INTRODUCTION

The judgement of the European Court of Justice, Grand Chamber, on the 9th June 2009 (C-480/06, *Commission v. Federal Republic of Germany*) has rekindled the interest on the topic of cooperation agreements. For the first time, in this judgement, the European Court has recognized the legitimacy of cooperation agreements between public administrations even though in the presence of stringent conditions.

This case involved a cooperation agreement between administrative districts for the construction of an incineration facility and a municipal waste disposal service contract. The contract has been settled down without an open tendering procedure and, for this reason, it was judged potentially able to breach the legislation in place to protect open competition.

The verdict was immediately welcomed by legal authors and public administrators (especially in smaller local authorities) since it highlights the principle of institutional autonomy owned by the different States, often degraded in front of the necessity to foster an open European market and protect free competition. However, it seems clear that the admission of intergovernmental agreements, even under certain conditions, can be in conflict with abovementioned European principles.

The intervention of the European court and the public-public cooperation's contracts were consolidated by the new Directives in Public Procurement and Concessions (e.g. art. 12 of Procurement Directive in classic sectors 2014/24/EU; art. 28 of Procurement Directive in special sectors D. 2014/25/EU and art. 17 of the Utilities Directive D. 2014/23/EU) where the European legislator describes the institute of in-house providing rules as an alternative to open tendering.

The new European intervention has however raised several questions.

Firstly, the admission of cooperation agreements from European Union requires preliminary analysis of the elements that legitimize them and the identification of specific criteria to evaluate its legitimacy. The results of this analysis were particularly important for clarifying what is – or will be – the impact on internal national agreements (the reference is art. 15 L. 241/90 and art. 30 Leg. 267/00). These agreements will need to be reinterpreted in the light of European Union's law.

The intervention of the European Community is actually part of a much broader debate concerning the analysis of the relationship between two different principles: the protection of the competition in Europe versus the power of public authorities to organise and govern themselves. Indeed, the intervention will clarify the extent to which the European Union can protect free competition while not sacrificing the principle of organizational autonomy of its Member States. This question is not trivial when considering that the European Union may use the legislation protecting open competition to justify the interven-

tion in areas from which they are traditionally excluded in force of the art. 5 of the Treaty on European Union. For example, the introduction of obligatory public procedures that administrations must respect to award public contracts has an impact on the legislative procedural autonomy of the Member States; in the same light, the Remedies Directive 2007/66/EC, which has imposed a particular motion to contest the adjudication of public procurement, has limited the legislative procedural autonomy of the Member States.

This framework of protection of conflicting requirements, outlined by the decision of the Court of Justice C-480/09, has set the first milestones in the field of cooperation agreements. At the same time, it has given a new impetus into the issue of the relationship between the administrative power of self-organization and the protection of competition.

In Chapter I, I will try to outline the conditions of the issue; as mentioned, it seems to be clear that the European Union have imposed a policy of harmonization aimed to create the EU single market based on four fundamental freedoms (freedom of movement of capital, goods, people and services): the protection of competition "in" and "for" the market as one of the tools implemented by the European Union to reach this purpose. This policy has in fact led to the liberalization of large sectors of the market in the different Member States and this by imposing a public procedure to ensure a proper competition and *equality* for tenders that participate therein.

However, it appears that the protection of competition can become inadequate with the principle of self-organization of the public authorities, which is protected by the national constitutional art. 97, as well as by other legal systems of established by the different states members (for example in France with the rule of the *Principe de libre administration des autonomies locales* pursuant to art. 2, para. 2 and 3 of the French Constitution).

It is well known that this principle gives to each public institution the power to choose the organizational structure more efficient, effective and economical in order to achieve his public purpose. This can even include some forms of coordination and/or cooperation among public administrations under contract (by signing agreements between intergovernmental organizations) or institutionalized (through the creation of legal entities such as consortia, enterprises etc.)

The question of the relationship between open market and organizational self-autonomy is especially relevant for areas which concern activities with potential contentious cases, in which the public authorities have a real choice in between the *make* (self-generation) or the *buy* (outsourcing to third parties).

Related to these questions, the European case law, mostly in a first time, was supporting competition by interpreting restrictively any exception to the procedures for procurement by contracting authorities. In this perspective, the same Court of Justice has made clear that an agreement between several autonomous governmental organizations need to be treated as a contract with eco-

nomic value exchange and therefore falling under the legislation that protect competition.

After that, I will draw attention to how the Court of Justice seems to have progressively changed its opinion by favouring the slow emergence of the principle of self-organization by the states Member in regard to the European law. In Chapter II, I will analyse two special models created by the Court of Justice as an alternative to public procurement: *in house providing* simple and horizontally integrated.

These regulatory models are the result of the valorisation of the principle of self-organization that allow a public institution to delegate its different departments or a new public institution, especially created in cooperation with others public administrations, for the accomplishment of their duties of public interest. It is with this point of view that the Court of Justice started to accept contractual forms of cooperation by creating the public-public cooperation's arrangement with the *Hamburg* judgement in 2009.

In order to analyse how these changes introduced at the EU level have been included at the national level, I will outline in Sec. I of the Cap. III the framework of inter-administrative negotiating tools already available in national law. Among these, I will define the category of administrative cooperation agreements (art. 15 L. 241/90 and art. 30 Leg. 267 / 00), analysing the conditions of legitimacy as well as those of distinction with public procurement contracts.

In Chap. III Sect.II, I will describe the recent evolution of the European legislation on the category of public contract among public contractors, by focusing the decision of the Court of Justice, as well as those provided by other European institutions. I will also discuss the adoption of the new European directives "Procurement and Concessions" in which there is a provision that contains a positive rule within the regulatory scheme, entitled *"Public contracts between entities within the public sector*". Furthermore, I will try to clarify, based on these texts, the current regulation of contracts between public administrations at the European level.

In light of these considerations, in the concluding chapter, I will attempt to provide answers to the questions asked in the opening of this work.

By analysing the recent case law and legal authors, I will show that the interpretation of the cooperation agreements, in the light of national stringent eligibility requirements set by European law, has restrictive effects on the market of goods, services and works. Indeed, the application of these principles seems to have given an extension of the principle of public evidence where previously activities were considered deductible in public agreements.

In regards to public services, recent changes appear to have provided an expansion of the self-organization by the States regarding cases previously believed to fall under the rules of the open market.

It will be noted that in some areas, the application of the requirements of legitimacy for public-public partnership has paradoxically led to a widening of the competitive market.

Moreover, the European intervention has also the merit of bringing the cooperation agreements within the national boundaries of legitimacy outlined by the legislature. This allows to avoid any unjustified extension and often elusive competition and to stay under the strict indications provided by the European legislator.

In regards to all these considerations, it seems correct to say that the European intervention has tried to confirm that the principles of competition and self-organization are mutually alternative and that they are equally protected in Europe. Indeed, it appears that the European Union does not wish to intervent directly in the organization of its Members States when there is not the possibility to circumvent the rules of the open market. Concomitantly, the European union also demonstrate a strong will to dictate conditions and limitations under which the government can freely exercise their power of self-organization.

Finally, I can interpret the emergence of the concept of "conformed self-organization" as a power not entirely free due to the existence of internal and external limits, making enclose it in an area where the organizational choice of an administration is not affecting the market and can be therefore always legitimate.