interesting aims of the research was to analyse to what extent the self-regulatory phenomenon is compatible with the undisputed Parliament's sovereignty and with the linked principle of rule of law, it should be clear that rules made by private actors (i.e. self-regulatory rules), which pretend to have external effects (binding *erga omnes*), can be considered as law and, as such, as sources of law, as long as they can be "incorporated" and recognized into some of the formal sources of Italian law. This seems the only possible and constitutional compatible interpretation of a phenomenon (such is self-regulation) which, instead, could potentially be able to put the formal hierarchy of sources of law in jeopardy.

On the other hand, the results of the study make clear that, even when the Parliament confers its normative powers to any other bodies (i.e. either independent administrative authorities or professional orders, or, more in general, any self-regulatory associations), it will unlikely give up fixing the limits within which those normative powers have to be exercised. Some authors actually consider this sort of "delegated legislation" as a mean for the State to reassert its sovereignty.

Anyway, this new pluralistic "architecture" will undoubtedly let the legislator to keep some exclusive duties: firstly and foremost, the power to prescribe the institutional conditions founding the «private self-regulatory governments'» basis, as well as the aims of their future normative action; secondly, to intervene in order to correct, if necessary, the new consensual rules.

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## I. Introduction

Italian legal scholarship rarely pays its attention to the self-regulatory mechanisms as a general issue. The debate usually focus on specific sectors where self-regulation is typically applied.

In recent years, however, the concept of self-regulation has generally attracted a good deal of attention. Professions, sports, advertising, internet, labour law, to give but a few examples, are regulated by self-regulatory bodies.

Despite this attention, self-regulation still remains a rather vague and elusive concept.

As Price and Verhulst pointed out: “*The initial problem of every approach to self-regulation pertains to definition and semantics. There is no single definition of self-regulation that is entirely satisfactory, nor should there be*”<sup>1</sup>: this is so mainly because it has developed for different reasons, in different circumstances and in different countries.

## II. The constitutional law dimension

This study is aimed at giving an overview of the self-regulatory mechanisms in Italy, firstly taking into account their position in the Italian Constitution.

The Constitution of 1948 is the basic law of Italian State, occupying the main place in the hierarchy of legal sources<sup>2</sup>. It consists of two parts, preceded by a section on fundamental principles. The two parts are concerned with the rights and duties of citizens and the structure of the Republic respectively. Shortly put, the first part deals with the civil, political, economic and social rights of citizens, while the second part concerns the mechanisms by which the State creates laws, governs the country, provides for resolution of disputes and polices the Constitution itself.

Generally speaking, the present Italian Constitution doesn't deal directly with self-regulatory mechanisms. Nevertheless, there can be found several constitutional provisions able to indirectly affect the recourse to self-regulation.

### II.1 Fundamental rights

As stated above, the first section of Italian Constitution deals with fundamental principles.

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<sup>1</sup> See PRICE, MONROE and VERHULST, In search of the self: charting the course of self-regulation on the Internet in a global environment, in MARSDEN, *Regulating the global information society*, Routledge, 2000, 58. On this point, see also BAGGOTT, *Regulatory reform in Britain: the changing face of self-regulation*, in *Public Administration*, 1989, 438. SHACKLETON, *Uk privatisation – US deregulation*, *Politics*, 1985, 2, considers self-regulation as a significant feature of regulation in Britain. More specifically, a number of reports and studies have confirmed that in several policy areas – such as the regulation of the professions, advertising and the press, to name a few – British policy makers have opted for a higher degree of self-regulation than their counterparts in other countries. As to Italian literature on self-regulation, see, among the others, CAFAGGI, *Crisi della statualità, pluralismo e modelli di autoregolamentazione*, in *Politica del diritto*, 2001, 345; ALVISI, *Pubblico e privato nei sistemi autoregolamentari. Il problema dei controlli sull'autonormazione nel settore della pubblicità commerciale*, in *Resp. comunicazione e impresa*, 1999, 463, who defines self-regulatory mechanisms as complex phenomena of self-regulation of private actors, as private legal orders able to replace, precede or complete statutes (“fenomeni complessi di autoregolamentazione dei privati ... veri e propri ordinamenti privati, che suppliscono, precedono e spesso sostituiscono o completano l'intervento del legislatore”).

<sup>2</sup> After it comes ordinary legislation, the codes being the main sources of this. Inferior to legislation, and incapable of modifying or abrogating it, are administrative acts. See below.

A very important question must be answered before analysing individual rights and their potential relationship with self-regulatory mechanisms: who is entitled to constitutional rights? Under art. 2 of Italian Constitution, “*the Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one’s personality finds expression*”.

It is thus clear that not only the individual, but also the “social groups” are entitled to constitutional rights.

The typical example of such a social group is the family, which is defined in art. 29 as a “*natural association founded on marriage*”, but local governments (art. 5)<sup>3</sup>, linguistic minorities (art. 6), trade unions (art. 39)<sup>4</sup>, and political parties (art. 49), are all mentioned as well. Constitutional rights do not only involve relationships between the individual and the State. There is also an intermediate tier (the social group) through which the individual realizes his or her constitutionally protected liberty.

Nevertheless, it’s fundamental – for the purpose of this study - to understand who is bound by rights afforded under the Constitution. Is it only the State (in the broad sense of all the public bodies<sup>5</sup>), or does this responsibility also extend to private corporations, where such corporations represent the so-called *poteri privati* or “private powers” (i.e. large corporations, political parties and, why not, self-regulatory bodies)?

The matter is highly controversial. With reference to freedom of speech, for example, the Constitutional Court has held that no entity, public or private, can abridge individual’s constitutional rights<sup>6</sup>.

In this framework, it is thus clear that “*social groups mentioned in art. 2 as possible beneficiaries of constitutional rights can also be perceived as potentially threatening to a person’s individual rights, and these groups are thus also bound by them*”<sup>7</sup>.

### **II.1.1 Civil Rights (Negative Rights) and Welfare Rights (Positive Rights)**

Part I of the Constitution is divided into four titles, dealing respectively with civil, ethical-social, economic and political relations<sup>8</sup>.

Civil rights - listed in arts. 13 to 28 - are also considered as *diritti negativi* or “negative rights”, because they prohibit the State from regulating or intervening in certain areas of private life.

Specifically, according to art. 18 of the Constitution, citizens have the right to associate freely, without any authorisation, for ends which are not forbidden to individuals by criminal law. The principle of freedom of association, closely linked to the concept of private auton-

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<sup>3</sup> See below.

<sup>4</sup> See below.

<sup>5</sup> For the concept of public bodies, see below.

<sup>6</sup> Corte Costituzionale, 9 luglio 1970, n. 122, in [www.giurcost.it](http://www.giurcost.it).

<sup>7</sup> See COMBA, *Constitutional law*, in LENA – MATTEI, *Introduction to Italian law*, Kluwer Law International, 2002, 36.

<sup>8</sup> In each case, the relations in question are those between the citizen and the State, thus illustrating the public law nature of these relationships.

omy, can be considered as one of the most important constitutional provisions able to promote and justify self-regulatory mechanisms<sup>9</sup>.

Freedom of association, as recognized by art. 18, has undoubtedly to be read in connection with the constitutional regulation of trade unions<sup>10</sup>. Agreements and organizations which uphold and regulate the rights of labour are thus promoted and favoured. Trade unions are free to organize themselves without restriction and without any pre-established legal model<sup>11</sup>.

The constitutional foundation of social (welfare) rights can be traced to art. 3, par. 2, stating that “it is the duty of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the effective participation in political, economic and social organizations within the country”. Welfare rights are thus considered a necessary instrument for the implementation of civil rights. The Republic is obligated to remove economic and social obstacles that may hinder citizens from fully enjoying civil rights like liberty and equality and the right to participate in those social organizations which are so crucial in the Italian Constitution’s idea of what “rights” are.

In this context, it must be reminded that, under art. 41, par. 1, private economic initiative is free. However, it cannot be exercised in such manner to damage safety, liberty and human dignity (art. 41, par. 2). Parliament is entitled to determine appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives (art. 41, par. 3).

The freedom of contract might also be taken into account as a fundamental principle able to justify self-regulatory mechanisms and to affect the Italian legal system’s capacity to adopt them.

Self-regulatory associations, in fact, can find their legal basis not only in the principle of freedom of association but also (since association can be undoubtedly defined as a contract – *contratto associativo*) in the principle of freedom of contract. As it will see below, Italian advertising self-regulatory code, for example, is binding for advertisers, agencies, consultants, all advertising media, and for anyone who has accepted the Code either directly or through membership in an association, or by underwriting an advertising contract (the clause of acceptance – *clausola di accettazione*). According to the prevailing Italian doctrine, moreover, the code and acceptance clause may be considered as contracts concluded in favour of third parties – *contratti a favore dei terzi* – *ex* art. 1411 Civil Code<sup>12</sup> (i.e. in favour of those including consumers who can be reached by advertising)<sup>13</sup>.

Nevertheless, the freedom of contract is not positively recognized as a general principle by the Italian Constitution of 1948. Some scholars argue that it is embodied in art. 2, while others

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<sup>9</sup> See par. II.1 of this study.

<sup>10</sup> Art. 35, par. 1: “The Republic protects work in all its forms and applications”; par. 3 of the same article: “It [The Republic] promotes and encourages international agreements and organisations whose aim is to assert and regulate labour rights”.

<sup>11</sup> As it will be remarked below, trade union freedom has been solemnly proclaimed as a fundamental principle of Italian industrial relations by art. 39 of the Constitution, declaring that “labour union organisation is free”.

<sup>12</sup> Art. 1411, par. 1, Civil Code: “A stipulation in favour of a third person is valid when the stipulator has an interest therein”.

<sup>13</sup> Notably, GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, Milano, 2003, 21.

refer to arts. 41 and 42 of the Constitution<sup>14</sup>. On the one hand, any restriction of the freedom of contract is regarded as the restriction of private enterprise. On the other hand, constitutional provisions, and the values protected thereby, work to limit the private autonomy to contract<sup>15</sup>.

*Last but not least*, it must be born in mind that, under art. 3, all citizens have equal social dignity and are equal before the law. Discrimination on grounds of sex, race, language, religion, political opinion, or social and personal condition is not permitted.

This means that the rights and duties which are described in Part I of the Constitution cannot be limited to any one or more classes within the community, nor can any class be excluded from their enjoyment.

## II.2 The principle of subsidiarity and the administrative decentralization

While the Republic is one and indivisible, it nevertheless recognizes and promotes local autonomy and decentralization (art. 5<sup>16</sup>). This latter disposition is a distinct departure from the centralizing tendencies of the fascist years and marks an early recognition of the merits of the so - called principle of subsidiarity (*principio di sussidiarietà*), according to which decisions should be taken at the level at which they are most pertinent<sup>17</sup>.

There can be two different interpretations of subsidiarity: vertical subsidiarity and horizontal subsidiarity<sup>18</sup>. The first deals with the distribution of powers among different levels of government and sovereignty: the EU, national states, regions and municipalities. Horizontal subsidiarity, on the other hand, deals with the responsibility and freedom of human beings as well as social and economic powers. It is thus a concept stating that governments should support individual and organised citizens in actions to the benefit of the general interest. Active citizens must take/get an equal position in the process of development, conducting and evaluating policy. Governments do not have the monopoly in setting the political and public agenda. Citizens should have an equal decisive position in it.

<sup>14</sup> See GAMBARO, *Freedom of contract and constitutional law in Italy*, in RABELLO & SARCEVIC (eds), *Freedom of contract and constitutional law*, Sacher Institute, Jerusalem (1998), 169.

<sup>15</sup> See again, MUSY and MONTI, *Contract law*, in LENA – MATTEI, *Introduction to Italian law*, cit., 247.

<sup>16</sup> Art. 5 of the Constitution: “The Republic, one and indivisible, recognises and promotes local autonomies; implements in those services which depend on the State the fullest measure of administrative decentralisation; accords the principles and methods of its legislation to the requirements of autonomy and decentralisation”.

<sup>17</sup> In general, on the principle of subsidiarity, see, among the others, D’ATENA, *Costituzione e principio di sussidiarietà*, in *Quad. cost.*, 2001, 13; RIDOLA, *Il principio di sussidiarietà e la forma di stato di democrazia pluralista*, in CERVATI – PANUNZIO – RIDOLA (a cura di), *Studi sulla riforma costituzionale*, Torino, 2001; POGGI, *Le autonomie funzionali “tra” sussidiarietà verticale e sussidiarietà orizzontale*, Milano, 2001; ALBANESE, *Il principio di sussidiarietà orizzontale: autonomia sociale e compiti pubblici*, in *Dir. Pubbl.*, 2002; MOSCARINI, *Competenza e sussidiarietà nel sistema delle fonti*, Padova, 2003, 13 ss.; MASSA PINTO, *Il principio di sussidiarietà: profili storici e costituzionali*, Napoli, 2003. More recently see CIMBALO – PEREZ (a cura di), *Federalismo, regionalismo e principio di sussidiarietà orizzontale: le azioni, le strutture, le regole della collaborazione con enti confessionali: atti del Convegno, Ravenna, 25-27 settembre 2003*, Torino, 2005.

<sup>18</sup> Notably POGGI, *Le autonomie funzionali “tra” sussidiarietà verticale e sussidiarietà orizzontale*, cit., 77, who considers the so-called “*autonomie funzionali*” (which can be translated as “functional autonomies”) as one of the most important applications of the principle of horizontal subsidiarity. The Chambers of Commerce are the most relevant examples of “*autonomie funzionali*”.

For the purpose of this study, it's important to pay a special attention to the so-called *principle of "horizontal" subsidiarity*<sup>19</sup>, regarded as a criterion operating in all those relationships between institutional and social entities of different levels, granting the preference to the lower level and legitimising the actions of higher entities only when their action is meant to enhance the inadequate capacity of the lower entities. In other words, it thus implies that society, in all its various forms (as a community of persons at the sub-state, state and international level), places itself at the service of the human being. The individual is thus considered as both a single entity of social expression and as being within a social pattern in which his or her personality can unfold.

In Italy, the "horizontal" extension of principle of subsidiarity was introduced by the comprehensive reform of Title V of the Constitution ("Regions, Provinces, Municipalities")<sup>20</sup>, which introduced important changes in the relations between different levels of government. More in particular, the present art. 118, par. 4 states that: "In accordance with the principle of subsidiarity, the State, Regions, Metropolitan Cities, Provinces and Municipalities shall support autonomous initiatives promoted by citizens, in individual or associated form, in order to carry out activities of general interest".

In this context, within the Italian Constitution as recently reformed, the principle of horizontal subsidiarity could undoubtedly be interpreted as the possibility to reallocate the decision-making power and delegate regulatory powers to private actors<sup>21</sup>.

### II.3 Sources of law and self-regulation. The concept of legislative delegation

A brief overview of the Italian system of sources of law is necessary in order to better understand the role and the position of self-regulatory mechanisms in the Italian legal order<sup>22</sup>.

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<sup>19</sup> The principle of subsidiarity constitutes the pivotal point around which revolves the entire process of devolution of government functions from the centre to the periphery. As far as the devolution of administrative functions and tasks from the central government to the peripheral entities of government is more specifically concerned, law. No. 59/1997 (the so-called "*Prima legge Bassanini*") has particularly contemplated that the exercise of public responsibilities falls by preference to the authorities that are closest to the citizens (see art. 4, par. 3, law No. 59/1997). It thus revolutionized the previously existent division of administrative powers between the State, the Regions, and local governmental entities (enti locali), devolving the majority of competencies to the lower levels, and retaining for the Government the crucial task of co-ordination and supervision.

<sup>20</sup> The Constitutional reform is known under the heading of "a federalist reform", with more normative powers transferred from the centre to the periphery and lesser interference of the national government on sub-national government activities. On the recent reform of Title V of the Italian Constitution, generally see, for example; PIZZETTI, *All'inizio della XIV legislatura: riforme da attuare, riforme da completare e riforme da fare. Il difficile cammino dell'innovazione ordinamentale e costituzionale in Italia*, in *Le Regioni*, 2001, 437; FALLON, *Modello e transizione nel nuovo titolo V della parte II della Costituzione* e CORPACI, *Revisione del titolo V della parte II della Costituzione e sistema amministrativo*, in *Le Regioni*, 2001, 1322; PIZZETTI, *Le nuove esigenze di governance in un sistema policentrico "esplosivo"*, in *Le Regioni tra riforma amministrativa e revisione costituzionale*. Atti dell'VIII Convegno Nazionale di studi regionali, Consiglio Regionale della Liguria, 25-26 gennaio 2002, 27.

<sup>21</sup> See CAFAGGI, *Modelli di governo, riforma dello stato sociale e ruolo del terzo settore*, Bologna, 2002, 25: "Il principio di sussidiarietà orizzontale comporta l'assunzione di responsabilità in capo ai soggetti privati senza tuttavia ridurre quella dei soggetti pubblici, definendo un sistema complementare, coerentemente, peraltro, con il dettato degli artt. 2 e 3 Cost. I due principi, quello del decentramento e quella della sussidiarietà orizzontale, sono destinati ad interagire. A ben vedere peraltro il tema dell'allocazione dei poteri normativi e gestionali tra pubblico e privato deve interpretarsi anche o forse soprattutto alla luce del principio di proporzionalità".

The Constitution of 1948 is the basic law of Italian State, occupying the main place in the hierarchy of legal sources, followed by statutes and regulations<sup>23</sup>.

A statute in conflict with the Constitution is invalid. A regulation in conflict with a statute is similarly invalid<sup>24</sup>. The invalidity operates differently in the two hypotheses. In the case of an unconstitutional statute, the Constitution itself gives the Constitutional Court the power to declare that it “ceases to have effect” (art. 136<sup>25</sup>), while for an illegal government administrative regulation, the Constitution is silent, and a determination of the rule’s validity is found in the machinery of the judicial control over administrative activity<sup>26</sup>.

Italian Constitution describes the organization of the Republic as centred on the Parliament, which is the only body empowered to make legislation (art. 70: “The legislative function is exercised collectively by both Houses”)<sup>27</sup>. Nevertheless, the legislator (Parliament) can entrust some of its normative powers to the Government, within expressly specified limits<sup>28</sup>. Under art. 76 Cost., in fact, legislative power may not be delegated to the government unless Parliament specifies principles and criteria of guidance, and only for limited time and well-specified subjects. Again, by virtue of art. 77, the government may not, without delegation from the Houses, issue decrees having the force of ordinary law.

*Decreti legislativi* are thus delegated legislation used in technically complex fields (taxation or procedural codes) where a sophisticated system of coordination is needed: the Parliament enacts a delegating law setting the main principles and the time required, and the Government issues the delegated decree.

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<sup>22</sup> For a more encompassing analysis of the Italian system of sources of law, see recently MODUGNO, *Appunti dalle lezioni sulle fonti del diritto*, Torino, 2002; CICONETTI, *Le fonti del diritto italiano*, Torino, 2002; MARTINES, *Fonti del diritto e giustizia costituzionale*, Tomo II, Milano, 2000. More recently see MODUGNO – CARNEVALE (a cura di), *Rilevanti novità in tema di fonti del diritto dopo la riforma del Titolo V della seconda parte della Costituzione*, Milano, Giuffrè, 2003.

<sup>23</sup> See art. 2 of the Provisions on the law in general (“Disposizioni sulla legge in generale”): “The enactment of statutes and the issue of governmental acts having the force of statutes are governed by constitutional laws”; art. 3, par.1: “The regulative power of the Government is governed by constitutional laws”. See art. 87 of Italian Constitution, which lists, among the several Presidential duties, the power to promulgate laws and issue decrees having force of law, as well as regulations.

<sup>24</sup> See also art. 4 of the Provisions on the law in general (“Disposizioni sulla legge in generale”): “Regulations cannot contain rules contrary to the provisions of statutes”.

<sup>25</sup> Under art. 136 Cost.: “When the court declares a law or an act with the force of law unconstitutional, the norm ceases to have effect from the day following the publication of the decision. The decision of the court is published and reported to parliament and to the regional councils involved for them to take appropriate measures in constitutional forms where necessary”.

<sup>26</sup> See COMBA, *Constitutional law*, in LENA, MATTEI, *Introduction to Italian law*, cit., 47.

<sup>27</sup> See, however, art. 117 Cost., as modified by Constitutional law no. 3/2001: “Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by european union law and international obligations”. The constitutional reform in 2001 modified art. 117 Cost., introducing the rule of residual legislative power to the Regions: it now lists the seventeen fields in which the State has exclusive legislative authority and another list of eighteen fields in which the State and Regions have concurrent authority. Any other field is subject to exclusive legislative power of Regions.

<sup>28</sup> For an exhaustive overview of the Constitutional Court’s judgments on the limits laid down by art. 76 Cost., see MALFATTI, *Rapporti tra deleghe legislative e delegificazione*, Torino, 1999, 35. Some Authors argue that there would not be any constitutional provisions which prohibit the legislator from delegating the normative functions to bodies different from Government. See G. DE MINICO, *Regole – Comando e consenso*, Torino, 2004, 17. In the Author’s opinion, independent administrative authorities would be entitled to exercise secondary normative powers (through regulations).

*Decreti legge*, on the other hand, are issued by the Government only in “exceptional cases of necessity and urgency”. They have to be immediately transmitted to Parliament, which can approve them in sixty days; otherwise, they lose effect as of the date of issue.

In addition to the above form of delegated legislation, statutes increasingly provide for the making of “codes of practice” (this is thus the so-called *delegated self-regulation*) which will have legal effect within the limits expressly specified by Parliament. This is the case, for instance, of Law No. 146 of 12 June 1990 which foresees that where a strike takes place in public essential services, minimum services shall be guaranteed, as agreed upon by the administration (or the enterprise that administers the essential service) and the union’s representation at the enterprise level (or the workers’ representatives where appropriate), through self-regulation codes (*codici di autoregolamentazione*). This is the case, again, of Law 27 June 1991, No. 220, which delegated the Consiglio Nazionale del notariato – National Council of Public notary – to adopt the notarial deontological rules. On the 29<sup>th</sup> July 1998, the *Garante per la protezione dei dati personali* (Privacy Authority) approved a code of conduct, in the exercise of the power expressly delegated by art. 25, Law 31 December 1996, No. 675 (now Legislative Decree No. 196/2003).

The model of the sources of law rooted in the Italian Constitution, as mentioned above, is typically positivistic and centred on the pivotal role of the Parliament.

For the purposes of this study, it will be interesting to analyse to what extent self-regulatory phenomenon is compatible with the Parliament’s sovereignty and with the linked principle of rule of law (*principio di legalità*<sup>29</sup>). According to this brief overview (but the matter will be better discussed in the sectorial analysis), it should be clear that rules made by private actors (i.e. self-regulatory rules) that pretend to have external effects (binding *erga omnes*) can be considered as law (and, as such, as sources of law), as long as they can be “incorporated” into some of the formal sources of Italian law<sup>30</sup>.

In this context, it can be briefly recalled some Authors’ theories, such as Santi Romano’s<sup>31</sup>, supporting pluralistic approaches of law (*teoria della pluralità degli ordinamenti giuridici*)

<sup>29</sup> On the “principio di legalità”, see, among the others, RESCIGNO, *Sul principio di legalità*, in *Dir. pubbl.*, 1995, 247 ss.; SORRENTINO, *Lezioni sul principio di legalità*, (E. Rinaldi), Torino, 2002. Recently see ALL, *Il principio di legalità nell’ordinamento comunitario*, Torino, 2005.

<sup>30</sup> CAFAGGI, *Crisi della statualità, pluralismo e modelli di autoregolamentazione*, in *Politica del diritto*, 2001, 543, in part. 576, who states that there are two different kind of self-regulatory codes: those that pretend to be generally binding and those that, being the product of private autonomy, have impact only on the regulatees. The Author argues that the self-regulatory codes which pretend to be binding *erga omnes*, necessarily need a formal legitimacy through the law (“I primi necessitano di una legittimazione formale attraverso la legge, ad esempio quando sia il legislatore a richiedere l’adozione di tali codici e fissi i principi cui essi debbano ispirarsi”). See, on this matter, the case of self-regulation in labour law. As it will see, Law No. 146 of 12 June 1990, as amended in 2000 (Law No. 83 of 11 April) and regulating the right to strike in the public essential services, foresees that where a strike occurs in such services, a minimum service shall be guaranteed, the modalities of which shall be agreed upon by the administration (or the enterprise that administers the essential service) and the union’s representation at the enterprise level (or the workers’ representatives where appropriate), not only by collective agreements but also through self-regulation codes (*codici di autoregolamentazione*). Some Italian authors argue that Act. No. 146/1990 represents a radical transformation in the law-making process towards a sort of delegated self-regulation. In this case, since legislator mandates the industry to adopt a code of self-regulation, collective agreements and more in general, self-regulatory codes can be thus considered as sources of law, valid *erga omnes*.

<sup>31</sup> SANTI ROMANO, *L’ordinamento giuridico*, Pisa, 1917. For a concrete application of the theory of “pluralità degli ordinamenti giuridici”, see Cass. Civ., 2 dicembre 1932, noted by CESARINI SFORZA, *La teoria degli ordinamenti giuridici e il diritto sportivo*, in *Foro It.*, 1933, I, 1385.

and arguing that spontaneous organisations could create private legal orders in competition with the State<sup>32</sup>. This doctrine – as it will be seen - has been followed by a consistent part of Italian doctrine in order to explain and justify self-regulatory mechanisms in the most relevant sectors they are applied<sup>33</sup>.

### III. The nature of the regulatory body and its activity

Determining the nature (public or private) of a regulatory body and its activity is crucial for understanding the concept of self-regulation in Italian legal order as elsewhere.

The question concerning the nature of public bodies (the so called *enti pubblici*) has been debated in Italy for a long time<sup>34</sup>.

By virtue of art. 1, par. 2, Legislative Decree 1993, No. 29<sup>35</sup>, Regions, Provinces, Municipalities, Chambers of commerce and their associations; Universities; schools; all entities belonging to the *Servizio Sanitario Nazionale* (the National Health Service) are included in the concept of public administration<sup>36</sup>. However, according to the prevailing doctrine<sup>37</sup>, this can

<sup>32</sup> On this point, see RESCIGNO, *L'autonomia dei privati*, in *Studi in onore di Gioacchino Scaduto*, Padova, 1988, 531 ss. See also Tribunal of Milan, 22 January 1976, in *Riv. Dir. Ind.*, 1977, 91 ss.: “Le disposizioni del C.d.l. costituiscono un ordinamento derivato... si dovrà accertare se questo sia collegabile con l'ordinamento dello Stato attraverso un potere stabilito e riconosciuto dall'ordinamento ed inoltre se il potere sia stato esercitato nelle condizioni di forma e di sostanza stabilite dall'ordinamento stesso ... se quel potere esiste e quelle condizioni sono state soddisfatte si potrà dire che le prescrizioni nascenti dal C.d.l. sono giuridiche”, who underlined that the rules and principles laid down by the Italian self-regulatory advertising Code can be considered as setting up a sort of autonomous, separate, “derived” (“derivati”) legal orders as long as they are recognized by the general legal order.

<sup>33</sup> *Amplius* (with express reference to self-regulation in sport sector) ALVISI, *Autonomia privata e autodisciplina sportiva. Il C.O.N.I. e la regolamentazione dello sport*, Milano, 2000, 270 ss. On the matter, see also GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, cit., who applies the Santi Romano's theory in order to explain the phenomenon of self-regulation in advertising sector. See again CAFAGGI, *Crisi della statualità, pluralismo e modelli di autoregolamentazione*, cit., 568. The Authors underlines that the theory of “pluralità degli ordinamenti” can be admitted whenever compatible with the Italian constitutional order and whenever the sources that don't find their legitimacy in statutes, don't pretend to have external effects (“La pluralità degli ordinamenti può essere ammessa quando sia compatibile con l'ordinamento costituzionale e quando le fonti che non trovano legittimazione nella legge non abbiano la pretesa di estendere i propri effetti nei confronti di terzi”).

<sup>34</sup> On public entities, see recently FRENI, *Le trasformazioni degli enti pubblici*, Torino, 2004. See also, among the others, ROSSI, *Gli enti pubblici*, Bologna, 1991; CERULLI IRELLI – MORBIDELLI (a cura di), *Ente pubblico ed enti pubblici*, Torino, 1994; GRECO, *Ente pubblico, impresa pubblica, organismo di diritto pubblico*, in *Riv. it. Dir. pubbl. comunit.*, 2000, 839. More in general, on the organisation of Italian public administration, see BACHELET, *Profili giuridici dell'organizzazione amministrativa*, Milano, 1965; NIGRO, *Studio sulla funzione organizzatrice della P.A.*, Milano, 1966; BERTI, *La pubblica amministrazione come organizzazione*, Padova, 1968; TREVES, *L'organizzazione pubblica*, Milano, 1977; MELIS, *Storia dell'amministrazione italiana*, Bologna, 1996.

<sup>35</sup> See now art. 1, par. 2, Legislative Decree 20 March 2001, No. 165.

<sup>36</sup> Art. 1, par. 2: “per amministrazioni pubbliche si intendono: tutte le amministrazioni dello Stato, ivi compresi gli istituti e scuole di ogni ordine e grado e le istituzioni educative, le aziende ed amministrazioni dello Stato ad ordinamento autonomo, le regioni, le province, i comuni, le comunità montane e loro consorzi ed associazioni, le istituzioni universitarie, gli istituti autonomi case popolari, le camere di commercio, industria, artigianato ed agricoltura e loro associazioni, tutti gli enti pubblici non economici nazionali, regionali e locali, le aziende e gli enti del Servizio sanitario nazionale”.

<sup>37</sup> Notably, CERULLI IRELLI, *Corso di diritto amministrativo*, Torino, 2001, 114.

not be considered exhaustive<sup>38</sup>, and does not solve all problems concerning the identification of public bodies (some Authors talk about the “*problema dell’ente pubblico*”<sup>39</sup>).

Italian scholars and courts have tried to solve the debate by referring to some common features (the so called *indici esteriori* or *indici di pubblicità*) in order to identify public entities (and, for the purpose of this study, to identify the nature – public or private – of a self-regulatory body).

First, crucial for determining the public nature of a body is the type of *source* which set it up. Public bodies are set up and ruled by law (*criterio nominalistico*)<sup>40</sup>, under an express duty to act in the general interest (*criterio finalistico* or *teoria del fine*)<sup>41</sup>.

However, the major difficulties arise whenever the act establishing the public body doesn’t expressly qualify that body as public. In this case, the existence of a constant public funding<sup>42</sup>; the participation of government, as well as of other public entities, in the appointment procedure of chief executive of the body; the circumstance that a body is set up by another public agency; the circumstance that a body acts under the control of the government (*criterio del controllo*)<sup>43</sup>, can also be considered as relevant for determining the public nature of an entity.

The characterisation of a body as public undoubtedly entails the application of a certain set of substantive and procedural rules.

Generally speaking, entities belonging to public administration have public law character and, as such, are subject to public<sup>44</sup> and administrative law<sup>45</sup>. All acts adopted by public bodies

<sup>38</sup> This is mainly because public entities have now a quite complex and heterogeneous character. Moreover, the new art. 114 Cost. (after the comprehensive reform of Title V in 2001) also refers to the concept of Metropolitan Cities (“The Republic is constituted by Municipalities, Provinces, Metropolitan Cities, Regions and the State”), absent in the definition given by the Legislative Decree No. 29/1993. For more details, see again CERULLI IRELLI, *Corso di diritto amministrativo*, cit., 114; BARDUSCO, *Ente pubblico*, in *Dig. Disc./pubbl.*, XIV, Torino, 1999.

<sup>39</sup> CERULLI IRELLI, *Corso di diritto amministrativo*, cit., 115.

<sup>40</sup> Art. 4 of Act. No. 70/1975 (*Disposizioni sul riordinamento degli enti pubblici e del rapporto di lavoro del personale dipendente*), in fact, confirming the general principle laid down by art. 97 Cost. (“public offices are organised according to the provisions of law”), states that: “all new public entities can be established or recognized only by law” (“Nessun nuovo ente pubblico può essere istituito o riconosciuto se non per legge”).

<sup>41</sup> However, see SANDULLI, *Manuale di diritto amministrativo*, Torino, 1989, 132 ss., who underlines the difficulty to distinguish between public and private ends.

<sup>42</sup> However, public funding can be granted to private entities too. On the existence of a public funding as a criteria for determining the public nature of a body, see Corte cost., 28 dicembre 1993, n. 466, in *Foro It.*, 1994, I, 325; Corte Conti, Sez. Giur. Lazio, 10 settembre 1999, n. 1015, in *Riv. Corte Conti*, 1999, f. 5, 87.

<sup>43</sup> *Contra* Consiglio di Stato, Comm. Spec., n. 289/2000, in *Cons. Stato*, 2000, I, 2409. On the other hand, a body whose budget is approved by the government can be considered a public body. See Cass. Civ., Sez. lav., 18 febbraio 1991, n. 1693, in *Cons. Stato*, 1991, II, 1101; Cass. Civ., Sez. Un., 14 gennaio 1987, n. 194, in *Foro It.*, 1987, I, 1790; Cass. Civ., 17 maggio 1984, n. 3021, in *Rep. Giur. It.*, 1984.

<sup>44</sup> See art. 11 Italian civil Code: “Provinces and communes, as well as public bodies recognized as legal persons, enjoy rights according to the statutes and usage recognized as public law”.

<sup>45</sup> Italian scholars usually make clear distinctions between private and public law. Private law rules are simply rules governing the relations between citizens amongst themselves; public law rules are rules which primarily govern relations between private citizens and governmental power and other bodies exercising public functions. Administrative law can thus be defined as the discipline regulating the organisation and the activities carried out by public bodies, as well as the relationship between these bodies and private citizens.

can be challenged and brought to the attention of administrative courts<sup>46</sup>. The activities of these entities are carried out by a specialised personnel – the public servants (*pubblici dipendenti*), subject to a special criminal, civil and administrative liability regime<sup>47</sup>. Public bodies as such have to respect all constitutional principles generally applicable to public administration, such as the principle of efficiency and impartiality of administration (“*principio di buon andamento*” and “*principio di imparzialità*”).

All exercise of administrative powers is subject to a special discipline, such as the Administrative Procedure Act 1990, No. 241<sup>48</sup>. This statute deals with administrative procedure and gives a comprehensive discipline of access to administrative documents, whether linked to administrative procedure or not. The most important rules on administrative procedure are those on the office and the person responsible for the proceeding (*responsabile del procedimento*) and those on participation of all parties concerned, including public interest groups. The due process principle was traditionally foreign to Italian administrative law; participation was limited to cases where the law expressly provided for it. The 1990 Act has turned this situation on its head. Participation is now the rule for proceedings leading to individual decisions<sup>49</sup>.

It should also be borne in mind that a public body can act according to private law - *attività di diritto privato* – (today this is the case concerning employment contract<sup>50</sup>). In this hypothesis, private law regime will generally apply. However, all activities of public agencies being undertaken in the public interest, both Italian doctrine and courts recognize some exceptions due to consideration of impartiality, efficiency, transparency of public administration. Some Authors talk about the principle of “*funzionalizzazione dell’attività di diritto privato dell’amministrazione*”, in order to identify a sort of *lex specialis*, which would always apply to public administration<sup>51</sup>.

<sup>46</sup> See art. 103, par. 1 Cost.: “The Council of State and the other organs of judicial administration have jurisdiction for safeguarding before the public administration legitimate interests and, in particular matters laid out by law, also subjective rights”.

<sup>47</sup> See art. 28 Cost.: “Officials and employees of the State and public entities are directly responsible, according to criminal, civil and administrative laws, for acts committed in violation of rights. In such cases the civil responsibility extends to the State and the public entities”.

<sup>48</sup> L. 7 agosto 1990, n. 241, *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*, recently modified by L. 11 febbraio 2005, n. 15 and L. 14 maggio 2005, n. 80. Recently, on these reforms, see CARANTA – FERRARIS – RODRIQUEZ, *La partecipazione al procedimento amministrativo. Seconda edizione aggiornata alla l. 11 febbraio 2005, n. 15 e l. 14 maggio 2005, n. 80*, Milano, Giuffrè, 2005.

<sup>49</sup> Under Art. 7 of the 1990 Act, ‘If there is no special urgency, both those who might be directly affected by the final decision and those who are called to take part to the procedure by the law are informed of the opening of the file following the rules laid down in Art. 8. In the same way, when the final decision might affect adversely people, other than the addressee of the final decision, whose identity is either known or might be easily known, the authority is under a duty to inform them, following the same procedure, of the opening of the file’; Art. 9 provides for the participation of public interest groups.

<sup>50</sup> See in fact the Legislative Decree No. 29/1993 (now Legislative Decree No. 165/2001). On the matter, see, among the others, VIRGA, *Il pubblico impiego dopo la privatizzazione*, Milano, 2000; D’ANTONA, *Scritti sul pubblico impiego e sulla pubblica amministrazione*, Milano, 2000; CATELANI, *Il pubblico impiego*, Padova, 2003.

<sup>51</sup> See NAPOLITANO, *Pubblico e privato nel diritto amministrativo*, Milano, 2003, 160: “(...) l’amministrazione (...) agisce sempre secondo valutazioni discrezionali anziché libere, e osserva tutti quei principi, costituzionali e non, che consentono di perseguire l’interesse pubblico e rispettare (o tener conto delle) situazioni giuridiche soggettive del privato”. On this point, DUGATO, *Atipicità e funzionalizzazione*

On the other hand, public interest activities may be also undertaken by private law organisations. Under certain circumstances, a private entity acting in the general interest may receive a special status, being partly subject to public law<sup>52</sup>.

It thus seems that the existence of public elements in the activities undertaken by a (private) self-regulatory body doesn't trigger any change in the legal nature of that entity. The private nature of an entity has thus no impact on its capacity to carry out a public interest activity since such a power is recognised to many sorts of private bodies: trade unions<sup>53</sup>, sports federations<sup>54</sup>, as well as associations, foundations and committees.

### III.1 Associations, foundations and committees

As stated above, art. 18 of Italian constitution (recognizing the principle of freedom of association) can be considered as one of the most relevant constitutional provisions able to promote and justify self-regulation.

Generally speaking, in modern political and socio-legal theory, self-regulatory associations (SRAs) undoubtedly play a fundamental role, acting as intermediaries linking different parts of society<sup>55</sup>.

It is thus useful to offer a brief survey of the rules applicable to them.

The first book of 1942 Civil Code deals with *associazioni riconosciute* (incorporated associations), *associazioni non riconosciute* (unincorporated associations), *fondazioni* (foundations, also incorporated), and *comitati* (committees). However, neither associations nor foundations and committees are defined by civil code. The debate and uncertainty as to the purposes that these entities may pursue just arises from the vagueness of the law itself.

According to art. 12 of Civil Code (before its repeal by the Presidential Decree of 10 february 2000, No. 361<sup>56</sup>), “associations, foundations and other private institutions acquire legal per-

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*nell'attività amministrativa per contratti*, Milano, 1996. Less recent, see AMORTH, *Osservazioni sui limiti dell'attività amministrativa di diritto privato*, 1938, now in ID., *Scritti giuridici*, Milano, 1999, I, 271 ss.

<sup>52</sup> This is the case, for instance, of the National sports Federations, recognized by law as associations of private nature. Their activities are thus generally governed by private law. However, being these activities exercised in the public interest, some Italian authors argue that they might be subject to judicial review, as well as the other sources of law. See below.

<sup>53</sup> See below.

<sup>54</sup> See below.

<sup>55</sup> In Italy, for example in the banking and insurance sector, it has to be remembered, among the others, the Italian Banking Association (see below); the so-called Assoreti, the Italian association of Italian securities brokerage companies (SIM) and Italian banks that distribute financial products and investment services through financial advisors; the ANASF (Associazione nazionale promotori finanziari), which is the main professional association representing the Italian “promotori finanziari”. This latter can be viewed as a typical form of purely private self-regulation *ex post* recognized by public powers: in this case, the industry engaged in self-regulation in the specific attempt to obtain a public recognition. All “promotori finanziari” belonging to the Association have to comply with the Code of behaviour (“Codice deontologico di autodisciplina dei promotori finanziari”, approved in 1999 by A.N.A.S.F.). Those who breach the code may undergo disciplinary proceedings held by the ANASF Board of Arbitrators and may be subject to several levels of sanctions right up to the expulsion from the Association

<sup>56</sup> D.P.R. 10 febbraio 2000, n. 361 - *Regolamento recante norme per la semplificazione dei procedimenti di riconoscimento di persone giuridiche private e di approvazione delle modifiche dell'atto costitutivo e dello statuto* – which repealed some important provisions of the Italian civil code (not only art. 12, but also art. 16, par. III, art. 27, par. III, art. 33 and 34), by virtue of art. 20, l. n. 59/1997 – Legge “Bassanini” -. It can thus be considered a form of delegated legislation.

sonality through recognition by decree of the President of the Republic. For specific categories of institutions operating within the limits of a province, the Government can delegate to the Prefetto [a local administrative authority] the authority to recognize them by decree”.

When the Italian Constitution was approved in 1948, art. 2 provided formal support for intermediate group. In this way, the institutional pluralism made possible by the new constitutional framework could – and did – promote decentralization, and encouraged the spontaneous growth of social groups. Nevertheless, since article 2 of the Italian Constitution states that “the Republic recognises and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one’s personality finds expression”, this clause of the Constitution was generally interpreted as restraining the government’s power to deny the right to incorporate *ex art. 12* of the Civil Code. The denial of the right to incorporate was in practice restricted to non-democratic organizations – *i.e* those that did not state definite purposes in their charter and those that did not appear to possess adequate funds <sup>57</sup>.

The discipline provided in the Italian Civil Code has been judged inadequate to the new reality of the non – profit world. The administrative controls, in particular, ran contrary to the Constitution’s provisions concerning institutional pluralism, and have also proved to be a less than efficient means of using economic resources. Art. 12 of the Civil Code has thus been repealed by the Presidential Decree of 10 february 2000, No. 361. Associations and foundations can now obtain legal personality by registration in the “*registro delle persone giuridiche*” (register of corporations), kept by the *Prefetto* <sup>58</sup>.

The *Prefetto* will evaluate whether or not the stated organizational purpose is possible and lawful <sup>59</sup>. Two results have thus been achieved. Firstly, the shifting of the process of incorporation from the central bureaucracy to provincial officers might save an enormous quantity of time. Secondly, the power of the State administration over associations and foundations might be greatly reduced.

However, according to art. 25 Civil Code, foundations are still subjected to a quite strict governmental control. The authority may in fact void their resolutions if contrary to law or to the foundation’s charter. It may dismiss directors and substitute them with a so called *commissario straordinario* (“*extraordinary commissioner*”) if they acted against the law or the charter. It may transform or wind up the foundation if its goals has been achieved, or has become impossible to achieve <sup>60</sup>.

#### IV. Liability of self-regulatory bodies

The third and final dimension of this study deals with the analysis of Italian tort law as it applies to the self-regulatory bodies.

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<sup>57</sup> See PONZANELLI, *Non-profit organizations*, in LENA – MATTEI, *Introduction to Italian law*, Kluwer Law International, 2002, 342.

<sup>58</sup> See ZOPPINI, in DE GIORGI – PONZANELLI – ZOPPINI, *Il riconoscimento delle persone giuridiche : D.P.R. 10 febbraio 2000, n. 361*, Milano, 2001.

<sup>59</sup> A power of control of the associations and foundations’ conditions of legitimacy is thus still recognized to the Prefetto. On the matter, see Cons. Stato, Sez. Comm. Spec., 20 dicembre 2000, n.288, in *Ragiusan*, 2001, f. 203-3, 36.

<sup>60</sup> This kind of control (of legitimacy) is, however, limited to exceptional hypotheses. See VITTORIA, *Le fondazioni culturali*, Napoli, 1976. Recently, on control over a private foundation, T.A.R. Marche, Sez. I, 27 aprile 2006, n. 217, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it)

In order to consider this dimension, in the total absence of specific legal provisions, as well as case law on the matter, the general rules on legal persons' liability should be consulted.

#### IV.1 Liability of private self-regulatory bodies. Tort liability and contractual liability

Lacking of case law on the matter and taking into account that self-regulators are not considered as specific legal categories, it would seem that the general provisions on tort liability laid down in the Civil code could be applied to liability of private self-regulatory bodies.

The basic legal principles relating to civil liability for wrongful acts (*responsabilità extracontrattuale* or *responsabilità aquiliana*) are contained in articles 2043-2059 of the Civil code. The key rule, upon which the other articles only enlarge, is found in article 2043. This reads that “a deliberate or negligent act of any sort, which causes an unjust harm to another, obligates the person who committed it to compensate for the harm”.

To give rise to tort liability, there thus must be <sup>61</sup>:

- a fact: this can be either an act or an omission;
- the capacity to understand and intend at the time when the act was performed;
- blameworthiness: the act must be “deliberate” or negligent. A deliberate act is one which is carried out intentionally and wilfully (the so called *dolo*), while a negligent act is one which involves some lesser degree of fault (*colpa*) <sup>62</sup>;
- an unjust damage: a damage can be defined as “the injury of a legally protected interest”, while a “damage is unjust and result in compensation where it arises thorough the illegitimate injury of the legal sphere of another subject” <sup>63</sup>;
- a causal link between the act or omission and the event (the so called *nesso di causalità*). In order for a victim to recover losses, the defendant must be shown to have caused the injury.

Even if differences of opinion persist <sup>64</sup>, prevailing scholarship interprets art. 2043 Civil code as a general clause designed to outline a system of atypical or “innominate” torts. This view is supported by those favouring a particularly broad interpretation of “unjustified injury”, as including all violations of situations and interests regarded as legally relevant <sup>65</sup>.

Following this interpretation, in the case of a private self-regulator's activity causing prejudice to third parties, it would seem that the self-regulatory body could be sued in tort under

<sup>61</sup> Most of those issues fall outside the purpose of this study and will therefore not be discussed.

<sup>62</sup> Neither *dolo* nor the different degrees of *colpa* are defined in the Civil code. The definition of these elements is provided by article 43 of the Italian Criminal code. For case law, see, for example, Cass., 26 giugno 1998, n. 6334, in *Corriere giur.*, 1998, 1029, noted by CARBONE, *Reato del sindaco e responsabilità dell'amministrazione comunale*; Cass., 14 maggio 1997, n. 4232, in *Resp. Civ. prev.*, 1998, 98. See also PATRONI GRIFFI, *Riflessioni problematiche su alcuni elementi dell'illecito*, in SORACE, *Le responsabilità pubbliche*, Padova, 1998, 217.

<sup>63</sup> LEROY CERTOMA, *The Italian legal system*, Butterworths, London, 1985, 367.

<sup>64</sup> For a critical review of current opinions, see MONATERI, *La responsabilità civile*, in SACCO, *Trattato di diritto civile*, Torino, 1998, 195. Recently MONATERI, *La responsabilità civile*, Torino, UTET Giuridica, 2006. On this point, see recently CASTRONOVO, *La nuova responsabilità civile*, Milano, 2006. Notably, CASTRONOVO, *La nuova responsabilità civile. Regola e metafora*, Milano, 1997, 14.

<sup>65</sup> Notably ALPA, *Trattato di diritto civile, La responsabilità civile*, Milano, 1999, 375; SALVI, *Responsabilità extracontrattuale (dir. vig.)*, in *Enc. Dir.*, XXXIX, Milano, 1988, 1212.

art. 2043 civil code<sup>66</sup>. For instance, whenever the application for the admission to a professional roll has been unlawfully refused by the professional order, the latter will be responsible (ex art. 2043 c.c.) for all damages suffered by the applicant (Tribunal of Rome, 3<sup>rd</sup> February 1994)<sup>67</sup>.

On the other hand, whenever, as often happens<sup>68</sup>, self-regulated rules are written in a contract, their execution has no impact on third parties in the light of the principle of the relative effects of contracts.

In this hypothesis, since a contractual relationship exists between the self-regulator and the regulatees, the general rules on contractual liability might be applied.

The violation of contractual duties by the parties to an agreement are generally disciplined by the Civil code in the section dedicated to obligations (arts. 1218 et seq<sup>69</sup>) and are known as rules of “contractual liability”, as opposed to recovery for damage wrongfully caused to any third person, which is referred to a “non contractual liability” or tortious liability.

More in particular, the parties to a contract must behave according to the fundamental rules of fairness (pursuant to art. 1175 Civil code) and, by virtue of art. 1375 Civil code, they must comply with the duty of good faith in performance<sup>70</sup>.

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<sup>66</sup> As to the legal remedies, general rules will apply. Harm suffered by the victim is translated into monetary terms through equivalent compensation. Because monetary compensation is only a surrogate for the harm, injured parties are not obliged to accept redress of this kind: they can demand the *restitutio in integrum* (restoration of the harmed party to *status quo ante*) under art. 2058 Civil code. Nevertheless, this legal remedy is very often materially or juridically no possible. Furthermore, recourse to restoration in kind, as an alternative to equivalent compensation, is unavailable whenever it is determined to be overly burdensome for the defendant (art. 2058, par. II). This is why monetary damages is the form of redress most widely applied in Italy. Private law also provides the injured party with injunctive relief aimed at preventing the prejudice or its continuation or repetition. The action is indeed expressly permitted only in special situation (for the protection against unfair competition, under art. 2599 civil code; in case of unlawful use of a name (art. 7 civil code) or of the illegal publication of another’s person likeness (art. 11 civil code). Thus, it is still controversial if this remedy it is to be qualified as exceptional or not. See PULEO, *Quale giustizia per i diritti di liberta? : diritti fondamentali, effettività delle garanzie giurisdizionali e tecniche di tutela inibitoria*, Milano, 2005; PIETROBON, *Illecito e fatto illecito, inibitoria e risarcimento*, Padova, 1998; FRIGNANI, *L’injunction nella common law e l’inibitoria nel diritto italiano*, Milano, 1974; MATTEI, *Tutela inibitoria e tutela risarcitoria*, Milano, 1987.

<sup>67</sup> *Trib. Roma, 3 febbraio 1994, in Gius, 1994, 221*: “L’illegittimo rifiuto della domanda di iscrizione all’albo professionale comporta la responsabilità del consiglio dell’ordine per i danni subiti dal professionista a seguito della mancata iscrizione”.

<sup>68</sup> As to a self-regulatory association, for example, contractual clauses are undoubtedly contained in the founding act (atto costitutivo) and by-laws (statuto). See art. 16 Civil code: “the founding acts and by-laws [of the associations and foundations] must contain the name of the institution, a description of its purpose, its assets, ... as well as the rules concerning its organization and management. They must also, with respect to associations, define the rights and obligations of their members and the conditions for the admission”. See also art. 36: “the internal organization and management of associations which are not recognized as legal persons are regulated by agreements among the members”.

<sup>69</sup> By virtue of art. 1218 Italian civil code “the contracting party who failed to fulfil exactly his/her obligation, must compensate for the harm unless he/she proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him/her”.

<sup>70</sup> Generally, on this topic, see MONTI, *Learned hand formula e buona fede nell’esecuzione del contratto. Analisi economica e comparata*, in *Riv. Critica del diritto privato*, 1998, 125; RICCIO, *La clausola generale di buona fede è, dunque, un limite generale all’autonomia contrattuale*, in *Contratto e Impr.*, 1999, 21.

Whenever the self-regulatory body acts in violation either of these general principles, or of the contractual rules according to which it had to regulate, this may amount to a breach of contract and entitle the regulatees to sue the self-regulator in order to recover the prejudice suffered.

## IV.2 Governmental liability

In the absence of case law, it can be argued that self-regulators, when considered public bodies<sup>71</sup>, are subjected to public law and then, to governmental liability.

Concerning the Italian governmental liability system<sup>72</sup>, a distinction must be made between liability cases arising from the performance of operational tasks and the provision of services to the general public (*attività materiale della pubblica amministrazione*) and liability cases arising from unlawful administrative decisions (*attività provvedimentoale*).

In the first hypothesis, core principle is that, even in the field of discretionary powers, a public authority has to act in accordance with the *neminem laedere* rule. When faced with liability claims in this area, Italian civil courts<sup>73</sup> have constantly applied the general provisions on tort liability laid down in Article 2043 *et seq* of the Civil code.

Concerning liability arising from unlawful administrative decisions (*attività provvedimentoale*), some broad rules must be given.

The distinction between subjective rights (*diritti soggettivi*) and legitimate interests (*interessi legittimi*) has been for a long time the key element to understand properly the issues arising in the field of the public administration's liability. This can be considered as a distinction which has some bearing with the English dichotomy distinguishing private and public law rights<sup>74</sup>.

To make simple a matter which has been a subject of hot dispute for well over a century, some examples can be given. The person asking for a decision from an authority has no right, just an *interesse legittimo*. For instance, those asking for a licence to open a shop, a building permission, a school grant or any other benefit, all are said to be entitled to an *interesse legittimo*.

Until recently, Courts followed a judicial rule according to which for a damage to be unjust it should be both *non jure*, that is the injury or damage not justified by another legal provision,

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<sup>71</sup> See the common features (the so called *indici esteriori* or *indici di pubblicità*) created by Italian scholars and courts in order to identify public entities (part. II of this study).

<sup>72</sup> On the issue of public liability in Italy, see, among the others, CARINGELLA – PROTTO, *La responsabilità civile della Pubblica Amministrazione*, Bologna, 2005; FOLLIERI (a cura di), *La responsabilità civile della pubblica amministrazione*, Milano, 2004; VIOLANTE, *La responsabilità civile della pubblica amministrazione da atti e comportamenti illegittimi*, Napoli, 2003; DIANA, *La responsabilità precontrattuale della pubblica amministrazione*, Padova, 2000; GARRI, *La responsabilità civile della pubblica amministrazione*, Torino, 2000; BRONZETTI, *La responsabilità nella pubblica amministrazione*, Padova, 1991.

<sup>73</sup> *Liability cases arising from the performance of operational tasks and the provision of services to the general public usually fall under the jurisdiction of civil courts. Normally courts do not have recourse to the idea of interessi legittimi when no formal administrative decision is challenged and what is asked are just damages. Even the fact that the defendant public authorities may enjoy discretionary powers does not, as a rule, lead civil courts to strike out the action as inadmissible. For the distinction between interessi legittimi and diritti soggettivi, see below.*

<sup>74</sup> On this point, see CARANTA, *Public law illegality and governmental liability*, in D. FAIRGRIEVE – M. ANDENAS – J. BELL (eds.), *Tort Liability of Public Authorities in Comparative Perspective*, London, BIICL, 2002, 271.

and *contra jus*, that is when a subjective right (*diritto soggettivo*)<sup>75</sup>, as opposite to the subjective position of legitimate interest (*interesse legittimo*)<sup>76</sup> is violated. As a consequence, one could ask for damages only when the unlawful administrative decisions infringed a *diritto soggettivo*.

In 1999, the Corte di cassazione made a spectacular turnaround<sup>77</sup>. Reinterpreting art. 2043 of civil code, the Court held that, given certain conditions as to the fault, causation and harm, infringements of *interessi legittimi* (if significant for the legal order – the so called “*interessi giuridicamente rilevanti*” -<sup>78</sup>) could sound in damages.

The way was thus open to find the State and the other public law entities liable for unlawful decisions infringing both *diritti soggettivi* and *interessi legittimi*<sup>79</sup>.

The general clause laid down by art. 2043 civil code can be useful in order to evaluate which might be the consequences when the self-regulatory body failed to act (for example to exercise its powers to control and supervise the regulatees), causing prejudice to third parties. In the absence of case law on this subject, one might refer, by way of example, to the issue of liability of regulators for lack of supervision in the financial sector.

In the last few years, liability of regulators for lack of supervision has been discussed all over Europe. Bank failures in different EU-countries have increasingly led to liability claims being directed against supervisory authorities for alleged negligence or improper conduct in the course of exercising prudential supervision over banks.

In Italy, a very recent step of the evolution of case law concerning regulators’ liability has been taken with the HVST decision in March 2001<sup>80</sup>.

<sup>75</sup> See LEROY CERTOMA, *The Italian legal system*, cit., 367, defines the subjective right as “the power to act for the satisfaction of an interest which is recognised and protected by the legal system”.

<sup>76</sup> See again LEROY CERTOMA, *The Italian legal system*, cit., 367, who defines the legitimate interest as “the pretence that the administration exercises its power in accordance with the norms which regulates the exercise of its power”.

<sup>77</sup> Cass., Sez. un., 22 July 1999, n. 500. The decision has been reported and commented in most Italian law journals. See, among the others: in *Foro it.* 1999, I, 2487, with observations by PALMIERI, PARDOLESI, in *Foro it.* 1999, I, 3201, with notes by CARANTA, *La pubblica amministrazione nell'età della responsabilità*; in *Giur. cost.* 1999, 3217, with note by SATTA, *La sentenza n. 500 del 1999: dagli interessi legittimi ai diritti fondamentali*. For more details on the matter, see CARANTA, *Attività amministrativa ed illecito aquiliano*, Milano, 2001, 23.

<sup>78</sup> See again Cass., Sez. un., 22 July 1999, n. 500, point n. 8: “è risarcibile il danno che presenta le caratteristiche dell’ingiustizia, e cioè il danno arrecato *non iure*, da ravvisarsi nel danno inferito in difetto di una causa di giustificazione, che si risolve nella lesione di un interesse rilevante per l’ordinamento”.

<sup>79</sup> Some Authors talk about the 1999 judgment as an “arrêt de règlement” (see again CARANTA, *Attività amministrativa ed illecito aquiliano*, cit., 28).

<sup>80</sup> Cass. Civ., 3 March 2001, n. 3132, in *Resp. civ. e prev.*, 2001, 562 (“Sussiste la responsabilità civile della Consob nei confronti dei sottoscrittori quando abbia omesso di esercitare il dovuto controllo, pure avendone il potere, sulla veridicità dei dati contenuti nel prospetto informativo predisposto dai promotori di operazione di pubblica sottoscrizione”), noted by CARANTA, *Responsabilità della Consob per mancata vigilanza e futuri problemi di giurisdizione*; in *Danno e Resp.*, 2001, 505. On the same matter, see recently Trib. Roma Sez. Unite (Ord.), 13 giugno 2005, in *Foro It.*, 2005, 1, 3047; Trib. Roma, Sez. II, 16 maggio 2005, in *Contratti*, 2006, 5, 497 (“La Consob non ha alcun obbligo di informare puntualmente e preventivamente i risparmiatori circa la convenienza di questo o quel prodotto finanziario; ne consegue che non è configurabile una colpa aquiliana della Consob per il solo fatto che un investimento proposto da un intermediario autorizzato si sia poi rivelato rovinoso”); Trib. Roma Sez. II, 26 luglio 2004, in *Foro It.*, 2005, 1, 559 and in *Danno e Resp.*, 2005, 7, 767. Less recently, see Cass. Civ., Sez. Un., 14 January 1992, n. 367, in *Resp. civ. e prev.*,

The case arose from a public offering of “atypical” security interests in the development of “Hotel Villaggio Santa Teresa di Gallura” in Sardinia <sup>81</sup>.

In deciding on the appeal proposed by the damaged investors, the Corte di Cassazione hold that the Consob (Commissione Nazionale per le Società e la Borsa <sup>82</sup>) had to exercise its power to carry out both a preventive and subsequent verification for the completeness and truthfulness of information contained in the financial prospectus, failing which it can be held liable for the damage suffered by the investors under art. 2043 civil code.

In so far as the powers of the Commission are concerned, the Corte di Cassazione argued that, once verified that the information contained in the prospects was untrue, the Commission had a duty to act in order to stop the public offering: the Consob’s Commissioners can be sued in tort if they fail to use the statutory powers conferred them by law <sup>83</sup>.

## V. Sector analysis. Introductory remarks

As stated above, Italian legal scholarship rarely pays its attention to the self-regulatory mechanisms as a general issue. The debate usually focus on specific sectors where self-regulation is typically applied.

Self-regulation in Italian legal order can thus be considered as a sector-oriented concept.

Being impossible to give an exhaustive overview of all self-regulatory mechanisms in Italian legal order, special attention will be paid to the most relevant sectors in which the self-regulatory technique is applied.

### V.1 Advertising self-regulation

Advertising can be considered as the most important sector in which there has been academic discussions on the role of self-regulation in Italian legal order <sup>84</sup>.

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1993, 332, noted by CARANTA, *Problemi di responsabilità degli organi di vigilanza sui mercati mobiliari*; in *Giur. It.*, 1993, I, 1, 1795, noted by SATTA, *La lesione di interessi legittimi: variazioni giurisprudenziali sull’inammissibilità del risarcimento e principi comunitari*; in *Giust. civ.*, 1992, I, 2727.

<sup>81</sup> On July 1983 a group of promoters published a prospectus according to Article 18, Law 7<sup>th</sup> June 1974, No. 216 in order to promote the placement with the public of the securities of the Hotel Villaggio Santa Teresa company. At the beginning the offering was a success and a large amount of securities were subscribed by the public, but in short time press published news concerning the irregularities committed by the promoting company. In December 1985 the Tribunal of Milan declared two of the promoters’ corporation bankrupted and the H.V.S.T. was liquidated. A group of subscribers decided to sue the Consob’s relevant officers before the Tribunal of Milan to recover all or part of the money they lost as a consequence of the incorrect information contained in the prospectus.

<sup>82</sup> See below.

<sup>83</sup> Recently, for a case of liability of the supervisory authorities for losses resulting from defective supervision, see C. giust. CE, 12 ottobre 2004 (in causa C-222/02).

<sup>84</sup> In general, for the Italian literature, see UBERTAZZI (a cura di), *La giurisprudenza completa dell'autodisciplina pubblicitaria, 1966-2006: la raccolta integrale delle decisioni autodisciplinari*, Anthelios, 2006; GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, Milano, 2003; GRAZZINI, *Autodisciplina pubblicitaria e profili di diritto concorrenziale*, in *Resp. Comunicazione e impresa*, 2001, 419; ALVISI, *Advertising regulation: the basic elements of a self-regulatory system*, in *Resp., comunicazione e impresa*, 2000, 187; AUTIERI, *Il codice di autodisciplina pubblicitaria*, in ZATTI (cur), *Le fonti di autodisciplina. Tutela del consumatore, del risparmiatore, dell’utente*, Padova, 1996; ZORZI, *Autodisciplina pubblicitaria*, in *Contr. e impr.*, 1985, 549 ss.; FLORIDIA, *Legge e autodisciplina pubblicitaria in Italia*, Milano, 1983; TESTA, *L’autodisciplina pubblicitaria in Italia*, Milano, 1983.

In a broad sense, the term *advertising regulation* includes “all controls or regulations from all sources, including self-discipline by individuals and by organisations involved in advertising”<sup>85</sup>.

In a strict sense, advertising regulation can be considered as the control of commercial behaviours through mandatory rules, laid down by statutes, often implementing European Directives<sup>86</sup>, and enforced through the intervention of statutory Authorities and State courts.

The Italian advertising self-regulatory system was borne by a non-profit organisation (the so-called *Istituto dell’Autodisciplina Pubblicitaria*)<sup>87</sup> set up by the business organisation of all constituent parts of the advertising industry<sup>88</sup>.

Within I.A.P. system, responsible for the practical interpretation and application of the self-regulatory code are two different bodies. Firstly, the *Supervisory Committee* – Comitato di Controllo – entitled to investigate and to prosecute those responsible for breaching the adver-

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<sup>85</sup> See C. ALVISI, *Advertising regulation: the basic elements of a self-regulatory system*, in *Responsabilità, comunicazione e impresa*, 2000, 182, who refers to the definition by MIRACLE-NEVETT, *Voluntary regulation of advertising. A comparative analysis of the United Kingdom and the United States*, 1987.

<sup>86</sup> See article 5 of Directive 84/450/EEC on Misleading Advertising, as modified by Directive 97/55: “This Directive does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies and recourse to such bodies by the persons or organizations referred to in Article 4 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article”. The Directive on Misleading Advertising was implemented by the Italian Legislative Decree No. 74/1992, as recently modified by Legislative Decree No. 67/2000. See art. 8, par. 1: “Le parti interessate possono richiedere che sia inibita la continuazione degli atti di pubblicità ingannevole o di pubblicità comparativa ritenuta illecita, ricorrendo ad organismi volontari e autonomi di autodisciplina”; par. 2: “Iniziata la procedura davanti ad un organismo di autodisciplina, le parti possono convenire di astenersi dall’adire l’Autorità garante sino alla pronuncia definitiva”: so the parties involved in a dispute before the Authority in charge with the protection of Competition and the Market are entitled to request the issue of an injunctive order by recourse to the self-regulatory bodies. However, once a case is instituted before a self-regulatory body, the parties involved can agree to refrain from taking action before the Authority, until the “organismo di autodisciplina” in charge with the case issues its final decision. It must again be noticed that the decision issued by the self-regulatory body is not binding on the Authority. See in fact, for example, the Jury’s decision 11 May 1999, No. 149 and the Authority’s measure 13 April 1999, No. 17514, analysed by C. ALVISI, *Parallelismi e interferenze fra ordinamento autodisciplinare e ordinamento statale in tema di repressione del mendacio pubblicitario nel settore delle comunicazioni cellulari*, in *Responsabilità, comunicazione e impresa*, 1999, 154.

<sup>87</sup> As set out in its own Statute, it’s a non-profit organisation. Amongst its main tasks are the formulation and updating of the rules of the Code of Self-Regulation (C.A.P.), the appointment of members to the Jury and the Review Board. For more details about the *Istituto dell’Autodisciplina Pubblicitaria*, see PEDRIALI, *Profili soggettivi dell’autodisciplina pubblicitaria*, in *Riv. dir. ind.*, 1992, I, 136 ss.

<sup>88</sup> The Italian self-regulatory advertising system can be considered as a typical case of purely private self-regulation *ex post* recognized by State. It was born, in fact, in order to compensate the lack of public law rules (the Legislative Decree No. 74/1992 was adopted only in 1992) and aiming at creating an autonomous, separate system. See, however, below. The advertising self-regulatory system was set up in Italy in 1963, the year in which the 7<sup>th</sup> National Conference on Advertising approved a motion in which the principles and aims to which voluntary control in advertising must conform were provided. On the occasion of the Conference, in fact, a general agreement was recorded in the following terms: “(...) having established that the function of advertising is equally in the interest of enterprises and consumers, having acknowledged the requirement that the principles of morality and loyalty underlying the profession are enhanced, (...) as a further concrete impediment to marginal degenerative forms of advertising, commits advertisers, artists, producers and the media, through their respective associations to work out and collect under a single moral Code of Advertising the rules that are to govern all advertising activities in defence of entrepreneurial activities and of the fundamental interests of consumers; moreover it commits such associations to appropriate themselves of such Code and ensure its application by their members”.

tising code, in order “to protect the general interests of consumers”<sup>89</sup>. Secondly, the *Jury – Giurì* –, which works as a domestic tribunal<sup>90</sup>, with the task of interpreting and applying the code of practice. The Jury considers cases in which there seems to be a breach of the code, and which can arise as a result of complaints. According to Art. 36 of Italian C.A.P., in fact: “anyone<sup>91</sup> who believes to have suffered prejudice from advertising activities contrary to the Code may request the intervention of the Jury against those who, having accepted the Code in one of the forms set out in the preliminary and general rules<sup>92</sup>, have undertaken the activities alleged to have caused damage to the petitioner”. If the Jury decides that a complaint is justified, it will then decide upon the appropriate action to take. More in particular, when the decision establishes that the advertising does not comply with the rules of the Code and its Regulations, the Jury may order the interested parties to refrain from using it. It has to be remarked that the Jury’s decisions are unappealable (art. 38 C.A.P.).

### V.1.1 The relationship between the I.A.P. and the legal system in general

The enforceability of C.A.P. rules highlights the matter of State judicial review of Jury’s decision, whenever, for example, this interferes with antitrust statutes or whenever this involves individual rights that cannot be violated or not placed within Jury’s jurisdiction<sup>93</sup>. As stressed

<sup>89</sup> By virtue of Art. 30 of Italian Code of Advertising Self-Regulation, “The Supervisory Committee, aimed at protect the general interests of consumers, is made up of from ten to fifteen members appointed by the *Istituto dell’Autodisciplina pubblicitaria* and selected among experts in consumer problems, advertising technique, communication, media and legal matters”.

<sup>90</sup> According to Art. 32 of Italian C.A.P.: “The Jury examines the advertising submitted to it and judges it according to the Code of Advertising Self-Regulation. In disputes where the interests of consumers are not involved, the Jury, at the mutually agreed request of the parties, can constitute itself as a court of arbitration and decide the dispute with an award”.

<sup>91</sup> This means that any consumer and, more in general, any citizen may request the intervention of the Jury.

<sup>92</sup> It has to be pointed out that the Italian C.A.P. is binding for advertisers, agencies, consultants, all advertising media, and for anyone who has accepted the Code directly or through membership in an association, or by underwriting an advertising contract (the clause of acceptance - *clausola di accettazione*). On this point, see B. GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, Milano, 2003, 1. The C.A.P. and acceptance clause are thus to be considered as contracts concluded in favour of third parties – *contratti a favore dei terzi* - (i.e. in favour of those including consumers who can be reached by advertising). Nevertheless, the principles laid down in the Code might be viewed as general principles of professional diligence and, as such, generally binding for all business firms operating in the market, through the provision of 2598, n. 3, Civil Code (“... Acts of unfair competition are performed by whoever ... avails himself directly or indirectly of any other means which do not conform with the principles of correct behaviour in the trade and are likely to injure another’s business”). For the case law, see the important decision of Tribunale of Torino, 27 november 1998, in *Riv. Dir. Ind.*, 1999, II, 61.

<sup>93</sup> With regard to this point, as remarked above, according to art. 38, last paragraph of the C.A.P., Jury’s decisions are final and binding, even when they involve fundamental rights or apply C.A.P. rules erroneously or unreasonably. Unfortunately, instances of this kind are frequent and it is indeed unclear to know of what remedies one can avail oneself. In Italy, only once a Jury’s decision was challenged before State Court as interfering with rights outside the jurisdiction of the Jury. See Pretura of Rome, 1<sup>st</sup> February 1993, in *Riv. Dir. Comm.*, 1995, II, 269, and in *Giur. It.*, 1994, I, 2, 1170, noted by QUARATO, *Il caso Lambertucci: un’occasione per un ripensamento dei rapporti tra ordinamento statale e sistema di autodisciplina pubblicitaria* “L’istituto dell’autodisciplina pubblicitaria, (...) è sempre espressione di un’autonomia negoziale privatistica; la tutela dei consumatori è indubbiamente una finalità nobile di rango primario, ma l’estrinsecazione dell’attività dell’istituto, (...) è priva di quel riconoscimento pubblico specifico e non generico, tale da attribuire al suo giudizio una valenza di rango superiore od a sopprimere o a limitare diritti soggettivi dei singoli, tanto più se di rango costituzionale”. The Court held that the advertising self-regulation, expression of a private contractual autonomy, cannot limit individual rights, protected and recognized by Constitution.

above, the fundamental principle of freedom of competition might be considered as a relevant limit to the advertising self-regulatory mechanism. The C.A.P. rules may conflict with mandatory rules relating to competition if they are able to generate monopolistic effects and/or restraint competition<sup>94</sup>.

However, in 1976 the Milan Court<sup>95</sup>, with a decision of utmost importance, held that C.A.P. and the acceptance clause are not to be considered limitations to the freedom of competition. According to this case, there could be restraint of trade whenever one's freedom of business is limited in favour of someone else's business and for a monetary consideration. Indeed, in the case of C.A.P. and its acceptance clause, every single advertising party sacrifices his/her own freedom of commerce in favour of a more general interest in honesty and truthful advertising rather than for a personal enrichment of his/her counterpart<sup>96</sup>.

More in general, it can also point out that, while a self-regulation organisation (S.R.O.) may also comprise an appeal body, which acts as a court of appeal in the event of either the complainant or the adjudicated advertiser wishing to challenge the decisions issued by the code-applying body, the Italian advertising self-regulatory system does not have a separate appeals board. Consequently, a decision can be reinterpreted and amended by the Jury itself. As remarked above, in fact, by virtue of art. 38 C.A.P., last paragraph, Jury's decision are final and binding.

According to the prevailing opinion of the doctrine<sup>97</sup>, a Jury's ruling cannot be appealed or challenged before the State judge. This because the C.A.P. system is set up on a *conventio ad excludendum* towards the legal system in general<sup>98</sup>.

It has to be remarked, in fact, that, in the advertising sector, the self-regulatory rules live as a separate, autonomous, freely created and accepted system.

Nevertheless, the I.A.P. system cannot be considered as independent from State law<sup>99</sup>.

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<sup>94</sup> See C. ALVISI, *Advertising regulation: the basic elements of a self-regulatory system*, cit., 191: "This could happen, e.g., because [the C.A.P.] bans the conclusion of contracts to people refusing to conform to it".

<sup>95</sup> Tribunal of Milano, 22 January 1976, in *Riv. dir. ind.*, 1991, 5 ss., noted by FLORIDIA, *Autodisciplina e funzione arbitrale*.

<sup>96</sup> This idea has been championed by GRAZZINI, *Autodisciplina pubblicitaria e profili di diritto concorrenziale*, cit., 426.

<sup>97</sup> See C. ALVISI, *Advertising regulation: the basic elements of a self-regulatory system*, cit., 193. Notably, B. GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, cit., 80: "Il riconoscimento dell'ammissibilità e rilevanza, da parte dell'ordinamento statale e all'interno di esso, dell'Autodisciplina Pubblicitaria deve (...) indurre ad escludere la possibilità di supplenza del Giudice nell'ordinamento superiore nell'esercizio delle funzioni spettanti al Giurì". See recently Tribunal of Rome, 30 January 2001: "Le decisioni del Giurì sono vincolanti per tutti i soggetti che hanno preso parte al procedimento autodisciplinare e non sono sindacabili dall'autorità giudiziaria né dai soggetti che hanno elaborato il codice di autodisciplina e che hanno conferito al Giurì il potere di interpretarlo con decisione definitiva".

<sup>98</sup> Again B. GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, cit., 81: "L'Autodisciplina costituisce (...) *conventio ad excludendum* rispetto all'ordinamento statale: il Giudice Ordinario non è suscettibile di essere considerato né alternativo al 'giudice pubblicitario', né organo di secondo grado rispetto al Giurì".

<sup>99</sup> Notably B. GRAZZINI, *Autodisciplina pubblicitaria e ordinamento statale*, cit., 38: "Non si tratta (...) di rapporti tra ordinamenti *superiorem non recognoscentes*: quand'anche il sistema autodisciplinare dovesse dichiararsi svincolato da quello statale, tuttavia, (...) gli risulterà subordinato e sarà soggetto alle regole sue proprie. Dunque, non solo la causa del negozio di autodisciplina e le sue previsioni sostanziali, ma anche il

The relevant decision of Milan Court, 22 January 1976<sup>100</sup> stated in fact that the I.A.P. system can be viewed as a so-called “*ordinamento giuridico derivato*”, founding its legal basis in the principle of private autonomy, as recognized by the State (art. 41 of the Constitution)<sup>101</sup>.

## V.2 Self-regulation and labour law

Trade union freedom has been solemnly proclaimed as a fundamental principle of Italian industrial relations by art. 39 of the Constitution, declaring that “labour union organisation is free”<sup>102</sup>.

This latter norm regulates trade unions and specifies that only the *registered* ones can obtain legal status and can make collective agreements valid *erga omnes* (for all employers and employees)<sup>103</sup>.

This provision, however, has not been enforced because a bill regulating the registration of unions has never been adopted<sup>104</sup>. Therefore, in Italy unions do not need any recognition and can organize themselves without any pre-established legal model. They can conclude collective agreements (*contratti collettivi di diritto commune*), which are legally enforceable under civil law rules, i.e. on the assumption that the parties to a collective agreement have stipulated on behalf of their respective membership.

Art. 39 of the Constitution is, first of all, a confirmation of the more general principle of freedom of association sanctioned by art. 18 of the same Constitution<sup>105</sup>; the confirmation being necessary to mark beyond any doubt the distinction between present practice and that of the fascist regime.

Trade union freedom has traditionally been held to imply the right of individuals to organise, to join a union without any condition required by law, to resign from it, to choose among different unions and to refuse to belong to any union (*negative freedom*)<sup>106</sup>. But it implies, moreover, a constitutional prohibition on the State to interfere in internal union affairs: i.e.

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procedimento interno di risoluzione delle controversie, potranno essere sottoposti al vaglio del Giudice dello Stato”. See also FERRI, *Il diritto statale e il suo doppio*, in *Quadrimestre*, 1993, 1 ss.

<sup>100</sup> See note 95.

<sup>101</sup> See Tribunal of Milano, 8 luglio 1998: “Se è vero che l’ordinamento autodisciplinare è autonomo rispetto a quello statale e che quindi il giudice ordinario non può sindacare le decisioni rese in sede autodisciplinare, è vero anche che l’ordinamento autodisciplinare non può sovvertire il contenuto delle pronunce assunte dal giudice ordinario e passate in giudicato”: if, at one extrem, a Jury’s ruling cannot be appealed or challenged before the State judge, on the other hand, a Jury’s decision has to conform to a final judgement issued by State courts.

<sup>102</sup> See art. 39, par. 1 of Italian Constitution: “L’organizzazione sindacale è libera”.

<sup>103</sup> On this issue, see for example Pretura of Brindisi, 23 September 1999, in *Orient. Giur. Lav.*, 1999, I, 884; Cass. civ., Sez. lav., 7 June 1999, n.5584, in *Mass. Giur. It.*, 1999.

<sup>104</sup> Since artt. 39, par. 2, 3, 4 has not been enforced, trade unions are generally thus considered as “*associazioni non riconosciute, prive di personalità giuridica*” (unicorporated associations). Consequently, they are regulated by artt. 36 ss. of the Civil Code. See GALANTINI, *Diritto sindacale*, Torino, 2003, 11.

<sup>105</sup> Art. 18, par. 1: “I cittadini hanno diritto di associarsi liberamente, senza autorizzazione, per fini che non siano vietati ai singoli dalla legge penale”.

<sup>106</sup> It has to be remarked that the trade union freedom as the right of strike cannot be exercised without limits, and specifically, cannot limit other fundamental rights equally protected and guaranteed by Constitution. On this issue, see recently Cass. civ., Sez.lav., 15 March 2002, n.3852, in *Mass. Giur. It.*, 2002.

predetermining by law their aims and models of organisation, defining areas of union jurisdiction<sup>107</sup>.

The only condition required by art. 39 is that union constitutions and by-laws be inspired by the principle of democracy<sup>108</sup>. Nonetheless other conditions, such as a minimum number of percentage of members, have been, more or less legitimately, derived from the second part of art. 39 as conditions for recognition and are required to acquire the status of “most representative union”.

Italian Constitution also recognises the right to strike, which must be exercised within the limits fixed by the law (Art. 40<sup>109</sup>). However, the only statute concerning the right to strike is Law No. 146 of 12 June 1990, as amended in 2000 (Law No. 83 of 11 April) and regulating the right to strike in the public essential services.

Under Act No. 146/1990, the notion of *public essential services* (*servizi pubblici essenziali*) relates to certain rights protected by the Constitution referring to life, health, freedom, safety, freedom to circulate, social assistance and provident fund (*previdenza*), instruction and freedom of communication of the persons<sup>110</sup>.

This Act regulates strikes in essential public services, through a complex procedure based on a network of different sources (codes of practice unilaterally adopted by trade unions, collective bargaining, unilateral regulations and instructions issued by employers). More in detail, it foresees that where a strike takes place in such services, minimum services shall be guaranteed, as agreed upon by the administration (or the enterprise that administers the essential service) and the union’s representation at the enterprise level (or the workers’ representatives where appropriate), not only by collective agreements but also through self-regulation codes (*codici di autoregolamentazione*)<sup>111</sup>. Some Italian authors<sup>112</sup> argue that Act. No. 146/1990

<sup>107</sup> Tribunal of Rome, 5 November 1999, in *Lav. nella p.a.*, 2000, 321, noted by CAMPANELLA, *Rappresentanza e rappresentatività sindacale nel lavoro pubblico: primi interrogativi sulla costituzionalità delle nuove regole*.

<sup>108</sup> Art. 39, par. 3: “E’ condizione per la registrazione che gli statuti dei sindacati sanciscano un ordinamento interno a base democratica”.

<sup>109</sup> See Art. 40: “Il diritto di sciopero si esercita nell’ambito delle leggi che lo regolano”.

<sup>110</sup> Art. 1 of Act. No. 146/1990: “Ai fini della presente legge sono considerati servizi pubblici essenziali (...) quelli volti a garantire il godimento dei diritti della persona, costituzionalmente tutelati, alla vita, alla salute, alla libertà ed alla sicurezza, alla libertà di circolazione, all’assistenza e previdenza sociale, all’istruzione ed alla libertà di comunicazione”. On this issue, see Cass. civ., Sez. lav., 14 settembre 2000, n.12150, in *Mass. Giur. It.*, 2000; Cass. civ., Sez. lav., 5 ottobre 1998, n. 9876, in *Mass. Giur. It.*, 1998; Pret. Milano, 31 gennaio 1996, in *Orient. Giur. Lav.*, 1996, 349.

<sup>111</sup> Art. 2, par. 2, Law No. 146/1990: “le amministrazioni e le imprese erogatrici dei servizi, (...) concordano nei contratti collettivi o negli accordi di cui alla legge 29 marzo 1983, n. 93 nonché nei regolamenti di servizio, da emanarsi in base agli accordi con le rappresentanze sindacali aziendali o con gli organismi rappresentativi del personale, di cui all’art. 25 della medesima legge, sentite le organizzazioni degli utenti, le prestazioni indispensabili che sono tenuti ad assicurare, nell’ambito dei servizi di cui all’articolo 1, le modalità e le procedure di erogazione e le altre misure dirette a consentire gli adempimenti di cui al comma 1 del presente articolo”.

<sup>112</sup> Notably, ALVISI, *Pubblico e privato nei sistemi autoregolamentari. Il problema dei controlli sull’autonormazione nel settore della pubblicità commerciale*, cit., 482: “L’individuazione delle prestazioni indispensabili da garantire anche in caso di sciopero, ed altresì delle regole e delle modalità della loro erogazione, viene principalmente rimessa dalla legge alla contrattazione collettiva che viene a costituire una sorta di codice negoziato da recepire nei regolamenti di servizio emanati dagli enti erogatori di servizi pubblici essenziali”. See also TREU, *La legge sullo sciopero: il ruolo del contratto*, in *Dir. e prat. del lavoro*, 1990, 2741.

represents a radical transformation in the law-making process towards a sort of delegated self-regulation (a so-called “*legificazione degli atti dell’autonomia privato-collettiva*”<sup>113</sup>).

In this case, since legislator mandates the industry to adopt a code of self-regulation, collective agreements and more in general, self-regulatory codes can be thus considered as sources of law (“*fonti di ius singulare*”<sup>114</sup>), valid *erga omnes*.

The Commission regulating strikes in sectors providing essential services to the public (*Commissione di garanzia in materia di sciopero nei servizi pubblici essenziali*) - the first body to be created as an independent administrative authority - evaluates the rules regarding minimum levels of service set by collective agreements, by codes of practice, or by employers, and this evaluation constitutes the ground for the special sanctions provided under Law No. 146/1990.

### V.3 Self-regulation in Internet sector

Enthusiasm for self-regulatory solutions has been particularly marked in the Internet sector. First, despite widespread concern about the need for norms, trust and rule formation on the Internet, there is a widespread consensus that content controls are simply impossible to enforce because of the difficulty of policing an anonymous global medium<sup>115</sup>. Voluntary schemes are therefore seen as more likely to deliver results.

The explosion of Internet use during the 1990s was thus accompanied by a burst of self-regulatory activity in the form of new ethics codes, codes of practice, industry organisations and enforcement mechanisms.

Despite this enthusiasm, however, the limits of self-regulation have been evident in this sector. More in particular, the core idea that consumer choice is the best mechanism for delivering the public interest is not borne out in all cases.

There are some respects, particularly in relation to children, where voluntary schemes that rely on consumers choosing the most trusted content are of limited value.

On 19<sup>th</sup> November 2003, the Minister for Communications, the Minister for Innovation and Technology and the main associations of Internet service providers signed a new self-regulatory Code of Conduct aimed at protecting children from potentially damaging use of, and from unsuitable content on, the Internet.

The code draws inspiration from the principle of co-regulation and represents a step forward with respect to self-regulation as it implies shared responsibility through an agreement between public and private, a sort of *regulated self-regulation*, the logic of which is simple but effective as it introduces sanctioning as well as rewarding mechanisms defined by market operators themselves. According to Article 1 of the Code, the adherent is considered the subject conducting Internet business activities, even when this does not directly involve money

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<sup>113</sup> For the expression, see ROMAGNOLI, *Le fonti regolative dello sciopero nei servizi essenziali*, in *Lav. Dir.*, 1991, 558.

<sup>114</sup> Again ALVISI, *Pubblico e privato nei sistemi autoregolamentari*, cit., 482.

<sup>115</sup> LESSIG, *Code and other laws of cyberspace*, 1999, 19. On the matter, see also FEELEY, *EU internet regulation policy: the rise of self-regulation*, in *Boston College International and Comparative Law Review*, 1999, 159.

considerations for clients and users, agreeing to accept the Code either directly or through the signatory associations”<sup>116</sup>.

Under article 6 of the Code, a Guarantee Committee (*Comitato di Garanzia*) will be responsible for supervising the correct, impartial and transparent application of the Code<sup>117</sup>. It will ensure that Adherents meet all necessary requirements and that their conduct is in line with the Code, notifying those concerned should the Code be broken in any way. As to self-disciplinary procedures, Art. 7.1.1. held that whoever has founded grounds to claim that the Adherent is in violation of the obligations of the Code, may notify the Guarantee Committee of this violation by reporting it to the Committee Office<sup>118</sup>.

#### V.4 Financial sector. Introductory remarks

The regulation of the financial and banking system can be viewed as a very relevant case of public control over the economy. This can be considered as a sector in which Italian policy makers have traditionally opted for a high degree of public regulation<sup>119</sup>.

The major changes in financial and banking sectors in the past three decades have come about under the pressure of both the European directives and of increasing cross-border financial market integration. Such changes have been grafted onto a regulatory system characterized by a three-way division of the financial market into banking, securities and insurance sectors and a corresponding division of the regulatory authorities: the Bank of Italy; the Financial Markets and Stock Exchange Commission, usually known under the acronym of CONSOB (Commissione Nazionale per le Società e la Borsa<sup>120</sup>) and the *Istituto per la vigilanza sulle*

<sup>116</sup> By virtue of Art. 1 of the Code, the adherent is: “Il soggetto che svolge attività imprenditoriale su Internet, anche a titolo non direttamente oneroso per Clienti ed Utenti, e che aderisce al Codice direttamente e per il tramite delle associazioni firmatarie”. See also Art. 2, par. 2: “The voluntary adherence to the present Self-Regulation code entails a firm commitment to: accept integrally the contents of the code itself and, in particular, to accept the surveillance activities and sanctions therein; adapt the contractual conditions of the services provided to the provisions of the present code”.

<sup>117</sup> This Committee is made up of eleven experts, including representatives of the adherents, the Ministry for Communications and the Presidency of the Italian Council of Ministers - Department for Innovation and Technology. Three members will be designated by the Association for the protection of minors and the National Users Council. They are appointed by a ministerial decree issued by the Minister for Communications, in tandem with the Minister for Innovations and Technology. It must be argued that in the field of co-regulation, many aspects of the legal structure of the self-regulatory body are often set down by statutes, as well as regulations.

<sup>118</sup> Adherents receiving a communication informing them that self-disciplinary proceedings have been instituted against them, can ask the Committee for an audition. The Adherent must implement the decisions of the Committee as soon as possible. Where he or she fails to comply, in the prescribed time, or where violations of the Code are particularly serious or numerous, the Committee has the power to send those concerned a communication of censure. Where the Adherent does not comply in the prescribed time with the terms of the communication of censure, the Committee will revoke his or her authorisation to use the ‘Internet and Children’ logo.

<sup>119</sup> On this issue, F. BELLÌ – F. MAZZINI, *Argomenti di diritto bancario*, Torino, 1998, 231, who underlines the preference for public regulation in financial and banking field. On the relations between self-regulation and public regulation in financial services, see FERRARINI, *Novità e problemi del decreto Eurosim*, in *Banca, Borsa, Titoli di credito*, 1996, I, 887. More in general, see GIORGIANNI – TARDIVO, *Manuale di diritto bancario*, Milano, 2005.

<sup>120</sup> See CARDI and VALENTINO, *L’istituzione CONSOB*, Milano, Giuffrè, 1993; CASSESE, *La Commissione Nazionale per le Società e la Borsa – Consob e i poteri indipendenti*, in *Riv. soc.* 1994, I, 412; MARZONA, *Il regolamento sull’organizzazione e sul funzionamento della CONSOB*, in *Giorn. dir. amm.* 1995, 522.

*assicurazioni private e di interesse collettivo* (the insurance sector regulator), going under the acronym of ISVAP. The final outcome is a structure of controls which is quite difficult to classify into any one of the typical supervisory models <sup>121</sup>.

The Italian model of supervision is in fact characterised by a “mixed approach” <sup>122</sup>. The primary regulators over financial institutions and capital markets in Italy can be summarised as follows:

- The supervision over banks is delegated to the Banca d’Italia for what concerns stability, transparency and competition law. It has regulatory authority over all financial institutions and financial markets, with respect to specific goals enumerated by the Parliament;
- The supervision over investment services offered by banks, and over investment firms, is under the responsibility of CONSOB in relation to transparency and investor protection and of Banca d’Italia with regard to both the limitation of the risk and financial stability;
- Insurance companies are supervised by the Isvap (Istituto di Vigilanza sulle Assicurazioni Private e di Interesse Collettivo);
- A completely different model is provided for the supervision over pension funds. Here Article 16 of the Legislative Decree 21 April 1993, No. 124, identifies in the Covip (Commissione di Vigilanza sui Fondi Pensione) the competent supervision authority. The Ministry of Labour, in accordance with the Ministry of the Treasury, issues general directives in relation to the supervision of pension funds and supervises the Commission.

#### V.4.1 Self-regulation in financial sectors

As mentioned above, financial sector can be considered as a field in which Italian policy makers have traditionally opted for a high degree of public regulation. Nevertheless, since the so-called “Decreto Eurosim” (D.lgs. 23 luglio 1996, n. 415), it has to be registered a remarkable transformation in the law-making process, which is moving towards a form of co-regulation and delegated self-regulation <sup>123</sup>.

Under art. 46 Eurosim Decree, in fact, the activities of organization and management of regulated markets of financial products are carried out by joint stock companies <sup>124</sup> (“l’attività di organizzazione e gestione di mercati regolamentati di strumenti finanziari ... è esercitata da società per azioni”), which, according to the prevailing doctrine, can indeed be considered as

<sup>121</sup> See DI GIORGIO, C. DI NOIA and L. PATTI, *Financial market regulation: the case of Italy and a proposal for the euro area*, The Wharton School, University of Pennsylvania, June, 2000.

<sup>122</sup> On the other hand, the English system of supervision has recently moved to a single regulator model. The Financial Services Authority (the FSA) is now the body supervising all financial markets. See the *Financial Services and Markets Act 2000*, which unified supervision over financial services providers in the hands of the Financial Service Authority.

<sup>123</sup> Notably VELLA, *L’autoregolamentazione nella disciplina dei mercati mobiliari: il modello italiano*, in FERRARINI – MARCHETTI, *La riforma dei mercati finanziari dal decreto Eurosim al Testo Unico della Finanza*, 1998, 481, who underlines the importance of the Eurosim Decree: “Il decreto legislativo 23 luglio 1996, n. 415 rappresenta un momento importante nel processo di costante evoluzione nel nostro Paese. Il legislatore, infatti (...) ha avviato una profonda riforma di tutto l’impianto sul quale si incardina la regolamentazione in materia di funzionamento e organizzazione dei mercati. Per la prima volta, e invertendo una lunga e consolidata tradizione di esclusiva (e pervasiva) presenza della disciplina statutale, si è lasciato spazio ad ampie forme di autoregolamentazione in materia di funzionamento e organizzazione dei mercati”.

<sup>124</sup> More specifically see art. 47, par. 1 of the Eurosim Decree (now art. 62 of T.U.F.).

self-regulatory associations<sup>125</sup>. The same disposition has been repeated in art. 61, par. 1 of the Finance Consolidation Act – T.U.F. - (Legislative Decree No. 58 of 24 February 1998, *Testo unico delle disposizioni in materia di intermediazione finanziaria*)<sup>126</sup>.

The assignment of roles and responsibilities among the private joint stock companies – then called “società di gestione” by art. 61, par. 1 of the T.U.F. or “società mercato” by Italian doctrine<sup>127</sup> – and the Consob (Commissione Nazionale per le Società e la Borsa) has been redefined by assigning to the latter the task of determining the minimum paid in capital (“capitale minimo delle società di gestione”) and all the activities connected to the organisation and management of financial markets carried out by the “società di gestione” according to art. 61, par. 1 T.U.F.<sup>128</sup>.

However, under art. 74 T.U.F., “the Commission has to supervise the financial markets in order to ensure the transparency, the fairness of the transactions and the protection of the investors”; all (wide) powers conferred to the Consob often involve technical decisions in which it enjoys a wide discretion (see, in fact, art. 62, par. 2<sup>129</sup> and art. 63, par. 1 T.U.F.<sup>130</sup>): some Italian authors doubt the future of self-regulation in the financial sector<sup>131</sup>.

#### V.4.2 The Italian Banking Association and the Banking Ombudsman

In banking and financial sector, some self-regulatory associations play a fundamental role. It has to be remembered, among the others<sup>132</sup>, the Italian Banking Association (ABI), a voluntary non-profit organization, with the purpose of representing, defending and promoting the interests of its member banks and financial intermediaries.

In pursuit of these purposes, the Association develops codes of conduct and works for their adoption by members<sup>133</sup>, also collaborating in relevant initiatives undertaken by other national and international bodies.

<sup>125</sup> See again FERRARINI – MARCHETTI, *La riforma dei mercati finanziari dal decreto Eurosim al Testo Unico della Finanza*, cit., 481.

<sup>126</sup> “L’attività di organizzazione e gestione di mercati regolamentati di strumenti finanziari (...) è esercitata da società per azioni, anche senza scopo di lucro (società di gestione)”.

<sup>127</sup> See VELLA, *L’autoregolamentazione nella disciplina dei mercati mobiliari: il modello italiano*, cit., 492.

<sup>128</sup> See art. 61, par. 2 of the T.U.F.: “La Consob determina con regolamento: a) il capitale minimo delle società di gestione; b) le attività connesse e strumentali a quelle di organizzazione e gestione dei mercati che possono essere svolte dalle società di gestione”.

<sup>129</sup> Art. 47, par. 2: “La Consob detta disposizioni per assicurare la pubblicità del regolamento del mercato”.

<sup>130</sup> Art. 48, par. 1: “La Consob autorizza l’esercizio dei mercati regolamentati quando: a) la società di gestione possiede i requisiti previsti dall’articolo 61, commi 2, 3, 4, e 5; b) il regolamento del mercato è conforme alla disciplina comunitaria ed è idoneo ad assicurare la trasparenza del mercato, l’ordinato svolgimento delle negoziazioni e la tutela degli investitori”.

<sup>131</sup> See again FERRARINI, *Novità e problemi del decreto Eurosim*, in *Banca, Borsa e Titoli di credito*, 1996, I, 887, who emphasizes the difficulties to differentiate public regulation and self-regulation in financial and banking sector.

<sup>132</sup> See, for example, ASSORETI, the Italian association of Italian securities brokerage companies (SIM) and Italian banks that distribute financial products and investment services through financial advisors. The main objectives of ASSORETI are to represent the interests of its members; to promote research activities and initiatives, and to provide data on the trends shaping the distribution of financial products through financial advisors. See also the ASSORETI Code of Conduct adopted in 1993 and representing a form of self-regulation undertaken to implement legislation (Act No. 1/1991).

<sup>133</sup> See for example the “Codice di comportamento tra banche per affrontare i processi di ristrutturazione atti a superare le crisi di impresa”, in *Banca, Borsa e Titoli di Credito*, 2000, III, 423.

In the area of the initiatives aimed at creating better relationships with customers, a special attention is to be paid to the “Code of conduct for the banking and financial sector” (*Codice di comportamento del settore bancario e finanziario*), just based upon the initiatives undertaken by the A.B.I. The document constitutes a tangible call for a system of ethics and code of behaviour for the sector, identifying self-regulatory guide-lines which prescribe regulations that should be observed by the associated members.

It contains in synthetical form the rules and obligations already laid down in the banking legislation (on transparency<sup>134</sup>, credit installments, and operations on the stockmarket). Nevertheless, as a whole it is permeated by a series of general principles not completely ruled by legislative or administrative law such as commitment to offer credit, better understanding of services, better financial conditions, security, access to services<sup>135</sup>.

Also relevant are the Interbank Agreement of 15<sup>th</sup> April 1993 and the linked “A.B.I. Regulations of the bank complaint office and bank Ombudsman”<sup>136</sup>.

Section II of the A.B.I. Regulations provides for a Banking Ombudsman<sup>137</sup>, a collective body whose task is to settle any dispute concerning banking or financial transactions by credit institutions up to a value of 10,000 Euros. Specifically, only consumers having the characteristics reported in Decree No. 385 of September 1<sup>st</sup> 1993, art. 121 (now art. 121 of TUB – Testo Unico Bancario -<sup>138</sup>), par. 1 can have recourse to the Ombudsman for disputes linked to services offered or transactions made by their bank or intermediaries (art. 7). The controversy must not have been referred to a Judicial Authority or a committee of arbiters yet (art. 7, lett. a)). Moreover, according to art. 7, lett. c), “the dispute has already been referred to the bank or intermediary but: the bank or intermediary did not answer within the prescribed time limits (60 days); the complaint was rejected or partly rejected; the bank or intermediary accepted the complaint but did not settle the controversy within the prescribed time limits”. In order to better understand the controversy nature, the Ombudsman secretariat – within the so-called “*poteri istruttori*” - can ask further information both to the person in charge for the complaints

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<sup>134</sup> See, for example, L. 17 febbraio 1992, n. 154 *on transparency of banking and financial operations*.

<sup>135</sup> This can thus be considered as a typical case of co-regulation, undertaken to implement or supplement legislation.

<sup>136</sup> Specifically, see the Agreement in the “Circolare Serie Tecnica” n. 3 of February 1<sup>st</sup> 1993. Notably PRATIS, *L'accordo interbancario del 1993 per l'istituzione dell'Ufficio reclami degli enti creditizi e dell'Ombudsman bancario nell'ambito della tutela del consumatore. Raffronto con analoghi sistemi di altri paesi della Cee*, in *Banca, Borsa e Titoli di Credito*, 1994, I, 216.

<sup>137</sup> On the Italian Banking Ombudsman, see CARRIERO, *Crisi del processo civile e giustizia stragiudiziale: l'ombudsman bancario*, in *Foro It.*, 2002, V, 249; GABRIELLI, *L'incompetenza dell'Ombudsman bancario (il "non liquet" dell'organismo di garanzia)*, in *Giust. Civ.*, 1999, I, 1523; GIANFELICI, *L'ombudsman bancario*, in *Impresa*, 1993, 1400; NOVELLI, *L'ufficio reclami della clientela e l'ombudsman bancario*, in *Impresa*, 1993, 1557; MACCARONE, *Le esperienze europee di Ombudsman bancario*, ne AA.VV., *La banca e l'arbitrato*, RIOLO (a cura di), Roma, 1994, 33.

<sup>138</sup> Art. 121 TUB defines the consumer credit (credito al consumo): “Per credito al consumo si intende la concessione, nell'esercizio di un'attività commerciale o professionale, di credito sotto forma di dilazione di pagamento, di finanziamento o di altra analoga facilitazione finanziaria a favore di una persona fisica che agisce per scopi estranei all'attività imprenditoriale o professionale eventualmente svolta (consumatore). 2. L'esercizio del credito al consumo è riservato: a) alle banche; b) agli intermediari finanziari; c) ai soggetti autorizzati alla vendita di beni o di servizi nel territorio della Repubblica, nella sola forma della dilazione del pagamento del prezzo. 3. Le disposizioni del presente capo e del capo III si applicano, in quanto compatibili, ai soggetti che si interpongono nell'attività di credito al consumo”.

department of the bank or intermediary and to the customer himself, giving final time limits for answering<sup>139</sup>.

By virtue of art. 10 of the A.B.I. Regulations, the Ombudsman has to deliberate within 90 days after the customer making the complaint or sending any other useful information.

It is also important to point out that, while the decision of the Ombudsman is binding both for the banks and intermediaries<sup>140</sup>, “the customer can nevertheless apply to State courts, as well as to the Committee of Arbiters, at any time” (art. 14)<sup>141</sup>.

## V.5 Sport

Sport is one of the most significant fields to observe the functioning of self-regulatory mechanisms in Italy. It has been one of the few sectors where there has been academic discussion concerning the role of self-regulation<sup>142</sup>.

The exercise of sport activities – now expressly recognized by art. 117, III par. 3, Cost., as modified by Law No. 3/2001<sup>143</sup> – undoubtedly involves constitutional rights and freedoms such as freedom of association (art. 18 Cost.) and right of health (art. 32 Cost.<sup>144</sup>)<sup>145</sup>.

This is why Italian legislator delegated the functions of promotion, regulation and organization of sports activities to a public entity, such as the National Olympic Committee, known under the acronym C.O.N.I. – *Comitato Olimpico Nazionale Italiano*. It was set up by Act 16 febbraio 1942, n. 426<sup>146</sup> (*legge di costituzione e funzionamento del Comitato Olimpico nazi-*

<sup>139</sup> If such time limits are not kept, the Ombudsman will take it into account. It has to be remarked that the Italian Banking Ombudsman also has self-regulatory powers: according to art. 11 of the A.B.I. Regulations, in fact, it can regulate itself and the technical secretariat with special deliberations, which are approved by a majority of the collective body. On this point and in general on the Banking Ombudsman, see GRECO, *Considerazioni sull'esperienza dell'ufficio reclami della clientela*, cit., 237.

<sup>140</sup> If the bank or intermediaries do not conform to the decision, the Ombudsman imposes a delay on the bank to settle the problem. If they do not carry out the Ombudsman instructions within the prescribed time limits, the non-fulfilment will be published in the press and the bank or intermediary themselves will sustain the costs.

<sup>141</sup> See art. 14, par. 2: “Il ricorso all’Ufficio Reclami o all’Ombudsman non priva il cliente del diritto di investire della controversia, in qualunque momento, l’Autorità giudiziaria ovvero, ove previsto, un collegio arbitrale”. The Italian banking Ombudsman, as introduced by the 1993 Agreement, is not thus a judiciary body. It can only be considered as a sort of guardian of transparency of banking operations. See INCHINGOLO, *L’Ombudsman bancario*, in *Dir. banc.*, 1994, II, 36: “L’Autorità introdotta dall’ABI, priva della natura di organo giudiziario, opera in veste di garante della regolarità dell’attività bancaria”.

<sup>142</sup> Notably ALVISI, *Autonomia privata e autodisciplina sportiva. Il C.O.N.I. e la regolamentazione dello sport*, Milano, 2000. More in general, see FRATTAROLO, *L’ordinamento sportivo nella giurisprudenza*, Milano, 2005; DI NELLA, *Il fenomeno sportivo nell’ordinamento giuridico*, Napoli, 1999, 62.

<sup>143</sup> Art. 117, par. 3, Cost.: “The following matters are subject to concurrent legislation of both the state and regions: (...) sports regulations”.

<sup>144</sup> Art. 32, par. I, Cost.: “The Republic protects individual health as a basic right and in the public interest; it provides free medical care to the poor”.

<sup>145</sup> See recently PICOZZA, *I rapporti generali tra ordinamenti*, in FRANCHINI (a cura di), *Gli effetti delle decisioni dei giudici sportivi*, Torino, 2004, 2, who also refers to art. 9 Cost. (research and culture) and art 33 Cost. (Freedom of Arts, Science and Teaching).

<sup>146</sup> Now see the *Legislative Decree 23 luglio 1999, n. 242 and the Legislative Decree 8 gennaio 2004, n. 15*, Modifiche ed integrazioni al decreto legislativo 23 luglio 1999, n. 242, recante “Riordino del Comitato olimpico nazionale italiano - CONI”, ai sensi dell’articolo 1 della legge 6 luglio 2002, n. 137.

*onale italiano*) as a public law entity (*ente associativo pubblico*), with independent legal status<sup>147</sup> but under the control and supervision from government<sup>148</sup>.

For the purpose of this study, C.O.N.I. can thus be considered a public self-regulatory body<sup>149</sup>, with delegated public powers<sup>150</sup>. In fact, following the legal criteria for determining the public nature of a body as specified in part II of this study, it seems useful to underline that it was set up by law, with the express duty to act in the general interest. It carries out its activities under the control and supervision of government. Government play a pivotal role in the appointment procedure of the certified public account committee (*collegio dei revisori dei conti*)<sup>151</sup>. Because it enjoys an indirect public funding, C.O.N.I.'s activities are also under the control (*controllo contabile*) exercised by the Court of Auditors (*Corte dei conti*)<sup>152</sup>.

The public powers or tasks entrusted to C.O.N.I. include the organisation and strengthening of the national sports, as well as the orientation towards athletic improvement. Only the C.O.N.I. (as well as the other National Olympic Committees – NOCs) can select teams and competitors for participation in the Olympic Games.

On the other hand, C.O.N.I. may delegate many of these tasks to other private subjects, known as the *Federazioni Sportive Nazionali*.

The National Sports Federations are expressly recognized *ex lege* as associations of private nature<sup>153</sup> and, as such, they are generally governed by private law.

<sup>147</sup> In general, on C.O.N.I., see GHIA, *Il C.O.N.I. e la legge 31 gennaio 1992, n. 138*, in *Riv. dir. sport.*, 1993, 172; MORBIDELLI, *Gli enti dell'ordinamento sportivo*, in *Dir. amm.*, 1993, 5; ALPA, *L'ordinamento sportivo*, in *Nuova giur. Civ. comm.*, 1986, 50; RIGO, *Storia della normativa del C.O.N.I. dalle sue origini alla legge istitutiva del 1942*, in *Riv. dir. sport.*, 1986, 1. Notably, LUISO, *La giustizia sportiva*, Milano, 1975, 201: "Il C.O.N.I. è ente pubblico, cioè persona giuridica di diritto pubblico, in quanto portatore di interessi della stessa natura di quelli dell'ordinamento statale in cui è inserito, e tuttavia rimane ente indipendente dallo Stato, (...) tanto che si è affermato che il C.O.N.I. occupa una posizione atipica nell'ambito della pubblica amministrazione".

<sup>148</sup> Art. 1, Legislative Decree No.242/1999: "Il Comitato olimpico nazionale italiano, di seguito denominato C.O.N.I., ha personalità giuridica di diritto pubblico (...) ed è posto sotto la vigilanza del Ministero per i beni e le attività culturali". The Committee is thus a public body, under the control of Ministry of cultural heritage. See also art. 157, par. 1, Legislative Decree No. 112/1998: "resta riservata allo Stato la vigilanza sul C.O.N.I. di cui alla legge 16 febbraio 1942, n. 426 e successive modificazioni".

<sup>149</sup> This is thus a typical case of self-regulation performed by a public entity. As a consequence, the ordinary model of public liability (*responsabilità contabile* and *responsabilità amministrativa*) will apply.

<sup>150</sup> This can be considered as a hypothesis of delegated self-regulation. Again ALVISI, *Autonomia privata e autodisciplina sportiva. Il C.O.N.I. e la regolamentazione dello sport*, cit., 43: "(...) attraverso la pubblicizzazione del C.O.N.I. lo Stato ha assunto la cura di interessi settoriali demandandola, *rectius* riconoscendo la titolarità delle relative funzioni, in capo allo stesso gruppo di privati portatori di quegli interessi".

<sup>151</sup> The Ministry of cultural heritage can also revoke the President of C.O.N.I. for the circumstances specified in art. 13, co. 1, Legislative Decree No. 242/1999.

<sup>152</sup> See in fact art. 103, par. 2 Cost.: "The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law".

<sup>153</sup> See art. 15, par. 2, Legislative Decree No. 242/1999, as modified by Legislative Decree No. 15/2004: "Le federazioni sportive nazionali hanno natura di associazione con personalità giuridica di diritto privato. Esse non perseguono fini di lucro e sono disciplinate, per quanto non espressamente previsto nel presente decreto, dal codice civile e dalle disposizioni di attuazione del medesimo". The national sport Federations are thus private associations and their activities are governed by civil code. It must be stressed that there was an important academic discussion on the nature (private or public) of the national Federations. On this matter, see T.A.R. Calabria Catanzaro Sez. II, 14 novembre 2006, n. 1321, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); T.A.R. Calabria Catanzaro Sez. II, 18 settembre 2006, n. 984, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); Cass. civ. Sez.

However, they quite often carry out activities in the public interest, operating under the strict supervision of C.O.N.I.<sup>154</sup>. More in particular, according to the prevailing Italian doctrine<sup>155</sup>, general interest activities (behind all those expressly qualified as public by law) can be considered: the sanitary inspections of athletes; the control and supervision of professional sport companies (*società sportive professionistiche*)<sup>156</sup>; all powers relating to the insurance and social security protection of athletes; the prevention and repression of doping; the use and management of public sport installations; all activities related to the Olympic training of athletes; the use of public funds<sup>157</sup>.

Some Authors argue that, since legislator mandates the National Olympic Committee to undertake activities in the general interest and since C.O.N.I. may delegate its regulatory powers to other private associations, this can be considered as a relevant case of delegated self-regulation (a so-called “*legificazione degli atti dell’autonomia privato-collettiva*”)<sup>158</sup>.

According to the Italian legal literature, acts adopted by the national federations in the public interest are to be considered as sources of law (“*fonti di ius singulare*”) and, as such, be subject to judicial review of administrative Courts<sup>159</sup>.

Again, by virtue of art. 16, Legislative Decree No. 242/1999, National sports Federations have to observe the “principle of inside democracy” (*principio di democrazia interna*), the principle of equal treatment, as well as the principle of participation. It can thus be pointed out that the private nature of a self-regulatory body doesn’t necessarily imply a total respect of private autonomy, so that the self-regulatory body may freely make, interpret and apply its own rules and determine its membership. In the case of National sports Federations, in fact, there are public law restraints to their freedom, expressly laid down by law, in the respect of principle of democracy, equality of treatment, transparency and participation.

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Unite, 20 giugno 2006, n. 14103, in *Mass. Giur. It.*, 2006; Cons. Stato Sez. VI, 9 febbraio 2006, n. 527, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it). For the doctrine on the point, see VIDIRI, *Natura giuridica e potere regolamentare delle federazioni sportive nazionali*, in *Foro It.*, 1994, I, 137; DE SILVESTRI, *Le qualificazioni giuridiche dello sport e nello sport*, in *Riv. dir. sport.*, 1992, 296. Some Authors argued that the national sports Federations would have a mixed nature, private and public. See CAPRIOLI, *Le federazioni sportive nazionali tra diritto pubblico e privato*, in *Dir. e giur.*, 1989, 1 ss.

<sup>154</sup> See art.7, e), Legislative Decree No. 242/1999.

<sup>155</sup> See MORBIDELLI, *Gli enti dell’ordinamento sportivo*, in *Dir. amm.*, 1993, 5; ALVISI, *Autonomia privata e autodisciplina sportiva*, cit., 58.

<sup>156</sup> That is to say, for example, the powers of affiliation and the recognition of professional sport companies. See art. 5, par. 2, lett. e), which delegate to the C.O.N.I. National Council the power of establishing the criteria and the modalities for the exercise of control on national sport federations, as well as the control on professional sport companies carried out by the national sport federations.

<sup>157</sup> See the new C.O.N.I.’s statute, approved by Ministerial Decree 23 giugno 2004, whose art. 23, par. 1 states: “Ai sensi del decreto legislativo 23 luglio 1999, n. 242 e successive modificazioni e integrazioni, oltre quelle il cui carattere pubblico è espressamente previsto dalla legge, hanno valenza pubblicistica esclusivamente le attività delle Federazioni sportive nazionali relative all’ammissione e all’affiliazione di società, di associazioni sportive e di singoli tesserati; alla revoca a qualsiasi titolo e alla modificazione dei provvedimenti di ammissione o di affiliazione; al controllo in ordine al regolare svolgimento delle competizioni e dei campionati sportivi professionistici; all’utilizzazione dei contributi pubblici; alla prevenzione e repressione del doping, nonché le attività relative alla preparazione olimpica e all’alto livello alla formazione dei tecnici, all’utilizzazione e alla gestione degli impianti sportivi pubblici”.

<sup>158</sup> See again ALVISI, *Autonomia privata e autodisciplina sportiva*, cit., 58.

<sup>159</sup> ALVISI, *Autonomia privata e autodisciplina sportiva*, cit., 58.

## V.6 Professional orders

Like the National Olympic Committee, professional orders can be considered as entities constituted under public law, better known as “*enti pubblici associativi*”<sup>160</sup>, with the right to regulate their members through deontology codes<sup>161</sup>, whose violations they can sanction<sup>162</sup>, and with functions of strict control over the regulatees<sup>163</sup>.

The Italian Constitution doesn't directly deal with professional orders.

Nevertheless, their constitutional basis can indirectly be found in some constitutional provisions, such as, for instance, art. 33, V par. (“exams are defined for admission to various types and grades of schools, as final course exams, and for professional qualification”), as well as, more in general, in the general principle laid down by art. 1 (“Italy is a democratic republic based on labour”) and in the several provisions recognizing and protecting rights potentially involved by professional orders' activities<sup>164</sup>.

As to ordinary legislation, under art. 2229 of Italian Civil Code, “*the law specifies the intellectual professions for whose exercise registration in special rolls or lists is required. Verification of the requisites for registration in rolls or lists, the keeping of same and disciplinary power over registered members are vested in professional associations, under the supervision of the State, unless the law provides otherwise. Judicial review of the denial of registration in or cancellation from those rolls or lists and against disciplinary measures which entail loss or suspension of the right to exercise a profession is admitted in the manner and within the terms*”

<sup>160</sup> Notably, ROSSI, *Enti pubblici associativi*, Napoli, 1979. On the matter, see also GESSA, *Ordini e collegi professionali*, in *Enc. Giur.*, XXII, Roma, 1990, 1; CATELANI, *Gli ordini e i collegi professionali nel diritto pubblico*, Milano, 1976. Recently, CARBONE – MUNARI, *La tutela dell'utente tra deontologia professionale e disciplina della concorrenza*, in ZATTI (a cura di), *Le fonti di autodisciplina*, cit., 91; BELLELLI, *Codice deontologico medico e tutela del paziente*, *ivi*, 111. As to case law, see recently T.A.R. Lazio, Sez. I, 28 gennaio 2000, n. 466, in *Giust. Civ.*, 2000, I, 2183. On this point, see however, PINOTTI, *Il futuro delle professioni liberali tra tutela nazionale e concorrenza*, in *I contratti dello Stato e degli enti pubblici*, 2004, 365, who indeed underlines a deep contradiction in the nature of a professional order, which can be, at one and the same time, professional body, public body, private association (“La prima ambiguità generalmente denunciata riguarda proprio la natura dell'Ordine, il cui modello organizzativo contiene in sé una profonda contraddizione essendo nello stesso tempo corpo professionale, organismo statale, associazione privata ed ente pubblico, con continua commistione di piani di interessi”).

<sup>161</sup> Binding for who is registered in the professional roll.

<sup>162</sup> On the disciplinary proceedings carried out by the professional orders (and, more in particular, by the Consiglio dell'Ordine degli Avvocati, the “Council of the Bar”), see Cass. civ. Sez. III, 31 maggio 2006, n. 13004, in *Impresa*, 2006, 11, 1686; Cass. civ. Sez. Unite, 12 marzo 2004, n. 5164, in *Mass. Giur. It.*; Cass. civ., Sez. Un., 23 gennaio 2002, n.762, in *Giur. It.*, 2002, 1713: “Sono sottoposti a procedimento disciplinare gli avvocati che si rendano colpevoli di abusi o mancanze nell'esercizio della loro professione o, comunque, di fatti non conformi alla dignità o al decoro professionale. L'accertamento della non conformità delle singole condotte a tali canoni è rimesso all'autonomia degli ordini professionali”. See also Cass. civ., Sez. III, 30 luglio 2001, n.10396, in *Mass. Giur. It.*, 2001.

<sup>163</sup> Cfr. BASSI, *La norma interna, Lineamenti di una teorica*, Milano, 1963, 2. See also Cons. Giust. Amm. Sic., sez. consult., 14 giugno 1999, n.254, in *Cons. Stato*, 1999, I, 1034: “Gli ordini e i collegi professionali sono enti pubblici che, per le professioni per l'esercizio delle quali occorre una speciale abilitazione dello Stato, secondo le disposizioni degli art. 2229 e 2233 c.c. e secondo le varie leggi istitutive dei singoli ordini, hanno le specifiche competenze della tenuta degli albi, dell'esercizio della funzione disciplinare ... tali funzioni devono essere considerate conferite a tutela della collettività nei confronti degli esercenti la professione e non già a tutela degli interessi della categoria professionale”.

<sup>164</sup> MAVIGLIA, *Professioni e preparazione alle professioni*, Milano, 1992.

*laid down by special laws*”<sup>165</sup>. This means that, within the Italian legal order, there can be professions or professional activities which don’t have a specific legal discipline (the so called “*professioni libere*”, “*free intellectual professions*”) and for which it’s not necessary a registration in any professional rolls<sup>166</sup>.

On the other hand, the so called “*professioni protette*” are regulated firstly by national statutes which provide for the compulsory registration in a professional roll and for the institution of a specific professional order<sup>167</sup>; secondly, by regulations and deontology rules which implement and integrate ordinary legislation (there is thus a sort of “mixed discipline”<sup>168</sup>).

### V.6.1 Professional ethical rules

As mentioned above, in the exercise of their self-regulatory functions<sup>169</sup>, professional orders may regulate their members through deontological codes, which generally have a voluntary basis.

Thus, deontological rules rarely have a legal basis. Nevertheless, there are some exceptions.

Law 27 June 1991, No. 220, for example, delegated the Consiglio Nazionale del notariato – National Council of Public notary – to adopt the notarial deontological rules; on the 29<sup>th</sup> July 1998, the *Garante per la protezione dei dati personali* (Privacy Authority) approved a code of conduct in the exercise of a power expressly delegated by art. 25, Law 31 December 1996, No. 675. On the other hand, the “*Carta dei doveri del giornalista*” adopted by the National Council of Journalist on 8<sup>th</sup> July 1993, has an exclusive voluntarily basis.

The nature of deontological rules has been debated in Italy for a long time. According to the prevailing Italian doctrine<sup>170</sup> and to the recent case law<sup>171</sup>, professional ethical rules find

<sup>165</sup> See *The Italian Civil Code and complementary legislation*, translated by BELTRAMO, LONGO, MERRY-MAN, 1991.

<sup>166</sup> Cons. Stato, Sez. IV, 14 gennaio 1999, n. 33, in *Giorn. dir. amm.*, 1999, 351 underlined the existence, in the Italian legal order, of “free” intellectual professions: “Il punto di partenza della questione è l’articolo 2229, c. 1, c.c., ai sensi del quale la legge determina le professioni intellettuali per l’esercizio delle quali è necessaria l’iscrizione in appositi albi o elenchi. Da ciò deriva che non per tutte le professioni intellettuali è prevista l’istituzione di appositi albi, per cui esistono ‘professioni intellettuali per così dire libere’ e cioè non tipizzate legislativamente”.

<sup>167</sup> This can thus be viewed as a direct application of the general principle laid down by art. 97 Cost.: “The organization of public offices is determined by law”. It must be clarified that the interference of the legislator should be limited in the respect of the autonomy of professional orders (some Authors talk about a sort of “autogoverno”: see CATELANI, *Gli ordini e i collegi professionali nel diritto pubblico*, Milano, 1976, 128). Any interference of the State in internal affairs (either by limiting the right of labour of the professional order’s members, as laid down by art. 1 Cost., or being prejudicial to the regular functioning of the order) must be considered as intolerable. On this point, see CASSESE, *Professioni e ordini professionali in Europa. Confronto tra Italia, Francia e Inghilterra*, Milano, 1999, 34.

<sup>168</sup> See CASSESE, *Professioni e ordini professionali in Europa. Confronto tra Italia, Francia e Inghilterra*, cit., 34: “...L’ordinamento italiano è caratterizzato nel settore delle professioni protette da forme miste di disciplina: la norma primaria regola gli aspetti più rilevanti della materia, altre norme di natura regolamentare o interne al corpo professionale intervengono in funzione di attuazione o di integrazione”.

<sup>169</sup> See (with regard to the notarial deontological rules) Cass. civ., Sez. III, 4 dicembre 2002, n.17202, in *Mass. Giur. It.*, 2002; (with regard to deontological rules adopted by the Council of the Bar – Consiglio dell’Ordine), Cass. civ., Sez. un., 6 giugno 2002, n. 8225, in *Mass. Giur. It.*, 2002, which expressly refer to general self-regulatory powers given to professional orders.

<sup>170</sup> CASSESE, *Professioni e ordini professionali in Europa. Confronto tra Italia, Francia e Inghilterra*, cit., 34. See also LOMBARDI, *Principi di deontologia professionale ed efficacia normativa nell’ordinamento gi-*

their basis in the professional order's autonomy (“*autogoverno*”). They are thus to be considered as non – legal rules (“*precetti extra-giuridici*”, “*norme morali*” “*norme di convenienza sociale*”), as “*norme interne*” (“*inside norms*”) and, as such, they cannot be viewed as being part of the formal hierarchy of sources of law<sup>172</sup>.

Following the Santi Romano's theory<sup>173</sup>, some Authors argue that professional orders, as “derived orders” (*ordinamenti derivati*), are not able to adopt deontological rules in violation with the general principles of legal order (*ordinamento derivante*). In the case of breach of these latter precepts, judicial review might thus be admitted<sup>174</sup>.

This also emerges from two quite important and recent judgments (Cassazione Civile, 4 giugno 1999, n. 5452<sup>175</sup> and Consiglio di Stato, Sez. IV, 17 febbraio 1997, n. 122<sup>176</sup>). In both cases, the Courts held that judicial review (literally: “*controllo giurisdizionale*”) is possible only when the deontological rules are in violation of constitutional precepts, as well as the general principles of legal order, and involve issues not related to professional deontology (“*Le regole deontologiche poste dagli ordini professionali sono soggette al controllo giurisdizionale solo in quanto violino precetti costituzionali o inderogabili o principi generali dell'ordinamento e in quanto incidano su oggetti estranei alla deontologia professionale*”).

## VI. Final remarks

This study was aimed at giving an overview of the evolution of the self-regulatory mechanisms in Italy.

It is clear that self-regulation by itself is not a topic in Italian legal literature.

It's even hard to give an all encompassing definition of the phenomenon, self-regulation being a sector-oriented concept. From the research, it was made clear that Italian legal scholarship rarely takes into account self-regulatory mechanisms as general principles. The debates usually focus on specific sectors in which the self-regulatory technique is applied: advertising, sport and professional orders can be viewed as fields where enthusiasm for self-regulatory solutions has always marked.

The sectorial analysis has showed the existence of different kinds of purely private self-regulation, *ex post* recognized by State, and born in order to compensate the lack of public law rules (this has been the case of the advertising sector, where self-regulation has a long and

*uridico statale*, who commented Cons. Stato, Sez. IV, 17 febbraio 1997, n. 122, in *Dir. proc. amm.*, 1998, 193. Less recently, SANDULLI, *Regole di deontologia professionale e sindacato della Corte di cassazione*, in *Giust. civ.*, 1961, I, 619.

<sup>171</sup> Cass. Civ., Sez. Un., 10 febbraio 1998, n. 1342, in *Rass. Forense*, 1999, 475 (s.m.); Cass. Civ., Sez. Un., 12 dicembre 1995, n. 12723, in *Rass. Forense*, 1996, 362; Cass. Civ., Sez. Un., 23 luglio 1993, n. 8239, in *Giust. Civ. Mass.*, 1993, 1223; Cass. Civ., Sez. Un., 17 gennaio 1991, n. 401, in *Foro It.*, 1992, I, 2243.

<sup>172</sup> The situation is quite different in the case of a resolution (“*delibera*”) adopted by a professional order in order to carry the deontological rules into effect. In this case, the resolution is to be viewed as an administrative act (with all the consequences stated in part. II of this study). See on this point, Cons. Stato, Sez. IV, 17 febbraio 1997, n. 122, in *Dir. Proc. Amm.*, 1998, 193.

<sup>173</sup> SANTI ROMANO, *L'ordinamento giuridico*, Pisa, 1917.

<sup>174</sup> Notably, LOMBARDI, *Principi di deontologia professionale ed efficacia normativa nell'ordinamento giuridico statale*, cit., 193.

<sup>175</sup> Cass. civ., Sez. III, 4 giugno 1999, n.5452, in *Giust. Civ.*, 2000, I, 416.

<sup>176</sup> Cons. Stato, Sez. IV, 17 febbraio 1997, n. 122, in *Dir. proc. amm.*, 1998, 193, note by LOMBARDI, *Principi di deontologia professionale ed efficacia normativa nell'ordinamento giuridico statale*.

powerful tradition), as well as fields in which there has been a radical transformation in the law-making process towards a sort of delegated self-regulation (this is the case, for instance, of labour law and sport sector)<sup>177</sup>.

More in general, in order to better understand the role, the position, as well as the aims of self-regulatory mechanisms within the Italian legal order, a brief overview of the Italian system of sources of law has been absolutely necessary.

The research has showed that the model of the sources of law rooted in the Italian constitution is typically positivistic and centred on the pivotal role of the Parliament, the only body empowered to make legislation, either directly (art. 70, Constitution) or by delegation of its normative powers to the Government (art. 77, Constitution), within expressly specified limits.

What space, if any, does exist for the self-regulatory rules?

The study shows that, in addition to the delegated legislation (art. 77, Constitution), statutes increasingly provide for the adoption of “codes of practice” (through a form of “delegated self-regulation”), which have legal effect within the limits expressly specified by Parliament. This was the case, for instance, of Law No. 146 of 12 June 1990: where a strike takes place in public essential services, minimum services shall be guaranteed, as agreed upon by the administration (or the enterprise that administers the essential service) and the union’s representation at the enterprise level (or the workers’ representatives where appropriate), through self-regulatory codes (*codici di autoregolamentazione*). This was the case, again, of Law No. 220 of 27<sup>th</sup> Jun 1991, which delegated the Consiglio Nazionale del notariato – National Council of Public notary – to adopt the notarial deontological rules. Again, on the 29<sup>th</sup> July 1998, the *Garante per la protezione dei dati personali* (Privacy Authority) approved a code of conduct, in the exercise of the power expressly delegated by art. 25, Law 31<sup>st</sup> December 1996, No. 675.

If one of the most interesting aims of the research was to analyse to what extent the self-regulatory phenomenon is compatible with the undisputed Parliament’s sovereignty and with the linked principle of rule of law<sup>178</sup>, it should be clear that rules made by private actors (i.e. self-regulatory rules), which pretend to have external effects (binding *erga omnes*), can be considered as law and, as such, as sources of law, as long as they can be “incorporated” and recognized into some of the formal sources of Italian law. This seems the only possible and constitutional compatible interpretation of a phenomenon (such is self-regulation) which, instead, could potentially be able to put the formal hierarchy of sources of law in jeopardy.

More in general, it should be clear that Parliament cannot be considered any longer the only body empowered to make rules. The legal order is crossing through a radical transformation

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<sup>177</sup> On the other hand, the research has showed that the financial sector can be viewed as the field in which Italian policy makers have opted for the highest degree of public regulation. However, certain forms of self-regulation are increasing in this sector too. To this aim, it is sufficient to remember the fundamental role played by the Italian banking association, as well as the Banking Ombudsman.

<sup>178</sup> Recently see the Advice of Consiglio di Stato, 14th February 2005, No. 11603/04 (Cons. Stato, Sez. cons. atti normativi, 14 febbraio 2005, n. 11603/04) on the Draft of the Legislative Decree on “Reordering of the provisions in force in the insurance sector. Insurance code” (*Schema di decreto legislativo recante “Riassetto delle disposizioni vigenti in materia di assicurazioni. Codice delle assicurazioni”*). The Council expressly recognizes that the Independent administrative authorities are entitled, in the light of the principle of the so called “normative policentrism” (“policentrismo normativo”), to the exercise of secondary normative powers (through regulations), in the total respect of the principle of rule of law.

towards a sort of “reticular system”, able to coexist with plurastic organisations which are increasingly making rules in competition with the State <sup>179</sup>.

On the other hand, the results of the study make clear that, even when the Parliament confers its normative powers to any other bodies (i.e. either independent administrative authorities or professional orders, or, more in general, any self-regulatory associations), it will unlikely give up fixing the limits within which those normative powers have to be exercised. Some authors actually considers this sort of “delegated legislation” as a mean for the State to reassert its sovereignty <sup>180</sup>.

Anyway, this new pluralistic “architecture” will undoubtedly let the legislator to keep some exclusive duties: firstly and foremost, the power to prescribe the institutional conditions founding the «private self-regulatory governments’» <sup>181</sup> basis, as well as the aims of their future normative action; secondly, to intervene in order to correct, if necessary, the new consensual rules.

To this latter aim, the analysis of tort law, as it applies to the self-regulatory bodies, has showed that liability regime could potentially be considered as an absolutely necessary complement of self-regulation; first, by preventing self-regulatory rules to violate statutes, as well as constitutional precepts; second, by incorporating them into indirect sources of law, such are judgments.

In the end, the general overview seems to show a promising future for self-regulation, a phenomenon which, in the next years, will probably attract a good deal of attention.

The current constitutional and legislative Italian framework seem to ensure a solid basis for the development of the self-regulatory technique. At the moment, all one has to do is to wait for a more resolute intervention of both Italian Courts and legal scholarship.

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<sup>179</sup> This is what, in this study, has been called the “Santi Romano’s theory” (SANTI ROMANO, *L’ordinamento giuridico*, Pisa, 1917). On this theory see again CAFAGGI, *Crisi della statualità, pluralismo e modelli di autoregolamentazione*, cit., 568. The Authors underlines that the theory of “pluralità degli ordinamenti” can be admitted whenever compatible with the Italian constitutional order and whenever the sources that don’t find their legitimacy in statutes, don’t pretend to have external effects (“La pluralità degli ordinamenti può essere ammessa quando sia compatibile con l’ordinamento costituzionale e quando le fonti che non trovano legittimazione nella legge non abbiano la pretesa di estendere i propri effetti nei confronti di terzi”).

<sup>180</sup> G. DE MINICO, *Regole – comando e consenso*, Torino, 2004, 127.

<sup>181</sup> The expressions in inverted commas have been used by G. DE MINICO, *Regole – comando e consenso*, cit., 127, who expressly refers to “governi privati di autoregolazione”.

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