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Essays

Public Services Beyond State and Market.
Rethinking Contract as a Tool for Decommodification Within European Private Law

Rocco Alessio Albanese*

Abstract

This work discusses how different conceptions of contract within European Private Law shape the way of managing and providing public services.

The argument builds on an overview of the EU legal framework in the domain of public services. The regime of public procurement and the divide between economic and non-economic Services of General Interest are addressed. Attention is given to the recent focus on both social and environmental issues and the social economy. This broad analysis gives room to question competition as the major organizational criterion in the legal arrangement of public services,in this respect, the trends characterising the Italian laboratory are discussed to deal with the implementation of EU rules at the domestic level.

The critique of the dominant market-oriented and regulatory schemes leads to a new understanding of the overall topic. While antagonistic conceptions of contract serve as basic infrastructures of the market as a socio-legal institution, more sophisticated approaches can play an unexpected role in experimenting with alternative organizations of public services. From this perspective a commons-oriented view of the new property theory is adopted too, to provide end-users with a new legal zone of agency.

Although some questions remain open, one can claim that contract can be a tool of de-commodification, capable of bringing public services beyond state and market.

I. Public Services, Competition and European (Private) Law. A Critical Overview

The domain of public services is pivotal in contemporary societies and can

* Assistant Professor of Private Law, University of Piemonte Orientale Amedeo Avogadro. The article must be regarded as a sketch of a broader research program: because of this, the development of the reasoning is sometimes quick and footnotes are limited to the essential. This work has been conceived during two visiting research fellowships at the Vrije Universiteit Brussel and at the University of Groningen. I wish to thank Serge Gutwirth, Alessia Tanas and Björn Hoops for having welcomed me and for the thorough conversations we had. Very useful inputs for the argument I try to develop came from an interview with policy officers of the European Commission (DG Internal Market, Industry, Entrepreneurship and SMEs): I am grateful for their availability. A first presentation of this piece of research took place on 12 December 2022 at the Conference 'Commodification and the Law' at the European University Institute in Florence. I want to thank all the participants in the Conference for their inspiring comments: they allowed me to definitively improve my work. Many grateful thanks to the organizing committee as well (especially to Tommaso Fia and Ian Murray) for having invited me. All remaining mistakes are the sole responsibility of the author.

be included among the most complex and delicate sectors of the whole body of EU law, from a technical point of view as well as in terms of policy. The sole market of public procurement, for instance, owns a crucial legal and economic weight, amounting to 14% of the EU GDP.[1] While building on such a basic awareness, this article is not aimed at providing a detailed analysis of the European legal framework relevant to the public services sector or public procurement. Indeed, such an analysis has been made elsewhere.[2] More humbly, the goal of this paper is to highlight some core evolutive trends in the European (and the Italian) regulation of such intertwined domains, then to adopt the perspective of European private law to discuss whether and how different legal understandings of contract are capable of shaping the concrete way of producing, managing and providing some essential services for human wellbeing.

As a very preliminary remark, one can notice that the history of public services in the EU is about a contradiction between two cultural and political foundations of the European legal project. On the one hand, any theoretical and operational reflection on public services must be traced to the special mission of these activities since objectives such as the promotion of solidarity and effectiveness of social inclusion and territorial cohesion lie at the core of the so-called European social model.[3] On the other hand, public services can and should be regarded as an economic phenomenon. In this respect, the possible extension of competition law to the organization and provision of such utilities has been resulting a major issue, in light of the EU's foundational goal of establishing a common internal market.[4]

Such a longstanding dialectic can be noticed by reading the relevant provisions of the current sources of EU primary law. At the most general level, it is easy to refer to Art 3(3) of the Treaty on the European Union (TEU), affirming both the *constitutional* goal of a 'highly competitive social market economy' – the expression

[1] E. Varga, 'How Public Procurement Can Spur the Social Economy' *Stanford Social Innovation Review*, (2021), available at https://tinyurl.com/3n5txsxc (last visited 30 September 2023).

[2] R. Caranta and A. Sanchez-Graells eds, *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham: Edward Elgar Publishing, 2021); H.W. Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018); P. Valkama et al eds, *Organizational Innovation in Public Services. Forms and Governance* (London: Springer, 2013); M. Cremona ed, *Market Integration and Public Services in the European Union* (Oxford: Oxford University Press, 2011).

[3] J. Ottmann, 'The Concept of Solidarity in National and European Law. The Welfare State and the European Social Model' 1 *ICL Journal*, 36-48 (2008); G. de Búrca ed, *EU Law and the Welfare State. In Search of Solidarity* (Oxford: Oxford University Press, 2005). More recently see E. di Napoli and D. Russo, 'Solidarity in the European Union in Times of Crisis: Towards "European Solidarity"?', in V. Federico and C. Lahusen eds, *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (Baden-Baden: Nomos, 2018), 195-248.

[4] Among many, on the internal market as a systemic goal of the EU see M. Cremona ed, n 2 above; and D. Simeoli, 'Contratto e potere regolatorio (rapporti tra)' *Digesto delle Discipline Privatistiche* (Torino: UTET, 2014). To understand the dominant views at the beginning of the current century it is worth referring to the Commission Green Paper of 21 May 2003 on services of general interest: this groudbreaking document is available at https://tinyurl.com/bd6hpjhj (last visited 30 September 2023).

of the very ordoliberal imprinting of the Union –[5] and that the EU 'shall combat social exclusion and discrimination, and shall promote social justice and protection'. More important inputs for the field of public services come from the Treaty on the Functioning of the European Union (TFEU). As is well-known, Arts 14 and 106 of the TFEU contain specific references to the 'services of general economic interest' (SGEI), thus introducing a notion that is crucial for several reasons. First, the mere fact that the interest connected to the services is qualified as general and economic at once alludes to the above-mentioned interference between the welfare-oriented organization of such services and the promotion of competition. In this respect, under Art 106(2) TFEU

> 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

Such a statement should be read in conjunction with the parallel provision of Art 36 of the Charter of Fundamental Rights of the European Union (CFREU), according to which

> 'the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union'.[6]

In light of the combination of these provisions, one could foresee a principle lying at the very core of the EU legal framework, namely a general derogation from the major organizational criterion of opening up societal activities and exchanges to competition (ie the means for creating and promoting the internal market) for services pursuing missions of general interest.

Of course, this has not been the dominant understanding of the issue throughout the last two decades. The Green Paper on Services of General Interest delivered by the European Commission in 2003 can be seen as the groundbreaking document for the establishment of a market-oriented policy in the sector of public services. Four pillars should be recalled. First, the traditional notion of 'public service' was found to be confusing and thus abandoned, while the

[5] For the roots of ordoliberalism see W. Röpke, *A Humane Economy. The Social Framework of the Free Market* (Chicago: Henry Regnery Company, 1960).

[6] On how the rise of fundamental right has affected the EU legal framework see H.W. Micklitz ed, *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014); F. Costamagna, *Diritti fondamentali e rapporti interprivati nell'ordinamento dell'Unione Europea* (Torino: Giappichelli, 2022); and E. Scotti, 'Servizi pubblici locali' *Digesto delle Discipline Pubblicistiche* (Torino: UTET, 2012).

distinction between economic and non-economic services of general interest (SGI) was enhanced. Second, even though the Green Paper explicitly recognised that

> 'the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance',

such an awareness about the relativity of the divide did not prevent the Commission from affirming the expansive character of the concept of services of general economic interest.

The Green Paper has therefore been the source of two intertwined legal axioms. On the one hand, a very naturalistic and *a priori* approach is in that 'any activity consisting in offering goods and services on a given market is an economic activity'. On the other hand, since the economic character of an activity depends on the potential existence of a market, EU law is called to give effect to its foundational commitment by opening up such activities to competition within the field and for the field (the latter case occurring when a service is a natural monopoly so that there could be just an upstream market). Third, and consequently, a competition-oriented interpretation of the Treaty was given in that Art 106(2) TFEU (former Art 86(2) of the Treaty on the European Community) was read as ruling that

> 'providers of services of general interest are exempted from application of the Treaty rules only to the extent that this is strictly necessary to allow them to fulfil their general interest mission'.[7]

Fourth, some major regulatory principles and obligations, such as universal service, continuity and quality of service, affordability and end-user protection, were foreseen to introduce social aspects capable of balancing the overall policy of opening up public services to liberalization and competitive markets.[8]

One cannot but highlight the tremendous role of the choices to ignore the legal and political relativity of the divide between SGEI and SGI, as well as to naturalise the economic quality of services by tracing them to the market as a socio-legal

[7] Already in 2005 it was possibile to acknowledge that 'the peculiar structure of the European political process sometimes seems to lead policy outcomes that may not be comparable to those of a traditional representative democracy. The solution to these difficulties would require a radical change in the structure of the European political process that would make it conform better to basic democratic principles' (J. Baquero Cruz, 'Beyond Competition: Services of General Interest and European Community Law', in G. de Búrca ed, n 3 above, 169-212, 212).

[8] In recent year, the development of such legal arrangements led an influential scholar to remark how 'the shift from public to private does not alter the character of the public service. (…) even the private universal service provider is bound by standards on access and principled minimum substance. We are no longer dealing with a bilateral concept of shared competences and shared responsibilities but with a trilateral one – the EU, Member States and private companies. All three stand on an equal footing. There is no hierarchy and no primary or secondary or tertiary responsibility' (H.W. Micklitz, *The Politics* n 2 above, 314).

institution. The topic will be critically discussed later on, however, it should be clear that it is also because of these remarks that this article refers to the comprehensive category of public services instead of maintaining the distinction between SGEI and SGI (despite the importance it is provided with in the EU legal framework).[9]

Within the above-described framework, from the perspective of this work it is also worth underlining how the *economic* qualification of public services has been crucially relevant to the relationship between law and commodification. While they certainly are and remain also a matter of public and administrative law, the market-oriented management and provision of public services have been stimulating major evolutions of European private law thanks to the hegemony of influential legal and economic theories. The most apparent instance in this respect is perhaps the problem of natural monopolies. Although it often emerges in the domain of public services, such an institutional issue has long been addressed simply by enhancing the aforementioned notion of competition for the field, thus opening up core utilities (eg water services, waste collection, management of highways, and the like) to the market through a procedural competition among private companies aiming at becoming the sole actor within a certain socio-economic sector.[10] Thus, it is no exaggeration to see the increasing influence of ordoliberal views of European private law also as an attempt to deal with the major challenges deriving from the privatization of welfare.[11]

One can trace to this framework some core legal developments: the choice to protect end-users interests first and foremost under consumer law; the increasing role of Authorities as concurrent heteronomous sources of administered contracts; the proceduralization of contractual relationships between public administrations and private providers; the overall regulatory approach, aimed at using private (and public) law mostly as a technical device for tackling market failures and for establishing a highly competitive economic framework.[12]

[9] Under Art 2 Protocol no 26 to the TFEU, 'the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest'. However, in its 2003 Green Paper the European Commission noted that 'the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance' (section 45). The issue will be discussed in depth throughout the following sections.

[10] Among the seminal works in this respect see, even before the neoliberal turn of the Seventies, H. Demsetz, 'Why Regulate Utilities?' 11 *Journal of Law and Economics*, 55-65 (1968).

[11] The presence of a private monopolist in economic fields often characterized both by the inelastic demand of end-users and the institutional responsibility of public administrations for the provision of a utility can be certainly counted among these challenges.

[12] See F. Cafaggi and H. Muir Watt eds, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar Publishing, 2009). For a critical contribution focussed on the Italian legal framework see G. Carapezza Figlia, 'Concorrenza e contratto nei mercati dei servizi pubblici locali' *Rivista di diritto dell'impresa*, 39-79 (2012). For a different and historically meaningful view of the interplay between regulation and market see the 'American-style perestroika' model advocated by C.R. Sunstein, *After the Rights Revolution. Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1993).

Such an understanding of both the domain of public services and the role of European private law has long been dominating European legal culture. Still, the prevailing mindset has always been questioned by that scholarship aware of the need for providing the EU legal framework with a private law capable of being both socially grounded and enriched by interdisciplinary inputs, far beyond the sole hegemony of market-oriented law and economics.[13] For instance, almost twenty years ago many prominent scholars already pointed out the risks and opportunities of the Europeanization of contract law. The sector of public services being one of the most relevant to their argument, these scholars noted that

> 'as far as direct public provision of goods and services through the agencies of the Welfare State is dismantled and replaced by contractual relations – for education, health, utilities, pensions, communications – contract law supplies the rules that govern how citizens obtain the satisfaction of their basic needs. The content of those rules becomes of even greater political significance, because they express the central principles of contemporary ideals of social justice'.[14]

If one carries such a theoretical claim further, it is eventually easy to see how the supposed natural neutrality of the whole European private law is questionable. To put it in simple terms, modern and contemporary private law has always been dealing (either expressly or implicitly) with the rise, changes and fall of the welfare state and the public sphere, the changing role and expansion of the market as a major socio-legal institution based on competition, the never-ending crisis and blur of the supposedly clear public-private divide, the delicate dialectic between democratic claims, political choices and technocratic professionalism.[15] This is true for contract law.[16] And the same is for property law, the most relevant reference in this respect being the seminal intuition about the 'new property' provided, from a traditional individualist standpoint, by Charles A. Reich in discussing the US welfare state's growing capability (and political arbitrariness) of affecting people's life.[17] The

[13] See S. Grundmann, H.W. Micklitz and M. Renner, *New Private Law Theory. A Pluralist Approach* (Cambridge: Cambridge University Press, 2021); U. Mattei and A. Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Cheltenham: Edward Elgar Publishing, 2018).

[14] Study Group on Social Justice in European Private law, 'Social Justice in European Contract Law. A Manifesto' 10 *European Law Journal*, 653-674, 655 (2004).

[15] After decades of quasi oblivion, a new awareness of the need for a critical understanding of the deepest trends in modern and contemporary private law is at the core of the discussions within legal scholarship. See, for instance, K. Pistor, *The Code of Capital. How the Law Creates Wealth and Inequalities* (Princeton and Oxford: Princeton University Press, 2019); F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (San Francisco: Berrett-Koehler Publishers, 2015). See also the Law and Political Economy Project at https://lpeproject.org/.

[16] See P. Zumbansen, 'The Law of Society: Governance Through Contract' 14 *Indiana Journal of Global Legal Studies*, 191-233 (2007).

[17] See C.A. Reich, 'The New Property' 73 *The Yale Law Journal*, 733-787 (1964). An updating of

currently established discourse on the constitutionalization of European private law – with its concern for the interplay between contract law, public services and fundamental rights – can be traced to this overall cultural and legal framework as well.[18]

It is therefore time to question the aforementioned set of legal mentalities and practices, deeply grounded in a market-oriented and ordoliberal thought. Since today meaningful contradictions in the way in which regulatory private law deals with public services are well-known, a new understanding of these issues can be developed. The argument goes as follows. Section 2 discusses EU secondary law, namely the European Parliament and Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('2014/24/EU Directive' or simply 'Directive'). Instead of dealing with the sectoral pieces of European law devoted to the regulation of single public services, the choice to analyze the 2014/24/EU Directive – that is a general legal reference for understanding how public bodies are supposed to contract out services in the EU legal framework – will allow showing the rise of social and environmental concerns within the European regulation of public activities. In Section 3 a critique of competition as the major organizational criterion in the legal regime of public services is provided, and alternative views are introduced. Section 4 represents a demonstrative interlude dedicated to the Italian legal framework, which is meaningful since it has been mirroring and somehow emphasising European trends. Section 5 presents the core theoretical claim of the article by asserting that contract could be a tool of decommodification, once this major legal institution is understood and put into practice from relational and organizational standpoints (instead of maintaining rather simplistic and antagonistic views of it). In Section 6 the legal entitlements of end users are discussed and a commons-oriented view of Reich's new property theory is proposed. Section 7 contains some concluding remarks since open questions and possible shortcomings should be considered when one foresees alternative modes of producing, managing and providing public services.

II. EU Secondary Law and the Rise of the Contexts. Public Services in Their Social and Environmental Dimensions

The above-mentioned market-oriented and ordoliberal hegemony has been crucial during the last two decades of the last century and the first years of the current one, acting as a supportive narrative in the age of privatizations of the welfare state and public services. This has often resulted in a peculiar pro-competition implementation of EU secondary law at the level of Member States (see section 4 below), even beyond the textual contents of the relevant Directives. In

the argument is Id, 'The New Property After 25 Years' 24 *University of San Francisco Law Review*, 223-271 (1990).

[18] See again H.W. Micklitz ed, *Constitutionalization* n 6 above.

this respect, it is worth thinking of the 2014/24/EU Directive, which is one of the core legal documents for understanding the interplay between the rules on public procurement and the European regime of public services. Without going into the details of the complex regulation provided for by this piece of law, one can just refer to some meaningful recitals. While recital 1 clarifies that public contracts are first and foremost relevant to the EU's four fundamental freedoms, this implying that 'above a certain value'[19] they should be 'opened up to competition', other recitals contain important provisions for a better understanding of EU policies in the field of public procurement. In fact, according to recitals 5, 6 and 7, the 2014 legal framework is declared to be neither relevant to non-economic SGI (being such services out of the scope of the Directive) nor to the liberalization of SGEI.

In more general terms, the Directive recognises the very meaning of the provisions contained in the TFEU in that the EU acknowledges the freedom of Member States to organize and provide some utilities 'as services of general economic interest or as non-economic services of general interest or as a mixture thereof', since 'nothing in this Directive obliges Member States to contract out or externalise the provision of services'. While such statements are of crucial importance in reiterating the relative and context-sensitive character of the distinction between SGEI and non-economic SGI, other recitals give further information by pointing out some subjective and objective exclusions from the application of the Directive. In this respect, under recital 28 an exclusion is established, within the 'strictly necessary', for 'certain emergency services where they are performed by non-profit organizations or associations'.[20] The application of the Directive is also excluded for public contracts awarded to legal persons falling into the scope of 'in-house providing', according to recital 32.

More importantly, recital 33 enables contracting authorities 'to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form'. Even though this cooperative dimension can be put in place under certain conditions – namely that the contracts should be 'exclusively between contracting authorities, (…) and that no private service provider is placed in a position of advantage *vis-à-vis* its competitors' – a crucial input comes from the very 'cooperative concept' sketched in the recital. Indeed, 'such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards

[19] Both the thresholds and some relevant exclusions are defined under Art 4 to 12 of the Directive. For instance, according to Art 4 twohundred seven thousand euros is the threshold 'for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities'.

[20] Much case law of the CJEU deals with the implications of such a provision. Among many judgments see Cases C 213/21 and C 214/21 *Italy Emergenza Cooperativa Sociale* v *Azienda Sanitaria Locale Barletta-Andria-Trani and Azienda Sanitaria Provinciale di Cosenza*, Judgment of 7 July 2022; Case C-50/14 *CASTA and others* v *Azienda sanitaria locale di Ciriè, Chivasso e Ivrea and Regione Piemonte*, Judgment of 28 January 2016. The decisions are available at https://curia.europa.eu.

the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest'.

This provision is of major importance for the following analysis, since it shows that the EU legislature explicitly recognises the possibility to organize, manage and provide public services through contractual relationships different from and more sophisticated than the rather traditional concept of a bilateral and antagonistic contract.

In spite of such a remark, the latter view of contract seems the foundation of the 2014/24/EU Directive, since according to recital 4

> 'rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract' (purchase, leasing and so on).

Alongside this overall understanding, the Directive is relevant to this article also because it shows the rising context-sensitive character of EU law, namely the role of environmental and social dimensions in the regulation of contractual relationships between public administrations and privates, as well as between service providers and end-users.

Once again, within the scope of this piece of research, there's no need to go into the details, while it is worth remarking that the EU is increasingly aware that public procurement can result in a pivotal driver of social and environmental innovation (see recital 95). Therefore, it is not surprising that under the 2014/24/EU Directive the monetary amount of tenders should no longer be considered the exclusive element to be taken into account by contracting authorities in awarding procedures. On the contrary, by complementing quantitative criteria with a rather qualitative legal approach the EU legislature has been able to provide 'a non-exhaustive list of possible award criteria which include environmental and social aspects' (recital 92).

Arts 67 to 69 of the Directive contain meaningful provisions in this respect. For instance, on the one hand, the life-cycle costing is indicated to the contracting authorities as the major methodology for individuating the most economically advantageous tender. On the other hand, among the criteria which the life-cycle costing should be based on public administrations are supposed to take into account

> 'environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs'.

Social aspects, such as both the specific character of a given service and the

subjective organization of certain providers, are also capable of affecting the procedures provided for by the 2014/24/EU Directive, especially by derogating from the overall policy of opening up public procurement to competition and market. This is the case for Art 77, according to which contracting authorities have the competence to provide some specific organizations – those pursuing a public service mission, mainly committed to reinvesting possible profits in reaching collective goals, and functioning on the basis of participatory features such as 'the active participation of employees, users or stakeholders' – with a reserved right 'to participate in procedures for the award of public contracts', although for several listed health, social and cultural services[21] and under certain time conditions ('the maximum duration of the contract shall not be longer than three years').

The aforementioned remarks certainly lead to acknowledgement that public procurement remains a market-based instrument. Deriving from the sole 2014 provisions a paradigm shift in EU policies would probably be over-interpretation. However, such novelties can be seen as a noticeable change within the cultural and economic views accepted and implemented by the European Institutions. To be clearer, by building on such a reading of the 2014/24/EU Directive one can problematize some proposals made by recent Italian legal scholarship and question arguments claiming that the rise of green public procurement could, *per se*, eventually result in one of the major inputs for a deep and ecological revision of the general theory of contract.[22] Notwithstanding this, the current EU legal framework on public procurement can certainly be seen as an attempt to integrate environmental and social concerns in both an established legal narrative and a former technical infrastructure that have tended to treat public services (as well as products and works) as commodities, subject as a matter of principle to the very rationality of the market.[23]

It seems possible to trace such findings to a broader trend, according to which the overall legal policies and political discourses of the EU have been changing in a (certainly contradictory and maybe insufficient yet, although) meaningful manner. Not to mention the strategic challenges connected to the implementation of NextGenerationEU, the Recovery plan for Europe launched to face the manifold crisis caused by the covid-19 pandemic,24 for the purposes of this article it is worth highlighting that on 9 December 2021, the European Commission delivered a Communication titled 'Building an economy that works for people: an action plan

[21] To tell the truth, the list does not seem too strict in light of the provisions contained in Annex XIV of the Directive.

[22] For this standpoint see M. Pennasilico ed, *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2016).

[23] Such important novelties provided by the 2014/24/EU Directive have been noticed by E. Varga, n 1 above. For a comprehensive analysis see R. Caranta and A. Sanchez-Graells eds, n 2 above.

[24] See https://tinyurl.com/429xykz3 (last visited 20 September 2023).

for the social economy'.[25] This plan represents a possible step forward in those EU policies aimed at making both the activities of public administrations and the undertakings of economic actors more and more committed to the effective fulfilment of major societal needs. At a general level, the Commission has explicitly recognised the increasing role of the social economy by pointing out how this model covers a varied range of legal and organizational arrangements as well as economic sectors. In other words, even from the European Commission's standpoint the wording *social economy* seemingly alludes to an overall mode of producing, managing and providing goods and services, characterized by the following principles:

> 'the primacy of people as well as social and/or environmental purpose over profit, the reinvestment of most of the profits and surpluses to carry out activities in the interest of members/users ("collective interest") or society at large ("general interest") and democratic and/or participatory governance'.[26]

Such an acknowledgement is linked to the most updated debates on the issue – think of that scholarship claiming that we are

> 'at a crossroads: either the social economy will remain separate from the rest of the economy, or it will permeate the broader global economy and contribute to changing the way all business is done'[27]

– and entails some important legal implications. For instance, the Commission regrets that 'most public tenders are still awarded based only on the price criterion'[28] and expresses its commitment to reinforcing as much as possible the awareness among the member States about the potential of socially responsible public procurement. An effort to foster experimentation of new legal and organizational models, such as social outcome contracting, is mentioned as well.[29]

However, one has to bear in mind that the main focus of the recent action

[25] All the relevant documents can be accessed at https://tinyurl.com/33ednxrj (last visited 20 September 2023). For a first analysis of the Communication and its implications in the Italian legal framework see G. Gotti, 'Il Piano d'azione europeo per l'economia sociale e i riflessi sull'ordinamento italiano' *Impresa Sociale*, 30-44 (2022).

[26] European Commission, 'Building an economy that works for people: an action plan for the social economy', 2021 (5).

[27] J. Battilana, 'For Social Business to Become the Norm, We Need to Build a Social Business Infrastructure' *Stanford Social Innovation Review*, (2021), available at https://tinyurl.com/3rxmbb2r (last visited 20 September 2023). For another contribution by this author see I. Ferreras, J. Battilana and D. Méda, *Democratize Work. The Case for Reorganizing the Economy* (Chicago: The University of Chicago Press, 2022). See also G. Krlev et al, 'Reconceptualizing the Social Economy' *Stanford Social Innovation Review*, (2021), available at https://tinyurl.com/yavk9ydt (last visited 20 September 2023).

[28] European Commission, n 26 above, 10.

[29] In this respect see L. Klimavičiūtė, V. Chiodo, *Study on the Benefits of Using Social Outcome Contracting in the Provision of Social Services and Interventions* (Luxembourg: Publications Office of the European Union, 2021).

plan for the social economy is still on the established field of public procurement, whereas different legal relationships between contracting authorities and private actors involved in the social economy are not explicitly considered. Even though during the consultation process many stakeholders

> 'highlighted the need to revise and adapt EU competition and State aid rules to the particularities of social economy entities and called on specific changes to legislation and initiatives',[30]

the European Commission's primary goal has been about developing the full social potential of existing EU law, according to the view that 'it's good if you have a new law, but it's better to fully implement existing laws'.[31]

III. Questioning Competition as the Major Organizational Criterion for Public Services

The trends described in the preceding section seem capable of providing the longstanding contradiction between market-oriented views and alternative goals of policy with unprecedented intensity. In this respect, it has become commonplace that the EU's ordoliberal legal framework on public services is not neutral in at least two senses. First, crucial importance should be assigned to the rising awareness that the distinction between economic and non-economic SGI is not at all about *ontology* or *nature*, since the economic quality of a given service – and the consequent need for opening up it to the market – depends on the political choices and the legal features through which that service is managed and provided. Second, it is currently easy to notice the inner polyfunctionality of regulatory approaches in that a legal framework cannot be solely aimed at fostering competition and assuring the well-functioning of the market: on the contrary, it is supposed to pursue either complementary or conflicting goals, such as the protection of end-users rights and redistribution.[32]

[30] Commission Staff, 'Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building an economy that works for people: an action plan for the social economy', 27 (2021), available at https://tinyurl.com/2vdhceya (last visited 20 September 2023).

[31] Here I quote one of the policy officers of the European Commission I met for an interview about the action plan for the social economy.

[32] According to H.W. Micklitz, recent developments of the so-called *rationality doctrine* could lead to see the dialectic between the well-functioning of the market (ie the full deployment of the four fundamental freedoms) and other legal and political concerns from an unprecedented perspective. In particular 'in secondary EU law, it [the rationality doctrine] offers new opportunities for efficient (in the meaning of redistribution) and effective (in the meaning of societal impact) legislative means in labour, non-discrimination and consumer law. First and foremost, however, it allows for the reversal of the priority between freedom and restrictions. Not only do restrictions have to be justified, but so too freedoms' (H.W. Micklitz, *The Politics* n 2 above, 264). For a general

This new perspective has given room to a twofold critique of those dominant market-oriented conceptions which have been providing competition with a pivotal role in the domain of public services.

Some remarks, eg those coming from non-orthodox economic analysis of law, have long been representing the negative side of the critique and have become widespread in the contemporary reflection on public services. The rise of competition within the field and for the field in societal sectors formerly focussed mostly on their missions of general interest has been found to be problematic for several reasons. Natural monopolies are no doubt a major challenge since they could entail monopoly rents, socially unjust supply and profits, informational asymmetries in favour of the monopolists and lack of adequate investments in the quality of service, not to mention the barriers newcomers have to deal with if they aim at competing for the field.[33]

In another respect, in spite of some improvements in terms of legal protection (eg the so-called universal service obligations and the application of rules on unfair clauses), possible threats to social cohesion derive from the transition from the legal status of citizens to one of end-users/consumers. Indeed, citizens are supposed to have multifaceted and politically meaningful relations with public administrations and service providers, whereas end-users/consumers use to conclude bilateral contracts with the providers in order to access utilities at market conditions unless either regulatory interventions or their fundamental rights come into the picture.[34] Regardless of the variety of their legal arrangements, privatization processes tend to result in a lowering of employees' conditions as well, both in terms of wages and with respect to the overall legal treatment as workers. The establishment of Authorities as new institutional actors and their crucial role in giving effect to regulatory frameworks can be traced to another set of critical issues. Indeed, the legal understanding of administered contracts has been a major topic in European private law since such contracts are relevant to the interplay between freedom of contract, private autonomy, heteronomous sources of the very content of the contract, presence of multiple interests in the contractual relation. From a general and rather traditional standpoint, even the political legitimacy of Authorities and the compatibility of their role with the rule of law have been an open question for a while. Lastly, a major focus is on the shortcomings of the legal relations between contracting administrations and privates. In this respect, the overall strategy of opening up public services to the market has often meant incremental losses of know-how and human resources within the public sector, with negative

understanding of the topic see D. Simeoli, n 4 above; and D. Oliver, T. Prosser and R. Rawlings eds, *The Regulatory State: Constitutional Implications* (Oxford: Oxford University Press, 2010).

33 Two classical readings in this respect are V.P. Goldberg, 'Regulation and Administered Contracts' 7 *The Bell Journal of Economics*, 426-448 (1976); and C.D. Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly* (Oxford and Cambridge, MA: Blackwell, 1992).

34 Some of these issues are noticed by P. Vincent-Jones, 'The New Public Contracting: Public Versus Private Ordering?' 14 *Indiana Journal of Global Legal Studies*, 259-278 (2007).

consequences for administrative efficiency in the long run. Weakened public administrations are more exposed to outcomes such as growing costs and difficulties in monitoring as well as the rise of many forms of regulatory capture, especially when concentrations of economic power arise. Indeed, the latter phenomenon was already noticed sixty years ago, since

> 'in any society with powerful or dominant private groups, it is not unexpected that governmental systems of power will be utilized by private groups. Hence the frequency with which regulatory agencies are taken over by those they are supposed to regulate'.[35]

The aforementioned issues are more or less commonplace within European legal culture. What is less obvious, even though the topic is a usual one, is the extent to which the supposedly clear-cut public-private divide has been challenged by the interplay between public services, the State and market. Both the depth of such an ongoing 'blurring or fusing of public and private' and the pivotal role of public services for such an institutional process were already noticed at the apex of the welfare state era.[36] Then the rise of neoliberalism has been a turning point: all relevant actors (contracting authorities, private actors, legislatures, scholars) were forced to reflect on the changing boundaries between state and market; the potential integration of diverse social and legal rationalities became an open and delicate issue.

To tell the truth, the first wave of privatization policies was not so involved in such a discussion, being mostly focussed on opening up to the market as many sectors as possible of the traditional publicly organized and provisioned welfare. Well soon different perspectives came into the picture, challenging the dominant idea of an ineluctable withdrawal of the public sector and foreseeing a more sophisticated institutional framework. From this standpoint,

> 'quasi-market organization entails an intensification of governmental activities directed at building markets, allocating responsibilities among the public and private agencies engaged in public service networks, and establishing other regulatory conditions for more effective or efficient service provision'.[37]

In light of the increasing role of contractual relations in dealing with such evolving issues, these debates must be regarded as one of the major foundations of the overall reflections on the interplay between contractual governance and governance through contract. Indeed, one has to bear in mind

[35] C.A. Reich, 'The New Property' n 17 above, 768.

[36] The quotation comes again from ibid 746. The author clarified that the blurring was apparent in that 'many of the functions of government are performed by private persons; much private activity is carried on in a way that is no longer private'.

[37] P. Vincent-Jones, n 34 above, 263.

> 'that contractual governance of a post-industrial welfare state, whether in terms of democratic participation, effective governance, or a "constitutionalization" of private law, must endorse a non-unifying understanding of the public-private divide in one way or the other'.[38]

Such a renovated approach is among the major building blocks of those more constructive criticisms of the role of competition that have been trying to foresee viable alternatives to traditional views in the legal and institutional domain of public services. On the one hand, one can notice that the trust in market and competition as the dominant organizational criteria for these core societal activities has been questioned – and somehow complemented – by the rise of both new political awareness and new legal objectives (see the preceding section in this respect). On the other hand, the attempt to go beyond competition has enabled a variety of theoretical proposals which have in common the development of more sophisticated views of contracts. This can be seen in the aforementioned reflection on the 'quasi-markets' of public services, which can be traced to a broader and socially oriented understanding of new public contracting.[39] The application of the contractual governance perspective to the domain of public services must be considered as well since it leads to questioning the traditional conception of contract – grounded in its very bilateral, discrete and antagonistic model – and highlights the rising long-term, organizational and hybrid potential of this legal institution, this implying the crisis of the pillar of the privity in light of contract's increasing capacity to serve multiple (either concurring or conflicting) interests.[40] Another instance is the influential claim aimed at addressing public services and regulation by enhancing the relational contract paradigm instead of accepting ordoliberal approaches. According to this standpoint, 'regulation can be viewed, in effect, as a long-term, collective contract for provision of a changing set of services'.[41]

IV. Demonstrative Interlude: A Look at the Italian Laboratory

[38] P. Zumbansen, n 16 above, 223.

[39] P. Vincent-Jones, n 34 above and, later on, Id, 'Relational Contract and Social Learning in Hybrid Organization', in D. Campbell, L. Mulcahy and S. Wheeler eds, *Changing Concepts of Contract. Essays n Honour of Ian Macneil* (London: Springer, 2013), 216-234.

[40] See S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract. From Exchange to Long-Term Network Cooperation in European Contract Law* (London: Routledge, 2013); and K.H. Ladeur, 'The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making' 14 *Indiana Journal of Global Legal Studies*, 329-351, especially 333 (2007). For a general discussion see S. Grundmann et al eds, *Contract Governance. Dimensions in Law and Interdisciplinary Research* (Oxford: Oxford University Press, 2015). For the Italian perspective see G. Carapezza Figlia, 'I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale' *Rassegna di diritto civile*, 440-466, especially 448 (2017).

[41] V.P. Goldberg, 'Protecting the Right to Be Served by Public Utilities' 1 *Research in Law & Economics*, 145-156 (1979). In more general terms see I. Macneil, *The New Social Contract. An Inquiry Into Modern Contractual Relations* (New Haven: Yale University Press, 1980).

The above-discussed arguments eventually allow us to conceive contract as a possible tool of decommodification, capable of dealing with the several shortcomings connected to an excessively competition-based regulation of public services. Further discussion in this respect is in the last three sections of this work, while in introducing this brief section it is worth endorsing the opinion that

> 'privatization has the effect of re-importing these conflicts into the economic arena. Paradoxical as it sounds, after privatization, political conflicts about public services are indeed increasing'.[42]

In fact, since it has been mirroring and somehow emphasising the European trends in both enacting former market-oriented policies and enhancing more recent collaborative and social issues, the Italian legal framework on public services can be seen as a clear explanation for the argument developed throughout these pages. At the dawn of the age of austerity policies, the Italian legislature passed the decreto legge 25 June 2008 no 112, whose Art 23-*bis* went far beyond the EU regulatory framework by setting the principle of the privatization of all local public services characterized by 'economic relevance'. Such a regulation was dealt with by Corte Costituzionale 17 November 2010, no 325.[43] The very notion of economic relevance was at the core of this landmark judgment and was read by building on a *radical* understanding of the (*per se* questionable) European concept of economic activity. On the one hand, the Court clarified that under Italian law there is economic relevance whenever a service can be managed by a plurality of operators in even potential (and not only actual) market conditions. On the other hand, the legal definition of the conditions of economic relevance was found to be the competence of the State's exclusive legislative power in the field of the protection of competition (Art 117, para 2 lett e) of the Italian Constitution). As a result, the naturalistic view of economic relevance led to considering constitutionally lawful imposing to public administrations a generalised obligation (presenting very strict exceptions) to put on the market local public services, through an expansive application of the domestic regime of public procurement (currently the decreto legislativo 31 March 2023 no 36, 'code of public contracts').[44]

In addition to the influence of the dominant European views on the economic

[42] G. Teubner, 'After Privatization? The Many Autonomies of Private Law' *Current Legal Problems*, 393-424 (1998). See also U. Mattei and F. Nicola, 'A "Social Dimension" in European Private Law? The Call for Setting a Progressive Agenda' 41 *New England Law Review*, 1-66 (2006).

[43] The judgment is available at www.cortecostituzionale.it. For two comments see A. Lucarelli, 'Primissime considerazioni a margine della sentenza n. 325 del 2010' *Rivista AIC* (2011), available at https://tinyurl.com/m7h7dwrn (last visited 20 September 2023); and L. Cuocolo, 'La Corte costituzionale "salva" la disciplina statale sui servizi pubblici locali' *Giornale di diritto amministrativo*, 484-493 (2011).

[44] On the understanding endorsed by the Italian Constitutional Court see, in addition to the references contained in the preceding note, E. Scotti, n 6 above. For a private law perspective see G. Carapezza Figlia, 'Concorrenza' n 12 above. The new code, which is the product of a significant effort of legislative reform, has been in force from 1st April 2023.

character of SGI, it seems possible to trace such a radical market-oriented legal and interpretative policy to at least two peculiar features of the Italian way of dealing with the institutional problem of public services. The first one is recent and is about how the horizontal subsidiarity principle was understood in the aftermath of its inclusion within the Italian constitutional framework in 2001. Even though revised Art 118, para 4 of the Italian Constitution just provides that

> 'State, Regions, metropolitan Cities, Provinces and Municipalities facilitate autonomous initiatives of both individual and organised citizens in carrying out activities of general interest, by building on the subsidiarity principle',[45]

during the first decade of the current century this sentence was mostly found to be a clear constitutional choice in favour of privatization and of opening up as many activities as possible to the rationality of the market.[46] The second aspect is much more ancient since it regards the roots of the Italian legal conception of public services. In fact, according to an influential scholarship, one can notice that at the very origins of the welfare state – late XIX century, early XX century – the Italian legal culture rejected the rising French theory of the *service public*. Instead of grounding the understanding of the legal relations among public administrations, providers and citizens on the collective and solidarity-oriented character of public service activities, Italian scholarship chose to defend the institutional dominance of the State's sovereignty by adopting the epistemological framework established by German jurisprudence. To put it in simple terms, a theoretical individualization and binarization of the complex social relationships regarding public services was reached through the isolated and correlative relation between the *duty of* and the *right to* public services performance (the Italian wording alluding to the category of 'rapporto giuridico di prestazione').[47]

This conceptual move can be seen as the legal prerequisite of two long-lasting intertwined outcomes. On the one hand, once recognised as legally meaningful the collective entitlements to the utilities provided through public services (or, from

[45] Translation is mine.

[46] The year before the reform of the Italian Constitution a useful introduction to the issue was provided (in Italian) in P. Duret, 'La sussidiarietà «orizzontale»: le radici e le suggestioni di un concetto' *Jus*, 95-145 (2000). In recent years an influential Italian scholarship has been building on a richer reading of the horizontal subsidiarity principle to develop a new understanding of contract as a major legal institution. See in this respect P. Perlingieri, 'Persona, ambiente e sviluppo', in M. Pennasilico ed, n 22 above, 321-342; and F. Maisto, 'Subsidiarity and the New Frontiers of Freedom of Contract' 7 *The Italian Law Journal* 2, 731-742 (2021).

[47] For such an insight see B. Sordi, 'Dall'attività sociale ai pubblici servizi: alle radici ottocentesche dello Stato sociale' 46 *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 175-198, especially 187 to 196 (2017). The concept of binarization is addressed in P. Femia, 'Il civile senso dell'autonomia' 25 *The Cardozo Electronic Law Bulletin* (2019) available at https://tinyurl.com/4cp8nc6z (last visited 20 September 2023). On correlatives see the classical reference of W.N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Juddicial Reasoning' 26 *Yale Law Journal*, 710-770 (1917).

Victor P. Goldberg's standpoint, the rights to be served) have been deemed to be dependent on an institutionally asymmetric legal relationship so that it has been rather easy – think of the successful Italian category of 'financially conditional social rights' – to allow the State to limit citizens' rights in light of its sovereign and discretionary choices.[48] On the other hand, throughout the last decades, individualization and binarization have facilitated rather antagonistic conceptions of contractual relationships between service providers and end-users, this having constituted one of the basic frames of reference for the above-noticed rise of consumer law and of Authorities' interventions.[49]

Although such elements could partially explain its success, the aforementioned dominant policy caused grassroots reactions so that widespread political conflicts arose and the alternatives to privatization in the production, management and provision of public services became an open question in the Italian public discussion. In fact, the 2008 legislative regulation on local services was repealed in 2011 by virtue of a popular referendum whose major claims were twofold: first, water was reclaimed as a commons, with an effort to challenge any attempt to commodify the resource and its management; second, the pivotal democratic importance of combining transparency, participation and affordable access in the whole domain of public services was pointed out.[50]

Since describing the evolving interplay of statutory provisions, case law and political struggles about the Italian regime of local public services is not so relevant to this article, one can just notice that the domestic legal framework has changed in the last few years. In the attempt to enhance and systematise the potential of some European case law concerning emergency services,[51] Art 55 to 57 of decreto legislativo 3 July 2017 no 117 ('code of the third sector') eventually provided for general regulation of the involvement of non-profit organizations in the *co-planning* of social services interventions. Although the scope of these new pieces of law is rather limited from both a subjective and an objective perspective – only third-sector organizations are supposed to be involved in the regulation; the procedures established by the legislature are relevant to some social services of general interest

[48] On financially conditional social rights see S. Pellizzari, 'New commons e servizi sociali. Il modello dell'amministrazione condivisa tra autonomie territoriali, terzo settore e società civile organizzata', in M. Bombardelli ed, *Prendersi cura dei beni comuni per uscire dalla crisi. Nuove risorse e nuovi modelli di amministrazione* (Trento: Università degli Studi di Trento, 2016), 249-278, especially 259-260. More comprehensive reflections on the topic are in A. Baldassarre, 'Diritti sociali' *Enciclopedia giuridica* (Roma: Treccani, 1989), XI; and F. Merusi, *Servizi pubblici instabili* (Bologna: il Mulino, 1990). A recent and very significant critique of the notion came from the constitutional case law: see Corte Costituzionale 16 December 2016 no 275, available at www.cortecostituzionale.it.

[49] For a discussion on the Italian legal framework see G. Carapezza Figlia, 'I rapporti' n 40 above, especially 441-442.

[50] In this respect see U. Mattei, 'Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance' 112 *South Atlantic Quarterly*, 366-376 (2013).

[51] See n 20 above.

only –, the relational and collaborative view they assume has been stimulating a broader discussion on the potential conflict between the cooperative and socially-oriented approach of the code of the third sector and the more traditional trust in competition and market for the overall regulation of public services.

In this respect, the Consiglio di Stato dealt with the possible interferences between public procurement and co-planning in the Opinion 20 August 2018 no 2052. A very restrictive reading of the rules on co-planning was provided together with a reiteration of the naturalistic and competition-oriented views of the economic relevance of service. However, the Constitutional Court rejected such a mindset with two judgments: Corte Costituzionale 26 June 2020 no 131 and Corte Costituzionale 26 November 2020 no 255.[52] These decisions enhanced the role of the provisions contained in the code of the third sector. In the Court's opinion, contracting authorities and privates (non-profit organizations) are capable of establishing not only antagonistic bilateral contracts under the code of public contracts, but also more relational agreements, based on shared goals and on the aggregation of public and private resources for planning in common services and interventions aimed at fostering social security and citizens' participation, far beyond the mere utilitarian exchange.

The understanding developed by such a groundbreaking constitutional case law is very close to the 'cooperative concept' analyzed with respect to the 2014/ 24/EU Directive (recital no 33). Accordingly, one can notice that in recent years the Italian legal framework has been unexpectedly capable of putting a strong emphasis on the social potential of public contracting, even before the European Commission delivered the action plan for the social economy in 2021. Indeed, with decreto legge 16 July 2020 no 76 the domestic legislature upheld the doctrine of the Constitutional Court through a revision of Arts 30, 59 and 140 of the previous code of public contracts. Art 6 of the current code (the aforementioned decreto legislativo 31 March 2023 no 36) eventually provides, as a matter of principle, that

> 'in fulfilling the social solidarity and horizontal subsidiarity principles, with respect to notably social activities the public administration can adopt cooperative organizational models, based on contractual relations lacking consideration and on the sharing with privates of the public function, provided that Third Sector entities contribute to reach social objectives in conditions of equal treatment, with effectiveness and transparency, in base of the outcome principle. (…)' (translation is mine).[53]

[52] With respect to such a major case law see E. Rossi, 'Il fondamento del Terzo settore è nella Costituzione. Prime osservazioni sulla sentenza n. 131 del 2020 della Corte costituzionale' *Forum di Quaderni Costituzionali* (2020), available at www.forumcostituzionale.it; and G. Arena, 'L'amministrazione condivisa ed i suoi sviluppi nel rapporto con cittadini ed enti del Terzo Settore' *Giurisprudenza costituzionale*, 1449-1457 (2020).

[53] A detailed overview on such collaborative relations is provided for by the guidelines contained in decreto ministeriale of 31 March 2021 no 72. It is also worth noticing that the future code

V. Dealing with Public Services in Light of Different Conceptions of Contract

In summarising the above discussion, one can recognise that the recent trends in the regulation of public services have led major institutional issues to a point of no return. On the one hand, the interplay between competition and cooperation in the organization of activities of general interest has become apparent. The dominance of the market-oriented category of SGEI has been questioned. Public contracting models which are beyond public procurement have been regulated even at domestic levels. On the other hand, the rise of social and environmental commitments has come so far that the traditional public procurement paradigm is affected. Environmental aspects should be at the core of all public tenderings. Both objective and subjective characters of some services and of potential providers (eg emergency or social nature of the service; not-for-profit and participatory organization of the provider) are relevant to meaningful derogations from the general legal framework, such as reserved procedures and exclusions.

In spite of these novelties, there are some persisting doubts on whether and to what extent the rising cooperative and context-sensitive mindset is effective and capable of gradually reshaping the organization of public services. In this respect, the choice of the European Commission to launch an action plan in late 2021 can be found to be the evidence of a still insufficient social orientation of the domestic legal frameworks and practices in the domains of public services and public procurement.

While further issues will be mentioned in the last section of this work, at this stage in the development of the argument one can notice that the aforementioned state of the art certainly alludes to a matter of mentalities. In the end, the long-lasting hegemony of market-oriented views has affected the way in which all involved actors and stakeholders – contracting authorities, providers, end-users, workers – deal with and reproduce the very functioning of the public services sector.

Beyond this, in the analytical framework of this article a rather legal argument is crucial, since one can claim that a core obstacle to the establishment of cooperative and participatory organizational settings for public services is in the epistemological and technical limits of the very concept of public procurement. While it maintains a pivotal role from both an institutional and a symbolic perspective, the notion of public procurement seems indeed grounded in the bilateral, discrete and antagonistic view of contract. In spite of the increasing regulatory complexity of this branch of the law, such an original linkage is apparent

of public contracts will eventually contain a more general provision. According to Art 6 of the draft decreto legislativo approved by the Italian Government, 'in fulfilling the social solidarity and horizontal subsidiarity principles, with respect to notably social activities the public administration can adopt cooperative organizational models, based on contractual relations lacking consideration and on the sharing with privates of the public function, provided that Third Sector entities contribute to reach social objectives in conditions of equal treatment, with effectiveness and transparency, in base of the outcome principle. (…)' (translation is mine).

in EU secondary law and implies that binarization and privity remain, at least in principle, the core institutional features of those contractual relations deriving from public procurement procedures.[54] One can notice that such a framework is not accidental. The above-mentioned traditional understanding considers contract (together with individual and exclusive property rights) as the basic infrastructure of a well-functioning market,[55] and this has been going hand in hand with the major goal of EU policies in the domain of public services, namely the attempt to open up as many *economic* SGI as possible to the rationality of the market. In fact, the 'troubling coincidence' between the privatization of the welfare state and the renovated influence of traditional contract theory has been clearly pointed out. As put forward by Zumbansen,

> '(…) just as we can perceive a return of formalism in the public law discourse over regulatory governance, we see in current contract law discourses a striking insulation of contractual bargaining from the social relations that are shaped by contract. This insulation of contract rights from the political economy that is shaping them, and in which they are simultaneously implicated, is the more troubling as its success rests on the reintroduction of the public-private distinction, which we had believed we had productively overcome already a long time ago'.[56]

Far from being obsolete, the traditional view of contract seems capable of maintaining a strong influence. This seems true for the theory considering contracts as morally meaningful collaborative communities. Even though the reflection is explicitly limited to certain transactions among individual persons (even the most self-interested ones, whereas 'relations involving organizations (…) cannot directly participate in the value of contractual collaboration'), such a standpoint is important since it posits that bargain owns an intrinsic value in being the logical scheme of a specific collaborative relation among individuals:

> 'bargains therefore generate relations in which the bargainers engage each other, and subject themselves to each other's authority, in precisely the pattern that collaboration requires. Bargains also underwrite such collaborative relations simply by virtue of their formal structure, and regardless of their

[54] On this point see, again, P. Femia, n 47 above, and G. Teubner, 'After Privatization?' n 42 above.

[55] The groundbreaking work on the topic is R.H. Coase, 'The Problem of Social Cost' *Journal of Law & Economics*, 1-44 (1960). Another classical contribution is H. Demsetz, 'Towards a Theory of Property Rights' 57 *The American Economic Review*, 347-359 (1967). Critical contributions are in A.T. Kronman, 'Contract Law and Distributive Justice' 89 *The Yale Law Journal*, 472-511 (1980); and in G. Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' 100 *The Yale Law Journal*, 1211-1237 (1991).

[56] P. Zumbansen, n 16 above 206.

substantive fairness'.[57]

The legacy of traditional conceptions of contract is also apparent with respect to the networks of contracts, a topic of major importance which seems capable of offering helpful insights for a better understanding of the domain of public services and their organizational patterns. Both the economic importance of networks and their 'provocative power' have given rise to a new era of contract theory: (i) the complex relational and organizational dimensions of contract have been enhanced; (ii) contractual relations have been seen as the dynamic point of intersection of multiple interests and rationalities, as well as the expression of unprecedented tensions between private ordering and heteronomous regulations; (iii) scholars have been trying to understand whether and how contract law is capable of regulating and governing contemporary 'trans-subjective evolutionary structures'.[58] In spite of such a theoretical and operational complexification, some reflections have maintained a narrow understanding of the issue. In this respect, the term network has been considered

> 'a legal concept in a wider sense' only. Networks have been found to be relevant to competition law and contract law in spite of such a status of quasi-legal concept, the reason being 'simply that contracts are the legal media to organize competition'.[59]

Findings coming from the discussions on networks of contracts should be carried further, since they seem relevant to the way in which European private law affects the management and provision of public services. Indeed, the attempt to take seriously the cooperative approach to public services requires to go beyond the traditional view of contract. In order to foster and refine these emerging organizational models a 'radical understanding of contract theory'[60] should be pursued, this implying first and foremost that the 'extreme caricature of contract'[61] based on discreteness, presentiation and anonymity should be abandoned.

To put it in simple terms, the rising trend toward cooperative and participatory production, management and provision of public services can be seen as one among the major laboratories for rethinking the institutional role of contract within European

[57] D. Markovits, 'Contract and Collaboration' 113 *The Yale Law Journal*, 1417-1518 (2004). The quoted sentence regarding organizations is at 1465. Alongside the core theoretical claim, this work eventually recognises that there could be forms of contractual collaboration that are beyond consideration (at 1488).

[58] G. Teubner, ' "And if I by Beelzebub Cast out Devils, ...": An Essay on the Diabolics of Network Failures', in S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract* n 40 above, 113-135, especially 125. See also K.H. Ladeur, 'The Role of Contracts' n 40 above.

[59] M. Martinek, 'Networks of Contracts and Competition Law', in S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract* n 40 above, 163-178 (178).

[60] M.W. Hesselink, 'The Right to Justification of Contract' 33 *Ratio Juris*, 196-222 (2020).

[61] V.P. Goldberg, 'Regulation' n 33 above. See also Id, 'Toward an Expanded Economic Theory of Contract' 10 *Journal of Economic Issues*, 45-61 (1976).

private law. In fact, the organization of such activities highlights that contract is capable of being the legal infrastructure both serving and shaping complex societal exchanges, characterized by long-term and multi-party legal relations.

This cannot but lead to question the privity of contract and to challenge the insulation of single contractual relations – eg those between public administrations and service providers; those between service providers and end-users; those between service providers and public services employees – from the contexts in which they are embedded. Externalities and distributive implications of such contracts can no longer be ignored.[62] The dynamic relational dimension of contracts organizing the production, management and provision of public services should be enhanced as well, so that opening up the 'black box'[63] of contract becomes possible by tracing the very legal regime of these activities not only to the mere economic rationality of the market, but also to a variety of sectorial rationalities that have long been asking private law theory to accept 'to rethink the one (*de facto*, economic) autonomy of the free individual into the many autonomies of different social worlds'.[64]

By building on these findings, claiming that contemporary contract law is able to definitively overcome the binary divide between economic and non-economic SGI is not exaggeration. More importantly, one can eventually foresee that the technical and institutional sophistication of contract allows it to function as a possible tool for decommodification. Several theoretical contributions relevant to public contracting and the legal regime of public services can be gathered in this respect since they share the attempt to challenge the simplistic equivalence between contract and market by adopting a rather pluralistic contract theory.[65] For instance, the above-mentioned understanding of regulation and administered contracts as relational contracts (see section 3) can be enhanced since it shows the long-lasting existence of alternatives to the ordoliberal view of regulatory private law.[66]

The relational contract theory – with its focus on the integrity of contractual roles, flexible planning and renegotiation, not to mention the overall awareness of the social matrix to which a contractual relation should be traced[67] – has also been the epistemological base for those reflections on new public contracting both defining public services as quasi-markets and pointing out

[62] Almost twenty years ago the Study Group on Social Justice in European Private Law pointed out that 'to the extent that nation states reduce their use of the direct re-distributive mechanisms of the welfare state, the distributive effects of the market become the determining force governing people's life chances. A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society' ('Study Group on Social Justice' n 14 above, 665).

[63] V.P. Goldberg, 'Regulation' n 33 above, 427.

[64] G. Teubner, 'After Privatization?' n 42 above, 399.

[65] For the debates on pluralism in contract theory see S. Grundmann, H.W. Micklitz and M. Renner, n 13 above; H. Dagan and M.A. Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017); D. Markovits and A. Schwartz, 'Plural Values in Contract Law: Theory and Implementation' 20 *Theoretical Inquiries in Law*, 571-593 (2019).

[66] Compare V.P. Goldberg, 'Protecting' n 41 above; and D. Simeoli, n 4 above.

[67] I. Macneil, n 41 above.

> 'the potential of contracts to serve in the public interest as mechanisms for the promotion of social learning among all parties with interests or stakes in the services under consideration'.[68]

Other influential doctrines on contractual governance and on reflexive autonomy come into the picture as well, since they have shown how public contracting is a delicate and experimental field for understanding contract beyond the binary confrontation between both autonomy and heteronomy and private and public.[69] In this respect, the contract can eventually be

> 'perceived as a highly sensitive framework, concept and instrument with which most divergent societal expectations and rationalities can be brought into confrontation, channelled, reformulated, and sustained'.[70]

VI. End-Users, Consumers, Citizens. Carrying Reich Further

Recognising that contractual relations serve and shape a variety of interests in the production, management and provision of public services entails a major implication in that the legal entitlements of all involved subjects should be reconsidered in understanding the organization of such activities of general interest. Although actors such as workers, or even regulatory Authorities, could be relevant to this reflection, in this work it is particularly worth dealing with the position of end-users. The reason for focusing on the sole entitlements of end-users to public services is that this issue has been stimulating major theoretical reflections, strongly connected with both the rise and fall of the welfare state and the above-discussed transformations of contractual relations.

One point of departure in this discussion can be seen in the already mentioned contribution by Charles A. Reich, who proposed the new property theory exactly as a way to deal with his problematic understanding of the expansion of public policies in the everyday life of the United States. On the one hand, Reich highlighted in a pioneering manner the *dark side* of the welfare state by showing the political relevance of many possible conditions in the provision of what he used to call 'government largess' – from the systemic discrimination of subjects suspected of communism or other subversive political engagement under McCarthyism to a

[68] P. Vincent-Jones, 'Relational Contract' n 39 above, 225. Some relational and institutional conditions for having successful new public economic contracting are indicated in Id, 'The New Public' n 34 above, especially 270-275.

[69] In a theoretical perspective see K.H. Ladeur, 'The Role of Contracts' n 40 above, especially 349. Some insights about the Italian legal framework are in G. Carapezza Figlia, 'I rapporti' n 40 above.

[70] P. Zumbansen, n 16 above, 230. On the pluralistic and reflexive view of private autonomy see G. Teubner, 'And if I' n 58 above, and Id, 'After Privatization?' n 42 above, especially 397-399.

broader disciplining potential.[71]

On the other hand, such an awareness led him to advocate the rise of the new property in order to defend the epistemological and legal standpoint of individualism in a context where 'there can be no retreat from the public interest state'. According to Reich, in fact,

> 'if public and private are now blurred, it will be necessary to draw a new zone of privacy. If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do'.[72]

At the time when it appeared Reich's reflection on the new property was received with a certain scepticism in Europe for two reasons. First, scholars working on property law were aiming at questioning rather than renovating the role of (individual) property as a major legal institution, since they tended to base their analyses on the deep connection between private property, individualism, exclusion and inequality. Second, national legal frameworks such as the Italian one were experimenting with a huge democratic expansion of the welfare state, grounded in both the post-World War II Constitutions and in the public positive actions implementing social rights of the citizens.[73] In spite of this, Reich's intuitions have been crucial for understanding both ancient problematic aspects of the welfare state and some of the core transformations that occurred also in Europe throughout the last decades, as is discussed in the preceding sections.

With respect to the legal entitlements of end-users to public services, the debate on the new property certainly paved the way for framing the tension between the right to be served (of the citizens) and the right to serve (of the providers). In the Seventies, Victor P. Goldberg's reflections in this regard have been groundbreaking, since they highlighted the complex interfering entitlements relevant to the organization of public services. Such contributions enhanced the theoretical consideration for the elements – eg the rather inelastic structure of the user demand curve, especially after he or she enters into a long-term contractual relation involving the provision of public service – causing 'the vulnerability of the individual customer to arbitrary treatment by the utility'.[74] The analytical framework developed by Guido Calabresi and A. Douglas Melamed[75] has been adopted as well in order to discuss the variety of property rules and liability rules

[71] See C.A. Reich, 'The New Property' n 17 above, 746-751. For an overview regarding the last decades see J. Soss, R.C. Fording and S.F. Schram, *Disciplining the Poor. Neoliberal Paternalism and the Persistent Power of Race* (Chicago: The University of Chicago Press, 2011).

[72] C.A. Reich, 'The New Property' n 17 above, 778.

[73] A clear and influential instance of such approaches is in S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: il Mulino, 2013).

[74] V.P. Goldberg, 'Regulation' n 33 above, 440 (the quoted sentence is at footnote 57).

[75] G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' *Harvard Law Review*, 1089-1128 (1972).

capable of protecting the right to be served of end-users and of balancing it with the right to serve of the providers.[76] Even in light of his overall view of regulation as a relational contract, providing end-users with a combination of rules – namely with

> 'a *choice* between (1) termination with compensation for reasonable reliance and (2) enjoining termination, but paying damages (a higher price) to the producer' –[77]

seems the favoured alternative from Goldberg's standpoint.

In spite of this thorough understanding of the problems related to the regulation of end-users' entitlements to public utilities, the rise of neoliberalism and the age of privatizations have implied major changes in the legal conception of the position of citizens. As has been noticed above, a transition from the status of citizens to the qualification as consumers occurred. Accordingly, the right to be served has been traced to the BtoC relation between providers and consumers so there has been a shift from the politically meaningful former category to a narrower and market-based view. In fact, while it is worth underlining their important role and their connection with the emerging constitutionalization of European private law, one cannot but recognise that principles and rights such as universal service and affordability, continuity and quality of service have been initially established in an overall ordoliberal legal framework, namely to protect weaker parties in long-term bilateral and antagonistic contractual relations subject to the very rationality of the market.[78]

The standpoint adopted in this work is substantially different. Through a technical complexification and a cultural repoliticization of the legal discourse on contractual relations regarding public services, it becomes possible to carry Reich's intuition further by claiming that end-users are less consumers than citizens, whose collective (rather than individualistic) entitlement to public services should be recognised and promoted. Since such activities are crucial for both the quality of individual life and the fulfilment of societal and environmental well-being and inclusion, in recent years some influential scholarship already endorsed the idea that 'the joint reading of primary and secondary EU law, however, justifies the existence of an enforceable right', so that 'access to universal service is non-negotiable'.[79] By building on these findings, it is time to go further in the analysis and to reach a commons-oriented understanding of public services, thus acknowledging in favour of end-users a (collective or even trans-subjective) new property based on

[76] V.P. Goldberg, 'Protecting' n 41 above, especially 150-152.

[77] ibid 151.

[78] See H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in H.W. Micklitz ed, *Constitutionalization* n 6 above, 26-60; C. Mak, 'The Lion, the Fox and the Workplace: Fundamental Rights and the Politics of Long-Term Contractual Relationships', in S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract* n 40 above, 97-110. From the Italian perspective see G. Carapezza Figlia, 'I rapporti' n 40 above, especially 444-452.

[79] H.W. Micklitz, *The Politics* n 2 above, 295 and 307.

the free access to a decent level of utility and on the capability of having a voice in organizational issues.[80] On the one hand, access entitlements are an emerging building block in the debates on the reconceptualization of property: this rising relevance should be recognised in the domain of public services too, since

> 'against the market logic of freedom [and privity] of contract, the counter-principle (of collective access) needs to be established right in the centre of private law regimes'.[81]

On the other hand, enabling private law theory to provide end-users with a real capability of co-determining strategic choices in the management and provision of public services affecting their very lives can certainly give rise to delicate challenges, such as the risks of corporative outcomes.[82] However, this complex pathway is a desirable one, since citizens' incremental involvement and consciousness can be considered major means for establishing a 'post-privatization'[83] regime of public services, characterized by more transparency, fostered effectiveness[84] and the aspiration toward a renovated political legitimacy related to 'a more radically democratic European private law'.[85]

To put it in simple terms: while the traditional theorization was focused on the need for zones *of privacy*, a renewed and commons-oriented understanding of the new property paradigm could provide citizens and other stakeholders involved in the organization of public services (eg workers) with new zones *of agency*.

[80] On the interplay between public services, commons and sovereignty see P. Napoli, 'Indisponibilità, servizio pubblico, uso. Concetti orientativi su comune e beni comuni' *Politica & Società*, 403-426 (2013); and E. Scotti, n 6 above. For a trans-subjective look at private law see M. Spanò, 'Making the Multiple: Toward a Trans-Subjective Private Law' 118 *South Atlantic Quarterly*, 839-855 (2019). For the qualification of the welfare system as the new property of the dispossessed see C.A. Reich, 'The New Property After' n 17 above, especially 236-240.

[81] G. Teubner, 'After Privatization?' n 42 above, 411. For an access-based property theory see A. Quarta, 'Towards an Access-Based Paradigm of Ownership. A Plea for Inclusion in Property Law', in B. Hoops et al eds, *Property Law Perspectives V* (Den Hague: Boomuitgevers, 2017), 191-208.

[82] How could one assure that the participatory management of a certain utility is eventually open and democratic instead of being collusive and reserved to the most organized stakeholders? How could one reach a satisfactory trade-off between free access to a service and the possibility to use tariffs to avoid congestion and over-consumption?

[83] G. Teubner, 'After Privatization?' n 42 above.

[84] These profiles are highlighted in P. Vincent-Jones, 'The New Public' n 34 above, especially 268; in R.Q. Grafton, 'Governance of the Commons: A Role for the State?' 76 *Land Economics*, 504-517 (2000), especially 512; and in S. Pellizzari, 'New commons' n 48 above. Among the groundbreaking contributions in this respect see N. Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' 25/26 *Social Text*, 56-80 (1990).

[85] M.W. Hesselink, 'Private Law Subjects in Citizens' Assemblies. On the Dialectics of Private and Public Autonomy in the EU', (2022) available at https://tinyurl.com/2vnyau7j (last visited 20 September 2023).

VII. Concluding Remarks and Open Questions

Is the combination between the relational and reflexive view of contract and the commons-oriented conception of entitlements of end-users enough for fostering a different mode of organizing public services? Are the above-discussed findings sufficient to go beyond State and market, ie beyond the possible shortcomings of bureaucratic arrangements and especially beyond the commodification of these core societal activities?

Similar questions have been fostering intense discussions for the last fifteen years. This is not surprising, since the long-lasting and ongoing transition from the hegemony of market-oriented views towards more pluralistic legal and institutional frameworks is not an easy task. At a preliminary level, technical issues rapidly come into the picture once the clear-cut divide between economic and non-economic SGI is abandoned because of its theoretical weakness and operational shortcomings.[86] Lawyers and decision-makers shall find new legal and economic criteria – not to mention the need for recognising the role of other social rationalities relevant to specific public services – to deal with the choice among at least three interfering organizational models: the traditional public management; the opening up to competition and market; the experimentation of new cooperative and hybrid arrangements.

In particular, some questions arise with respect to the growing attention to the latter cooperative and participatory models. First, one could wonder how to select the services whose management and provision could become the field for testing such new organizational arrangements. Second, the procedures and the contractual frameworks enabling cooperation among public administrations, providers and other relevant stakeholders (especially end-users and workers) should be assessed. Third, remedies for dealing with possible conflicts within and beyond the contractual relations – eg abusive behaviours of the contracting authority; providers failing in performing their service activities; new forms of regulatory capture; congestion-related issues and their interplay with the access-based view of the position of end-users; lack of attention for participatory commitments; problematic working conditions – shall be outlined.

Such open questions show that the dissemination of cooperative models has shed light on their possible limits. In this respect, one should bear in mind that these new contractual relations run the risk of being another (more surreptitious perhaps) withdrawal of the public sector from the welfare system, rather than an innovative paradigm in the organization of public services.[87] For instance, the growing focus

[86] However, as is well-known technical issues are never just technical, since law – as an infrastuctural technology – is always regarded and irritated by political and social discourses: for an instance on contract law see D. Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' *European Review of Private Law*, 7-28 (2001).

[87] In this respect one should remind 'not everything that looks cool and collaborative really does represent a diffusion of power or a working anarchy, as opposed merely to cheap outsourcing of labor that offers its workers no meaningful degree of freedom' (Y. Benkler, 'Practical Anarchism:

on the social economy could be discussed to assess how public contracts awarded solely (or mostly) on the cost/price criterion can affect working conditions.[88] Moreover, clientelism, lack of transparency and unlawful anti-competitive outcomes are possible shortcomings of such non-market-based models, even though influential scholars highlight both the difference between privatization and new public contracting[89] and the need for making private law more *network friendly*, ie capable of fostering cooperation among different interests and within multi-party contractual relations.[90] From a more general standpoint, the overall rise of governance as a new dominant institutional setting has been increasing complexity and creating delicate issues to such an extent that it has been possible to conclude that 'in this realm of entropy, the concept of public contract itself loses its meaning'.[91]

It is exactly in light of all the aforementioned issues that a context-sensitive approach should be adopted. Since 'there is no general formula according to which the logics of economic action necessarily contradict the internal logics of other socio-cultural activities',[92] the cooperative and participatory management of public services should be a field of case-by-case (or also service-by-service) experimentation. While the domain of social services of general interest is likely to be the first sector of innovation, thanks to both its traditional characters and its established legal regime (eg such activities have often been qualified as non-economic), it should be clear that each and every public service once analyzed in its peculiarities, could be turned into a cooperative and participatory organizational model. In this respect, it is also worth underlining that the commons-oriented turn in the legal conception of end-users entitlements should be capable of affecting every form of public service management, including the traditional public and the privatezed ones.

In this broader institutional perspective, a renovated European contract law seems capable of giving some positive contributions. First, its unprecedented cooperative potential could foster the involvement of the stakeholders, namely end-users and workers, in the management of public services. This shift would imply not only recognising new entitlements in favour of end-users (see the preceding section) but also and above all trying to bring contractual arrangements to organize and reinforce intrinsic motivations among the involved stakeholders.[93] Second, its hybrid character can be enhanced in that the rise of cooperative and participatory

Peer Mutualism, Market Power, and the Fallible State' 41 *Politics & Society*, 213-251 (2013)).

[88] J. Battilana, n 27 above.

[89] P. Vincent-Jones, 'The New Public' n 34 above, especially 277-278.

[90] See G. Teubner, 'And if I' n 58 above, especially 116-118.

[91] K.H. Ladeur, 'The Role of Contracts' n 40 above, 348.

[92] G. Teubner, 'After Privatization?' n 42 above, 408.

[93] Commons-based peer production, commoning and mutualism are the most inspiring instances of such an intrinsic and socially-oriented potential of the transactions among privates. See Y. Benkler, 'Peer production, the commons, and the future of the firm' *Strategic Organization*, 1-11 (2016); E. Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' 100 *The American Economic Review*, 641-672 (2010); D. Spade, 'Solidarity Not Charity, Mutual Aid for Mobilization and Survival' 38 *Social Text*, 131-151 (2020).

approaches among providers and stakeholders does not necessarily entail the withdrawal of the public sector from its responsibilities in the domain of public services. Since the emerging organizational models are not – or at least should not be – a new version of privatization, public administrations are supposed to question their practices and attitudes. On the one hand, they could 'act as facilitator[s]',[94] going beyond the insulated and antagonistic view of contract and fostering contractual innovation in public contracting, such as co-planning and multi-party cooperative contracts of service. On the other hand, they should reshape still widespread mentalities, according to which

> 'procurement officers often prefer to keep procurement criteria simple and ignore social considerations for fear of distorting competition. They also tend to be risk averse and reluctant to try new approaches'.[95]

In this respect, it is worth concluding by recognising that the ongoing transformations of contract theory and practice within European private law allow this major legal institution to definitively overcome the divide between economic and non-economic SGI[96] and to eventually be a tool for decommodifying public services in two senses. In a rather traditional sense, it is easy to notice that the legal regime of public procurement has gone through meaningful innovations and that this process has shown how contract law is capable of taking into account environmental and social issues. Accordingly, the whole functioning of the market of public services has changed: service providers often have to deal with universal service obligations; considerable reserved markets and exclusions are currently possible; the choice of opening up a service to competition is supposed to be taken far beyond the mere price criterion. In a more innovative sense, contract law could decommodify public services by testing and refining cooperative and participatory contractual relations among public administrations, providers and relevant stakeholders. Since they have been one of the major issues dealt with in this work, it is now clear that such relations can be considered as a new form of public contracting, an alternative to public procurement – ie to the ordoliberal and market-oriented imprinting of the relevant European regulation – and grounded in the core findings of recent contract theory. Such hybrid contracting is supposed to reshape both the legal organization and the governance of public services through the lessons of relational contract theory and the potential of reflexive and pluralistic autonomy.

In conclusion, still today one can endorse the opinion that 'in many respects

[94] R.Q. Grafton, n 84 above, 514.

[95] E. Varga, n 1 above.

[96] In fact, from this renewed legal perspective the core elements to be considered are the structures and the contents of certain contractual relations, whereas the supposedly natural distinction between the economic and the non-economic character of a service is no longer a relevant aspect.

what happens to the law of contract will be a defining moment in the history of Europe'.[97]

[97] Study Group on Social Justice n 14 above, 653.