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The New Paradigm of Italian Disability Regulations, from the Reform Law to the Implementing Decrees, via the New Contracts Code: Change starts with Public Administration

[Il nuovo paradigma della normativa italiana sulla disabilità, dalla riforma ai decreti attuativi attraverso il nuovo Codice dei contratti pubblici: cambiamento in corso per la Pubblica Amministrazione]

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Abstract

[**It.**] Il presente contributo mira ad evidenziare come la realizzazione di un reale cambiamento nel modo di approcciare i bisogni di tutela e di inclusione delle persone con disabilità muova anzitutto dalle pubbliche amministrazioni, cui il legislatore sembra aver assegnato il compito di avviare e sostenere il cambio di paradigma necessario per rendere effettivi i principi espressi dalla Convenzione delle Nazioni Unite sui diritti delle persone con disabilità. In questa prospettiva si propone un'analisi dei decreti attuativi della legge delega, nonché del sistema di organismi pubblici che ne deriva, prendendo in considerazione anche quelle disposizioni del Codice dei contratti pubblici da poco riformato che contribuiscono allo sviluppo di una sempre maggiore inclusione delle persone con disabilità in ambito lavorativo.

[**En.**] This contribution aims to highlight how the realization of a real change in the approach to the protection and inclusion needs of people with disabilities primarily starts with public administrations, to which the legislator seems to have assigned the task of initiating and supporting the paradigm shift necessary to make the principles expressed by the United Nations Convention on the Rights of Persons with Disabilities effective. In this perspective, an analysis of the implementing decrees of the delegated law is proposed, as well as of the system of public bodies resulting from it, also considering those provisions of the recently reformed Public Contracts Code that contribute to the development of increasing inclusion of people with disabilities in the workplace.

Parole-chiave: Normativa sulla disabilità – Inclusione delle persone con disabilità – Pubblica amministrazione e questioni relative alla disabilità – Codice dei contratti pubblici e clausole sociali.
Keywords: Disability Regulation – Inclusion of Persons with Disabilities – Public Administration and Disability Issues – Public Contracts Code and Social Clauses.

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1. *The Traditional Approach to the Condition of Disability*

The condition of disability was originally and traditionally expressed by referring to the psycho-physical integrity of the person, according to an approach closely influenced by the historical concept of health, understood as the absence of disease, where health and disease form a dichotomy, a pair of opposites incapable of autonomous existence. That is, disability was mainly considered as the consequence of a (psycho-physical) impairment of the subject such as to determine the inability to perform certain functions, with the consequent emergence of a condition of social disadvantage ("handicap"). In this sense, the WHO (World Health Organisation) expressed itself when, in drawing up the document containing the Classification of Impairments, Disabilities and Handicaps, associated the condition of disability with a pathological state of the person, while clarifying that "handicap" is the consequence of an impairment, i.e. the social disadvantage suffered by those who are unable to fulfil their (normal) role in relation to age, gender and socio-cultural factors[1].

This conception of disability can be traced back to the so-called "biomedical model", which views the body as a complex machine to be studied in its individual parts, excluding any influence of non-biological circumstances on biological processes. In this sense, the biomedical approach focuses on pathology and biological factors within the body, rather than on the individual[2].

Looking at the European legislative context, until a few years ago, there was in fact a similar way of considering the condition of disability which, in the absence of a common legal definition, was described by the Court of Justice as a limitation resulting, «in particular, from physical, mental or psychic impairment and which hinders the participation of the person concerned in professional life»[3]. Indeed, it

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[1] See World Health Organisation, ICIDH (International Classification of Impairments Disabilities and Handicaps), *A manual of classification relating to consequences of diseases,* 1980. The adoption of the ICIDH document was intended to supplement and specify the first official *International Classification of Diseases ICD* document. On this subject see C. Hanau, *Handicap*, in *Dig. Disc. Pubbl.*, VIII, 1993, 67.

[2] See M.G. Bernardini, *I diritti umani nelle persone con disabilità,* Apes, 2016, 19.

[3] See CJEU, Case C-13/05, 11 July 2006, Chacón Navas.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

should be pointed out that neither Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation irrespective of religion or belief, disability, age or sexual orientation, nor any other Community source offered a legal definition of disability[4].

If one then looks at the way in which this phenomenon has been addressed at the national level, one can see how from the earliest regulatory interventions even the Italian legislature did not follow an integrated or holistic perspective of the individual's different needs, but rather preferred to adopt an "incremental" approach[5], on the basis of which the initiatives to protect and guarantee persons with disabilities initially focused on the economic support of individuals affected by specific physical impairments[6] , and then extended attention to the profiles considered to be gradually more significant in the lives of the individuals concerned, starting from their working capacity/condition[7], passing through the

[4] In this sense see S. Fernandez Martinez, *The evolution of the legal concept of disability: towards an inclusion of chronic illnesses?*, in *Industrial Relations Law*, No. 1, 2017. For a broader picture regarding European actions on disability see D. Ferri, *The European Union and the rights of persons with disabilities: brief reflections twenty years after the first "Strategy"*, in *Health Policies*, No. 2, 2016.

[5] In this regard F. Sanchini, *I diritti delle persone con disabilità tra dimensione costituzionale, tutela multilivello e prospettive di riforma*, in *federalismi.it*, No. 24, 2021, observes how it is possible to find in the development of the Italian legislation the manifestation of an initial orientation inspired by a mostly welfare logic, which was followed by a subsequent gradual greater attention towards the social inclusion, emancipation and independence of the person affected by this peculiar condition.

This greater attention would be expressed, for example, in the more recent Law 22 June 2016, no. 112, on provisions on assistance for severely disabled persons deprived of family support' and aimed at enhancing their capacity for self-determination, so as to allow them to live as autonomously and with as much dignity as possible (the so-called "After Us" Law).

[6] Among the most significant measures in this sense, we can recall, for example, Law 9 August 1954, no. 632, relating to the establishment and tasks of the National Institute for the blind civilians and the granting of a lifetime allowance to them; the Law 27 May 1970, no. 381, concerning the increase in the ordinary contribution of the State in favour of the National Organisation for the protection of and assistance to the deaf and dumb and the measures of the allowance for the assistance of the deaf and dumb; Law 6 August 1966, no. 625, concerning provisions in favour of the mutilated and invalid civilians.

[7] One example is Law 2 April 1968, no. 482, on the general regulation of compulsory recruitment in public administrations and private companies.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

elimination of architectural barriers[8], to the guarantee of the effective enjoyment of the right to education[9].

The result is a fragmented picture from which it is not possible to derive a unitary discipline, also and above all because of the significant terminological variability of the provisions adopted in delimiting the subject matter and the boundaries of the subject matter[10]: Italian legislation, in fact, uses both the term «civil invalid»[11], and, using an improper synonymy, the expressions «differently abled», «handicapped» or «handicapped» subject[12].

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[8] The attention of the public authorities to the removal of architectural barriers can be traced back to the Ministry of Public Works circular of 15 June 1968, by virtue of the reference to it in Article 27 of Law 30 March 1971, no. 118 (with its implementing regulation Presidential Decree 27 April 1978, no. 384). This provision in fact provided for the first time that newly constructed public buildings or those open to the public and new educational, pre-school or social interest institutions were to be built in accordance with the aforementioned circular with the aim of facilitating the relational life of the mutilated and disabled civilians**.** As public interest and awareness grow, so do the regulatory references, first with the provisions for the elimination of architectural barriers in private buildings and public residential buildings (Law 9 January 1989, no. 13 and its implementing regulation, the Ministerial Decree 14 June 1989, no. 236), then with the removal of obstacles for the exercise of sporting, tourist and recreational activities (Art. 23 of Law 5 February 1992, no. 104), and finally with the removal of architectural barriers in places of cultural interest (Decree of the Ministry of Cultural Heritage and Activities of 28 March 2008). On this subject, the provisions of regulation no. 384/1978 had been updated again by Presidential Decree 24 July 1996, no. 503, on standards for the elimination of architectural barriers in public buildings, spaces and services.

[9] We refer in particular to Law 5 February 1992, n. 104, which, in addition to guaranteeing the right to education, education and vocational training of the disabled person, sanctions his or her right to school integration (arts. 12, para. 2, and 13); in this sense see S. Troilo, *I "nuovi" diritti sociali: la parabola dell'integrazione scolastica dei disabili*, in *Gruppo di Pisa*, No. 3, 2012 and, more recently, for an extensive reconstruction of the normative evolution on the subject see F. Masci, *L'inclusione scolastica dei disabili: inclusione sociale di persone*, in *Costituzionalismo.it*, No. 2, 2017.

[10] In these terms, see C. Casella, *La condizione giuridica della persona con disabilità: evoluzione, problemi e prospettive*, in *BioLaw Journal - Rivista di BioDiritto*, No. 4, 2021, where she points out, moreover, how within the different linguistic options adopted there are non-overlapping legal conditions, which postulate the existence of infungible requirements whose different assessment procedures are followed by the provision of specific benefits and services to which individuals and families have access depending on the conditions indicated by the respective laws of reference. In this sense, the author emphasises that unlike the assessment of civil disabilities, the procedure for ascertaining the state of disability is based on criteria that take into account the person's difficulty of social integration and is not, therefore, univocally based on medico-legal or quantitative criteria linked to personal inability to work. It is not by chance that the assessments of disability and residual capacity are carried out by the medical commissions in charge of ascertaining civil invalidity, supplemented, however, by a social worker and an expert selected in relation to the particular case to be examined.

[11] Article 2(2) of Law no. 118/1971 recognises civil invalid status (for persons over the age of 18) for any impairment, congenital or acquired, regardless of the etiopathogenesis, if the ability to work is reduced by more than one third. On the other hand, minors under 18 years of age and persons over 65 years of age who have persistent difficulties in performing the tasks and functions proper to their age are declared civil invalids (Art. 2(2) and (3)).

[12] The term "handicap", which differs from "civil invalidity", is defined in Article 3(1) of Law 5 February 1992, no. 104, as «a person with a physical, psychic or sensory impairment, stabilised or progressive, which causes difficulties in learning, social relations or work integration and which is

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

A fundamental role in determining a progressive extension of this discipline in view of greater attention to the relational aspect of the disabled person was played, as often happens in relation to the guarantee of fundamental rights, by the interpretative work of the Constitutional Court[13]. As the doctrine has pointed out, it is in fact possible to divide the constitutional jurisprudence into two strands, the one that moves in the more traditional direction of the protection of the right to assistance of the disabled person, with the recognition of the relative economic benefits, and the more innovative one, on the other hand, aimed at enhancing a protection of the disabled person that goes well beyond his primary needs of material assistance, and that comes to affirm the "new social right" to the socialization of the disabled person[14].

Although it is not possible to find any explicit reference to disability in the Constitution, apart from the references in Article 38 to the – only partially overlapping – condition of the «unfit for work» and the «disabled», it is nevertheless possible to find within the Fundamental Charter a set of provisions that ensure adequate protection for the disabled person, as there are several references that, albeit indirectly, contribute to defining their fundamental legal status. We refer in particular, but not only, to the statements of principle enshrined in Articles 2 and 3, which, as is well known, respectively entail the recognition of fundamental human rights, as well as formal and substantive equality with the Republic's commitment to remove all economic and social obstacles to the full development of the human person[15].

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such as to determine a process of social disadvantage or marginalisation. The disabled person is therefore entitled to the benefits established in his or her favour in relation to the nature and extent of the disability, to the residual overall individual capacity and to the effectiveness of rehabilitation therapies» (Art. 3, para. 2).

[13] Cf. M. Michetti, *I diritti delle persone diversamente abili: l'evoluzione del quadro normativo ed il contributo della giurisprudenza costituzionale*, in *Italian Papers on Federalism*, No. 2, 2017, which highlights how the response of the national legislator to disability was weak and meagre at least initially, more incisive and strong later, thanks above all to a different cultural perception of the phenomenon and to the shrewd impulse of the Constitutional Court. In this sense see also F. Sanchini, *I diritti delle persone con disabilità*, cit*.,* 171.

[14] Thus C. Colapietro, *I diritti delle persone con disabilità nella giurisprudenza della Corte costituzionale: il "nuovo" diritto alla socializzazione*, in *dirittifondamentali.it*, No. 2, 2020, according to which «the greatest contribution to a more precise definition of the protection of the rights of persons with disabilities has come precisely from the incessant work of guaranteeing and promoting them exercised by the constitutional jurisprudence, which, in supporting a reinterpretation of the provisions of the Constitution in the light of the evolution of social conscience and of the legislation on the subject, has ended up offering them full protection at the constitutional level, explicating moreover new dimensions, hitherto unknown, but still expressive of values already underlying the same constitutional dictate».

[15] For a broader reconstruction and analysis of the constitutional foundations of the discipline on disability see C. Colapietro, F. Girelli, *Persone con disabilità e Costituzione*, Naples, 2020; F. Masci, *La tutela costituzionale della persona disabile*, in *federalismi.it*, No. 1, 2020; F. Sanchini, *I diritti delle persone con disabilità*, cit*.;* F. Girelli, *La disabilità e il corpo nella dimensione costituzionale*, in *Consulta online*, No. 2, 2021.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

2. *The Emergence of a Different Way of Conceiving the Disabled Person and the Need for a Renewed Legal Framework of the Italian Regulations*

The spread of a greater awareness of the real nature of the condition of persons with disabilities has led to the emergence of a different perspective on how to approach this phenomenon: While it was not questioned that the particular psycho-physical conditions of persons with disabilities could be the reason for the difficulties they suffered in carrying out their daily activities, in some cases even requiring medical care, the level of knowledge and technology attained, as well as that of the resources available, had nevertheless created the conditions for believing that such physical or mental impairments did not prevent them from living a full and satisfying life. In other words, the cause of disabilities was to be found in society's reluctance to employ these means to modify and improve itself, rather than in the personal conditions of the subject[16]. By adopting a social model of disability, it was then realised that individuals, considered different because of an impairment, were in fact oppressed by a society obsessed with the concept of normality: disability, therefore, would only exist to the extent that it was socially constructed and imposed (from outside) on people[17].

The focus has therefore progressively shifted from the causes of the limitations experienced (the aetiology in medical terms) to the context within which the individual moves and relates, thus focusing on the person in his or her entirety[18].

Such a bio-psycho-social approach has been definitively affirmed since the definition of a new ICF (International Classification of Functioning, Disability and Health) system and reflects, in essence, the awareness that disability does not refer to a condition that can be explained exclusively with reference to the person's psycho-physical condition, i.e. seen in a static perspective, but rather concerns the nature and quality of the relationships that the subject is able to establish with the outside world, understood not only in its physical/material dimension, but also and above all in its relational and interpersonal dimension, thus in a dynamic perspective[19].

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[16] This new awareness is formally expressed in the manifesto drawn up in 1976 by the UPIAS (Union of the Physically Impaired Against Segregation), entitled *Fundamental Principles of Disability*, which defines disability as «the disadvantage or limitation produced by the current social organization which takes little, if any, account of people with physical impairments, and in so doing excludes them from participation in mainstream social activities».

[17] See T. Hutchinson, *The classification of disability*, in *Archives of Disease in Childhood*, 1995, 91.

[18] On the different ways of understanding disability in relation to its social dimension see S. Rizzo, *La rappresentazione sociale della disabilità: modelli teorici e approcci interpretativi*, in *Dir. San. Mod.*, No. 4, 2019, 243-254.

[19] See WHO, *International Classification of Functioning, Disability and Health*, Geneva, 2001 on which, for a commentary, see M. Cingolani, A. Romanelli, *Handicap and Disability. Una proposta di metodo valutativo medico-legale e sociale*, Giuffrè, 2008; G. Griffo, *La Convenzione delle Nazioni Unite sui diritti delle persone con disabilità e l'ICF*, in G. Borgnolo et al. (eds.), *ICF e Convenzione ONU sui diritti delle persone con disabilità. New perspectives for inclusion*, Erikson, 2009.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

This new classification, in other words, embodies a new language that signals the real nature of disability, no longer seen as a loss of normality, but as a variation in human functioning, caused by the interaction between intrinsic individual characteristics and those of the physical and social environment. The concept of functioning is the result of both the health condition (so, for example, the heart patient will not be able to perform intense and prolonged physical exertion) and the environment in which one lives (a particularly stressful relational context will have negative consequences on so-called functioning)[20].

In this respect, it is possible to draw a sort of parallelism between what happened in the evolution of the concept of disability and what happened a few decades earlier with reference to the concept of health itself.

In fact, it is well known that in both the medical and legal spheres, Italian and otherwise, the idea of health has progressively abandoned the exclusive reference to psycho-physical integrity as a reference parameter[21], to embrace instead a broader conception, well expressed at the clinical level by the definition proposed by the hygienist and health education expert Alessandro Seppilli, according to whom «health is a condition of harmonious functional balance, physical and psychic, of the individual dynamically integrated into his natural and social environment»[22].

The relevant elements that we can identify from this definition, such as the reference to the harmonious balance and dynamic integration of the subject, both with reference to the natural environment and with regard to the social environment, are actually accepted and shared subsequently also by constitutional and ordinary jurisprudence, in a process of evolution of the scope of the right to health aimed at progressively extending the scope of the protection recognised in our legal system[23].

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[20] Cfr. M. Leonardi, *Health, disability, ICF and social and health policies*, in *Sociologia e politiche sociali*, No. 3, 2005, 82.

[21] As is well known, the WHO defines health as «a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity», see Preamble to the Constitution of the World Health Organisation, as adopted by the International Health Conference in New York, 19-22 June 1946 and signed on 22 July 1946 by the representatives of 61 states (Official Records of the World Health Organization, No. 2, 100), entered into force 7 April 1948.

[22] See F. Forino, *Dalla parte della salute: il servizio sanitario nazionale tra prevenzione, cura e salute*, in *Sistema Salute*, No. 3, 2014, 297.

[23] The first affirmation of the concept of health/wellbeing according to a twofold physical dimension and psychic equilibrium emerged in the judgment of the Constitutional Court, 18 February 1975, no. 27 on the subject of (therapeutic) abortion: the order in question specifically denounced Article 546 of the Criminal Code, with reference to Articles 31 and 32 of the Italian Constitution, in the sole part in which it punished those who cause the abortion of a consenting woman, and the woman herself, «even when the danger of the pregnancy for the pregnant woman's physical well-being and psychic equilibrium is ascertained». It was only a few years later that the jurisprudence of the Supreme Court upheld the existence of a close connection between health and the environment, whereby the protection of the former would also be expressed in the protection of the environment (one speaks of a healthy environment) as its precondition. In particular, in the judgments of the united sections of the Supreme Court of Cassation 5 July 1979, no. 3819 and 6 October 1979, no. 5172 it is stated that legal protection is not limited to the physical safety of the man supposedly

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

There is also a trace of this conceptual development at an international level in the Ottawa Charter, drawn up on the occasion of the WHO Conference held in Canada on 21 November 1986, where it is clarified that «to achieve a state of complete physical, mental and social well-being, the individual or group must be able to identify and realise their aspirations, satisfy their needs, modify their environment or adapt to it». In this perspective, health is seen, therefore, as a daily life resource, not as a life objective: a positive concept, which emphasises social and personal resources, as well as physical capacities, with the consequence that its promotion is not the exclusive responsibility of the health sector, while also going beyond the mere proposal of healthier life models, in order to achieve a condition of well-being[24]. In linking the multidimensionality of people and health to the natural and social environment, Seppilli had therefore already highlighted the need to integrate the biomedical paradigm and the bio-psycho-social paradigm, which today, in medicine and care, represents a knot still to be unravelled[25].

The affirmation of such a multidimensional approach to disability, no longer limited to clinical considerations, but also extended to the valorisation of social factors, is thus traceable to the more general development that has characterised the concept of health itself, which is closely related to the level of well-being of the person in his or her dynamic relationship with others and with the surrounding environment[26].

This new way of conceiving of disability was accepted at the normative level in 2006 with the United Nations Convention on the Rights of Persons with Disabilities[27], which constitutes, in fact, «evidence of a change in cultural approach towards the condition of persons with disabilities» destined to be «reflected also in domestic adaptation legislation»[28].

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immobile in the isolation of his home, but extends to the associated life of man in the places of the various aggregations in which it is articulated and, by reason of its effectiveness, to the preservation, in those places, of the conditions that are indispensable or even merely conducive to his health, so that the protection acquires a content of sociality and security for which the right to health, in addition to being merely a right to life and physical safety, is configured as a right to a healthy environment.

Lastly, health or wellbeing is also understood as the individual's possibility of interweaving social and affective relationships that can satisfy and improve the quality of life. In this sense, the structuring of inter-subjective relationships is worth attributing relevance to the psychological factor of the individual's health, which is formed in the confrontation with others, as emerged in Constitutional Court ruling 24 May 1985, no. 161, in which a correlation is attested to between the recognition of one's personal identity (in the case of sex change) also by other persons and the attainment of «a state of well-being in which health consists».

[24] See Ottawa Charter for Health Promotion, *First International Conference on Health Promotion Ottawa*, 7-21 November 1986.

[25] Cf. F. Forino, *Dalla parte della salute*, cit., 297.

[26] It is no coincidence that ICD and ICF coexist, complementing each other.

[27] Adopted by the General Assembly, with its Optional Protocol, on 13 December 2006 and entered into force on 3 May 2008. On this subject, most recently, see U. Villani, *Spunti di riflessione sulla convenzione delle Nazioni Unite sui diritti delle persone con disabilità*, in *Ordine Internazionale e Diritti Umani*, No. 5, 2021, 1171-1180.

[28] Thus S. Marchisio, *Preface*, in S. Marchisio, R. Cera, V. Della Fina (eds.), *The United Nations*

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

As is well known, in Italy, the reference text for the protection of persons with disabilities was represented until recently by Law 5 February 1992, no. 104, with which the legislator wanted to promote the full integration of the disabled person in the family, school, work and social spheres[29].

Although the law came into being at a time when the social component of disability had not yet emerged in scientific classifications, it is certainly oriented towards the achievement of bio-psycho-social objectives, as is evident both from the goals outlined in Article 1, and from the instruments envisaged to achieve these goals[30].

However, if one observes Law no. 104/1992 from a defining point of view, it emerges that a person with a "disability" is identified as «one who has a physical, psychic or sensory impairment, whether stabilised or progressive, which causes difficulties in learning, relationships or work integration and which is such as to determine a process of social disadvantage or marginalisation». From this definition, therefore, «a sequential chain, beginning with an impairment, which results in disability, has been derived»[31].

The influence exerted by the WHO's conception of disability since 1980, which is still linked to the biomedical model, according to which non-biological circumstances cannot affect the body and its biological processes, and it is only medical and specialist knowledge that can prepare suitable corrective and rehabilitative interventions, is therefore evident.

As already pointed out by the doctrine[32], even the regulatory interventions subsequent to law no. 104/1992 have not led to a full acceptance of the new bio-psycho-social approach by our legal system: law 8 November 2000, no. 328, concerning the implementation of the integrated system of interventions and social services[33], in fact, limits itself to providing in Art. 14 that, in order to achieve the

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Convention on the Rights of Persons with Disabilities. Commentary, 2010, IX.

[29] Law no. 104/1992 was passed following a request to that effect by the Constitutional Court in its judgement no. 167 of 1991, in which it addressed the strongest recommendation to the legislature itself so that – where it does not consider it necessary to adopt broader and even generalised measures for the protection of the disabled – It may make up for the inadequacy of the regulations adopted in the specific sector. Subsequently, the Court, in its judgement 29 October 1992, no. 406, highlighted how the law implied the need to pursue an obvious national interest, which is stringent and infractionable, such as that of guaranteeing throughout the national territory a uniform level of realisation of the fundamental constitutional rights of disabled persons, and then confirmed, with judgement 10 May 1999, no. 167, the intervening change in perspective with respect to the problems of disabled persons, no longer considered in a merely individual dimension, being issues that the entire community is called upon to resolve.

[30] See C. Sagone, *La tutela della disabilità secondo il modello bio-psico-sociale*, in *federalismi.it*, No. 1, 2023, 248.

[31] Thus S. Rossi, *Forms of vulnerability and implementation of the constitutional programme*, in *Aic Magazine*, No. 2, 2017, 28.

[32] See C. Sagone, *La tutela della disabilità secondo il modello bio-psico-sociale* cit., 249.

[33] See Art. 1, para. 1, according to which the Republic ensures that persons and families have an integrated system of interventions and social services, promotes interventions to guarantee the quality of life, equal opportunities, non-discrimination and citizenship rights, prevents, eliminates

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

full integration of the disabled persons referred to in Article 3 of Law no. 104/1992, within the framework of family and social life, as well as in school or vocational education and employment, the municipalities, in agreement with the local health units, shall prepare, at the request of the person concerned, an individual project. This document must contain, in addition to a diagnostic-functional assessment, an indication of the treatment and rehabilitation services at the charge of the National Health Service, personal services, with particular reference to recovery and social integration, as well as the economic measures necessary to overcome conditions of poverty, marginalisation and social exclusion[34]. On the other hand, the same Law 3 March 2009, no. 18, concerning the ratification and implementation of the United Nations Convention on the rights of persons with disabilities, with optional protocol, while expressly enshrining the adherence to the bio-psycho-social model, has not, however, provided for any provision formally implementing the ICF classification.

A further intervention for the protection and support of persons with disabilities was then represented by Law 22 June 2016, no. 112, concerning provisions on assistance in favour of persons with severe disabilities deprived of family support[35], with which measures were introduced to take charge of the person concerned already during the lifetime of the parents, also aimed at avoiding institutionalisation, and intended to be integrated, with the involvement of the persons concerned, in the aforementioned individual project governed by Law no. 328/2000[36]. The legislation explicitly addresses persons with serious disabilities and then refers, for the purposes of ascertaining this condition, to the provisions of law no. 104/1992 which, however, as mentioned, express themselves in terms of handicapped and disabled persons, thus suggesting that the two notions fully

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or reduces the conditions of disability, need and individual and family hardship, resulting from inadequate income, social difficulties and conditions of non-autonomy, in coherence with Articles 2, 3 and 38 of the Constitution.

[34] For an analysis of the institution and its impact on the lives of persons with disabilities see G. Arconzo, G. Ragone, S. Bissaro, *Il diritto delle persone con disabilità al progetto individuale*, in *Le Regioni*, No. 1, 2020, 31-74.

[35] On which, among others, see the contributions by E. Vivaldi, *Le Regioni ed il Dopo di noi, alla luce della legge n. 112/2016*, in *Non profit*, n. 2-3/2016; A. Cordasco, *Il ruolo degli enti locali nell'attuazione della legge c.d. "Dopo di noi"*, in *Non profit*, No. 2-3, 2016; F. Migliazzo, *La questione del "dopo di noi" e il diritto a favore della fragilità*, in *Studium Iuris*, No. 11, 2017; G. Arconzo, *La L. n. 112 del 2016: i diritti delle persone con disabilità grave prive del sostegno familiare*, in *Il Corriere Giuridico*, No. 4, 2017; M. Dogliotti, *La condizione dei disabili e la legge sul "dopo di noi"*, in *Famiglia e Diritto*, No. 4, 2018; M. Sorbilli, *La c.d. legge sul "dopo di noi": una nuova tutela delle fragilità sociali*, in *Teoria e Storia del Diritto Privato*, No. 13, 2020.

[36] According to Article 1(2), this must be done in accordance with the wishes of the severely disabled person, where possible, their parents or guardians. The main support measure is represented by the Establishment of the «Fund for the Assistance to Severely Disabled Persons without Family Support», enshrined in Art. 3, but there is also provision for the development of local de-institutionalization paths in houses or groups of flats that «reproduce the living and relational conditions of the family home» (Art. 4, para. 3, lett. a), and in the provision of «innovative residential interventions for severely disabled persons» (Art. 4, para. 1, lett. c).

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

overlap and demonstrating once again the terminological uncertainty characteristic of the Italian regulations on disability.

It is then necessary to consider how the amendment made to the text of Law no. 104/1992, by Legislative Decree no. 66 on rules for the promotion of the school inclusion of students with disabilities, with which a wording was introduced that finally conforms to the provisions of the bio-psycho-social model, since it is aimed exclusively at ascertaining the disability condition of girls and boys, pupils and students, female students and male students, for the purpose of formulating the individual project (referred to above), into which the PEI (Individualised Educational Plan) has also been integrated[37].

It was not until Legislative Decree 7 August 2019, no. 96 containing supplementary and corrective provisions to Legislative Decree no. 66/2017 that Article 4 finally provided for the adoption of the ICF criteria for the assessment of disability status, thus supplementing and updating the provisions enshrined in Law no. 104/1992[38].

From this brief overview of legislative interventions on disability, it clearly emerges how the regulations aimed at ensuring the inclusion of persons with «special needs» (another expression that recurs in the Italian legal system[39]) are the result of a progressive stratification of several legislative acts that have followed one another in an attempt to adapt the existing rules to the conceptual and linguistic development that has characterised this subject[40].

[37] Cf. Article 12, para. 5, Law no. 104/1992, which states that at the same time as the assessment provided for in Article 4 for girls and boys, pupils and students, the medical committees referred to in Law 15 October 1990, no. 295, shall carry out, at the request of the parents of the girl or boy, the girl or boy, the girl or boy, the girl student or the boy student certified in accordance with Article 4, or ofthose exercising parental responsibility, the assessment of the child or boy, the girl student or the boy student certified in accordance with Article 4. This assessment is preparatory to the drafting of the functioning profile, prepared in accordance with the criteria of the bio-psycho-social model of the ICF of WHO, for the purpose of formulating the PEI (Individualised Educational Plan) which is part of the individual project referred to in Article 14 of Law 8 November 2000, no. 328.

[38] With reference to the specific school and educational context, the inclusion system was subsequently supplemented and extended by Law 28 March 2003, no. 53 of on delegation to the Government for the definition of general rules on education and essential levels of performance in the field of education and vocational training, as well as by Law 8 October 2010, no. 170 on new rules on specific learning disorders in schools.

[39] We refer, for example, to Ministerial Circular 6 March 2013, no. 8, prot. no. 561, concerning the Ministerial Directive of 27 December 2012 on intervention tools for pupils with Special Educational Needs and territorial organisation for school inclusion, which provides for the application of the regulations dedicated to children with DSA (Specific Learning Disorders) also to all pupils with BES (Special Educational Needs). The Circular clarifies that the area of scholastic disadvantage, which is indicated as the area of Special Educational Needs includes different problems that can be traced to three large sub-categories: that of disability; that of specific developmental disorders and that of socio-economic, linguistic and cultural disadvantage.

[40] In this sense cf. S. Rossi, *Forme della vulnerabilità e attuazione del programma costituzionale*, cit., 28, where he notes, in a critical sense, the stratification of terminologies and legal definitions anchored to outdated models that do not facilitate the establishment of a clear conceptual framework.

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Starting from the observation of how the search for an answer to the numerous problems connected with disability has, over time, returned a complex and fragmentary regulatory framework[41] , there has matured an awareness of the "need to update and standardise languages, to share a common definition by adopting a systematic perspective", on pain of the risk of continuing to intervene in a manner that is neither organic nor coherent on the existing discipline with the sole aim of adapting the "label by which the phenomenon of disability is called, without, however, this also being matched by a substantial change in the concept itself"[42].

3. *The Role of the Public Administration in the Framework of the Disability Reform*

The process of maturing of the conditions favorable to the implementation of a reform of the disability discipline was strongly accelerated by the occurrence of the Covid-19 pandemic, which essentially laid bare all the criticalities of the protection system, making it even more imperative to prepare emancipatory pathways that place the actual capabilities and needs of persons with disabilities at the centre[43].

As emerged in the immediate aftermath of the emergency situation, in fact, persons with disabilities were among those most affected by the pandemic in terms of its negative consequences, both with reference to their medical/health dimension and to their relational and social dimension: in the first profile, the condition of disability, with the associated need for the constant support of a *caregiver*, certainly favoured exposure to contagion, which was often followed by a greater propensity to develop the disease (also due to the existence of other pathologies or more simply to the person's intrinsic frailty)[44]; with regard to the second profile, on the other hand, it should not be overlooked that, precisely in order to limit the greater risk of contagion to which they were exposed, vulnerable persons were forced into long periods of isolation, which represented a real trauma, due to the sudden interruption of their daily routines and related personal relationships, thus exacerbating their marginalisation in society[45].

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[41] On which, *ex multis*, see E. Vivaldi, A. Blasini, *Verso il "Codice per la persona con disabilità". Introduction*, in *Forum di Quaderni Costituzionali*, No. 1, 2021.

[42] See M. D'Amico, G. Arconzo, *I diritti delle persone con disabilità grave. Osservazioni al D.D.L. A.S. 2232 approvato dalla Camera dei Deputati sul cosiddetto "Dopo di noi"*, in *Osservatorio Costituzionale*, No. 1, 2016, 6.

[43] In this sense, F. Masci, *P.N.R.R., delega al Governo in materia di disabilità e legge di bilancio 2022: per un paradigma di tutela costituzionale che garantisca la riduzione del "disability divide"*, in *Costituzionalismo.it*, No. 3, 2021, 109, where he also notes that the "disability divide" has undoubtedly been exacerbated by the spread of SARS-CoV-2.

[44] See the WHO document, *Disability considerations during the Covid-19 outbreak*, 26 March 2020, as well as the ISS (National Institute of Health) document, *Indicazioni ad interim per un appropriato sostegno alle persone con demenza nell'attuale scenario della pandemia di Covid-19*, 23 October 2020.

[45] E. Vivaldi, *Pnrr e disabilità: misure e interventi per l'attuazione del diritto alla vita indipendente*, in *Rivista giuridica del lavoro e della previdenza sociale*, No. 4, 2022, 633, where he points out that the emergency approach dictated by the pandemic has led to privileging the health protection needs

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The pandemic crisis, therefore, has acted as an «amplifier of inequalities» that, on the basis of multiple risk factors (gender, age, presence of one or more disabilities), has in fact multiplied the differences and unequal access to the enjoyment of rights, disproportionately impacting on certain categories of individuals, the most discriminated against[46].

Moreover, the health emergency itself can be seen from a different perspective, which also allows us to grasp the positive effects associated with its occurrence, if only we consider how it was decisive, almost like a catalyst, in fostering that reaction - produced in our system - that led to considering the value of social inclusion (above all) of persons with disabilities as central to the post-covid recovery[47].

As is well known, in order to respond to the socio-economic crisis created by the pandemic, the European Union set up several support instruments for the most affected Member States[48], including Regulation (EU) No. 2021/241 which established the Recovery and Resilience Facility[49]. Each country wishing to receive a financial contribution from the EU therefore had to submit to the Commission a Recovery and Resilience Plan that would, in particular, provide a detailed explanation of how to strengthen the growth potential, job creation and economic, social and institutional resilience of the Member State concerned and mitigate the social and economic impact of the COVID-19 crisis, contributing to the implementation of the European Pillar of Social Rights and thereby improving economic, social and territorial cohesion and convergence within the Union (Art. 18(4)(c)).

With reference to Italy, the PNRR (National Plan for Recovery and Resilience) is characterised, as mentioned above, by having identified inclusion as one of the

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of persons with disabilities, rather than those related to their full inclusion, according to a perspective that has considered them more as objects of care than as subjects of rights.

[46] See M.G. Bernardini, S. Carnovali, *Diritti umani in emergenza: un'introduzione*, in M.G. Bernardini, S. Carnovali (eds.), *Diritti umani in emergenza. Dialoghi sulla disabilità ai tempi del Covid-19*, Rome, 2021, 18, where it is recalled that on 29 April 2020, in the midst of the pandemic, the United Nations High Commissioner for Human Rights issued an important document stating that while the pandemic threatens all members of society, persons with disabilities suffer a disproportionate impact due to attitudinal, environmental and institutional barriers that are also reproduced in the response to Covid-19: (see UNHCR, *Il Covid-19 e i diritti delle persone con disabilità: guida*, 29 April 2020). Similarly, see also F. Masci, *P.N.R.R., delega al Governo in materia di disabilità e legge di bilancio 2022*, cit., 112, according to whom «it is evident that the dissemination of covid has affected the development of new forms of disability and the aggravation of existing ones [...], widening pre-existing gaps and generating new factors of discrimination».

[47] As mentioned earlier, this reaction had indeed long been triggered in Italy too by the global acceptance of the bio-psycho-social assessment model, without, however, producing a real change in the perspective followed in relation to persons with disabilities.

[48] Consider, for example, the establishment of the so-called Next Generation EU instrument. *Next Generation EU*, with Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery of the economy after the COVID-19 crisis.

[49] See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Facility for Recovery and Resilience.

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main objectives to be pursued through the provision of numerous interventions and reforms aimed at «catching up with the country's historically disadvantaged backwardness concerning persons with disabilities, young people, women and the South»[50].

Indeed, the Plan recognises a multiplicity of economic, social and infrastructural factors that can negatively affect the existence of persons with disabilities, or in any case those who are not self-sufficient, so that the focus on the issue of disability intersects with the interventions envisaged in the various Missions provided for (by the Plan), while at the same time being the specific object of the one intended for Inclusion and Cohesion[51].

With regard to the transversal nature of disability intervention, it has been observed that, although it may seem an inefficient option, this modality is in fact «the most suitable for addressing a pervasive phenomenon such as the "disability divide", since it places the capabilities and needs of persons with disabilities at the centre of intervention programs in the health, social, housing, urban planning, training, employment, family support and security sectors»[52].

With reference to "Inclusion and Cohesion", in which there are more references to disability, the PNRR does not limit itself to envisaging investment measures in the strengthening of social infrastructures in favour of vulnerable persons, but also envisages the implementation of a reform of the existing legislation, with a view to de-institutionalisation and the promotion of the autonomy of differently abled persons. The aim is to fully realise the principles of the UN Convention on the Rights of Persons with Disabilities of 2006, according to an approach that is fully consistent with the Charter of Fundamental Rights of the European Union and the

[50] The final text of the PNRR was transmitted by the government to Parliament on 25 April 2021; on 26 and 27 April, the Houses of Parliament passed resolutions supporting the PNRR. On 22 June 2021, the European Commission published the proposal for a Council implementing decision, providing an overall positive assessment of the Italian PNRR. On 13 July 2021, the plan was definitively approved with a Council Implementing Decision, which transposed the European Commission's proposal.

[51] See V. Pupo, *La progressiva attuazione del principio di accessibilità delle persone con disabilità*, in *Rivista AIC*, No. 4, 2023, 118, where it is clarified how inclusion is central especially in the Missions dedicated to "Digitalisation, innovation, competitiveness, culture and tourism" (M1) and to "Inclusion and cohesion" (M5): with respect to the first area, a specific investment is planned for the removal of architectural, sensory and cognitive barriers in order to improve the accessibility of Italian cultural venues, such as museums, libraries and archives, and thus allow wider access to and participation in culture; with regard instead to the second area of action, extraordinary investments are planned to strengthen inclusion policies, with resources for the creation of social infrastructures and services, community and home health services, focused on the needs of persons with disabilities, the non-self-sufficient elderly, minors and their families, in order to improve their autonomy in a perspective that is as de-institutionalised as possible.

[52] Cf. F. Masci, *P.N.R.R., delega al Governo in materia di disabilità e legge di bilancio 2022* cit., 121-122, where it is emphasised that for the first time, therefore, the issue of disability is treated from a "mainstreaming" perspective and is included within a wide-ranging strategic programme.

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"Strategy for the Rights of Persons with Disabilities 2021-2030" presented in March 2021 by the European Commission[53].

The inclusion of a reform on disability in the framework of the NRP measures was an opportunity to follow up on the requests for rationalisation and adaptation of the fragmentary and stratified legislation on the subject, which had already been brought to the government's attention previously, without, however, ever having reached the *status* of a law[54].

The challenge presented to the legislator was rather ambitious insofar as it is by no means easy to reduce disability to a single abstract concept, in the face of a reality made up of persons who may present different conditions of vulnerability[55]. In order to deal with it properly it would in fact be «necessary to cut across public action, focusing it on the person of the addressee, adopting a perspective aimed at grasping the complex (and the complexity) of the interventions but, above all, of the will and of the aspirations of the person with disabilities», while trying - at the same time - not to «increase that "sectionalism" from which, according to authoritative analyses, the Italian State's social action has always been affected»[56].

This particular way of approaching the subject of disability was in fact followed in the context of the enabling Act of 22 December 2021, no. 227, with which the Government was assigned by Parliament the task of issuing one or more legislative decrees for the revision and reorganisation of the current provisions on disability, implementing Articles 2, 3, 31 and 38 of the Constitution and in compliance with the provisions of international and European rank[57], in order to guarantee that

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[53] See European Commission COM(2021) 101 *final* of 3 March 2021, *A Union of Equality: A Strategy for the Rights of Persons with Disabilities 2021-2030*, and the European Parliament resolution of 7 October 2021.

[54] We refer to the Draft Law on "Delega al Governo di semplificazione e codificazione in materia di disabilità" approved by the Council of Ministers on 28 February 2019, which was not then translated into law. On this point see F. Sanchini, *I diritti delle persone con disabilità* cit., 188; as well as E. Vivaldi, A. Blasini, *Verso il "Codice per la persona con disabilità". Introduction*, in *Forum di Quaderni Costituzionali*, No. 1,2021, 368.

[55] On this topic see L. Busatta, L*'universo delle disabilità: per una definizione unitaria di un diritto diseguale*, in F. Cortese and M. Tomasi (eds.), *Le definizioni nel diritto*, Trento, University of Trento, 2016, 335.

[56] In these terms see F. Pacini, *Disuguaglianza e tecniche legislative. Il caso di un riassetto di settore "promesso" e mai attuato*, in *P.A. Persona e Amministrazione*, No. 2, 2021, 209-210, who recalls in this sense the study by S. Cassese, *Governare gli italiani. Storia dello Stato*, Bologna, 2014, 293. In his contribution, Pacini emphasises the importance of any attempt at reform (regardless of the sector considered) because even just rearranging normative statements within an organic system means guiding the work of the interpreter in a more stringent manner. Not only: the "recomposed" legal system becomes less punctiform and fragmentary, therefore potentially more effective in protecting rights, increasing its capacity to have an impact on reality.

[57] The text of the Act, in Art. 1, para. 1, expressly refers to the provisions of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, done in New York on 13 December 2006, ratified pursuant to Act No. 18 of 3 March 2009, the Disability Rights Strategy 2021-2030, referred to in European Commission Communication COM(2021) 101 *final* of 3 March 2021, and the European Parliament Resolution of 7 October 2021 on the protection of persons with disabilities.

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persons with disabilities obtain the recognition of their condition, including through a congruent assessment of the same, transparent and easy assessment of his condition, which allows the full exercise of his civil and social rights, including the right to independent living and full social and labour inclusion, as well as the effective and full access to the system of services, benefits, financial transfers provided and any other related facilitation, and to promote the autonomy of the person with disabilities and his living on an equal basis with others, in compliance with the principles of self-determination and non-discrimination[58].

As for the subject of the implementing delegated decrees, the law was clear in identifying a number of profiles on which to intervene, with particular regard to the role of the public administration in ensuring the implementation of the disability reform.

After identifying the first requirement to be met, and thus the first objective to be attained, in the definition of the condition of disability, as well as in the revision, reorganisation and simplification of the sectoral regulations (Article 1(5)(a))[59], the enabling act in fact indicated a further six objectives that in turn can be traced back to three different types of measures that directly affect aspects inherent to the organisation of the public administrations involved in various ways in giving practical effect to the provisions of principle expressed at the regulatory level.

More specifically, it is possible to relate the area concerning the assessment of the disability condition and the revision of its basic assessment processes (Art. 1, para. 5, lett. b), as well as that concerning the multidimensional assessment of disability (Art. 1, para. 5, lett. c) - instrumental to the implementation of an individual, customised and participatory life project - to the need to «simplify procedural and organisational aspects so as to ensure promptness, efficiency, transparency and protection of the disabled person, and to rationalise the procedures and organisation of the disabled person's life project» (Art. 1, para. 5, lett. c). c) - instrumental to the implementation of the individual, customised and participatory life project - with the need to «simplify the procedural and organisational aspects so as to ensure timeliness, efficiency, transparency and protection of the person with disabilities, rationalisation and unification in a single procedure of the assessment

[58] See Art. 1, para. 1 of Law 22 December 2021, 227, concerning the delegation to the Government in the field of disability.

[59] The objective of rationalising the current legislation expressed by the provision in question refers, in addition to the evaluations underlying the assessment of the condition of disability pursuant to Law 5 February 1992, no. 104; to the assessments relating to civil invalidity pursuant to Law 30 March 1971, no. 118, and to civil blindness pursuant to Law 27 May 1970, no. 382 and Law 3 April 2001, no. 138; to civil deafness pursuant to Law 26 May 1970, no. 381; to deafblindness pursuant to Law 24 June 2010, no. 107; to assessments preparatory to the identification of pupils with disabilities pursuant to Article 1, paragraph 181, letter c), number 5), of Law July 2015, no. 107; to the assessment of disability for the purposes of labour inclusion pursuant to Law 12 March 1999, no. 68, and Article 1, paragraph 1, letter c), of Legislative Decree 14 September 2015, no. 151, and to the granting of prosthetic, health and rehabilitation assistance, of the assessments useful for the definition of the concept of non-self-sufficiency and of the assessments relating to the possession of the necessary requirements for access to tax, tax and mobility-related benefits as well as any other assessment of disability provided for by the regulations in force.

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process» underlying the various conditions of frailty that have long been regulated in our system, while maintaining the specificity and autonomous relevance of each form of disability (Art. 2, para. 2, lett. b, no. 2). The use of new digital technologies with reference to the activities relating to differently-abled persons is also part of the broader process of digitalisation of the public administration, both from an internal point of view, through the computerisation of the assessment and archiving processes by public bodies (Art. 1, para. 5, lett. d)[60], and from an external point of view, through the upgrading of (public) services on the subject of inclusion and accessibility in favour of users/citizens (Art. 1, para. 5, lett. e). Lastly, the initiatives aimed at establishing a national ombudsman for the disabled (Art. 1, para. 5(f)) and at strengthening the Office for policies in favour of people with disabilities, set up at the Presidency of the Council of Ministers (Art. 1, para. 5(g)), are united by the intention to provide greater protection for citizens with disabilities.

Maintaining the same perspective aimed at enhancing the impact of the provisions of Law no. 227/2021 on the role of the administration in the field of disability, it must be emphasised that, in addition to the fundamental provisions that finally impose the adoption in our legal system of a definition of disability consistent with Article 1 of the United Nations Convention on the Rights of Persons with Disabilities[61] – together with the consequent use of the international classification models[62] – the text of the proxy provides for a series of regulatory changes to the current discipline, which impact both from a substantive and a formal

[60] On which Article 2(2)(d) clarifies the need to set up, within the framework of the actions provided for in the PNRR, IT platforms, accessible and usable pursuant to Law 9 January 2004, no. 4, and inter-operable with those existing at the date of entry into force of the legislative decrees, which, in compliance with the principle of confidentiality of personal data, assist the assessment processes and the drafting of life projects, allow the consultation of certifications and information concerning economic benefits, social security and welfare benefits and social and health care assistance to which the disabled person is entitled, guaranteeing in any case the simplification of the conditions for the exercise of the rights of disabled persons and the possibility of carrying out checks, and also contain information on any benefits due to family members or persons caring for the disabled person.

[61] See Article 2(2)(a)(1) of Law no. 227/2021 where it is clarified that this objective is also to be pursued by supplementing Law no. 104/1992 and introducing provisions providing for a basic assessment of disability distinct from a subsequent multidimensional assessment based on the bio-psycho-social approach.

[62] Respectively, the ICF (International Classification of Functioning, Disability and Health) and the ICD (International Classification of Diseases) (Art. 2, par. 2, lett. a, no. 2); elements whose importance has been widely emphasised by the doctrine, inasmuch as they are capable of positively impacting on the current discipline, enabling the updating of the internal regulatory framework and thus overcoming some of the problems that had prevented a homogeneous and unitary treatment of the phenomenon: cf, *Proxy to the Government on Disability and the Budget Law 2022* cit., 94, in footnote 27, where he clarifies that the two classifications eschew both an exclusively "medical" approach, tending to represent disability as a disease or as the consequence of a disease, and an exclusively "social" approach, which sees disability as a problem generated by a society modelled on the needs of persons without disabilities. On the differences between the "medical" approach and the "social" approach, and for more bibliographical references, see C. Barnes, *Capire il modello sociale della disabilità*, Italian transl. A. Marra (ed.), in *Intersticios: Revista Sociológica de Pensamiento Crítico*, No. 1, 2008, 87.

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point of view on the powers of the public administrations involved in ascertaining and protecting persons with disabilities.

As far as the substantive aspect is concerned, we refer in particular to the provision requiring the separation of the assessment paths envisaged for the elderly from those envisaged for adults and from those envisaged for minors, as well as the provision requiring the introduction into Law no. 104/1992 of the definition of reasonable accommodation, providing adequate protection tools consistent with the provisions of the United Nations Convention on the Rights of Persons with Disabilities. Indeed, these interventions risk limiting the administrative powers related to the issuance of attestations of the condition of disability necessary to enjoy a series of facilitation and support measures provided by the laws in force in various contexts (work, education, social security, etc.): if, on the one hand, sanctioning the separation of the assessment paths for elderly people and people with disabilities, both of whom are considered categories of fragile subjects, determines a distinction that may in fact constitute a potential obstacle to the achievement of an adequate level of protection, on the other hand, the introduction of reasonable accommodation in the general application Law no. 104/1992 represents an elastic instrument through which, in the face of an ascertained condition of disability, the administration may impose adjustment measures only when reasonable, thus suggesting that, otherwise, the differently-abled person cannot find suitable satisfaction of his or her (occupational, and) life needs[63].

As regards, on the other hand, the formal aspect of the aforementioned regulatory changes on the activities of public administrations, it is sufficient to recall the provision to entrust a single public body with the exclusive medical-legal competence over the basic assessment procedures, guaranteeing their homogeneity throughout the national territory and achieving, also for the purpose of reducing legal disputes, a simplification and rationalisation of the procedural and organisational aspects (Article 2(2)(b)(4))[64]; or the one aimed at establishing an effective and transparent system of controls on the adequacy of the services rendered[65] , or again, with regard to the multidimensional assessment of disability and the implementation of the individual, customised and participatory life project,

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[63] See P. Vargiu, *The Concept of "Reasonable Accommodation" as a Barrier to the Rights of Persons with Disabilities in International Law*, in *OIDU - Ordine Internazionale e Diritti Umani*, No. 4, 2023, 811-825, where the author argues that the principle of "reasonable accommodation", rather than aiding the achievement of the substantive equality between persons with and without disabilities declared as the primary goal of the CRPD, frustrates its very own objective by depriving the obligation to provide accommodation of its actual binding force.

[64] Simplification that must also concern the re-examination or reassessment procedures, so that timeliness, efficiency and transparency are ensured and the protection and representation of the disabled person is recognised at all stages of the procedure for ascertaining the disability condition, guaranteeing the participation of the professional associations referred to in Article 1(3) of Law 15 October 1990, no. 295.

[65] To be implemented by guaranteeing interoperability between existing databases, as well as by also providing for specific situations entailing unforeseeability over time, except in cases of exemption already established by existing legislation.

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one thinks of the provision aimed at coordinating the competent administrations for the integration of national and regional social and health planning, as well as the one that for the purposes of the multidimensional assessment, requires the establishment and organisation of assessment units composed in such a way as to ensure the integration of the interventions of taking charge, assessment and planning by the competent administrations in the social-health and social-welfare sphere.

4. *The Inclusion of Persons with Disabilities in Relations with Public Administrations*

Among the first measures to implement the objectives set forth in Delegated Law no. 227/2021, aimed at reviewing and reorganising/rationalising the current provisions relating to persons with disabilities, it is worth mentioning the entry into force, on 13 January 2024, of Legislative Decree 13 December 2023, no. 222 relating provisions on the upgrading of public services for inclusion and accessibility[66].

The purpose of this implementing decree is to make a series of amendments to the current legislation on administrative matters with the aim of guaranteeing accessibility to public administrations by persons with disabilities and uniformity of protection for public employees with disabilities on the national territory, so as to ensure their full inclusion in accordance with European and international law, with particular reference to Article 9 of the United Nations Convention on the Rights of Persons with Disabilities[67]. This initiative is also part of the actions promoted by the European Commission as part of the 2021-2030 strategy for the rights of persons with disabilities[68].

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[66] For a detailed reconstruction of the regulatory changes made by Legislative Decree no. 222/2023 see M. Bertocchi, L. Bisio, *Accessibilità fisica, digitale e performance nel D.Lgs. n. 222/2023*, in *Azienditalia*, No. 4, 2024, 572-579.

[67] Cf. Art. 1, Legislative Decree no. 222/2023, which in Paragraph 2 clarifies how, for the purposes of the decree, accessibility is to be understood as the accessibility and usability, on an equal basis with others, of the physical environment, public services, including electronic and emergency services, information and communication, including computer systems and information technologies in Braille characters and in easily readable and comprehensible formats, also through the adoption of specific measures for the various disabilities or of assistance mechanisms or the provision of reasonable accommodation.

[68] See Brussels, 3 March 2021 COM(2021) 101 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Commissioner of the Regions, "Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030", which under point 8.1, dedicated to "disability-inclusive selection, recruitment, employment and retention processes", underlines how diversity and inclusion enrich and strengthen organisations. In this spirit, the Commission will include in its renewed HR (Human Resources) strategy actions to boost the recruitment, effective employment and career perspectives of staff with disabilities and to create inclusive work environments, reinforcing its commitment as an employer to foster diversity and equality while also ensuring that accessibility and reasonable accommodation are provided for.

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The scope of application of the legislation in question is therefore subjectively delimited, since it is addressed to the public administration in a broad sense, i.e. not only to the administrations referred to in Article 1(2) of Legislative Decree no. 165 of 30 March 2001 (Article 2(1) of Legislative Decree no. 222/2023), as well as to all independent Authorities, constitutional bodies (and those of constitutional importance) which, although enjoying regulatory autonomy, will have to adapt their internal regulations to the principles expressed by the Decree (Art. 2, para. 2, Legislative Decree no. 222/2023), but also to public service concessionaires (albeit limited to the provisions of Articles 7 and 8).

On the other hand, with regard to the objective sphere, it is possible to observe how the provisions in question affect various aspects of a predominantly organisational nature of the life of the administrations, addressing different categories of subjects in two distinct directions: one outward, in favour of citizens/users of public services with disabilities, the other inwards, for the benefit of public employees with disabilities.

The provisions of Art. 3 aimed at enhancing the prominence of social inclusion and accessibility in the planning and management of administrative activities, which is carried out through the PIAO (Integrated Plan of Activities and Organisation), through the creation of a new managerial position to be assigned to a person with experience in the issues of social inclusion and accessibility of persons with disabilities (also proven by specific training); the function conferred on this new figure is that of specifically defining the methods and actions aimed at achieving full accessibility, both physical and digital, to the Administrations for the benefit of citizens over 65 years of age and citizens with disabilities (referred to in Art. 6, co. 2, lett. f, of Legislative Decree 9 June 2021, no. 80), having to propose the related identification of the programmatic and strategic performance objectives (as per Art. 6, co. 2, lett. a), and of the related human capital management and organisational development strategy, as well as the annual and multi-year training objectives (as per Art. 6, co. 2, lett. b).

For the purposes of a more feasible implementation of this provision, the provision under review also specifies that the aforesaid functions may also be performed by the person responsible for the process of integration of persons with disabilities in the workplace (as per Article 39-*ter*, paragraph 1, of Legislative Decree no. 165/2001), if he/she has a managerial qualification[69], also allowing smaller administrations (with fewer than fifty employees) to assign this new managerial function also by resorting to forms of associated management.

Another regulatory provision that operates at an organisational level, but in any case to the benefit of the relationship between administrations and citizens/users with disabilities, is represented by Article 4, through which the dictate of Legislative Decree 27 October 2009, no. 150 (the so-called "Brunetta" reform) is amended, introducing for the first time a correlation between accessibility/inclusion

[69] The names of the persons identified pursuant to this paragraph are communicated to the Presidency of the Council of Ministers - Civil Service Department.

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objectives and results and the performance cycle. Specifically, in Art. 5 of Legislative Decree no. 150/2009, the administration's management objectives are to be integrated so as to ensure the effective social inclusion and accessibility of people with disabilities, and Art. 3 of the same legislative decree, the provision whereby for the assessment of individual and organisational performance – to be implemented according to criteria strictly linked to the satisfaction of the interest of the recipient of the services and interventions – it is required to take into account whether or not those objectives have been achieved, thus affecting the disbursement of performance-related bonuses and components of remuneration, and relevant for the purposes of the recognition of economic progressions, the assignment of positions of responsibility to staff, as well as the conferment of managerial appointments, and exposing the official to a possible negative assessment, in turn relevant for the purposes of ascertaining managerial responsibility[70].

There is also a further point in the legislation that is destined to affect relations outside the administration insofar as it relates to the instruments of protection granted to the citizen/user with specific reference to the quality of public services with regard to the requirements of social inclusion and accessibility.

In fact, Article 7 of the Decree requires the service charter to indicate the quality levels of the activity performed (by the administration or the public service concessionaire) in relation to the actual accessibility of the services for persons with disabilities, clearly identifying (and in an accessible manner) for the various disabilities the rights, also of a compensatory nature, that users may demand from the service and infrastructure managers, as well as the methods by which to demand them, including through the appointed control bodies or authorities. This provision is instrumental in raising the level of protection obtainable by the citizen/user with disabilities, insofar as Article 8 sanctions the extension of the right to appeal for the efficiency of the administrations and public service concessionaires (pursuant to Article 1 of Legislative Decree 20 December 2009, no. 198) also to cases of failure to implement or violation of the quality levels of essential services for the social inclusion and accessibility of persons with disabilities contained in the service charters or of the obligations provided for by the regulations in force on the subject.

On the other hand, the provisions of Article 6 aimed at affecting relations within the administration, specifically in favour of public employees with disabilities, follow a perspective aimed at making certain changes to the rules on employment in public administrations enshrined in Legislative Decree 30 March 2001, no. 165[71].

The provision in question focuses on the figure of the «Person in charge of the process of integration of persons with disabilities» in the workplace, governed by Article *39-ter* of the aforementioned Legislative Decree no. 165/2001, which, unlike what was previously provided for, must now be appointed by all public administrations as part of their staff in service, without new or greater burdens for the public finance and within the human, financial and instrumental resources

[70] In this sense, see Article 3(5) and (*5-bis*) of Legislative Decree no 150/2009.

[71] On this topic, see V. Berlingò, *L'effettività dell'integrazione lavorativa del disabile alla luce delle più recenti riforme della pubblica amministrazione*, in *Consulta online*, No. 1, 2018, 109-122.

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available under the legislation in force. The previous text in fact only required the appointment of the person in charge to public administrations with more than two hundred employees. The new legislation also clarifies that the activity of the person in charge is aimed not only at guaranteeing the specific needs of integration of persons with disabilities in the workplace, but more generally at implementing the general principles established by Art. 7, by virtue of which «public administrations shall guarantee equality and equal opportunities between men and women and the absence of any form of discrimination, direct or indirect, relating to gender, age, sexual orientation, race, ethnic origin, disability, religion or language, in access to employment, treatment and working conditions, vocational training, promotion and safety at work»[72].

Another amendment introduced by Article 6 of the Decree integrates the previous text of Article *39-ter* of Legislative Decree no. 165/2001 by requiring that the person in charge be chosen primarily from among those managers, or in any case from among those employees, who have experience in social inclusion and accessibility of persons with disabilities, also proven by specific training.

As a whole, therefore, the intent of the legislator is not only to broaden the scope of application of the regulatory provision establishing the figure of the Person in charge, which no longer encounters any limit due to the size of the administration, but also to strengthen its role, to the extent that in addition to having to possess special professional and training requirements, the official in charge must tend to be chosen from among the tenured managers, and only if they are not available, from among other employees: in fact, this also ensures greater "commitment" to the pursuit of the objectives of inclusion and accessibility of employees with disabilities on the part of the manager, as a subject of managerial responsibility.

The specific provisions dedicated by Article 5 to the associations representing persons with disabilities also move in both the directions just referred to, and they now assume significant importance both with reference to the determination of the actions provided for in the PIAO, thus aimed at planning and scheduling the external activities of the administration in favour of citizens/users, and with reference to the preparation of the proposals formulated by the person in charge of the process of integration of persons with disabilities in the workplace, as well as in relation to the performance plan, limited to the profiles concerning the accessibility and social inclusion of persons with disabilities.

In conclusion, it is spontaneous to consider the provisions introduced by Legislative Decree no. 222/2023 as suitable for strengthening the current regulations for the protection of persons with disabilities who come into contact with the administrations that provide public services or who simply take an active part in them, as employees. This result is achieved by intervening, as seen, on the profile of the responsibilities of the public administration in relation to the effective achievement of the aforementioned objectives of social inclusion and accessibility,

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[72] See Article 7(1) of Legislative Decree no. 165/2001, which concludes that public administrations also guarantee a working environment characterised by organisational wellbeing and undertake to detect, combat and eliminate all forms of moral or psychological violence within the administration.

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whether it is an internal responsibility, of a managerial nature, or an external responsibility, of a jurisdictional nature.

Some perplexity remains, however, as to the real capacity of these new regulatory provisions to be effectively and concretely implemented, considering the organisational difficulties that Administrations, especially small ones, might encounter in a path that should entail not only a formal regulatory adjustment, but also an effective integration of inclusion and accessibility issues, both in their strategies and in their organisational models[73]. In fact, Article 9 of Legislative Decree no. 222/2023 makes it clear that the implementation of the provisions of this decree should not give rise to new or greater burdens on the public finance and that therefore the administrations concerned should provide for the envisaged fulfilments with the human, financial and instrumental resources available under current legislation[74].

5. *The Regulation on Public Contracts and the "Third Generation" Social Clauses*

Already for some time, in the European context, the regulation of public contracts has been an instrument for implementing a policy of promoting so-called "social aspects" that, with the achievement over the years of an ever-increasing legal prominence[75], has put administrations in a position to contribute indirectly to the development of the Member States, favouring the realisation of the more general cohesion objectives set out in Article 151 TFEU (Treaty on the Functioning of the European Union), including the promotion of employment, the improvement of living and working conditions and adequate social protection[76]. The importance of

[73] In this sense see M. Bertocchi, L. Bisio, *Accessibilità fisica, digitale e performance* cit., 578.

[74] In this sense, the consideration already expressed in V. Pampanin, *The Role of Public Administration in Promoting the Accessibility of Online Resources: the Italian Legal Framework*, in AA.VV., *Building an Inclusive Society for Persons with Disabilities. New Challenges and Future Potentials in the Digital Era*, Pavia University Press, 2019, 49, where with reference to the legislation on the digital accessibility of public administration it is observed that «as it often happens with regulatory reforms that directly involve public administrations, the legislation [...] has not been accompanied by an adequate transfer of resources in favour of public administrations, neither in terms of personnel nor in strictly economic terms».

[75] The generic term "social aspects", referring to public procurement, was first adopted by the case law of the Court of Justice of the European Union (in particular in the judgments of 17 September 2002, Case C-513/99, *Concordia Bus*, and 4 December 2003, Case C-448/01, *Wienstrom*) and subsequently saw its real scope better defined by a number of communications of the European Commission, until it was expressly formalised at the regulatory level by Directives 2004/17/EC and 2004/18/EC, later amended by Directives 2014/24/EU, 2014/25/EU and 2014/23/EU.

[76] In this sense cf. V. Berlingò, *L'effettività dell'integrazione lavorativa del disabile* cit., 113-114, where it is recalled how the European Commission's publication, entitled *Buying social. A guide to the consideration of social aspects in public procurement*, employs the expression "Buying social" precisely to indicate the possibility offered to public administrations to achieve procurement operations that take into account one or more social aspects, including decent work, compliance with social and labour rights, social inclusion (understood as the inclusion of persons with disabilities), equal opportunities, accessibility.

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the pursuit of social values and inclusion has been further reaffirmed, more recently, both at the European level, within the Europe 2020 strategy[77], and at the international level, within the ambitious UN 2030 Agenda for Sustainable Development[78].

Directive 2014/24/EU, which most recently consolidated the relevant European regulatory framework, clarifies how public procurement is the means to smart, sustainable and inclusive growth that should also strive to achieve shared objectives of social value (recital no. 2), since work and employment contribute to integration in society and are key elements in ensuring equal opportunities for all (recital no. 36).

In particular, the directive identifies how to integrate social aspects throughout the tender process, emphasising them both in the tender phase, in relation to the technical specifications, and in the contractor selection phase, regarding the selection and award criteria, not even neglecting the execution phase, through the provision of specific clauses.

The effective achievement of these objectives is ensured by a system of rewards and sanctions consisting, on the one hand, in the recognition of economic incentives for those who present specific requirements to guarantee social cohesion, and, on the other hand, in the exclusion from the tender for those who do not comply with the required parameters.

In this way, the contracting authority ends up influencing the companies' own production policies, directing them to invest in the "social aspects" of their activities, thus marking the definitive departure of the discipline from the use of the sole criterion of economic interest, traditionally conceived as the sole objective to be pursued in procurement[79].

With specific reference to the Italian national legal system, the first regulatory provision aimed at favouring the employment of persons with disabilities, through the determination of special requirements for participation in tenders, can in fact already be identified in Law 8 November 1991, no. 381 of concerning the regulation of social cooperatives, i.e. those companies whose purpose is to pursue the general interest of the community in the human promotion and social integration of citizens.

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[77] See Brussels, 3 March 2010, COM(2010) 2020 final, Communication from the Commission *EUROPE 2020. A strategy for smart, sustainable and inclusive growth*, which identifies inclusive growth as one of the priorities to be pursued, i.e. achieving an economy with a high employment rate that fosters economic, social and territorial cohesion. Concretely, this is reflected in the flagship initiative European Platform against Poverty, which includes the development and implementation of programmes to promote social innovation for the most vulnerable, in particular by providing innovative education, training and employment opportunities for disadvantaged communities, as well as to combat discrimination, e.g. against people with disabilities.

[78] See the Resolution adopted by the General Assembly on 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development*, with specific reference to Goal 8.5, aimed at «ensuring by 2030 full and productive employment and decent work for women and men, including youth and persons with disabilities, and fair remuneration for work of equitable value», as well as Goal 10.2, aimed at «enhancing and promoting the social, economic and political inclusion of all, regardless of age, gender, disability, race, ethnicity, origin, religion, economic or other status».

[79] Cf. in this sense V. Berlingò, *L'effettività dell'integrazione lavorativa del disabile* cit., 114-115.

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In particular, Art. 5, intended to operate with reference to those cooperatives that carry out activities (agricultural, industrial, commercial or services) aimed at the employment of disadvantaged persons[80], provides that public entities, including economic entities, and joint stock companies with public shareholdings, also by way of derogation from the rules on public administration contracts, may enter into agreements for the supply of goods and services other than socio-medical and educational ones, the estimated amount of which, net of VAT, is lower than the amounts laid down by the Community directives on public contracts, provided that such agreements are aimed at creating employment opportunities for disadvantaged persons[81].

If the aforementioned requirements, both subjective and objective, are met, the cooperative society may therefore, after entering into an appropriate agreement, obtain the direct award of the service contract, as an exception to the contract code. Recourse to this instrument is in any case a mere faculty granted to the administration and not an obligation[82].

This is clearly a provision capable of operating, albeit indirectly, in favour of persons with disabilities employed within the cooperative even if, as is evident, its particularly circumscribed scope of application and its non-binding scope testify to the still scarce relevance attributed, in those years, to the social dimension of public procurement in favour of the principle of guaranteeing competition[83].

The explicit entry of social values (in the broad sense) into the regulatory context of public contracts only occurred as from the “Code of public contracts for works,

[80] Pursuant to Article 4, Law no. 381/1991, disadvantaged persons are, among others, the physically, mentally and sensory disabled, former in-patients of psychiatric hospitals, including judicial ones, and persons undergoing psychiatric treatment.

[81] This provision then finds a further extension of its scope also for the supply of goods or services (other than socio-medical and educational), the estimated amount of which net of VAT is equal to or greater than the amounts established by the EU directives on public procurement, with respect to which public entities (including economic entities, as well as joint-stock companies with public shareholdings), may include in their calls for tenders and specifications the obligation to perform the contract with the employment of disadvantaged persons and with the adoption of specific rehabilitation and work integration programmes.
The conditions that cooperatives must meet in order to enter into an agreement to entrust a service as an exception to the public contract regulations were reiterated and further specified by ANAC Resolution 20 January 2016, no. 32 on *Linee guida per l’affidamento di servizi a enti del terzo settore e alle cooperative sociali*.

[82] For more in-depth analysis see, among many others, S.C. Sortino, *Gli appalti di servizi e le cooperative sociali*, in *Nuova rassegna di legislazione, dottrina e giurisprudenza*, No. 19,1998, 1893-1897; D. Mezzacapo, *Norme per il diritto al lavoro dei disabili (l. 12 marzo 1999, n. 68)*, in *Le Nuove leggi civili commentate*, No. 6, 2000, 1431-1438; P. Michiara, *L'affidamento di servizi al Terzo settore*, in *Non profit*, No. 3, 2014, 199-215.

[83] Cf. M.V. Ferroni, *L'affidamento agli enti del terzo settore ed il Codice dei contratti pubblici*, in *Nomos*, No. 2, 2018, 25-27, spec. 26, where it is observed how the administrative jurisprudence on the subject has clarified that «this rule, derogating from the general principles of protection of competition that govern the conduct of tender procedures, has exceptional value and as such must be interpreted restrictively. It follows that it is not possible to bring within its scope contracts other than those specifically indicated» (thus, Council of State ruling, sez. VI, 29 April 2013, no. 2342).

services and supplies", adopted by Legislative Decree No 163 of 12 April 2006, implementing Directives 2004/17/EC and 2004/18/EC. This was in fact already to be found in Article 2, according to which «the principle of economy may be subordinated [...] to criteria, set out in the notice, inspired by social needs, as well as the protection of health and the environment and the promotion of sustainable development». The reference to generic social needs, however, acquired a more precise meaning, as far as the inclusion of persons with disabilities is concerned, in the provisions of Article 52 aimed at regulating a special category of so-called reserved contracts[84].

According to this original provision - most recently included in Article 61 (entitled "excluded contracts") of Legislative Decree no. 36 - contracting stations may reserve participation in public procurement procedures, in relation to individual contracts, or in view of the subject matter of certain contracts, to sheltered workshops in compliance with the regulations in force, or ensure that performance takes place exclusively in the context of sheltered employment programmes[85], when the majority of the workers concerned are disabled persons who, by reason of the nature or severity of their disability, cannot carry out a professional activity under normal conditions[86].

Clearly, these are special and derogatory provisions for contracts and concessions that provide for a real reservation, which can be applied both in the participation phase and in the execution phase, in favour of economic operators and

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[84] See Art. 19, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 *On the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, transposed by Art. 52 of the former Procurement Code and then substantially confirmed by Art. 20, Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, *On public procurement and repealing Directive 2004/18/EC*, transposed, in turn, by Art. 112 of Legislative Decree No. 50 of 18 April 2016. In doctrine see M. Lottini, *Gli appalti pubblici riservati a laboratori protetti e le clausole sociali di esecuzione del contratto, in* M.A. Sandulli, R. De Nictolis, R. Garofoli (eds.), *Trattato sui Contratti Pubblici*, Giuffrè, 2008, II, 1255-1263.

[85] In relation to the notions of "sheltered workshop" and "sheltered work programme", in the absence of a clear regulatory definition, it has been argued in doctrine that «both figures are characterised by the employment (on a stable basis in the case of sheltered workshops, in relation to a specific contract in the hypothesis of "sheltered work programmes") of the majority of disabled workers: with the consequent exclusion of categories of workers who are "disadvantaged" for reasons other than disability»: A.M. Balestreri, *Gli "appalti riservati" fra principio di economità ed esigenze sociali,* in *Urbanistica e appalti*, No. 7, 2009, *790*.

[86] Cf. A. Romeo, *Art. 61 Excluded Contracts*, in R. Villata, M. Ramajoli (eds.), *Commentary to the Public Contracts Code*, 2023, 248, where it is emphasised that the purpose, adopted by the national legislator, is therefore that of preparing a system of public contracts that, in the context of a free market, allows the implementation of social policies aimed at enhancing the professionalism of the subjects, protecting the employment of disadvantaged or disabled persons and promoting equal opportunities. Reserved contracts pursue a twofold objective: on the one hand, that of protecting particular subjective situations of disadvantage, promoting access to the labour market; on the other hand, that of recognising the possibility of participating in competitions outside the logic of pure competition.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

social cooperatives and their consortia, whose main purpose is the social and professional integration of persons with disabilities.

In particular, the possibility given to contracting authorities to limit the number of aspiring tenderers to only "sheltered workshops" represents a potential compression of competition in the reference market and, therefore, a substantial limitation of the principle of favor "partecipationis" enshrined in Community law on procurement. On the contrary, in the hypothesis of reservation to "sheltered workshops" for the phase of execution of the contract, the pursuit of the social purposes underlying the reservation may well be declined by the authorities in a manner consistent with and respectful of the principles of maximum participation and freedom of organisation of business activity.

The instrument of public procurement thus comes to have a "mixed" cause, given not only by the acquisition of the work, service or labour, but also by the ability to promote and facilitate the social and labour insertion of persons in need of special protection, such as persons with disabilities. To this end, the provision now enshrined in Article 61 of Legislative Decree No. 36/2023 also provides for the possibility for contracting stations to introduce «mechanisms and instruments of bonus to achieve equal generational, gender and labour inclusion opportunities for persons with disabilities or disadvantaged persons»[87].

The real change of step for the valorisation of social aspects in public procurement is, however, represented by a different provision, introduced in the national context starting with the regulation of contracts under Legislative Decree no. 50/2016, namely Article 50 concerning the so-called social clauses. In fact, this provision provides that for the awarding of concession contracts and contracts for works and services other than those of an intellectual nature, with particular regard to those relating to labour-intensive contracts, the calls for tenders, notices and invitations shall include, in compliance with the principles of the European Union, specific social clauses aimed at promoting the employment stability of the staff employed[88].

What is most interesting to emphasise is first of all the compulsory nature of the introduction, among the tender rules, of the social clauses, which thus assume for the first time a general applicative scope, as they are addressed to all procurement and concession contracts concluded by Italian public administrations[89].

Although these are "second-generation" social clauses, i.e., aimed at protecting the employment stability of the workers involved (so-called "reabsorption" clauses) and functional to countering downward competition dynamics in labour costs, their provision in national legislation has proved fundamental as a prerequisite for the more recent development of new social clauses. Although these are "second-

[87] See A. Romeo, *Art. 61 Excluded Contracts* cit., 250.

[88] For an extensive reconstruction of the development of social clauses in our legal system see F. Pantano, *Le clausole sociali nell'ordinamento giuridico italiano. Concorrenza e tutela del lavoro negli appalti*, Pacini Giuridica, 2020.

[89] On this topic, see S. Bandini, A. Coppetti, P. Moro, *La leva dei contratti pubblici per l'inserimento lavorativo di soggetti svantaggiati*, in *Appalti e Contratti*, No. 9, 2018, 11-28.

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generation" social clauses, i.e. aimed at protecting the employment stability of the workers involved (so-called "reabsorption" clauses) and functional to countering downward competition dynamics in labour costs[90], their provision in national legislation has proved fundamental as a prerequisite for the more recent development of new social clauses that can be defined as "third-generation" by virtue of the different purpose they aim at, no longer and not so much aimed at protecting and stabilising the employed workers, but rather at promoting equal conditions and opportunities for the categories of workers that are currently less protected (women, persons with disabilities, young people)[91].

In the context of the provisions of Decree-Law 31 May 2021, no. 77[92], intended to regulate the initiatives and instruments for the implementation of the National Recovery and Resilience Plan (PNRR)[93], and the National Plan for Complementary Investments (PNC), the Legislator has in fact provided in Art. 47 the adoption of measures aimed at fostering equal gender and generational opportunities, as well as the labour inclusion of persons with disabilities, through conditionality mechanisms, according to which the fulfilment of social interests entails the acquisition of a competitive advantage for companies participating in tenders[94].

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[90] Cf. B. Rabai, *Public procurement e clausole sociali. Un nuovo equilibrio tra diritti sociali e ragioni del mercato*, in *Giorn. dir. amm.*, No. 2, 2022, 233, where it is clarified that the rationale of the latter instruments is to be found mainly in the protection of the employment of personnel used by the outgoing company in the performance of the contract and, therefore, in the aim of opposing downward competition dynamics in labour costs (so-called *social dumping*).
Compared to the "second generation" clauses, the "first generation" clauses aim instead to promote the application of the minimum standards of treatment established by national collective agreements, with the objective of ensuring better employment conditions for the employees of the companies to which the so-called social clauses are addressed: cf. E. Ghera, *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, in *Dir. relaz. ind,* No. 2, 2001, 143, where the author observes that one can therefore recognise – in the so-called social clauses of fair treatment – the expression of a principle of support and enhancement of collective bargaining and, at the same time, of protection – or guarantee – of the individual rights of workers.

[91] See R. Caranta, S. Fichera, *Il nuovo Codice degli Appalti pubblici e le tutele sociali dal punto di vista dell'amministrativista*, in *Rivista giuridica del lavoro e della previdenza sociale*, No. 1, 2024, 36-37, where, in relation to the second generation clauses, it is emphasised that the legislator goes further, foreseeing the possibility that social clauses be used to achieve further objectives, such as equal opportunities between persons of different ages, between men and women, the integration of disabled or disadvantaged workers.

[92] See Decree-Law 31 May 2021, no. 77, concerning governance of the National Recovery and Resilience Plan and initial measures to strengthen administrative structures and accelerate and streamline procedures, converted with amendments by Law 29 July 2021, no. 108.

[93] Pursuant to Article 1, the decree defines the national regulatory framework aimed at simplifying and facilitating the realisation of the goals and objectives set out in the National Recovery and Resilience Plan, referred to in Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021, as well as in the National Plan for Complementary Investments referred to in Decree-Law 6 May 2021, no. 59, on urgent measures concerning the complementary fund for the National Recovery and Resilience Plan and other urgent measures for investments, implemented by Regulations (EU) 2021/240 and (EU) 2021/2041.

[94] Cf. F. Pantano, *Clausole sociali, concorrenza, investimento pubblico e tutela del lavoro: dal Codice dei contratti pubblici al PNRR*, in *federalismi.it*, No. 25, 2022, 180.

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The aforementioned provision, in addition to providing for the obligation for companies with more than 50 employees, participating in calls for tenders (financed with NRP funds), to submit at the time of the request to participate (or bid), under penalty of exclusion, a copy of the report on the personnel situation (Art. 47, para. 2), in accordance with the provisions of the Code of Equal Opportunities between men and women[95], requires companies with 15 or more employees, but less than 50, to submit, within six months of the conclusion of the contract, a certification and a report on the fulfilment of the obligations provided for by the regulations for the right to work of disabled persons[96], as well as a report on any sanctions and measures taken against them in the three years preceding the deadline for submission of bids (Art. 47, para. 3-*bis*).

These obligations addressed to companies are clearly suitable to reinforce compliance with the rules protecting the right to work of persons with disabilities in relation to the particular context of public contracts, especially considering that in the event of non-compliance there is the application of penalties commensurate with the seriousness of the violation and proportional to the amount of the contract or the services provided under the contract (Art. 47, para. 6), but they are not in themselves an effective tool to promote the effective employment of persons with disabilities in companies, such as to ensure an increase in terms of employment rates.

On the contrary, such an effect is instead produced directly by the different provision requiring contracting authorities to adopt, in the contract notices, notices and invitations, specific clauses aimed at including criteria to promote youth entrepreneurship, the employment inclusion of persons with disabilities, gender equality and the hiring of young people, both as necessary requirements for participation in the tender, and as autonomous bonus requirements of the tender with a view to the award of the contract (Art. 47, para. 4).

In relation to this last profile, the ability of the public administration to reward companies participating in the tender that are more virtuous in the field of, among others, the inclusion of persons with disabilities, is further strengthened by the possibility of providing (in the tender rules) for the assignment of an additional score to the tenderer or candidate that in the three years preceding the date of expiry of the deadline for submission of tenders, is not the subject of findings relating to discriminatory acts or conduct; which uses or undertakes to use specific tools to reconcile the needs of care, life and work for its employees, as well as innovative ways of organising work; which undertakes to employ, in addition to the minimum percentage threshold laid down as a requirement for participation, disabled persons, young people under the age of thirty-six, and women for the performance of the

[95] See Art. 46, Legislative Decree, No. 198 of 11 April 2006.
[96] See Art. 17, Law, No. 68 of 12 March 1999.

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contract or for the implementation of related or instrumental activities (Art. 47, para. 5)[97].

However, it must be considered that the potential positive impact of the introduction of such measures risks being somewhat weakened by the closing provision of Art. 47 which, in paragraph 7, indeed allows contracting authorities not to include in the contract notices, notices and invitations the participation requirements set forth in paragraph 4, or to establish a lower proportion thereof, giving adequate and specific reasons, if the subject of the contract, the type or nature of the project or other elements specifically indicated make their inclusion impossible or contrary to the objectives of universality and sociality, efficiency, cost-effectiveness and quality of the service as well as the optimal use of public resources.

In this sense, the provisions most likely to promote the development of employment inclusion of persons with disabilities risk being substantially obliterated in the face of a simple reinforced motivation burden.

The role of "third-generation" social clauses in promoting the inclusion of people with disabilities in public administration procurement has also recently been confirmed in the recently approved new Public Contracts Code.

In fact, Legislative Decree 31 March 2023, no. 36 re-proposes in Art. 57, paragraph 1, a special regulatory provision dedicated to the social clauses of the contracts, according to which, except for contracts for works and services of an intellectual nature, the calls for tenders, notices and invitations must contain specific social clauses with which measures oriented, among other things, to guarantee equal generational, gender and labour inclusion opportunities for disabled or disadvantaged persons, the employment stability of the personnel employed, as well as the application of the national and territorial collective agreements of the sector.

Compared to the regulations on social clauses enshrined in the previous Legislative Decree no. 50/2016, the new Code no longer contains an express reference to labour-intensive contracts, while it has introduced one for the cultural heritage and landscape sector, thus requiring contracting authorities to take the special social needs of this sector into due consideration[98].

The changes thus introduced signal a further broadening of the scope of the obligation to include social clauses in calls for tenders, both with regard to the group of people who will be able to benefit - now expressly referring to women, young

[97] In this sense see M. Lamberti, *La riforma degli appalti pubblici tra PNRR e legge delega*: *verso il rafforzamento delle clausole sociali?* in *Il diritto del mercato del lavoro*, No. 3, 2022, 592-593, where it is argued that the additional bonus measures referred to, although merely illustrative, seem to be attributable to the precise desire to incentivise tender participants to put in place measures that can be traced, in a broad sense, to the objectives of equal generational and gender opportunities identified by Art. 47, Legislative Decree no. 77/2021, measures that, when adopted, can guarantee greater chances of being awarded the contract.

[98] See M. Lunardelli, *Dal PNRR come "corpus normativo" speciale al nuovo codice dei contratti pubblici: continuità e innovazioni*, in *Urbanistica e appalti*, No. 2, 2024, 199.

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people and persons with disabilities - and with regard to the type of contracts covered by this obligation.

As clarified in doctrine, in fact, both the administrative courts and the competent authority for public contracts had interpreted the reference to labour-intensive contracts as meaning that the obligation to include the social clause should only concern that category of contracts, while for other contracts it was left to the discretionary choice of the contracting authority. With the new wording, this rule should instead be interpreted in the sense of imposing a generalised obligation for all contracts (excluding those concerning services of an intellectual nature)[99].

6. *The "National System" for the Promotion and Protection of the Rights of Persons with Disabilities*

Within the framework of the reform process for the adaptation of domestic regulations to the principles and values accepted at the international level starting with the United Nations Convention on the Rights of Persons with Disabilities, it is necessary to emphasise the importance of accompanying individual regulatory interventions with the construction of an apparatus of administrative bodies, operating at various levels, aimed at guaranteeing the protection of the rights of vulnerable persons, as well as supervising and promoting the conditions for their effective enjoyment.

The first public body to do so in our legal system was the National Observatory on the Condition of Persons with Disabilities, whose establishment took place on the occasion of the ratification of the United Nations Convention on the Rights of Persons with Disabilities[100]. In fact, Article 3 of Law 3 March 2009, no. 18 provided for the establishment of this Observatory at the Ministry of Labour, Health and Social Policies, «in order to promote the full integration of persons with disabilities, in implementation of the principles enshrined in the Convention [...], as well as the principles indicated in Law 5 February 1992, no. 104»[101].

The main tasks of the body are characterised mainly by the purpose of reporting on the activities carried out in implementation of the Convention (collection of statistical data defining the condition of persons with disabilities, preparation of the report on the state of implementation of disability policies pursuant to Art. 41, para. 8, of Law no. 104/1992), as well as the promotion of the rights and integration of

[99] Cf. E. Caruso, *La funzione sociale dei contratti pubblici: oltre il primato della concorrenza?*, Jovene, 2021, 452, where Anac Guidelines No. 13 and the related Council of State Opinion No. 2703 of 21 November 2018 are referred to.

[100] For an initial comment see I. Ambrosi, M.D. Auria, *La l. n. 18 del 2009 di ratifica della convenzione delle Nazioni Unite sui diritti delle persone con disabilità*, in *Famiglia, Persone e Succioni*, No. 5, 2009; N. Foggetti, *Con la creazione dell'Osservatorio nazionale fatto il primo passo per adeguarsi alla disciplina*, in *Guida al Diritto*, No. 15, 2009.

[101] For the rules on the composition and internal functioning of the Observatory, please refer to Ministerial Decree 6 July 2010, no. 167 concerning regulation governing the National Observatory on the condition of persons with disabilities, adopted by the Minister of Labour and Social Policies in agreement with the Minister for Public Administration and Innovation.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

persons with disabilities[102]. In this latter regard, the two two-year action programmes for the promotion of the rights and integration of persons with disabilities are particularly noteworthy[103], as well as the study and research activities to identify priority areas of intervention in the field.

The real change of step in the construction of an administrative apparatus supporting the achievement of the objectives of social inclusion and protection of persons with disabilities is, however, much more recent, as it can be identified first in the identification of a special Minister of Disability, not only of symbolic value (since without portfolio) but also partly operational (thanks to the provision of the Single Fund for the inclusion of persons with disabilities)[104], and then in the creation of a National Guarantor of Disabilities, responsible for the protection and promotion of the rights of persons with disabilities[105]. In fact, both these interventions have made it possible to definitively integrate, also in our legal system, that "national system" for the promotion and protection of the rights of persons with disabilities required to achieve the full implementation of the provisions contained in the UN Convention on the Rights of Persons with Disabilities.

Among the main functions entrusted to the National Guarantor of Disabilities, it is worth highlighting here those more specifically aimed at ensuring the effective protection of persons with disabilities against discrimination phenomena that often affect the enjoyment of rights by these persons: we refer in particular to b) combating the phenomena of direct or indirect discrimination or harassment on the grounds of disability and the refusal of reasonable accommodation referred to in Article 5, paragraph 2 (Art. 4, para. 2, lett. b); the promotion of the effective enjoyment of the rights and fundamental freedoms of persons with disabilities, on an equal footing with other citizens, also by preventing them from being victims of segregation (Art. 4, para. 2, lett. c); the reception of complaints submitted by

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[102] See A. De Amicis, *La L. 3 marzo 2009, n. 18 di ratifica della convenzione delle Nazioni Unite sui diritti delle persone con disabilità: i principi e le procedure*, in *Giurisprudenza di merito*, No. 10, 2009, 2377-2378, where it is clarified that the tasks of the Observatory are, for the most part, of a programmatic and propulsive nature.

[103] See respectively Presidential Decree of 4 October 2013 and Presidential Decree of 12 October 2017. On the action plans of the Observatory see also C. Sagone, *La tutela della disabilità secondo il modello bio-psico-sociale* cit., 268.

[104] See Article 1, paragraphs 210-216 of Law No. 213 of 30 December 2023, which provided for an endowment of the Fund of more than 552 million euros for the year 2024.
The Single Fund will make it possible to manage, with simpler rules, the allocation of resources and the refinancing of calls for proposals and projects addressed to persons with disabilities. It is a simplification and rationalisation measure that will support the creation of interconnected and integrated lines of intervention, overcoming the current parcelling out of resources that penalises persons with disabilities and families, but also the work of local authorities and third sector organisations; see the institutional website of www.disabilita.governo.it.

[105] Cf. the provision of Article 1, par. 5, let. f, and 2, par. 2, let. f, of Law no. 227/2021, as well as Legislative Decree no. 20 of 5 February 2024, concerning the establishment of the National Guarantor Authority for the rights of persons with disabilities, implementing the delegation conferred on the Government.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738

persons with disabilities, their family members (or their representatives), associations and bodies entitled to act in defence of persons with disabilities, identified pursuant to Art. 4 of Law 1 March 2006, no. 67, by individual citizens, by public administrations.

Moreover, it should be remembered that this new figure will only be fully operational as of 1 January 2025, which makes the initiatives of those territories that, even before formalisation at the national level, have set up a Guarantor for the disabled at the regional, provincial or municipal level even more significant[106]. To date, there are eight Italian regions that have provided for and regulated, through *ad hoc* regional laws, the creation of a figure dedicated to the protection of the rights of persons with disabilities (Calabria, Campania, Latium, Lombardy, Apulia, Sicily, Umbria and Valle d'Aosta). Four others (Basilicata, Friuli-Venezia Giulia, Marche and Molise) have instead merged these competences into the broader figure of the Guarantor of the rights of the person, which also deals with minors and prisoners[107].

There are also regions such as Abruzzo, Emilia-Romagna and Tuscany for which a Guarantor with regional coverage has not yet been defined, but many municipalities in the area have acted independently[108].

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[106] The first region to intervene in this field was Apulia by means of Article 31-*ter*, Regional Law 10 July 2006, no. 19 entitled 'Discipline of the integrated system of social services for the dignity and wellbeing of women and men in Apulia' - Regional guarantor of the rights of persons with disabilities, which provides that in order to ensure the full implementation of the rights and individual and collective interests of persons with disabilities in the region, pursuant to Law 5 February 1992, no. 104 (Framework law for assistance, social integration and the rights of disabled persons), and the United Nations Convention on the Rights of Persons with Disabilities, ratified by Italy by means of Law 3 March 2009, no. 104 (framework law for assistance, social integration and the rights of disabled persons), the Office of the Regional Guarantor of the Rights of Persons with Disabilities is established at the Regional Council of Apulia, to which is entrusted the protection and non-judicial protection of the rights of disabled persons resident or temporarily present in the regional territory.
More recently, the Lombardy region has taken action with Law 24 June 2021, no. 10, on establishment of the Regional Guarantor for the protection of persons with disabilities. Amendments to Regional Laws no. 6/2009, no. 18/2010 and no. 22/2018, on which see N. Maccabiani, *L'istituzione del Garante regionale per la tutela delle persone con disabilità in Lombardia: un passo avanti, con prudenza*, in *Le Regioni*, No. 6, 2021, 1488-1508. Lastly, see Law 25 July 2023, no. 7 of the Region of Lazio through which the Regional Guarantor has been assigned important functions that can be traced back to two main macro-typologies: an action of protection and intervention to guarantee respect for the rights sanctioned by regional and national regulations and an action of promotion of widespread culture and awareness of the needs and rights of persons with disabilities. To this end, the Guarantor may introduce initiatives to prevent and combat bullying, abuse and gender discrimination; he/she may activate initiatives of an educational and informative nature; he/she may enter into agreements and conventions with institutions, bodies, schools or any other body involved in a truly inclusive culture.
[107] On the other hand, the regions of Liguria, Piedmont, the Autonomous Province of Trento and the Autonomous Province of Bolzano do not appear to have started any institutionalisation of the guarantor. These data are taken from www.osservatoriomalattierare.it.
[108] These include Chieti, Ferrara, Piacenza, Livorno, Pisa, Lucca, Siena, Montopoli, Grosseto and Fucecchio.

 ISSN 2612-6672 | DOI 10.54103/2612-6672/27738