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Balancing individual will and social benefit: a study of contract regulation

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Sommario

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Abstract

Under the influence of liberal-derived legal-economic thought, the study of the contract has long been conducted with exclusive reference to the repercussions it presents against the parties who entered into it. In the light of this individualistic approach, an objectively unfair and socially inefficient contract has no disvalue where the set-up of interests declined therein corresponds to the will of the parties. This explains the scant attention paid to the "social efficiency" profiles of the normative and jurisprudential regulation of the contract. The gradual overcoming of liberal ideology in its most extreme declination and the emergence of a Welfare State model have meant that scholars' attention has also (and especially) turned to the social efficiency profiles of contract regulation. It is clear that an efficient contract regulation system generates a significant impact on market efficiency. The purpose of the research at this point is to examine, through the lens of the scholar of the economic analysis of law, the typological variety of correctives through which the policy maker improves the ratio of contract outcomes to achieve the social optimum by means of contractual negotiation within the context of Italian law.

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1. Introduction.

Efficiency is a concept considered relevant and central to many areas of society, including the legal field. This is a concept that emphasizes the need to maximize resource allocation and optimize procedures in order to achieve goals in a cost-effective manner. In Italian law, efficiency has gradually acquired an increasingly important role, first in private relationships and later also between public administrations and private individuals.

An examination of how efficiency has influenced the development of relational dynamics in Italian law will be indispensable.

Starting with an analysis of the conceptual basis of efficiency, we will note how this principle has been employed for an optimization of resource management and to promote a better allocation of goods in negotiated transactions (by which we include private contracts and agreements with public entities).

Theories of contract law - dogma of will and dogma of declaration - as well as their evolution and decline will be highlighted. The consequences of them on efficiency will be observed, providing insight into the interaction between legal and economic principles.

In the course of the discussion, the stages of vertical administrative action - characterized by the unilateral exercise of administrative power - will be traced, gradually arriving at a more equitable and even-handed approach. This change was necessitated by the consideration of efficiency not as mere compliance with procedural formalities but also and above all as achieving the optimal allocation of resources and the attainment of concrete results.

A key institution of this progressive transformation is that of "agreements", which abstractly should allow for more efficient allocation of resources and greater stability of transactions.

However, despite the potential benefits of agreements, the most significant challenges that hinder their consolidation will be analyzed.

Another institute grounded in efficiency is "dequotation of formal defects", which raises important questions about the relationship between efficiency and legality. This principle allows some measures with formal defects to remain valid, even if they do not comply with the law, in order to balance efficiency and legality.

2. The dogma of will and the critics of efficiency.

A contract is an agreement intended to constitute, extinguish and modify a property legal relation. It is structurally characterized by will and declaration, its essential elements. The will connotes the subjective element, i.e., the decision-making act of the parties, a manifestation of will capable of modifying the legal sphere of its authors. In other words, the will is expressed in the determination of the act and the

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intentional modification by the author of his own legal sphere. The declaration, on the other hand, coincides with the objective situation, i.e., the means by which the autonomy[1] of the authors is made known and knowable. The objective element of the contract consists of the declaration as the form of the transaction or as a vehicle; it is made of any outward manifestation (consisting of a gesture, concluding conduct, tacit declaration)[2]. The consequence of this circumstance is that the lack of external manifestation of will would render it irrelevant to the juridical system. Sometimes, the form required by the legislator has restrained configurations in order to empower the authors of the contract, so that they are protected and make the contract stable. The stability of the contract crystallizes the relationship between the parties and makes it efficient in terms of preserving its effectiveness.

These two elements have been mentioned as if they were coincident: but what if there is no concordance between declaration and will?

This question was resolved by an initial jurisprudence thesis endorsed by Savigny and the German authors of the second half of the 19th century.

The dogma of the will expresses the idea that the cornestone element of the legal transaction is the creative will of the individual. The idea that man could freely dispose of his actions as well as his property is inherent in the natural law school.

Such a theory leads towards the idea of a free manifestation of the will and the hegemony of the creative will. The consideration of the will in the aforementioned terms is also the consequence of the profound cultural and economic transformation of the era, dedicated to the rise of capitalism and industry. These were the leading elements of the ideals of a liberal, bourgeois society.

The idea of the contract was different from that of today.

Meanwhile today the contract also responds to the economic needs of stability and efficiency (understood in terms of preserving its effectiveness), the paradigm of the will was the result of an extreme liberalism that did not pose the question to reinforce an instrument abstractly capable of binding the parties.

Nowadays, the contract has "the force of law between the parties" and therefore involves the allocation of goods between contracting parties who value them differently.

The instability of the cooperation vehicle could have led to allocative inequities and precarious contractual relations.

The subjective-voluntarist conception was the result of a system that guaranteed to the individual the expression of his freedom. The recognition of autonomous

[1] What latins called *voluntas*.

[2] From which must be distinguished the solemn or *ad substantiam* form, which, on the other hand, is a formal and specific requirement imposed by the legislator whenever a 'free' outward manifestation is not deemed sufficient.

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economic initiative concretized a liberalist economy entrusted exclusively to the private.
The contract as an expression of the individual will was based on an ideological meaning; the dogma of the will as a political principle of the autonomy thereof.
The will theory acknowledges the essence of the contract in creative will of human.
In the event of conflict between will and declaration, the actual will prevails. The volitional element is what the legal transaction is based on. It is not sufficient that the will is revealed externally itself, but that it is coincident with the internal forum of the author. If the determination and the declaration do not coincide, the act has no value as a transaction. The legal transaction does not also consist of the author's determination but it is itself the declaration of will; it is, therefore, the implementation of the private individual's creative force.[3]
According to this thesis, all defects of the will have invalidating effect; except where the law gives relevance to the declaration by way of exception to the general rule.
Understood the legal and ideological dynamics of the contract according to the paradigm of the will, we must analyze the economic repercussions of the legal conception on economic transactions.
Of course, the contract is not *in re ipsa* referable to an economic transaction. Indeed, it is not the immediate result of economic rules and does not coincide with the underlying economic transaction. The contract is the instrument through which the trade becomes relevant to the legal system and through which the party may enforce its rights.
Although the contract is not the result of economic rules it is undoubtedly influenced thereof. The princing of a good is not merely arbitrary but adapts itself to the supply and demand economic rules.
The economic analysis of the contract intends the study of the contract as a general legal phenomenon[4] and the connection between the legal and economic rules. An economic rationalization of the legal rules is to be carried out by indicating and explaining economically optimal legal situations.
The economic analysis of trades allows us to identify the possible behaviors parties in a contract would be able to adopt pursuing their own advantageous.
Legal transactions have an object consisting of a trade exchange that is itself a promise. In the light of this, it is presupposed time elapses between the promise and actual execution. This is what creates uncertainties and risks that result in obstacles to exchange and cooperation.

[3] WINDSCHEID, *Diritto delle Pandette*, I, § 69, 202
[4] While in other circumstances it may be the case that the economic analysis of the contract would mean the evaluation of the individual contract in concrete and the assessment of the economic viability of the deal.

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Uncertainty and risk are the reasons who bring the parties to stipulate a contract capable of binding their promises to each other and susceptible of compulsory execution.
Let us take an example to allow an even quicker understanding of the economic rationalization of the dogma of the will: A decides to sell a tonne of fruit and B buys it. B buys the good, without fault or negligence, at a lower price than A would. A initially does not realize the error and enters into the contract.
What will the consequences be in terms of the economic efficiency of the contract? Is the contract to be interpreted as efficient in accordance with the dogma of the will?
The dogma of the will evaluates the internal forum of the contracting parties and not the mere contractual declaration. The act will therefore not have the value of a transaction. The expectation created on the part of the purchaser is not protected by the legal system, whose sole intention is to guarantee to the individual the conditions for the exercise of his or her freedoms.
In the next section we will analyze that the subjective-voluntarist theory renders the contract unstable and does not allow the contracting parties the possibility of relying on it; in other words, the contract is rendered inefficient by the idea of the lordship of the will. The instability of the cooperation vehicle leds to allocative inequities and precarious contractual relations.
The said thesis exposes itself to criticism that permeates on the difficulty of investigating the human psyche; a difficulty that produces uncertainties incompatible with the demands of economic transactions.
This is why the dogma of the will has subsequently been superseded by declarative and preceptive theories. After a legal analysis of the aforementioned dogmas, we will move on to an economic analysis of them.

3. The overcoming of the dogma of the will and the establishment of the theory of the declaration.

The decline of the voluntarist theory is explained by the fact that it requires a complex investigation of the inner will of the contracting parties.
In its most extreme development, it leads to the conclusion that any contractual declaration must be invalidated if it does not correspond to the real inner intention of the contracting party, thus likening the contract to a psychological fact.
The discrepancy existing between the internal will of the subject and the contractual declaration could be invoked as an argument for challenging the contract, paralyzing the stability of its effects.
The primary need to make trade and transactions between private individuals efficient has led courts, jurisprudence and the legislature to emphasize the other fundamental constituent element of the contract, namely that of the declaration.

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This does not mean debasing the role of the will, which is still the epicentric element of the contract, but to combine it with the principle of trust and responsibility of the author of the declaration.
On the other hand, it is clear that there are certain hypotheses in which the voluntarist element must prevail over the declaratory one: suffice it to think of the contractual declaration made by a person because he was forced to do so as a result of physical violence exercised upon him.
This implies that whoever enters a declaration into legal transactions must take care from the outset that it corresponds to his or her actual will.
Together with the declaration there must be the apparent intention, such that the other party is led to believe in the reality of the intention.
The tendency for the declaration to take precedence over the psychological will is based on two principles, namely: a) the principle of self-responsibility, whereby the person who places a declaration in the legal transaction must be bound by it on the basis of the expectation it creates in the third party; b) the principle of reliance, which looks to the recipient of the declaration, who diligently trusts in the seriousness of the declaration.

4. Declaration theory and economic efficiency.
In the previous section it was said that the full acceptance of the theory of the will, as developed within the German Pandettist school, would have deprived the contract of its natural vocation as an instrument of efficiency in the allocation of resources.
It is therefore appropriate to investigate the reasons why the dogma of the will, in its most extreme sense, generates inefficiency.
First of all, the possibility of alleging in court that contractual declarations do not correspond to the real will of the party that made them would exponentially multiply the number of trials.
This would lead to an increase in public expenditure in the area of the administration of justice.
Moreover, our procedural system (both in civil and criminal law) does not provide for the use of evidentiary tools capable of investigating the inner will of a party.
So, the lack of will could be invoked as a convenient excuse to paralyze the effects of a contract that is no longer deemed convenient.
The legal force of the contract is inseparably linked to the canon of efficiency in its various manifestations.
In the first place, it is instrumental to the efficiency of the exchange: if, in the absence of transaction costs, the contract is the instrument that ensures the most efficient allocation of resources, it is clear that this allocative arrangement can persist where

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the party is not given the subjective right to question it. The stability of the exchange allows for a clear definition in the allocation of rights between the parties.
Moreover, the negation of the will theory in its extreme sense, to which the binding character of contractual declarations is linked, is the most socially efficient solution.
Starting from a methodologically rigorous approach, it should be recalled that a policy is efficient if it generates among all possible economic situations, which one is the most desirable for society taking into account the alternatives.
Reasoning by absurdity, the acceptance of the voluntarist theory would have both negative repercussions on the volume of trade and on litigation costs. These are negative effects whose burden would fall on society.
The prevalence of the theory of the declaration, which does not, as mentioned, debase the voluntarist element, but balances it with the principles of self-responsibility and reliance, can also be explained on the basis of an economic analysis approach.
The objective of this paper is in fact to deal with certain legal disciplines that provide for the prevalence of the declaration over the will because they are more functional to economic efficiency.
The Italian civil code provides relevant examples in this regard, and these will be discussed from both a legal-formal and economic perspective (in close correlation with the category of efficiency).

5. Discipline of validation.

Article 1321 of the Italian Civil Code defines a contract as the means by which the parties constitute, regulate or extinguish a legal relationship having a patrimonial character.
It follows from the codified notion that the contract is configured as an explicative act of the human will, free and creative. The contract is a manifestation of will, and more precisely of a will aimed at the creation of legal relations of a patrimonial nature.
The fact that this is a central element is supported by what the civil code prescribes: it in fact provides for the so-called vitiating factors of the will as a cause of invalidity of the contract (Article 1427 et seq. of the Civil Code). This is a legal category that makes it possible to paralyze the effects of the contract insofar as what is declared in the contract does not correspond to the real will of the party, thus registering a contrast between declaration and will.
There are three of them, namely mistake, malice fraud and violence. Where they exist, the contract is voidable.
In the case of mistake, the conflict between will and declaration is the fact that what results from the contract, i.e. what has been declared, does not conform to the will of the party. Think of an error as to the nature of the transaction: I think I am entering

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into a sale-purchase agreement, whereas it is a lease-purchase agreement. For it to lead to the invalidity of the transaction, it must be essential, i.e. decisive, and recognizable.

With reference to malice fraud, the conflict between intent and declaration emerges insofar as the contractual declaration made by one party has been conditioned by the deception perpetrated against him by the other party. For example, one party presents another with a false building permit, fraudulently inducing him to purchase a plot of land that in reality cannot be built on.

The last vice of the will is violence, which may be physical or psychological. In this case too, the declaration made by the party in the contract does not conform to his will, the latter having been coerced precisely by the use of violence. Consider the case of the party who is forced to sell a good under duress.

According to the voluntarist approach, the presence of a contractual statement made in such a condition as to clash with the actual will would be entirely incapable of producing legal effects.

However, Article 1447 of the Civil Code provides for a mechanism, that of validation, inspired by obvious reasons of efficiency, which allows the salvation of a declaration made in conflict with the will.

This discipline allows the party whose will has been vitiated to obtain, once the defect has ceased (when, for example, the violence has ceased), permission to validate the production of the effects of that declaration.

This legal provision stands in stark contrast to the voluntarist approach in its most extreme sense.

In the light of the latter, even if the disruptive element had ceased to exist, the lack of intention would preclude in full the unfolding of the effects of that declaration.

With the validation discipline, the parties are allowed to keep the exchange intact and not generate new costs within them. Think of the case of a contract with a particular form (e.g. a real estate sale), which would again require a physical meeting between the parties and the presence of a notary, with a new outlay of money.

The legislator is well aware that such an approach panders to economic efficiency.

This efficiency is to be understood in a dynamic sense.

It is clear that when a party enters into a contract that does not conform to its will, it does not allocate resources efficiently, since the very fact of having been deceived or induced by violence to enter into the agreement leads to the presumption that it does not achieve an exchange that conforms to its utility.

However, in the period of time from the conclusion of the agreement to the termination of the defect, the moment from which the validation of the transaction may take place, the party may for whatever reason consider an exchange to be efficient.

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Think of the case in which a person has been swindled in connection with the purchase of a plot of land that is in reality undevelopable, but subsequently became so as a result of an authority order.
The exchange, initially harmful, thus becomes efficient and does not generate further costs through the institution of validation.

6. Ratification of the contract.

As already anticipated, the coincidence of will and declaration indicates the most successful condition of contract operation. A perfect contract presupposes the coincidence of will and declaration. Circumstances have been reported where these two elements were not coincident due to a defect in the will. The remedy provided by the legislature in these circumstances is validation, which as already pointed out is the transaction through which the party entitled to bring the action for annulment (for the defect inherent in the contract) decides not to bring it. This is the case when real estate purchased at less than average market value due to the alienator's malice is deemed buildable and subsequently becomes so.
Quite different is ratification, although the effects envisaged by the legislature are the same, to make the volitional element coincide with the declaratory element. The instrument *de qua* is employed whenever the one who is the recipient of the effects decides to make his or her own the effects of the transaction concluded by the *falsus procurator* (i.e., the one who falsely represented him or her).
Civil law knows instruments of representation, such as power of attorney, that enable the representative to execute the will of the sender. However, it may happen that the representative exceeds the limits of the power conferred on him (so-called excess of power), and this is the case of the representative who decides to purchase an object at a higher price than the one indicated by the principal - or that the transaction is concluded by a person who acts on behalf of another without having the power (so-called defect of power); an example is that of the person who aware of the will of his friend to buy a motorcycle, given the convenient price, decides to buy it on his behalf.
Underlying the necessity for the act of ratification is the principle that one cannot be allowed to affect the legal sphere of others by one's own activity.
The contract will not produce any effect in the legal sphere of the subject, and its invalidity is called ineffectiveness. This is because nullity pertains to the inherent defects of the contract, while voidability would allow the effects of the contract to be produced on the legal sphere of the addressee.
The economic analysis of the contract, as repeatedly anticipated, evaluates in terms of stability and therefore efficiency. A contract that is unstable as ineffective cannot be evaluated as efficient. It could be subject to trial of the action by the pseudo-

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represented party and give rise to litigation. If the legislature did not provide anything about this, the pseudo-represented party would first have to assert the invalidity of the act and then enter into a new transaction, albeit with the same contractual terms, to make the contract valid, effective and stable: in other words, efficient. We would have high transaction costs in terms of time, negotiation, judicial, and monetary terms that would not easily admit the new contract stipulation on equal terms. A worthy bargaining offer might become unaffordable because of the underlying transaction costs.

However, it should not be forgotten that transaction costs are equal to zero if the legislature so decides. The provision of a unilateral act of ratification almost totally zeroes transaction costs to stabilize a contract that would otherwise be inefficient in terms of allocative and negotiating stability. Ratification is an act of contractual efficiency that, like validation, admits that: a) the contract maximizes the allocation of assets with a posthumous declaration of will that allows the coincidence of will and declaration; b) transaction costs are significantly reduced by not requiring any negotiating, time, judicial, monetary expenses; c) reduce civil litigation (indirectly making the administrative process more efficient as well).

7. Efficiency in the relationship between public administration and the private sector.

In the light of what has been pointed out so far, it might appear that social efficiency is only pursued in the private sector. However, the misconception that public administration only pursues public goals while neglecting all other interests at stake should not emerge. According to a legal-economic consideration, public administration should not be regarded as an organization chart that only fulfils the primary interest. It must be understood in the sense that it primarily pursues the latter but also any other secondary interests that may be present in the case. In other words, the public administration should be regarded as a production company whose aim is to maximize the profit of its action and the satisfaction of its users.

What has been said, however, should not be taken for granted. The public system has not always been based on a contractual relationship between public administration and private individuals. The conception just mentioned is the result of the shift from a pyramid relationship to a contractual relationship in which the public administration is equal to the private individual.

Previously, traditional public law merely specified the relationship between the limits of action and procedural guarantees without understanding, however, that the protection of legality and impartiality were not sufficient.

In truth, it should be understood that public law (and with it public administration) also responds to the requirements of efficiency (consisting of optimizing the

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relationship between costs and profits) and effectiveness. Public administration is a delivery company and must respond to economic as well as public requirements for good performance.
The public system has been forced to transform into a system of production companies. Failure to consider the public system in such terms would have led to self-destruction because of the continuous waste of wealth. Wasted wealth could no longer be utilized and therefore could no longer perform the function of an economic multiplier.
This new awareness made sure to start the trend of privatizations (of public agencies, civil service relations, managers, setting minimum levels of operation) making the system not unlike a private one.
The salary of the public executive is also related to performance or result activity. The public executive enjoys a remuneration that is, on the one hand, "fixed" (so-called position pay) related to the qualification and duties held, and a "variable" (so-called result pay) related to the objectives that the executive manages to achieve in terms of productivity and profitability. This is a pay system that rewards objectives and results concretely achieved; an effective evaluation of managerial activity is carried out and brings the public economic system closer to the private pay mechanism.
The publicist system has been increasingly directed toward the consideration of the good performance of public administration not only as fair performance in the pursuit of the primary public interest (or to the needs of social solidarity) but also as economically sound performance. Public administration must be as effective and efficient as a business. For this very reason, the legislature has enunciated in Article 1 of Law No. 241 of 1990 that administrative activity shall pursue the operational criteria of economy and effectiveness.
There is a shift from the need to comply with the formalistic procedural criteria inherent in the existing legislation to a necessary consideration of the relationship between ends pursued and resources employed. In fact, the need to pursue interests with the appropriate means, that is, in an optimal manner, becomes apparent. The public administration, *rectius* the person in charge of the procedure will have to act according to good performance in economic and legal terms.

7.1. Supplementary and substitute agreements: a practically inefficient institution?

To this day, the power of imperium is the cornerstone of the public system that unilaterally influences the legal sphere of the private individual without his consent. However, it is understood that the administrative assessment of existing conditions and its unilateral determination is not always efficient. It does not always allow for a better allocation of the assets held by the parties and does not permit stability of the

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unilateral measure. A private party that sees its legal position harmed by a unilateral measure is more likely to appeal to the competent court. For a clearer understanding of the issue, the case of expropriation of real estate can be recalled. It is clear that the agreement is more efficient: a) because it maximizes the allocation of assets in consideration of the will of the parties; b) because of the reduction of administrative litigation (deriving from the possibility for the private party to assert its interests); c) because, taking into account the public interest pursued, the community benefits from the faster realization of the public work.

Replacing the vertical conception with that of equiordination makes negotiation preferable to imposition. This is especially true if several interests are to be assessed and weighed.

The Italian administrative system lends itself to an analysis of the efficiency of legal relations.

An interesting picture is that of the supplementary agreements provided for in Article 11 of Law No. 241 of 1990. Already before Article 11, the use of agreements had emerged, first in practice and later in special legislation in particular contexts (first of all the already mentioned subdivision for the building of large parts of land). The agreement is based on a discretionary content of the measure that allows a better balancing of the interests under consideration and thus in more general terms a more efficient allocation of the assets in question.

This is not a foregone conclusion since an agreement presupposes the presence of a more or less wide range of choices. A constrained power admits of no negotiation between the parties because it is limited to a single possible choice. In the case under consideration, the private party may promote the agreement by submitting observations and proposals during the procedure (i.e. the formation of the measure). Article 11(1bis) grants the person in charge of the procedure the possibility of organizing informal meetings between the administration and private interested parties by initiating what could be defined as negotiating tables. The public administration is not obliged to enter into the agreement and this circumstance mitigates but does not entirely remove the asymmetrical nature of the public administration-private relationship. We will not dwell on the strictly legal issues surrounding this institution, since it is sufficient to point out that agreements may be supplementary or substitutive.

Supplementary agreements provide for the determination of the content of the final measure that will in any case be issued in implementation of the agreement. Replacement agreements, on the other hand, do not provide for the issuance of the final measure. They produce their effects with the conclusion of the agreement and without the issuance of an implementing act.

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Furthermore, it is relevant to emphasize, for the subsequent analysis of possible transaction costs, that agreements must be preceded by an authorization of the body responsible for issuing the final measure for determining the limits of negotiation.
Since it is clear what is meant by agreements in the public system, it must be understood whether or not they can have a future through an economic analysis of law. Here again it should be anticipated that an institution can be efficient if its allocation of assets maximizes the profits of the parties involved and if transaction costs are not such that they do not limit its implementation.
Agreements allow us to believe that the public administration, conforming to a private system of efficiency, effectiveness and economy also pursues interests other than the primary good. Agreements abstractly respond to the economic corollaries of efficiency in terms of better allocation and especially stability of the measure. We will, therefore, have an agreement in which one party (the public body) primarily envisions the attainment of public benefits and secondarily private benefits and another party (private) whose purpose is to pursue only private benefits.
The private party is granted a contractual power that does not exist in the ordinary procedural phase of the formation of the procedure, which would admit to the same the exhibition of any challenges for the protection of its own participatory interest that would be evaluated by the administration without the relationship of *pari passu* typical of agreements.
From an economic point of view, therefore, it must be accepted that supplementary or substitute agreements are efficient if they maximize outcomes and transaction costs do not exceed the marginal benefits of negotiation.
They must provide greater or different utility to both parties than would be provided by the authoritative measure. Failure to do so would only result in an alternative procedure with no practical reason.
They must firmly bind the relationship between the parties by allowing for an integration of the content of the measure by identifying a common interest between private autonomy and administrative discretion (understood by the Italian legal system as the possible choice among a range of possible positions respecting the regulations in force).
They must be based on the common interest between public administration and private party i.e. the economic interest. Nevertheless, for the private party the latter will have a primary character while for the public administration secondary.
Agreements, if they comply with the directions listed above should be considered efficient tools.
They maximize asset allocations in consideration of the will of the parties. Let us recall that the preferences of individual parties are not always easy to determine and

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that a negotiation between them allows for a more expeditious depiction of the individual's preferences.
One of the factors that make the implementation of the above agreements more feasible is the existence of an administration motivated in a managerial sense.
The economy and quality of the result, the product of the goal set by the public administration, are, as anticipated, the basis of managerial remuneration itself.
Managerial rewards is *pari passu* with good performance in public administration. The pursuit of an economic objective corresponds to good performance. This can also be indirectly deduced from the legislation that grants public managers a performance-related salary.
According to what has been said so far, it can a fortiori be held that public administration is bound to pursue the most efficient economic choice with overriding pursuit of the primary public or collective interest. The primary objective, consisting of the public interest, is not conflicting with the secondary interest, which now more than ever increases in importance.
Efficiency (as well as allocative) can also be considered in terms of negotiation stability. A settlement if consensual reduces litigation related to the change in the legal sphere of the subject of the measure.
Therefore, public negotiation efficiency also indirectly leads to procedural efficiency.
At this point a question arises: if public administration agreements are optimal for compliance with the criterion of cost-effectiveness (also provided for in Article 1 of Law No. 241 of 1990) why are they so poorly implemented? What could be the related reasons for the low expansion of a phenomenon that abstractly should be efficient?
Until now, no consideration has been given to transaction costs, which, if too high, can make a negotiation inefficient. Transaction costs should be understood not only in terms of monetary loss but also in terms of resources. The expression pertains to costs arising from negotiation, information, execution, etc...
A systematic analysis of administrative regulations suggests the presence of high transaction costs and also a particular instability of the agreement.
Failure to enforce agreements is caused by the difficult contact between private parties and the public administration. Despite the fact that Law No. 241 of 1990 introduces a process manager for a direct relationship with the public administration, the latter is not directly empowered to enter into negotiations with private parties in pursuit of the public interest. In fact, it is required, as already anticipated, that the person in charge of the procedure be authorized by the body responsible for issuing the administrative measure for identifying the limits of the negotiation. This entails a not insignificant procedural slowness that results in the non-immediate application of the content of the measure (which could result in a loss for the public

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administration). The very need to carry out negotiations requires resources (time and money).

A further issue relates to the bargaining "strength" that a private party must have in order to be able to condition the activity of the administration; that is, to succeed in convincing the public administration to come down from its authoritative position.

Recall that the public administration "can" enter into agreements (meaning that the public administration is not forced to enter into an agreement). Private parties capable of standing up to the public administration can only be companies with large economies of scale and economic power and association-based entities. However, the economic-legal requirement for parties with economic power is completely absent because of their ability to directly affect the life of the country without the need for supplementary agreements. While, on the other hand, associative bodies are present only in limited areas such as consumer protection and environmental protection. The only area in which parity can be felt in practice is the territorial-local area, where there is a direct relationship between the administered and administrators. A political body, such as the local body, needs to preserve political consensus, including through the use of supplementary agreements.

Despite the fact that these aspects are already indicative of the inefficiency of the public store we are referring to, the element that makes the public agreement of Article 11 of Law No. 241 of 1990 little used is the possibility of withdrawal of the public administration. Indeed, Paragraph 4 of Article 11 provides that "for reasons of public interest that have arisen, the administration shall unilaterally withdraw from the agreement, subject to the obligation to provide for the payment of compensation in relation to any prejudice incurred to the detriment of the private party". The obscurity of the legislative text, which indicates as grounds for withdrawal any "supervening reason of public interest" manifests an instability of the concluded agreement. A private party would hardly have any interest in wasting valuable resources on the negotiation necessary to determine the subject matter of the agreement, only to see any attempt at enforceability subsequently fade away, almost like a fog of smoke.

Nor does the protection guaranteed by the legislature, consisting of the determination of compensation "for any prejudice that has occurred to the detriment of the private party", seem sufficient. This is because compensation has a restorative function that is not necessarily proportional in economic terms to the disservice suffered; Compensation is intended to repair an injury by restoring the situation prior to it.

7.2. Administrative measure and de-quotation of formalities.

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Italian legal doctrine is accustomed to contrasting the contract, as a manifestation of private autonomy, of the free will of the parties who, as they see fit, decide to regulate their own interests, with the administrative measure, an authoritative act of the administration, capable of unilaterally affecting the legal sphere of the addressees.

The activity of the public administration has a fundamental constraint, namely that of the law. The principle of legality dominates administrative action. This makes administrative power not arbitrary, but subject to the rule of law.

The subordination of administrative power to the law of Parliament, an institution endowed with direct democratic legitimacy, constitutes a fundamental guarantee for the private individual from potential arbitrary Executive power.

This means that if an administrative measure is in conflict with a rule of law, it becomes subject to challenge for violation of the law.

A citizen who is aggrieved by an administrative measure may appeal to the Regional Administrative Court to have the measure declared invalid and its effects terminated.

However, like what has been said with regard to contracts in the previous paragraphs, administrative law too is increasingly inspired by an efficiencyist logic.

If, with regard to contract law, the efficiencyistic logic rested on the dialectic between will and declaration, in this case the contrast is intertwined with legality.

Article 21 octies of Law No. 241/90 (the so-called law on administrative procedure) provides for a discipline that aims to introduce a significant departure from its general framework. The general principle is that any administrative measure issued in violation of the law is voidable, i.e. one can turn to the judge to request the cessation of the effects of the act itself.

Thus, the non-compliance of the measure with the provision of the law renders it voidable.

The exception to this principle is given by the fact that in the presence of certain breaches of law, the measure is in any case not voidable: this is the rule of the so-called "dequotation of formal defects". Pursuant to the rule in question, in fact, two cases are provided for that do not permit the annulment of the measure notwithstanding its non-conformity with the law.

The first case of derogation establishes that the measure cannot be annulled if three conditions exist: a) that rules on administrative procedure are violated; b) that the measure has a binding character; that it is obvious that the operative content of the measure could not have been different from what was adopted.

The second hypothesis occurs when, having failed to give prior notice of the commencement of proceedings, the administration proves to the court that the content of the measure could not have been different from that actually adopted.

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These are defects of a purely formal nature, i.e. they do not affect the operative content of the measure, i.e. the arrangement of interests (assignment of rights, gravament of obligations).
The reason why the legislator has refrained from invalidating measures with merely formal defects is to ensure the efficiency of administrative action.
From the standpoint of economic analysis, the administrative measure, like the contract, is an instrument for allocating rights and conversely obbligations. What changes with respect to the contract is that in this case the allocation is determined by the exercise of the Public Administration's power of authority, instead of the common will of the parties.
It follows that there is an inseparable link between the allocation of resources and the substantive content of the measure: substantiality consists in fact in the suitability of the measure to permit the redistribution of resources. Consider the case of a decree ordering the expropriation of land to be used for the construction of a public work.
The reason for efficiency stems from the fact that the distribution of resources would be perfectly coincident both in the case of the existence of the defect and in the case of an administrative measure that complies with the law.
If the formally flawed measure could be challenged, the costs of administrative litigation would increase exponentially, without, however, providing substantial protection to the citizen.
The citizen, as *homo economicus*, has an interest in having the good of life attributed to him or returned to him, he does not have a direct and primary interest in having the administrative activity comply with formal obligations.
Therefore, the legislature did not consider it necessary to initiate a process with significant costs that would be essentially of no use to the plaintiff.
In addition to the procedural side, this rule also induces efficiency from the point of view of administrative activity, as administrative measures achieve stability.
However, it must be taken into account that exist a trade-off between efficiency and legality.
The dequotation of formal defects could lead the administration to breach its formal obligations.
The danger is that it could be a convenient expedient for nonchalantly violating formal obligations. It should be remembered that these are legal obligations in any case and therefore the administration is bound to observe them.
Therefore, it is necessary to introduce a deterrent that can make the administration responsible for complying with formal obligations, the violation of which, however, does not entail the annulment of the act.
In this regard, the case law of the Council of State has intervened, which has established that although the administrative measure that violates formal obligations

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is not voidable, it may nevertheless give rise to a liability on the part of the administration, which is required to pay a pecuniary sum.

8. Conclusions.

Given that the efficiency represents an important principle of both private and public law, ensuring his observance implies the existence of trade-offs between efficiency and other alternative values.

Having regard to contract law, it has been emphasized that to configure an agreement as efficient requires sometimes to sacrifice the epicentric element of the contract itself, namely the voluntee. Validation and ratification legal disciplines represent the main examples of the existence of the said trade-off.

The relevance of the efficiency is so strong that this principle makes an irruption in the field of the administrative law, wherein the exigences of public expenditure have suggested the use of contractual models.

However, the legislator should discipline the law making use of peculiar technics of economic analysis that would encourage a better activity of comprehension of the system.

Such as the private law, it would not be sufficient that in the public legislation would be provided for a possible agreement between public administration and the private; it's necessary that the legislator would limit transaction costs that are to high to allow a better allocation of goods.

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