

2025 Rule of Law Report - additional consultation on single market dimension

Fields marked with * are mandatory.

Introduction

The annual Rule of Law Report lies at the centre of the Annual Rule of Law Cycle, which acts as a preventive tool, deepening multilateral dialogue and joint awareness of rule of law issues. So far, five editions of the Rule of Law Report have been published since 2020.

As announced in the Political Guidelines for the 2024-2029 Commission, a Single Market dimension will be added to the Rule of Law Report to report to address rule of law issues affecting companies, especially SMEs, operating across borders.

Therefore, in addition to the regular stakeholder consultation for the 2025 Rule of Law report which was launched on 29 November 2024 (available [here](#)), **the Commission is now launching an additional targeted stakeholder consultation on the single market dimension of the rule of law**. This short questionnaire covers additional topics that are not yet included in the Report's scope which the Commission considers of particular relevance under this angle. The questionnaire is in particular directed to business stakeholders, but all interested parties are invited to contribute.

Under the questions below, you are invited to provide information both on the **relevant legal framework** as well as information on any relevant developments since January 2024. Under each question, the following types of information may be relevant:

A) Legislative developments

- Newly adopted legislation
- legislative drafts currently discussed in Parliament
- legislative plans envisaged by the Government

B) Policy developments

- Implementation of legislation
- evaluations, impact assessment, surveys
- white papers/strategies/actions plans/consultation processes
- follow-up to reports/recommendations of Council of Europe bodies or other international organisations

C) Developments related to the judiciary / independent authorities

- important case law by national courts
 - important decision/opinions from independent bodies/authorities
 - state of play on terms, nominations and expired mandates for high-level positions (e.g. Supreme Court, Constitutional Court, Council for the Judiciary, Prosecutor General, heads of independent authorities included in the scope of the questionnaire)
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D) Any other relevant developments

About you

* I am giving my contribution as

Public authority

Organisation name

250 character(s) maximum

Italian Council of State - Consiglio di Stato

Please insert an URL towards your organisation's main online presence or describe your organisation briefly:

500 character(s) maximum

The Consiglio di Stato is the supreme administrative jurisdiction in Italy
<https://www.giustizia-amministrativa.it/>

* **Country of origin**

Italy

*** Names of respondents**

President of Section Giancarlo Montedoro and Councillor Marina Perrelli

*** Email Address of the organisation**

cds-internazionali@giustizia-amministrativa.it

*** Publication of your contribution and privacy settings**

You can choose whether you wish for your contribution to be published and whether you wish your details to be made public or to remain anonymous.

☒ **Public** - Your personal details (name, organisation name, transparency register number, country of origin will be published with your contribution).

☒ **We agree with the personal data protection provisions.**

Topics for input on the single market dimension of the Rule of Law Report

*** Country covered in your contribution [only one choice possible]**

Italy

Specialisation (of judges/specific courts/chambers within courts) and training for the judiciary to deal with commercial cases.

In Italy the Council of State has concentrated the competence to review the acts of the independent authorities that regulate economic relations in a single Section (the Sixth) with the exclusion of the matter of the Energy and Waste Authority because of the emergence of a specificity of the latter discipline (connected to the efficiency needs of the energy markets and the environmental profiles involved). The panels in the Council of State are made up of judges who, despite having a profound knowledge of market law and the legal regulation of the economy, are not supported by economists of proven independence and must - where necessary - acquire the decisive technical evaluations to resolve cases in court by resorting to forms of external knowledge. This is done through official technical consultancy or through an instrument of Italian administrative procedural law called verification.

In the latter case, it must involve investigations and judgments that are requested from other administrations that are not parties to the judgment and that are equipped with the required technical skills.

It would be appropriate for the national procedural laws competent in the matter for the principle of procedural autonomy of the member states to provide for the integration of the colleges regarding independent administrations with highly qualified experts in non-legal matters to be identified by the Council of State itself. It should also be noted the paradoxical situation of the judgments against large multinational groups which are equipped with knowledge - connected to the applied research they carry out for legitimate business interests - not even available in the national academic world and often unavailable because the knowledge is covered by industrial secrets.

It is not up to the judge to investigate the reasons - including geopolitical ones - for which this situation was created which is profoundly unsatisfactory for the good health of antitrust law and which requires a rethinking of the foundations of this strategic legal matter for the proper functioning not only of the market but also of democracy.

Alternative dispute resolution and mediation

In 2013, the EU enacted yet another significant instrument in the regulation of ADR: the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (hereinafter the "Consumer ADR Directive").

The Consumer ADR Directive, which, in the eyes of EU institutions, was made necessary by the lack of development and consistency of ADR legislation across European countries focused on providing consumers with a cost-free, effective, and accessible procedure to solve their disputes with business entities and service providers.

Italy implemented the directive with Legislative Decree 130/2015, which amends the so called "Consumer Code" (D.Lgs. 206/2005), creating the new Art. 141 (divided in the separate articles, to 141-decies). This time, the new legislation does not radically depart from the European model. To the contrary, Italy - correctly - decided to make Consumer ADR free from the mandatory intervention of lawyers. An important point is that the new legislation recognized the so-called joint conciliation (*conciliazione paritetica*) put in place between Consumers' Associations and business entities to solve consumer disputes. Originally born under the telecommunication conciliation mentioned above, it is now more widespread across several sectors and specifically regulated by Art. 141-ter.

It's important to mention the results of the study commissioned by the European Parliament "Rebooting the Mediation Directive: Assessing the Limited Impact of Its

Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU”⁶²) shows that, among the 861 ADR experts consulted, the most popular option to revitalize ADR in the Old Continent is “make mandatory mediation in certain categories of cases”, followed by “require mandatory mediation information sessions before litigation.

On the side of ADR orthodoxy, stand academics such as Jacqueline M. Nolan Haley, who is eager to remind us that “In short, we need a renewed appreciation of consent in mediation” “Non-consensual mediation may help to clear dockets, but it is a poor substitute for the real thing”.

Many independent administrations in Italy have established ADR bodies in favor of consumers and the experience gained is generally positive, in some cases their decisions can be subject to judicial review.

Safeguards to ensure legal certainty, the stability of the legal framework and non-discrimination.

Legal certainty involves the accessibility of the law. The law must be certain, foreseeable and easy to understand. Basic principles such as *nullum crimen sine lege*/*nulla poena sine lege*, or the non-retroactivity of the criminal law are bulwarks of the legal certainty.

Competition laws have frequently been criticised for lacking certainty and predictability.

There are two different mechanisms through which competition law prevents harmful conduct. First, the direct mechanism consists in precluding or stopping the conduct through intervention in a given specific case. Second, the indirect mechanism, also known as general deterrence, relies on businesses adjusting their conduct in expectation of potential enforcement against them.

What is “sufficient” legal certainty? After all, many laws are couched in terms that are, to a greater or lesser extent, vague.

The antitrust laws are vague by default.

Antitrust laws are in fact based on indeterminate legal concepts such as relevant market, competition, consumer preferences .

This is a quasi-criminal law : in fact the antitrust law enforcement is based on fines. In fact, it involves the application of the Engel criteria developed in ECHR jurisprudence.

The situation is therefore problematic from the point of view of predictability of antitrust law as the European and national legislative provisions are based on indeterminate legal concepts, the violation of which results in heavy sanctions.

The remedy lies in the stability of jurisprudence.

It can be said from this point of view that the dialogue between European judges and national courts is the way to achieve this result.

Safeguards to ensure the effective independence of supervisory and regulatory authorities with a direct impact on economic operators

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The independent administrations rest on three pillars: 1) functional and organizational independence; 2) accountability; 3) research of the best ability to make adjustments.

The protection of independence is also achieved through the typology of requirements of authority, competence and moral stature deemed necessary, having to exclude phenomena of co-optation due to political affiliation, favor towards the Executive or closeness to supervised companies.

The appointment procedures follow various models, which provide for the intervention of the Chambers through their presidents or through parliamentary commissions or providing as a guarantee that the final act of appointment is sometimes adopted by the President of the Republic.

The President of the Republic is not given a mere task of expressing the will of Parliament or the Government but also of controlling the formal and substantial legality of the appointments, precisely to protect the aforementioned values (independence and accountability) which are relevant and well carved in the European legislation.

In the 1990s, we had the demolition of state monopolies in various sectors crucial to the life of a country such as, for example, energy, telecommunications, transport. Thus the need arose to identify the "Market arbitrators" in order to guarantee compliance with impartial rules of a technical nature and not dependent on government choices to allow correct competition between private enterprises called to take the place of the State. Added to this was the need to respond competently, effectively and promptly through streamlined, autonomous and rapid bodies to the economic-social and technological developments as well as the crisis that has hit the Italian political system with the consequent growing intolerance of societies towards the party state". On appointments then: Coagulating these different regulatory provisions - in search of unitary reference models - part of the doctrine has deemed it possible to identify the fundamental "stages" into which the so-called "prevailing procedural mechanism" is divided: the proposal; the resolution of the Council of Ministers; the opinion of the parliamentary Commission; the appointment. In the context of the aforementioned procedure, more specifically, the proposal of the names (of the individual members of the Authority or of the members and of the President) can come from the Minister competent for the subject matter - individually or in agreement with the President of the Council of Ministers - or only from the latter; the proposal (ministerial and/or presidential) is generally followed by the resolution

of the Council of Ministers (as a concrete "certification" of the collegial nature of the appointment procedure) and, in some cases, the opinion of the parliamentary Commissions is also required. Finally, the act of appointment is adopted by the President of the Republic with a decree.

Another model provides for an agreement between the Presidents of the Chambers.

None of the aforementioned models (of appointment procedure) excludes the risk that the appointment is based on a "trust relationship" of a political nature, abstractly incompatible with the statute of the independent Authorities: not the governmental one, which lends itself ex se to political contamination; not the one expressed in the agreement between the Presidents of the Chamber and the Senate, in turn the expression of political majorities. Within the aforementioned procedural mechanisms and integrated with the ownership of the power of appointment, therefore, the possession by the candidate-members of the so-called "subjective requirements" possibly required for the relative appointment to be legitimate, emerges as an element of primary importance. The definition of the selection criteria for candidate members is not exempt from the problems connected to the variety of regulatory disciplines provided for the different Authorities, it is however possible to identify some minimum common denominators and indeed a quick comparison of the same highlights how these present a level of homogeneity more marked than the descriptive ones of the technical appointment procedures.

In this sense, in fact, the main selection parameters can be found in the "independence" - variously qualified as "notorious" or "undisputed" - of the chosen candidate and his "professionalism". In particular, this last requirement is commensurate with the specific sector of competence of the Authority in question, for which the law generally requires people "experts in the technical and administrative disciplines relevant to the activity [...] with specific and proven experience and competence [...] with high and recognized professionalism and competence [...] experts with recognized competence in the subjects" or whose professionalism can be deduced from being "personalities from economic sectors with high and recognized professionalism" or from having "held institutional roles of great responsibility and importance". However, even the technical requirements - it is worth noting - must in turn be interpreted and can be the subject of controversy. The technique is not a "guarantee of purity"; one might say (and the topic refers to the relationship between democracy and technocracy in the era of globalization): it is difficult to find a satisfactory definition of technicality.

Independence then, in this light, is presented for administrative authorities essentially is a moral requirement, difficult to verify.

Respect of the good administration principle (including the obligation of the administration to give reasons for decisions)

This is a real cornerstone of Italian administrative law.
It is established nowadays by art. 3 of law no. 241 of 1990.
Administrative judges have ensured its observance on a daily basis since their institution dating back to the nineteenth century.

Safeguards (other than judicial review) regarding decisions or inaction of administrative authorities, including remedies

These are the remedies that Italian law defines as judicial administration.
The following administrative appeals are provided for in the Italian legal system:
Proper hierarchical appeal (to the authority that supervises the authority that adopted or not the act)
Improper hierarchical appeal(This type of appeal is provided for in the case in which there is no hierarchically superior body to the one that issued the act that is intended to be challenged, and this can occur:
when the act was deliberated by a collegiate administrative body (by definition, collegiate bodies are not subject to hierarchical relationships);
when the act was deliberated by a top body of the public administration, given that following the reform of the public administration between the ministers and the senior managers of the ministries there is a relationship of management and not of hierarchy.
when the act is issued by certain administrations that are functionally dependent on others).
Opposition appeal (to the same authority that adopted or not the act).
Extraordinary appeal to the President of the Republic.
These remedies have often been overlooked in favor of jurisdiction but should be re-evaluated and strengthened.

Measures for the prevention of corruption in relation to the issuing of official permits (e.g. related to environment, energy and various types of construction)

Digitalisation strongly characterises not only social life but also the functioning of the public administration itself.
In Italy, the process of digitalisation has become increasingly profound, as evidenced by Decree - Law No. 76 of 16 July 2020 on "Urgent measures for simplification and digital innovation". Its areas of intervention concern simplification measures to support and disseminate digital administration, simplification of procedures and responsibilities, simplification in the areas of the

economy, the environment and the green economy, but also public procurement and the construction sector.

The stated objectives are to foster the green economy and business activities, as well as to simplify administrative procedures, “eliminate and speed up red tape and transparency of public administration actions”.

Digitising the approval of urban plans and the issuance of building permits leads to greater reliability, speeds up the preliminary investigation, makes the use of data more secure, increases compliance with the principles of impartiality and good performance of public administration, reduces the likelihood of errors due to human negligence and marginalises the possibility of corrupt phenomena.

Reporting on the use of digital technologies to enhance transparency and oversight in public procurement

Since 2012, important regulations have been adopted in Italy to bring the system in line with constitutional principles and international obligations in the field of anti-corruption with the related codification of anti-corruption tools: see in particular Law No. 190 of 06 November 2012, Legislative Decree No. 33 of 14 March 2013, Law No. 179 of 30 November 2017.

The complete digitalisation of procedures and the interoperability of platforms, according to the "once only" principle, i.e. the single transmission of data, documents and information to the contracting entities, is one of the guiding principles of the new Public Procurement Code, approved by Legislative Decree No. 36 of 2023.

As of 1 January 2024, the provisions of the new Public Procurement Code came into force. They provide for the digitalisation of the entire life cycle of public contracts, to which section of the Code is devoted (Articles 19-36). Digitisation applies to all contracts subject to the Code's discipline, i.e. procurement or concession contracts, of any value, in ordinary and special sectors.

The digitisation of the entire lifecycle of a public contract implies that the design, publication, award and execution phases are managed through digital procurement platforms certified by the Agency for Digital Identity (AGID), which are listed and can be consulted in the Register of Certified Platforms (RPC) on the open data portal of the National Anti-Corruption Authority (ANAC).

The platforms are to be used for the creation or acquisition of documents related to tender procedures:

- a) transmission of data and documents to the ANAC database;
- b) access to tender documents;
- c) submission of the Single European Tender Document;

- d) submission of tenders; opening, management and storage of the tender dossier;
- e) technical, accounting and administrative control of contracts during their execution;
- f) management of guarantees.

The digitisation of public procurement simplifies the phases of the procurement lifecycle, reduces lead times and improves the operational efficiency of contracting authorities. It enables greater transparency and accessibility of online information, including timely publication of data, and makes it easier for economic operators to find out about procurement opportunities. It facilitates the exchange of data between platforms in a harmonised manner, thus improving the coherence and cohesion of the system.

The digitisation of all procedures under the Procurement Code requires the upgrading of existing infrastructures, the adoption of new technologies and the implementation of training measures to develop the skills of the public administration staff involved.

Define and develop effective security measures for the proper and secure management of personal data and the protection of sensitive information.

Digitisation is one of the tools to fight corruption and maladministration in public procurement, due to the benefits it brings in terms of standardisation of procedures, transparency and publicity. However, it is not sufficient on its own to eliminate the problem.

Digitisation has positive effects on public procurement by involving every stage of the procedure, verifying the implementation of the principles of good performance and efficiency of administrative action and ensuring monitoring aimed at bringing to light facts and behaviour that, due to the violation of laws or regulations, determine the typical elements of a criminal offence of reference and, in any case, facts that are part of maladministration.

The prevalence of corruption and mismanagement in an administration not only leads to inefficiencies in operations carried out with corrupt intent, but also undermines the relationships of trust between members of the organisation not directly involved, leading to general malfunctioning.

Any other points you would like to raise related to the single market dimension in the context of the Rule of Law Report

In Italy, since 2022, public administrations are required to draw up the Integrated Activity and Organisation Plan (PIAO), which brings together in a single planning

and governance document, among others, the performance, personnel requirements, gender equality, smart working and anti-corruption plans. With reference to anti-corruption, a mapping system of organisational processes is envisaged as a basis for identifying the context in which the corruption risk assessment is to be developed.

Processes must be grouped according to the risk areas and related sub-areas identified in the legislation.

- SOCIAL SERVICES AND MANAGEMENT OF SOCIAL SUBSIDIES
- CONTRACTS
- PUBLIC COMPETITIONS AND PERSONNEL SELECTION IN GENERAL
- REGISTRY OFFICE AND CIVIL STATUS
- ACCOUNTING AND BURSAR'S OFFICE
- TRADE AND PRODUCTIVE ACTIVITIES
- TAXES
- MUNICIPAL PROPERTY MANAGEMENT
- ENVIRONMENT
- ISSUING OF BUILDING PERMITS
- TOWN PLANNING AND LOCAL GOVERNMENT.

The aim is to identify organisational measures to reduce the risk of biased decisions. In this context, it is up to administrations to assess and manage the risk of corruption according to a methodology that includes context analysis, risk assessment (identification, analysis and weighting of risks) and risk management (identification and planning of preventive measures).

In this new approach, the ANAC has gone beyond the standardised risk assessment, as each administration has a different level of risk.