

The Imperative Need to Chart a “National Path” for Artificial Intelligence in Administrative Proceedings: Opportunity and Legitimacy of a National Regulatory Framework Complementing the AI Act*

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ABSTRACT The AI Act, though hailed as a landmark in global regulation, leaves the administrative sector in a state of unresolved uncertainty. By omitting a comprehensive framework for AI in public functions, it risks dismantling safeguards previously secured through case law and national legislation. This contribution explores the resulting fragmentation and argues for a nuanced, principle-based national response.

KEYWORDS: AI Act - Administrative law - Human oversight - Algorithmic transparency

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1. AI Act and the Administrative Sector: Many Questions, Few Answers

In June 2024, the European Union formally adopted the Regulation on Artificial Intelligence.¹ The legal community had awaited this moment with great anticipation, viewing it as a historic milestone that placed the European Union at the forefront of global regulatory efforts.² This sentiment was shared

by administrative law scholars,³ who have

is constantly evolving and closely tied to broader geopolitical dynamics (on this dimension of competition between global “powers”, see the volume by *Limes*, *L'intelligenza non è artificiale*, 12, 2022). Consider, for instance, the abrupt policy reversal introduced by the Trump administration, which, shortly after taking office, repealed the executive order “on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” issued by his predecessor on 30 October 2023. As for the impact that technology regulation may have on wealth distribution - and the need for an inclusive digital vision that does not further exacerbate inequality - reference should be made to the seminal work of D. Acemoglu and S. Johnson, *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity*, London, John Murray Publishers Ltd, 2023.

³ Among the numerous studies on the subject, and without claiming to be exhaustive, the following may be noted: B. Marchetti, *Intelligenza artificiale, poteri pubblici e rule of law*, in *Rivista italiana di diritto pubblico comunitario*, 1, 2024, 49 ff.; G. Lo Sapio, *L'Artificial Intelligence Act e la prova di resistenza per la legalità algoritmica*, in *Federalismi*, 16, 2024; S. Francario, *La decisione amministrativa automatizzata secondo il Regolamento UE 2024/1689*, in *this Journal*, 31 October 2024; A. Cerrillo i Martínez, *El impacto del Reglamento de Inteligencia Artificial en las Administraciones públicas*, in *Revista Jurídica de les Illes Balears*, 26, 2024; I. Hasquenoph, *Commande publique : quels enjeux au lendemain du règlement européen sur l'intelligence artificielle?*, in *AJ Collectivités Territoriales*, 2025, 147; A.G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l'impatto*

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¹ Regulation (EU) No. 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) No. 2018/858, (EU) No. 2018/1139 and (EU) No. 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), published in the Official Journal of the European Union, L Series, on 12 July 2024.

² Positioning the Union as a “regulatory giant” that, however, remains a “technological dwarf” when compared to the United States and China - two countries that pursue profoundly different approaches (as recently noted by L. Torchia, *Pubblica amministrazione e transizione digitale*, in *Giornale di diritto amministrativo*, 6, 2024, 729). Moreover, the landscape

actively engaged, for over half a decade,⁴ in a new wave of research on the topic. Yet the expectation that the European legislator would provide definitive answers to the numerous legal uncertainties surrounding the matter has, for the most part, gone unfulfilled.

Indeed, we may now be facing a regulatory framework that is even more ambiguous than

dell'IA Act sull'assetto regolatorio dell'informatica pubblica, forthcoming in *Diritto pubblico*.

⁴ Indeed, in Italy, the earliest reflections on the topic date back more than thirty years (A. Predieri, *Gli elaboratori elettronici nell'amministrazione dello Stato*, Bologna, 1971, 52; G. Duni, *L'utilizzabilità delle tecniche elettroniche nell'emanazione degli atti e nei procedimenti amministrativi. Spunto per una teoria dell'atto emanato nella forma elettronica*, in *Rivista amministrativa della Repubblica italiana*, 1978, 407 ff.; B. Selleri, *Gli atti amministrativi «in forma elettronica»*, in *Diritto e società*, 1982, 133; G. Caridi, *Informatica giuridica e procedimenti amministrativi*, Milan, Franco Angeli editore, 1983, 145; V. Frosini, *L'informatica e la p.a.*, in *Rivista trimestrale di diritto pubblico*, 1983, 48; A. Usai, *Le prospettive di automazione delle decisioni amministrative in un sistema di teleamministrazione*, in *Il diritto dell'informazione e dell'informatica*, 1993, 17 ff.; among the monographs, see A. Masucci, *L'atto amministrativo informatico. Primi lineamenti di una ricostruzione*, Naples, Jovene, 1993 and U. Fantigrossi, *Automazione e pubblica amministrazione*, Bologna, Il Mulino, 1993). The current wave of interest is merely the latest phase in a much broader and longer-standing debate. Indeed, there have been at least two other distinct "seasons" of legal scholarship following the pioneering works in the field. The first took place in the early 2000s, spurred by developments in administrative case law (A.G. Orofino, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, in *Foro amministrativo C.d.S.*, 2002, 2276; F. Saitta, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo*, in *Diritto dell'economia*, 2003, 615; D. Marongiu, *L'attività amministrativa automatizzata*, Santarcangelo di Romagna, Maggioli editore, 2005; A.G. Orofino and R.G. Orofino, *L'automazione amministrativa: imputazione e responsabilità*, in *Giornale di diritto amministrativo*, 12, 2005, 1300 ff.). The second, more recent and still ongoing, is the product of the rapid technological acceleration seen since the mid-2010s. While quantitatively more abundant, this body of work largely continues along the lines already traced by earlier studies. Among these, again without claiming to be exhaustive and focusing only on monographic works, reference may be made to: G. Avanzini, *Decisioni amministrative e algoritmi informatici. Predeterminazione, analisi predittiva e nuove forme di intellegibilità*, Naples, Editoriale Scientifica, 2019; V. Brigante, *Evolving pathways of administrative decisions. Cognitive activity and data, measures and algorithms in the changing administration*, Naples, Editoriale Scientifica, 2019; A. Di Martino, *Tecnica e potere nell'amministrazione per algoritmi*, Naples, Editoriale Scientifica, 2023; E.M. Menéndez Sebastián, *From Bureaucracy to Artificial Intelligence: The Tension between Effectiveness and Guarantees*, Milan, Wolters Kluwer, 2023.

the one previously developed through case law and sector-specific legislation.⁵

There can be little doubt that the AI Act is intended to apply to public administrations as well. The vast majority of early commentators support this view,⁶ rightly focusing in particular on the definitions of "provider" and "deployer" set out in Article 3, paragraphs 3 and 4, which explicitly refer to "public authorities".⁷ Although public entities are

⁵ The reference is, respectively, to administrative case law - most notably that of the Italian Council of State (Council of State, sect. VI, 8 April 2019, n. 2270; Council of State, sect. VI, 13 December 2019, n. 8474; Council of State, sect. VI, 4 February 2020, n. 881, with a commentary by A.G. Orofino and G. Gallone, *L'intelligenza artificiale al servizio delle funzioni amministrative: profili problematici e spunti di riflessione*, in *Giurisprudenza italiana*, 2020, 1738; for a description of the broader context in which these rulings emerged, see L. Carbone, *L'algoritmo e il suo giudice*, in www.giustizia-amministrativa.it, 2023) - and to Article 30 of Italian Legislative Decree No. 36 of 2023 (for an analysis of which, see G. Gallone, *Digitalizzazione, amministrazione e persona: per una "riserva di umanità" tra spunti codicistici di teoria giuridica dell'automazione*, in *P.A. Persona e Amministrazione*, 1, 2023, 329 ff.; D.U. Galetta, *Digitalizzazione, Intelligenza artificiale e Pubbliche amministrazioni: il nuovo Codice dei contratti pubblici e le sfide che ci attendono*, in *Federalismi*, 12, 2023, 4 ff.; M. Barberio, *L'uso dell'intelligenza artificiale nell'art. 30 del d.lgs. 36/2023 alla prova dell'AI Act dell'Unione europea*, in *Rivista italiana di informatica e diritto*, 2, 2023). In general on the subject of digital simplification see A.G. Orofino, *La semplificazione digitale*, in *Il diritto dell'economia*, vol. 100, 2019, 87.

⁶ In this sense, see B. Marchetti, *Intelligenza artificiale, poteri pubblici e rule of law*, cit., 49; G. Lo Sapio, *L'Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 269; S. Francario, *La decisione amministrativa automatizzata secondo il Regolamento UE 2024/1689*, cit.; V. Neri, *AI Act e diritto amministrativo*, in *Lavoro, diritti, Europa*, n. 1, 2025; I. Hasquenoph, *Commande publique : quels enjeux au lendemain du règlement européen sur l'intelligence artificielle?*, cit.; A. G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l'impatto dell'IA Act sull'assetto regolatorio dell'informatica pubblica*, cit.

⁷ Moreover, there are other provisions within the Regulation - most notably Articles 27 and 86 - that impose specific obligations exclusively on public deployers (as well as on those entrusted with a public service). These include, respectively, the requirement to carry out a fundamental rights impact assessment and the duty to ensure explainability of individual decision-making processes. As I. Hasquenoph, also notes in *Commande publique : quels enjeux au lendemain du règlement européen sur l'intelligence artificielle?*, cit., "Notons qu'il ne paraît pas impossible que cette qualification de fournisseur s'applique à l'administration lorsqu'elle développe une solution d'IA en interne : le règlement y inclut en effet les «autorités publiques». Dans ce cas, le droit de la commande publique est neutralisé" ("It should be noted that it is not inconceivable that the qualification of «provider» could

clearly included within the Regulation’s subjective scope - albeit under a specific qualification - it is evident that its provisions were neither conceived nor crafted with the administrative domain’s specificities in mind.⁸

This shortcoming stems from a fundamental flaw in the Union’s regulatory approach: its ambition to govern the phenomenon of artificial intelligence through a “horizontal” framework, implemented by means of a regulation. It hardly needs stating that artificial intelligence - being a foundational technology with potentially limitless applications - is inherently difficult to regulate. A meaningful approach can only rest on a minimal, principle-based framework that transcends the logic of individual legal domains.⁹

The result - at least from the standpoint of administrative law - is a regulatory framework marked by notable gaps. This becomes particularly evident when considering its practical implications, especially when reflecting on what would occur if, following the Regulation’s entry into force,¹⁰ it were to

apply to a public administration when it develops an AI system in-house: indeed, the Regulation explicitly includes «public authorities». In such cases, public procurement law becomes inapplicable”).

⁸ In this terms, G. Lo Sapio, *L’Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 270. Even more explicitly, A. Cerrillo i Martínez, *El impacto del Reglamento de Inteligencia Artificial en las Administraciones públicas*, cit., 104, observes that: “No obstante, a pesar del protagonismo de las Administraciones públicas en la aplicación del RIA y el impacto que la norma europea puede tener en su funcionamiento o en la toma de decisiones públicas y la prestación de servicios públicos, no podemos desconocer que el RIA no es una norma pensada para las Administraciones públicas” (“Despite the prominent role played by public administrations in the implementation of the AI Regulation, and the significant impact that the European measure may have on their operations, decision-making processes, and delivery of public services, it must be acknowledged that the AI Regulation was not conceived with public administrations in mind”).

⁹ A.G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l’impatto dell’IA Act sull’assetto regolatorio dell’informatica pubblica*, cit., aptly notes that: “La poca incisività dell’IA Act è [...] anche conseguenza fisiologica della difficoltà di regolazione delle materie caratterizzate da elevato tasso di tecnicismo” (“The limited incisiveness of the AI Act is [...] also a physiological consequence of the inherent difficulty in regulating domains marked by a high degree of technical complexity”).

¹⁰ The Regulation’s entry into force has, as is well known, been staggered. At the time of writing, the provisions set out in Article 5 of the Regulation have

be applied - by virtue of the direct effect of many of its provisions - to the functioning of the public administration.

2. Fragmented Regulation, Legal Gaps, and the Risk of a Collapse of Safeguards: The Case of the “Human Oversight Clause” and Algorithmic Transparency

Before turning to two specific aspects, it is useful to briefly recall the main pillars of the Regulation in order to assess the potential impact that its bare provisions might have within the administrative domain.

The structure of the AI Act rests, in particular, on the categorization of artificial intelligence systems according to a risk-based approach,¹¹ aimed at defining the applicable legal regime. These systems, except for certain specific categories,¹² are classified into four main types: those “prohibited” under Article 5 of the Regulation; those deemed “high-risk” pursuant to Article 6; certain systems falling under Article 50, which are subject to limited transparency obligations (“limited-risk”); and, lastly, all remaining systems, which are regarded as posing “minimal risk”.¹³

The first two categories are defined exhaustively and are governed by specific regulatory provisions. The third, by contrast, operates on a residual basis in relation to the former and is not subject to a dedicated legal framework under the Regulation.

Within the scope of this analysis, Article 6 represents the true cornerstone of this

already entered into force (as of 2 February 2025). In contrast, the rules concerning high-risk AI systems will become applicable at a later stage - albeit with further distinctions - as of 2 August 2026.

¹¹ This represents the most recent frontier of the “law of risk”, with the main reference being A. Barone, *Il diritto del rischio*, Milan, Giuffrè, 2006. For a critical analysis of the risks underlying the AI Act - particularly regarding the predetermined classification of risk levels based largely on axiological grounds, and its static nature (which increases the likelihood that such categories may be either over - or under - inclusive) - see C. Novelli, *L’Artificial Intelligence Act Europeo: alcune questioni di implementazione*, in *Federalismi*, 2, 2024, 95 ff.

¹² The reference is essentially to the so-called “general-purpose AI models” governed by Articles 51 ff. of the Regulation. The notion of a “general-purpose AI model” is provided under point n. 63) of Article 3 of the same Regulation.

¹³ On this fourfold classification, see G. Lo Sapio, *L’Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 282.

categorization, as it identifies - so to speak - its normative core.¹⁴

The provision classifies “high-risk” artificial intelligence systems through an external reference to Annex III,¹⁵ which provides an exhaustive list of systems that are “considered to be high-risk”.¹⁶ Indeed, as some scholars have pointed out, it is difficult to overlook that this somewhat unwieldy list certainly includes areas that fall squarely within the scope of administrative action.¹⁷ One example, among others, is Annex III, para. 5, letter (a), which refers to “AI systems

intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for essential public assistance benefits and services, including healthcare services, as well as to grant, reduce, revoke, or reclaim such benefits and services”.¹⁸

Conversely, there is no general provision that classifies as “high-risk” all artificial intelligence systems used to support the performance of public functions and the exercise of authoritative powers. This becomes particularly clear when compared to the “justice” sector, for which such a provision does, in fact, exist.¹⁹ Moreover, it should not be overlooked that, during the complex legislative process that led to the adoption of the AI Act, an amendment was proposed - though ultimately not approved - to include also those AI systems supporting administrative activity among the high-risk systems, following the model established for judicial activity.²⁰

The intention of the European legislator, as reflected in the final version of the Regulation, appears to have been not to classify, in general terms, the use of AI in support of administrative activity as “high-risk”, except in those specific cases that are exhaustively listed in Annex III (including, for instance, the aforementioned Annex III, para. 5, letter a).²¹

¹⁴ For a detailed analysis of the provision and, more generally, of the classification techniques for high-risk AI systems, see A. Huergo Lora, *Classification of ai systems as high-risk*, in A. Huergo Lora (ed.), *The EU regulation on artificial intelligence: a commentary*, Milan, Wolters Kluwer, 2025, 79 ff.

¹⁵ Indeed, Article 6(1) of the Regulation sets out a specific category of “high-risk” AI systems, the boundaries of which are rather vague and problematic. In particular, this includes any system that simultaneously meets the following conditions: a) it must be “intended to be used as a safety component of a product” or to be “itself a product” that is “covered by the Union harmonisation legislation listed in Annex I” b) As such, it “is required to undergo a third-party conformity assessment, with a view to the placing on the market or the putting into service of that product pursuant to the Union harmonisation legislation listed in Annex I”. Annex I contains an exhaustive “list of Union harmonisation legislation” which, although covering a range of areas - from the “safety of toys” and “lifts and safety components for lifts” to “in vitro diagnostic medical devices” - does not appear, at least directly, to intersect with the exercise of public powers.

¹⁶ The exhaustive nature of the list derives from the wording of Annex III, which, although referring to entire “sectors”, does not contain any safeguard or residual clauses that would allow it to be interpreted as merely illustrative (see A. Huergo Lora, *Classification of ai systems as high-risk*, cit., 84). It is worth recalling that the Regulation itself, in Article 7, provides for the possibility for the Commission to amend Annex III by means of delegated acts (and thus through the procedure outlined in Article 97) “by adding or modifying use-cases of high-risk AI systems” subject to two cumulative conditions. Specifically: “the AI systems are intended to be used in any of the areas listed in Annex III” (lett. a) and “the AI systems pose a risk of harm to health and safety, or an adverse impact on fundamental rights, and that risk is equivalent to, or greater than, the risk of harm or of adverse impact posed by the high-risk AI systems already referred to in Annex III” (lett. b). For an in-depth analysis of this normative mechanism - which might well be used by the Commission to include additional uses of AI systems in the administrative domain among those classified as “high-risk” - and its relationship to the distinct provision under Article 6(3) of the Regulation, see A. Huergo Lora, *Classification of ai systems as high-risk*, cit., 125 ff.

¹⁷ G. Lo Sapio, *L’Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 282.

¹⁸ But also, as noted by B. Marchetti, *Intelligenza artificiale, poteri pubblici e rule of law*, cit., la “gestione e il funzionamento di infrastrutture critiche” (“the management and operation of critical infrastructures”) or the determination of access or admission to educational institutions at all levels.

¹⁹ All. III, para. 8, lett. a) according to which are considered high-risk those “AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution”. For a discussion of the implications of this classification, reference may be made to G. Gallone, *Riserva di umanità, intelligenza artificiale e funzione giurisdizionale alla luce dell’IA Act. Considerazioni (e qualche proposta) attorno al processo amministrativo che verrà*, in *Judicium*, 2024.

²⁰ The reference is to Amendment 738 to the Proposal for a Regulation, which sought to modify the text of Annex III, paragraph 8, letter a), by classifying as high-risk all “AI systems intended to be used by, or on behalf of, a judicial authority or an administrative body to assist in the investigation and interpretation of facts and law, and in the application of the law to a concrete set of facts, or used in a similar way in alternative dispute resolution procedures”.

²¹ For a reflection on the impact of the list set out in Annex III in the field of public administration, see G.

The implications of this choice are readily apparent.

The first and most evident implication lies in the fragmentation of the legal framework.²² Indeed, only those AI systems used in the exercise of administrative functions that are expressly classified as “high-risk” will fall under the specific legal regime established by the Regulation.

This quite evidently results in the absence of a general qualification and in a high degree of legal uncertainty, which, especially at an early stage, may hinder the use of artificial intelligence tools. In fact, each case will require an assessment as to whether a particular AI use in the public sector falls within one of the categories - sometimes vaguely defined - listed in Annex III.²³ And considering that a significant portion of the provisions comprising the regulatory framework for “high-risk” systems has direct effect, it is easy to foresee that these uncertainties in application may also fuel litigation concerning automated administrative activity.

However, the most delicate repercussion of the European legislator’s regulatory choice

concerns the level of safeguards ultimately granted by the AI Act. Following the rationale underlying the four-tier categorization on which the Regulation is built, AI systems employed in the performance of administrative functions that do not fall under the category of “prohibited” systems pursuant to Article 5, nor qualify as “high-risk” under Article 6, are bound to be classified either as “limited-risk” systems or, residually, as “minimal-risk” systems. For these categories, the Regulation does not provide for an *ad hoc* legal framework, except for the possibility of a voluntary extension of the legal regime applicable to high-risk systems through the adoption of codes of conduct pursuant to Article 95, paragraph 1 of the Regulation.²⁴

²⁴ Article 95(1) of the Regulation provides, in particular, that: “The AI Office and the Member States shall encourage and facilitate the drawing up of codes of conduct, including related governance mechanisms, intended to foster the voluntary application to AI systems, other than high-risk AI systems, of some or all of the requirements set out in Chapter III, Section 2 taking into account the available technical solutions and industry best practices allowing for the application of such requirements”. As noted by A. Nicolás Lucas, *Codes of conduct and guidelines*, in A. Huelgo Lora (ed.), *The EU regulation on artificial intelligence: a commentary*, Milan, Wolters Kluwer, 2025, 540, codes of conduct are an expression of self-regulation that accompanies globalization. They are “set of principles, guidelines, and ethical standards designed to guide the development, deployment, and responsible use of Artificial Intelligence systems”. Part of the legal scholarship (G. Barrachina Navarro and Andrés Boix Palop, *The applicability of the Artificial Intelligence Act to the field of public administration and public services*, cit., 385) has argued that a similar solution could be pursued also in the field of public administration - namely, the voluntary extension, in whole or in part, of the safeguards provided for high-risk systems to low-risk AI systems “through codes of conduct”. However, the reliance on such atypical regulatory tools, whose legal nature remains uncertain, may further fragment the regulatory framework of administrative action by leaving the adoption of the safeguards provided in Chapter III, Section 2 of the Regulation to the discretion of individual deployers - that is, public authorities. Moreover, it risks clashing with the principle of substantive legality, which, as affirmed by the Italian Constitutional Court in its well-known ruling (Constitutional Court, 4 April 2011, no. 115), must govern the exercise of administrative powers. The complex relationship between the principle of legality and the digitalization of administrative functions has been explored - particularly in connection with technical rules - by F. Cardarelli, *Amministrazione digitale, trasparenza e principio di legalità*, in *Il diritto dell’informazione e dell’informatica.*, 2015, 238 ff. The relationship between legality and automated administrative decisions, instead, lies at the core of the reflections made by S. Civitarese Matteucci, «*Umano troppo umano*». *Decisioni amministrative automatizzate*

Barrachina Navarro and Andrés Boix Palop, *The applicability of the Artificial Intelligence Act to the field of public administration and public services and special features regarding compliance: special attention to Annex III and administrative action and particularities of compliance*, in L. Cotino Hueo and D.U. Galetta (eds.), *The European Union Artificial Intelligence Act. A Systematic Commentary*, Naples, Editoriale Scientifica, 2025, 383 ff.

²² In these terms, see A.G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l’impatto dell’IA Act sull’assetto regolatorio dell’informatica pubblica*, cit.

²³ The Regulation seeks to carry out an *ex ante* risk-based classification, which, however, fits poorly with the inherently dynamic nature of AI systems - particularly those based on machine learning - that evolve and change over time (see G. Lo Sapio, *L’Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 283). For this reason, the European legislator introduced a specific corrective mechanism which, upon closer examination, ends up constituting an additional source of uncertainty. In particular, Article 6(3) of the Regulation provides that, under certain conditions, even an AI system listed in Annex III shall not be considered to be high-risk “where it does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making”. A particularly important example of uncertain classification is that of public procurement award procedures, on which see the observations of M. Barberio, *L’uso dell’intelligenza artificiale nell’art. 30 del d.lgs. 36/2023 alla prova dell’AI Act dell’Unione europea*, cit., 6.

This entails the inapplicability of the safeguards provided under the Regulation.

Nonetheless, it is beyond doubt that many conceivable applications of AI within the public sector do not fall under the scope of Annex III, yet are still capable of significantly affecting individuals' fundamental rights and freedoms.²⁵

Despite their sensitivity, such applications would face a weakening - or even a dismantling - of safeguards previously developed at national level by legal scholarship and case law, and subsequently codified by the legislature in special legislation.²⁶

Two particularly critical concerns arise.

First, the "human oversight" safeguard under Article 14 of the Regulation²⁷ would apply only to those uses by public authorities - which, in fact, represent a clear minority - that fall within the scope of Annex III. Outside of this narrowly defined framework, the principle of non-exclusivity of algorithmic decision-making would not apply,²⁸ thereby betraying

the so-called "human-in-the-loop" safeguard.²⁹

Second, the safeguards on algorithmic transparency laid down in Article 13 would also be excluded,³⁰ except, at most, for the far more lenient and optional provisions (applicable only to "limited-risk systems") set out in Article 50 on "Transparency obligations for providers and deployers of certain AI systems".

It is clear that such a construction - particularly if no room for corrective action were to be left to the national legislator - would give rise to profound tensions with fundamental constitutional principles. This applies both to the "human oversight" requirement, which is constitutionally protected under Articles 2, 54, 97, and 98 of the Italian Constitution and at the

landmark judgment of the Italian Council of State, sect. IV, 8 April 2019, n. 2270, cit.

²⁹ The expression "reserve of humanity" (in Spanish "reserva de humanidad") was first coined by J. Ponce Solè, *Inteligencia artificial, Derecho administrativo y reserva de humanidad algoritmos y procedimiento administrativo debido tecnológico*, in *Revista General de Derecho Administrativo*, 50, 2019. In its minimal meaning, it corresponds to the prohibition on exercising administrative powers through fully automated decision-making, without any involvement of a human being. It also reflects the broader idea that, at both constitutional and supranational levels, there exists an irreducible and non-negotiable sphere of individual rights (on this point, see also G. Gallone, *Riserva di umanità e funzioni amministrative. Indagini sui limiti dell'automazione decisionale tra procedimento e processo*, Milan, Wolters Kluwer, 2023). For an interpretation of what EU law means by "solely automated decision-making", albeit with reference to Article 22 GDPR and its interpretation by the Court of Justice of the EU, see C. Silvano, *La nozione di "decisione completamente automatizzata" sotto la lente della Corte di Giustizia: il caso Schufa*, in *CERIDAP*, 4, 2024, 270 ff.

³⁰ As well as the even more significant "Right to explanation of individual decision-making" and, specifically, "to obtain from the deployer clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken", as established by Article 86 of the Regulation, solely in favour of the person "subject to a decision which is taken by the deployer on the basis of the output from a high-risk AI system listed in Annex III, with the exception of systems listed under point 2 thereof, and which produces legal effects or similarly significantly affects that person in a way that they consider to have an adverse impact on their health, safety or fundamental rights". On the transparency safeguards provided for under the AI Act, see A. Palma Ortigosa, *Transparency and provisions of information to deployers (article 13)*, in A. Huergo Lora (ed.), *The EU regulation on artificial intelligence: a commentary*, Milan, Wolters Kluwer, 2025, 79 ff.

e principio di legalità, in *Diritto pubblico*, 1, 2019, 5 ff.

²⁵ An impact of which the European legislator is fully aware, given that Article 27 of the Regulation establishes - for only certain high-risk AI systems - the obligation for public deployers (as well as private entities entrusted with a public service) to carry out a fundamental rights impact assessment.

²⁶ Concerns shared by I. Hasquenoph, *Commande publique: quels enjeux au lendemain du règlement européen sur l'intelligence artificielle?*, cit., who warns of the risk of "under-regulation", noting that: "Surtout, le règlement édicte des obligations spécifiques à l'égard des SIA à haut risque, mais les exigences qu'il pose à l'égard des autres SIA sont finalement assez limitées. Par ailleurs, il prévoit des dérogations: un SIA figurant sur la liste de l'annexe III ne sera pas considéré comme étant à haut risque «lorsqu'il ne présente pas de risque important de préjudice pour la santé, la sécurité ou les droits fondamentaux des personnes physiques, y compris en n'ayant pas d'incidence significative sur le résultat de la prise de décision" ("Above all, the Regulation lays down specific obligations for high-risk AI systems, but the requirements it imposes on other AI systems are ultimately quite limited. Furthermore, it provides for exceptions: an AI system listed in Annex III will not be considered high-risk "where it does not pose a significant risk of harm to the health, safety, or fundamental rights of natural persons, including by not having a significant impact on the outcome of decision-making").

²⁷ On this point, see G. Lazcoz Moratinos, *Human oversight (article 14)*, in A. Huergo Lora (ed.), *The EU regulation on artificial intelligence: a commentary*, Milan, Wolters Kluwer, 2025, 243 ff.

²⁸ A notion first introduced by A. Simoncini, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in *BioLaw Journal – Rivista di BioDiritto*, 1, 2019, 69 and subsequently endorsed in the

supranational level under Article 1 of the Charter of Nice,³¹ and to algorithmic transparency.³² Such a scenario could even lead to the invocation of counter-limits,³³ or prompt domestic courts to pursue the path of a preliminary reference on validity before the Court of Justice, relying - by way of a primary Union law benchmark - on the Charter of Fundamental Rights of the European Union.³⁴

³¹ The constitutional and supranational foundation of the “human oversight” requirement has been thoroughly examined in G. Gallone, *Riserva di umanità e funzioni amministrative*, cit., 41 ff.

³² For a comprehensive analysis of the constitutional and European dimension of the principle of transparency - between the Treaties, the Charter of Nice, and the ECHR - see A.G. Orofino, *La trasparenza oltre la crisi. Accesso, informatizzazione e controllo civico*, Bari, Cacucci, 2020, 47 ff. and 193 ff. In case law, these foundations have been analytically addressed in Italian Council of State, Plenary Assembly, 4 April 2020, No. 10, paras. 22.3 ff. On the role of transparency as a counterbalance to automation, see also A. Corrado, *La trasparenza necessaria per infondere fiducia in una amministrazione algoritmica e antropocentrica*, in *Federalismi*, 22 February 2023.

³³ The doctrine of “counter-limits”, originally developed in Italian legal scholarship (P. Barile, *Rapporti tra norme primarie comunitarie e norme costituzionali e primarie italiane*, in *Comunità internazionale*, 1966, 14), has experienced a rather troubled trajectory in case law - especially in more recent times, following the innovations introduced by the Treaty of Lisbon - becoming a field of contention between the Constitutional Court and the Court of Justice. For an overview, see A. Lo Calzo, *Dagli approdi giurisprudenziali della Corte costituzionale in tema di controlimiti alle recenti tendenze nel dialogo con le Corti nel contesto europeo*, in *Federalismi*, 13 January 2021.

³⁴ Dignity is enshrined as a cornerstone of supranational human rights catalogues, being expressly placed at the outset of both the 1948 Universal Declaration of Human Rights and the Charter of Fundamental Rights of the European Union. Indeed, Article 1 of the latter (entitled “Human dignity”) provides that “Human dignity is inviolable. It must be respected and protected”. On the role and legal value of the Charter in light of the new Article 6 of the Treaty on European Union, see C. Salazar, *A Lisbon Story: la Carta dei diritti fondamentali dell’Unione europea da un tormentato passato... a un incerto presente?*, in *Gruppo di Pisa*, 3, 2011; P. Gianniti (ed.), *I diritti fondamentali nell’Unione Europea. La Carta di Nizza dopo il Trattato di Lisbona*, Bologna, 2013; L.S. Rossi, *Stesso valore giuridico dei Trattati? Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell’Unione europea*, in *IL Diritto dell’Unione europea.*, 2016, 329 ff. For an in-depth analysis of the role of the principle of human dignity in the case law of the Court of Justice, see P. Mengozzi, *Il principio del rispetto della dignità umana, la Carta dei diritti fondamentali dell’UE e la giurisprudenza della Corte di giustizia*, in *Annali A.I.S.D.U.E.*, II, Naples, 2021, 536 ff.

3. The Issue of the Admissibility of National Regulatory Intervention in the Field of Administrative Decision-Making Automation through Artificial Intelligence

The risk of a general reduction in safeguards makes national regulatory intervention not only appropriate but arguably necessary to complement the AI Act.

These considerations certainly do not exempt the legal scholar from questioning whether such a regulatory intervention is also admissible within the framework of the relationship between national law and Union law. Indeed, this is a matter that primarily concerns the structure of the system of sources in a legal order which, even in the administrative sphere, has by now clearly become multilayered.

Moreover, the existence or absence of a regulatory margin available to the national legislator is a matter of pressing and current relevance, as highlighted by the most attentive legal scholarship.³⁵

And this is not only due to the upcoming entry into force of the part of the Regulation concerning “high-risk” AI systems, but also because, in May 2024, on the occasion of the G7 summit under the Italian presidency, the Government introduced a bill entitled “Provisions and Delegations to the Government on Artificial Intelligence”.³⁶

³⁵ B. Marchetti, *Intelligenza artificiale, poteri pubblici e rule of law*, cit. In support of the admissibility of legislative intervention by the Member States are, within domestic legal scholarship, C. Burelli, *Prime brevi considerazioni sul “ddl intelligenza artificiale”: incompatibilità o inopportunità?*, in F. Ferri (ed.), *Rivista Quaderni AISDUE - L’Unione europea e la nuova disciplina sull’intelligenza artificiale: questioni e prospettive*, Naples, 2024; at the European level, see O. Mir Puigpelat, *The impact of the AI Act on public authorities and on administrative procedures*, in *CERIDAP*, 4, 2023, 247 ff.; A. Cerrillo i Martínez, *El impacto del Reglamento de Inteligencia Artificial en las Administraciones públicas*, cit., 104, according to whom: “será necesario que las Administraciones públicas dispongan de unas normas ajustadas a los principios que guían su funcionamiento y que garanticen de manera adecuada los derechos de las personas cuando se relacionan con ellas” (“it will be necessary for public administrations to have rules that are aligned with the principles guiding their functioning and that adequately guarantee the rights of individuals when interacting with them”).

³⁶ This is Senate Bill No. 1146, introduced on 20 May 2024 and announced during sitting No. 191 of 21 May 2024, available at www.senato.it. On 20 March 2025, the bill was approved by the Senate of the Republic and subsequently transmitted to the Chamber of Deputies

Notably, Article 14 of the bill includes provisions on the “Use of artificial intelligence in public administration”, introducing a general “human oversight” requirement in the context of automated administrative functions and reaffirming the centrality of safeguards concerning algorithmic transparency.³⁷

The risk of an overlap with the AI Act (meanwhile adopted) was, in fact, perceived from the outset by the national legislator, who not only expressly ruled out such a possibility in the technical-normative analysis, but also included an explicit clause reserving the primacy of Union law.³⁸

In keeping with the principle of loyal cooperation, the presentation of the bill was followed by an exchange of correspondence with the European Commission concerning certain aspects of the bill itself. While the outcome of this dialogue remains provisional and confidential, it is unlikely to yield definitive conclusions - especially regarding AI use by public administrations, which seems not to have been directly discussed.

In any case, in such an evolving framework, there are elements suggesting that national regulation of AI-driven administrative decision-making might be deemed inadmissible.

First and foremost, it is almost superfluous to recall that the European legislator opted for

for consideration.

³⁷ In particular, Article 13 of the aforementioned draft law provides, in its first paragraph, that: “Public administrations shall use artificial intelligence with the aim of increasing the efficiency of their activities, reducing the time needed to conclude administrative procedures, and improving the quality and quantity of services provided to citizens and businesses, while ensuring that the functioning of such systems is made comprehensible to the data subjects and that their use is traceable”. Paragraph 2, for its part, generally states that: “The use of artificial intelligence shall serve as a tool and support for administrative decision-making, without prejudice to the autonomy and decision-making power of the individual, who remains solely responsible for the measures and procedures in which artificial intelligence has been employed”.

³⁸ As stated on page 35 of the documents accompanying the bill, “the measure is compatible with the European legal order” and “does not overlap with the forthcoming European regulation on artificial intelligence (‘AI Act’), approved by the European Parliament on 13 March, but rather complements its regulatory framework within the areas falling under national law.” Moreover, Article 1, paragraph 2, of the bill provides that “The provisions of this law shall be interpreted and applied in conformity with European Union law”.

the adoption of a regulation enacted through the legislative procedure. What we are dealing with, therefore, is a source of secondary law of the European Union, which possesses the well-known characteristics set out in Article 288 TFEU. A regulation is, in particular, a general act, binding in all its parts and, above all, “directly applicable” in Member States. Its direct applicability implies that, as a general rule, it does not require implementation at national level.³⁹

However, it must be added that the specific legal basis for the adoption of the AI Act was Article 114 TFEU, which is set out in Chapter 3 of Title VII of Part Three of the Treaty and governs the instruments for the “Approximation of Laws” aimed at achieving the objectives referred to in Article 26 - namely the “establishment” and “functioning of the internal market”.⁴⁰ Even within this specific framework, however, it appears - as previously noted - that the Regulation was conceived with the ambition of providing a general and horizontal regulation of the phenomenon of artificial intelligence.⁴¹

This is particularly evident not only from the Recitals,⁴² but also from the provisions on its

³⁹ On the characteristics of regulations as a source of secondary law of the European Union, see R. Adam and A. Tizzano, *Manuale di diritto dell’Unione Europea*, Turin, Giappichelli, 2017, 170 ff. As noted by C. Burelli *Prime brevi considerazioni sul “ddl intelligenza artificiale”: incompatibilità o inopportunità?*, cit., 240, the provisions of a regulation produce immediate effects within the legal systems of the Member States, without requiring national authorities to adopt any implementing measures. However, this does not exclude that certain provisions may require, for their full and proper implementation, the adoption of enforcement measures at the national level - provided that such measures “do not obstruct its direct applicability, do not conceal its nature as an act of Union law, and specify the exercise of the discretion granted to them by the regulation, while remaining within the limits of its provisions” (Court of Justice of the EU, 12 April 2018, C-541/16, *Commission v. Denmark*, paras. 27 e 28).

⁴⁰ As well as, for the part concerning the processing and protection of personal data, Article 16 TFEU (see B. Marchetti, *Intelligenza artificiale, poteri pubblici e rule of law*, cit.). For a more in-depth analysis on the subject, see M. Inglese, *Il regolamento sull’intelligenza artificiale come atto per il completamento e il buon funzionamento del mercato interno?*, in F. Ferri (ed.), *Rivista Quaderni AISDUE - L’Unione europea e la nuova disciplina sull’intelligenza artificiale: questioni e prospettive*, Naples, 2024, 71 ff.

⁴¹ G. Lo Sapio refers to it as “transversal” in *L’Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 269.

⁴² Awareness of this transversal nature clearly emerges,

material scope of application, in particular Article 2, paragraph 3, second sentence, of the Regulation, which excludes only the military sector from its scope.⁴³

The Regulation itself, moreover, addresses - in certain instances - the interaction with national legislation. The AI Act, in fact, contains specific provisions that permit or authorise legislative intervention by Member States, even by way of derogation from the regulatory framework. A clear example is Article 5(5), which concerns the use of real-time remote biometric identification systems.⁴⁴ Emphasising such provisions, one might argue - albeit through a formalistic lens - that *ubi lex voluit, dixit; ubi non voluit, tacuit*, thereby excluding any national regulatory scope beyond the cases expressly provided for by EU law. Finally, any acknowledgment of the possibility for national legislative intervention must confront the tangible risk of regulatory overreach, including in the form of so-called “gold plating” - a phenomenon to be avoided, as it introduces legal uncertainty and jeopardises the very principle of the primacy of Union law.⁴⁵

for instance, in Recital 3, which states that “AI systems can be used in a wide range of sectors of the economy and in many parts of society, including across borders”. Similarly, Recital 8 expresses the ambition to create “a Union legal framework establishing harmonised rules on AI to foster the development, placing on the market and use of AI in the internal market while ensuring a high level of protection of public interests, such as health and safety and the protection of fundamental rights, including democracy, the rule of law and environmental protection, as recognised and protected under Union law”.

⁴³ The aforementioned provision indeed establishes that: “This Regulation does not apply to AI systems where and in so far they are placed on the market, put into service, or used with or without modification exclusively for military, defence or national security purposes, regardless of the type of entity carrying out those activities”.

⁴⁴ It is specifically provided that: “A Member State may decide to provide for the possibility to fully or partially authorise the use of ‘real-time’ remote biometric identification systems in publicly accessible spaces for the purposes of law enforcement within the limits and under the conditions listed in paragraph 1, first subparagraph, point (h), and paragraphs 2 and 3. Member States concerned shall lay down in their national law the necessary detailed rules for the request, issuance and exercise of, as well as supervision and reporting relating to, the authorisations referred to in paragraph 3”.

⁴⁵ This is the risk highlighted by C. Burelli *Prime brevi considerazioni sul “ddl intelligenza artificiale”: incompatibilità o inopportunità?*, cit., 260, who notes

4. A (Possible) Pathway for Opening a “National” Route to Artificial Intelligence in Administrative Procedure

Notwithstanding the potential counterarguments discussed in the preceding paragraph, the prevailing considerations appear to favour the admissibility of national legislative intervention in the matter.

First of all, it must not be overlooked that, as already noted, the legal basis for the adoption of the AI Act is Article 114 TFEU, and that, therefore - regardless of the type of legislative instrument chosen - the underlying rationale remains that of the “approximation” (rather than the complete harmonisation) of national laws.⁴⁶

Moreover, as already mentioned, the purpose of the Regulation - explicitly stated in Article 1(1) - is “to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation”.⁴⁷

that “qualora venga imposta un’armonizzazione massima, non potendo gli Stati membri discostarsi da quanto previsto dall’atto UE, ogni eventuale sovraregolamentazione è verosimilmente fonte di una violazione del diritto dell’Unione, in quanto tale suscettibile di essere contestata con una procedura di infrazione” (“where maximum harmonisation is imposed, and Member States are not allowed to depart from what is provided for by the EU act, any form of overregulation is likely to constitute a breach of Union law and, as such, may give rise to infringement proceedings”).

⁴⁶ In this regard, see the observations made by B. Cappiello, *The EU and the AI ACT. Was it worthwhile to be the first?*, in *CERIDAP*, 4, 2024, 235 ff., who reflects on the appropriateness of the Union legislator’s choice to rely on the broadest legal basis available in the Treaties for a matter of shared competence (namely, the internal market pursuant to Article 4(2)(a) TFEU), and to do so from the perspective of fundamental rights protection (which, in itself, would not constitute an autonomous legal basis), through the instrument of a regulation - whereas, typically, in relation to Article 114 TFEU, the preferred instrument is the directive, possibly with detailed provisions.

⁴⁷ On the role of fundamental rights in the AI Act, see E. Cirone, *L’AI Act e l’obiettivo (mancato?) di promuovere uno standard globale per la tutela dei diritti fondamentali*, in *Quaderni AISDUE*, 1, 2025, 12 ff. The author notes that, within the AI Act, fundamental rights are referred to as “public interests” (see Recital 7), “to be protected alongside health and safety, within the broader and more general context of product safety”.

It may be inferred that the European legislator primarily conceives of artificial intelligence as a *res*,⁴⁸ and more precisely as a market product, particularly from the standpoint of ensuring its free movement.⁴⁹

This stems from the fact that, in general, the EU legislator is required to respect fundamental rights when exercising the competences conferred upon it by the Treaties. What distinguishes this Regulation from other EU legislative instruments is that “la tutela dei diritti fondamentali costituisce, assieme alla previsione di standard tecnici, lo scheletro dell’intero impianto normativo e non, invece, uno dei vari requisiti da rispettare. Il rischio per i diritti fondamentali diventa, infatti, il principale criterio per la previsione di obblighi più stringenti” ([the protection of fundamental rights, together with the definition of technical standards, constitutes the backbone of the entire legal framework, rather than merely one of several compliance requirements. The risk to fundamental rights becomes, in fact, the main criterion for the imposition of more stringent obligations] E. Cirone, *L’AI Act e l’obiettivo (mancato?) di promuovere uno standard globale per la tutela dei diritti fondamentali*, cit., 12). Indeed, as mentioned, the negative impact of an AI system on the fundamental rights guaranteed by the Charter constitutes a co-criterion for classifying an application as high-risk (see Article 6(3)). Moreover, the impact on fundamental rights is also a criterion to be followed in the *ex-ante* assessment required for the use of high-risk AI systems under Article 6(2), which must be carried out by “deployers that are public sector bodies” (see Article 27 of the Regulation).

⁴⁸ This is also the perspective outlined by C. Iurilli, *Il diritto naturale come limite e contenuto dell’intelligenza artificiale. Prime riflessioni sul nuovo Regolamento Europeo “AI Act”*, in *Judicium*, 24 June 2024, which frames artificial intelligence as a “*res tecnologica*” and as a “product or consumer good”. Along similar lines, see also M. Inglese, *Il regolamento sull’intelligenza artificiale come atto per il completamento e il buon funzionamento del mercato interno?*, cit., 86. Likewise, G. Barrachina Navarro and Andrés Boix Palop, *The applicability of the Artificial Intelligence Act to the field of public administration and public services*, cit., 365, observe that the AI Act “is a regulation that, applying the lessons learned from decades of public control over safety and control requirements with regard to the placing on the market of products (or, although less frequently, the provision of services that may also entail environmental or safety problems), establishes a series of protocols and requirements typical of this field”.

⁴⁹ Thus, in particular, the second part of Recital 1, according to which: “This Regulation ensures the free movement, cross-border, of AI-based goods and services, thus preventing Member States from imposing restrictions on the development, marketing and use of AI systems, unless explicitly authorised by this Regulation”. However, as has rightly been observed by O. Mir Puigpelat, *The impact of the AI Act on public authorities and on administrative procedures*, cit., 248, “this does not seem to be aimed at preventing Member States from conditioning the use of AI systems by national public authorities, but rather at preventing them from imposing additional restrictions on the development and use of such systems in the private sector. The free movement of goods and services is conceived for citizens and businesses, not for public

From this essentially static - rather than dynamic - perspective, the EU regulatory framework focuses on the tool itself as the object of regulation,⁵⁰ rather than on its use, except in certain particularly sensitive applications.⁵¹ Admittedly, the boundary between these two dimensions is not always clear-cut; indeed, regulating the tool may, in certain cases, also entail a degree of regulation of its use.⁵² This is borne out by Article 1(2) of the Regulation, which, through what appears to be an all-encompassing approach, sets out to establish “harmonised rules for the placing on the market, the putting into service and the use of AI systems in the Union”.

However, for the purposes most relevant here, it appears necessary to acknowledge - as

authorities, which cannot oppose to their national legislator that a European Regulation entitles them to develop and use a certain software system without additional limitations”.

⁵⁰ G. Lo Sapio observes (*L’Artificial Intelligence Act e la prova di resistenza algoritmica*, cit., 281) that: “se il focus è il mercato dell’era digitale, si spiega perché il Regolamento abbia preso in considerazione i sistemi di IA secondo un approccio risk-based, analogo a quello seguito per la sicurezza dei prodotti pericolosi” (if the focus is the market in the digital age, it becomes clear why the Regulation has considered AI systems according to a risk-based approach, similar to that adopted for the safety of dangerous products).

⁵¹ It cannot be denied that, in certain cases - though they should be considered exceptional - the Regulation’s provisions also extend to specific uses of artificial intelligence. The most emblematic case is that of biometric identification, in relation to which the intentions of the European legislator are made explicit in Recital 35 (“Each use of a «real-time» remote biometric identification system in publicly accessible spaces for the purpose of law enforcement should be subject to an express and specific authorisation by a judicial authority or by an independent administrative authority of a Member State whose decision is binding”).

⁵² This opinion is shared by B. Marchetti, *Intelligenza artificiale, poteri pubblici e rule of law*, cit., who notes that the effect of the Regulation “non è solo quello di regolare il mercato comune stabilendo le condizioni in presenza delle quali i sistemi di IA, come prodotti, possono circolare ma anche l’uso che ne fanno le amministrazioni, individuando scopi proibiti e consentiti, settori di impiego e garanzie degli interessati. Così facendo l’Unione disciplina, dunque, il modo in cui il potere pubblico usa l’IA definendo diritti e garanzie dei privati di fronte ad esso” (“is not limited to regulating the internal market by setting the conditions under which AI systems, as products, may circulate, but also extends to the way they are used by public administrations, identifying prohibited and permitted purposes, areas of application, and safeguards for those concerned. In doing so, the Union thus regulates the manner in which public authorities make use of AI, defining the rights and guarantees of individuals in their dealings with it”).

also noted in legal scholarship - that the regulatory framework established by the AI Act, particularly with regard to the possible uses of the tool, is not exhaustive⁵³ and therefore calls for further implementation, resulting in a form of partial harmonisation.⁵⁴

⁵³A.G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l'impatto dell'IA Act sull'assetto regolatorio dell'informatica pubblica*, cit.; Its lack of exhaustiveness also emerges from the observation - made by C. Burelli *Prime brevi considerazioni sul “ddl intelligenza artificiale”*: *incompatibilità o inopportunità?*, cit., 245 - that the AI Act “affida ampiamente alle future misure di attuazione della Commissione europea, che è incaricata, da un lato, di dettagliare e specificare alcuni aspetti della disciplina e, dall'altro lato e soprattutto, di aggiornarla e rinnovarla sulla base della fisiologica evoluzione tecnologica” (“extensively entrusts future implementing measures to the European Commission, which is tasked, on the one hand, with detailing and specifying certain aspects of the regulation, and on the other - and above all - with updating and revising it in light of the natural evolution of technology”). This is to be done both through “l'adozione di atti delegati (ad esempio, per aggiungere criteri di classificazione dei modelli di IA per finalità generali come modelli che presentano rischi sistemici, come disposto dall'art. 51)” (“the adoption of delegated acts (for example, to add classification criteria for general-purpose AI models considered to pose systemic risks, as provided for in Article 51)”) and through “atti esecutivi (ad esempio, secondo l'art. 50, per approvare o specificare eventuali codici di buone pratiche a livello UE per facilitare l'efficace attuazione degli obblighi relativi alla rilevazione e all'etichettatura dei contenuti generati o manipolati artificialmente) da adottarsi ex artt. 290 e 291 TFUE” (“implementing acts (for example, under Article 50, to approve or specify possible EU-level codes of good practice to facilitate the effective implementation of obligations related to the detection and labelling of artificially generated or manipulated content), to be adopted pursuant to Articles 290 and 291 TFEU”).

⁵⁴ As noted by C. Burelli *Prime brevi considerazioni sul “ddl intelligenza artificiale”*: *incompatibilità o inopportunità?*, cit., 260, “l'uso del regolamento da parte del legislatore UE indurrebbe a ritenere che il grado di armonizzazione richiesto dall'AIA sia, a ben vedere, massimo [...] Eppure, come si è visto, il tenore del regolamento non è eccessivamente prescrittivo e svariati spazi d'azione sono lasciati agli Stati membri, con ciò potendosi affermare che il grado di armonizzazione, se non propriamente minimo, non sia in senso stretto nemmeno massimo” (“the use of a regulation by the EU legislator would suggest that the degree of harmonisation required by the AIA is, in fact, maximal [...] Yet, as we have seen, the content of the regulation is not excessively prescriptive, and various areas of discretion are left to the Member States. It can therefore be argued that the degree of harmonisation, if not strictly minimal, is not, in the strict sense, maximal either”). The same author (*Ibid.*, 250), also observes that the AI Act “lasci, su più di un fronte, un indiscusso potere discrezionale a favore degli Stati membri, che, da questo punto di vista, hanno dinnanzi a sé un atto che, per certi versi, somiglia più a una direttiva che non a un regolamento in senso stesso, per sua natura idoneo a regolare direttamente e immediatamente (tutti) i rapporti

The legislator of the AI Act itself appears to be, at least to some extent, aware of this, as evidenced by Recital 153, which provides that “Member States hold a key role in the application and enforcement of this Regulation. In that respect, each Member State should designate at least one notifying authority and at least one market surveillance authority as national competent authorities for the purpose of supervising the application and implementation of this Regulation”.⁵⁵

giudici ad esso sottoposti” (“leaves, on more than one front, an undisputed margin of discretion to the Member States, which, from this perspective, are faced with an act that, in some respects, resembles more a directive than a regulation in the strict sense - an instrument that is, by its very nature, intended to regulate directly and immediately (all) the legal relationships to which it applies”). Thus, “la sensazione è che, lungi dall'essere autosufficienti, alcune di queste norme si avvicinino, talvolta, più che altro a dei «programmi di legislazione» e, in fondo, il largo affidamento agli atti delegati e di esecuzione della Commissione, così come all'ulteriore intervento legislativo o amministrativo da parte degli Stati membri, sembra dimostrarlo” (“the impression is that, far from being self-sufficient, some of these provisions come closer, at times, to ‘legislative programmes’; and ultimately, the extensive reliance on delegated and implementing acts by the Commission - as well as on further legislative or administrative measures by the Member States - appears to confirm this”). Similar conclusions are reached by M. Inglese, *Il regolamento sull'intelligenza artificiale come atto per il completamento e il buon funzionamento del mercato interno?*, cit., 85, who notes that “complessivamente inteso, l'approccio del legislatore [...] pare voler superare la rigida distinzione tra armonizzazione minima e massima in favore di un approccio maggiormente pragmatico, probabilmente dettato dall'ambito specifico oggetto di intervento normativo” (“taken as a whole, the approach of the legislator [...] seems to aim at overcoming the rigid distinction between minimum and maximum harmonisation, in favour of a more pragmatic approach, likely prompted by the specific subject matter of the normative intervention”).

⁵⁵ In these terms, see C. Burelli, *Prime brevi considerazioni sul “ddl intelligenza artificiale”*: *incompatibilità o inopportunità?*, cit., 246, who further notes that: “Anche nella relazione di accompagnamento della proposta di regolamento presentata dalla Commissione, era scritto che «le disposizioni del regolamento non sono eccessivamente prescrittive e lasciano spazio a diversi livelli di azione da parte degli Stati membri in relazione ad aspetti che non pregiudicano il conseguimento degli obiettivi dell'iniziativa»” (“Even in the explanatory memorandum accompanying the Commission's proposal for a regulation, it was stated that ‘the provisions of the regulation are not overly prescriptive and leave room for varying levels of action by Member States in relation to aspects that do not compromise the achievement of the objectives of the initiative’) in Explanatory memorandum to the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial

On another front, it must also be acknowledged that the scope of application of the Regulation, by virtue of the overall structure of the relationship between national and EU legal orders, is inherently limited. First and foremost, it is worth recalling that the fundamental criterion for the allocation of legislative competences between the Union and the Member States, as laid down in Article 5 TEU, is the principle of conferral. In light of this principle, there exists no general legal basis for regulating administrative activity.⁵⁶

While it is true that the European legislator frequently lays down fragments of procedural regulation, it does so by exercising specific competences, and through an approach that must be guided by *self-restraint*, in deference to the principle of procedural autonomy.⁵⁷

intelligence and amending certain Union legislative acts, Brussels, 21 April 2021, COM(2021) 206 final, in particular point 2.4.

⁵⁶ A.G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l'impatto dell'IA Act sull'assetto regolatorio dell'informatica pubblica*, cit.

⁵⁷ As observed by O. Mir Puigpelat, *The impact of the AI Act on public authorities and on administrative procedures*, cit., 249, "When the debate on the suitability of adopting a European codification of administrative procedure to be observed by all national administrations when implementing Union law has arisen, significant doubts have been raised about EU competence, arguing that this would infringe the so-called institutional and procedural autonomy of the Member States, and it has been considered more prudent to limit such a codification to the procedures of the Union administration, which has the solid legal basis provided by Art. 298 TFEU. In the same vein, Art. 41 of the Charter only applies directly to the EU administration, even though the CJEU has extended the principle of good administration that emerges from it to national administrations as well. It would not make much sense that, against this background, the EU legislator would and could deprive the Member States of their competence to shape the administrative procedure to be observed by their public authorities by means of a piece of legislation such as the AI Act, which is limited to regulating a certain type of

Software". As noted by D.U. Galetta, *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost? Studio sulla cd. autonomia procedurale ovvero sulla competenza procedurale funzionalizzata*, Turin, Giappichelli, 2009, 2, *et passim*, "la nozione comunitaria di diritto procedurale è assai più ampia di quello che noi siamo tradizionalmente abituato a considerare come tale. Poiché essa include anche previsioni che, nel nostro schema mentale «di diritto nazionale», noi identificheremmo come di diritto sostanziale: ma che in una prospettiva comunitaria, rientrano, invece, nella nozione ampia di «diritto procedurale», nella misura in cui si riferiscono a strumenti giuridici idonei a sanzionare il rispetto del diritto comunitario" ("the notion of procedural law under EU law is considerably broader than what we are

In the present case, moreover, it appears difficult to argue that a legal basis - such as the one previously mentioned - intended merely for harmonisation and aimed at ensuring the common functioning could be "stretched" to the point of allowing for a transversal occupation of the substantive domain of administrative procedure, whenever the use of artificial intelligence tools comes into play.

Secondly, account must be taken of Article 2(3) of the AI Act itself. According to that provision, "This Regulation does not apply to areas outside the scope of Union law, and shall not, in any event, affect the competences of the Member States concerning national security, regardless of the type of entity entrusted by the Member States with carrying out tasks in relation to those competences".

It follows that the binding force of the Regulation is in any case limited to situations in which public administrations operate within areas governed by European Union law and, therefore, only in cases of "indirect" or "shared" administration,⁵⁸ where national administrative authorities directly apply EU law. Outside of this scope, there is no issue - not even in abstract terms - of incompatibility between any potential national legislation and the AI Act.

Lastly, it must not be overlooked that, as also emerges from the initial Recitals of the Regulation, the protection of human rights - while not constituting the legal basis of the European legislative intervention - nonetheless represents one of its primary objectives. Therefore, the admissibility of national regulatory measures complementing the AI Act must also be assessed based on their capacity to implement and enhance the level of protection afforded by the legal

traditionally accustomed to consider as such. It also encompasses provisions which, within our national legal framework, we would classify as substantive law, but which - under a Community perspective - fall instead within the broader concept of "procedural law", insofar as they refer to legal instruments aimed at ensuring compliance with EU law").

⁵⁸ On the phenomenon of "administrative integration" at the EU level, see, from a textbook perspective and also for further bibliographic references, M.P. Chiti, *La pubblica amministrazione*, in M.P. Chiti (ed.), *Diritto amministrativo europeo*, Milan, Giuffrè, 2018, 197; H. Caroli Casavola, *L'amministrazione nazionale in funzione dell'Unione Europea*, in S. Del Gatto and G. Vesperi (eds.), *Manuale di diritto amministrativo europeo*, Turin, Giappichelli, 2024, 117 ff.

system with regard to such fundamental subjective positions, from a multilevel perspective.⁵⁹

In other words, legislative initiatives capable of correcting what has been described - harshly yet effectively - using a metaphor borrowed from the field of architecture, as the “brutalism” of the emerging European legal framework on digital technologies, should be viewed favourably.⁶⁰

In such a fragmented and complex framework, it would appear that the identification of a regulatory margin for the use of AI in the administrative sector by Member States may lie along the fine line between the closely related but distinct phenomena of so-called “spontaneous harmonization” and “gold plating”.

As noted by leading scholarship,⁶¹ the so-called *gold plating* typically concerns the implementation phase of European Union law and is characterised by the imposition, by the national legislator, of regulatory, administrative, and bureaucratic burdens that go beyond those expressly required by the Union act;⁶² as such, it is a concept that may

be framed within a broader discourse on *better regulation*.

By contrast, the phenomenon of spontaneous harmonization does not concern the implementation phase of European Union law, but rather consists in the alignment of domestic legislation with EU-derived rules, even in cases where the latter do not apply.

The distinction from gold plating is therefore clear: in cases of spontaneous harmonisation, the national legislator is under no obligation to transpose or implement EU law, but voluntarily chooses to “draw inspiration” from it when regulating a domestic matter falling outside the scope of Union law - thus giving rise to a genuine process of “spontaneous Europeanisation” or a “spill-over effect” of EU law.⁶³

From the perspective of the so-called “spontaneous harmonisation”, particular significance may be attached to a legislative intervention by a Member State that entails extending the *safeguards* established for high-risk AI systems beyond the natural scope of application of the AI Act. More specifically, this would mean not merely going beyond the limits set by the aforementioned Article 2(3) (i.e., also in cases where national public authorities are not applying Union law within

⁵⁹ This is expressly stated in Recital No. 2 of the Regulation, which provides that: “This Regulation should be applied in accordance with the values of the Union enshrined as in the Charter, facilitating the protection of natural persons, undertakings, democracy, the rule of law and environmental protection, while boosting innovation and employment and making the Union a leader in the uptake of trustworthy AI”. In this sense, see O. Mir Puigpelat, *The impact of the AI Act on public authorities and on administrative procedures*, cit., 247, according to whom: “AI Act establishes *minimum guarantees* concerning the use of AI systems by public authorities that cannot be reduced, but which can be increased by national legislators”.

⁶⁰ The “brutality” referred to by V. Papakonstantinou and P. de Hert, *The Regulation of Digital Technologies in the EU Actification, GDPR Mimesis and EU Law Brutality at Play*, in *Technology and Regulation Journal*, 2022.

⁶¹ See C. Burelli, *Il gold plating e l’armonizzazione “spontanea”, due tecniche a confronto*, in *Rivista italiana di diritto pubblico comunitario*, 5-6, 2022, 621 ff.

⁶² C. Burelli, *Prime brevi considerazioni sul “ddl intelligenza artificiale”: incompatibilità o inopportunità?*, cit., 248, observes that the Regulation “fa financo salve due ipotesi di *gold-plating* «autorizzato» (autorizza espressamente, cioè, l’adottabilità di misure più stringenti rispetto a quelle di derivazione “comunitaria” e, quindi, per tale ragione, non è *gold-plating* in senso stretto): l’art. 5, par. 5, infatti, prevede che gli Stati membri possano introdurre, in conformità con il diritto UE, disposizioni più restrittive sull’uso dei sistemi di identificazione biometrica remota a posteriori; e anche l’art. 2, par. 11, non osta «a che gli Stati mantengano o introducano

disposizioni legislative, regolamentari o amministrative più favorevoli ai lavoratori in termini di tutela dei loro diritti in relazione all’uso dei sistemi di IA da parte dei datori di lavoro, o incoraggino o consentano l’applicazione di contratti collettivi più favorevoli ai lavoratori” (“It even expressly preserves two instances of what might be termed “*authorised*” *gold-plating* (that is, cases in which the adoption of more stringent measures than those laid down at EU level is explicitly permitted and, for that reason, does not constitute gold-plating in the strict sense”). Indeed, Article 5(5) provides that Member States, in accordance with EU law, may introduce more restrictive provisions regarding the *ex post* use of remote biometric identification systems; similarly, Article 2(11) does not preclude “Member States from maintaining or introducing more favourable legislative, regulatory or administrative provisions for workers, in terms of the protection of their rights in relation to the use of AI systems by employers, or from encouraging or allowing the application of more favourable collective agreements for workers”).

⁶³ As noted once again by C. Burelli, *Il gold plating e l’armonizzazione “spontanea”, due tecniche a confronto*, cit., 623, the national legislator who pursues the path of spontaneous harmonisation is seen as a legislator who is “più realista del re” (“more royalist than the king”), displaying a degree of loyalty to EU law that exceeds what is actually required. A prime example of this can be found in the field of competition law.

the framework of indirect administration), but also applying such safeguards to administrative activities not expressly classified as “high-risk” under Annex III of the Regulation.⁶⁴ This logic of voluntarily enhancing guarantees also finds a reflection within the text of the Regulation itself, notably in the mechanism of codes of conduct provided for in Article 95, paragraph 1.⁶⁵

It might be objected, however, that such an extension would in some way override the European legislator’s political choice.⁶⁶

A choice that may also have been expressed *negatively*, in the sense that, by classifying only certain AI systems - exhaustively listed - as “high-risk”, the legislator simultaneously intended to exclude those not included in such a list from that classification. This would imply that, at the core of the Regulation, lies the intention that AI systems not expressly designated as high-risk should always remain subject to a more lenient regime - or, more precisely, to a regime of substantial freedom.

Framed in these terms, the real issue becomes the identification of the Regulation’s ultimate objective.

It is worth asking, in particular, whether the ultimate purpose of the Regulation lies in encouraging the use of AI systems (also with the intention of ensuring that regulation does not act as a brake on the sector’s development), or rather in laying down a common minimum framework aimed at protecting fundamental rights and freedoms - which could serve as a benchmark even

beyond the boundaries of the European continent.⁶⁷

Once again, the answer is far from clear-cut, as it inevitably involves political considerations - especially given that, as previously noted, both of the aforementioned objectives are reflected, albeit to varying degrees, in the recitals and operative provisions of the Regulation. Thus, the key issue to consider lies in identifying a point of balance between these two opposing poles. In all likelihood, as has occurred in the context of other sensitive junctures in the complex process of European integration, this delicate task will ultimately fall to the dialogue between national courts (both constitutional and courts of last instance) and the Court of Justice.

While definitive answers are still pending, it is time to start shaping a national approach to the use of artificial intelligence in the public sector.⁶⁸ This process must begin promptly - before the AI Act becomes fully applicable - and must be guided unwaveringly by constitutional and European principles, with human oversight and algorithmic transparency placed firmly at its core.

With regard to the method, given the current delicate Union-Member States relations, a more restrained approach seems advisable than that pursued thus far - one that focuses not so much (or not only) on the development of a general and horizontal regulatory framework, which may risk duplicating the European one,⁶⁹ but rather on

⁶⁴ See also O. Mir Puigpelat, *The impact of the AI Act on public authorities and on administrative procedures*, cit., 247, who notes that: “The free movement of AI systems that meet the requirements of the AI Act does not prevent a national (or even regional) legislator [...] To extend the requirements imposed by the AI Act on high-risk systems to other types of systems used by public authorities that do not merit such a classification according to Annex III” or even “To add further requirements to the use of AI systems by public authorities”.

⁶⁵ However, as noted above (see footnote 24), such a mechanism does not align with the specific features of the administrative sector and, therefore, cannot provide a solution to the regulatory gaps just mentioned.

⁶⁶ As noted by A.G. Orofino, *Tra obiettivi perseguiti e problemi irrisolti: l’impatto dell’IA Act sull’assetto regolatorio dell’informatica pubblica*, cit., there also emerges the risk of a “recepimento frammentario” (“fragmented transposition”) capable of undermining “l’efficacia del regolamento europeo” (“the effectiveness of the European regulation”).

⁶⁷ E. Cirone expresses skepticism regarding the AI Act’s capacity to trigger a new “Brussels effect” in the field of fundamental rights protection. As he notes in *L’AI Act e l’obiettivo (mancato?) di promuovere uno standard globale per la tutela dei diritti fondamentali*, cit., 18, “l’AI Act non sembra che rifletta le caratteristiche essenziali per essere considerato uno standard globale, proprio in virtù del (solo formalmente centrale) ruolo della protezione dei diritti fondamentali nell’intera struttura del regolamento” (“the AI Act does not appear to reflect the essential characteristics required to be regarded as a global standard, precisely due to the (merely formally central) role of fundamental rights protection within the overall structure of the Regulation”).

⁶⁸ The power of imagination - even for the jurist - was extolled throughout the works of G.B. Vico, one of the greatest Italian thinkers, culminating in *La scienza nuova*, where it emerges as a point of convergence between rationalism and classical roots.

⁶⁹ Especially when, as in the case of Article 13 of the government-initiated draft bill of 20 May 2024, the provision in question is a general principle which, by its

more targeted and narrowly tailored - almost surgical - interventions on the text of Italian Law No. 241 of 1990.⁷⁰

The groundwork may be considered laid.

very nature, requires further specification.

⁷⁰ In particular, this could involve, first and foremost, amending Article 1 concerning general principles (by including among them the principle of “non-algorithmic exclusivity” or the so-called “humanity safeguard”), as well as the subsequent Article 3-*bis* (by expressly referring to artificial intelligence as an “instrument” of public administration action). Another amendment could concern Articles 6 and 10-*bis*, by introducing the requirement for human intervention - specifically by the case officer - during the pre-decisional phase of assessing the evidentiary material (and therefore also the computational result produced by the algorithm), or, in proceedings initiated upon request, during the examination of any observation submitted in response to a notice of intended refusal. Finally, it would be appropriate to update the provisions on access to administrative documents set out in Articles 22 ff., aligning them, as far as possible, with the principles already established by Article 30 of the Italian new Public Contracts Code. A legislative amendment to the national rules on administrative procedure is also suggested by A. Cerrillo i Martínez, *El impacto del Reglamento de Inteligencia Artificial en las Administraciones públicas*, cit., 104, who observes that “será necesario incorporar en la legislación de régimen jurídico y de procedimiento administrativo las normas en que se concreten los requisitos, las obligaciones y los procedimientos de las Administraciones públicas en tanto que proveedoras y responsables del despliegue de sistemas de IA” (“it will be necessary to incorporate into the legislation on legal regime and administrative procedure those rules that define the requirements, obligations and procedures applicable to public administrations as providers and entities responsible for the deployment of AI systems”).

