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Testing governance and its regulatory techniques against some of the GDPR provisions

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Abstract [En]: The paper follows a three-layered concentric perspective: starting with governance at large, then moving on to EU governance, and ending with an examination of a more focused domain shaped by the European Data Protection Regulation. More specifically, the GDPR intends to reverse the path: from being governed by governance to "steering" existing governance processes for the sake of protecting fundamental rights.

Abstract [It]: Lo scritto adotta una prospettiva concentrica: prendendo le mosse dal generale concetto di governance, si focalizza poi su quella dell'UE, per soffermarsi infine su alcune previsioni del Regolamento europeo sulla protezione dei dati personali. Nello specifico, il GDPR tenta di invertire il percorso: dall'essere governato dalla governance al carpirne ed indirizzarne le procedure per funzionalizzarle alla protezione dei diritti fondamentali.

Keywords: governance; regulatory techniques; self/co-regulation; methods of coordination; privacy enhancing technologies; European Data Protection Board
Parole chiave: governance; tecniche regolatorie; auto/co-regolamentazione; metodi di coordinamento; tecnologie per la privacy; Comitato europeo per la protezione dei dati

1. Preamble

When a public law scholar deals with concepts for which there is little consensus, such as governance, he needs to be careful not to fall into a "political science hangover"[1] and ensure that he is not captured by "economic theology"[2] and the underlying neo-liberal or ordo-liberal approach[3].

* Articolo sottoposto a referaggio.

[1] See the dialogue between two constitutional scholars about governance and their trust or mistrust in such a vague category outlined by M. DANI, F. PALERMO, *Della governance e di altri demoni (un dialogo),* in *Quaderni costituzionali,* n. 4, 2003, pp. 785 ff.

[2] A. MORRONE, *Teologia economica v. Teologia politica? Appunti su sovranità dello Stato e diritto costituzionale globale,* in *Quaderni costituzionali,* n. 4, 2012, pp. 829 ff.

[3] M. LUCIANI, *L'antisovrano e la crisi delle costituzioni,* in *Rivista di diritto costituzionale,* n. 1, 1996, pp. 124 ff.

Governance attempts to cope with the fragmented global reality and the resulting conflicts of interest that represent a deep challenge to the certainty of the law, its effectiveness as well as the implied democratic principle[4].

It is a struggle between diversity and uniformity, autonomy and hierarchy, which results in a decrease in the law's ability to grasp and shape this complex political, economic, social, scientific and technological environment. In this respect, it is not a coincidence that discourse on governance entered the legal scholars' domain around the time that the theory of the coexistence of self-referential organisations within a pluralistic world society was spreading (late 1980s to early 1990s)[5].

Due to multi-layered and multi-faceted factors usually termed 'governance implications', these fading boundaries of traditional institutions and sources of law are difficult to separate into clear causes and consequences. The only evidence is the effective co-existence of different players and powers (public but also private) that interact at different level giving rise to various systems of rules. In this regard, governance has undertaken an organisational and procedural task through the process of communication between public and private bodies or entities at different levels, bringing about various regulatory techniques.

Following this path, the classical role of the law has undergone a transformative process. In this sense, as highlighted by Zagrebelsky, the legislator shall refrain from imposing uniform rules that stifle diversities and shall rather make the law "milder"[6]. As such, the shared feature of various regulatory techniques is a sort of self-restraint in relation to the scope of the law.

[4] This fragmented and conflicting legal reality emerges from many studies within different disciplinary domains and consequently different theoretical approaches. In this respect it suffices to recall two studies that establish a link between fragmentation stemming from globalisation and the rule-of-law paradigm: S. CASSESE, *Chi Governa il mondo?,* Il Mulino, Bologna, 2013; G. PALOMBELLA, *E' possibile una legalità globale. Il Rule of Law e la governance del mondo,* Il Mulino, Bologna, 2012.

[5] On the one hand, this is a reference to the pattern of autopoietic, self-referential, poly-contextual social sub-systems, as well as the consequent effort to establish an organisational, procedural or optional way to create channels of communication between them and as such to tackle with the "regulatory-trilemma" and the relevant regulatory gap. In this regard, see the book G. TEUBNER, A. FEBBRAJO (eds.), *State, Law and Economy as Autopoietic Systems – Regulation and autonomy in a new perspective,* Giuffré, Milan, 1992, and more specifically, within this book, G. TEUBNER, *Social order from legislative noise? Autopoietic closure as a problem of legal regulation,* pp. 609 ff. as well as W.H. CLUNE, *Implementation as autopoietic interaction of autopoietic organizations,* pp. 485 ff. On the other hand, it is a reference to the interaction among states in international relations as well as between them and non-governmental institutions, such as transnational corporations, as addressed by E.O. CZEMPIEL, *Governance and Democratization,* in J.N. ROSENAU-E.O. CZEMPIEL (eds.), *Governance without Government: order and change in world politics,* Cambridge University Press, Cambridge, 1992, pp. 250 ff. Consistently, one can observe that the conceptualisation of governance laid down by Czempiel starts where Teubner's autopoietic systems theory ends, since the former channels, frames and institutionalises the need for communicative external interaction between self-referential systems tackled by the latter.

[6] G. ZAGREBELSKY, *La virtù del dubbio,* Editori Laterza, Rome-Bari, 2007, p. 50.

Dealing with all these dynamics is a starting point for better understanding how they can be redirected and consequently perform in compliance with public law paradigms in terms of sources of law and the relevant protection of fundamental rights and freedoms.

Accordingly, the paper follows a three-layered concentric perspective: starting with governance at large, then moving on to EU governance, and ending with an examination of a more focused domain shaped by the European Data Protection Regulation. This concentric and layered perspective, which shifts from global governance to the European level and within the latter shifts to sector-specific competence (data protection), smoothens the path towards an understanding of the channels in which governance processes have interfered with both public law procedures and legal sources.

Against this backdrop, it is the GDPR that comes into focus due to its substantial and procedural scope, which is truly paradigmatic of the effort to govern and order the challenges posed by globalisation. On the one hand, its material scope covers the data processing activities that underlie the blurring of territorial boundaries and technological evolution with the aim of protecting a right that rests on the fundamental value of human dignity[7]. On the other hand, the GDPR enshrines data processor autonomy and accountability by means of procedures aimed at assessing and managing the risk involved in the processing of personal data[8]. Indeed, risk assessment and risk management have traditionally featured in governance procedures and the connected regulatory techniques which – in more recent times – have also widened to encompass the deployment of technological tools for regulatory management goals.

In this regard, the GDPR is one of the principal manifestations of the measures adopted by the legislator to capture certain governance procedures, as well as their regulatory outcomes, which similarly emerge at the global and European levels (according to the description provided in the first and second layer of the analysis). As such, it intends to reverse the path: from being captured to "capturing" the regulated entities as well as their modus operandi; from being governed by governance to "steering" existing governance processes[9]. In this sense, it tries to convert governance threats into procedural and regulatory opportunities in order to keep pace with rapid technological changes and fading territorial boundaries, offering a bedrock for the better protection of fundamental rights.

[7] O. POLLICINO, *Costituzionalismo, privacy e neurodiritti,* in *mediaLaws,* 2 April 2021, p. 5.

[8] As stressed by O. POLLICINO, *Piattaforme digitali e libertà di espressione: l'ora zero,* in www.lavoce.info, 19 January 2021, "procedure" is the new key-word of digital constitutionalism.

[9] To paraphrase the well-known expressions "capture of the regulator" and "governing without Government" (with regard to the latter, see R. A. W. RHODES, *The New Governance: Governing without Government,* in *Political Studies,* Vol. XLIV, 1996, pp. 562 ff).

2. First layer: governance at large

2.1. Globalisation and governance: an introduction

One of the main "institutional" consequences of globalisation[10] is the growing use of the term "governance"[11]. Before the EC's well known White Paper on Governance and beyond the EU's *sui generis* features, Ernst-Otto Czempiel addressed the concept: "governance [means]… the capacity to get the things done without the legal competence to command that they have to be done… From this point of view the international system is a system of governance"[12].

Governance is a truly encompassing "label" which can include "a variety of perspectives that share some conceptions, assumptions and research strategies"[13].

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[10] B. CARAVITA, *Trasformazioni costituzionali nel federalizing process europeo,* in Federalismi.it, n. 17, 2012, identifies the crisis of the nation-state and the welfare state as a consequence of the globalisation process. M. LUCIANI, *L'antisovrano e la crisi delle costituzioni, cit.*, p. 162, deems that the statehood crisis is due to globalisation as well as to international and supranational institutions. More specifically, on the one hand it is the freedom of movement of capital and international free trade as well as the next trans-nationalisation of industrial production; on the other hand, it is the international and supranational organisations that simultaneously represent the response to and the trigger of this process, according to which economic law has started to seek validity beyond the possibility of being captured by politics, state sovereignty and constitutions. A. MORRONE, *Teologia economica v. Teologia politica? Appunti su sovranità dello Stato e diritto costituzionale globale, cit.*, p. 829, stresses that, due to globalisation, within the framework of the westfalian model, "political theology" gives way to different "economic theology" as well as the related "juridification of economic concepts". Consistently, the author deals with the various (positive or negative) ways of conceiving globalisation vis à vis nation-States.

[11] According to M. BETZU, *Stati e istituzioni economiche sovranazionali,* Giappichelli, Turin, 2018, p. 15, globalisation rests on three pillars: a factual one, an institutional one and an ideological one. The concept of governance belongs to the second pillar. In this respect, M.R. FERRARESE, *La governance tra politica e diritto,* Il Mulino, Bologna, 2010, p. 11, highlights the difficulty of establishing a clear-cut definition of governance, since the extent of its use is inversely proportional to the clarity of its meaning. As stressed by A. MORRONE *Teologia economica v. Teologia politica? Appunti su sovranità dello Stato e diritto costituzionale globale, cit.*, p. 831, the reference to the concept of governance is evidence of the loss of autonomy of the legal sciences in respect of financial and economic theories. Indeed, as pointed out by the author, the classical concept of "form of government" has been changed to that of governance that has no salience in constitutional history as it actually comes from American economic theories, goes through political science then reaches national, European and international public law. Broadly speaking, in reference to the concept of governance, its empirical and descriptive scope shall be distinguished from its normative scope. In this regard, see C. SHORE, *'European Governance' or Governmentality? The European Commission and the Future of Democratic Government,* in *European Law Journal,* Vol. 17, n. 3, 2011, p. 296.

[12] E.O. CZEMPIEL, *Governance and Democratization,* in J.N. ROSENAU-E.O. CZEMPIEL (eds.), *Governance without Governament: order and change in world politics, cit.*, p. 250. According to R.A.W. RHODES, *The New Governance: Governing without Government, cit.*, p. 653, establishes "at least six separate uses of governance": the "Minimal State" and the underlying privatisation process; the "Corporate Governance" that involves openness and accountability; the "New Public Management" that involves extending to public sectors paradigms typical of the private sector (such as measurement of the performance, competition and outcomes); the "Good Governance" that shifts the new public management to the level of state institutions; the "Socio-cybernetic System" that implies the interaction of all relevant (social/political/administrative) actors in a particular policy area; the "Self-organising Network" according to which "networks are an alternative to…markets and hierarchies and they span the boundaries of the public, private and voluntary sectors", while, moreover, being self-organising.

[13] S. HIX, *The Study of the European Union II: the 'new governance' agenda and its rivals,* in *Journal of European Public Policy,* n. 5, 1998, p. 1350. As stressed by J. LENOBLE, M. MAESSCHALCK, *Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance,* in O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World,* Hart Publishing, Oxford, 2010, p. 3, "under the umbrella of a single term — one that designates a common investigation into the question of governance — can be found an aggregation of studies that diverge significantly as regards the issues examined and the methodological approaches used".

From a constitutional standpoint, dealing with governance implies reference to a disputed and unsettled legal conceptualisation[14] and the underlying displacement of traditional categories[15]. More specifically, broad concepts of general theory like sovereignty beyond nation-states[16], plurality of legal systems and their intertwined relations[17], the existence of a constitutional legal order and constitutionalism beyond states[18], as well as the consequent blurring of boundaries between public and private law[19], are all involved. In addition, governance has contributed to putting pressure on the representative democracy paradigm, broadening the debate around its deployment beyond nation-state boundaries[20]. As such, it has led to the

[14] "The concept of new governance is by no means a settled one. It is a construct which has been developed to explain a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions. The language of governance rather than government in itself signals a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically governmental actors, or indeed the absence of any traditional framework of government, as is the case in the EU and in any trans-national context. In a practical sense, the concept of new governance results from a sharing of experience by practitioners and scholars across a wide variety of policy domains which are quite diverse and disparate in institutional and political terms, and in terms of the concrete problem to be addressed", in this regard, G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism,* G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, Hart Publishing, Oxford, 2006, p. 3.*

[15] As regards "the key dimensions of the relationship between constitutionalism and new governance", see N. WALKER, *Constitutionalism and New Governance in the European Union: Rethinking the Boundaries*, in G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, op. cit., p. 15.*

[16] The doctrine on this subject is very extensive, so it suffices to quote, as starting point, N. MACCORMICK, *Beyond the Sovereign State,* in *Modern Law Review,* Vol. 56, n. 1, 1993, pp. 1-18; J. HABERMAS, *The Postnational Constellation – Political Essays,* Wiley, New Jersey, 2000.

[17] With reference to "legal pluralism in an emerging world society", G. TEUBNER, *'Global Bukowina': Legal pluralism in the World Society,* in G. TEUBNER (eds.), *Global Law without a State,* Dartmouth Publishing Company, Aldershot-Brookfield, 1997, p. 3. As stressed by A. PIZZORUSSO, *La produzione normativa in tempi di globalizzazione,* in www.associazionedeicostituzionalisti.it, irrespective of multiple uncertainties, what shall be born in mind is that nowadays a national legal system can no more be deemed a monad isolated from other normative systems. However, in the author's opinion, it is not possible to speak about a single "global or universal or cosmopolitan" legal system, but rather a plurality of sectoral transnational legal systems or "horizontal legal systems". At any rate, as early as the beginning of the 20th century, S. ROMANO, *L'ordinamento giuridico,* Quodlibet, Macerata, 2018, pp. 97 ff., addressed the issue of a plurality of institutions and relevant legal systems as well as their mutual relations.

[18] To borrow the words "constitutional legal order without constitutionalism" from J.H.H. WEILER, *The Autonomy of the Community Legal Order: through the looking glass,* in J.H.H. WEILER, *The Constitution of Europe – "Do the new clothes have an Emperor? And other essays on European integration,* Cambridge University Press, Cambridge, 1999, p. 298. The underlying question about the "ways to cut the concept of constitutionalism" and the "world-view of the commentator" is stressed by J. SHAW in *Postnational constitutionalism in the European Union,* in *Journal of European Public Policy,* Vol. 4, n. 6, 1999, p. 583. As regards the theoretical distinction between constitution, constitutionalism and constitutional legal order, see P. CRAIG, *Constitutions, constitutionalism and the European Union,* in *European Law Journal,* Vol. 7, n. 2, 2001, pp. 125-150. With regard to social legitimacy as a matter of legal consideration and the consequent inextricable link between polity, constitution and law supporting the perspective of constitution and law as a system of beliefs and values, see U. HALTERN, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination,* in *European Law Journal,* Vol. 9, n. 1, 2003, p. 17. As regards the concept of multilevel constitutionalism, see I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action,* in *Walter Hallstein-Institut (WHI) – Paper,* n. 2, 2009.

[19] The subject has been recently addressed according to an historical approach by B. SORDI, *Diritto pubblico e diritto privato – Una genealogia storica,* Il Mulino, Bologna, 2020.

[20] G. MAJONE, *The common sense of European integration,* in *Journal of European Public Policy,* Vol 13, n. 5, 2006, p. 618.

so-called legitimacy paradox[21] and the consequent attempt to develop sources of legitimacy other than input legitimacy[22].

This baggage of multi-faceted legal uncertainty brings about further democratic risks[23], such as the lack of transparency, effective openness, accountability and representativeness of the actors involved in governance procedures, as well as the underlying elitist and technocratic dominance and the so-called capture of the regulator[24].

To summarise, as pointed out by Shore, governance is a "buzzword" and "catch-all" term "with at least two distinct meanings. The first refers to the nature of organisations… The second use refers to the nature of the relationship between organisations. Here governance refers to a particular form of coordination"[25]. Accordingly, as argued by Weiler, what can change from one scholar's perspective to another, is the identification of the key players and principal actors as well as their relevant modus operandi[26]. Moreover, different regulatory techniques come into play as a consequence of the actors and their operative modes. These are the issues that will be addressed on the following pages.

2.2. The "players" and their "modus operandi"

Looking at the players involved, a review of the doctrine has revealed a tripartite classification from the scholars' standpoint and the consequent pivotal roles given to certain actors rather than others. Accordingly, the intergovernmental (or international or neorealist) approach is more state-centric and gives nation-states the role of key players in the international environment; the supranational (or multi-level) approach pays attention to the shared decision-making process within and between institutions at different levels; the infra-national (or transnational or globalist) approach splits the nation-state into its components that interact in a transnational dimension among themselves and with private bodies[27].

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[21] P. VERBRUGGEN, *Does Co-Regulation Strengthen EU Legitimacy?,* in *European Law Journal,* Vol. 15, n. 4, 2009, p. 431; P. POPELIER, *Governance and Better Regulation: Dealing with the Legitimacy Paradox,* in *European Public Law,* Vol. 17, n. 3, 2011, p. 560.

[22] To take Scharpf's well-known distinction between input and output legitimacy a step further, see V.A. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput',* in *Political Studies,* Vol. 61, 2021, pp. 2-22.

[23] As recalled by C. PINELLI, *The Discourse on Post-National Governance and the Democratic Deficit Absent an EU Government,* in *European Constitutional Law Review,* Vol. 9, n. 2, 2013, p. 182.

[24] Regarding the neo-liberal and market-oriented design that governance conceptualisation underlies, see C. SHORE, *'European Governance' or Governmentality? The European Commission and the Future of Democratic Government, cit.*, p. 289.

[25] *Ibid.,* p. 294.

[26] J.H.H. WEILER, *European Democracy and its critics: polity and system,* in J.H.H. WEILER, *The Constitution of Europe – "Do the new clothes have an Emperor? And other essays on European integration, cit.*, pp. 270 ff.

[27] This tripartite classification stems from the comparison and matching of the conclusion drafted by E.O. CZEMPIEL, *Governance and Democratization,* in J.N. ROSENAU-E.O. CZEMPIEL (eds.), *Governance without Government: order and change in world politics, cit.,* pp. 250 ff.; by G. MARKS, L. HOOGHE, K. BLANK, *European Integration from the 1980s: State-Centric v. Multi-level Governance,* in *Journal of Common Market Studies,* Vol. 34, n. 3, 1996, p. 341 ff.; by J.H.H. WEILER, *European Democracy and its critics: polity and system, cit.*, pp. 270 ff. This latter author establishes "several points of contact" between

Beyond this trichotomy, it is possible to establish some cross-cutting implications of governance, irrespective of the perspective one may prefer. In this regard, and broadly speaking, States "no longer provide the sole interface between the supranational and subnational arenas and they share rather than monopolise control over many activities that take place in their respective territories"[28]. These complex interrelationships involve not only institutions at different territorial levels or public bodies at large, but also civil society[29] as well as corporations and NGOs[30]. This scenario of fading boundaries and multiple interactions fuelled by economic and financial dynamics has been further fostered and favoured by digital transformation[31]. With regard to the latter, the opportunities for contact between different actors and across different countries have been continuously increasing, which has brought about not only positive consequences, by implementing economic potential and channels of democratic participation and consultation[32], but also negative consequences, by functioning as a multiplier of the risk of the infringement of fundamental rights[33].

Looking at the modus operandi, governance processes "generally encourage or involve the participation of affected actors (stakeholders) rather than merely representative actors, and emphasise transparency (openness as a means to information sharing and learning), as well as ongoing evaluation and review. Rather than operating through a hierarchical structure of governmental authority, the 'centre' (of a network, a regime, or other governance arrangement) may be charged with… ensuring co-ordination or exchange as between constituent parts"[34]. Against this backdrop, an in-depth study that analysed the modus operandi of governance players through different sectors, has identified various approaches. With regard to the latter, it demonstrated that while the neo-institutional approaches adopt a top-down

democratic theories and different modes of governance, more specifically between international governance and the consociational model on the one hand, and, infranational governance and the neo-corporatist model on the other (pp. 279-285).

[28] G. MARKS, L. HOOGHE, K. BLANK, *European Integration from the 1980s: State-Centric v. Multi-level Governance,* in *Journal of Common Market Studies, cit.,* p. 347.

[29] M.R. FERRARESE, *La governance tra politica e diritto,* cit., p. 52.

[30] E. SANTORO, *Diritto e Diritti: lo stato di diritto nell'era della globalizzazione,* Giappichelli, Turin, 2008, pp. 72 ff. As stressed by M. LUCIANI, *L'antisovrano e la crisi delle costituzioni, cit.*, p. 164, it is a new politics that emerges from globalisation (a sort of trans-national counter-sovereign politics) with a public and private face where the will of state governments, international technocracies (such as the WTO, FMI, World Bank) and the transnational corporations that run strategic sectors (first and foremost information and communication) are intertwined.

[31] G. PASCUZZI, *Il diritto nell'era digitale,* Il Mulino, Bologna, 2020, pp. 347 ff.

[32] Literature on the subject is wide, so it suffices to quote, P. COSTANZO, *La democrazia elettronica (Note minime sulla c.d. e-democracy),* in *Diritto dell'informazione e dell'informatica,* n. 3, 2003, p. 471; S. RODOTÀ, *Tecnopolitica – La democrazia e le nuove tecnologie della comunicazione,* Editori Laterza, Rome, 2004; G. GOMETZ, *Democrazia elettronica. Teoria e tecniche,* Edizioni ETS, Pisa, 2017; G. FIORIGLIO, *Democrazia elettronica. Presupposti e strumenti*, Cedam, Padua, 2017.

[33] G. AZZARITI, *Internet e Costituzione,* in *Politica del Diritto,* n. 3, 2011, p. 373, underlines the risks for fundamental rights represented by the (private-public) control of power over the on-line world, recalling the original role of constitutions that encompasses the protection of rights and the separation of powers.

[34] G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism,* G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, cit., p. 5.*

perspective focusing on the coordinating role of institutions and their respective organisation, the collaborative-relational (or deliberative) approaches are based on Habermas's communicative action model and its bottom-up perspective. In addition, the pragmatist approaches contextualise the collective learning process, embedding it in experimental and concrete problem-solving settings, while the genetic approaches improve the pragmatist perspective, focusing on the capabilities and possibility of actor participation[35].

The comparison of these different approaches is leads to some common features of the model known as "reflexive governance", namely transnational networks (including participation), coordination as, well as mutual learning with regard to risk assessment, risk management and problem-solving[36]. More specifically, institutions or mechanisms of coordination are "conceived so as to provide the actors involved with an opportunity for learning" by means of tools such as monitoring and evaluation, benchmarking of best practices, consultation and participation[37].

Indeed, most of the theories that underpin governance commonly make its procedure rest on this learning-based approach, conceiving it as a move beyond the failure of the "pre-existing, ready-made models" which are, on the one hand, the neo-liberal state and the underlying market-based solutions and, on the other hand, the Welfare State and its inadequacy in relation to the underlying "context of changing demographics and economic globalisation"[38].

This means that whatever theoretical perspective one may adopt, the governance modus operandi is a means of institutional action that strives to cope with issues stemming from a dynamic and pluralistic society as well as the underlying challenges stemming from the economic, socio-political, scientific and technological environment. Accordingly, the least common denominator of governance is its adaptive mode of action *vis à vis* our rapidly changing reality: this is the reason why the experimental and learning-based approaches are given a pivotal role. It encompasses a plurality of actors and their networks that give rise to different systems of interaction as well as different relationship between systems of rules. In

[35] J. LENOBLE, M. MAESSCHALCK, *Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance,* in O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World, cit.,* pp. 7 ff.

[36] As stressed by M. LEE, *The legal Institutionalization of public participation in the EU governance of Technology*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, Oxford University Press, Oxford, 2017, p. 622, "the two dominant rationales for public participation… focus respectively on substance and process, or output and input legitimacy. In terms of substance, public participation may contribute to the quality of the final decision, improving decisions by increasing the information available to decision makers, providing them with otherwise dispersed knowledge and expertise, as well as a wider range of perspectives on the problem, or… by providing a more deliberative collective problem-solving forum. In terms of process, public participation may have inherent or normative (democratic) value".

[37] O. DE SCHUTTER, J. LENOBLE, *Institutions equipped to learn,* in O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World, cit.*, pp. XV-XVI.

[38] O. DE SCHUTTER, J. LENOBLE, *Institutions equipped to learn*, *op. cit.,* pp. XV-XVI.

this respect, it is not only the leeway left open by legislative acts that increases but it is also the distinction between rule-making and rule-taking that becomes increasingly blurry[39].

Consequently, it is not a question of displacing traditional institutions and their courses of action, but rather stressing the validity of the hybridity theory according to which "actually existing old forms of government tended to incorporate some new elements, while the new forms continue to incorporate aspects of the old" in a sort of regulatory mix of old and new[40].

2.3. Regulatory outcomes

As stated by MacCormick, "there is a general need for reflection on the bases of legal order. The idea of 'system' will go on being needed as a regulative ideal. Systems as systems of rules, partly overlapping but capable of compatibility, will be recognised. This will depend… on legal and political communities recognising themselves as communities of principle. To see and show all this clearly will be a challenging task for the legal imagination"[41].

From the perspective of legal sources, this statement represents what, from a sociological perspective, has been called the "institutions of the liquid modernity" (drawing on the Bauman's liquid society) where the rigidity of institutions is deemed an intolerable constraint while more flexible and pragmatic institutions are required to smoothen the path towards experimental and learning-by-doing approaches that better fit a bi-directional communicative path. Accordingly, "following an architectural metaphor", "instead of drawing up life models, they [institutions] draft master plans ready to incorporate the proliferating multiplicity of models developed by individuals themselves"[42]. In this respect, rather than setting out command and constraint (as is usually the case) "normative institutions" are submerged by the "intrusiveness of the present"[43].

This is a process underpinned by the theoretical perspective on the regulatory state's alternative modes of intervention[44] as well as the OECD's Guiding Principles for Regulatory Quality and Performance[45], both calling for regulatory techniques tailored to the domain subject to regulation and the relevant self-restraint of the law.

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[39] *Ibid.*, p. XVII.
[40] N. WALKER, *Constitutionalism and New Governance in the European Union: Rethinking the Boundaries*, in G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, cit., p. 22.*
[41] N. MACCORMICK, *Beyond the Sovereign State,* in *Modern Law Review,* Vol. 56, n. 1, 1993, p. 18.
[42] M.R. FERRARESE, *Il diritto al presente - Globalizzazione e tempo delle istituzioni,* Bologna, 2002, p. 58.
[43] *Ibid.*, p. 63.
[44] G. MAJONE, *The transformations of the regulatory State,* in *Osservatorio sull'Analisi d'Impatto della Regolamentazione,* September 2010, pp. 4 ff.
[45] Testo consultabile sul sito dell' *OECD*.

More specifically, legal systems are faced with a two-fold challenge; on the one hand, from supranational, international and intergovernmental organisations, and on the other hand, from non-state actors such as the market (i.e. transnational corporations), non-governmental organisations, civil society and the coding architecture of cyberspace[46]. Indeed, "the fragmentation of power associated with processes of globalisation and the growth importance of both corporate and NGO capacities" as well as the consequent spread of practices of self-organisation and self-regulation "associated with the disenchantment with public regulation" [47] and its effectiveness has brought about an evolution of traditionally conceived legal systems.

Consequently, it is the hierarchical ambition of the law that is put under stress[48]. In this respect, without necessarily leaning towards blind faith in the existence of a "Global Bukowina" according to which "various sectors of world society… are developing a global law of their own" irrespective of any state's intervention[49], many scholars have nonetheless shown how transnational regulatory regimes are flourishing, and how they interact with national legal systems.

[46] This issue is clearly addressed by C. SCOTT, *Reflexive Governance, Regulation and Meta-regulation: control or learning?,* in O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World, cit.*, pp. 54 ff. According to G. CERRINA FERONI, *Organismi sovranazionali e legittimazione democratica – Spunti per una riflessione,* in *Federalismi.it,* n. 20, 2016, the state is reducing its role as an exclusive player in regulatory policy due to the expansion of private or public-private bodies that involve transnational networks of regulators which adopt rules, standards and policies valid within state boundaries irrespective of any previous exercise of the power of ratification. In this respect, G. TEUBNER (eds.), in *Global law without a State, cit.*, p. XIV, stresses that governance process "makes it necessary to rethink the traditional doctrine of sources of law" as "it decentres political law-making, moves away from its privileged place at the top of the norm-hierarchy and puts it on an equal footing with other types of social law-making. The replacement of frames, from hierarchy to heterarchy, allows for the recognition of other types of social rule production… here we find – parallel to political legislation – may forms of rule-making by 'private government' on a global scale which, in reality, have a highly 'public' character". Consequently, I. MASSA PINTO, *Rileggendo «L'ordinamento costituzionale per valori» di Francesco Pizzetti*, in C. BERTOLINO, T. CERRUTI, M. OROFINO, A. POGGI (eds.), *Scritti in onore di Franco Pizzetti,* Vol. II, Edizioni ESI, Naples, 2020, p. 340, speaks about a "de-formalization" of the legal system due to the loss of centrality of parliaments, their political representation and their pivotal role in the production of law, leaving room for a socio-economic self-regulatory dynamic. Against this backdrop, M. DOGLIANI, *Il principio di legalità dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima,* in *Diritto Pubblico,* n. 1, 2008, p. 15, stresses the loss of the axiological feature of the legality principle linked to both its structural and functional dimensions that underlie the adoption of the law by parliament, to better pursue the purpose of the protection of rights.

[47] C. SCOTT, *Reflexive Governance, Regulation and Meta-regulation: control or learning?,* in O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World, cit.*, p. 43. As stressed by G. SILVESTRI, *Lo Stato di diritto nel XXI secolo,* in *Rivista AIC,* n. 2, 2011, self-regulation adopted by large transnational corporations is as reliable as the voluntary restraint of power by '800 sovereigns.

[48] F. MODUGNO, *Fonti del diritto (gerarchia delle),* in *Enciclopedia del Diritto,* agg. I, Giuffré, Milan, 1998, p. 561 ff., points out the current impossibility of an a priori unique system of sources of law, due to the plurality of systems (and micro-systems) of rules in reference to different domains.

[49] G. TEUBNER, *'Global Bukowina': Legal pluralism in the World Society,* in G. TEUBNER (eds.), *Global Law without a State, cit.*, p. 4.

Lex mercatoria[50], transnational private regulations[51], transnational laws[52] as well as *lex informatica*[53] and the deployment of technology at large as a regulatory tool[54], should – among others – be recalled.

Consequently, the axes along which public and private regulatory spaces run rely on various regulatory techniques. On the one hand, there is the legislature's deployment of sunset clauses[55], or general

[50] An emerging *lex mercatoria*, which is a separate legislative system of customary origin whose legitimacy stems from the shared *opinio juris* of market actors (irrespective of their nationality and irrespective of its codification in Unidroit principles), entails a sort of new universal law applied and enforced by the international court of arbitration, as described by F. GALGANO, *La Globalizzazione nello specchio del diritto,* Il Mulino, Bologna, 2009, pp. 9-10.

[51] "Transnational Private Regulation (TPR) constitutes a new body of rules, practices and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard-setters and epistemic communities"; as such, it "differs both from global public regulation and from conventional forms of private rule-making identifiable with the merchant law". Indeed, in contrast to the former they are not based on states legislation, while in contrast to the latter it encompasses not only market actors (but also NGOs, for instance); moreover, it sometimes involves different players such as regulators, regulatees and beneficiaries of the rule-making process. In this regard, see F. CAFAGGI, *New foundations of transnational private regulation,* in E. PALMERINI, E. STRADELLA (eds). *Law and Technology – The Challenge of Regulating Technological Development,* Pisa University Press, Pisa, pp. 77 ff. Moreover, the internet has increased this spreading of transnational private regulation: "legal expectations are, on the whole, channelled through large intermediaries, such as search engines, social networking sites, or online marketplaces, to that much legal implementation occurs away from public view in corporate head offices, drafting Terms and Conditions, complaint procedures, national customised platform, and so on. In fact, it is the role and power of global online intermediaries that suggests that there is a parallel reality of online normativity. This online normativity does not displace the State as a territorially based order, but overlaps and interacts with it. This is accounted for by explanations of emerging global regulatory patterns that construct societies not merely or mainly as collectives of individual within national communities, but as overlapping communicative networks": U. KOHL, *Conflict of Laws and the Internet*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, Oxford University Press, Oxford, 2017, p. 290.

[52] A. SANTOSUOSSO, *A general theory of law and technology or a general reconsideration of law?,* in E. PALMERINI, E. STRADELLA (eds). *Law and Technology – The Challenge of Regulating Technological Development, op. cit.*, p. 159, recalls the transgovernmentalism approach according to which the "state is not disappearing; it is disaggregating into its separate, functionally distinct parts; these parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dens web of relations that constitutes a new, transgovernmental order". The objective flip side of this (subjective) intertwined institutional system beyond national borders deals with the consequent disaggregation "of law sources, bodies of law and their internal hierarchies… thus what seems to be the main novelty is not the subversion of the old system but rather the co-presence of the old system (which still works perfectly in non-boundary zones or in fields that are closer to democratic political legitimacy) and several kind of interactions (old and new) corresponding to different and unstable hierarchies of laws" (p. 162).

[53] This is in reference to the well-known expression "code is law" with regard to the architectural framework of the cyberspace, its protocols and codes, in L. LESSIG, *Code and the Other Laws of the Cyberspace,* Basic Books, New York, 1999. As stressed by L.A. BYGRAVE, *Hardwiring Privacy*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, *cit.*, p. 755, according to the perspective that recognises "the powerful regulatory potential of Lex Informatica" it is recognised that "the ability of information systems architecture to shape human conduct in ways that parallel the imposition of law laid down by statue and contract, and to shape conduct more effectively than such law… by seeking to build the norms into the information systems architecture", make the rules "largely self-executing". Thus, this has become "a legal layer of protection".

[54] R. BROWNSWORD, *Law, Technology, and Society: In a State of Delicate Tension,* in *notizie di Politeia,* Vol. XXXVI, n. 137, 2020, p. 27.

[55] For a definition of these clauses, see, A. KOUROUTAKIS, *The Constitutional value of sunset clauses. An historical and normative analysis*, Routledge, London, 2016, p. 3. According to the Author, "Sunset clauses are statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorised by the legislature". The link between these clauses "allowing potentially out of date rules to automatically lose binding force after a given period" and the inherent features of the rule of law, is pointed out by M. DAWSON, *Better regulation and the future of EU Regulatory Law and Politics,* in *Common Market Law Review,* n. 53, 2016, p. 1215.

principles/general clauses[56] or formal statutory delegation; and on the other hand, there is the consequent exercise of formally delegated regulatory competences by public agencies (and their transnational network) or by private regimes[57] or by public-private co-regulation[58], or – at any rate – their intervention within the space left open by legislation. Lastly, the deployment of technological management by public or private regulators[59] is another recent feature of this regulatory evolutionary path.

Against this backdrop, governance has usually been described as involving "a shift in emphasis away from command-and-control in favour of 'regulatory' approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature"[60]. As such, the resulting norms are voluntary and non-binding, and this is the reason why they are often classified as soft law in comparison with classical hard law[61]. However, as will be clarified in the following sections, it is nonetheless true that not all governance procedures lead to this result, not only can binding sources be adopted within governance mechanisms but, under certain conditions, private self-regulation itself can be endowed with legal consequences[62].

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[56] A. ZEI, *Shifting the boundaries or breaking the branches? On some problems arising with the regulation of technology,* in E. PALMERINI, E. STRADELLA (eds). *Law and Technology – The Challenge of Regulating Technological Development, cit.*, p. 178, "the use of general clauses, and, more generally, of formulations whose content is at least partially indeterminate, in fact also constitutes an alternative to so called special legislation and, in particular, too much criticized micro-legislation" indeed "some areas of social life, although requiring regulation, were not suitable for a strict legality rule". A. STERPA, *La frammentazione del processo decisionale e l'equilibrio costituzionale tra i poteri,* in Federalismi.it, n. 23, 2019, points out the "prairies left free" by the law because of its inability to fill the assigned normative scope due to the legislator's inability to decide.

[57] Delegation of regulatory tasks to self-regulatory regimes or the government's recognition or validation of rules originating in self-regulatory regimes that could also be conceived as two forms of co-regulation, see C. BROWN, C. SCOTT, *Regulation, Public Law, and Better Regulation,* in *European Public Law,* Vol. 17, n. 3, 2011, p. 469.

[58] As stressed by F. CAFAGGI, *New foundations of transnational private regulation,* in E. PALMERINI, E. STRADELLA (eds). *Law and Technology – The Challenge of Regulating Technological Development, cit.*, pp. 106 ff., there are different forms of transnational regulatory integration between the public and the private. More specifically, "there are at least four different forms of transformation of the relationship between public and private dimension: hybridization, collaborative rule-making, coordination, and competition". In this respect, "the shift from the national to the transnational level produces remarkable phenomena concerning the reallocation of rule-making power from the public to the private. Private power and authority have grown in the past years acquiring a larger regulatory share. The apparent paradox is that the transfer of regulatory power from public to private at transnational level occurs within the framework of the legislation of international relations, historically associated with the emergence of the State and the public sphere. This 'apparent' paradox explains the differences with other patterns of the growth of the private sphere which have coincided with de-juridification and de-legalisation".

[59] R. BROWNSWORD, *Law, Technology, and Society: In a State of Delicate Tension, cit.*, pp. 39 ff. The Author discusses how to make technological management comply with the Rule of law

[60] G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism,* G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, cit., p. 3.*

[61] For an in-depth review of what soft law classically entails, and its critics, see D. M. TRUBEK, P. COTTRELL, AND M. NANCE, *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity,* in *Legal Studies Research Paper Series*, n. 1002, 2005, pp. 1-43.

[62] For the relationship between self-regulation and soft law, see E. STRADELLA, *Approaches for regulating technologies: lessons learned and concluding remarks,* in E. PALMERINI, E. STRADELLA (eds). *Law and Technology – The Challenge of Regulating Technological Development, cit.*, p. 349.

In all this respect, the risk to be avoided is that of a "general privatisation… of the production of the rules, because the private actors can offer only the guarantees compatible with their interests"[63]. Accordingly, a steering-role towards substantial and procedural "meta-regulation"[64] shall be preserved, not only by means of fundamental principles of administrative law[65] but also by safeguarding fundamental rights and principles enshrined by constitutions and laws[66]. Following the hybridity thesis, these are a bedrock, a baseline to be respected (according to fundamental/baseline hybridity approach). In this respect, new governance and new regulatory techniques can be conceived as "instrumental means of developing or applying existing and traditional legal norms" (according to the developmental hybridity approach) –, consequently they imply "interaction between old and new, with the new providing an institutional framework for the elaboration (and continuous transformation) of the old"[67]. In this sense, formal legal systems and "non-legalistic systems" do not displace each other, but rather they interact with and are deeply interwoven[68] even if they stem from different forms of governance, since they "are posited as mutually inter-dependent and mutually sustaining" fuelling a "fruitful interaction"[69].

Thus, the risk of closure within autopoietic systems[70] lacking in any constitutional texture linking one to another can be avoided. This is the challenge undertaken by the EU with the GDPR (see par. 4).

3. Second layer: governance in the EU

3.1. The framework of EU governance

The conundrum set out by the European integration process[71], either in respect of the nature of its legal order or the nature of its polity and the implied legitimacy issue, is as widely debated as it is difficult to

63 S. RODOTÀ, *Technology and regulation: a two-way discourse,* E. PALMERINI, E. STRADELLA (eds). *Law and Technology – The Challenge of Regulating Technological Development, op. cit.*, p. 35.

64 In this regard, see, C. SCOTT, *Reflexive Governance, Regulation and Meta-regulation: control or learning?,* in O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World, cit.*, p. 61.

65 For the reference to the existence of a global administrative law, see S. CASSESE, *Chi Governa il mondo?, cit.*, pp. 92 ff.

66 A. MORRONE, *Teologia economica v. Teologia politica? Appunti su sovranità dello Stato e diritto costituzionale globale, cit.*, p. 846.

67 G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism,* G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, cit., p. 9.*

68 G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism, op cit.,* p. 8.

69 *Ibid., p. 7. Furthermore, as stressed by the Authors,* "concept of hybridity potentially refers to the interaction of many different kinds and characteristics of governance: at its most general, it refers to the combination of elements of a stylized 'new governance model' and those of a stylized 'traditional regulatory model'".

70 According to the perspective adopted by A. FEBBRAJO, G. TEUBNER, *Autonomy and regulation in the Autopoietic perspective: an introduction,* in G. TEUBNER, A. FEBBRAJO (eds), *State, Law and Economy as Autopoietic Systems – Regulation and autonomy in a new perspective, cit.*, pp. 3 ff.

71 As for European integration as a process instead of a status, see M. LUCIANI, *Integrazione Europea, Sovranità statale e Sovranità popolare,* in *XXI Secolo. Norme e idee*, Treccani, Rome, 2009, p. 339; S. FABBRINI, *Il sistema governativo dell'U.E.: una prospettiva comparata,* in G. GUZZETTA, *Qeustioni Costituzionali del governo europeo,* Cedam, Padua, 2003, p. 41, stresses that, on the one hand, the term governance fits the ongoing institutional, legal and political transformations that have featured the EU integration process, and that, on the other hand, this concept underlies a changeable set of relationships between different actors as well as their respective decision-making processes. Strictly speaking, according to the author,

sketch in clear constitutional language. As stressed in doctrine, this is also due to the original dominance of parameters pertaining domains other than the legal one, more specifically economics, sociology, statistics and political science, in respect of which legal science has played an ancillary and side role, limited to verifying that communities are compatible with traditional legal categories[72].

Beyond the definition of the European system as a constitutional legal order without constitutionalism[73] or critique of its democratic polity[74], it is still Weiler's description that helps to picture the *sui generis* European entity: "it is neither state nor community… it does not extinguish the separate actors who are fated to live in an uneasy tension with two competing senses of the polity's self, the autonomous self and the self as part of a larger community", consequently "each state actor's need to reconcile the reflexes and ethos of the 'sovereign' national state with new modes of discourse and new discipline of solidarity"[75].

This complex and multilevel process of governance has undergone a renewal according to the guidelines of the EC's well-known 2001 White paper[76]. It was an initiative launched by the European Commission (as well as the relevant "Better Regulation" approach)[77] to revamp EU legitimacy in a period of European disenchantment by means of key concepts such as openness, transparency, participation, flexibility and effectiveness of the decision-making process. It implies networked dynamics that involve not only European institutions but also other European and state actors along with non-state actors and civil society at large.

Accordingly, at the European level too, as seen in the previous paragraphs, the complex and quickly changing socio-economic, scientific and technological global context results in a series of governance mechanisms. On the one hand, they structurally mirror the multi-layered and composed reality, giving rise to cooperative and intertwined (public/private) networks; on the other hand, they aim at streamlining

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governance and government are obliged to go hand in hand because neither the former nor the latter has the tools and the legitimacy to mutually overwhelm.

[72] A. SANDULLI, *Il ruolo della scienza giuridica nella costruzione del diritto amministrativo europeo,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole,* Il Mulino, Bologna, 2015, p. 275.

[73] The concept is taken from J.H.H. WEILER, *The Autonomy of the Community Legal Order: through the looking glass,* in J.H.H. WEILER, *The Constitution of Europe – "Do the new clothes have an Emperor? And other essays on European integration, cit.*, p. 298. The concept of "interconstitutional order" is set out by A. RUGGERI, *Una Costituzione e un diritto costituzionale per l'Europa unita,* in P. COSTANZO, L. MEZZETTI, A. RUGGERI (eds.), *Lineamenti di diritto costituzionale dell'Unione europea,* Giappichelli, Turin, 2014, p. 15. Doctrine on the matter is broad, so it suffices to recall P. CRAIG, *Constitutions, constitutionalism and the European Union, cit.*; U. HALTERN, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination, cit.*; I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action, cit.*

[74] Doctrine on the subject is broad, so it suffices to recall C. PINELLI, *The Discourse on Post-National Governance and the Democratic Deficit Absent an EU Government, cit.*; J.H.H. WEILER, *European Democracy and its critics: polity and system, cit.*; V. BOGDANOR, *Legitimacy, Accountability and Democracy in the European Union,* in *A Federal Trust Report,* January 2007.

[75] J.H.H. WEILER, *The transformation of Europe,* in J.H.H. WEILER, *The Constitution of Europe – "Do the new clothes have an Emperor? And other essays on European integration, cit.*, p. 93.

[76] For a "genealogy" of the concept of governance in reference to the EU's standpoint as well as the underlying neoliberal approach, see C. SHORE, *'European Governance' or Governmentality? The European Commission and the Future of Democratic Government,* in *European Law Journal, cit.*, pp. 287 ff.

[77] P. POPELIER, *Governance and Better Regulation: Dealing with the Legitimacy Paradox, cit.*, pp. 558-559.

the normative system, according to the European Better Regulation approach, and fine-tuning it with the paradigms of flexibility, efficiency, adaptability and effectiveness, as required by economic, technological and scientific progress as well as the underlying neo-liberal stance[78].

Consequently, according to the principle of subsidiarity and proportionality, the legislature is asked to limit its intervention to what is strictly necessary for the purpose. As a consequence, it is the implementation phase that assumes a pivotal role and – in turn – embraces the features of a governance process for the fulfilment of increased harmonisation along the whole regulatory space and path.

This is the reason why the blurring border between legislation and administration at the European level entails a similar fading border between direct and indirect administration[79]. Indeed, it is not only "high politics" that matter in the EU decision-making process but "it is within the 'low politics' of the administrative domain that a significant proportion of routine decision-making occurs in the EU"[80] and it is in this domain that the struggle between intergovernmentalism and supranationalism as well as between efficiency and accountability continues its search for the right balance[81]. In addition, this is the reason why the real scope of the functions delegated to committees first, and to agencies in the aftermath, has continuously undergone a "camouflage" [82] to comply with the strict boundaries imposed by the Meroni doctrine.

3.2. The "players" and their "modus operandi"

EU dynamics have featured various governance mechanisms which in turn have tailored different policy-making solutions[83]. Some of them have received formal institutionalisation[84]: this is the case for

[78] C. BROWN, C. SCOTT, *Regulation, Public Law, and Better Regulation, cit.*, p. 467 ff. "The origins of BR policies in concerns to reduce burdens on business partially explain the widespread published commitment to promoting alternatives to traditional regulations by rules", including self-regulation in favour of citizens and firms. As stressed by the revamped EU approach to Better Regulation (Communication form the Commission, *Better Regulation: Joining forces to make better laws,* in COM(2021) 219/3), its key features rest on "Cooperation among EU co-legislators, with Member States and stakeholders, including social partners... We need to boost our joint efforts to improve the transparency of evidence-informed policy, raise awareness of benefits of legislation and reduce the burden of EU legislation" (p. 2).

[79] P. CRAIG, *UK, EU and Global Administrative Law. Foundations and Challenges,* Cambridge University Press, Cambridge, 2015, pp. 391 ff.

[80] T. CHRISTIANSEN, J. MIRIAM OETTEL, B. VACCARI, *Introduction,* in T. CHRISTIANSEN, J. MIRIAM OETTEL, B. VACCARI (eds.), *21st Century Comitology: The Role of Implementing Committees in the Enlarged European Union,* EIPA, Maastricht- Luxembourg, 2009, p. 4.

[81] T. CHRISTIANSEN, J. MIRIAM OETTEL, B. VACCARI, *Introduction, op. cit.*, p. 7.

[82] C. JOERGES, J. NEYER, *From intergovernmental bargaining to deliberative political processes: the constitutionalisation of Comitology,* in *European Law Journal,* n. 3, 1997, p. 275.

[83] For an in-depth overview of the implication of comitology, agencies and the open method of coordination as EU governance arrangements, see P. KJAER, *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-National Constellation,* Hart Publishing, Oxford, 2010, pp. 74 ff.

[84] Comitology and Agencies are described as institutionalized forms of cooperation and administrative integration by J. MENDES, *La legittimazione dell'amministrazione dell'UE tra istanze istituzionali e democratica,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, cit.*, pp. 100-101.

committees, comitology, and EU agencies as well as the creation of networked bodies composed of independent national authorities (a sort of new form of agency). Others encompass procedural mechanisms implying cooperation between the European and national levels, according to the underlying sincere cooperation principle and the connected subsidiarity and proportionality principles. They involve different degrees and patterns of interaction in reference to the pursued goals (positive and negative integration; methods of coordination; stakeholder consultations).

The inspiring path of both these governance systems is tailored by the dominance of an administrative pattern due to the fact that – since the beginning – the organisational and functional routes of action of the Communities were based on administrative principles[85]. Indeed, the aforementioned White Paper on EU governance and the related Better Regulation approach truly mirror this prevalent administrative approach to the decision-making process.

Accordingly, "the key governance function" has been identified as the "'regulation' of social and political risk, instead of resource 'redistribution'. The result is a new 'problem-solving' rather than bargaining style of decision-making"[86] that really fits the structural features of institutionalised (such as comitology, agencies and independent authorities) or procedural forms of cooperation (such as stakeholder consultations, European economic governance, the OMC and joint administration procedures).

An outline of both the aforementioned (institutional and procedural) mechanisms is provided below.

3.2.1. Institutionalised governance: an overview

a) Committees at large and Comitology

In the early 60s, before the spreading of comitology[87], the EU was characterised by "the phenomenon of transnational committees, impressive both in quality and quantity, and the building of a standardisation systems"[88]. Indeed, as stressed in doctrine, even if comitology is the most familiar and formally institutionalised of governance mechanisms, it is along the whole European decision-making process that the "whole system of EU committees… plays a crucial role" as they "are relevant for the full understanding of decisional dynamics in the EU"[89].

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[85] A. SANDULLI, *Il ruolo della scienza giuridica nella costruzione del diritto amministrativo europeo,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, op. cit.*, p. 283.

[86] S. HIX, *The Study of the European Union II: the 'new governance' agenda and its rivals, cit.* p. 39.

[87] As stressed by G. DELLA CANANEA, *L'organizzazione amministrativa della Comunità europea,* in *Rivista Italiana di Diritto Pubblico Comunitario,* n. 5-6, 1993, p. 1115, EU committees, comitology and agencies belong to a sort of "parallel administration".

[88] E. CHITI, *The emergence of a Community administration: the case of European Agencies,* in *Common Market Law Review,* n. 37, 2000, p. 309.

[89] M. SAVINO, *The Role of Committees in the EU Institutional Balance: Deliberative or procedural Supranationalism?,* in T. CHRISTIANSEN, J. MIRIAM OETTEL, B. VACCARI (eds.), *21stCentury Comitology: The Role of Implementing Committees in the Enlarged European Union, cit.*, p. 16.

In this respect, polysynody has been deemed the hallmark of systems of collegial bodies that institutionalise transgovernmental/transnational relations, as occurred within the EU governance system[90]. Accordingly, in contrast to comitology which takes part in the implementation phase of EU law, this system of committees takes part (formally or informally) during the initiative and deliberative phase where they often enjoy de facto decision-making powers (except for interest committees)[91].

In addition, comitology became widespread as a result of the adoption of the Single European Act and its formal provision (Article 145 SEA) for the Council's delegation of implementation power to the Commission[92]. Over the years, an increasing "balance" between the Council and the European Parliament has involved their control and power over comitology. Moreover, even if it "was originally a mechanism for central state oversight over Commission activities, [it] has had [the] intended consequence of deepening the participation of subnational authorities and private actors in the European arena", since "the majority of participants in comitology are not civil servants, but interest group representatives… alongside technical experts, scientists and academics"[93].

[90] M. SAVINO, *The Role of Committees in the EU Institutional Balance: Deliberative or procedural Supranationalism?, op. cit.*, p. 17.
[91] According to the construction drafted by M. SAVINO, *Ibid.*, p. 17 ff., the following committees could intervene during the initiative phase: 1) expert governmental committees set up by the Commission or the Council and composed of officials or other experts sent by relevant national administrative units; 2) interest committees are mainly transnational bodies representative of civil society, but if they assume a tripartite structure they are also made up of representatives of domestic governments; 3) scientific committees are composed of scientists, university professors or other independent experts that act as non-representative subjects with the main task of providing the European institutions with scientific advice on risk assessment during the elaboration of legislative and executive measures. Some transgovernmental bodies can intervene during the legislative phase, i.e. Council committees or working groups, composed of representatives of the Commission and national delegation of officials. They are in charge of the preparation of the Council decisions and work under the coordination of the Committee of Permanent Representatives (COREPER).
[92] For an empirical approach to comitology practices, see J. BLOM-HANSEN, *The EU comitology system in Theory and Practice. Keeping an Eye on the Commission?,* Palgrave Macmillan UK, London, 2011.
[93] G. MARKS, L. HOOGHE, K. BLANK, *European Integration from the 1980s: State-Centric v. Multi-level Governance, cit.*, p. 368.

Against this backdrop, comitology too, like committees at large, is a networked transgovernmental/transnational mechanism[94] shaping the harmonised application of EU law[95] by means of a function that mainly settles clashing interests[96].

Consequently, "the principal pathologies of comitology… are… to be found in the twin risks of, first, a hugely consequential regulation taking place at a level of public input and accountability which are not commensurate with the importance of such regulation" (because of the participation of European and national mid-level civil servants); "and secondly, in a regulatory process which allocates privileges by unequal and hence unfair access" (because of the participation of well settled private interests)[97].

In the end, comitology not only rolls out an institutional governance mechanism but it also brings about an alternative "model of regulation", reducing the space left for regulatory competition or mutual recognition[98].

b) Agencification

Following the US model, EU agencies[99] spread in the 90s and feature as bodies of high sectoral specialisation and technical competence[100]. They operate as an interface between national public

94 M. SAVINO, *L'organizzazione amministrativa dell'Unione europea,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, cit.*, p. 47; C. JOERGES, E. VOS (eds.), *Committes: Social Regulation, Law and Politics,* Hart Publishing, Oxford, 1999, p. 19, according to these Authors "transnational governance" is in the middle of intergovernmentalism and supranationalism.

95 For the description of comitology as a constitutional governance mechanism for deliberative supranationalism, see C. JOERGES, J. NEYER, *From intergovernmental bargaining to deliberative political processes: the constitutionalisation of Comitology, cit.*, p. 294. For a different understanding of the supranational outcomes of comitology, conceiving it as a third dimension beyond normative supranationalism and decisional intergovernmentalism, and describing it as "procedural supranationalism", see M. SAVINO, *The Role of Committees in the EU Institutional Balance: Deliberative or procedural Supranationalism?,* in T. CHRISTIANSEN, J. MIRIAM OETTEL, B. VACCARI (eds.), *21st Century Comitology: The Role of Implementing Committees in the Enlarged European Union, cit.*, pp. 29 ff. According to this latter author, "committees, conceived as a third dimension of European supranationalism …, influence decisional outcomes not because their members "argue", but rather because their decisions are shaped by proceedings with a supranational bias", in reference to the crucial role played by the Commission.

96 M. SAVINO, *The Role of Committees in the EU Institutional Balance: Deliberative or procedural Supranationalism?, op. cit.*, p. 24.

97 J.H.H. WEILER, *European Democracy and its critics: polity and system, cit.*, p. 278.

98 C. JOERGES, J. NEYER, *From Intergovernmental Bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology, cit.*, p. 275.

99 E. CHITI, *The emergence of a Community administration: the case of European Agencies, cit.*, p. 341, stresses that "European agencies as a radical challenge to the original model envisaged in the 1957 Treaty of a Community without administrative powers. Nowadays, the EC is directly involved in all the main processes of implementation of its own policies, …The increasing involvement of the EC authorities in the administrative action, however, has not weakened the role of national administrations. In other terms, it has not been the case of a zero sum situation in which the supranational authorities have substituted the national bodies in the process of implementation of the EC policies. On the contrary, a partial "fusion" between the two orders of authorities has taken place: a *copinage technocratique* between Community and national officials, often assisted by national experts, private bodies and representatives of interest groups". For a broad overview of the agencification process, its typologies, autonomy and control issues, see K. VERHOEST, *Agencification in Europe,* in E. ONGARO, S. VAN THIEL (eds.), *The Palgrave Handbook of Public Administration and Management in Europe,* Palgrave Macmillan UK, Basingstoke, 2018, pp. 327-346.

100 As stressed by G. MAJONE, *The transformation of the regulatory State, cit.*, p. 6, according to the American tradition, regulatory agencies combine powers of rulemaking, adjudication and enforcement. For an in-depth overview of the EU

administration and the EU Commission[101], and as such they are mainly structured in transnational networks being composed of subjects that "belong to different legal orders and express a variety of voices"[102]. Accordingly, agencies pursue a functional integration goal where "unity is replaced by polycentrism, levels and layers are substituted by links and paths" with the consequent difficulty of developing "a theoretical model able to describe and explain this space and its internal dynamics"[103].

Agencies differ from each other in terms of organisation, procedures and structure, but their functions are more evenly described because of their instrumental role in respect of the decision-making power of European and national authorities by means of high-quality information or advisory or technical assistance competence. As such, they are rarely entrusted with final decision-making powers in compliance with the Meroni doctrine[104]. Moreover, they normally undertake coordination tasks for national sectoral administration systems or authorities: in this sense, they institutionalise cooperation and integration among Member States and between the latter and the European institutions[105] in accordance with a governance process.

Consequently, when EU agencies act through their networked organisation they don't act "in function of the supranational or of the national order but rather in function of the solution of the technical problem raised by the proper working of the internal market. In other terms, we are faced with an "adespota" arena: a continuum of a myriad of subjects… referable to the ordering criterion neither of the Nation State nor of the supranational Community"[106]. Accordingly, they (too) act under the aegis of a problem-solving approach and mirror the relevant Better Regulation philosophy.

c) European networks of supervisory authorities

Supervisory authorities spread as a consequence of European privatisation of some strategic economic sectors and the underlying withdrawal of politics[107]. This process led to broad scientific debate around

agencies in reference to their sectors of intervention and their respective tasks, see E. CHITI, *The emergence of a Community administration: the case of European Agencies, cit.*, pp. 309 ff.

[101] M. SAVINO, *L'organizzazione amministrativa dell'Unione europea, cit.*, p. 56.

[102] E. CHITI, *The emergence of a Community administration: the case of European Agencies, cit.*, p. 329

[103] *Ibid.*

[104] J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione Europea,* Il Mulino, Bologna, 2013, pp. 461 ff., recalls how Agencies are set out by European secondary law and, except for "executive agencies" that find their general provisions within Regulation 58/2003, other agencies lack common taxonomy in reference to their organisational and functional features.

[105] E. CHITI, *An important part of the EU's institutional machinery: features, problems and perspectives of European Agencies,* in *Common Market Law Review,* n. 46, 2009, pp. 1395 ff.

[106] E. CHITI, *The emergence of a Community administration: the case of European Agencies, cit.*, p. 342.

[107] E. CHELI, *Riflessioni postume intorno ad una esperienza: la prima legislatura dell'Autorità per le garanzie nelle comunicazioni,* in E. APA, O. POLLICINO (eds.), *La regolamentazione dei contenuti digitali – Studi per i primi quindici anni dell'Autorità per le garanzie nelle comunicazioni (2008-2013),* Aracne Editrice, Rome, 2014, p. 31. For an overview of the reasons underlying the creation of national and European supervisory authorities (independence from supervision as well as the economic/financial interests of government; expertise and regulatory flexibility; credibility; protection of human rights;

their democratic legitimacy and accountability[108] as well as the implied issues in terms of respect of the rule of law[109].

Accordingly, supervisory authorities – like agencies – are further evidence of globalisation and governance but in contrast to the latter they enjoy more independence in respect of political institutions and regulatees or affected people at large[110]. More specifically, the scope and implications of their independence from the political arena is not evenly conceived across the European and national legal systems, on the contrary, more uniform is their autonomy from the interested parties[111]. Indeed, a balance needs to be struck between a sufficient degree of independence to guarantee objectives and consistent decision-making on the one hand, and adequate and effective accountability mechanisms to ensure that the supervisory authorities exercise their powers in accordance with their legal mandates, on the other hand[112]. Consequently, this balancing activity can lead to different results due to the different constitutional and legal features of the EU and its Member States.

The European Court of Justice has pointed out the scope of independence in respect of the European Data Protection Supervisor through a generally applicable concept: "In relation to a public body, the term 'independence' normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure"[113]. In this regard, they are not

networking and inter-institutional cooperation), see S. *LAVRIJSSEN,* A. *OTTOW, Independent Supervisory Authorities*: A *Fragile Concept*, in *Legal. Issues* of *Economic Integration, Vol. 39*, *n. 4, 2012,* pp. 425 ff.

[108] E. CHELI, *L'innesto costituzionale delle Autorità indipendenti: problemi e conseguenze,* in *Astrid Online,* 27 February 2006, underlines that independent authorities introduce a breach of the principles of democratic accountability and the separation of powers as a consequence of their belonging to a different legal tradition and the underlying difficulty of applying this common law model to civil law forms of government.

[109] M. MANETTI, *Autorità indipendenti: tre significati per una costituzionalizzazione,* in *Politica del Diritto,* n. 4, 1997, p. 678. The Author also points out that the breach of the rule of law principle needs to be compensated by the due process guarantee conceived as a form of citizen protection from the bottom up rather than from the top down (i.e. from the provision of a law enacted by parliaments). Beyond independent authorities' compliance with the national constitutional framework, they are nonetheless imposed by European law and as such they need to be conceived in reference to the European integration process. in this regard, see F. DONATI, *L'Autorità per le garanzie nelle cominicazioni nella dimensione costituzionale,* in E. APA, O. POLLICINO (eds.), *La regolamentazione dei contenuti digitali – Studi per i primi quindici anni dell'Autorità per le garanzie nelle comunicazioni (2008-2013), cit.*, p. 59.

[110] Doctrine has defined independent authorities as a true public law puzzle because of their being administrative and independent at the same time: in this regard, see, M. MANETTI, *Autorità indipendenti: tre significati per una costituzionalizzazione, cit.*, p. 658. The author also reviews various perspectives on the concept of independent authorities and the consequent difficulty of establishing a uniform and shared definition of them. Moreover, F. MERLONI, *Fortuna e limiti delle cosiddette Autorità amministrative indipendenti,* in *Politica del Diritto,* n. 4, 1997, p. 640, beyond differences in organisation and functions, has identified the common features of independent authorities in their "escape" from the classical model of administration based on democratic accountability; as such, they are a form of decentralisation of functions from the State.

[111] In this regard, see. C. IANNELLO, *L'indipendenza della autorità di regolazione tra diritto interno e comunitario,* in L. CHIEFFI (eds.), *Il processo di integrazione europea tra crisi di identità e prospettive di ripresa,* Giappichelli, Turin, 2009, p. 245.

[112] S. *LAVRIJSSEN,* A. *OTTOW, Independent Supervisory Authorities*: A *Fragile Concept*, in *Legal. Issues of Economic Integration, cit., pp. 420-421. In this respect, the European trend towards independent authorities "curtails the institutional autonomy of the EU Member States and may be in tension with their constitutional traditions" (p. 433).*

[113] C-518/07, par. 18.

only independent from the supervisees but also from any direct or indirect external influence in order to ensure "effectiveness and reliability" in the fulfilment of their duties[114]. In this last respect, their independence is something different from both the impartial functions undertaken by public administration[115] and the independent role assumed by judges[116].

Furthermore, they undertake a specialised and technical role underlying professional expertise[117]; they are entrusted with mixed functions (regulatory functions) that encompass rule-making, adjudication and dispute resolution, thus overcoming the principle of separation of powers[118]; lastly, they are required to respect the principles of due process as a form of procedural legitimation in place of their lack of substantial legitimation[119].

Beyond the European Central Bank (ECB) and the European System of Central Banks (ESCB) as well as the cooperation between the European commission and national competition authorities envisaged by the European Treaties, the European legislator has promoted relationships of coordination among European and national independent authorities.

With regard to the latter aspect, during the 2009-2010 period "new European agencies originate from the former European-wide networks of national regulators"[120]. In this regard, it is worthwhile recalling the Body of European Regulators for Electronic Communications (BEREC), the European Union Agency for the Cooperation of Energy Regulators (ACER) and the European Data Protection Board (EDPB). They give rise to European networks aiming to promote the exchange of experience and the harmonised implementation and application of European legal provisions[121]. Along this path, in the financial sector,

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114 C-518/07, par. 25.

115 As highlighted by C. BENETAZZO, *I nuovi poteri "regolatori" e di precontenzioso dell'ANAC nel sistema europeo delle Autorità indipendenti,* in Federalismi.it, n. 5, 2018, p. 23, independence means a substantial neutrality rather than a mere formal neutrality limited to the duty not to discriminate.

116 A. PATRONI GRIFFI, *L'indipendenza del Garante,* in L. CALIFANO, C. COLAPIETRO (eds.), *Innovazione tecnologica e valore della persona – Il diritto alla protezione dei dati nel Regolamento UE 2016/679,* Editoriale Scientifica, Naples, 2017, pp. 267 ff.

117 G. DE MINICO, *Libertà e copyright nella Costituzione e nel diritto dell'Unione,* in G. DE MINICO, *Libertà in Rete. Libertà dalla Rete,* Giappichelli, Turin, 2020, p. 137, in reference to the regulatory power of independent authorities, denounces that their technical expertise stops at the stage of gathering data since then it is their discretionary power that comes into play and the underlying balancing assessment between conflicting values that is really similar in nature to that usually displayed by the political decision-maker.

118 For a categorisation of the functions of independent authorities, see F. MERLONI, *Fortuna e limiti delle cosiddette Autorità amministrative indipendenti, cit.*, pp. 642-645.

119 E.L. CAMILLI, M. CLARICH, *I poteri quasi-giudiziali della autorità indipendenti,* in *Astrid Online.* The Italian Council of State, IV Section, No. 1215/2010, upheld that regulatory acts by independent authorities shall be reasoned and adopted as a consequence of a participatory procedure in order to give procedural legitimacy to their competences (irrespective of Article 13 of Law 241/1990 which waives such procedural duties for normative or general administrative acts).

120 S. *LAVRIJSSEN,* A. *OTTOW, Independent Supervisory Authorities*: A *Fragile Concept*, *cit.*, p. 427.

121 In this respect, see C. BENETAZZO, *I nuovi poteri "regolatori" e di precontenzioso dell'ANAC nel sistema europeo delle Autorità indipendenti, cit.*, p. 12. M. MIDIRI, *Privacy e Antitrust: una risposta ordinamentale ai Tech Giant,* in C. BERTOLINO, T. CERRUTI, M. OROFINO, A. POGGI (eds.), *Scritti in onore di Franco Pizzetti, cit.*, p. 553, recalls that there are cases of cross-cutting cooperation between national supervisory authorities of different sectors.

the European system of Financial Supervisors (ESFS) has been entrusted with macro-prudential and micro-prudential oversight. The former (macro-prudential) is carried out by the European Systemic Risk Board (ESRB), the latter (micro-prudential) is undertaken by three European supervisory authorities (ESAs), namely the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA)[122].

Consequently, as stressed by doctrine, national independent authorities are "double-faced" bodies that operate as a bridge between the national and the European institutional contexts[123]. Moreover, their European networks can be entrusted with powers that goes beyond soft law, being rather binding in nature and as such mandatory for national authorities with a consequently more intense "vertical centralisation"[124] and regulatory harmonisation.

In this last regard, integration (and the implied uniform or harmonised normative landscape) does not only stem from legislative acts but also from the institutional cooperation of technical bodies when they implement or apply existing European and national rules by means of differently coordinated procedures[125].

3.2.2. Procedural Governance: an overview

a) Stakeholder consultations

One of the key features of the European Commission's White Paper on Governance, as well as its Better Regulation approach, is openness and participation of all relevant stakeholders from the early stages of the decision-making process[126].

From the EC's standpoint "It is important to consult as early and as widely as possible in order to maximise the usefulness of the consultation and to promote an inclusive approach where all interested parties have the opportunity to contribute to the timely development of effective policies. At the same time, consultation is an ongoing process and … should allow for reasonable time limits to stimulate informed and effective feedback from all relevant stakeholder groups, and should ensure that feedback

122 R. IBRIDO, *L'Unione bancaria europea: Profili costituzionali*, Giappichelli, Turin, 2017, p. 145. As stressed by K. BOTOPOULOS, *The European Supervisory Authorities: role-models or in need of re-modelling?,* in *ERA Forum,* n. 21, 2020, p. 179, these financial authorities "were created not from scratch but by an upgrading of the existing advisory committees (CEBS, CESR and CEIOPS, respectively), each acting independently… but in close collaboration", moreover they adopted "a mixed organisational model, combining supranational elements… with a strong national representation".

123 E. CHELI, *L'innesto costituzionale delle Autorità indipendenti: problemi e conseguenze, cit.*

124 The expression is taken from N. MARSCH, *Network of Supervisory bodies for Information Management in the European Administrative Union,* in *European Public Law,* n. 1, 2014, p. 143.

125 L. TORCHIA, *Moneta, banca e finanza tra unificazione europea e crisi economica,* in *Rivista Italiana di Diritto Pubblico Comunitario,* n. 6, 2015, p. 1506.

126 COM (2001) 428: *European Governance: A White Paper;* COM (2015) 215 final, *Better Regulation for better Results – An EU Agenda.*

is given to respondents about how their information and views were used"[127]. In this respect, the European Commission has proven a steady engagement in consulting those affected by its initiatives essentially through means of electronic participation such as (currently) the "Have Your Say" web portal. Accordingly, the EC strives "to publicise… [its] public consultations to attract more participants and quality contributions. … [It] will work more closely with the Committee of Regions, the European Economic and Social Committee, national authorities, social partners and other representative associations in order to raise awareness of the opportunities to contribute to the Commission's policymaking"[128] .

This is not the place to undertake an in-depth review of the pros and cons of participation[129], the implied the risk of the "capture of the regulator"[130] more specifically, or their efficacy and effectiveness[131], so it suffices to recall that it is one of the procedures that have characterised the EU's approach to governance. In this respect, the classical decision-making process is implemented through its opening up to the intervention of subjects other than the legislator, more specifically the interested parties, whether they are public or private in nature.

b) Positive and negative integration/harmonisation

Positive and negative European integration may be conceived as a governance procedure between the European and national levels carried out by means of different regulatory techniques.

On the one hand (positive integration), directives represent the trade-off between the European desire for harmonisation (or approximation of legislation) and the need to respect diversity and plurality.

In this regard, cooperation is required between European and national legislators, since directives are two-stage legislation[132], due to being "sources of purpose" that lay down "rules of principle"[133].

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127 SWD (2015) 111 final, *Better Regulation Guidelines,* p. 8.

128 COM (2021) 219/3, *Better Regulation: Joining forces to make better laws,* p. 4.

129 Doctrine on the matter is extensive; for instance, see U. ALLEGRETTI (eds.), *Democrazia partecipativa*, Florence University Press, Florence, 2010.

130 M. DAWSON, *Better Regulation and the Future of EU Regulatory Law and Politics,* in *Common Market Review*, Vol. 53, n. 5, 2016, p. 1219, underlines the "gatekeeper problem – that consultations involve usual suspects of industry associations, EU-funded transnational NGOs, and those with existing privileged access to the political process".

131 A. MEUWSE, *Embedding Consultation Procedures: Law or Institutionalization?,* in *European Public Law*, Vol. 17, n. 3, 2011, p 529, challenges the "textbook story" according to which consultations in early stages of policy-making fit the purpose of "strengthening the overall quality of regulation". Accordingly, B. KOHELER-KOCH, *Post-Maastricht Civil Society and Participatory Democracy,* in *Journal of European Integration,* Vol. 34, n. 7, 2012, p. 820, stresses that "civil society contributes little to the democratic legitimacy of the EU, because it does not bring about the democratic empowerment of citizens and hardly achieves equal and effective participation".

132 S. PRECHAL, *Directives in European Community Law: a study on EC Directives and their enforcement by national courts,* Oxford University Press, Oxford, 1995, p. 17.

133 A. RUGGERI, *Le fonti del diritto eurounitario ed i loro rapporti con le fonti nazionali,* in P. COSTANZO, L. MEZZETTI, A. RUGGERI (eds.), *Lineamenti di diritto costituzionale dell'Unione europea, cit.*, p. 285.

Accordingly, harmonisation is different from uniformity (usually built on EU regulations) as it allows "a certain variety within homogeneity". Indeed, "harmonised laws are compatible with national legal traditions, legal techniques, doctrinal theories of law and ideological divergence"[134].

This is the reason why directives have been qualified as the most typical act of EU law[135], since they mirror the composite nature of the European governance system. They are binding in terms of their objectives and the space-time for implementation but they leave a certain room for manoeuvre to member States in reference to the forms and methods for achieving the goals (Article 288(3) TFEU). Beyond their implementation, they also bring about the duty of consistent interpretation in compliance with the general principle of sincere cooperation (Article 4 TEU).

On the other hand, negative integration is taken into consideration from a perspective consistent with the purposes of the paper, that is to say as evidence of governance processes and not for the role played by the European Court of Justice and its relevance in respect of fundamental rights. Bearing this premise in mind, it is worthwhile to recall that negative harmonisation encompasses the mutual recognition principle[136], that often implies horizontal integration between different national administrative systems and offices[137] (see point e)).

c) European economic governance

This is a form of "indirect integration" because it is not underpinned by legislative acts[138] but rather by means of a complex procedure of coordination and surveillance of national budgetary and macro-economic policies that found their original basis in the provisions of the Maastricht Treaty[139].

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134 M. BARTOLOMIEJ KURCZ, *Harmonisation by means of Directives – never-ending story?,* in *European Business Law Review,* n. 6, 2001, p. 288.

135 J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione Europea, cit.*, p. 562.

136 According to the well-known Cassis de Dijon case, C- 120/78.

137 S. CASSESE, *Diritto amministrativo europeo e diritto amministrativo nazionale: integrazione o signoria?, cit.*, p. 1138. The author highlights that mutual integration encompasses a sort of side opening of legal systems.

138 M. BARTOLOMIEJ KURCZ, *Harmonisation by means of Directives – never-ending story?,* in *European Business Law Review*, n. 6, 2001, p. 288, distinguishes direct harmonisation by means of directive from indirect harmonisation that stems from other non-legislative forms of coordination, including the OMC and the so-called "structural method" according to which harmonisation is driven by financial instruments (structural funds).

139 The current Article 121(6) TFEU states that "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4", aiming at ensuring "closer coordination of economic policies and sustained convergence of the economic performances of the Member States" by means of the guidance and monitoring competences entrusted to the European Commission and Council. Moreover, Article 126 provides for the excessive deficit procedure and the relevant sanctions. This multilateral surveillance framework has been implemented by the Stability and Growth Pact (Regulations No. 1466/97 e 1467/97) and further enhances by the so called Six Pact (Regulations Nos. 1173/2011; 1174/2011; 1175/2011, 1176/2011; 1177/2011 and Directive No. 2011/85/UE). As regards the evolutionary path of the Economic Governance framework, see A. DE STREEL, *The evolution of the EU Economic Governance Since the Treaty of Maastricht: Un Unfinished Task,* in *Maastricht Journal of European and Comparative Law,* Vol. 20, n. 4, 2013, pp. 336-362.

This is not the place for an in-depth review of all the steps through which the European Semester rolls out[140] or for a critique of the European Monetary Union asymmetry and imbalance[141]. For our purposes, it suffices to highlight its coordinating function between different levels. More specifically, it is a cyclical procedure composed of the so-called preventive arm and corrective arm that involves European institutions and Member States.

The preventive arm aims at coordinating fiscal and economic policies and it splits this into two steps. The first takes place at the European level and the second also embraces the national level. The former starts with the Annual Growth Survey adopted annually by the European Commission in November and ends with the intervention of the Council of Ministers and the European Council, which adopt broad economic guidelines and the recommendation for the Euro Area (during spring time). The latter focuses on National Reform Programmes as well as Stability and Convergence Programmes submitted by the Member States and assessed by the Commission, the Council and the Economic and Financial Committee. This phase ends with the issuance of country-specific recommendations proposed by the Commission, discussed by the Council and endorsed by the European Council the scope of which involves matters of fiscal and economic policy. Moreover, this preventive phase has been broadened with an autumn session[142] during which Member States are asked to submit their draft budgetary plans to the Commission and the Eurogroup and in return the Commission provides its opinions to the former.

The corrective arm rolls out in respect of Member States that are experiencing an excessive deficit or excessive macro-economic imbalances and can lead to the application of sanctions[143].

The role played by European and national parliaments within the economic governance framework is quite limited, being of an informational or advisory nature, but it is interesting for our purposes to recall the parliamentary weeks that take place in the first and second semester of each year[144]. In this context,

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[140] Doctrine is broad, so it suffices to quote C. BERGONZINI, S. BORELLI, A. GUAZZAROTTI (eds.), *La legge dei numeri – Governance economica europea e marginalizzazione dei diritti,* Jovene, Naples, 2016; R. DICKMANN, *Governance economica europea e misure nazionali per l'equilibrio di bilancio,* Jovene, Naples, 2013; E.C. RAFFIOTTA, *Il governo multilivello dell'economia: studio sulle trasformazioni dello Stato costituzionale in Europa,* Bonomia University Press, Bologna, 2013, pp. 31-88.

[141] The asymmetry refers to the shift of monetary sovereignty at the European level while economic and fiscal policy still rests on the sovereign competence of Member States; while the imbalance refers to the "displacement" of social issues in favour of fiscal and economic austerity. Doctrine for both matters is wide, so it suffices to quote, O. CHESSA, *La costituzione della moneta – Concorrenza indipendenza della Banca centrale pareggio di bilancio,* Jovene, Naples, 2016; A. GUAZZAROTTI, *Sovranità statale e vincolo finanziario. Potere pubblico e potere privato nel governo degli Stati europei*, in *Diritto Costituzionale – Rivista Quadrimestrale,* n. 2, 2018, p. 85 ss.; G. PITRUZZELLA, *La costituzione economica europea: un mercato regolato e corretto, nulla a che vedere con il fondamentalismo di mercato,* in *Federalismi.it,* n. 16, 2018; C. KILPATRICK, *The displacement of Social Europe: a productive lens of inquiry,* in *European Constitutional Law Review*, n. 14, 2018, pp. 62 ff.

[142] According to the provisions of Regulation No. 473/2013.

[143] The sanctioning system has been enhanced by Regulation No. 1173/2011 as a consequence of the requirement of the reverse qualified majority voting procedure (RQM).

[144] A. MANZELLA, *Notes on the "Draft Treaty on the Democratization of the Governance of the Euro Area"*, in *European Papers,* Vol. 3, n. 1, 2018, p. 95, recalls that "In the first semester of the year, the Conference takes place within to the so-called

representatives of European and national parliaments meet together to discuss issues relevant to the economic governance process and deliver their opinion, thus giving rise to an informal network of cooperation[145].

d) Open method of coordination

The open method of coordination has been defined as "another aspect of experimental governance" consistent with the "inherent logic" of the EU[146]. Indeed, the OMC is "based not so much on the traditional hierarchical, top-down, state-centric model of control, but rather on the more diffuse techniques of disciplinary power in which lines of authority are more obscure and where binding norms are achieved through non-enforceable peer-evaluation and voluntary self-regulation"[147].

This operative model was conceived by the Lisbon Summit in 2000 and originally found its legal basis in the Treaties in reference to economic policy coordination, and secondly in reference to the employment domain, later extending to social inclusion issues. Indeed, these are typical policy domains that mainly lie with Member States' competences and their involvement in the OMC is deemed as "a complementary form of governance"[148].

More specifically, Articles 147 and 148 TFEU provides the legal basis for the employment policies coordination procedure, but – at the start – it was the European Council of Essen in 1994 that launched an informal method of policy cooperation in employment matters, later formalised in the so-called Luxembourg process in 1997 and institutionalised by the Amsterdam Treaty. Subsequently, the procedure was expanded to other issues of social concern such as social inclusion and the fight against poverty, the legal basis of which was originally provided by the Treaty of Nice (current Article 153(2)(a) TFEU).

The OMC (like European economic governance) can also be conceived as an indirect means of positive harmonisation (integration).

e) Coordination between administrations

"European Parliamentary Week", held in Brussels. In the second semester, the Conference is held in the Member State holding the Council rotating presidency. In Brussels the Conference is co-chaired by the European Parliament and the parliament of the State holding the Council presidency. In the second semester, the presidency of the Conference is exclusively ensured by that national parliament. "Non-binding conclusions" are foreseen as a possible result of the meetings. With regard to the modus operandi, the Conference functions on the basis of "consensus", that is now consistently used within the organs of interparliamentary cooperation. Indeed, "consensus" stands in between majority rule and unanimity, so that possible reservations expressed during the debate are not then voiced when the decision is taken".

[145] As regards interaction between parliaments within the EU, see N. LUPO, C. FASONE (eds.), *Interparliamentary Cooperation in the Composite European Constitution*, Hart Publishing, Oxford, 2016.

[146] E. SZYSZCZAK, *Experimental governance: the Open Method of Coordination,* in *European Law Journal,* Vol. 12, n. 4, 2006, p. 487. Doctrine on the OMC is broad, so it suffices to quote, S. SACCHI, *Il metodo aperto di coordinamento, origini, ragioni e prspettive del coordinamento delle politiche sociali,* in *Il Politico,* n. 1, 2007, pp. 5-57; J. ZEITLIN, P. POCHET (eds.), *The Open Method of Co-ordination in Action – The European Employment and Social Inclusion Strategies,* P.I.E. Peter Lang, Brussels, 2005.

[147] C. SHORE, *'European Governance' or Governmentality? The European Commission and the Future of Democratic Government, cit.*, p. 299.

[148] E. SZYSZCZAK, *Experimental governance: the Open Method of Coordination,* in *European Law Journal, cit.*, p. 488.

Shared administrative procedures carried out in cooperation between European[149] and national offices sometimes brings about a model of joint-administration[150]. The degree of contribution from the two levels (European and national) depends on the procedure involved and the underlying conferred competences according to sector-specific provisions of EU law[151], while general provisions on administrative procedure are still lacking at the European level[152]. Indeed, while there is a uniform way to describe the (vertical) relation between the European and national levels in respect of both the legal and the judicial systems, no uniform means of description is yet possible in respect of the (vertical and horizontal) relation between European and national administrative systems: this is the reason why instead of "integration" it would be better to refer to "connection or junction"[153]

Accordingly, different forms of execution – beyond the sharp combination of direct/indirect execution – have been isolated by doctrine along with different cooperation techniques[154]. In this latter respect, on the one hand, cooperation may be vertical, between European and national offices, and it may follow a top-down or bottom-up approach, in relation to the level that starts the procedure. On the other hand, cooperation may be horizontal, between different national offices, that in turn may give rise to bilateral, trilateral or multilateral cooperation (in this latter case it involves all the administrations of the Member States as well as the European ones).

In this regard, administrative cooperation is aimed at dealing with the complexity of the European integration process in order to strike a fair balance between pluralism, diversity and uniformity[155].

Moreover, general provisions of EU law (Articles 41-42, ECFR; Articles 10-11, TUE; Articles 15, 296 TFEU), underpinned by the ECJ's case law, enshrine fundamental rules aimed at protecting affected

[149] As regards the evolutionary steps of implementation of the European administrative structure and the distinction between Directorates endowed with direct administrative responsibilities and those entrusted with national administration coordination functions, see G. DELLA CANANEA, *L'organizzazione amministrativa della Comunità europea,* in *Rivista Italiana di Diritto Pubblico Comunitario, cit.*, pp. 1105 ff.

[150] P. CHIRULLI, *Amministrazioni nazionali ed esecuzione del diritto europeo,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, cit.* p. 146.

[151] J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione Europea, cit.*, p. 517, speaks about "composed procedures" when the application of EU normative acts is split into different steps, some composed of acts or opinions issued by the authority of a Member State, and others composed of acts or opinions set out by a European institution or body.

[152] P. CRAIG, *Sfide sostanziali e procedurali del diritto amministrativo europeo,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, cit.*, p. 299, highlights the complex, fragmented, overlapping and sectoral nature of procedural provisions of EU administrative law, irrespective of the fact that most procedural issues cut across different sectors. Moreover, the request for European administrative procedural rules of general scope is not a mere technical question as it implies constitutional values and principles. This is the underlying reason for the ReNEUAL project (Model rules on EU Administrative procedure) underpinned by J.B. AUBY, P. CRAIG, D. CURTIN, G. DELLA CANANEA, D.U. GALETTA, J. MENDES, O. MIR, U. STELKENS, M. WIERZBOWSKI, in *ReNUAL.eu*.

[153] S. CASSESE, *Diritto amministrativo europeo e diritto amministrativo nazionale: integrazione o signoria?,* in *Rivista Italiana di Diritto Pubblico Comunitario,* n. 5, 2004, p. 1137.

[154] L. DE LUCIA, *Strumenti di cooperazione per l'esecuzione del diritto europeo,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, cit.*, pp. 176 ff.

[155] *Ibid.,* p. 185.

people[156]. These rules of due process range from participation, transparency and the openness of the procedure, to the right of access to documents of EU institutions, bodies, agencies and offices, the right to good administration and the duty to state the reasons for all legal acts.

Lastly, in respect of these forms of cooperation between public offices, it is relevant to recall that the formal legitimacy of their action, according to the rule of law model, decreases as public power moves away from its legal roots giving rise to relations and procedures that are unregulated or loosely regulated[157]. Accordingly, it is the consequent leeway that raises concern when public offices act in networked dimensions. However, it is nonetheless true that their technical expertise, as well as procedural openness and participation and their ongoing interaction at the national and European levels, contribute to reducing the "regulatory risk" brought about by interference from unstable political majorities[158].

3.3. Regulatory outcomes of EU governance

"One common starting point…is to define New Governance in the EU in terms of a departure from the Classic Community Method of norm generation… centring around the Commission right of initiative and the legislative and budgetary powers of the Council of Ministers and European Parliament"; another usual starting point is to underline "its non-legislative or only marginally legislative character"; as a consequence this "comes very close to defining New Governance as the antithesis of *legal* ordering as commonly conceived, and so, by inference of *constitutional* ordering as the most fundamental level of legal discourse"[159].

However, this binary and oppositional logic makes it impossible to capture the hybridisation that traditional forms of regulation have undergone[160].

On the one hand, the legislator leaves an increasing number of regulatory spaces open because of multiple simultaneously intertwined factors. Firstly, its inadequacy for technical questions that require expertise, resources, flexibility and efficiency in tackling ongoing evolutionary issues[161]; secondly, the impossibility

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[156] For an overview of the EU principles of due process and the relevant ECJ case law, see M. SAVINO, *I caratteri del diritto amministrativo europeo,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, op. cit.*, pp. 231 ff.

[157] J. MENDES, *La legittimazione dell'amministrazione dell'UE tra istanze istituzionali e democratiche,* in L. DE LUCIA, B. MARCHETTI (eds.), *L'amministrazione europea e le sue regole, op. cit.* p. 91.

[158] As stressed by C. BENETAZZO, *I nuovi poteri "regolatori" e di precontenzioso dell'ANAC nel sistema europeo delle Autorità indipendenti, cit.*, p. 23.

[159] N. WALKER, *Constitutionalism and New Governance in the European Union: Rethinking the Boundaries*, in G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, cit., p. 21.*

[160] *Ibid., p. 33.* As further emphasised by M. TRUBEK, P. COTTRELL, M. NANCE, *"Soft Law", "Hard Law", and European Integration: toward a Theory of Hybridity, cit.,* p. 6, "the role of law and other normative orders and governance processes may play in integration".

[161] A. ZEI, *Shifting the boundaries or breaking the branches? On some problems arising with the regulation of technology,* in E. PALMERINI, E. STRADELLA (eds.), *Law and Technology – The Challenge of Regulating Technological Development, cit.*, pp. 173-174, stresses the need for "a regulative framework which should be at once consistent but flexible enough for a

to ringfence far reaching socio-economic phenomena within national boundaries; furthermore, not only the "regulatory state" approach[162] and the consequent "agencification" process but also the related better law-making approach lean towards non-intervention or self-regulation or co-regulation[163]. On the other hand, this process, underpinned and legitimised by the ECJ's case law, results in the search for "alternatives to traditional legislation" and the underlying practice of "limiting proposals to essential elements… providing greater scope for implementing measures"[164] that – more than legislative provisions – can cope with the "scientific and technical uncertainty in many areas, and the need to deal quickly with unexpected circumstances"[165].

As a consequence, the boundaries between legislative and executive functions[166], normative execution and normative application[167], policy-making and policy-implementation, hard law and soft law[168], public and private regulation, rule-making and rule-taking[169], inevitably fade.

Bearing this premise in mind, even if the key feature of EU governance is usually termed as soft law, it is nonetheless true that it encompasses a great deal of legally binding acts. More specifically, legal acts with

continuously developing matter… This constitutes a serious assignment for the legislator, because it requires an extremely complex inquiry and, at the same time, a timely and updating of the subject, to avoid the legal frame rapidly becoming obsolete… The organizational resources and expertise necessary to address the challenges related to new technologies can be more easily found in the sphere of private autonomy. Due to that, legal provisions often merely set out general terms".

162 G. MAJONE, *The transformation of the regulatory State, cit.*

163 As overhauled by COM(2021) 219/3, *Better Regulation: Joining forces to make better laws.* As stressed by E. CHELI, *Presentazione,* in G. DE MINICO, *Libertà in Rete. Libertà dalla Rete,* Giappichelli, Turin, 2020, pp. XV-XVIII, the complexity of the current world of digital transformation, where technology comes first and law comes second, needs to be tackled with the proper dosage of legislative regulation and self-regulation to be sure that fundamental constitutional values are safeguarded.

164 COM (2002) 705 final, *Report from the commission on European Governance,* p. 13.

165 A. TUERK, *The Development of Case Law in the Area of Comitology*, in T. CHRISTIANSEN, J. MIRIAM OETTEL, B. VACCARI (eds.), *21st Century Comitology: The Role of Implementing Committees in the Enlarged European Union, cit.*, p. 52. Moreover, in reference to the ECJ's standpoint the Author evidenced that the Court had allowed abstract and general enabling provisions that delegate implementing powers. As regards the ECJ's deference towards technical and scientific opinions, see by M. LEE, *The legal Institutionalization of public participation in the EU governance of Technology*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), T*he Oxford Handbook of Law, Regulation, and Technology*, *cit.*, p. 629.

166 M. SAVINO, *L'organizzazione amministrativa dell'Unione europea, cit.* In this respect, J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione Europea, cit.*, p. 500, speaks about "normative execution" (different from normative application to single cases) as the possibility of general rules being adopted not only by EU institutions (first and foremost, the Commission) but also by regulatory agencies as a consequence of the flexible application of the Meroni doctrine (first and foremost in the financial sector with reference to the financial supervisory authorities: EBA, EIOPA, ESMA). At the national level, this difficult distinction between normative and executive competences is mirrored by the dispute around the qualification of acts adopted by independent authorities, whether normative or administrative in scope, see F. MERLONI, *Fortuna e limiti delle cosiddette Autorità amministrative indipendenti,* in *Politica del Diritto,* n. 4, 1997, pp. 639 ff.

167 The distinction between normative execution and normative application is drafted by J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione Europea, cit.*, p. 500

168 As for the hybridisation between hard law and soft law and their mutual integration, see G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism, cit.*

169 For "complementarity" between law and self-regulation, see A. MORRONE, *Fonti normative,* Il Mulino, Bologna, 2018, p. 234.

normative scope or aimed at normative execution, mainly when committees and comitology are concerned, but also binding acts of a more administrative nature, in case of normative application, mainly when agencies or procedural cooperation between European and national offices are involved. In addition, European agencies and networks of national supervisory authorities adopt, beyond administrative acts or non-binding acts (such as opinions, guidelines), legally binding provisions that overcome mere normative application and rather assume a normative execution scope[170] (first and foremost this is the case for supervisory authorities). In this regard, they act as rule makers without apparent prejudice to the limits drafted by the Meroni doctrine, which permits executive acts with normative scope, adopted by bodies other than the Commission and Council, insofar as they do not imply discretionary powers; otherwise, they need to be formally adopted by the Commission. But when complex technical matters are involved, it is difficult to track a sharp boundary between technical choices and underlying political assessments[171]. Consequently, even if the act is formally submitted and adopted by the EC (such as the case of the single rulebook proposed by the European Banking Authority - EBA), the real rule-setting power lies with the supervisory authority[172]. This is how the strict limits imposed by the Meroni doctrine are evaded.

In the similar terms, soft law instruments, within different methods of coordination (in the economic and social domain), have been conceived to better fit the purpose of flexibility, harmonisation and adaptability[173] and have undergone a "transformative" process, leading doctrine to identify a "third strengthened category", that of "smart law"[174].

Following the path of hybridisation further along this swinging relationship between harder and softer systems of rules, it is worthwhile to recall that various forms of self-regulation and co-regulation have been promoted by the European Union, giving rise to codes of practice and conduct, agreements, technical standards and guidelines. The main difference is due to the fact that, on the one hand, co-regulation[175] underlies a "legislative [that] entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field" and entails a validation procedure by a public authority that verifies the proposal's compliance with EU law and can table amendments if deemed

[170] See *supra,* footnote n. 167.
[171] S. *LAVRIJSSEN,* A. *OTTOW, Independent Supervisory Authorities*: A *Fragile Concept*, *cit.*, p. 421.
[172] In this respect, see J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione Europea, cit.*, pp. 510-511.
[173] O. DE SCHUTTER, J. LENOBLE (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World, cit.*
[174] A. DE STREEL, *The evolution of the EU Economic Governance Since the Treaty of Maastricht: Un Unfinished Task, cit.*, p. 358, defines "smart law" as the economic governance procedures resulting from the corrective arm's system of sanctions.
[175] Within the category of co-regulation, part of the doctrine establishes the category of "regulated self-regulation" when public authorities and private entities do not cooperate in joint institutions but the former only structures the way in which the latter intervenes. See H.J. KLEINSTEUBER, *The internet between Regulation and Governance,* in C. MÖLLER, A. AMOUROUX (eds.), *The Media Freedom Internet Cookbook*, in OSCE Representative on Freedom of the Media, Wien, 2004, p. 63.

necessary; on the other hand, self-regulation relies on an exclusively voluntary initiative by private entities[176].

More specifically, the EU has – among others – promoted codes of conduct adopted by professional bodies, organisations and associations at the Community level that are intended to set minimum standards of conduct and that can be complementary to Member States' legal requirements[177]. It has also supported corporate social responsibility agreements[178] and underpinned codes of conduct to prevent unfair commercial practices[179], as well as fostering codes of conduct in the Audiovisual Media sector[180] and providing for the adoption of standard clauses, binding corporate rules or codes of conduct for personal data protection[181].

These systems of rules give rise to fragmented non-legally binding regulatory spaces of varying scope and nature, but under certain conditions they bring about legal consequences, at least in reference to the burden of proof or support for the legal reasoning of judges. Moreover, as evidenced in recent times, science and technology are not the only object to regulate, nor they are simply players within the governance arena, but they can also be conceived as "a regulatory tool, by incorporating regulation and legal compliance into the technology itself"[182]. Accordingly, technological tools can fit the purpose of

[176] For the difference, see the Inter-institutional Agreement on better law-making (2003/C 321/01). Pursuant to this Agreement, self-regulation and co-regulation must "represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market".

[177] Directive 2006/123/EC on services in the internal market.

[178] For an insight into the European new regulatory mechanisms, see A. DI PASCALE, *Responsabilità sociale dell'impresa nel diritto dell'Unione Europea,* Giuffré, Milan, 2010, pp. 243 ff.

[179] Pursuant to Article 2(f), Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market: "'code of conduct' means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors" but, according to Article 6(2)(b), when a trader does not comply with a code of conduct that he has undertaken to be bound by he (under certain conditions) can fall into a misleading commercial practice.

[180] Pursuant to Article 4a(2) Directive (EU) 2018/1808 (amending directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities) "Member States and the Commission may foster self-regulation through Union codes of conduct drawn up by media service providers, video-sharing platform service providers or organisations representing them, in cooperation, as necessary, with other sectors such as industry, trade, professional and consumer associations or organisations. … The Union codes of conduct shall be without prejudice to the national codes of conduct. In cooperation with the Member States, the Commission shall facilitate the development of Union codes of conduct, where appropriate, in accordance with the principles of subsidiarity and proportionality", moreover this code shall "provide for effective enforcement including effective and proportionate sanctions".

[181] Articles 40, 46, 47 of Regulation (EU) 2016/679.

[182] E. PALMERINI, *The interplay between law and technology, or the RoboLaw project in context,* in E. PALMERINI, E. STRADELLA (eds.), *Law and Technology – The Challenge of Regulating Technological Development, cit.*, p.13. As stressed by R. BROWNSWORD, E. SCOTFORD, K. YEUNG, *Law, Regulation and Technology – The Field, Frame and Focal Questions,* in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation and Technology, cit.*, p. 11, the pivotal question is "whether the regulatory environment is adequate or whether it is 'fit for purpose'" in reference

regulatory governance by being tailored for regulatory management goals. In this respect, they contribute "towards the more effective and efficient achievement of legal and regulatory objectives"[183]. More specifically, the display of technological tools "can be charted on a spectrum from soft to hard. At the soft end of the spectrum, the technologies are employed in support of the legal rules… By contrast, at the hard end of the spectrum, the focus and ambition are different. Here, measures of technological management focus on limiting the practical (not the paper) options of regulatees; and, whereas legal rules back their prescriptions with ex post penal, compensatory, or restorative measures, the focus of technological management is entirely ex ante, aiming at anticipate and prevent wrongdoing rather than punish or compensate after the event"[184]. Consequently, this is another way by means of which private technical expertise is required by the regulators and as such feeds into the regulatory outcomes of normative and executive procedures.

Against this backdrop, it is evident that regulatory techniques, even if different in structure, scope and legal effects, nonetheless share the main purpose of flexibility and normative harmonisation. More specifically, they aim at "broad harmonisation… through relatively few European legislative acts", and as such, "broadly defined legislative objectives and principles could be continually concretised and adapted to new economic and technological developments"[185], by means of coordination procedures that aim at "achieving… a stabilization of the conduct of the various competent bodies and at achieving expected standards of behaviour"[186].

Consequently, it seems possible to point out that the common feature of governance mechanisms – more than the blurring category of soft law – is their effort to reach a certain degree of harmonisation within the regulatory spaces left open by legislative self-restraint. At this point in time, a question arises: is this latter (self-restraint) the consequence of the governance and better regulation approach, or is it its cause? Faced with the technicalities implied in the current complex and globalised reality, the self-restraint of the law – rather than a voluntary choice of a legislator prone to governance and better regulation standpoints – seems to be a necessity imposed by the impossibility for the legislator to keep pace with quickly changing complexities. It is not its ability to understand and represent the need of the people (according to the democratic principle) that is undermined, but rather its ability to process technical,

to its "connection" with the target technologies, its effectiveness in achieving its purposes, and its acceptability and legitimacy according to its underlying institutional procedures and values.

[183] R. BROWNSWORD, E. SCOTFORD, K. YEUNG, *Law, Regulation and Technology – The Field, Frame and Focal Questions, op. cit.*

[184] R. BROWNSWORD, *Law, Tecnology, and Society: In a State of Delicate Tension,* in *notizie di Politeia,* Vol. XXXVI, n. 137, 2020, p. 31.

[185] C. JOERGES, J. NEYER, *From intergovernmental bargaining to deliberative political processes: the constitutionalisation of Comitology, cit.*, p. 274.

[186] E. CHITI, *An important part of the EU's institutional machinery: features, problems and perspectives of European Agencies, cit.*, p. 1410.

complicated and cross-border issues into effective normative provisions and its consequent self-restraint in relation to broader and more general provisions.

4. Third layer: testing governance against some GDPR provisions

Bearing in mind the double layers of inquiry already addressed, a third level will now be examined. This is a level that fits a more concrete approach since it aims at testing the issues (of a more theoretical and broader scope) addressed in the first and second layer, against some specific provisions of the General Data Protection Regulation (GDPR)[187].

As is known, the GDPR replaced the previous Directive 95/46/CE adopted on the legal basis of the Treaty provisions (the current Article 114 TFEU) aimed at supporting "the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

This Directive also partially failed in its goal because the right to the protection of personal data didn't belong to the constitutional traditions common to Member States[188]. This led EU law to implement its provisions (by means of Article 8 ECFR and Article 16 TFEU) and laid down a stronger legal basis for a "European common policy of personal data"[189].

More specifically, the insight draws on the institutional and procedural governance mechanisms endorsed by the GDPR as well as their regulatory outcomes. Some bodies, such as the European Data Protection Supervisor and national supervisory authorities rely on the broader Agencification process, their main features being independence and technical expertise, as well as risk assessment and risk management being essential components of their decision-making. Moreover, some procedures and regulatory techniques leave open a certain discretionary power, not only in favour of the supervisory authorities but also the regulatees, in a way that sometimes can hardly can be reduced to mere a normative-application function. In this respect, is the cooperation and consistency mechanisms as well as the consequences of the accountability principle imposed on data controllers and the relevant self-regulatory spaces that come into play. Indeed, while regulations usually aim at uniformity, some provisions of the GDPR are more

[187] Regulation EU 2016/679. As stressed by M. RUBECHI, *La transizione verso il nuovo Sistema delle fonti europee di protezione dei dati,* in L. CALIFANO, C. COLAPIETRO (eds.); *Innovazione tecnologica e valore della persona – il diritto alla protezione dei dati personali nel Regolamento UE 2016/679, cit.*, p. 393, the right to the protection of personal data is so pivotal in the EU legal system that it has not only been enshrined and safeguarded by a regulation but it has also been placed at the core of a multilevel governance system.

[188] As observed by G.M. SALERNO, *Le origini ed il contesto,* in L. CALIFANO, C. COLAPIETRO (eds.); *Innovazione tecnologica e valore della persona – il diritto alla protezione dei dati personali nel Regolamento UE 2016/679, cit.*, p. 68.

[189] *Ibid.*, p. 71.

like directives than provisions of regulations[190], and consequently they leave open a certain discretionary power that – even if technical in nature – is rather normative in scope.

4.1. National supervisory authorities, their European network (EDPB) and their modus operandi

National supervisory authorities for data protection are the unique independent authorities enshrined in the ECFR (more specifically Article 8(3))[191]. The choice to endow independent authorities with data protection governance is due to the need to emancipate the fundamental right to the protection of personal data, which rests on human dignity, from political interference[192]. Accordingly, they have been described "as a new phenomenon" being qualified with "elements of an institution, an agency, a regulator, an ombudsman and a judicial body" and "all these roles must contribute to a high level of data protection within the European Union"[193]. Indeed, according to Articles 57-58 of Regulation (EU) No. 679/2016 they not only have information, advisory and monitoring tasks[194], but also regulatory competences[195] and adjudication powers[196].

Against this backdrop, the network of European and national supervisory authorities (EDPB)[197] has been featured by the GDPR as an institutional system charged with the task of fostering the highest possible degree of homogeneous implementation of its provisions. This has been deemed by doctrine a great challenge because of legal, methodological and cultural differences across national systems[198].

Consequently, in contrast to Directive 95/46 which had limited its provisions to "a rather unspecific duty of mutual assistance" between NSAs, as well as mere horizontal cooperation in the form of consultative functions under Article 29 'Working Party', the GDPR enhanced the position of the EDPB[199]. Indeed, beyond sharing the same rationalities underling the creation of national independent authorities, the

190 C. COLAPIETRO, *I principi ispiratori del Regolamento UE 2016/679 sulla protezione dei dati personali e la loro incidenza sul contesto normativo nazionale,* in Federalismi.it, n. 22, 2018, p. 28.

191 Also Article 16(2) TFEU provides for independent authorities entrusted with the task of supervising compliance with EU rules on personal data protection.

192 L. CALIFANO, *Il Regolamento UE 2016/679 e la costruzione di un modello uniforme di diritto europeo alla riservatezza e alla protezione dei dati personali, cit.*, p. 33. As regards the different degrees of independence of these authorities within Member States, see A. PATRONI GRIFFI, *L'indipendenza del Garante, cit.*, pp. 291

193 H. HIJMANS, *The European Data Protection Supervisor: The Institutions of the EC controlled by and Independent Authority,* in *Common Market Law Review,* Vol. 43, n. 5, 2006, p. 1341.

194 See Article 57(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (l), (o), (q), (u); Article 58(3)(a), (b), of Regulation (EU) No. 679/2016.

195 See Article 57(1)(m), (n), (p), (r), (s); Article 58(3)(d), (f), (g), (h), (i), (j), of Regulation (EU) No. 679/2016.

196 See Article 58(1), (2), (3)(e), (f) of Regulation (EU) No. 679/2016, in reference to investigative and corrective powers.

197 Article 68 of Regulation No. 2016/679.

198 L. CALIFANO, *Il Regolamento UE 2016/679 e la costruzione di un modello uniforme di diritto europeo alla riservatezza e alla protezione dei dati personali, cit.*, p. 32.

199 N. MARSCH, *Networks of Supervisory Bodies for Information Management in the European Administrative Union,* in *European Public Law,* Vol. 20, n. 1, 2014, p. 138. The author also denounces the originally proposed Regulation because of the enhanced role granted to the European Commission within the EDPB. Indeed, this vertical centralisation is deemed to be in contrast with the independence enshrined by primary EU law in favour of supervisory authorities.

EDPB is more specifically aimed at underpinning networking and coordination tasks for the sake of harmonised practices and a more uniform implementation of EU law[200]. Accordingly, it is not only stated that cooperation between supervisory authorities shall take place "without the need for any agreement between Member States on the provision of mutual assistance or on such cooperation"[201]; but the EDPB is entrusted with binding powers in respect of national supervisory authorities.

As for the former, Regulation No. 679/2016 lays down the so-called 'one stop shop' mechanism for cross-border personal data processing. More specifically, when one or more establishments of the controller or the processor are involved, the GDPR entrusts the lead authority of the State where the main or unique establishment is based with the task of fostering cooperation with the other supervisory authorities concerned[202], including by means of mutual assistance and joint operations[203].

As for the latter, Regulation No. 679/2016 lays down the consistency mechanism. On the one hand, this mechanism should be triggered by the president of the EDPB, the competent supervisory authority or other supervisory authority concerned, or the European Commission, when the adoption of a measure aimed at producing legal effects which substantially affect a significant number of data subjects in several Member States or matter of general application are involved[204]. In this case, the opinion set out by simply majority of the member of the Board (the European Commission does not cast any vote) shall be taken into "utmost account" by the competent supervisory authority[205]. On the other hand, when a dispute between supervisory authorities arises, the EDPB shall adopt a legally binding decision by a two-thirds majority of the member of the board[206].

These are truly significant powers and they represent a novelty among European agencies and networks of supervisory authorities, except for the similarly binding powers entrusted to the European supervisor

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200 S. *LAVRIJSSEN,* A. *OTTOW, Independent Supervisory Authorities*: A *Fragile Concept*, *cit.*, p. 425. The authors point out that "The creation of the new authorities has been an evolutionary process, where more and more coordination between the national practices of national regulators became necessary to ensure a consistent application of European law and to promote market integration".

201 Regulation (EU) No. 679/2016, recital 123.

202 See Articles 56 and 60 of Regulation (EU) No. 679/2016. As recently stated by the European Court of Justice, C-645/19, paras. 53 and 63, in reference to the one-stop shop mechanism, there is a requirement for "sincere and effective cooperation between the lead supervisory authority and the other supervisory authorities concerned. Accordingly, as the Advocate General stated in point 111 of his Opinion, the lead supervisory authority may not ignore the views of the other supervisory authorities, and any relevant and reasoned objection made by one of the other supervisory authorities has the effect of blocking, at least temporarily, the adoption of the draft decision of the lead supervisory authority"; this implies that "the lead supervisory authority cannot, in the exercise of its competences, as stated in paragraph 53 of the present judgment, eschew essential dialogue with and sincere and effective cooperation with the other supervisory authorities concerned". As stressed by O. POLLICINO, *Le Authority garanti tra limiti di ruolo e tutela della privacy,* in *Il Sole 24Ore,* 17 June 2021, cooperation between supervisory authorities is not only functional to the increasing protection of fundamental rights but it also enhance the dialogue among them outside the EDPB.

203 See Articles 61-62 of Regulation (EU) No. 679/2016.

204 Regulation (EU) No. 679/2016, para 135 and Article 64(1).

205 Article 64(7) of Regulation (EU) No. 679/2016

206 Article 65 and para. 136 of Regulation (EU) No. 679/2016.

in the financial sector in respect of financial institutions when a national authority fails to act and thus infringes EU law[207].

Moreover, the EDPB has regulatory powers. On more general basis, it has the competence to issue guidelines and recommendations to promote the consistent application of the GDPR[208]; on a more specific basis it can issue guidelines on the criteria to be taken into account in order to ascertain whether the processing of personal data substantially affects data subjects in more than one Member State (as regards the possibility of triggering the consistency mechanism)[209]. It is also entrusted with the power to approve criteria for the data protection certification procedure[210] and it shall establish the "list of the kind of processing operations which are subject to the requirement for a data protection impact assessment" when it involves "processing activities which are related to the offering of goods or services to data subjects or to the monitoring of their behaviour in several Member States, or may substantially affect the free movement of personal data within the Union"[211].

Against this background, the EDPB is further evidence of governance mechanisms to promote cross-border networked environments endowed with rule-making powers aiming at the approximation of practices and the uniform implementation and application of the law. In this regard, the GDPR (and Article 8 ECFR) represents not only a bedrock, a baseline to be respected, but it also lays down the guiding principles for the balance to be struck between conflicting fundamental rights and freedoms. As such, it underpins the hybridity approach to governance mentioned in the previous paragraphs.

4.2. Self-regulatory/co-regulatory outcomes

As stressed by doctrine, not only do national supervisory authorities contribute to the creation of the legal system because of their broad powers of implementation, but they also play a "catalyst" role in respect of mixed (public-private) legal sources such as codes of conduct[212]. Accordingly, these codes have been deemed alternative regulatory tools to the deployment of regulatory powers by the authority itself[213].

[207] S. *LAVRIJSSEN,* A. *OTTOW, Independent Supervisory Authorities*: A *Fragile Concept*, *cit.*, p. 441.
[208] Article 70(1)(e) of Regulation (EU), No. 679/2016.
[209] Regulation (EU) No. 679/2016, para. 124.
[210] Article 70(1)(o), and Article 42(5) of Regulation (EU) No. 679/2016.
[211] Article 35(6) of Regulation (EU) No. 679/2016. The same procedure also encompasses the list "of the kind of processing operations for which no data protection impact assessment is required" (Article 35(5)).
[212] A. SIMONCINI, *Autorità indipendenti e costruzione dell'ordinamento giuridico,* in *Diritto Pubblico* n. 1, 1999, p. 897.
[213] A. MORRONE, *Fonti normative, cit.*, p. 240. The author makes a distinction between deontological codes and code of conduct promoted by independent authorities. The difference resides in their scope (the former focus on professional ethics, the latter on the protection of fundamental constitutional rights and values) and their internal or external efficacy, but both – as further stressed by the author – can be blended within a same code such as the journalists' code.

More specifically, they entail a cooperative public-private means of action through which the authority exercises its regulatory powers[214].

This co-regulation or "regulated self-regulation"[215], otherwise described as assisted self-regulation[216], primarily encompasses the possibility of adopting codes of conduct for processing personal data[217]. As pointed out by doctrine, the latter exit the mere private and contractual space to enter the environment of public legal sources[218]. Indeed, pursuant to Article 40 GDPR it is up to public powers, such as Member States, supervisory authorities, the EDPB and the European Commission to promote the drafting of codes of conduct, but it is up to associations and other bodies representing categories of controllers or processors to prepare, amend or extend them. Moreover, the draft code is submitted to the competent supervisory authority for an assessment of its consistency with the GDPR and approved by the latter before being registered and published (Article 40(5-6)). When a draft code of conduct relates to processing activities in several Member States, the assessment is provided by the EDPB (pursuant to the consistency mechanism) whose opinion is then submitted to the European Commission (Article 40(8)) which may decide – by means of an implementing act adopted on the basis of a comitology procedure – to give general validity to the code[219]. Moreover, according to the due process rule, when drawing up a code the drafters "should consult relevant stakeholders, including data subjects where feasible, and have regard to submissions received and views expressed in response to such consultations"[220].

Consequently, the code of conduct underlies a public-private decision-making process that aims at reaching more uniformity in the implementation of the processing duties provided for by the GDPR. Moreover, when cross-border processing activities are involved, it aims at fostering networked

214 *Ibid.*, p. 242.

215 H.J. KLEINSTEUBER, *The internet between Regulation and Governance,* in C. MÖLLER, A. AMOUROUX (eds.), *The Media Freedom Internet Cookbook, cit.*, p. 63.

216 A. MORRONE, *Fonti normative, cit.*, p. 241.

217 Article 40 of Regulation (EU) No. 679/2016.

218 M. CUNIBERTI, *La professione del giornalista,* in G.E. VIGEVANI, O. POLLICINO, C. MELZI D'ERIL, M. CUNIBERTI, M. BASSINI (eds.), *Diritto dell'informazione e dei media,* Giappichelli, Turin, 2019, p. 271. The author stresses that the journalist's code of conduct for processing personal data assumes the features of a source of law because of the supervisory authority's participation, its publication on the Official Journal and its scope that reaches all people processing data for reasons of right of expression, and its infringement can give rise not only to disciplinary consequences but also to the possibility of a claim being lodged with the supervisory authority or judges.

219 As regards the adoption of the implementing act, Article 40(9) of Regulation (EU) 679/2016 refers to Article 93(2), which in turn refers to Article 5 of Regulation (EU) No. 182/2011, which provides for the "examination procedure" within the comitology framework.

220 Regulation (EU) No. 679/2016, recital 99. As stressed by S. CALZOLAIO, L. FEROLA, V. FIORILLO, E.A. ROSSI, M. TIMIANI, *La responsabilità e la sicurezza del trattamento,* in L. CALIFANO, C. COLAPIETRO (eds.); *Innovazione tecnologica e valore della persona – il diritto alla protezione dei dati personali nel Regolamento UE 2016/679, cit.*, p. 165, this provision has weakened the position of data subjects in the code of conduct drafting procedure. Indeed, according to established Italian practice, the associations representing of data subjects had the power to subscribe to this code and not only the right to be consulted, as is the case in the GDPR.

cooperation within the EDPB as well as the relevant interaction with the European Commission, giving rise to a complex multilevel and multi-stakeholders procedure.

Furthermore, the reach of a code of conduct can go beyond EU borders by means of adherence to them by controllers or processors (not submitted to the GDPR according to Article 3) within the framework of personal data transfers to third countries or international organisations (Article 40(3)). This is a singular way to widen both the level of protection laid down by the European Regulation beyond its original territorial scope, and the room for discretionary power given to private entities, supervisory authorities, the EDPB and the European Commission[221].

With regard to the latter aspect, like the adherence to codes of conduct, other tools of private origin have undergone a validation procedure of a public nature and also offer safeguards that may be extended to countries outside of the EU's borders. This is the case for standard contractual clauses or binding corporate rules adopted by a supervisory authority or the EDPB and approved by the European Commission (Article 46(2)-(3)-(4) and Article 47)[222]. But, as laid down by the ECJ in the Schrems I and Schrems II cases, the implementing powers of the Commission in the adoption of standard data protection clauses (pursuant to Article 46(2)(c)), do not prevent the supervisory authorities from exercising their corrective powers (according to Article 58(2)) and more specifically suspending or banning the data processing involved[223]. In this regard, the scope and effectiveness of uniform solutions can be undermined[224], but the consistency mechanism can help to recover it.

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[221] As stressed by C. GENTILE, *La saga Schrems e la tutela dei diritti fondamentali*, in Federalismi.it, n. 1, 2021, p. 48, as regards data transfer to third countries or international organisations, the GDPR makes reference to some general clauses of uncertain legal scope, such as the adequate level of protection and the measures that shall be taken to compensate for the lack of data protection in the third country.

[222] More specifically, standard contractual clauses are adopted by the supervisory authority or the EDPB when the conditions for triggering the consistency mechanism are involved, and then approved by the European Commission through implementing acts. When any decision of the European Commission has been adopted, standard contractual clauses provide for appropriate safeguards when authorised by the competent supervisory authority or the EDPB (see Article 46(2)-(3)). Binding corporate rules are adopted by the EDPB (consistency mechanism) and approved by the European Commission pursuant to the examination procedure for implementing acts (see Article 47(1) and recital 168).

[223] See C-362/14, parr. 103-105; C- 311/18, par. 115.

[224] As stressed by R. BIFULCO, *Il trasferimento dei dati personali nella sentenza Schrems II: dal contenuto essenziale al principio di proporzionalità e ritorno,* in *Diritto Pubblico Europeo – Rassegna online,* n. 2, 2020, p. 7. In this regard, it is worthwhile to recall par. 133-134 of the C-311/18 ruling: "It follows that the standard data protection clauses adopted by the Commission on the basis of Article 46(2)(c) of the GDPR are solely intended to provide contractual guarantees that apply uniformly in all third countries to controllers and processors established in the European Union and, consequently, independently of the level of protection guaranteed in each third country. In so far as those standard data protection clauses cannot, having regard to their very nature, provide guarantees beyond a contractual obligation to ensure compliance with the level of protection required under EU law, they may require, depending on the prevailing position in a particular third country, the adoption of supplementary measures by the controller in order to ensure compliance with that level of protection. In that regard, as the Advocate General stated in point 126 of his Opinion, the contractual mechanism provided for in Article 46(2)(c) of the GDPR is based on the responsibility of the controller or his or her subcontractor established in the European Union and, in the alternative, of the competent supervisory authority. It is therefore, above all, for that controller or processor to verify, on a case-by-case basis and, where appropriate, in collaboration with the recipient of the data, whether the law of the third country of destination ensures adequate protection, under EU law, of

In addition, adherence to the abovementioned co-regulatory instruments brings about legal effects because they support the burden of proof incumbent on the controller (Article 24(3) and recitals 74, 77). This EU approach to codes of conduct seems to be proving effective, as evidenced by the recent Communication of the European Commission taking stock of two years of GDPR application[225] and the European Data Strategy that further underpins the adoption of codes of conduct, including for special categories of data (first and foremost health data) to foster more a uniform implementation of the safeguards provided by the GDPR[226].

Broadly speaking, adherence to codes of conduct or certification mechanisms[227], as well as standard contractual clauses[228], or – for data transfers to third countries or international organisations – the adoption of binding corporate rules[229] provide formal evidence of the accountability principle that the GDPR imposed on the data controller and processor as well as the underlying risk-based approach[230]. In this respect, the policy approach embraced by the GDPR is that of "better regulation", according to which, on the one hand, the involvement of the relevant stakeholders in the decision-making procedure is essential; on the other hand, any policy decision implies the prior carrying out of a risk assessment for better risk management choices. Accordingly, the GDPR pursues both; it enforces the data controller's accountability by endowing him with a certain amount of discretionary power[231], and it obliges the data controller to carry out the risk assessment and consequently adopt appropriate and effective precautionary measures[232].

personal data transferred pursuant to standard data protection clauses, by providing, where necessary, additional safeguards to those offered by those clauses".

225 COM (2020) 264 final, *Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation,* p. 9 and p. 17.

226 COM (2020) 66 final, *A European strategy for data*, p. 30.

227 Articles 42-43 of Regulation (EU) No. 679/2016.

228 Article 28(6)-(7)-(8) of Regulation (EU) No. 679/2016.

229 Article 46(2)(b), (c), (d) of Regulation (EU) No. 679/2016.

230 G. GIANNONE CODIGLIONE, *Risk-based approach e trattamento dei dati personali*, in S. SICA, V. ANTONIO, G.M. RICCIO (eds.), *La nuova disciplina europea della privacy*, Cedam, Padua, 2016, p. 70

231 L. CALIFANO, *Il Regolamento UE 2016/679 e la costruzione di un modello uniforme di diritto europeo alla riservatezza e alla protezione dei dati personali, cit.*, pp. 34 ff.; A. PAPA, *Il diritto dell'informazione e della comunicazione nell'era digitale,* Giappichelli, Turin, 2018, p. 226. In short, the data controller becomes the "pivot" of the new legal architecture drafted by the GDPR, in this regard, see S. CALZOLAIO, *Privacy by design. Principi, dinamiche, ambizioni del nuovo Reg. UE 2016/679,* in Federalismi.it, n. 24, 2017, p. 12.

232 As regards the relationship between the precautionary principle, risk assessment and risk management taken into consideration as different steps in the risk regulatory process, see A. ARCURI, *Reimagining risk regulation: from reason to compassionate reason?,* in E. PALMERINI, E. STRADELLA (eds.), *Law and Technology – The Challenge of Regulating Technological Development, cit.*, pp. 216 ff. For a summary of the evolution undergone by the precautionary principle and its emergence in the environmental domain as well as its spreading to other sectors such as health, emerging technologies, innovation, world trade, see A. STIRLING, *Precaution in the governance of technology,* in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, *cit.*, pp. 646-647.

Accordingly, the regulatory outcomes fostered by the GDPR, more specifically self-regulatory or co-regulatory tools (according to the doctrinal perspective adopted), give evidence to another alternative mode of regulation, typical of governance.

4.3. Technology itself as a regulatory tool

The accountability principle and the underlying risk-based approach leads towards the adoption of preventive mechanisms to avoid infringements that not only encompass formal adherence to the previously described acts (codes of conduct, standard contractual clauses, binding corporate rules) but also entail more practical and concrete consequences for data controllers and processors[233]. More specifically, privacy by design and privacy by default mechanisms (Article 25), as well as the implied security-of-processing duties (Article 32), the data protection impact assessment (Article 35) and the appointment of a Data Protection Officer are part and parcel of this *ex ante* accountability principle[234].

They give evidence to both the shift of "paradigm" from the more "paternalistic" approach of Directive 95/46/CE to a more "liberal" and flexible approach under the GDPR[235], as well as the shift from a more "conflictual" to a more "collaborative" relationship between privacy and technology that in turn underlies the aforementioned shift from an *ex-post* and sanctioning logic to an *ex-ante* setting for the protection of personal data[236], and mirrors the transposition of the precautionary principle[237].

Against this background, the data controller is required to assess – prior to the processing of personal data –the likelihood and severity of the risks to rights and freedoms of natural person (Article 24; Article

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233 As pointed out by G. FINOCCHIARO, *Introduzione al Regolamento Europeo sulla protezione dei dati,* in *Le nuove leggi civili commentate,* n. 1, 2017, p. 11, the accountability principle encompasses both the responsibility and liability of the controller and his duty to be able to prove the adequacy and effectiveness of the technical and organisational measures adopted, as well as underlying compliance with the GDPR.

234 L. CALIFANO, *Il Regolamento UE 2016/679 e la costruzione di un modello uniforme di diritto europeo alla riservatezza e alla protezione dei dati personali, cit.*, p. 34.

235 The shift of paradigms from the "paternalistic" approach of Directive 95/46/CE towards a "risk-based approach" under Regulation (EU) No. 679/2016 is due to the digital breakthrough and the systematic processing of big data. This has led to a more liberal perspective in respect of privacy and relevant compliance procedures, replacing the stricter and formalistic approach of the Directive with a more flexible approach resting on the accountability of the data controller. In this regard, see O. POLLICINO, M. BASSINI, *Libertà di espressione e diritti della personalità nell'era digitale. La tutela della privacy nella dimensione europea,* in G.E. VIGEVANI, O. POLLICINO, C. MELZI D'ERIL, M. CUNIBERTI, M. BASSINI (eds.), *Diritto dell'informazione e dei media, cit.*, p. 100.

236 S. CALZOLAIO, L. FEROLA, V. FIORILLO, E.A. ROSSI, M. TIMIANI, *La responsabilità e la sicurezza del trattamento, cit.*, p. 171.

237 C. COLAPIETRO, *I principi ispiratori del Regolamento UE 2016/679 sulla protezione dei dati personali e la loro incidenza sul contesto normativo nazionale,* in Federalismi.it, n. 22, 2018, p. 24. The author stresses the wide scope of the data minimisation principle (Article 5(1)(c)) underlying the precautionary approach and placing the proportionality principle at its basis. More specifically, it brings together others principles such as accuracy and storage limitation (Article 5(1)(d),(e) but also data protection by design and by default (Article 25) as well as the data protection impact assessment (Article 35). Accordingly, according to A. STIRLING, *Precaution in the governance of technology, cit.*, p. 654, "precaution is as much about appraising threats as managing them" and its scope is wider than that of risk assessment since it also encompasses uncertainty whose "real nature… is that it cannot be reduced merely to probability".

25(1); Article 32(1) and Article 35) and to implement appropriate and effective technical and organisational measures (recital 74).

In this regard, privacy by design and privacy by default are both purposes and means to be addressed and performed, in respect of which the GDPR "entrusts an increasing role to Information Technology activities"[238]. Accordingly, "When developing, designing, selecting and using applications, services and products that are based on the processing of personal data or process personal data to fulfil their task, producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications and, with due regard to the state of the art, to make sure that controllers and processors are able to fulfil their data protection obligations" (recital 78, GDPR)[239]. Moreover, when high risks to the rights and freedoms of natural persons in the processing of their personal data come into question and any available technology is appropriate to mitigate them, prior consultation with the supervisory authority is required (Article 36 and recitals 84, 94). In this respect, technological and organisational measures should prevent or reduce, in case of a data breach, adverse effects for the data subject (Articles 32, 33, 34 and recital 83). Furthermore, "the controller should use appropriate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised, secure personal data in a manner that takes account of the potential risks involved for the interests and rights of the data subject and that prevents, inter alia, discriminatory effects" (recital 71).

This is one means by which technology and law interact in a mutually supportive manner[240] and as such they contribute to another way of conceiving the hybridity approach to governance, giving rise to a

238 F. PIZZETTI, L. MONTUORI, *Il nuovo Regolamento Data Protection e le sfide dell'innovazione digitale,* in T.E. FROSINI, O. POLLICINO, E. APA, M. BASSINI (eds.), *Diritti e libertà in Internet,* Le Monnier Università, Milan, 2017, p. 109. The approach followed by the GDPR could be deemed to be a way to make technology abide by freedoms and equality instead of private egoistic interests. In this regard, see G. DE MINICO, *Per una tecnologia amica della Costituzione,* in G. DE MINICO, *Libertà in Rete. Libertà dalla Rete, cit.*, p. XIX. In this regard, also see P. COSTANZO, *Il fattore tecnologico e il suo impatto sulle libertà fondamentali*, in T.E. FROSINI, O. POLLICINO, E. APA, M. BASSINI (eds.), *Diritti e Libertà in Internet*, *cit.*, p. 5, which stresses the risks but also the opportunities of technological deployment, discussing their "virtous use". G. SARTOR, *Human Rights and Information technologies*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, *cit.*, pp. 424 ff., gives a broad overview of the opportunities (in terms of economic development, public administration procedures, culture and education, social knowledge, art and science, association, communication and information, cooperation, public dialogue and political participation, moral progress) and the risks of information technologies (in terms of unemployment/alienation, inequality, surveillance, data aggregation and profiling, virtual nudging, automated assessment, discrimination, exclusion, virtual constraints, censorship, polarisation, techno-war, loss of normativity) as well as their implications for human rights.

239 As stressed by S. CALZOLAIO, *Privacy by design. Principi, dinamiche, ambizioni del nuovo Reg. UE 2016/679, cit.*, p. 17, this recital has not being included in the GDPR's provisions, and as such it remains a recommendation. It does not lay down any legal duty on producers of information and communication technologies to embed privacy since they project hardware and software to avoid stifling research, innovation and development in ICT.

240 G. FINOCCHIARO, *Introduzione al Regolamento Europeo sulla protezione dei dati, cit.*, p. 10, observes that data security entails an "integrated overview" between different competences and expertises in law, technology and organisational

further regulatory technique by means of which the force of the law is implemented by the default settings of technologies.

In this way, concepts previously outside of the legal environment, like privacy by design and by default, have entered it and reached a pivotal role for the assessment of controller accountability[241]. Besides being dealt with together, they differ in scope, as the former (privacy by design) entails the integration of protective measures in the processing itself (a sort of "embedded protection" in the architecture of the processing system)[242], while the latter is a consequence of the data minimisation principle and means that adequate and relevant collected data, limited purposes, time-limit storage, integrity and confidentiality of personal data are all features embedded in default settings[243].

More specifically, "Privacy-Enhancing Technologies" (PETs), as already referred to in the 90s Report of the Dutch and Ontario data privacy authorities[244], have been developed to comply with "the need to ensure that due account be taken of privacy-related interests throughout the lifecycle of information systems development, especially in its early phases, such that the interests are hardwired… into the systems concerned. This discourse typically goes under the rubric 'Privacy by Design' (PbD) or 'Data Protection by Design' (DPbD). It feeds into a broader interdisciplinary endeavour aimed at embedding key human values – particularly those central to virtue ethics – in the technology design process"[245]. PETs often overlap with "Security-Enhancing Technologies" (SETs), mainly aimed at safeguarding confidentiality, integrity or the availability of data[246].

The GDPR provides for both data protection by design (Article 25) and security of processing (Article 32). However, on the one hand, their scope in the GDPR is wider than PETs because of the involvement of organisational measures throughout the whole data processing cycle and the relevant duty to

domains. Moreover, as observed by A. SIMONCINI, *Sovranità e potere nell'era digitale,* in T.E. FROSINI, O. POLLICINO, E. APA, M. BASSINI (eds.), *Diritti e Libertà in Internet, cit.*, p. 34, because legal provisions are able to affect technology in an effective manner, it is requested that they be written down in the same language (code) as the latter; this is the condition to make the dialogue between the political and technical domain work.

241 S. CALZOLAIO, L. FEROLA, V. FIORILLO, E.A. ROSSI, M. TIMIANI, *La responsabilità e la sicurezza del trattamento,* in L. CALIFANO, C. COLAPIETRO (eds.), *Innovazione tecnologica e valore della persona – il diritto alla protezione dei dati personali nel Regolamento UE 2016/679, cit.*, p. 170, pointed out the external origins of privacy by design and by default in respect of the legal system.

242 *Ibid.*, p. 173.

243 S. CALZOLAIO, *Privacy by design. Principi, dinamiche, ambizioni del nuovo Reg. UE 2016/679, cit.*, p. 15.

244 On "privacy-enhancing technologies" see, L.A. BYGRAVE, *Hardwiring Privacy*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (eds.), *The Oxford Handbook of Law, Regulation, and Technology*, *cit.*, pp. 754 ff.; R. D'ORAZIO, *Protezione dei dati by default a by design,* in S. SICA, V. ANTONIO, G.M. RICCIO (eds.), *La nuova disciplina europea della privacy*, *cit.*, pp. 99 ff. As regards the Seven Foundational Principles for Privacy by Design set out by the former Ontario Information and Privacy Commissioner, A. CAVOUKIAN, see *Foundation Principles.*

245 L.A. BYGRAVE, *Hardwiring Privacy*, *cit.*, p. 755.

246 *Ibid.*, p. 756.

continuously update them[247]. On the other hand, the data protection technologies encompassed in the GDPR narrow the goals addressed by PETs in a twofold manner. Firstly, the GDPR merely focuses on "identity protection" such as pseudonymisation by means of cryptographic protocols rather than on more advanced techniques aimed at preventing profiling measures (by means of blocking systematic tracking and linkage between data from the early software and hardware design steps). Secondly, the GDPR aims at increasing *ex ante* protection of data subjects by means of the accountability principle and the involved risk assessment, nonetheless "we cannot assume that basic privacy-relevant design decisions in information systems development will be exclusively or predominantly taken by entities acting in a controller capacity"[248].

Against this backdrop, privacy by design and by default can be defined – as in doctrine – as "regulatory instruments", and more specifically "technological management", which means "the use of technologies… with a view to managing certain kinds of risk", while sharing this task with classical duty-imposing rules for social ordering[249]. In this respect, the "normative regulatory environment will co-exist and co-evolve with technologically managed environment" for the purpose of a more effective way of managing risk[250].

In this regard, the deployment of technologies not only contributes to complementing regulatory outcomes and – in doing so –implying a sort of public/private partnership, but it also contributes to smoothening the path towards the burden of proof incumbent on the controller, akin to the self-/co-regulatory instruments covered in the previous paragraph.

5. Concluding remarks

Governance is a process that has deeply fed into public law procedures and their regulatory outcomes. Accordingly, as stressed by the hybridisation theory[251], old legal categories have not been displaced but rather complemented by new processes with the aim of coping in more flexible and effective ways with the multi-faceted and multi-layered challenges stemming from globalisation and evolution in the economic, socio-political, scientific and technological domains. Indeed, this complex environment has

[247] This is what has been defined as a "dynamic planning of data protection": S. CALZOLAIO, L. FEROLA, V. FIORILLO, E.A. ROSSI, M. TIMIANI, *La responsabilità e la sicurezza del trattamento, cit.*, p. 170.

[248] Indeed, basic privacy-relevant design decisions in information system development are usually undertaken by computing software manufacturers or engineers involved in drafting core internet standards: L.A. BYGRAVE, *Hardwiring Privacy*, *cit.*, p. 768 e p. 770.

[249] R. BROWNSWORD, *Law Technology and society – Re-imagining the regulatory environment*, Routledge, Abingdon-New York, 2019, p. 4.

[250] *Ibid.*, pp. 23-24.

[251] G. DE BURCA, J. SCOTT, *Introduction: New Governance, Law and Constitutionalism,* G. DE BURCA, J. SCOTT (eds.), *Constitutionalism and New Governance in Europe and United States, cit., p. 9.*

contributed to shifting the focus of legislation mainly onto risk assessment and risk management as well as dealing with the underlying precautionary principle.

Against this backdrop, a triple concentric-layered perspective has been followed: it starts from drafting the fundamental features of governance (at large and within the EU) for both sides – the subjective (players and their modus operandi) and the objective (the regulatory outcomes) –and it ends with the observation of how they have shaped the legislator's choices in respect of the GDPR content.

As highlighted in the first and second layers of the analysis, governance first and foremost means the involvement – at different scales and by means of different mechanisms (some institutional and others procedural in nature) – of various players and actors (beyond public authorities). Consequently, it brings about different regulatory techniques as well as different patterns of interaction between statutory regulation and other systems of rules. As such, governance goes hand in hand with the better regulation approach launched by the OECD at the international level in 1997 and mirrored by the engagement undertaken by the European Commission at the European level.

In this regard, in respect of "the transformation of the regulatory State"[252] that encompasses most governance mechanisms (from comitology, to the agencification process and independent supervisory authorities, as well as their regulatory outcomes and the spread of self-regulation and co-regulation), the EU is to be taking a step further, which is not only procedural but also substantial in nature.

Bearing in mind that the streamlining of legislation remains a feature, not only as a voluntary choice stemming from the Better Regulation agenda, but also as a necessity due to the difficulties that the legislator has in adequately coping with a quickly changing environment[253], it is nonetheless true that it does not necessarily imply an abdication of statutory regulation. Accordingly, the GDPR has enhanced its steering role in governance dynamics, tracing the path forward in respect of issues of a very public-law nature. Not only because a Regulation has replaced a Directive, but also because it improves some typical governance outcomes.

More specifically, it not only institutionalises the network of national supervisory authorities, but it also entrusts it with the novelty of binding powers (Article 65); it not only provides for assisted co-regulation, but it also entrusts the Commission, by means of binding implementing acts, to give them general validity within the Union (Article 40(9)). As such, the uniformity of the legal bedrock fostered by the GDPR is increased.

In addition, the GDPR mirrors the evolutionary path that governance has undergone, broadening from market competition failures to risk assessment and risk management; however, it (once again) takes this

[252] G. MAJONE, *The transformations of the regulatory State, cit.*

[253] In this regard, what is evidenced in E. PALMERINI, E. STRADELLA (eds.), *Law and Technology – The Challenge of Regulating Technological Development, cit.*, is emblematic.

latter aspect a step further. Indeed, according to the human-centric approach[254] that characterises the whole European digital strategy, risk assessment and management need to be carried out in compliance with a rights-oriented perspective aiming at protecting citizens as bearers of a fundamental rights[255] and not merely as market players (consumers)[256].

Along this path, for the delivery of a more effective protection of the affected fundamental rights, the GDPR constantly requires the cooperation of the data processors (according to a multi-faceted accountability principle)[257].

This is the way forward addressed by the GDPR: an enhanced networked reality of public supervisory authorities at the European level (EDPB) that aims for a sort of public-private partnership in the assessment and management of the risks and the consequent matching of public and private rules[258]. Moreover, it broadens this partnership by underpinning the deployment of technological tools for regulatory management aims.

In this sense, the GDPR contributes to fulfilling the "legal meaning of effectiveness"[259]: it results in a procedural model of governance that feeds into outcomes of a more substantial nature, fostering the assessment and balance of fundamental rights and freedoms. Indeed, since in the current environment of uncertainty not all risks involved can be envisaged in advance and in abstract terms by normative acts, it is the cooperation of the involved people that becomes essential in the understanding of their scope. It can help to supplement the duty to carry out a comprehensive assessment and better tailor the

254 As recently stressed by the European Commission in its Report - COM (2020) 264 final, *Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation,* p. 1, "The GDPR is an important component of the human-centric approach to technology".

255 In this regard, not only is the fundamental right to the protection of personal data is enshrined (Recital No. 1 of Regulation (EU) No. 679/2016 provides that "The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her") but reference is also made to the need to balance other fundamental rights and freedoms pursuant to the proportionality principle (Recital No. 5 sets out that "The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity").

256 L. CALIFANO, *Il Regolamento UE 2016/679 e la costruzione di un modello uniforme di diritto europeo alla riservatezza e alla protezione dei dati personali, cit.*

257 S. CALZOLAIO, L. FEROLA, V. FIORILLO, E.A. ROSSI, M. TIMIANI, *La responsabilità e la sicurezza del trattamento, cit.*

258 Indeed, this public/private partnership in the governance of digital transformation and digital security is gaining an increasing role within the EU and its Member States, see A. LAURO, *Sicurezza cibernetica e organizzazione dei poteri: spunti di comparazione,* forthcoming in *Gruppo di Pisa. Dibattito aperto sul Diritto e la Giustizia costituzionale.*

259 To borrow the words of N. IRTI, *Significato giuridico dell'effettività,* Editoriale Scientifica, Naples, 2009, p. 9.

consequent forms of protection of fundamental rights. The GDPR has embraced this method which – in turn – fosters the judiciary in its balancing and reasoning on proportionality, as well as in the underlying assessment of the burden of proof. In addition, it widens the scope of the provided protection from *ex-post* to *ex-ante*, not only by means of self-/co-regulation but also through the deployment of privacy enhancing technologies as well as organisational measures.

Perhaps this is a non-reversible model of regulation stemming from the evolutionary process that governance has triggered. Indeed, it is not simply question of opening the normative process to participation, or even a simply blank legislative delegation to private soft-law regulation, but it is rather a cooperative process in which rule making and rule taking are blurred, while the nature of the actors also blurs within a public/private networked reality that has entered the public law domain.

The GDPR has sketched such a strategy to bring under the umbrella of statutory regulation issues that are otherwise difficult to reach because of their technicalities and their evolution. Accordingly, it delivers a sort of experimental and assisted regulatory model, something like the regulatory sandboxes and innovators facilitators at large experienced in Fintech[260].

This does not mean that mechanisms suggested by governance result in a sort of universal panacea against current evils and modern risks, "a checklist of widely affirmed regulatory desiderata… a broadly palatable institutional recipe… regardless of context means that is often left unclear"[261]. Rather, it means that governance outcomes change according to the manner in which they are deployed. Accordingly, in the face of the current challenging reality, public/private partnerships supervised by independent authorities and endorsed in advance by a legislative act that sets out a bedrock for fundamental rights, can provide the way forward.

Consequently, this seems to close the loop of public-law relevance, i.e. the methods adopted by the GDPR legislator to "govern" mechanisms usually termed as governance processes.

[260] E. CORAPI, *Regulatory Sandbox in FinTech?,* in *Diritto del commercio internazionale,* n. 4, 2019, pp. 785 ff.; M.T. PARACAMPO, *Dalle* regulatory sandboxes *al* network *dei facilitatori di innovazione tra decentramento sperimentale e condivisione europea,* in *Riv. Dir. Bancario,* n. 2, 2019, pp. 219 ff.

[261] N. WALKER, *Constitutionalism and New Governance in the European Union: Rethinking the Boundaries*, *cit., p. 27.*