REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 13, NR. 2, 155-174, PARIS LEGAL PUBLISHERS © 2020

Principle of Proportionality and The Principle of Reasonableness

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Abstract

This paper examines a principle of particular relevance for administrative action and the concept of good administration, namely the principle of reasonableness, at the EU level, from the point of view of the Italian administrative doctrine, and jurisprudence of the Council of State. Specific attention will be paid to the many faces and functions of reasonableness, in administrative proceeding as well as in judicial review of discretion, and its connection with the idea of proportionality. Moreover, this article will discuss the influence and effects of the application of general principles of EU law on the Italian legal order. Finally, it will describe the EU principle of reasonableness has influenced the Italian administrative (case) law. This article aims to show that on the one hand the European principles of reasonableness and proportionality seem to be smoothly absorbed in the Italian administrative case law; on the other, the Europeanisation process still encounters resistance from a part of the Italian doctrine that persists in categorizing reasonableness as a principle different from proportionality.

1. Reasonableness in European Union law

Reasonableness is one of the general principles which in various ways provide the framework for action by the European Union public administration.[1] This principle is applicable not just to administrative actors, but to all authorities, both of the EU and of its Member States (when implementing EU law). Reasonableness is a principle of specific application to the administration itself (as the principle of good administration, data protection, acting within power and good faith). This principle provides the basis for efficient and fair administrative decision-making by ensuring that officials arrive at decisions in a rational way. Indeed, reasonableness operates as a guarantee for individuals against arbitrary decisions. On this point, Article 11 of European Code of Good

* DOI 10.7590/18747982oX159307018522921874-7981 2020 Review of European Administrative Law

1 As in the case of Italian administrative law, such principles should be familiar with the constitutional principles underlying national legal systems. On this point, see HCH Hofmann, GC Rowe, AH Turk (eds), *Administrative Law and Policy of the European Union* (Oxford University Press 2011) pt 2, ch 7, 143-221.

Administrative Behaviour states that the official shall act impartially, fairly and reasonably, without giving a specific definition of reasonableness.

As we will see shortly in the Italian legal order, and also at the EU level, reasonableness is considered as an unwritten[2] general principle of law,[3] invoked under the heading of broader constitutional principles.[4]

General principles of law perform an important function in – and can be regarded as the commonly accepted legal foundations of – EU administrative law. Surely, such general principles, including proportionality and reasonableness, have mainly been developed by the European Court of Justice.[5] These principles are very relevant for Italian administrative law pursuant to Article 1(1) Law No. 241/1990 (the Italian Administrative Procedure Act), setting that administrative action shall be also founded on the principles underpinning the EU legal order.[6] Indeed, following the amendment made by Article 1(1), letter

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2 Aside from the Article 6 ECHR, which protects the right to a hearing within a reasonable time; although this provision is currently interpreted in a broad sense, so as to also include adversary administrative procedures, this aspect is irrelevant in this regard because the requisite of reasonable time of a fair process does not concern the reasonableness as procedural or substantive ground of judicial review of administrative action covered by this paper. Moreover, on the EU level – unlike reasonableness – proportionality is frequently enounced in positive law, eg as a corollary of subsidiarity.

3 On the general principles in the EU legal order, see T Tridimas, *The General Principles of EU Law* (3rd rev edn, Oxford University Press 2019); Hofmann, Rowe, Turk (n 1); RJGM Widdershoven, M Remac, 'General Principles of Law in Administrative Law under European Influence' (2012) 2 European Review of Private Law 381; GL Goga, 'The Significance of the General Principles in European Union Administrative Law' (2012) 8 Acta Universitatis Danubius 63; HCH Hofmann, 'General Principles of EU law and EU Administrative Law' in C Barnard, S Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) ch 8.

4 G Della Cananea, 'Reasonableness in Administrative Law' in G Bongiovanni, G Sartor, C Valentini (eds), *Reasonableness and Law* (Springer 2009) 306.

5 On this point see A Adinolfi, 'The Principle of Reasonableness in European Union Law' in G Bongiovanni, G Sartor, C Valentini (eds), *Reasonableness and law* (Springer 2009) 383-404; G Tesauro, 'Reasonableness in the European Court of Justice Case-Law' in A Rosas, E Livits, Y Bots, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Springer 2013) 307-327; J Wouters, S Duquet, 'The principle of reasonableness in global administrative law' (2013) Jean Monnet Working Paper 12/2013 <https://ssrn.com/abstract=2867419> accessed 14 November 2019.

6 According to Article 1(1) Law No. 241/1990, in addition to those already mentioned, there are other principles upon which administrative action is founded, eg economy, effectiveness, impartiality, publicity and transparency. On the application of general principles of EU law to administrative activity see Council of State, Section V, 19 June 2009, n. 4035, in <www.giustizia-amministrativa.it>. According to this judgment, the general principles of EU law consistently used by the European Court of Justice (principle of competition, equal treatment, transparency, non-discrimination, mutual recognition, proportionality) not only can be applied directly in the Italian legal system but they must also regulate the administrative activity. On this point, G Carlotti, A Clini, *Diritto amministrativo*, Vol 1 (Maggioli 2014) 169, point out that article 1(1) Law no. 241/1990 contains a dynamic reference to the general principles of EU law which are constantly evolving; G Pepe, *Principi generali dell'ordinamento comunitario e attività amministrativa* (Eurilink 2015) 241, even goes so far as to say that Article 1(1) Law No. 241/1990 includes not only the principles already recognised but also those that will be developed by the European Court of Justice in the future. See also F Spagnuolo, 'Il richiamo ai principi dell'ordinamento comunitario nella nuova legge sull'azione amministrativa' in A Massera (ed), *La riforma della Legge 241/1990 sul procedimento amministrativo: una prima lettura*, (2005) Astrid <www.astrid-

a), Law No. 15/2005 to Article 1(1) Law No. 241/1990, those principles become directly applicable and immediately effective in the Italian legal order. According to the case law of the Regional Administrative Courts[7] and the Council of State,[8] the need to give priority to the application of European principles in administrative activity is a «corrective interpretation of the system»[9] imposed by «the need to interpret the law in accordance with the general principles of EU law».[10]

The ECJ's established case law reveals that the essence of reasonableness as standard of judicial review lies in balancing interests.

Moreover, in the ECJ case law, reasonableness often ends by being absorbed in the proportionality test;[11] it also occurs when the applicants expressly invoked reasonableness as standard of legality of state measures derogating from rules on free movement of goods, people and services.[12]

On the other hand, reasonableness is often used by the EU Court of Justice as a tool to operationalize other general principles of law. A relevant example is provided by the ECJ case law on principle of legitimate expectations.[13] According to this jurisprudence, the interested parties must be able to count on the maintenance of a legal situation with respect to a sudden change that they could

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online.it>, 14-17 accessed 14 November 2019; L Ferrara, 'Il rinvio ai principi dell'ordinamento comunitario nella disciplina del procedimento amministrativo' in G Clemente Di San Luca (ed), *La nuova disciplina dell'attività amministrativa dopo la riforma della legge sul procedimento* (Giappichelli 2006) 39-73; D U Galetta, 'L'art. 21 octies della novellata legge sul procedimento amministrativo nelle prime applicazioni giurisprudenziali: un'interpretazione riduttiva delle garanzie procedimentali contraria alla costituzione e al diritto comunitario' in MA Sandulli (ed), *Riforma della L. 241/1990 e processo amministrativo* (Giuffrè 2006) 111; A Valletti, 'Il Subappalto' in R De Nicotolis (ed), *I contratti pubblici di lavori, servizi e forniture* (Vol 3, Giuffrè 2007) pt 7, ch 3, 189-190; F Caringella, *Corso di diritto amministrativo: profili sostanziali e processuali* (Vol 1, Giuffrè 2011) pt 1, ch 4, para 6, 138-139; A Bartolini, A Pioggia, 'La legalità dei principi di diritto amministrativo e il principio di legalità' in M Renna, F Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 86-88.

7 In the Italian legal order, the Tribunale Amministrativo Regionale (hereafter referred to as "TAR") is the regional administrative Court (administrative judge of first instance).

8 In Italy, the Council of State acts both as legal advisor of the executive branch and as the supreme Court for administrative justice (administrative judge of second and last instance).

9 TAR, Puglia, Section I, Lecce, 21 May 2008, n. 1812, in <www.giustizia-amministrativa.it>.

10 Council of State, Section V, 31 May 2007, n. 2825, in <www.giustizia-amministrativa.it>.

11 Wouters, Duquet (n 5) 29, point out that «the ECJ's long-standing practice to review administrative action using a proportionality standard complicates the successful use of reasonableness as a standard of review. The reasoning in EU case-law is to such an extent permeated with proportionality that, even where applicants invoke a violation of the reasonableness standard, the EU courts are inclined to translate that claim into the proportionality test. An interesting illustration thereof can be found in the 2008 *Moreno* judgment of the EU's Civil Service Tribunal».

12 Case C-34/08 *Azienda Disarò v Milka*, [2009] European Court Reports (English Edn.) I- 4023, points 73 and 82-83.

13 G Strozzi, R Mastroianni, *Diritto dell' Unione Europea. Parte istituzionale* (Giappichelli 2014) 217.

not *reasonably* expect;[14] or when the conduct of Union Institutions created a *reasonably* founded expectations in the interested parties.[15] In these cases, in order to verify the legitimate expectation claimed by the applicant, the Court carries out the reasonableness test (whose formula can be reconstructed as follow: could the interested parties *reasonably* expect a sudden change of legal situation? Is *reasonably* founded the expectation that conduct of Union Institutions created in the interested parties?). Therefore, reasonableness is interpreted also as a tool and condition for implementing other general principles of law (in the above example, the legitimate expectations).[16]

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14 Case 111/63 *Lemmerz-Werke v. High Authority* [1965] ECR 677; Case 84/78 *Tomadini v Amministrazione delle finanze dello Stato* [1979] ECR 1801; Case 90/77 *Stimming CG v Commission*, [1978] ECR 995; Case 235/82 *Ferriere San Carlo v Commission*, [1983 ECR 3949; Case 223/85 *RSV v Commission* [1987] ECR 4617; Case C-316/86 *Hauptzollamt Hamburg-Jonas v Krüken* [1988] ECR 2213; Case C-104/89 *Mulder v Council of the European Communities and Commission of the European Communities* [1992] ECR I-3061; Case C-81/91 *Twijnstra v Minister van Landbouw* [1993] ECR I-2455. However, the principle cannot be invoked when the change in the legal situation is predictable or expression of a discretionary power of Institutions: Case C-22/94 *Irish Farmers Association and others v Minister for Agriculture, Food and Forestry, Ireland and Attorney General* [1997] ECR I-1809; Joined Case C-37 and 38/02 *Di Leonardo Adriano and Dilexport*, [2004] ECR I-6911; Case C-168/09 *Flos v Semeraro Casa e Famiglia SpA* [2011] ECR I-181.

15 Case 74/74 *CNTA SA v Commission*, [1975] ECR 533; Case 289/81 *Mavridis v Parliament* [1983] ECR 1731; Case 223/85 *RSV v Commission* [1987] ECR 4617; Case C-63/93 *Fintan Duff v Minister for Agriculture and Food and Attorney General* [1996] ECR I-569; Case C-51/95 *Unifruit Hellas v Commission* [1997] ECR I-727; Case T-105/96 *Pharos v Commission* [1998] ECR II-285; Case T-222/99 and T-329/99 *Martinez* [2001] ECR II-2823; Case C-179/00 *Weidacher v Bundesminister* [2002] ECR I-501; Case C-14/01 *Molkerei Wagenfeld v Bezirksregierung Hannover* [2003] ECR I-2279.

16 It's also true for other examples, like the precautionary principle. On this point see the Communication from the Commission on the Precautionary principle COM/2000/0001 final, point 3, according to which, the precautionary principle is not defined in the Treaty, and prescribes it only once – to protect the environment. However, in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are *reasonable* grounds for concern that the potentially dangerous effects on the environment, human animal or plant health may be inconsistent with the high level of protection chosen by Community. See also, Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretris*, [2004] ECR I-7405, para 59, according to which, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no *reasonable* scientific doubt remains as to the absence of such effects; C-236/01 *Monsanto Agricoltura Italia v Presidenza del Consiglio dei Ministri and Other* [2003] ECR I-8105, points 106 and 113; Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA, and Vereniging Leefmilieu* [2018] EU:C:2018:882, points 98, 104 and 112. On the relation between precautionary principle and reasonableness, see F De Leonardis, 'Tra precauzione e ragionevolezza' (2006) 21 Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato <www.federalismi.it> accessed 14 November 2019; on the reasonableness standard of proof for the application of precautionary principle, see C Weiss, 'Scientific uncertainty and science-based precaution' (2003) 3(2) International Environmental Agreements: Politics Law and Economics 3, 157-159.

Finally, reasonableness is «invoked in order to interpret EC legislation or to assess its validity, or to ascertain whether national legislation is in compliance with a given EC obligation».[17]

2. An Italian perspective. Reasonableness as proportionality?

The devil is in the details. On the level of Italian administrative law, part of the national doctrine considers reasonableness[18] a principle different from proportionality[19] and endowed with its own autonomy with respect to the latter, reconnecting to each of them specific fields of action and peculiarities.[20]

The fields of action of the two principles (reasonableness and proportionality) refers to different phases of the administrative decision-making process.

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17 Adinolfi (n 5) 386.

18 For an historical frame of the traditional Italian recostruction of the principle of reasonableness in the administrative action, see G Lombardo, 'Il principio di ragionevolezza nella giurisprudenza amministrativa' [1997] Rivista trimestrale di diritto pubblico 421ff; G Corso, 'Il principio di ragionevolezza nel diritto amministrativo' (2002) 7 Ars Interpretandi 437; Della Cananea (n 4) 295-310; F Merusi, *Ragionevolezza e discrezionalità amministrativa* (Editoriale Scientifica 2011); F Astone, 'Il principio di ragionevolezza' in M Renna, F Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 371-388; F Nicotra, 'I principi di proporzionalità e ragionevolezza dell'azione amministrativa' (2017) 12 Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato <www.federalismi.it> accessed 14 November 2019; F Astone, 'Principio di ragionevolezza nelle decisioni giurisdizionali e giudice amministrativo' (2018) 17 Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato <www.federalismi.it> accessed 14 November 2019.

19 The literature on proportionality is vast. Specifically on the principle of proportionality in the administrative action, see A Sandulli, *La proporzionalità nell'azione amministrativa* (Cedam 1998); DU Galetta, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo* (Giuffrè 1998); A Sandulli, 'Proporzionalità' in S Cassese (ed), *Dizionario di Diritto Pubblico* vol. V (Giuffrè 2006) 4643ff; S Villamena, *Contributo in tema di proporzionalità amministrativa. Ordinamento comunitario, italiano e inglese* (Giuffrè 2008); DU Galetta, 'Il principio di proporzionalità' in MA Sandulli (ed), *Codice dell'azione amministrativa* (Giuffrè 2010) 110ff; S Cognetti, *Principio di proporzionalità. Profili di teoria generale e di analisi sistematica* (Giappichelli 2011); DU Galetta, 'Il principio di proporzionalità' in M Renna, F Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 389-412; M D'Alberti, 'Transformations of administrative law: Italy from a comparative perspective' in S Rose-Ackerman, PL Lindseth, B Emerson, *Comparative Administrative Law* (2nd edn, Edward Elgar Publishing 2017) ch 7, 102-118; Nicotra (n 18).

20 Some other scholars state that the principle of proportionality belongs to the principle of reasonableness, because of their relationship of *species* a *genus*. On this point see PM Vipiana, *Introduzione allo studio del principio di ragionevolezza* (Cedam 1993) 69ff; G Morbidelli, '*Il principio di ragionevolezza nel procedimento amministrativo*' in *Scritti in onore di G. Guarino* vol 3 (Cedam 1998) 97-99; G Morbidelli, 'Il procedimento amministrativo' in L Mazzarolli and others (eds), *Manuale di diritto amministrativo* (2nd edn, Il Mulino 1998) 1187.

In particular, reasonableness concerns the administrative proceeding, especially the preliminary phase; proportionality concerns the administrative measure, as a concrete balancing of interests at stake.[21]

The principle of reasonableness operates a weighting of interests inspired by the criterion of logic and congruity of the choice made by the public authority; it is independent of assessments regarding the person who suffers the administrative decision and its application involves an objective test, taking the position of a neutral person (the "reasonable man").

However, the principle of proportionality implies a more complex evaluation, based on a three-stage scheme, testing for adequacy (which requires that a measure must be suitable to achieve a given aim), necessity (which implies that the least oppressive measure should be used) and proportionality *stricto sensu*[22] (which prevents a measure imposing unreasonable burdens on the sacrificed individual interests); it directly compares the costs suffered by private interest and the pursued public interest.

Proportionality is the principle on the basis of which a public authority, in the decision-making process, must choose the most appropriate and adequate solution (from all available options) with the least sacrifice for the opposite interest. In other words, proportionality concerns the quantitative balancing and the correct measure of the exercised administrative power. In this way, according to the theory of the three-pronged test, the administrative measure should be necessary, suitable and adequate to pursue the public interest, imposing reasonable burdens on affected individuals.

Instead, reasonableness concerns the qualitative balancing of interests; it involves the plausibility of the effects[23] and has a limited range because it excludes only decisions that are so unreasonable that no reasonable man could ever have come to it.

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21 On this point, R Ferrara, *Introduzione al diritto amministrativo* (Laterza 2014) 192, argues that «the reasonableness of the administrative proceeding, and in particular of the preliminary investigation, measures the rationality of the procedure, and therefore the fact that it was conducted by resorting to rules and regularity according to logic and knowledge (according to science and experience), in the framework of a process of formation of the knowledge of the factual reality and the will characterized by information and rational evaluation, while the proportionality of the final statement, based on the principle of adequacy, gives an account of how the care of the public interest identified by the law (or more precisely, interpreted in the proceeding) is concretely satisfied with the least possible sacrifice of private interests» (my translation).

22 This component of proportionality is also called *reasonableness*. See JE Van Den Brink and others, 'General principles of law' in JH Jans, S Prechal, RJGM Widdershoven (eds), *Europeanisation of public law* (2nd edn, Europa Law Publishing 2015) 184.

23 C Malinconico, 'Il principio di proporzionalità' in *Autorità e consenso nell'attività amministrativa. Atti del 47° Convegno di studi di scienza dell'amministrazione. Varenna, Villa Monastero, 20-22 settembre 2001* (Giuffrè 2002) 69.

Of course, the proportionality test involves a more intensive judicial control of administrative action than the reasonableness one.[24] Indeed, proportionality implies the three-stage test mentioned above (checking for adequacy, necessity, proportionality *stricto sensu*); however, reasonableness implies a «must less structured test, one that is not only broader but also much vaguer».[25]

In the Italian administrative law, the origins of these two principles are also different. Originated at the beginning of the 20th century[26] in the German legal system[27] and integrated into the EU legal order through the case law of the European Court of Justice,[28] the general principle of proportionality become a source of inspiration for the national judge,[29] spontaneously and without notable resistance.[30]

Until the nineties, there was no real proportionality test in Italian administrative law. The only judicial review standard that could conceptually be considered similar to the content of the proportionality test was that of reasonableness. However, the principle of reasonableness is characterized by a large degree of indeterminacy; it does not correspond to any well-defined concept and does not contain a fixed and certain criterion of judicial review. Therefore, until the nineties, Italian judges did not exercise control that took into consideration the elements of judgment which instead already characterized the European principle of proportionality. The use of the reasonableness test only created unsatisfactory results and lack of judicial protection for the individual interests compared to the public interest.

Starting from the first half of the nineties, to meet the aforementioned need of individual judicial protection, a proportionality test also began to be applied, first in areas deeply regulated by EU law, namely in: financial market regulation

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24 A Barone, GA Ansaldi, 'The European "nomofilachia" and the principle of proportionality' (2009) 28 Transylvanian Review of Administrative Sciences 210, 222-223, point out the vagueness of reasonableness.

25 Della Cananea (n 4) 304.

26 In the specific context of *polizierecht*, F Fleiner, *Institutionen des Deutschen Verwaltungsrechts* (Mohr 1912) 354, used a fortunate expression, according to which the principle of proportionality implies that "the police should not use cannons to shoot at sparrows" (my translation). On the principles of reasonableness and proportionality in the police law, F Rota, 'Full jurisdiction e diritto di polizia' (2018) 2 P.A. Persona e Amministrazione 285, 293.

27 The principle of proportionality was first developed in German constitutional and administrative case law. See on this point Galetta, *Principio di proporzionalità e sindacato* (n 19) 11ff; Sandulli (n 19) 4644ff.

28 Since its birth and mainly in the matter of sanctions, State aid and derogations from the competition rules. See eg European Court of Justice, Case C-8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, [1954-1956] ECR 291, the first case in which the ECJ dealt with the principle of proportionality; Case C-5-11 & 13-15/62 *Società Industriale Acciaierie San Michele v High Authority of the European Coal and Steel Community* [1962] ECR 449; Case C-18/63 *Schmitz v European Economic Community* [1964] ECR 85.

29 See M Clarich, *Manuale di diritto amministrativo* (Il Mulino 2013) 150.

30 D De Pretis, 'Italian administrative law under the influence of european law' (2010) 1 Italian Journal of Public Law 6, 13.

(law no. 262/2005, according to which the public authority must apply the principle of proportionality in defining the content of the general regulatory acts); environmental protection (legislative decree no. 152/2006, according to which waste management must respect the principle of proportionality); public procurement (Legislative Decree no. 163/2006); free movement of persons within the territory of the Member States (Legislative Decree no. 32/2008, which provided that removal orders are taken in compliance with the principle of proportionality). Subsequently, the principle of proportionality begins to be applied by judges even in purely internal situations. For instance, the principle also applies to administrative action that is directed towards the issue of measures having a regulatory, general administrative, town planning or programming function.

After the described historical development in relation to the context or the nature of the power, the Italian administrative courts have often ruled that proportionality test must be carried out according to the three-stage scheme.[31] Now, to apply the principle of proportionality according to the three-stage scheme, it is not necessary for the dispute to concern Europeanised legal relation. Even in the case of a purely internal situation, Italian judges use the proportionality test as interpreted by the Court of Justice. Indeed, the difference between areas deeply regulated by EU law and purely internal situations is not considered significant in the Italian legal system: pursuant to the aforementioned Article 1(1) Law No. 241/1990, the general principles of EU law must in any case be applied by both the public authority and the judge. According to the Italian Council of State, the European principle of proportionality must always be applied in administrative activity.[32]

However, the principle of reasonableness, which has been primarily used by the common law systems,[33] has successively been applied also in the continental legal orders; as for Italy, administrative law borrowed the concept of reasonableness from national constitutional law.[34] In constitutional law, reas-

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31 This is made explicit in Council of State, Section VI, n. 1736/2007, in <www.giustizia-amministrativa.it>; Council of State, Section V, n. 2087/2006, *ivi*; Council of State, Section VI, 22 March 2005, n. 1195, *ivi*; Council of State, Section IV, n. 6410/2004, *ivi*; Council of State, Section VI, 1 April 2000, n. 1885, *ivi*.

32 Council of State, Section V, 20 February 2017, n. 746, in <www.giustizia-amministrativa.it>.

33 On this point see HWR Wade, CF Forsyth, *Administrative Law* (Oxford University Press 2000) 353ff. One of the first judgments in this matter was the leading case *Associated Provincial Picture Houses Ltd. V Wednesbury Corporation* EWCA [1948] 1 KB 223. According to the Court, judicial intervention is allowed only if a decision is so unreasonable as to be aberrant. The literature on Wednesbury case is vast. See, among the newest, ACL Davies, JR Williams, 'Proportionality in English Law' in S Ranchordás, B De Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2018) 75ff; K Thompson, 'Administrative law in the United Kingdom' in R Seerden (ed) *Comparative administrative Law. Administrative law of the European Union, its Member States and the United States*, (4th edn, Intersentia 2018) 247.

34 In the Italian legal order, constitutional law and administrative law are closely linked (as two fields of public law) but different.

onableness is indeed a standard for reviewing laws.[35] This use of reasonableness emerged in a recent case[36] brought before the Constitutional Court.[37] The Legislative Decree 14 March 2013 no. 33, reordered obligations of disclosure, transparency and dissemination of information by public authorities. In detail, Article 14 of the Legislative Decree no. 33/2013 provides for holders of political offices some transparency measures on asset, interest and financial data. The Legislative Decree 25 May 2016, no. 97, amending Article 14 of the Legislative Decree no. 33/2013, extended the asset and income disclosure to executive officials.[38] Following the amendment, the obligation applied to holders of political offices of State, Regions and Local entities, holders of administrative, direction or Government offices, however named, except in the case of appointments without remuneration, holders of management positions, granted for whatever reason, including any appointment granted at the discretion of the political bodies without resorting to public selection procedures. This category included managerial senior positions such as Secretary General, Head of Department, General Manager and any other managerial position, also those conferred on subjects who do not possess the rank of employees of public administrations (external appointments).

Public officials, as above identified and without any distinction, were subject to disclosure and publishing on the websites of the administrations where they

35 Specifically on this point, without claiming to be exhaustive, see C Lavagna, 'Ragionevolezza e legittimità costituzionale' in *Studi in memoria di Carlo Esposito* (Vol 3, Cedam 1973) 1573-1578, currently in C Lavagna, *Ricerche sul sistema normativo* (Giuffrè 1984) 637; AM Sandulli, 'Il principio di ragionevolezza nella giurisprudenza costituzionale' (1975) Diritto e Società 561, currently in *Scritti giuridici* (Vol 1, Jovene 1990) 665; G Zagrebelsky, 'Su tre aspetti della ragionevolezza' in *Il principio di ragionevolezza nella giurisprudenza della corte costituzionale* (Giuffrè 1994) 179-192; G Scaccia, *Gli "strumenti" della ragionevolezza nel giudizio costituzionale* (Giuffrè 2000); F Modugno, *la ragionevolezza nella giustizia costituzionale* (Editoriale Scientifica 2007); A Marrone, 'Constitutional adjudication and the principle of reasonableness' in G Bongiovanni, G Sartor, C Valentini (eds), *Reasonableness and law* (Springer 2009) 215-241; M Cartabia, 'I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana' (2013) <www.cortecostituzionale.it> accessed 14 November 2019; M Fierro, 'La ragionevolezza nella giurisprudenza costituzionale italiana' in *I principi di proporzionalità e ragionevolezza nella giurisprudenza costituzionale, anche in rapporto alla giurisprudenza delle Corti europee* (2013) <www.cortecostituzionale.it>, accessed 14 November 2019; N Stamile, 'Ragionevolezza e giustizia costituzionale' (2001) 2 Sociologia. Rivista Quadrimestrale di Scienze Storiche e Sociali 11; I Rivera, 'Il sindacato di ragionevolezza quale strumento di controllo della razionalità (formale e pratica) della norma. Brevi osservazioni a margine della sentenza n. 113 del 2015' (2016) Forum di Quaderni Costituzionali <www.forumcostituzio nale.it> accessed 14 November 2019.

36 Constitutional Court, 21 February 2019, n. 20, in <www.cortecostituzionale.it>. See A Corrado, 'Gli obblighi di pubblicazione dei dati patrimoniali dei dirigenti' (2019) 5 Federalismi.it Rivista di diritto pubblico italiano, comunitario, comparato <www.federalismi.it> accessed 14 November 2019.

37 According to Article 134 of the Italian Constitution, the most important task of the Italian Constitutional Court is to rule on controversies or disputes regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and Regions.

38 M Lunardelli, 'The reform of Legislative Decree no. 33/2013 in Italy: a double track for transparency' (2017) 9 Italian Journal of Public Law 143-188.

hold offices the following information related to their income and asset: a) remuneration of whatever type related to the acceptance of the office included the public money spent on business travels and missions; b) data related to the acceptance of other offices, both in public and private bodies, and the relevant remuneration received on any ground; c) other appointments, if any, remunerated with public money with an indication of the relevant amount; d) copy of the latest tax return (annually); e) a statement on his/her real rights on immovable properties and movable properties recorded in a public register, ownership of company shares and equity participations, ownership of companies, any company directorships or posts as internal company auditors (within three months from the appointment and then annually to communicate any variation).

The Constitutional Court has declared the constitutional illegitimacy of Article 14 of Legislative Decree n. 33/2013, in the part which obliges – without distinction – each civil servant holder of an executive appointment in public entities or bodies to disclose asset and income data. According to the Court, this provision violates the Italian Constitution and EU Law, in particular the right to privacy, the protection of personal data and the principles of proportionality and reasonableness, as interpreted in the light of the case law of the European Court of Justice.[39]

According to the Court, the legislator should have made exceptions, because a provision stating the disclosure for all the subjects of the category (including holders of management positions granted at the discretion of the political bodies without resorting to public selection procedures) is unreasonable, disproportionate, unnecessary and entails an excessive burden. In other words, in this case the Constitutional Court carried out a balancing test, which involved both proportionality and reasonableness as standards of reviewing law. Indeed, the court balanced the public interest of transparency and preventing corruption with the rights of privacy and data protection of individuals. Furthermore, the court established that the imposed obligation was excessively burdensome and disproportionate when balanced with the aim of preventing corruption as predefined by the legislator. For present purposes, the focal point of this judgment is paragraph 3, according to which the scrutiny of reasonableness as standard for reviewing laws makes use of the proportionality test. Therefore, from the Court's point of view, reasonableness and proportionality are two different grounds of judicial review but the latter is a component of the former; at the same time, proportionality is considered as a tool for testing reasonableness.

An equally important case in which the Constitutional Court used the principle of proportionality and the three steps is the judgment n. 16/2017, re-

39 See point 3.1 of the decision. The Constitutional Court recalls the principle of proportionality expressed in Case C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk*, [2003] ECR I-4989; Case C-92/09 and 93/09 *Volker and Markus Schecke and Eifert* [2010] ECR I-11063.

garding financial incentives for energy efficiency.[40] This case concerned the question of constitutional legitimacy of a provision contained in the law no. 116 of 2014 on environmental protection and energy efficiency. This regulation provides for the re-modulation – starting in 2015 – of the tariffs relating to the energy produced by photovoltaic systems with a power greater than 200 kW on the basis of three predetermined options, all of which are worse than the previous regimes regulated by special agreements with the GSE – Gestore dei Servizi Energetici (the Italian company for electric services). According to the referring judge, this provision would have been constitutionally illegitimate for: a) unreasonableness of unjust penalty of producers (of greater dimensions) of alternative energy to that coming from solar source; b) unequal treatment of applicants compared to local authorities and schools, owners of energy plants of equal power, exempted from the remodeling of financial incentives; c) violation of the principle of competition and freedom of individual economic initiative, due to the damage caused to the abovementioned producers unable to operate on the market on equal terms with the other solar energy producers.

The Court declared unfounded the question of constitutional legitimacy of the mentioned provision of the law no. 116 of 2014. According to the Court, the legislation aim was to achieve a fairer distribution of tariff charges among the various categories of electric consumers. Furthermore, the different size of the energy plants, with power respectively less than or greater than 200 kW, justifies the remodulation of the tariffs only in relation to producers with a capacity exceeding 200 kW, which absorb the greatest amount of financial incentives. Therefore, the Constitutional Court established that the contested provision is justified by the pursuit of a prevailing public interest involving a reasonable and proportionate sacrifice of the opposing individual interests. This results from a balanced weighing of the interests at stake and, in any case, from a reasonable link between the legislation aim (of finding financial resources) and the regulatory state intervention.

Reasonableness is classified by Italian scholars[41] in the group of typical unexpressed principles. These principles are not laid down in an explicit constitutional or legislative provision but were elaborated and developed by the doctrine and jurisprudence. Indeed, reasonableness is (not a written constitutional principle but) an unwritten principle of a constitutional nature; it means that the principle of reasonableness cannot be derogated by an act of Parliament. Not by chance, reasonableness is also defined as an «absolute principle»,[42] that is without exceptions. In detail, in Italian administrative law, the principle of

40 Constitutional Court, 24 January 2017, n. 16, in <www.cortecostituzionale.it>.

41 V Crisafulli, 'Disposizione (e norma)', *Enciclopedia del Diritto XIII* (1964) 197; R Guastini, 'Principi di diritto', *Digesto delle discipline civilistiche XIV* (1996) 341; F Nicotra (n 18) 3; F Astone (n 18) 3.

42 S Cassese, *Istituzioni di diritto amministrativo* (Giuffrè 2006) 248.

reasonableness is a corollary of three constitutional principles, namely equality[43] (as contained in Article 3), impartiality and good administration[44] (laid down in Article 97).

In this regard, the Constitutional Court recognised that the principle of reasonableness, acting as a limit to the exercise of the administrative discretion, guarantees the protection of individuals affected by law, by an administrative decision, and more generally, by the legal order.[45]

Moreover, the principle of reasonableness is indirectly recognised by the Italian Administrative Procedure Act (Law No. 241/1990), setting in Article 3(1), that almost[46] all the administrative measures must include a statement of reasons.[47] Indeed, the statement of reasons must set out the factual premises and the points of law that determined the authority's decision, as these emerge from the preliminary investigation; through it, the judge carries out the reasonableness test.

Since the origin of Italian administrative law, general principles of law have represented an important feature in its development. Despite the lack of rules on the binding value of the precedent (*stare decisis*), Italian administrative courts have played and still play an important role in the development of these principles and in bringing them to life; the same applies to the principle of reasonableness.

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43 Nicotra (n 18) 8, links reasonableness to the constitutional principle of equality. Such a relation is also recognized by the Italian Constitutional Court. This is made explicit in Constitutional Court, 4 May 2009, n. 137, in <www.cortecostituzionale.it>.

44 Vipiana (n 20) 135, 152, notes that the basis of the principle of reasonableness of administrative measures is founded on the values of impartiality (as a prohibition of unequal treatment and as an obligation to weigh all the interests at stake) and sound administration (suitability, as a component of the reasonableness, relative to the choice of the most suitable means to achieve the purpose); Astone (n 18) 388, states that reasonableness ensures the implementation of the constitutional principle of sound administration. On the relation between reasonableness, impartiality and good administration see Morbidelli (n 20) 1251ff; Barone, Ansaldi (n 24) 223.

45 Constitutional Court, 4 November 1999, n. 416, in <www.cortecostituzionale.it>. On this point see MTP Caputi Jambrenghi, 'Il principio del legittimo affidamento' in M Renna, S Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2012) 171.

46 A statement of reasons shall not be required for normative measures or for those of general application. See Article 3(2) of Law No. 241/1990 in relation to the duty to state reason.

47 On this point see Nicotra (n 18) 10.

3. The many faces of the principle of reasonableness in Italian administrative law

Reasonableness is a substantive and procedural standard at the same time.[48] It is interesting to note the new and growing attention being shown by Italian scholars to the reasonableness as standard of judicial review of administrative discretion. There are substantially three reasons for this renewed interests: firstly, the Italian crisis of the rule of law, which leaves a large margin of maneuver to the public authority for the exercise of discretionary administrative powers; secondly, the necessity of a judicial review of those discretionary powers, exercised by testing also the reasonableness of administrative action; lastly, the necessity to respect the principle of separation of powers between the executive, legislative and judicial authorities.

Indeed, in the Italian legal system, administrative power – which is manifested through administrative measures – is subordinate to legislative power and the principle of legality.[49] In other words, an administration can exercise only the powers explicitly provided for by specific law.[50] However, this positivistic theory does not reflect the reality. Excessive recourse to soft-law instruments, existence of new legal sources alien to national legal order and loss of centrality of Parliament produced a crisis of the rule of law. In this context, administrative action becomes increasingly autonomous (in the truest etymological sense of the word).

Therefore, whereas judicial review of administrative action is becoming increasingly full, thus «the question becomes (more accurately, necessarily implies) the identification of parameters of judgment defined by their reasonableness and proportionality, insofar as reasonableness, according to Ledda's well-known definition,[51] pertains "to the world of values, and therefore to the fundamental need for justice"».[52]

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48 In this regard Vipiana (n 20) 8, makes a distinction between reasonableness as principle of administrative action (called "reasonableness-standard") and reasonableness as ground of judicial review (called "reasonableness-parameter").

49 On this point De Pretis (n 30) 10, states that «the subordination of the administration to the law is obviously in order to permit judicial review of administrative action and, as such, the justiciability of right and legitimate expectations of private parties affected by it. In this context, the notion of lawfulness of administrative action extends beyond simple compliance with the law, to include conformity of the administrative decisions to the criteria of logic, reasonableness, correspondence with the facts and substantial equity».

50 G Zanobini, 'L'attività amministrativa e la legge' in G Zanobini (ed), *Scritti vari di diritto pubblico* (Giuffrè 1956) 25.

51 F Ledda, 'L'attività amministrativa' in *Il diritto amministrativo degli anni '80* (Giuffrè 1987) 109.

52 R Spagnuolo Vigorita, 'Public enemy: the effectiveness of administrative judicial protection' (2011) 3(2) Italian Journal of Public Law 245.

3.1. Reasonableness in the administrative proceeding

The fundamental principle of reasonableness conditions administrative activity. It is an absolute principle of administrative proceeding, because it does not tolerate exceptions by other principles. Primary meaning of reasonableness as principle of administrative action implies a correspondence between the choice made and the rules of the reason.

Moreover, reasonableness is a criterion imposing the duty to weigh all interests,[53] including private ones, characteristic of the exercise of discretionary powers, and preventing the sacrifice of those interests, unless it is strictly necessary to do so. Therefore, reasonableness requires public authority to carry out a full assessment of all options at stake. From this point of view, «the principle of reasonableness finds advanced expression in the principle of proportionality».[54]

Always referring to the administrative proceeding, reasonableness is a procedural criterion that allows to verify the completeness of the preliminary investigation, the adequacy between the preliminary investigation and the final decision, the internal consistency, the non-arbitrariness in weighing of interests at stake and therefore the logic and the coherence of the decision-making process.[55] In other words, reasonableness indicates «the plausibility and the justifiability of the choice made by the public authority».[56]

Lastly, reasonableness is the basis of some legal provisions on the timeframes for concluding procedures.[57]

3.2. Reasonableness in judicial review of administrative discretionary power

From a substantial point, reasonableness is a criterion for judicial review of administrative discretion. Indeed, reasonableness is a standard of conduct which the public authority need to follow in the administrative action. According to this criterion, administrative measure must not be vitiated by a lack of logic or congruity.

As for the relation between reasonableness and administrative discretion, the former is the content and the limit of the latter at the same time. The essence of discretionary power is that a public authority can weigh public and private

53 In this respect, it is evident that reasonableness is a corollary of the constitutional principle of impartiality, in its objective meaning (while impartiality in its subjective meaning indicates prohibition of unequal treatment).
54 De Pretis, 'Italian administrative law' (n 30) 40.
55 On this point see Morbidelli (n 20) 1257.
56 Cassese (n 40) 248 (my translations).
57 See Article 21-*nonies* of Law no. 241/1990.

interests,[58] because the legislator did not pre-establish the prevailing interest; as unanimously stated by the Italian doctrine and jurisprudence, if discretion is particularly out of bounds, the judge may quash the administrative measure only in case of manifest unreasonableness, that is when the standards of logic or coherence[59] are manifestly breached. Nevertheless, according to the principle of proportionality, a public authority must also make the decision that imply the least burden on the private interest at stake. The issue thus concerns the relation between reasonableness and proportionality as standard of judicial review.

Since the second half of the last century, the Italian doctrine[60] linked the manifest inconsistency and illogicality of administrative measure with the concept of reasonableness. Recently, excess of power[61] has become associated (if not confused) with an illogical or manifestly unreasonable decision.[62] Therefore, in case of a violation of the principle of reasonableness, the administrative

58 The late thirties was the defining moment for scholarly discussions on administrative discretion in Italy. In Mortati's broad reading, discretion is the room for choice left by law to the decision-maker by using open-ended and/or vague legal and/or factual words (discretion in broad sense); however, according to Giannini's stricter view, discretion is the power to choose between conflicting (primary and secondary) interests (proper discretion). On the Italian scholarly discussion about discretion see M S Giannini, *Il potere discrezionale della pubblica amministrazione* (Giuffrè 1939); C Mortati, 'Potere discrezionale', *Nuovo Digesto ItalianoX* (1939) 76; G Azzariti, 'Discrezionalità, merito e regole non giuridiche nel pensiero di Costantino Mortati e la polemica con Massimo Severo Giannini' (1989) 20 Politica del Diritto 347; F G Scoca 'La discrezionalità nel pensiero di Giannini e nella dottrina successiva' (2000) 4 Rivista trimestrale di diritto pubblico 1045.

59 In a number of cases, reasonableness is conceived as logic or coherence by the Italian courts. On this point see Della Cananea (n 4) 298-299. *Contra*, S Civitarese Matteucci 'Ragionevolezza (dir. amm.)', Enciclopedia Treccani (2017) <http://www.treccani.it> accessed 14 November 2019, states that reasonableness used as standard of judicial review of administrative discretion does fill different from mere logic and more closely reflects a sense of justice or the concept of proportionality.

60 F Benvenuti, 'Eccesso di potere per vizio della funzione' (1950) Rassegna di Diritto Pubblico 1.

61 In Italian administrative law, originally excess of power corresponded to the *detournement de pouvoir* of French law, that is the perverse use of official powers to attain illegitimate ends; therefore, initially excess of power was – and in part it still is – a deviation of the power, consisting in the use of power for a different purpose than that contemplated by the law (more exactly, the latter definition now indicates a misuse of power, that is only one of the many forms of excess of power classified by scholars). For an historical frame of this concept see G Treves 'Judicial Review in Italian Administrative Law' (1959) 26 The University of Chicago Law Review 432-433; G Corso, 'The Principle of Reasonableness in Administrative Law' in *Reasonableness and interpretation*, 2003, 387ff; R Caranta, *On discretion*, in S Prechal, B Van Roermund (eds), *The coherence of EU Law. The search for unity in divergent concepts* (Oxford University Press 2008) 191-192.

62 On this point see R Caranta, B Marchetti, 'Judicial review of regulatory decisions in Italy; changing the formula and keeping the substance?' in O Essens, A Gerbrandy, S Lavrijssen, *National courts and the standard of review in competition law and economic regulation* (Europa Law Publishing 2009) 151.

measure is considered affected by excess of power,[63] with particular reference to some form of the excess of power, the so-called "symptomatic figures" (figure sintomatiche),[64] classified by Italian administrative doctrine and jurisprudence, namely: conflict with standards of consistency, logic and reasonableness in administrative choices; unwarranted unequal treatment (when comparable situations are treated differently, unless such treatment is objectively justified); insufficiency or inconsistency in the statement of reasoning.[65]

As established recently by the Council of State,[66] the administrative judge can review technical discretion[67] also intrinsically (id est, making use of the same technical knowledge of the specialist science applied by public authority, especially by independent agencies) but he cannot go beyond the scrutiny of logic and reasonableness of administrative decision, otherwise he would infringe the principle of separation of powers.

In detail, the most recent administrative case law[68] – after getting passed several lexical disagreements concerning the first difference between weak and *de novo* (strong) judicial review – affirmed the possibility for the administrative judge to have access to the disputed facts and the formation process of the public will;[69] however, the Council of State ruled that the judge (although on the outcome of "intrinsic" scrutiny) cannot always be entitled to substitute its own construction to that of the public authority, when it comes to a complex evaluation on a questionable technical problem (in particular, on the so-called "contextualization" of vague and imprecise legal terms and their comparison with the established facts). If this is the case, the intervention by the judge should be limited to verifying whether the complex technical evaluation made by public authority is plausible, reasonable and proportional in the light of the technique, the appropriate science and all the relevant facts. Such a kind of judicial review has been defined "of technical reliability" and "non-substitute".

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63 On this point see F Bassi, *Lezioni di diritto amministrativo* (Giuffrè 2008) 119ff.

64 This expression indicates that an excess of power may have occurred.

65 In addition to those already mentioned, there are other forms of excess of power, eg the lack of a proper preliminary investigation (when the process of discovery of relevant facts is deemed inadequate) and, of course, the misuse of power.

66 Council of State, Section V, 31 July 2019, n. 5434, in <www.giustizia-amministrativa.it>.

67 For an historical frame of the traditional Italian reconstruction of the administrative technical evaluation activity see D De Pretis, *Valutazione amministrativa e discrezionalità tecnica* (Cedam 1995); S Cassese, *Valutazioni tecniche della pubblica amministrazione* in S Cassese (ed), *Dizionario di diritto pubblico*, (Giuffrè 2006) 6176; Caranta, Marchetti (n 60) 150-153.

68 Council of State, Section VI, 5 August 2019, n. 5562, in <www.giustizia-amministrativa.it>; Council of State, Section VI, 15 July 2019, n. 4990, *ivi*.

69 On this point De Pretis, 'Italian administrative law' (n 30) 33 argues that «naturally, a definition of the regimen and an analysis of the defective course of the administrative decision also implies an evaluation of the respect paid to the rules regarding the formation of the public will (*volontà pubblica*) under which the decision to act was taken by the administrative authority».

4. Lights and shadows of Italian administrative jurisprudence. The influence of the European Court of Justice on the Italian administrative (case) law

If most Italian scholars agree on reasonableness and proportionality to be two different and autonomous principles, in the Italian administrative case law the mentioned distinction is full of lights and shadows; sometimes, this difference is so blurred that reasonableness and proportionality are confused. In other words, in many of its judgments, national administrative jurisprudence uses reasonableness and proportionality without distinction.[70]

An example of these difficulties and uncertainties encountered in interpreting such standards of judicial review of administrative discretion is provided by a dispute on derogations from an administrative measure imposing a limited-traffic zone in historic center of Rome.[71] In the case at hand, the Plenary Assembly of Italian Council of State ruled that the weighing of the opposing interests at stake should be the outcome of a reasonable evaluation, according to which a public authority, when taking a discretionary decision, must choose the most reasonable solution (among the other available options) with the least sacrifice for the opposite interest. Therefore, as can be seen, in the present case the Court used the notion of reasonableness in a meaning that scholars usually give to proportionality.[72]

Italian administrative law – as we know it today – is clearly influenced by the EU legal system. As it has been mentioned in the first paragraph, the ECJ's established case law reveals that the essence of reasonableness as yardstick of judicial review lies in balancing interests. And, of course, this point of view has influenced also Italian courts. A recent example[73] is provided by a dispute on environmental standards in Italy. Since the 1973, a company used to operate a chemical plant for the production of detergents with the necessary authorizations. Following the entry into force of Legislative Decree 3 April 2006, no. 152

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70 This is made quite explicit in Council of State, Section VI, 27 July 2015, n. 3669, in <www.giustizia-amministrativa.it>; Council of State, Section VI, 11 January 2010, n. 14, *ivi*. On this point see, Villamena (n 19) 100 who argues that in administrative case law reasonableness and proportionality are used confusedly; also Barone, Ansaldi (n 24) 222 state that «only during the last years has Italian jurisprudence acquired the Community principle of proportionality even if sometimes it confuses this principle with the reasonableness one»; Cognetti (n 19) 168 affirms that the principle of proportionality has entered the Italian jurisprudential language, although not until very recently (precisely with case Council of State, Section V, 18 February 1992, n. 132), overlapping and intertwining in an approximate and confused manner with the principle of reasonableness, interpreted in a double sense: as non-contradiction and suitability between means and ends.

71 Council of State, Plenary Assembly, 6 February 1993, n. 3, in <www.giustizia-amministrativa.it>.

72 It is highly significant that the word 'proportionality' is never used by the Court in the case at hand.

73 TAR Lazio, Latina, Section I, 18 April 2018, n. 205.

approving the Italian Code on the Environment, to carry out polluting activities became obligatory to obtain an Integrated Environmental Authorization. In 2012, the local government administration had issued the authorization requested by the company in 2007 but decided to impose on the company some conditions designed – from the point of view of local government – to raise environmental standards. In details, the company – to verify the environmental impact of road traffic resulting from the exercise of business activity around the production plant – should have notified within 180 days: number and type of vehicles arriving and departing from the plant as a whole; for each vehicle, power supply and emissions classification according to European standards (Euro 2, 3, 4 etc.); distribution of arrival and departure of vehicles in the space of a weekday, pre-holiday and festive day; average distance (km/journey) of the various means of transportation.

The company claimed that these conditions were unreasonable, disproportionate, unnecessary and that they entailed an excessive burden. The claim was recognized as valid by the regional administrative court, precisely on the basis of both the proportionality test and the reasonableness test. In other words, in this case the regional administrative court carried out a balancing test, which involves both proportionality and reasonableness as standards of judicial review. Indeed, on the one hand, the judge balanced the public interest of environmental protection with the individual interest in conducting business activity. Furthermore, the court established that the imposed conditions were excessively burdensome and disproportionate to the limits prescribed by law and more generally to the environmental protection aim predefined by the legislator; on the other hand, the judge ruled that the imposed administrative requirements were unreasonable because the data collected on monitoring and control of emissions were of no use to the environmental protection. Finally, the challenged administrative conditions were considered unreasonable as a consequence both of their difficult implementation and of the specificity of the required information, the majority of which was not directly available and easily accessible for the claimant.

In this case, European influences are clear in two respects: first, the Court implicitly recognizes that the essence of both reasonableness and proportionality lies in the balance of interests at stake;[74] second, the Court, while explicitly claiming to have applied the standards of reasonableness and proportionality, used them in a vague and indistinct manner.[75] Moreover, the Court has not

74 This is made explicit in TAR Sardegna, Cagliari, Section II, 7 November 2019, n. 824, according to which the EU principles of reasonableness and proportionality always require to achieve a balance between public and private interests.

75 D'Alberti (n 19) 109 highlights that in some cases, Italian Courts have quashed administrative measures that were deemed to be manifestly disproportionate. Obviously, to assess the manifest disproportion entails a marginal review. According to the author, in this case, the proportionality test resembles a control on reasonableness.

specified, in practice, how the application of each of these two principles affects the disputed administrative act, as we have seen often happen in the European Court of Justice case law. Instead, if the national administrative judge had wanted to follow the teaching of classical Italian doctrine, he probably would have specified which administrative prescriptions were disproportionate and which were unreasonable, diversifying the application of the criteria of judicial review, based on a precise and clear categorization of the same.

Moreover, as sometimes happens in the ECJ case law, reasonableness often ends by being absorbed in the proportionality test also in Italian administrative case law.[76] This obviously does not mean that proportionality and reasonableness express the same principle. Indeed, this case law, that often uses together reasonableness and proportionality or sometimes uses them interchangeably, doesn't convince the Italian doctrine, because such a judicial control does not seem particularly rigorous.

On the other hand, the influence of EU law – as interpreted by the Court of Justice – on the Italian administrative (case) law, is clear with regard to the relation between reasonableness and other general principles of law. Indeed, in the ECJ case law, reasonableness is seen as a key tool and condition for implementing other general principles of law (in the examples given in the first paragraph, the legitimate expectations and precautionary principle). In the same way, in the Italian legal order, the Constitutional Court stated that the tool able to give general application to the principle of legitimate expectations is exactly the reasonableness, understood as core value of legal culture, inherent in all public law relations;[77] according to the Court, indeed, the principle of legitimate expectations has its roots in the standard of reasonableness, especially in terms of legal certainty, fundamental element of the rule of law.[78] On the same topic, under the influence of the ECJ case law, the Italian Council of State also ruled that, according to the standard of reasonableness, in case of merely formal de-

76 De Pretis (n 30) 13, points out that «the reasonableness principle, in its traditional implementation, already allowed the [Italian] Council of State to question administrative choices in some sensitive areas, such as the protection of property and the environment, using standards that were not very different from those involved in the proportionality test under Community law»; on this point see also Astone (n 18) 4.

77 Constitutional Court, 4 November 1999, n. 416, in <www.cortecostituzionale.it>. On the relation between the principle of legitimate expectation and reasonableness see G Grasso, 'Sul rilievo del principio del legittimo affidamento nei rapporti con la Pubblica Amministrazione' in A Di Taranto (ed), *Il nuovo modello di amministrazione tra il principio di autoritarietà ed unilateralità ed i moduli consensuali nella organizzazione e nell'esercizio delle potestà pubbliche*, (2005) <www.sna.gov.it> 30; A Giurickovic Dato, 'Sul principio del legittimo affidamento' (2018) 1 Diritto e processo amministrativo 338.

78 Constitutional Court, 23 February 2011, n. 71, in <www.cortecostituzionale.it>.

fects and in presence of long-established legal position, judicial protection should be given to the *reasonably* founded expectations.[79]

In conclusion, in Italian and EU administrative law, reasonableness is a very broad[80] principle of law designed to ensure the fairness of administrative decisions; it is often used as a canon of interpretation and a tool to operationalize other general principles of law. In any case, it is clear that reasonableness is a basic and fundamental principle of legal system, parameter of supreme importance in order to protect individuals against administrative arbitrariness. On the other hand, as anticipated above, according to the majority of Italian scholars, the principle of proportionality must be distinguished from that of reasonableness. This division certainly has positive aspects. Indeed, the proportionality test, taking into account three elements of judgment, made judicial review of administrative discretion more intense than that of reasonableness; it is a further tool to control the proper use of administrative power; it ensures a wider judicial protection for the individual interests compared to the public interest.

79 Council of State, Section IV, 14 November 2014, n. 5609, point 6, in <www.giustizia-amministrativa.it>; Council of State, Section IV, 18 August 2009, n. 4958, *ivi*; Council of State, Section IV, 2 October 2007, n. 5074, *ivi*.

80 Adinolfi (n 5) 401, notes that reasonableness «is a manifold principle playing different roles, and in playing these roles it changes its meaning and content, like a chameleon».