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Locus Standi and distrust of the public administration. A comparison of three models

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Abstract

This paper examines the connection that exists in three specific legal orders between the regulation of locus standi in the public interest in administrative litigations, and the confidence that the society and the institutions place in the role and authoritativeness of the public administration. To this end, after briefly addressing the concept of 'Counter-Democracy', focus is turned first to the current debate regarding locus standi in the public interests in Germany and then to the situation in Italy. This analysis aims, on the one hand, to aid understanding of the reasons underlying the differences that can be found between these two legal systems and, on the other hand, to explain the tensions that are present in the third model, that of the European Union, which affect locus standi for environmental matters in relation to the Aahrus Convention.

1. Subject of the research

The issue of the right to appeal (*locus standi*) against acts of the public administration is of central importance in all European countries,[1] in

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1 For an extensive comparative analysis, see M. Eliantonio & C.W. Backes & C.H. van Rhee & T.N.B.M. Spronken & A. Berlee (Eds.), *Standing up for your right(s) in Europe: A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts* (Brussels: 2012), especially Chapter 4, that contains very interesting information on this issue. The study – commissioned by the EU Parliament – is also available on: www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf (consulted on the 21st May 2015).

which – as a consequence of EU law[2] – it is constantly the focus of case law and doctrine. From this point of view, there are very notable differences among national legal orders. Despite the fact that the main purpose of administrative justice in all legal systems is the protection of the legal sphere of private parties, the conceptualisation of the relationship between the protection of individual rights and the protection of public interests within the judicial review process, is quite different. This problem is, in turn, closely linked to that of the locus standi for taking action in the general, public or diffuse interests and, more generally, the issue of the special forms of locus standi for access to judicial review.

This paper will concentrate on one specific aspect of the argument and in particular on the relationships that can be seen between the regulation of locus standi in the public interest and the consideration held for the role and the authoritativeness of the public administration in the three legal orders examined here. However, it should be noted that the following are very brief, initial remarks on the subject, which will not therefore be dealt with in a comprehensive way: the aim of the paper is rather to indicate a possible research path, identifying some conceptual ideas that could be studied in more depth in future papers.

In order to begin upon this research path, the initial focus will be on the problem of social mistrust in democratic institutions using the concept of 'Counter-Democracy' (see *infra* 2), before moving on to examine the relationships that may exist between mistrust in the administration by the legislator and the judges and the right to appeal (see *infra* 3). In the light of these considerations, the current debate on locus standi for the protection of public interests in Germany (see *infra* 4.1) and Italy (see *infra* 4.2) will be briefly discussed. This analysis should enable an understanding both, on one hand, of the reasons underlying the differences between the two systems (see *infra* 4.3) and, on the other, of some tensions present in the third model considered here – that of the European Union – which concern the locus standi of environmental associations before the EU Courts, under the Aahrus Convention (see *infra* 5).

2. Social mistrust in democratic institutions and the concept of 'Counter-Democracy'

The starting point of this research is the theoretical finding that contemporary States are faced – in a more or less intense manner – with a growing distrust of citizens towards democratic-representative institu-

[2] See for e.g. M. Eliantonio, *Europeanisation of Administrative Justice. The Influence of the ECJ's Case Law in Italy, Germany and England* (Groningen 2008).

tions.[3] Even though in different ways, they have therefore used instruments – parallel to those of the traditional liberal-matrix (amongst which the techniques of legal protection of individuals' rights) – aimed at expressing and organizing such distrust. At times, these are political or social practices, at other times they are true legal procedures; In all cases these instruments are transformed into vigilance, denunciation and evaluation actions on behalf of associations, the press and individuals, concerning the conduct of elective bodies. Generally speaking, these actions have been traced back to the concept – essentially pertaining to political science – of 'Counter-Democracy'.[4] This neologism, which is rather counterintuitive, indicates the set of activities that do not aim to associate the citizen with the exercise of power (as is the case with electoral procedures and mechanisms of participatory democracy), but that instead have the purpose of organizing their control and influence over those who govern.[5]

For the sake of clarity, it should be pointed out that the concept of 'Counter-Democracy' does not constitute the opposite of democracy, but represents, rather, a specific form (being an expression of 'indirect powers disseminated throughout society') that opposes electoral democracy by submitting it to virtuous proofs so that it remains 'faithful to its commitments' in the service of the common good.[6] For this reason, the term 'negative sovereignty' has also been used, which refers, in fact, to the instruments through which some governmental choices are denounced and rejected by citizens.[7]

By its very nature however, 'Counter-Democracy', has strongly ambivalent characteristics.[8] It can, in fact, on the one hand reinforce and encourage dem-

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3 The issue of the distrust of citizens towards democratically-elected institutions is the subject of numerous interpretations in the political science. Apart from the references contained in the following notes, mention should be made e.g. of C. Galli, *Il disagio della democrazia* (Turin 2011) and C. Crouch, *Post-Democracy* (Cambridge et al. 2004).

4 P. Rosanvallon, *Counter-Democracy. Politics in an Age of Distrust* (Cambridge 2008).

5 From this point of view the obvious similarity between Rosanvallon's approach and some insights of the Italian legal scholar Feliciano Benvenuti cannot be ignored. See, in particular, F. Benvenuti, *Il nuovo Cittadino* (Venice 1994), now in Id., *Scritti giuridici* (Milan 2006), 869 ff., especially 940, where it is stated that: 'Thus, it appears that the contemporary crisis in which the Administration finds itself is also the result of the lack of discipline of an external control, that is to say the control that citizens – who now consider themselves involved in their fate – must be called on to exercise as members of a legal system characterized by demarchy. Only in this way can a legally disciplined answer be given to the state of mind of individuals or associations who feel unhappy and even sacrificed by a public power they consider not only not representative and lacking in the moment of consensus but moreover far from participation both in terms of active intervention and in terms of supervisory intervention'.

6 P. Rosanvallon, *Counter-Democracy*, cit., 8. In this regard, the quotes from John Gardner (founder of Common Cause) included by E. Magill, 'Standing for the Public: A Lost History' [2009/5] *Virginia Law Review* 1192, are very interesting from this point of view: He formed Common Cause to 'ensure government and political process serve the general interest rather special interest'.

7 P. Rosanvallon, *Counter-Democracy*, cit., 121 ff.

8 P. Rosanvallon, *Counter-Democracy*, cit., spec. Chap. IV.

agogic and populist attitudes, thus increasing the level of distrust present in society;[9] on the other hand, it can act as a 'buttress' for the democratically elected institutions: with the latter, it is able to become a true system, allowing it to extend and strengthen its range of action.[10]

Without undertaking an in-depth examination of such a complex issue of the contemporary State, it is sufficient to observe here that one of the instruments of 'Counter-Democracy' consists of 'putting on trial' the choices of those governing.[11] That leads to the 'the judicialization of politics': 'It is as though citizens hope to obtain from a judicial process of some sort, what they despair of obtaining from the ballot box'.[12] This brings us to the subject at hand, as locus standi in the public interest in administrative matters (and especially that recognized in favour of non-governmental organizations) can be traced back to this conceptual framework.[13] It in fact allows segments of society to act, with preventative aims,[14] against certain policies and administrative actions carried out by elective bodies.[15]

3. Locus standi in the public interest and institutional mistrust in the public administration

This reconstruction obviously raises some delicate issues for legal scholars. In particular, it is necessary to determine whether, and how, the more formalized mechanism of 'Counter-Democracy' – i.e. the locus standi in the public interest – is regulated in the various legal orders, what the causes are behind it and what the consequences are in systematic terms. The answer to these questions however presupposes some initial clarifications.

Social mistrust is in fact only one aspect of the problem; the other is represented by the choices made by the institutional actors (and in particular by the legislator and the judges) in this respect. For our purposes, it is important

9 See in general, P. Rosanvallon, *Counter-Democracy*, cit., 299, who affirms that, by their nature, the instruments of counter democracy 'suffer from structural instability; the significance of their activity is prone to a certain slippage'.

10 P. Rosanvallon, *Counter-Democracy*, cit., 8.

11 P. Rosanvallon, *Counter-Democracy*, cit., Part. III.

12 P. Rosanvallon, *Counter-Democracy*, cit., 16. See however C. Harlow, 'Public Law and Popular Justice' [2002/1] *MLR* 1-18, who formulates a series of observations (referring to the UK) regarding the risks of the interference between the political and judicial process.

13 Rosanvallon however, does not deal specifically with the subject of legal standing of associations, but in generic and wide terms refers only to putting the power on trial.

14 On the preventative function of 'Counter-Democracy', see once again, P. Rosanvallon, *Counter-Democracy*, cit., especially Part. II.

15 For Italian doctrine, see for e.g. Denti, 'Interessi diffusi', in *Nuovissimo digesto italiano. Appendice IV* (Turin: UTET 1983) 307, which speaks of the 'diffused majority' using judicial paths to participate in the decisional process.

to underline that when locus standi to act in the public interest is recognised either by legislative or judicial means, a potential connection can be seen between social distrust and institutional mistrust of the administration. Some examples could be useful to help in the understanding of this point.

First of all, the legislator can give room, or even encourage, this mistrust to pursue specific political goals. For example, in the 1960s and 1970s in the USA, for many important public sectors (e.g. environment, workplace safety, consumer lending, product safety) locus standi for citizens in the public interest were provided for. In these cases therefore '... the Congress mobilized a distinctly American army of enforcers – a decentralized, ideologically motivated array of private advocacy groups and lawyers'[16] – the so-called private attorney general.[17] It was a delegation by Congress to private parties of the public power to ensure that the law is faithfully executed by engaging in the judicial process.[18] It has been demonstrated that this regulation of the right to appeal was the result of conflicts between the government and the parliament, which led the latter to trust in the judicial action of the citizens, more than in the administration, to achieve the political objectives they desired.[19]

Furthermore, the standing to appeal can be extended, in the silence of the legislator, by courts, for example, to try to repair the structural malfunctions of the administration. This happened in France in the early twentieth century when the Conseil d'Etat ruled that the position as a municipal taxpayer would be sufficient to act in court against a municipal council's decision[20] or that the status as a neighbourhood resident would allow a person to appeal the decision of a prefecture to modify a tramway route.[21] According to historians, the widening of the legal standing to appeal (or rather of the *intérêt à agir*) was used here by the French judge for the specific purpose of dealing with irregularities and abuses resulting from the increasing politicization of the public administration.[22]

Firstly, these examples clarify how the encounter between social and institutional distrust (of Congress and the Conseil d'Etat) towards the administration

16 R. Kagan, *Adversarial Legalism. The American Way of Law* (Cambridge, Ma 2001) 47. For a highly interesting reconstruction and explanation (in the light of the political and social context of the 1960's and 1970's) of the evolution of the case law of the USA Supreme Court on the legal standing for a judicial review, see E. Magill, 'Standing for the Public', cit., 1131 ff.

17 R. Kagan, *Adversarial Legalism*, cit., 37 ff.

18 P. Cane, *Controlling Administrative Power. A Historical Comparison* (Cambridge 2016) 489, which cites H.J. Krent & E.G. Shenkman, 'Of Citizen Suits and Citizen Sunstein' [1993/7] *Michigan Law Review* 1793.

19 See – still with reference to the USA – S. Farhang, 'Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law' [2012/3] *Law & Social Inquiry* 657 ff.

20 Conseil d'Etat, 29 March 1901, *Casanova*.

21 Conseil d'Etat, 21 December 1906, *Syndicat des propriétaires du quartier Croix-de-Seguey-Tivoli*.

22 F. Burdeau, *Histoire du droit adminisytratif* (Paris 1995) 256-267, especially 261.

may give rise to the extension of the locus standi and how this may concern more or less extensive areas. Secondly, these examples provide another, more obvious clarification. The link between these two forms of mistrust affects, in individual legal systems, many structural factors (e.g. constitutional dictates) or contingents that cannot be overlooked.

According to many authors, for example, in the US system the regulation of the standing of citizens must be conceptualized in terms of the separation of powers (and in particular the division of powers between the legislator and the executive), rather than in terms of the relationship between citizens and the state.[23] This circumstance allows for an understanding of the restrictive reaction of the Supreme Court to the legislative openings mentioned above.[24] As far as the French legal order is concerned, one has to take into consideration the complex evolution of this administrative justice system, a large part of which (the *recours pour excès de pouvoir*) has the primary purpose of ensuring the compliance with legality of the administrative action (thus representing an objective form of judicial review). This corresponds to fairly generous (jurisprudential) rules, characterized by a marked flexibility[25] in the standing for private appeals,[26] which is still considered by some scholars as a kind of *procureur du droit*.[27] However, the applicant must always have a specific *intérêt à agir*, since he cannot appeal to the administrative court solely in the general interest of legality (hence forms of *actio popularis* are excluded). The peculiar characteristics of the *recours pour excès de pouvoir* make it more difficult to interpret the regulation of legal standing in light of the theme of mistrust in the public administration. But this in no sense means that the problem does not arise also in this case, as is demonstrated by the examples reported above and some recent legal norms:[28] it is merely more difficult to decipher.

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23 See es. P. Cane, *Controlling Administrative Power*, cit., especially 485 ff. and 492 f., where there is an extensive bibliography.

24 See for all, E. Magill, 'Standing for the Public', cit.

25 See e.g. Desrameaux, 'L'intérêt donnant qualité pour agir en justice. D'une règle du contentieux administratif à l'esprit du droit administratif français', in V. Donier & B. Lapérou- Scheneider (Eds.), *L'accès au juge – Recherche sur l'effectivité d'un droit* (Brussels: Bruylant 2013) 319 ff.

26 This however has not prevented the Conseil d'Etat from at times taking more restrictive positions; see e.g. E. Chevalier & M. Eliantonio, 'Standing before French administrative courts: too restrictive to effectively enforce environmental rights?' [2017/5] *Montesquieu Law Review* 65 ff.

27 See e.g. R. Chapus, *Droit du contentieux administratif* (Paris 2008, 13° ed.), 224.

28 See law n° 2016-1547 of the 18 November 2016 (*de modernisation de la justice du XXIème siècle*) and the Décret d'application n°2017-888 of the 6 May 2017 (*relatif à l'action de groupe*), which introduced collective action against the public administration. Also very interesting is P. Bélaval & L. Helmlinger & P. Mindu & A. Courreges & A. Levasseur, et al., *L'action collective en droit administratif*: Groupe *de travail interne au Conseil d'Etat* (France 2009); the document is available at: hal.archives-ouvertes.fr/hal-00685958/document (consulted on the 23 September 2107). For another, less recent example, reference can be made to *déféré préfectoral*, meaning the action that the prefect - under Art. 72 of the Constitution and Law n. 82-213 of 2 March 1982 – can bring before an administrative judge against decisions of municipalities.

All in all, a correlation between the legal regulation of locus standi in the public interest and the consideration held for the role of the public administration can often be seen. This consideration must not be understood only as a simple opinion held by the public, but also as a set of factors – above all legislative and jurisprudential (but also social and political) that, observed as a whole, represent the level of trust that a specific legal order places in the public administration. In this regard, it is necessary only to add that several factors, including external ones, can affect the social and institutional side of the trust in public administration. Regarding the Member States of the European Union, it is sufficient to consider the specific recommendations that the Council addresses to individual countries annually on the National Reform Programme and the Stability Program[29] and the references made to the need to improve the level of efficiency and reliability of the public administration (see *infra* 4.2.).

Following these clarifications, we can now move on to the analysis of the three legal orders that are the subject of this paper.

4. Legal standing to act in the protection of the public interest in Germany and Italy

4.1. Highlights of the German debate

The German system of administrative justice has a strong individualistic orientation:[30] According to Article 19, paragraph 4 of the German Basic Law, administrative justice must primarily be aimed at protecting the rights of private individuals.[31] For this reason, the forms of locus standi that go beyond this aim,[32] and in particular those in favour of associations for the protection of the environment originating from European law,[33] have often been

29 See Art. 5, Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

30 For example, speaks of *Systementscheidung für den Individualrechtsschutz*, E. Schmidt-Aßmann, *Allgemeine Verwaltungsrecht als Ordnungsidee* (Heidelberg 2006, 2° ed.) 213 ff.

31 For all, see Schmidt-Aßmann, 'Die Rechtsschutzgarantie des Art. 19, Abs. 4 GG', in T. Maunz & G. Dürig (Eds.), *Grundgesetz-Kommentar* (München: Beck 2014) 12 ff., which clarifies that eventual forms of objective control of judicial administrative action cannot exceed, from a quantitative and qualitative point of view, the activity of rights protection.

32 See, e.g. the general description offered by T. Groß, 'Die Klagebefugnis als gesetzliches Regulativ des Kontrollzugangs' [2010/3] *Die Verwaltung* 349-377, which also deals with the issue of locus standi regarding lawsuits within the State organisation.

33 For a complete description of the issue, see A.K. Mangold & R. Wahl, 'Das europäisierte deutsche Rechtsschutzkonzept' [2015/1] *Die Verwaltung* 1 ff., especially 20 ff., with extensive reference to the case law of the Court of Justice. See now Court of Justice, judgment of 15 October 2015, C-137/14 (*European Commission v. Federal Republic of Germany*), EU:C:2015:683.

seen in a negative light and with some distrust in doctrine and case law.[34] For many scholars, the problem lies in the fact that the judicial actions of associations target decisions taken by an administrative body characterized by unquestionable democratic legitimacy.[35] Furthermore, since this legal standing constitutes an opportunity to exercise an objective control over administrative action, this would be contrary to the German tradition which – based on the concept of the subjective public right[36] – tends to exclude the action of the individual in the general interest. This framework, according to one preeminent scholar, leads to the image of a depoliticized administration and of a citizen who is understood as *bourgeois* (i.e. essentially one who acts out of private interests) and no longer as a *citoyen* (i.e. primarily a member of the community and therefore interested in the pursuit of the common good).[37]

Some authors, on the contrary, argue that the German system of administrative justice should be interpreted in a more evolutionary way. Given that the administration does not have a monopoly over the identification of the general interest, legitimacy factors other than those deriving from the democratic/electoral circuit should also be taken into consideration.[38] European law has contributed to such developments, given that in addition to providing for cases of legal standing in favor of environmental associations, it has since the beginning confided in the so-called 'private enforcement' of European legal norms.[39] This

34 A confirmation of this can be found in the final report of the public law section of the 71st Deutscher Juristentag (Erfurt, 2016) entitled 'Change in the function of administrative justice under the influence of European Union law'. In particular, point 10 of the final report reads: 'a) the legislator may grant recognized associations for the protection of the environment and the nature the right to legal standing against any decision of the State which falls within the framework of the application of the Environmental Impact Assessment and Industrial Emissions Directives; b) non-governmental organizations can only censor violations of objective law, the protection for which was founded and recognized in their statute' (p. 18). The final report – which has obviously an advisory nature – can be found at the following Internet address: www.djt.de/fileadmin/downloads/71/161213_71_beschluesse_web.pdf (consulted on the 21st May 2017).

35 See, the overview offered by E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (Tübingen 2014), 112 f.

36 See for all, Masing, 'Der Rechtsstatus des Einzelnen im Verwaltungsrechts', in W. Hoffmann-Riem & E. Schmidt-Aßmann & A. Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, vol. 1 (München: Beck 2012, 2° ed.) 492 ff., where there is an extensive bibliography.

37 Masing, Der Rechtsstatus des Einzelnen, cit., 455 ff; Id., *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts. Europäische Impulse für die Revision der Lehre vom subjektiv-öffentlichen Recht* (Berlin 1997), 155 ff. and 219 ff.

38 See for all, E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik*, cit., 114; Id., *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, cit., 147 ff. See also in more general terms, F. Wollenschläger, 'Constitutionalisation and deconstitutionalisation of administrative law in view of Europeanisation and emancipation' [2017/1] *REALaw* 7-79.

39 As well-known, according to the Court of Justice, 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States': Court of Justice, judgment 5 February 1963, case no. 26/62 (*NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*), EU:C:1963:1. For an overview, see. F. Wilman, *Private Enforcement of EU Law Before National Courts* (Cheltenham, UK, Northempton, MA, USA 2015).

has led to the widening of the very notion of subjective public rights, as a prerequisite for access to the administrative courts.[40] As a result, these rights, while remaining individual, are guaranteed to private citizens in particular in order to ensure that the State apparatus pursues specific public interests (including those of the European Community/Union), and not only to protect the relative owner – the so-called *Prokuratorische Rechte*.[41] In this regard, it is considered that even though the Basic Law does not make specific reference to the *Prokuratorische Rechte*, these would in any case be admissible under German law,[42] as they could be recognized according to Paragraph 42 (2) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) by the legislature (and not by the judiciary) in specific circumstances.[43]

Despite these openings, these authors agree primarily on the fact that on the whole, a restrictive legislative trend is expected towards the standing of associations also in the future.[44] These actions should, in particular, be admissible only in the presence of structural deficiencies in the protection of certain public interests that originate from the lack of individual locus standi to which to turn.[45] The same can be said for the *Prokuratorische Rechte*, which must also be understood in a restrictive sense and the legal regulation of which must not call into question the 'individual substance' of the right itself.[46]

4.2. Highlights of the Italian situation

The situation in Italian law is very different, where the doctrinal debate and the jurisprudence activity on the subject has long been about the notion of legal standing for public and collective interests and the relationship

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40 See, for e.g. M. Ruffert, 'Rights and Remedies in European Community Law' [1997/2] *CMLR* 307 ff., especially 316, with further bibliographical references. See also, E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik*, cit., 113 f.

41 In doctrine, for all, see, J. Masing, *Die Mobilisierung des Bürgers*, cit.; along the same lines, see M. Ruffert, 'Rights and Remedies', cit. See also the considerations of A.K. Mangold & R. Wahl, 'Das europäisierte deutsche Rechtsschutzkonzept', cit., 1 ff.

42 Masing, 'Der Rechtsstatus des Einzelnen', cit., 501 f.

43 Paragraph 42 (2) of the Code of Administrative Court Procedure reads: 'Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission'.

44 See Schmidt-Aßmann, 'Mutamento della funzione della giustizia amministrativa tedesca. Spunti per alcune riflessioni sistematiche', in V. Cerulli Irelli (Ed.), *La giustizia amministrativa in Italia e in Germania. Contributi per un confront* (Milan: Giuffré 2017), 13.

45 See for e.g. point 11 of the final report of the public law section of the 71st Deutscher Juristentag: 'the same forms of legal standing for recognized non-governmental organizations that are active in other fields are admissible in exceptional circumstances, where the protection of rights shows structural weaknesses'. On this subject, see, amongst others, the considerations of A.K. Mangold & R. Wahl, 'Das europäisierte deutsche Rechtsschutzkonzept', cit., 18 ff.

46 See, once again, E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik*, cit., 114 f.

between these and the idea of legitimate interests (*interessi legittimi*).[47] Regardless of any other consideration of this complex theme, it must be observed that, on the one hand, in the Italian legal order the main function of administrative justice is to protect the individual's rights towards administrative action.[48] On the other hand, however, there are numerous legal norms in force which are oriented towards forms of objective judicial control over the public administration or in any case towards control techniques where the function of the applicant's rights protection is recessive.[49]

The most well-known case is that of the legal standing of environmental associations, which no longer raises any fundamental conceptual problems as it was provided for by the national legislator long before it was imposed by European law.[50] However, this is not an exception: Suffice to recall the provisions that allow associations and collective bodies to go to court to protect public or collective interests (e.g. the landscape, the territory of nature reserves or nature parks)[51] or to protect interests of certain categories (e.g. consumers, enterprises).[52] In addition, according to the law, citizens or associations can now take action to counter the inefficiencies of public administrations or bodies that supply public utilities.[53] But the examples do not stop there. Indeed, mention

47 For a summary of the problem, see Manfredi, 'Interessi diffusi e collettivi (diritto amministrativo)', in *Enciclopedia del diritto. Annali VII*, (Milan: Giuffrè 2014), 513 ff., with extensive bibliographical and case law references; C. Cudia, *Gli interessi plurisoggettivi tra diritto e processo amministrativo* (Rimini 2012); Ead., 'Interessi diffusi e collettivi [diritto amministrativo]', in *Diritto on line* (2014).

48 In doctrine e.g. V. Cerulli Irelli, 'Legittimazione "soggettiva" e legittimazione "oggettiva" ad agire nel processo amministrativo [2014/2] *Diritto processuale amministrativo* 341 ff. In the case law see, e.g., Consiglio di Stato, Adunanza Plenaria, judgment of 25 February 2014, No. 9; judgment of 7 April 2011, No. 4; judgment of 10 November 2008, No. 11.

49 On this subject, see *ex multis* V. Cerulli Irelli, 'Legittimazione "soggettiva" e legittimazione "oggettiva"', cit., 341 ff.

50 See Art. 18, par. 5, Law 8 July 1986, No. 349 (Instituting the Ministry of the Environment); Art. 309 and Art. 310, Legislative Decree 3 April 2006, No. 152 (Environmental Code).

51 Art. 146, par. 11, Legislative Decree 22 January 2004, No. 42 (Cultural Heritage and Landscape Code); Art. 13, par. 2, Law 6 December 1991, No. 394 (Framework Law on Protected Areas). See also Art. 11, Law 11 August 1991, No. 266 (Framework Law on Volunteer Work). In doctrine, see Manfredi, 'Interessi diffusi e collettivi', cit., 520 ff.

52 For example, for consumers, see Art. 139 ff., Legislative Decree 6 September 2005, No. 206 (Consumer Code), on which see for all Manfredi, 'Interessi diffusi e collettivi', cit., 522 ff. and C. Cudia, *Gli interessi plurisoggettivi*, cit., 239 ff. Regarding the Chambers of Commerce and the CNEL [National Council for Economics and Labour], see Art. 4, Law 11 November 2011, No. 180 (Provisions for the Protection of the Freedom of Enterprise), on the basis of which trade associations represented in at least five Chambers of Commerce or the CNEL, together with their local branches, have the legal standing to bring actions before the court to protect both the interests of all those belonging to the same professional category, or to protect similar interests concerning only some economic subjects.

53 Legislative Decree 20 December 2009, No. 198, for which see C. Cudia, *Gli interessi plurisoggettivi*, cit., 286 ff.

should also be made of the cases of *actio popularis* established by the law[54] (amongst which the recent regulation of civic access to documents stands out),[55] the possibility of taking legal action in front of the administrative judge granted by the legislator in favour of some (both independent and non) administrative authorities against other public administrations[56] and, finally, the legislative[57] and jurisprudential extension of the right to appeal of individuals in various sectors.[58]

The contribution of doctrine in this field must not be overlooked. Reference is made here to the studies on the so-called 'common goods' that, in certain areas, have proposed instituting new types of popular action[59] or to the similar

54 See, for example, the popular action regulated by Art. 9 Legislative Decree 18 August 2000, No. 267 (Unified Code on Local Authorities), concerning court cases that citizens can bring in the event of the omission of taking a legal action on the part of provinces and municipalities. See also the popular corrective action regarding the elections for local government, provinces, regions and the EU Parliament, now regulated under Art. 130, Legislative Decree 2 July 2010, No. 104 (Code of Administrative Court Procedure). See for all, C. Cudia, *Gli interessi plurisoggettivi*, cit., 239 ff., as well as F. Astone & F. Manganaro & A. Romano Tassone & F. Saitta (Eds.), *Cittadinanza ed azioni popolari* (Soveria Mannelli: 2010).

55 See the new wording of Art. 5, Legislative Decree 14 March 2013, No. 33, as amended by the Legislative Decree 25 May 2016, No. 97 (containing the Re-ordering of the legal discipline regarding the right of civic access to public documents and the obligation for publicizing, transparency, and diffusion of information by public administrations), on which see e.g. D.-U. Galetta, 'La trasparenza, per un nuovo rapporto tra cittadino e pubblica amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo' [2016/5] *Rivista italiana di diritto pubblico comunitario* 1019 ff.

56 For example, Art. 21-*bis*, Law 10 October 1990, No. 287 (Competition and Fair Trading Act); Art. 37, par. 2, lett. n., Decree-Law 6 December 2011, No. 201 (converted into Law No. 214/2011) with reference to the Authority for the Regulation of Transport. See also Art. 6, par. 10, Law 9 May 1989, No. 168 (Instituting the Ministry of Education, University and Technologic and Scientific Research). On this subject, see V. Cerulli Irelli, 'Legittimazione "soggettiva" e legittimazione "oggettiva"', cit., 341 ff.

57 Mention can be made here, for example, of the extension of locus standi regarding public procurement procedures, after the modifications made to Art. 120 of the Code of Administrative Court Procedure by the Legislative Decree 18 April 2016, No. 50.

58 One example which can be cited here is that of the right to appeal of an undertaking against the decision of the Competition Authority to close the file of a sanction procedure: see Consiglio di Stato, Section VI, judgment of 23 July 2009, No. 4597; judgment of 21 March 2005, No. 1113; judgment of 3 February 2005, No. 280; judgment of 14 June 2004, No. 3865 (with extensive reference to the case law of the Court of Justice). In doctrine see Caranta, 'La tutela giurisdizionale (italiana sotto l'influenza comunitaria)', in M.P. Chiti & G. Greco (Eds.), *Trattato di diritto amministrativo europeo*, general part, vol. II (Milan: Giuffré 2007), 1053-1093. In this regard, it has been noted that the evolution of administrative procedural law shows, 'as a whole, a certain tendency towards the progressive extension of the right to appeal'; this depends also on the fact that the law provides - in certain fields - for the recognition of 'new' legally-protected positions linked to specific normative assumptions and to specific types of situations: Consiglio di Stato, Adunanza Plenaria, judgment of 7 April 2011, No. 4 (para. 37).

59 There is already a great deal of literature on this subject. See for all, M. Bombardelli (Ed.), *Prendersi cura dei beni comuni per uscire dalla crisi* (Napoli: ESI 2016); V. Cerulli Irelli & L. De Lucia, 'Beni comuni e diritti collettivi [2014/1] *Politica del diritto* 1 ff.; M.R. Marella (Ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni* (Verona: Ombre Corte 2012), as well as, in more general terms, S. Settis, *Azione popolare* (Turin 2012).

conclusions reached in some research papers on the constitutional principle of horizontal subsidiarity (Art. 118, Italian Constitution).[60]

In essence, in the Italian legal system there is a clear propensity of the legislator, as well as a cultural climate that in many cases favour the judicial review of administrative action mainly in the name of the public interest. It is worth pointing out that this orientation is only in small part attributable to the influence of EU law.

4.3. One possible reason behind the differences between the two legal orders

At this point the question should be raised regarding the reasons behind the differences between the German and the Italian systems of administrative justice on this matter. One explanation can probably be found in the different vision or perception of public administration in the two countries.

On one hand, there is a public administration (obviously that of Germany) that is considered to be effective and efficient and therefore generally appreciated for the way in which it carries out its functions. With respect to this, the legislator, the government and a majority of lawyers believe that it is necessary to limit the legal mechanisms for organising public distrust[61] to a mere hypothesis (mainly under the imposition of EU law).[62] This behaviour, in addition to being a likely indication of a certain resistance in doctrine and jurisprudence towards radical changes in the rights protection system, undoubtedly reflects a positive assessment of the functioning of the electoral-representative democracy, which – also through specific forms of procedural participation and conflict management techniques – manages to ensure socially acceptable administrative choices,[63] since they are perceived basically as rational, well thought through and, ultimately, considered satisfactory.[64] This conclusion seems to be confirmed

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60 See for e.g. P. Duret, 'Riflessioni sulla *legitimatio ad causam* in materia ambientale tra partecipazione e sussidiarietà' [2008/3] *Diritto processuale amministrativo*, 688 ff.

61 In this fact, however, there is a clear difference between the administrative and the constitutional process regarding European issues. Indeed, in the latter case – probably due to the widespread social (and institutional) distrust of the European Union – the Federal Constitutional Court recognizes a very large number of rights for individuals aimed at overseeing the most important choices of European institutions: see, for all, F. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' [2014/2] *German Law Journal* 183 ff.

62 For a summary of the development of this problem in German law, see A.K. Mangold & R. Wahl, 'Das europäisierte deutsche Rechtsschutzkonzept', cit., spec. 10 ff.

63 On the issue of the acceptance (Akzeptanz) of administrative decisions, see e.g. T. Würtenberger, *Die Akzeptanz von Verwaltungsentscheidungen* (Baden-Baden 1996).

64 For a general overview, see Trute, 'Die demokratische Legitimation der Verwaltung', in *Grundlagen des Verwaltungsrechts*, cit., vol. I, 341 ff.; as well as Masing, 'Der Rechtsstatus des Einzelnen', cit., 499 f.

by the international indicators that measure the perception of the efficiency of public authorities in Germany. Just to give one example, in 2015, the Federal Republic of Germany achieved 94% in the World Bank ratings (Worldwide Governance Indicators) regarding the perceptions of government effectiveness;[65] in the same survey it received the score of 93% regarding the perception of regulatory quality.[66]

As a consequence, the administrative courts generally play a discrete role in the social dynamics of the German society.[67]

The Italian administration, on the other hand, is perceived (above all by the legislator and by the many governments that have taken power over time, but also by many citizens, business enterprises and the press) as weak and unreliable, as it is either unwilling or unable to pursue certain public interests (both national and European) or to reach adequate quality standards in the actions they take.[68] The issue of reforming the public administration has in fact been the centre of debate for many years. This perception of distrust can be seen clearly, also in this case, from several international indicators. In 2015, the Worldwide Governance Indicators, for example, place Italy below the European average for each of the six dimensions that make up the index, i.e. accountability; political stability and absence of violence; government effectiveness; the quality of regulation; legal certainty; corruption control.[69] Nor should the influence that the repeated criticisms expressed by the EU institutions regarding the inadequacy of the Italian public apparatus has on social and institutional confidence in the administration be overlooked.[70]

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65 The indicators express and capture the perception of 'the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies' (the definition is available at the following address: info.worldbank.org/governance/wgi/index.aspx#doc, consulted on the 21st May 2017).

66 This indicators express 'perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development'.

67 See e.g. Schmidt-Aßmann, 'Mutamento della funzione della giustizia amministrativa tedesca', cit., 4 ff.

68 In general terms see e.g. A. von Bogdandy & M. Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has be done, what can be done' [2014/1] *CMLR* 59 ff.

69 Regarding the index relating to the effectiveness of the Public Administration, in 2015, Italy ranked 69 at world level. Another example that can be mentioned here is the Eurispes report on Italy, that every year contains a survey on the Italian public's trust in the institutions (see e.g. the 2013 survey, available at the following internet address: www.eurispes.eu/content/la-fiducia-dei-cittadini-nelle-istituzioni-rapporto-italia-2013, consulted on the 21st May 2017).

70 See e.g. the Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Italy and delivering a Council opinion on the 2015 Stability Programme of Italy, (2015/C 272/16) in which it is stated that 'Italy's public administration is still characterised by significant inefficiencies which weigh on the business environment and on the country's capacity to implement reform effectively' (point 17). See also the Commission Staff Working Document, Country Report Italy 2017, SWD(2017) 77 final, 57 ff.

Since the 1990s, the crisis and the consequent downsizing of the role of the mass political parties as well as widespread corruption has led the legislature to grant ever wider space to social distrust – on the one hand by limiting administrative behavior through increasingly analytical legal regulations and, on the other hand, multiplying the cases of locus standi for judicial review when it concerns the protection of public interests.[71] It is important to emphasize that these normative provisions are not intended to facilitate the pursuit of political objectives (which the administration finds hard to implement), but have as their main purpose that of increasing opportunities of legal control over administrative action: hence, they represent true prevention instruments recognized by the legislator. Despite statements to the contrary, this is obviously indicative of a political/electoral system (national, regional and local) that is not considered capable of producing a legally and socially acceptable synthesis of the various (public and private) interests affected by governmental actions.[72]

Ultimately, in Italy the very extensive regulation of the locus standi expresses the desire to subsidize – with the procedural tools ascribable to the 'Counter-Democracy' logic – an electoral democracy that seems to be afflicted both by a congenital fragility and a bad reputation. Although there are no quantitative studies of the recurrence in practice to such types of judicial proceedings, it is undeniable that these legal norms give the administrative judge a potentially central position in the institutional system. This circumstance, in turn, raises the issue – which in Italy can be felt particularly keenly – of the separation of powers and the consequent safeguarding of the responsibilities of the executive bodies themselves.

5. Legal standing for the protection of the environment under EU law

The conceptual approach followed in this paper may be useful in order to understand some of the features of European administrative law – starting with the difficulties the EU is facing in implementing the Aahrus Convention. As is well-known, under this Convention, all parties (including

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71 It is therefore plausible – although this matter cannot be examined in any detail in this paper – that the phenomenon is in some way a result of the profound changes in the Italian political system which were seen at the beginning of the 1980's. See for all, the considerations of F. Benvenuti, *Il nuovo Cittadino*, cit., spec. Chap. 5. In different terms, see M.R. Ferrarese, *Il diritto al presente* (Bologna 2002), 202-217; as well as, in general G. Crainz, *Storia della Repubblica* (Roma 2016), 291 ff.; U. Allegretti, *Storia costituzionale italiana* (Bologna 2014), 185 ff.; L. Ferrajoli, *Poteri selvaggi* (Roma-Bari 2011); see also the analysis, conducted on a wider scale, of C. Crouch, *Post-Democracy*, cit., Chap. 4.

72 Manfredi, 'Interessi diffusi e collettivi', cit., 516; in general terms, see also S. Cassese, *L'Italia: una società senza Stato* (Bologna 2011).

the European Union itself) must give associations whose purpose is that of protecting the environment, the legal standing 'to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment' (Art. 9, par. 3).

However, the implementation of this obligation laid down in the Convention vis-à-vis European institutions and agencies encounters a serious obstacle in the norms of the Treaty, which regulate legal standing.[73] As is known, according to Article 263 paragraph 4 TFEU, a natural or legal person may institute proceedings against an act of EU institutions, bodies, offices or agencies in the presence of three alternative conditions: (a) the act is addressed to that person or (b) the act is of direct and individual concern to them,[74] and (c) in the case of a regulatory act which 'does not entail implementing measures' and is not of a legislative nature,[75] the act itself is of direct concern to them.[76] The Treaty thus excludes organized groups from acting before the European courts for the protection of general interests (including environmental matters).[77]

Regulation No. 1367/06[78] identified two complementary solutions to try to reconcile the Aahrus Convention with the preclusions originating from the Treaty to give associations legal standing.[79] First, it confines the jurisdiction action of associations solely to acts of European institutions and bodies which have an individual scope and that concern only environmental matters (Art. 2, par. 1, lett. g). Secondly, it subordinates judicial action to the prior use of an internal administrative appeal to be submitted to the same body that issued the

73 For the historical background of these provisions of the EU Treaties, see P. Craig, UK, *EU and Global Administrative Law. Foundations and Challenges* (Cambridge 2016), 313 ff., where further bibliographic references.

74 In other words, the act must produce immediate legal effects in the legal sphere of the complainant (not needing therefore an execution measure) and it must do this by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, identifying them, therefore, as in the case of the person addressed: See Court of Justice, judgment 15 July 1963, C-25/62 (*Plaumann & Co. v. European Commission*), EU:C:1963:17. In doctrine, see e.g. Marchetti, 'Il sistema integrato di tutela, in L. De Lucia & B. Marchetti (Eds.), *L'amministrazione europea e le sue regole* (Bologna: Il Mulino 2015), 209 ff.; see also A.A.H. Türk, *Judicial Review in EU Law* (Cheltenham et al. 2009), 40 ff.

75 E.g. Court of Justice, judgment 3 October 2013, C-583/11 (*Inuit Tapiriit Kanatami and Others v. European Parliament and Council*), EU:C:2013:625.

76 See once again, Marchetti, 'Il sistema integrato di tutela', cit., 209 ff.

77 See, for example, Court of Justice, judgment 2 April 1998, C-321/95 P (*Stichting Greenpeace Council v. European Commission*), EU:C:1998:153; order 5 May 2009, C-355/08 P (*WWF-UK Ltd v. Council*), EU:C:2009:286.

78 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

79 On this matter, it is worth pointing out that there is an evident paradox. Although on one hand, the EU has forced its State Members to respect the Aarhrus Convention rigorously – also regarding the question of the legal standing of associations - on the other hand the EU itself is not in the right condition to fully comply with the obligations laid down in the Convention.

contested measure (Art. 10);[80] Consequently, given that the association complainant is the direct recipient of the decision taken following the administrative review, it has the right to challenge it before the European court.[81] It should be pointed out that, in the event that a non-governmental organization challenges the decision rejecting the administrative appeal before the General Court, the subject of the judicial proceedings is limited to the legitimacy of this decision: the organization cannot instead raise arguments intended to directly contest the legitimacy or validity of the first measure (which is directed at other parties).[82]

As a consequence of this contorted regulation, most of the requests for administrative review (29 out of 35) have been declared inadmissible by the Commission as they refer to acts having general application.[83] This has given rise to an important judicial controversy, which has led to the conflict between the General Court, which found it unlawful – as a violation of the Convention – to limit the legal standing of the association solely to individual acts[84] and the Court of Justice which, on the other hand, retained this as completely legitimate.[85]

The Compliance Committee of the Convention – a supervisory body responsible for compliance with the Aarhus Treaty, but with no decision-making

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80 For more detail, see L. De Lucia, 'A Microphysics of European Administrative Law: Administrative Remedies in the EU after Lisbon' [2014/2] *European Public Law* 280 ff. See also G.J. Harryvan & J.H. Jans, 'Internal Review of EU Environmental Measures. It's True: Baron Van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation' [2010/2] *REALaw* 53-65.

81 On the other hand, the Commission, in the proposal that led to the approval of Reg. 1367/06, clarified that 'This preliminary procedure was introduced in order not to interfere with the right to access to justice under Article 230 EC Treaty, under which a person may institute proceedings with the Court of Justice against decisions of which it is individually and directly concerned. The addressee of the decision of internal review may have recourse to Article 230 EC Treaty ...' (Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies COM(2003)622).

82 General Court, judgment 15 December 2016, T-177/13 (*TestBioTech eV and Others v. European Commission*), EU:T:2016:736, par. 47 ff.

83 Situation as at March 2017. On this point, see the data (constantly updated) reported by the Commission at the following Internet address: ec.europa.eu/environment/aarhus/requests.htm (consulted on the 21st May 2017).

84 General Court, judgment 14 June 2012, T-338/08 (*Stichting Natuur en Milieu and Pesticide Action Network Europe v. European Commission*), EU:T:2012:300; judgment 14 June 2012, T-396/09 (*Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission*), EU:T:2012:301.

85 Court of Justice, judgment of 13 January 2015, C-401-403/12 P (*Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*), EU:C:2015:4. On this matter, see H. Schoukens, 'Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited' [2015/1] *Utrecht Journal of International and European Law* 46 ff.

powers – has also focused on this issue. In particular, on the urging of some environmental associations, in a recent, well-considered position, the Committee argued that the European Union (in particular due to the case law of the Court of Justice) is failing to meet its obligations and they have therefore invited it to amend the Regulation implementing the Convention or, alternatively, to adapt the case law of the Court of Justice itself.[86]

The reaction of the European institutions to the position of the Compliance Committee was rather questionable. Having unjustifiably maintained that the Committee had requested the EU to amend Article 263, paragraph 4 TFEU,[87] the Commission proposed that the Council adopt a position in the sixth session of the Meeting of the Parties to the Aarhus Convention to neutralize the finding of the Compliance Committee.[88] The Council accepted the Commission's proposal[89] and in September 2017 the Meeting of the Parties decided to continue discussion on this point.[90]

It will take time to discover whether and how the European legal order will react to these severe criticisms. This case, however, clarifies what conception the European Union has of its institutional apparatus in general, and its executive bodies in particular. On the one hand, the Treaty on the European Union now devotes a title to democratic principles and encourages 'an open, transparent, and regular dialogue' between the EU Institutions and citizens, associations and civil society (Art. 11); In this way, through a process of participation, it intends to increase the democratic legitimacy of the European institutional system, in the first instance by favouring the inclusion of social actors in the policy conception phase of the decision-making process.[91] On the other hand, as the case

86 Findings and recommendations of the Compliance committee of the Aahrus Convention of 17 March 2017, ACCC/C/2008/32 (EU), Part II, available at the following address: www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf (consulted on 21st May 2017).

87 See the Open statement by the Aarhus Convention Compliance Committee regarding its findings on communication ACCC/C/2008/32 (part II) concerning compliance by the European Union (the document is available at the following internet address: www.actu-environnement.com/media/pdf/news-29373-note-comite-conformite-Aarhus.pdf, consulted on the 21st September 2017).

88 Commission, Proposal for a Council decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32, COM(2017) 366 final.

89 Council decision (EU) 2017/1346 of 17 July 2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32.

90 See Meeting of the Parties to the Aarhus Convention, Draft decision VI/8f concerning compliance by the European Union with its obligations under the Convention (the document is available at the following address: www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_25_E.pdf, consulted on the 21st September 2017).

91 See e.g. General Court, judgment of 10 May 2017, T-754/14 (*Michael Efler and Others v. European Commission*), EU:T:2017:323. In doctrine e.g. Mendes, 'La legittimazione dell'amministrazione dell'UE tra istanze istituzionali e democratiche, in *L'amministrazione europea e le sue regole*, cit., 89 ff. where there are further references. For a more general perspective, see also P. Rosanvallon,

above shows, the European legislator and the case law of the Court of Justice converge in denying that 'indirect powers disseminated throughout society' can carry out forms of control (especially those which are of a preventive nature) in the implementation phase of the decision-making process. At the basis of this is the Treaty that, despite the improvements introduced in the latest version,[92] contains a regulation of legal standing that has reached such a high analytical level that it makes changes or adaptations by the legislator or by the courts very difficult.

All this is based on solid reasons, which can be found in the peculiar nature of the European Union (and in the highly delicate institutional balances on which it is based),[93] in the plurality of the sources of its legitimacy (only partly traceable to the democratic-electoral principle)[94] and, lastly, in the fact that despite the formal proclamations (e.g. Art. 9 TEU), European populations are not the main source of the legitimacy of the European legal and political system.[95]

Regardless of any further consideration of this point, it must be emphasized that this framework corresponds perfectly to the idea of an executive apparatus which – probably due to its technocratic nature – can only produce unquestionable results. In essence, the European legal order not only does not feel the need to acknowledge, but rather firmly opposes tools allowing for the organization and manifestation of the distrust of citizens and associations towards the choices made by the EU executive bodies: in this case, therefore, social distrust clashes with a solid institutional (and constitutional) trust in the administration.

6. Conclusions

In this short paper, the concept of 'Counter-Democracy', alongside that of institutional distrust, has been introduced to try and explain theoretically some hypotheses of locus standi in the public interest in the administrative judicial process. Obviously, these are initial reflections in an embryonic state that need to be completed and expanded upon, with, amongst other things, the analysis of other tools (even more informal ones) through

Democratic Legitimacy: Impartiality, Reflexivity, Proximity (Woodstock, Oxfordshire 2011), Chap. IV.

92 See Marchetti, 'Il sistema integrato di tutela', cit., 211 ff.

93 See e.g. Schmidt-Aßmann, 'Verfassungsprinzipien für den Europäischen Verwaltungsverbund', in *Grundlagen des Verwaltungsrechts*, cit., vol. I, 261 ff.

94 There is extensive literature on this matter. See the two different approaches of Unger, 'Verwaltungslegitimation in der Europäischen Union' and of Chiti, 'La legittimazione per risultati dell'Unione europea quale «comunità di diritto amministrativo»', both in F. Wollenschläger & L. De Lucia (Eds.), *Staat und Demokratie* (Tübingen: Mohr Siebeck 2016), 41 ff. and 79 ff. respectively.

95 On this subject, see once again, Mendes, 'La legittimazione dell'amministrazione dell'UE', cit.

which the citizens' distrust in public institutions can be expressed in the three legal orders examined; Instruments which, from the perspective of this paper, are different from those that allow civic participation in the exercise of power. In addition, the research should be extended also to other legal systems, if only to verify the plausibility in other contexts of the investigation criterion followed here (i.e. that of the relationship between the authoritativeness of a national administrative system and the regulation of legal standing).[96]

Another central aspect, however, must be highlighted in order to clarify the complexity of this subject. As mentioned above, the concept of 'Counter-Democracy' is ambivalent, since, alongside its positive potential, it can also result in extreme manifestations of social distrust towards the elective democracy; It can therefore be taken over by populist and diffusely demagogic dynamics.[97]

Although the issue is far wider than that of the legal discipline of the administrative process, some brief observations on this may still be helpful. As mentioned already, legislators can play an important role in ensuring that the more formalized instruments of 'Counter-Democracy' can express their constructive abilities to the fullest. The pursuit of this objective obviously requires a wise, responsible and balanced action that should be based on assessments of political opportunity and should not just be limited to the formal respect of the constitutional precept. To focus on the subject of this paper the question must be asked, for example, whether all of the numerous Italian rules governing derogatory legal standing, are really helpful to improve the quality of administrative action or if some of them (as seems plausible) have instead a predominantly symbolic (demagogic) function.

If this were the case, it would mean that institutional mistrust has welded with social distrust in the public administration. The result of this would be to further fuel the distrust of certain social actors in the administration, and as a consequence – besides undermining their authority – to diminish (to an even greater extent than at present) the credibility of the democratic and elective system itself in certain sectors. For this reason, it is essential for the legislator and the government not to give in to demagogic temptations, since otherwise they would be doing nothing more than contributing to the weakening of the basis of their own legitimacy. In other words, when intervening in these areas,

96 For a wide, comparative analysis, see *Standing up for your right(s) in Europe*, cit., as well as a reference to the UK, P. Cane, *Controlling Administrative Power*, ci. 485 ff., in which is stated that the widening of legal standing represents the answer to the concentration of government powers, in such a way as to make the judge an important counterbalance. See also the critical remarks by Harlow, 'Public Law and Popular Justice', cit., 1 ff.

97 P. Rosanvallon, *Counter-Democracy*, cit., spec. Chap. IV.

they should be careful not to allow the 'citizen-as-watchdog' to gain too much at the expense of the 'citizen-as-voter'.[98]

A similar reasoning, but moving in the opposite direction, can be followed for the European Union. Surely in the current, complex EU crisis, administrative matters play, at most, a marginal role. However, the question may be raised whether, in view of the gradual increase in European competences (coupled with the technocratic crisis factor), there is not an urgent need for a profound rethinking of the self-sufficiency claim of the EU's institutional system, which should instead show greater willingness to submit in some way to the screening of the 'indirect powers' of European societies. Certainly, the case of the implementation of the Aahrus Convention could be a great opportunity to abandon the stubborn attitude of closure shown especially by the Commission (with the fundamental support of the Court of Justice) and to find new and surely more courageous paths to follow that could perhaps help to effectively build a population of Europeans. The signs so far, however, have not been very encouraging.

98 See again P. Rosanvallon, *Counter-Democracy*, cit., 253.