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WP5: ECONOMIC RIGHTS

QUESTIONNAIRE'S ANSWERS

Deliverable D5.1 "Research paper on the categorization of economic rights"

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QUESTION 1: IDENTIFICATION OF ECONOMIC RIGHTS

Question 1: Identification of economic rights

✓ Which rights are considered in your country as economic rights?

The identification of legal provisions that in the Italian legal system are connected to the notion of economic rights moves from the Constitution.

"Economic rights" are indeed identified by the scholars as referred to all of the constitutional provisions relating to the economic phenomenon, stated in Title III (economic relations) of the first part of the Constitution ("Rights and duties of citizens").

Therefore, in Italy "economic rights" is a notion of positive law and not merely a scholarly or case-law definition.

However, not only the legislator, but scholars and case law too, have elaborated this concept in greater detail: in this regard, the boundaries of the constitutional provisions relevant in the economic sphere have been clarified. Particularly, it has been established which provisions of Title III could be considered as strictly economic and which ones are differently characterized by a prevailing protection of social rights. The definitions elaborated by scholars and case law thus lead to the identification of a so called "economic Constitution" (*Costituzione economica*), which defines the economic rights beyond the provisions of Title III: first of all, the catalogue of economic rights is enlarged beyond the original intent of the draft of Title III because of the influence of European law and of national statutes; on the other hand, the notion of economic rights does not coincide with the list of rights of the entire Title III (original intent), as the labour provisions mainly refer to the only sphere of social rights.

Therefore, the notion of economic law falls within the provisions mainly relating to property and economic initiative (articles 41 et seq.). The content of these provisions are properly linked to the "factors of production" (*fattori di produzione*), namely capital – more than labour – and its exploitation by organized activities (in the first place, but not exclusively, entrepreneurial). On the contrary, the provisions relating to employment (articles 35-40) are of a prevalently social nature: the fact that the Constitution qualifies the Italian system as a "Republic founded on work" (article 1) and the fact that other provisions ensure

that the work is a social right (article 4), change the economic nature of this second factor of production - employment - in the Italian legal system. As a consequence, statute law and case law that consider labour as a factor of production, alongside capital, have been regarded as qualitatively different (i.e. socially relevant) from legislation and judicial decisions referring to other economic rights, properly understood.

Economic rights relating to economic initiative and to ownership enjoy a special status: they are - as well as constitutional law – explicitly limited by a balance with social rights. This nature is rather alien to the structure of the labour provisions, whose content is clearly and mostly socially relevant (and are structurally directed to restrict economic rights).

While falling under Title III of Part I, therefore, articles 35-38 ("guarantees work"), article 39 ("freedom of association in trade unions") and article 40 ("on the right to strike") are only partially qualified as economic rights, and they are mainly characterized as social rights.

Differently, economic rights are certainly those resulting from article 41, according to which private economic initiative is free, although it cannot be held contrary to the common good or in a manner that could damage safety, liberty or human dignity (the law determines appropriate planning and controls to guarantee such protection, so that the public and private economic activity may be directed and coordinated towards social ends).

Moreover, ownership (art. 42) is strictly speaking an economic right in the Italian perspective. According to art. 42, ownership is qualified as public or private: consequently, economic goods could belong to the State, to entities or individuals. Private property is recognized and guaranteed by the law, which prescribes the conditions for the acquisition, enjoyment and limitations in order to ensure its social function and make it accessible to everyone. In addition, private property may, in the cases provided for by law (and with a previous payment of compensation), be expropriated for reasons of general interest. Finally, only legislation enacted by Parliament can lay down the rules and limits of legitimate and testamentary rights and the rule of inheritance.

Other provisions of the Italian Constitution outline the framework for completing those two main dimensions of economic rights (i.e. rights relating to a prevalent economic dimension, not characterized by the simultaneous presence of profiles of social protection).

Article 43 of the Constitution deals with public monopolies. According to this provision "for the purposes of general utility the law may reserve or transfer in the public sphere (that's to say: to the State, to public bodies, community workers or users) specific enterprises or categories of enterprises, which are related to essential public services or

sources of energy or monopolistic situations, and which have the nature of primary interest; this can be done only by means of expropriation and compensation".

Article 44 of the Constitution deals specifically with land ownership. It is expected that in order to achieve the rational exploitation of land and equitable social relationships, the law should impose obligations and constraints on private ownership of land, set limits to its extension by region and agricultural zone, encourage and impose land reclamation and the transformation of the bigger estates and the reorganization of production units; the Constitution therefore favours small and medium-sized holdings, and the law makes provisions in favor of disadvantaged areas (mountainous in particular), persecuting indirect social effects with a differentiated extension of economic rights.

Other provisions, however, are characterized by explicit social intents. In particular, article 45, which devotes particular attention to cooperation and crafts; article 46 concerning the participation of workers in business decisions. Finally, article 47 provides the promotion and protection of small monetary savings and credit.

What is clear from the abovementioned provisions, is that the Italian category of economic rights is located on the border with the issues of protection of social dimensions. Economic and social rights are physiologically connected. What scholars and case law have correctly operated, by identifying economic rights, is the separation between the relevant rights (articles 41 and 42) which are not prevalently socially oriented (but rather are physiologically limited by this end) and the other more socially relevant situations (labour, health, civil freedoms, etc.).

Starting from the ownership rights and from the private economic initiative, then, other derived disciplines have also been developed (through statutes and judicial interpretations too). Therefore, the legal basis of the economic relations is the Constitution, but the extension of these concepts should be further clarified in the light of the operative application of articles 41 and 42; those two provisions have originated a detailed corpus of rights which was not originally and directly specified in the Constitution.

In particular, three specific areas are outlined in art. 41 and 42 of the constitution:

A) Rules on professional qualifications. Economic freedom is confused on the one hand with the protection of work activities and, on the other hand, with the protection of clients and of a fair competition system.

B) Rules on consumers rights. In this regard, ownership and the economic initiative must respect the dignity and the interests of the consumers, as a general category of vulnerable subjects, when involved in a contract with a professional counterpart).

C) Rules on intellectual property. Here the economic approach of an "owner paradigm" comes into conflict with other interests, as well as with cultural and social dimensions (e.g. article 9 of the Constitution).

- ✓ Specify whether the notion "economic right" is consolidated in your country and the sources of the categorisation (legal rules, case law, definition provided by legal scholars, praxis) and whether there are disagreements/developments in the notion of economic right and their core elements.

As noted above, the first source of identification and classification of the Italian economic rights is in the Constitution; nevertheless this category is shaped by further elements.

It is important to emphasize that in Italy the Civil Code was enacted in 1942, six years before the Constitution (1948). Therefore, the precise content of articles 41 and 42 of the Constitution has to be read in connection with the previous approach of the Civil code to the issue: since the Code was the main source of the already existing legal order, the code provisions, as well as their interpretation by scholars and judiciary, were the framework on which the Constitution was built.

On the other hand, articles 41 and 42 of the Constitution, although indirectly deriving from the Civil Code, have been subsequently developed by legislation and case-law.

In this regard, administrative practice plays an important role too.

Hereinafter, a brief overview of the Constitution (1948), the Civil Code (1942), statutes, case law and administrative practice will be offered.

As already noted, the 1942 Civil Code provided on ownership, freedom of contract and freedom of enterprise. That was the basis on which the Constitution started to operate. More specifically, the Constitution operates by selecting the profiles that are so important as to require a strong safeguard (as core values). These profiles – instead – even if traditionally introduced in the civil code have to be relativized by the new constitutional approach, for social reasons (thus limiting the civil code economic rights, considered as a projection of nineteenth-century bourgeois freedoms).

Therefore the Constitution has made more complex the system of property rights, as initially outlined by the Civil Code (articles 832 et seq.).

Since the enactment of the 1865 (first) Italian Civil Code, ownership – and particularly private property - has played a central role in the Italian legal system. This character has been maintained in the 1942 (second) Civil Code, in which private property is still qualified as an inviolable and fundamental right. However, the Constituent Assembly has introduced in the text of the new Constitution the principle of "economic and social function of property"; the consequence of this decision - of Catholic inspiration - was to consider private property as an expression of a "right of the human person", but to assign to this right a key role in the social system too, as well as in that of protection of collective aspirations.

Therefore, the Italian constitutional provision blends three objectives: the acknowledgment of a constitutional nature of the right of property; the connection of a constitutionally protected property rights to work and to save money; the development of a model of ownership alternative to that provided by the civil code, aimed at creating a social economic management of public and private resources.

However, this model integrates the concept of "ownership" of the civil code, but it does not replace it. Nowadays, Italian economic law relating to the protection of proprietary situations (and then to the "capital" production factors) enjoys a plural status in the Italian legal system: there are many types of properties, and proprietary rights consist of a plurality of legal faculties and limits.

In this context, a huge number of different law sources coexist next to the Constitution and the Civil Code, like statutes and regulations, both of state and regional origin, as well as administrative practices. The latter plays an important role in the management of capital and economic initiative, e.g. by the Government general functions and the local authorities' role in planning land ownership, or by the new role for independent administrative authorities in the regulation of the economic phenomenon (CONSOB, the Bank of Italy and the ECB today, antitrust authorities, etc.).

The need, perceived in the Constituent Assembly, to regulate ownership in relation to specific objectives of economic and social nature has –therefore – been well implemented in a rich and complex regulatory activity.

In Italy the constitutional protection of ownership provided in article 41 et seq., as implemented by special legislation, is posed as a prerequisite for an economic order that accepts a social market economy. The content of the legislation can be understood only in this perspective: as a concrete declination of the conflict between constitutional values; legislative and administrative authorities (local or independent) monitor and plan the necessary limitations to economic rights, to achieve such a balance.

The normative production of the legislation relating to property (and thus to the "capital" economic factor) is thus very complex (See for further details section 1 of the 2 questionnaire).

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As far as the freedom of economic initiative is concerned, it is important to note that the constitutional basis of article 41 recognizes it as a liberty 'autonomous' from the right of ownership.

The legal bases of article 41 are founded in classical liberal thought, and this article has precedents in the idea of freedom of contract of the Civil Code (article 1321 et seq.) and inside the concept of freedom of enterprise (article 2082 et seq.).

The *Statuto Albertino* (1848) which can be qualified as the first Italian constitutional text recognizing and protecting "all properties" (within the limits of respect for the public interest legally established; article 29). Thus, together with the "classic" civil liberties (individual freedom, freedom of residence, freedom of the press), property was at the centre of protection too. Moreover, on the basis of art. 29, the famous scholar Santi Romano developed one more "liberty": the "freedom of activity", a concept which was later expressly recognized by positive law at the beginning of 1900 in the *Carta del Lavoro* (Labour Charter), drawn up in order to develop Fascist corporatism (21 April 1927).

The text of article 41 is the final result of a strong debate among the drafters of the Italian 1942 Constitution, who had two different visions of the economic activity: some of them supported the philosophy of a broad public interventionism, while others entrusted private autonomy.

In the final formulation of the Constitution "economic activity" is not aimed at the exclusive pursuit of collective well-being (and therefore it does not entirely incorporate a functionalist approach): on the contrary, even if free, economic activity is prevented from harming the public interest. Therefore, it is only partially meant to achieve a public profit.

Therefore, the final choice of the drafters was in favour of the recognition of private economic initiative in terms of freedom (1 par. of present article 41). In this regard, the influence of the 1942 Civil Code provisions "on contractual freedom and enterprise" (art. 1321 ss. and 2082 ss. c.c.) is clear in the Constitution; nevertheless, at the same time, art. 41 is the constitutional basis that justifies a number of limitations to private economic initiative, all connected to the so called "social utility".

In this framework, the Italian legislators established a series of programmes with the purpose of controlling and coordinating economic initiatives for social purposes, by imposing limits to government intervention in private economic initiative or to ensure social usefulness.

A first implementation of the social provisions of article 41 was focused on public interventionism; today, on the contrary, the European Union approach softens such an implementation of article 41. Nevertheless, in EU law still many social rules on protection of weaker parties of the economic relationships (first of all, consumers) are still present, but the main approach is not that of direct public intervention.

Nowadays, Italian law is consistent with a regulatory approach, in a competitive market; an approach which – usually by means of independent administrative authorities – is intended only to correct market failures, with a minor public intervention aimed at protecting only effective fair competition (without direct state involvement).

In this context of "mixed economy" only one Italian experience of statute providing for a general programme existed; an experience that was no longer followed by the subsequent special legislation. The only law of general economic programming (Law 685/1967, containing the first Five-Year Plan) was in fact defined by scholars as a "book of dreams", and the implementation of article 41 followed by subsequent special legislation was surely less dirigist.

Among the above mentioned statutes, those that secure competition and the regulated markets (insurances, banks, etc.) should be mentioned.

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In order to make the above described picture complete, it should be stressed that administrative practices by the State, by local authorities and independent administrative authorities play an important role too.

At the same level, the role of the courts is crucial in the evaluation of the economic rights status in the Italian legal system. Judicial control is realized by both *ordinary* judges (*giudice ordinario*) and administrative judges (*giudice amministrativo*), who respectively protect the rights or legitimate interests (*diritti soggettivi* and *interessi legittimi*). Economic rights are by their constitutional nature *diritti soggettivi*, but their limitation for public interest can determine (in a particular easy way) a degradation to the level of *interesse legittimo*.

Finally, fundamental is the role of the Constitutional Court. Constitutional adjudication is a system of control of economic rights implementation, often stopping some incorrect applications of the above mentioned constitutional provisions and consolidating some important interpretations (on this issue, see the cases cited below).

- ✓ The interactions with social rights

As mentioned above, in Italy the interaction between economic rights and social rights is consistent.

Firstly, Title III of Part I of the Constitution include in the same context property and economic initiative, as well as economic provisions which relate to "labor" as a production factor. Secondly, in the same articles 41 and 42, there are clauses of limitation of the economic rights determining a partial functionalization of property and private initiative to the protection of social rights.

The consequences of this discipline is that in Italy the technique of balancing rights – which is applied to all constitutional rights – has a particular role in the case of economic rights: such a technique is particularly pervasive because articles 41 and 42 explicitly refer to the limitation of property and economic initiative for social interests.

With regard to the proprietary situations (the "capital" factor), article 42 provides for a constitutional reference to the social function of property, which derives both from the Catholic tradition and from the ideology of the socialist and communist parties inside the Constitutional Assembly.

Thus, in Italy the social function of property has been the focus of special legislation, introducing rules for the conformation of property rights. Moreover, it has legitimized the extensive application of the provisions of the Civil Code establishing a series of limits to private property, in apparent contradiction with the statement of "the general freedom to enjoy and dispose of the owner" provided in art. 832 of the same Code.

The Constitution assigns to the Italian Republic the task of the achievement of so-called "substantial" equality (see e.g. art. 3, 2nd par., Constitution). Art. 42 of the Constitution must be read according to this general principle.

In this regard, the strong functionalization pursued in the early decades of the Italian Republic ('50s and '60)s with the passing of time evolved towards a mere balance of economic rights with social rights: the recent national legislation does not provide a "strict" functionalization, but a mitigation of economic purposes aiming at a social defence. The final aim is that of making economic purposes compatible with the so-called "social market economy".

Moreover, art. 41 2nd. par. introduces specific limits to the protection of social rights. These limits correspond to the recognition of many constitutional principles, such as freedom, security, human dignity and social utility. According to scholars and to the Constitutional Court, they have to be enacted trough statutes *("riserva di legge"*, that is to say a "statute monopoly" imposed by the Constitution to regulate specific subjects).

Therefore, the vagueness and indefiniteness of the clause of "social utility" has been reduced by the legislator. In this regard, the Italian Parliament moved from a strong private functionalization of the protection of social rights, in the first decades of the Republic, to a more flexible guarantee of the social issues in a competitive market, coherent with the European approach.

Since 1964 (C. cost., 14/1964), the Constitutional Court has established its own competence in evaluating the purposes of social utility pursued by the legislature on the grounds of reasonableness. The Court has elaborated an evaluation of proportionality, in order to balance social rights and private economic freedom (the so called "three-step test" of proportionality, present in German and EU case law too).

However, a precisely defined notion of "social utility" cannot be inferred from constitutional case law: on one side the Constitutional Court operates a sort of "negative" control, declaring unconstitutional only the statute containing provisions which do not correspond to a "social utility". On the other side, case law of the Constitutional court shows a variety of different purposes that – from time to time – may be suited to configuring the aforementioned social utility.

However, the "common core" of constitutional decisions in this field is that "socially useful goods" are not only those provided in a national statute, but include the values that have direct protection and guarantee in the Constitution, allowing the judges to consider other constitutionally protected interests or rights, as a direct limitation to economic rights; for example, health, the environment, the right to work are therefore used by the law to limit the economic liberties even without a Parliamentary decision (judgments on this topic: Constitutional Court 111/1974; 36/1969; 27/1969; 237/1975; 21/1964; 196/1998; 190 /2001; 78/1958; 5/1962; 45/1962; 30/1965; 63/1991; 439/1991).

The Constitutional Court, on the other hand, has also certified the transition from a dirigistic approach (of direct State intervention), aiming to limit the economy and to protect the social dimension, to a less intense public limitation of economic freedoms, consisting in only exceptional and isolated limitations, and in a general recognition – as a rule – of the private economic actors' autonomy (as already highlighted in special legislation).

Interpretations of article 41 have moved from a functionalist approach in the 60s (which valued the provisions on monopolies, article 43, now more problematic in comparison with the EU rules on state aid), to interpretations that enhance the regulation: the law has the task (the faculty) of determining the programmes and controls so that public and private economic activity may be directed and coordinated towards social ends, but without compromising the nature of economic freedom itself (Constitutional Court 78/1958, 5/1962, 30/1965).

The tools to pursue social ends are therefore not mainly authoritative, but the more recent special legislation operates with incentives (thus not affecting the freedom of privates to determine their own initiatives and to organize themselves). On this ground, the Constitutional Court stated that the "programmes" and "controls" mentioned in article 41 must not be implemented to abolish private initiative, but only to direct it and to condition the private sphere (see the following case law: Constitutional Court 548/1990; 279/1983; 94/1976; 78/1970)

✓ Amongst those rights, which are considered 'core'?

The catalogue of Italian economic rights is not characterized by a detailed list of individual hypotheses but by two very general provisions, that – in more detail – can bring a number of less general rights. Articles 41 and 42 protect economic freedom and proprietary categories without making a graduation of the intensity of the protection of their specific profiles; indeed, such a task is left to the discretion of the legislator, which can otherwise over-protect some situations covered by articles 41 and 42, and no other.

Apart from the express provisions in articles 43-47 (protection of cooperation and economic rights of small size), then, a hierarchy among the economic rights does not exist; the Constitution provides a general protection, and simply it is up to the legislator to privilege some economic initiatives (by means of discipline of economic aid or other special treatments).

It should also be borne in mind that, in general, the economic rights *per se* are never "core", in the sense that the technique of balancing of rights (which always allows the attenuation of protection of interests also constitutionally relevant) in economic rights is particularly permissive. Therefore, in order to grant this balance among economic rights, the two limits that the Parliament has to respect (core of the rights provided by the Constitution,

and proportionality) are physiologically observed if a social justification is discovered and considered: the compressibility of economic rights for social reasons is indeed prefigured by the Constitution itself, so no more balancing is required.

Beyond this, the cases of economic rights to be considered "fundamental" are the "classic" ones of property (protected in its liberal extension, against expropriations, etc.) and business activities. Articles 41 and 42 are, indeed, directly aimed at these activities.

Alongside these two cases however, the discretion of the legislator and of the courts has interpretatively identified other dimensions of the protection of economic rights; dimensions that are only indirectly founded on the grounds of 41 and 42, but nonetheless enjoy constitutional protection. This way, even more general values derived from these articles, and then are recognized by the legislator.

Thus, not only the Constitutional Court has extended the warranty for private property belonging to other situations (not coincident with the right of ownership: Constitutional Court 3/1976.). More in general some broad values can be included in the economic Constitution, the principal of which are the protection of competition and the freedom of contract; both these profiles of economic phenomenon, for the protected interests, combine article 41 with other provisions of the Constitution (competition is in fact founded also on article 117, while contractual freedom is covered not so much by 41, but has to be linked to the different individual rights case by case).

Scholars have long argued that from art. 41 it was possible to infer the constitutional foundation of the freedom of competition; this right can be defined as the equal chance to all individuals to activate materially and legally in the same industry. Nevertheless, only with the access to the European Union the Italian legal system has been provided with robust legal instruments for the protection of competition.

Today such value is also provided by article 117, as amended by Constitutional law 3/2001 (Constitutional Court 223/1982). On that basis, in case law 14/2004 the Constitutional Court affirms, first of all, that the national notion of competition cannot reflect a different vision than the one used within the EU; therefore, such a notion includes regulatory actions, antitrust measures and measures to promote an open and free competitive market. In addition, the Court also states that the protection of competition is one of the competences of State economic policy; therefore it cannot be understood only in a static sense, as a guarantee of regulatory measures to restore a lost balance, but also in a dynamic sense, well-known to EU law; therefore, protection of competition can justify public measures aimed at reducing

imbalances, to foster the conditions for an adequate development of the market or to establish a competitive structure of the market.

The second value only faintly traced back to article 41 is that of freedom of contract. As noted above, this value was already provided for in the 1942 Civil Code.

However, an autonomous foundation of freedom of contract is not immediately traceable in the provision of article 41. In fact the Constitutional recognition of such principle may be seen only in the broad concept of private economic initiative, corresponding to each activity which may bring an economic benefit to those involved. Otherwise, the constitutionalization of contractual freedom has to be established only when it is instrumental to the realization of another subjective situation expressly protected by the Constitution (Constitutional Court 30/1965, 241/1990).

This value – even if inferred by article 41 – has therefore an attenuated protection if compared to the traditional freedom of enterprise, since it must be bound to other constitutionally relevant interests.

QUESTION 2: NATIONAL SOURCES OF ECONOMIC RIGHTS

Question 2: National sources of economic rights

- ✓ Where are these rights laid down at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ Please describe the main legal sources of economic rights (constitution, legislation, general principles, etc.) as well as relevant policy instruments in your country (national, but also regional or local level, where relevant);

The most relevant provisions are in the **Constitution** and in the **Civil Code**:

(a) Articles 41-47 of the Constitution:

for the analysis of these rules, see the previous paragraphs.

(b) Articles 832 et seq., 1321 et seq. and 2082 of the Civil Code:

see the previous paragraphs.

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I) Most relevant legislation.

a) Property (art. 42 Constitution)

- Eminent domain: Law 2359/1865, Law 2892/1885, Law 458/1988, Law 549/1995, dPR 327/2001.
- Housing and urban planning: r.d.l. 981/1931, Law 10/1977, Law 865/1971, Law 396/1990, dPR 380/2001.
- Environmental protection and landscape: Law 1089/1939, Legislative Decree 152/2006, Legislative Decree 42/2004.
- Agricultural contracts: Law 11/1971.
- Leases of urban property: Law 392/1978.
- Copyright and industrial property: Law 633/1941; Legislative Decree 30/2005.
- Amendments to the regulations of condominium buildings: Law 220/2012.

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b) Economic freedoms (article 41 Constitution).

- Ministry of State Shareholdings: Law 1589/1956.
- Five-year national economic plan: Law 685/1967.
- Standards for the protection of competition and the market: Law 287/1990.
- Rules to protect consumers: Legislative Decree 206/2005.
- Liberalisation: Law 248/2006.
- Competition: Law 40/2007, Legislative Decree 1/2012.
- Insurance: Legislative Decree 209/2005.
- Banking and Finance: Legislative Decree 385/1993, Legislative Decree 58/1998.

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II) Most relevant administrative practice.

i) National level.

In the field of economic rights it is worth mentioning the important role played by the independent administrative authorities (that are both empowered with regulation and adjudication functions). The most relevant administrative authorities in economic matters in the Italian system, are:

- Regulatory Authority of Transport (ART; http://www.autorita-trasporti.it/)
- Authority for Communications (AGCOM; http://www.agcom.it/)

- Authority for the Supervision of Public Contracts of Works, Services and Supplies (AVCP; http://www.avcp.it)
- Authority for Competition and Market (AGCM; http://www.agcm.it/)
- Authority for Electricity and Gas (AEEG; http://www.autorita.energia.it/)
- National Commission for Companies and the Stock Exchange (CONSOB; http://www.consob.it/)
- Pension Funds Supervisory Commission (COVIP; http://www.covip.it/)
- Independent commission for the evaluation, transparency and integrity of the government (CIVIT; http://www.anticorruzione.it/)
- Guarantee Commission of the Implementation of the Law on Strike in Essential Public Services (CGS; http://www.cgsse.it/)
- Italian Data Protection Authority (*Garante della Privacy*; http://www.garanteprivacy.it/)
- Institute for the supervision of insurance (IVASS; http://www.ivass.it/)

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ii) Regional level:

The most important responsibilities of territorial authorities in the field of economic rights:

Some regional legislative powers have a significant connection with economic matters, and are listed in article 117, para. 3 and 4, of the Constitution (eg. regulation of professions).

Above all, the local authorities (municipalities and regions) play a central role in (land) property management and its regulation; urban planning is indeed implemented at the territorial levels of government (see the legislation on planning law and building cited above, and the many regional laws on housing and urban planning).

✓ Please, already indicate at this stage what you consider to be the strength and/or weaknesses of the legal protection of economic rights in your country, in terms of framework and substantial standards (not enforcement);

A general overview of the Italian legal system for the protection of economic rights certainly proves the existence of a satisfactory body of rules, if evaluated from an abstract

perspective (regulations); nevertheless some critical points are to be underlined in the concrete functioning (both inside the administrative practice and the judicial remedies). The creation of an economy based both on competition and social solidarity, indeed, has placed Italy in the framework of the national systems characterized by a social market economy. This is confirmed by the legal profiles of this model too, which is in harmony with the EU approach.

However, it is important to realize that regardless of the provisions enacted, a more competitive "national system" exists. In particular, the problems relating to the protection of economic rights seem to fit in great prevalence at the practical, operative level, rather than at the level of the rules. The reason is that rules are usually consistent with an extensive protection of individual positions, while the problems emerge at the implementation level.

With regard to the freedom of economic initiative (and its corollaries), the two main critical points seem to lie in the poor implementation in practice of the process of so-called liberalizations (increased competitiveness in the field of public services and the professions), which even if prefigured several times by the legislature (with clear procedures to achieve such goal) remained largely un-actuated, in the transitional phase. A second point concerns the efficiency and impartiality of the independent administrative authorities, given their central role in modern economies (and in the solutions to the current financial crisis); this is a structural problem in all western countries, which is also present in Italy.

With regard to proprietary situations, in the same way, it is especially the practical management of the limitations that could be sometimes inconsistent with an adequate protection of economic rights. In particular, although it has experienced a substantial increase in the level of protection (see below for expropriations), the role of urban planning remains problematic in the absence of an effective urban equalization, and the level of exploitation of the land (even in the context of illegal exploitation) varies greatly among the different regions. Even for the non-land property problems exist of protection of investors and shareholders, relating to the structural difficulties of making efficient and effective action by the independent administrative authorities; in addition, with respect to the more "recent" new forms of property, related to technologies, the topic of the copyright regulation is a not specifically Italian problem, but it also involves the Italian system.

✓ Please indicate whether significant developments have recently taken place in this respect

Moving from the framework outlined above, and from the structural issues already mentioned, it is important to highlight that many reform processes in the field of economic rights have gradually modified the Italian legal system.

The plurality of the sectors involved does not allow an exhaustive analysis; therefore, just the most significant and most recent evolutionary processes will be examined. Firstly, an important starting point is the process of massive strengthening of independent authorities, with the attribution of increasing skills and resources. This evolution is parallel to the process of privatization (started in the 90s), which made public intervention in the economy in Italy no longer a direct affair (with management of public enterprises) but mainly an indirect mediation (with regulation and adjudication).

The process of liberalization is also relevant, and it is consistent with the evolution described. Both in public services and – potentially – in private ones (professions), liberalization is indeed strictly connected with economic freedoms. With regard to the discipline and management of public services, it is important to mention a progressive reform in accordance with the aim of protecting competition (in a gradual opening to private initiative); such a reform trend is mainly based on the general rule of the need for public tender in the adjudication of the service, also in public-private mixed situations.

Later, various amendments to article 113 TUEL (law on local government, *testo unico enti locali*, Legislative Decree 267/2000) have consolidated the abovementioned trend.

Apart from the TUEL, some other provisions have been of central importance in the field of services, and in particular article 13 of Decree Law (legislative decree) 223/2006, converted into Law n. 248/2006, which regulates regional and local direct award. This provision includes in particular a high degree of exclusivity in the possibility of using public companies, in order to avoid that their position of strength – if used in the market – could distort competition.

The legislation on local public services of economic importance (art. 23-bis Decree Law 112/2008 converted with amendments by Law 133/2008 and by art. 15 Decree Law135/2009 providing limitations for the companies that are characterized by a mixed public and private participation) should be mentioned too. The law provides a general discipline to improve competition prevailing on the provisions of the single economic sectors. Because of Decree Law 112/2008 and subsequent amendments the so called in-house providing of public services is now a regressive model with respect to the principles of competition, transparency and non-discrimination; therefore, it is allowed only under certain strict conditions (ECJ judgments *Teckal*, *Parking Brixen*, etc.).

The last stage of this process (in which numerous other milestones could be listed) was marked by the so-called referendum on the liberalization of water, which was followed by the most recent changes in the field of public services: article 4 Decree Law 138/2011 reintroduced some of the rules repealed by referendum however, the Italian Constitutional Court 199/2012 has judged this provision to be unconstitutional.

Even the access to the professions has often been reported as an area in need of radical liberalization (see as an example the recent law on the reform of the legal profession: Law 247/2012).

Copyright law is an area of Italian law in evolution, in the run-up of technological developments; dating back to the 40s, law 633/ 1941 (coeval with the Civil Code), has been crossed by the most recent technology acquisitions, and integrated by the European Union discipline too. Many problems in this field are solved on the basis of new and complex rules, sometimes anticipated by case law.

Another area of Italian law recently touched by a deep revision is that of expropriation (Presidential Decree 327/2001), which has many profiles relating to urban equalization. In this field, the protection of private economic rights has been greatly enhanced by interventions of the Strasbourg Court, particularly in terms of compensation for expropriation and of *accessione invertita* (on which more details below question 5, number 4 on the point "different categories of persons in different location and policy contexts over time"). Finally, in the most recent evolutions in the field of economic rights it is important to note the developments of the so-called problems of Justice "in" the contract, and – in this field – the protection of the consumer (Legislative Decree 206/2005) is certainly the main hypothesis (besides some minor ones, like subcontractor legislation, cf. Law 192/1998).

- ✓ Please, analyse the main trends in public law protection of economic rights, distinguishing the approaches both on the bases of the different role of legislation and case law, so as on the ground of the different macro-areas of property right, business regulation and labour market.

In light of all of the previous discussion, the basic trend that should be recorded in the Italian legal system in the area of economic rights is apparently towards a "strengthening of protection through specialization" and towards a de-politicization of the management of limitations of economic rights.

This trend, in other words, characterizes the reforms as these are seen as a progressive evolution towards systems of special rules, of special administrative bodies and of specific procedural rules. In the first case, we refer to the legislative power, and the rules of consumers is the best significant example; the second case, concerning the systems of special administrative bodies, refers to the executive power and the important example of independent administrative authorities; the third case, about the systems of specific procedural rules, is focused on the judiciary, and again a good example is in the consumer law class action (article 140 *bis* Legislative Decree 206/2005). The tendency, therefore, is to specialize the system of protection of economic rights, in all its aspects.

This trend, in particular, is consistent with the new domain of technology and science on the policy on issues: due to the complexity of the technology society, the specialization is a common trend in all areas of government, but the field of economic rights is particularly significant because inside its space the modernization provides more and more opportunity to transform political decisions into technical ones.

QUESTION 3: INTERNATIONAL AND EUROPEAN SOURCES OF ECONOMIC RIGHTS

Question 3: International and European sources of economic rights

- ✓ To which international instruments for the protection of economic rights is your country a part?

In the area of economic rights, the international treaties are of immediate relevance, being sources of the law providing rules directly relevant to citizens; the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU are particularly relevant. These two instruments do not extend their effects only in the relations between the States and the international order but, more radically, also directly create rights and duties for the people (therefore, they can be protected before supranational courts, the Court of Strasbourg and Luxembourg, but also in front of national judges).

Regarding the ECHR, article 1 of Protocol 1 protects the right to property, and starting from this disposition the Court in Strasbourg has also developed some profiles of credit and contracts protection. Italy has signed and ratified it with Law 848/1995.

The Charter of Fundamental Rights, articles 15, 16 and 17, respectively safeguard: freedom to choose an occupation and right to engage in work, freedom to conduct a business, right to property. The Charter has become binding after the Lisbon Treaty, ratified by Italy with Law 130/2008.

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In addition to these provisions many other international agreements ratified by Italy have relevance to the economic rights, even if not directly conferring legal claims to the citizens. These other treaties, indeed, affect the approach of the State towards economic issues (liberalization, competition, etc.), and are therefore indirectly relevant. In particular, Treaties on issues of economic importance are not only bilateral but also multilateral; many of them concern very technical and specific issues, but some have a more structural importance because they create international organizations that obligate Italy to follow certain economic conventions (typical examples are the WTO, the World Bank or the IMF).

In this multiplicity of agreements, also the general tool consisting of the UN International Covenant on Economic, Social and Cultural Rights of 1966 is of main importance, especially for labour rights. Italy has joined with Law 881/1977.

- ✓ How are relevant international and European economic rights norms being incorporated in your country?

The regime of incorporation of rights of international or supranational origin inside the Italian legal system follows different rules, depending on the nature of the source of international law at issue.

For customary international law article 10 of the Constitution provides for a system of automatic adjustment, without need for any formal act. Moreover, as recognized by the Constitutional Court in judgment 48/1979 (Russell), the ranks of the customary international law are hierarchically prevalent inside the system, and take precedence over any other provisions of national law (and the Constitution itself).

As for the economic rights that arise from international treaties, article 117 co. 1 of the Constitution (as introduced by Constitutional Law 3/2001) recognizes them as prevailing over other sources of national law (Constitutional Court 10/1993). The treaties are ratified by the Government, after the possible law authorizing the ratification (article 80 of the Constitution), assuming the obligation on the international level; at the same time a national statute is

usually needed to execute the dispositions inside the Italian legal system, to make them effective and binding directly for the citizens (and not only for the Government). Even if such a process of execution is made by statutes, the effectiveness of the Treaties is connected to the rank of article 117 Constitution. Therefore it is not possible – for the future – to enact a different parliamentary decision and a divergent statute on the same issue covered by the Treaty.

Finally, EU law enjoys a special status. Both primary law (treaties), and derived law (regulations, directives and decisions) prevail over domestic law (including constitutional) according to the "supremacy principle". In addition, sources of primary and derived law, as well as general principles might have direct applicability (or direct effects), and are therefore often directly productive of rights for citizens. In this case national courts, in case of conflict between EU economic rights and national law, are required to dis-apply the second one (see Constitutional Court 170/1984, *Granital*).

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Furthermore, the adjustment of the national legal system to international law also takes place largely through an interpretation aimed at creating compatibility between internal and international provisions (*interpretazione adeguatrice*). Of particular importance is the impact of interpretation on the interaction between European law and article 41 Constitution: inspired by the EU principles, competition values and horizontal subsidiarity were considered implicit in the Italian legal system even before the Constitutional law 3/2001.

After the acceleration of the process of European integration which occurred in the early nineties, article 41 was interpreted in compliance with the principles of an open-market economy.

In line with the EU affirmation of the centrality of the protection of competition, by means of Law 287/1990 the Italian legal system evaluated the competition profiles "hidden" in the 1st co. of article 41: freedom of competition was considered a natural expression of the progress of freedom of economic initiative (and since 2001 the competition law is mentioned inside an express constitutional provision, article 117, 2nd co., as substituted by Constitutional Law 3/2001).

- ✓ To what extent has the European Convention on Human Rights been incorporated, and is relied upon by relevant national authorities (legislators, governments, administrations, courts, etc.)?

In the framework of international treaties, ECHR enjoys a special status as the case law of the Strasbourg Court is recognized as binding and helps to define the content of the rights.

This ECHR special status does not extend up to the same level of pervasiveness recognized for the EU law. It is indeed impossible to have non-application of internal rules in contrast with the ECHR, as it is in the EU system. In such cases national courts must provoke a question of constitutionality in front to the Constitutional Court; the parameter for constitutional adjudication is the abovementioned article 117, co. 1, of the Constitution, of which the ECHR is a parameter external to the Constitution, but indirectly constitutionally relevant ("interposed parameter", *parametro interposto*).

This attitude was reinforced by two key judgments of the Constitutional Court, which recently focused on issues of economic rights: the decisions 348 and 349/2007 on the amount of compensation for expropriation and the *occupazione acquisitiva* (or *accessione invertita*).

With regard to *occupazione acquisitiva* in the past the Constitutional Court allowed the public power to become owner of private property and to convert it to a public use, without setting up a full public responsibility for the damage caused to the owner. Initially, in the ECtHR case law such a situation was not considered as conflicting with the principles concerning the protection of the property, as enshrined in the Protocol 1 to the aforementioned Convention.

More recently, however, the Constitutional Court, following the case law of the Strasbourg Court (case Scordino: judgments of 29 July 2004 and 29 March 2006), admitted that the *occupazione acquisitiva*: (a) does not provide adequate protection of property rights, because ECHR requires that the damages will be paid out automatically in such cases, (b) does not qualify it as "expropriation", but has to be qualified as untitled dispossession, contrary to article 42 Constitution as interpreted in the light of the findings of the ECHR, (c) does not guarantee compliance with the principle of legality (article 1 of the Protocol) in the absence of sufficient requirements of accessibility, accuracy and predictability of the procedural regime.

- ✓ How and to what extent are international instruments for the protection of economic rights given effect in your country?

As mentioned in the previous paragraphs, there is a different scope of protection available in the event of a conflict between supranational or international law in the protection of economic rights and domestic law. Depending on the origin of the right in question, indeed, the court must un-apply the incompatible internal provision if contrasting with EU law; on the contrary, if it is provided for in the ECHR (or in other international instruments), the court cannot un-apply the law, but has to raise the question of constitutionality for breach of article 117 co. 1.

In any case, however, national courts have to attempt – where possible – an interpretation in conformity with international law, in order to save the apparently conflicting domestic law.

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As far as international and supranational level remedies are concerned, of main importance is the ability of individuals to appeal directly to the Strasbourg Court. The ECHR, indeed, as a subsidiary remedy, is competent to judge on violations of (also) economic rights once domestic remedies have been exhausted. The Member State must comply with pecuniary reparation measures committed by ECHR, but also with individual or general measures provided to eliminate the Human rights violation. In this case, the Committee of Ministers of the Convention supervises the implementation of the decisions of the Court in Strasbourg. Italy provides for the implementation of such supranational decisions by the activity of the Government, which promotes the collaboration of Parliament and of the judiciary power: Law 12/2006 (execution of ECHR Judgments) which modified article 5 Law 400/1988 (on the activity of the Government).

QUESTION 4: EU CHARTER OF FUNDAMENTAL RIGHTS

Question 4: EU Charter of fundamental rights

- ✓ To what extent have the EU Charter of fundamental rights as well as general principles of EU law protecting rights so far been recognised and referred to by the national authorities (legislators, governments, administrations, courts, equality bodies, Ombudsmen, etc.)?

The Charter of Fundamental Rights of the EU is peacefully recognized in the Italian legal system as a binding set of rules, as well as the general principles of the EU.

The provisions of the Charter used to be applied by case law already at the time when its only value was that of soft law; as everybody knows the Treaty of Lisbon introduced the recognition of the normative value of the Fundamental rights in the EU treaties system; as a consequence, the Charter of economic rights is now also considered – formally and in substance – as binding.

With specific regard to economic rights, the EU Charter has therefore contributed to the scope of articles 41 and 42 of the Constitution: those articles were reinterpreted in the light of European integration, even before the treaty of Nice, but the formalization of EU economic rights inside the Charter gives new reference to this evolutionary process. Such a role played by the Charter, it should be noted, is limited by the so-called horizontal dispositions of the same Charter of Fundamental Rights: it has to be applied in respect of the EU competences and only inside the boundaries of EU attributions.

- ✓ How is the relationship between the EU Charter and the ECHR being perceived in your country? How is their respective scope of application identified, in particular in respect of economic rights?

The aspect of the relationship between the ECHR and the EU Charter of Rights is crucial and perceived as central in the Italian legal system. As already noted, indeed, EU and ECHR rights have a different status in the Italian legal system; as a consequence, it is essential to define where it is a question of application of ECHR law and not of EU law. Such a problem, despite some attempts to extend the disapplication also to the ECHR system (Council of State 1220/2010; contra, see Constitutional Court. 80/2011), was solved on the ground of constitutional adjudication, without un-application. In fact, only the rights provided for by the Charter of Fundamental Rights of the EU benefit from the un-application power.

In the area of economic rights, possible overlaps between the EU and the ECHR provisions do not arise on the literal level, but on the interpretative one: the conflict arises when the ECJ and the Strasbourg Court case law contain different solutions for protecting the same economic right. One example is the protection of credit, which is considered in the property paradigm in ECHR law, while the EU system introduced specific provisions. In these cases the Italian legal system does not assume an original position in the European framework, but it follows the well-established set of *Bosphorus* case (ECtHR judgment 30 June 2005). It is then assumed (without specific demonstration case by case) that EU law

respects the rights of the ECHR, if the possible conflict arises in an area of EU competence, and – therefore – the Strasbourg Court will refrain in all those cases from further controls. However, when the Member state had no discretion in adapting its legal system to the rights provided by the EU, a second check by ECHR will be possible.

Moreover, it is important to remember that the accession of the EU to the ECHR is currently pending and a draft of the Treaty to accession is already available. As a consequence, some of the above mentioned crucial issues might find a final solution.

QUESTION 5: JURISDICTIONAL ISSUES

Question 5: Jurisdictional issues

- ✓ Personal
- ➢ ***Who*** is covered by (core) economic rights protection? Are both natural and legal persons covered? Are citizens of that state, EU citizens, third country nationals (refugee, long term resident, family members, tourists, etc.) given protection?

The Italian constitutional dispositions in the field of economic rights have a neutral formulation, looking at property and economic initiative in itself rather than to the user; such an approach, as mentioned above (answer to question 1), is a symptom of the non-social character of articles 41 and 42.

Thanks to the literal formulation of these rules, citizens are not strictly the only beneficiaries of these rights, as is the case for other rights recognized by the Italian Constitution. As an example, immigrants are not physiologically excluded in the enjoyment of economic rights.

The exclusion of immigrants from the enjoyment of economic rights is not prospected by the Constitution, and even foreigners enjoy fully – in principle –property and freedom of enterprise. Nevertheless, according to the general rules on the private international law principle of reciprocity some limitations can be admitted: “civil rights” for the purpose of article 16 of the preliminary provisions of the Civil Code have in fact to be considered – among other things – also (and mainly) the “economic rights”. The limitations of protection of rights for the reciprocity purposes, indeed, is typically pertaining to the economic relations (e.g. ability to contract, to be owner, etc.).

As regards the subjective extension of the legal protection of economic rights, in the Italian legal system legal persons are beneficiary too; economic rights, indeed, by their nature are often exercised in corporate form, and so the possibility of recognizing it also to non-physical persons is considered obvious. In fact, the projections of the individual entities are expressly protected under article 2 of the constitution, for the so-called social bodies (*formazioni sociali*).

Even the Constitutional Court stated that the "protection of the 1st par. article 41 concerns not only the initial choice of an economic activity, but also the successive stages of its development" (Constitutional Court 35/1960 v. C. also cost. 54/1962), therefore considering also the way of management of enterprises: business activities can be constitutionally guaranteed individually or in corporations (article 2082 of the Civil Code). Moreover, article 41 covers with a constitutional protection also self-employment and intellectual professions (Constitutional Court 13/1961, 17/1976, 59/1976; more problematically, Constitutional Court 89/1984.).

- ✓ Territorial
- ➢ What is the territorial scope of the protection of economic rights afforded by your member states? Are there ***territorial*** limitations to such protection? Which?

In the Italian legal system a discrimination in the enjoyment of economic rights cannot occur on territorial bases. The principle of equality (article 3, and more specifically article 120 of the Constitution) that follows the same logic as the EU free movement liberties inside the Italian territory requires in fact an equal protection throughout the Italian regions.

This does not exclude the possibility of supporting territorially selective measures: such measures have to be considered positive actions (aid or favorable tax regimes), which today, however, are frequently in tension with the EU rules on state aid. The EU system, nevertheless, in order to develop positive actions provides its own structural funds and sometimes admits tax systems selectively in favour of a specific territory (see judgment on the Sardinian luxury-tax, C-169/08). Such interventions, however, do not discriminate with a restriction of some economic rights; more simply, they are intended to expand the effectiveness of those rights also in the territorial areas where the implementation is more difficult (as it is indeed in the logic of the so called "positive actions").

- ✓ Material
- ➢ Are rights protected differently in different ***policy areas*** (e.g. security exceptions, foreign policy exclusion, etc.)? How are economic rights balanced with other social rights? What is the approach of the national legal system towards the prevalence of a Market view instead of a social rights view in the regulation of economic rights?

The balancing of social and economic rights is a crucial topic and determines the more macroscopic compressions in the enjoyment of economic rights in some specific areas (e.g. rental of residential property, freedom of enterprise and labor protection, environmental protection and production activities, etc. For a more detailed analysis of the role of social rights in the compression of economic rights, in the single specific policy areas, please refer to the answer to question 1 and particularly to case law and legislation quoted).

As noted above, the EU regulation approach has reduced the national possibilities to balance economic and social policies in some sensitive areas, when such limitation of private initiative is contrary to competition; this evolution is indeed important, but the realization of the Single market – however – admits that some faculties of free movement of factors of production are to be limited for reasons of public interest (health, protection of the public order and the social policies).

The EU law therefore permits in some specific areas a plurality of admissible public interventions on which bases the enjoyment of economic rights is compressed: for consumer, environment, workers or health protection, etc.

- ✓ Temporal
- ➢ What is the temporal scope of protection afforded to economic rights? Have they been recently changed/Have there been recent changes in the range and reach of economic rights protection?

As already mentioned, over time, in Italy the interpretation of economic rights has changed: this concept has gone from a friendly setting to a certain state dirigisme, to an approach that with priority preserves the competitive market (with a limited role of public powers: essentially in regulation and adjudication). The interpretation of articles 41 and 42,

compared to the many options available, is then concentrated – from time to time – on the interpretations compatible with EU law and its social market (competitive) economy. If the provisions of the Italian Constitution were originally open to various interpretations, gradually – in parallel with European integration – the Italian practice, legislation and case law have gone converging on the size of the EU economic market. This trend will be evident in the following section, particularly with regard to the cases highlighted there.

Evolution has not, however, been traumatic, but gradual. Such a characteristic explains why the reform of article 41, even if sometimes proposed, was never approved. The Italian economic Constitution has proved to be sufficiently flexible and adaptable to changes in the economy and in the European integration evolutions. Scholars refer to a change of the economic Constitution as an evolution from protection of individual freedoms (limited for social purposes) to the protection of an economic system (EU competitive market) and such evolution is particularly evident in the interpretation of article 43 (on the topic of collectivization of economic activities), that now takes into consideration EU policy in the field of State aid.

The trend is therefore mainly towards a more market friendly approach, compared to the first interpretations of the Italian Constitution. The three sectors analyzed confirm this tendency: both the liberalization of professions, even if with particular difficulties, and the treatment of intellectual property are characterized by the purpose of develop more competition. The issue of consumer protection, however, marks a different sensitivity to the defence of a European dimension of social interests: in this field economic rights are not limited but, rather, regulated to ensure an effectively "fair" competition. The competition is not replaced by a government intervention, but the State becomes – in fact – a guarantor of fair competition (protecting the weaker part of the contracts, with a special regulation and administrative checks).

- Please offer details as to how different rights are afforded to different ***categories of persons*** in ***different location and policy contexts over time.***

Hereinafter some of the most significant cases of different application of the economic rights are listed: over time and for different categories, more or less protected (landowners, landlords), of persons and situations. The following list shows the main references of five

cases commonly considered as some of the most significant in Italian legislation and case law on economic rights.

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1) Leases:

Article 42, 2nd co., of the Constitution has been the foundation of all the limitative regimes of property, pertaining to the operation of commercial or artisanal activities (within the meaning of Law 1115/1971; Constitutional Court 30/1975). On such a basis, the Constitutional Court decided for the constitutionality of the block of the fees for the lease of municipal property used for residential purposes (within the meaning of Law 1444/1963 and subsequent modifications; Constitutional Court 3/1976.).

After the introduction of law 392/1978 on "fair rent" in leases (*equo canone*), the Court has intervened several times, always believing the contested provisions to be legitimate (both if limitative or not of economic rights): for example, those that allow the owner/landlord to regain or not the availability of the property (Constitutional Court 58/1980; see also article 73, Law 392/1978 and C. cost.. 116/1987). In 1988, the fair rent discipline (l. 392/1978) was again considered by the Court as legitimate, as the compression of the right of ownership of the lessor would have been justified by the need, still present, to guarantee the conductors to ensure an adequate stability on the enjoyment of a primary good, so that the legislation is intended by the Court as the achievement of a balanced protection of the conflicting interests of the conductors and lessors (C. cost.. 1028/1988). Some provisions in Italian law were however considered a non-irrational protraction only because exceptional and temporary, and the ordinary full extension of economic rights was therefore not compressed (Constitutional Court 108/1986).

The weaker party (the lessee) is then protected with a discipline that is special if considered in comparison with the Civil Code dispositions. At the same time, landlords are treated differently depending on whether they are considered a weak part themselves in the economic relation (and if they have to use their properties for a socially beneficial, and equitable, purpose).

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2) Agrarian relations:

The discipline of agrarian relations (with reference, first, to Law 11/1971 laying down the new rules of the rustic funds rental regime) has been subjected to the scrutiny of the Constitutional court. The provisions which do not provide the periodic revaluation of rent, as well as the extent of the criteria to determining the fee, were held unconstitutional; indeed, the

compression of the property right would have resulted in almost a complete canceling, reducing significantly the income (Constitutional Court 155/1972). The contested legislation especially violated the reasonableness principle, due to the inadequacy of the revaluation coefficients: articles 42, 2nd co., and 44, 1st co, of the Constitution – indeed – require a balancing between owner and enterprise interests (Constitutional Court 301/1983).

The owners of rustic funds then enjoy their economic rights in a more constrained way than other landlords, as they are balanced with the needs of socially sustainable agricultural production (small businesses included).

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3) <u>Planning and landscape restrictions:</u>

For landscape and planning restrictions there is a close connection with case law on expropriation (which will be referenced in a following section), but they are also a factor that differentiates profoundly the enjoyment of economic rights connected to property: compressing some fundamental faculties, such as the *jus aedificandi*.

The Constitutional Court has always considered the right to build (*jus aedificandi*) connatural to the right of ownership and, therefore, the constraints imposed by the regulations – of various kinds – in relation to urban planning and construction have to be exceptional (Constitutional Court 64/1963). Some important decisions (55/1968 and 56/1968) have sanctioned the legitimacy of the limits to urban development: the immutability of those can be constitutional, if such a limit is intended to transfer the land to public property, in view of a future transformation for public interest.

Among the limitations to the use of land, admissible for planning law, a major role is played by the rules of the building permit that, without separating the property right by *jus aedificandi*, require the owner to pay a contribution for build, considered reasonable in principle and in tune with the fulfillment of the mandatory duties of economic and social solidarity.

Moreover, the protection of the landscape, according to article 9 of the Constitution, is placed in relation to the constraints to the economic right of article 42, especially relating to the rights on the lands included in the parks or reserves, and in general if classified as of public interest (Constitutional Court 391/1989). The planning activity in such cases can reasonably limit the building activity and the above mentioned balancing test is rarely in favour of the economic right.

Even in this case, rules have changed over time, becoming more precise and pressing; nevertheless, the discipline on such issues (limitation on building activity) is by nature

strongly unequal on the territory (in fact, not from a legal regime perspective): according to the destination given to the soils on the basis of technical-political choices, the protection of this economic rights depends mainly on the local political decisions.

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4) The so-called *occupazione acquisitiva*, or *accessione invertita* (obtaining property right by illegitimate occupation):

The provisions of this mechanism have undergone radical changes: at the origin, rules provided a mere compensation in case of public illegitimate occupation of private property. Therefore, the economic rights of the owners unjustly dispossessed were strongly compressed, treating them as the owners expropriated but without procedural safeguards. Only with the evolution of the interpretation in case law (up to the decisions of the Strasbourg Court cited above) the enjoyment of the landowners' rights was fully guaranteed also for these situations.

This mechanism was developed by the Italian courts, and later it was codified in article 3 Law 458/1988: there was a right to compensation for damages caused if the expropriation has been declared illegal, with the exception of returning the goods (Constitutional Court 384/1990). The Constitutional Court thus intervened in 1995 to establish the constitutionality of such a mechanism (Constitutional Court 188/1995).

In 1996, the Court again intervened on the regime provided by the new article 1, par. 65, Law 549/1995 (which modified the 6th par. article 5-bis, DECREE LAW 333/1992) stating that these provisions do not have to be applied when the price was not definitively determined, and the Court underlined the problem of distinguishing a compensation regime (for legitimate situations) and a damages regime (for illegitimate situations; Constitutional Court 269/1996.). The Court recognized, with regard to the legislative provision which stated for the equivalence of the damages and the compensation, that such an identical regime for legitimate expropriation and *occupazione acquisitiva* was in breach of the precept of equality, given the radical structural diversity of the two situations (Constitutional Court 188/1995).

Here, the different treatment of economic rights consists in attributing the same protections to radically different subject positions; and such an identical regime for different situations violates the principle of equality. Only the recent interventions of the Strasbourg Court – cited above – have introduced a remedy to that inequality (Constitutional Court 349/2007).

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5) <u>Expropriations, urban limitations and compensations:</u>

Expropriation represents the best known example of structural differentiation in the protection of economic rights in the Italian legal system. Over time, indeed, rules on compensation have dramatically changed, depending on the public finance context and conditioned by ideological and political perspectives. Only recently a sufficient degree of stability in the regime has been provided.

Article 42 (subsection 3) of the Constitution is the constitutional foundation of the discipline of expropriation for public interest. The three conditions granting the legality of the expropriation are: (a) the provision by law, (b) the existence of a public interest, (c) the obligation to pay compensation.

The "non-translational expropriation" (*espropriazione non traslativa*) is the limits (or planning restrictions) to the building activity. Such limits may be an expropriation when their imposition would lead to the absolute ban on *jus aedificandi*, lacking of compensation (Constitutional Court 55/1968).

The consequence of a chaotic regime of urban limitations to property rights, and characterized by sufficiently participative procedures is a profound difference in the enjoyment of property rights.

In a first phase – in the mid-sixties – the Constitutional Court (Constitutional Court 6/1966) excluded an expropriation and, therefore, the need to pay compensation in the event of restrictions relating to general categories of goods. The law could therefore identify *a priori* some goods, on the basis of certain characteristics, as not fully protected for what concerns the possible economic rights; so for example in relation to the unused flats in big cities, where a need for more leaseholds does exist (Constitutional Court 20/1967.).

In the same period the exclusion of an expropriation in relation to the constraints of landscape protection was decided by the Constitutional Court (Constitutional Court 56/1968.), as it also was considered an original hypothesis of public interest. The same has to be applied to the limitations imposed on the property owners for historic, artistic and archaeological reasons (l. 1089/1939, Constitutional Court 202/1974).

The enjoyment of some economic rights (*edificabilità*: buildability, i.e. suitability for building) relating to specific categories of goods (those that incorporated generic public interests) was so limited in very general ways.

The subsequent evolution of Italian law began with the requirement of an appreciable proportionality between the public interest and the legal instrument chosen to protect it, which implies the minimal sacrifice for the owners (e.g. Constitutional Court 155/1995).

The Constitutional Court had also stated (Constitutional Court 90/1966.) that in order to be justified, expropriation must be guided by specific, and concretely explained, purposes of general interest; therefore, the system of Law 2359/1865 underlined the necessity for an indication of the objectives, the means and the time of the expropriation procedure (as an essential guarantee for the private interest). The grounds of the protection is therefore connected to the necessity to demonstrate that the compressions of the economic rights related to whole categories of goods are reasonable.

Another guarantee representing a differentiating factor in the enjoyment of economic rights of property, and that has evolved over time, relates to the quantification of compensation.

Law 2359/1865 had governed expropriation compensation, providing that it will be done to the right price, that is to say the price the land would be paid in a free negotiation (article 39).

If the rule was the actual market value, in the following decades for individual areas of the territory, or specific categories of goods, the opportunity was provided to compensate with smaller amounts, thus differentiating negatively the enjoyment of the right to property. Symptomatic of this trend was the Law 2892/1885 (known as the "law on the reorganization of the city of Naples"), article 13.

When referring to compensation, the 3rd par. of article 42 of the Constitution does not require to pay the market value of the asset (Constitutional Court 61/1957), but the only requirement is that the compensation has to be not "apparent or purely symbolic" (Constitutional Court 5/1980).

The Constitutional Court 5/1980 stated that article 16, Law 865/1971, (*Legge Bucalossi*), which provided for compensation at agricultural value, is unconstitutional, as causing a compression of the right of property: to the compensate owner at the agricultural value was considered in violation of the principle that the extent of the compensation shall be referred to the value of the property, determined by its essential characteristics and the real economic purpose. It was a violation of equality to compensate rural and urban land at the same value.

As an immediate consequence of this decision (5/1980) Law 385/1980 was enacted by Parliament. This new Law provisionally liquidated the owner in accordance with the criteria laid down by the previous Law 865/1971 (as amended by Law 10/1977).

The Court stated that – in the absence of specific provisions – the Italian legal system was making reference back to the market value (pursuant to article 39, Law 2359/1865). The

Constitutional Court (judgments 355/1985 and 530/1988) tried to rationalize the system of compensations, but the legislator (article 5-bis, Decree Law 333/1992) introduced again a new system of calculation of compensation, less proximal to market value.

On the bases of this last legislative decision, the enjoyment of the economic rights to property or to build (*jus edificandi*) were therefore again limited by urban constraint or by expropriation, both compensated at less than market value. Only the more recent case law of the Constitutional Court above mentioned (348/2007), implementing the ECHR decisions, has put an end to this regime by requiring for all property rights a compensation coherent with the real value.

QUESTION 6: ACTORS

Question 6: Actors

- ✓ What is the involvement of private or public actors, such as private (e.g. National Bar Associations) and public entities and authorities (e.g. Patent Offices), agencies, NGOs, etc. – in defining and setting economic rights' standards (influencing legislative, regulatory, administrative or judicial processes). Note that this question is not about enforcement. It focuses on actors involved in the drafting or setting of economic rights norms?

There are several relevant stakeholders in the formulation and implementation of economic rights, and the relationships between them are extremely differentiated and not entirely formalized by law. In particular, under Italian law, it should be noted the development of a constant dialectic between the Government, the trade unions and the employers' organizations has been institutionalized in the forms of collective bargaining (*contrattazione collettiva*: in Italy the sources are in the inter-confederation agreements of 1993 and in the Protocol of 23 July 1993); in this way, the free economic dynamics have been rationalized to protect workers with collective agreements that remain private, but with a particular relevance in the system of sources of law.

As for other rights, in general, for economic rights too there is a similar tension between politics, independent authorities and private associations and individuals (as for the independent authorities, see the above mentioned references). The private associations are in

particular of main importance to the development of the three areas here specifically treated: consumer associations, associations of authors, and professional associations – in fact – play a role in in those economic fields (all protecting general or particular interests). An analysis of the prevalence of anti-competitive trend or guarantee of rights attitude in the action of associations requires – in practice – a case-by-case examination (and the case law on such issues is very important, also for the issue of *locus standi* of associations).

QUESTION 7: CONFLICTS BETWEEN RIGHTS

Question 7: Conflicts between rights

- ✓ How are the different sources of rights inter-related? Is there (potential) overlap? Are there inconsistencies? What are the mechanisms in place in order to determine how they should be addressed?

As already noted (answer to the question 1), overlaps and interferences between different economic rights are originally present in the Constitution: work, property and economic initiative are interconnected rights, and social utility is a perspective relevant in each one.

The role of legislation is to implement one or other economic law, deciding for the prevalence of specific interests time to time: such a decision has to be assumed according to the political discretion constitutionally admissible, without damaging the core of the economic rights. The Constitutional Court therefore checks the reasonableness and proportionality on sacrifices of economic right decided by the Parliament, and – according to the technique of balancing of interests – verifies if the core of the right is not affected and if the principle of proportionality is respected (applying the theory of the three steps, developed in the German case law, and then in the EU one). Even the other national courts, on this basis, are entitled to resolve conflicts between economic rights – when EU law comes into consideration – eliminating the possible conflicts with domestic provisions.

- ✓ Are there, in your countries, notorious or problematic clashes between particular economic rights, or between rights and other rights, between individual economic rights and important public interests?
- ➢ Please give examples, and illustrate how these conflicts are dealt with and resolved.

The cases of structural conflict among different economic rights are absorbed into the Italian legal system by the notion of "social utility" (see above answer to question 1): usually a link with its social preferability is set off, in order to permit an economic interest to prevail over the other. Looking in more detail at the main cases, the most obvious conflict is of course the problem of tensions between labour and capital interests, and therefore the problem of industrial relations and collective bargaining (as already noted above).

In addition, a second case of textural contrast in the field of economic rights is linked to the economic exploitation of resources and environmental protection requirements. All the Italian environmental laws (e.g. the most important Legislative Decree 152/2006) are the sources of a conflict of economic rights with other utilities, otherwise valuable (positive and negative externalities).

Turning to the specific issues that have been encountered in this questionnaire, the issue of liberalization (and within it, the one of professions) is particularly topical in Italy: the tensions between the established economic actors and the interest of the incumbents to find an environment favourable to competition. In this sense, the whole issue of competition law is applied in a setting of different economic interests of a multiplicity of actors (Law 287/1990).

Other classic themes that deserve attention (also present in Italy, but not only) is then certainly that of consumers (Legislative Decree 206/2005), in which the economic interests of the weaker party clashes with the professional interest in maximizing profit (see above).

Finally, in the area of intellectual property rights, a strong contrast is present between the authors'/inventors interest in the exclusiveness on their work/idea and the collective interest to cultural enjoyment, linked to article 9 Constitution. In particular, there does exist a socio-economic conflict of considerable proportions, focused on the free flow of information and knowledge (see, for instance, the "Open Source" phenomenon). This problem, however, is much more complex and cannot fully be faced with a "property/owner paradigm" (eventually, article 42 Constitution). The EU (but not explicitly the Italian Constitution) protects intellectual property, and this made the issue of relation between legal orders particularly interesting in this matter. The complexity of the legal sources that have been

raised in relation to copyright, for instance, (especially with reference to the Internet), indeed, is linked to EU directives which outline a system of intellectual property protection not only very different from the Italian one from 1941, but also in constant evolution.

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ANNEXES

National provisions

Constitutional and Civil Code legislation:

The most relevant legislation of constitutional level and inside the system of the Civil Code:

- Articles 41-47 of the Constitution
- Articles 832 et seq., 1321 et seq. and 2082 of the Civil Code

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Ordinary legislation:

The most relevant legislation in the field of proprietary situations (article 42 Constitution):

- eminent domain: l 2359/1865, Law 2892/1885, Law 458/1988, Law 549/1995, dPR 327/2001
- housing and urban planning: r.d.l. 981/1931, Law 10/1977, Law 865/1971, Law 396/1990, dPR 380/2001
- environmental protection and landscape: Law 1089/1939, Legislative Decree 152/2006, Legislative Decree 42/2004
- agricultural contracts: Law 11/1971
- leases of urban property: Law 392/1978
- copyright and industrial property: Law 633/1941; Legislative Decree 30/2005
- amendments to the regulations of condominium buildings: Law 220/2012

The most relevant legislation in the field of economic freedoms (Article 41 Constitution):

- Ministry of State Shareholdings: Law 1589/1956
- Five-year national economic plan: Law 685/1967
- Standards for the protection of competition and the market: Law 287/1990

- Rules to protect consumers: Legislative Decree 206/2005
- Liberalisation: Law 248/2006
- Competition: Law 40/2007, Legislative Decree 1/2012
- Insurance: Legislative Decree 209/2005
- Banking and Finance: Legislative Decree 385/1993, Legislative Decree 58/1998

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Constitutional case law:

Constitutional case law on property rights (article 42):

- locations: judgments 30/1975, 3/1976, 58/1980, 116/1987, 1028/1988, 108/1986
- agricultural leasing: judgments 155/1972, 301/1983
- building activity and distances: judgment 120/1996
- urban and landscape building limitations: judgments 64/1963, 6/1966, 55/1968, 56/1968, 188/1972, 97/1982, 9/1983, 233/1983, 391/1989, 417/1995, 167/1999
- expropriation and compensation: judgments 61/1957, 67/1959, 5/1980, 231/1984, 355/1985, 530/1988; 348/2007; 24/2009; 338/2011
- *occupazione appropriativa*: judgments 384/1990, 188/1995, 296/1996, 148/1999; 349/2007

Constitutional case law on freedom of economic initiative (article 41):

- limits to private economic activity: judgments 78/1958; 5/1962; 45/1962; 4/1962; 40/1964; 30/1965; 27/1969; 237/1975; 548/1990; 63/1991; 439/1991; 427/1995; 196/1998; 190/2001; 27/2003
- protection of competition: judgments 223/1982; 241/1990; 14/2004
- freedom of contracts: judgments 30/1965; 241/1990
- discrimination of business activity on territorial ground: judgments 64/2007; 391/2008

Bibliography:

Amato Giuliano, Il governo dell'industria in Italia, Bologna, 1972

Amato Giuliano, Il mercato nella Costituzione, in *Quaderni cost.*, 1992, 7 ff.

Baldassarre Antonio, Diritti inviolabili, in Diritti della persona e valori costituzionali, Torino, 1997

Baldassarre Antonio, Iniziativa economica privata, in *Enc. Dir.*, XXI, Milano, 1971

Baldassarre Antonio, Proprietà. I. Diritto costituzionale, in *Enc. Giur.*, XXV, Roma, 1992

Barbera Augusto, Leggi di piano e sistema delle fonti, Milano, 1968

Bognetti, La Costituzione economica italiana, Milano, 1993

Barcellona Pietro, Proprietà, (tutela costituzionale), in *Digesto civ.*, XV, Torino, 1997, 456

Bonini Monica, Controllare le idee: profili costituzionali della pubblicità commerciale, Milano, 2007

Calvi Roberto, I contratti del consumatore, Padova, 2005

Cassese Sabino, I beni pubblici. Circolazione e tutela, Milano, 1967

Cassese Sabino, La nuova costituzione economica, Roma-Bari, 2007

Cassetti Luisa, La cultura del mercato fra interpretazione della Costituzione e principi comunitari, Torino, 1997

Cavaleri Paolo, Iniziativa economica privata e Costituzione vivente, Padova, 1978

Cheli Enzo, Libertà e limiti dell'iniziativa economica privata nella giurisprudenza della Corte costituzionale e nella dottrina, in *Rass. dir. pubbl.*, 1960, I, 300 ff.

Cocozza Francesco, Profili di diritto costituzionale applicato all'economia. I «diritti di cittadinanza» tra libertà economiche ed integrazione sociale, Torino, 2001

Colavitti Giuseppe, La libertà professionale tra Costituzione e mercato: liberalizzazioni, crisi economica e dinamiche della regolazione pubblica, Torino, 2012

Costantino Michele, Contributo alla teoria della proprietà, Napoli, 1967

Costantino Michele, Proprietà. II. Profili generali - Diritto civile, in *Enc. Giur.*, XXV, Roma, 1992

Esposito Carlo, I tre commi dell'article 41 della Costituzione, in *Giur. cost.*, 1962, 37

Esposito Mario, Profili costituzionali dell'autonomia privata, Padova, 2003

Faccenda Franco, La tutela dei diritti economici degli stranieri extra-comunitari in Italia, in *Rivista italiana di diritto del lavoro*, 1984, II, 323 ff.

Galgano Francesco, Article 41, in Comm. Cost. Branca, Bologna-Roma, 1982, 1 ff.

Gambaro Antonio, Il diritto di proprietà, in Tratt. Cicu-Messineo, Milano, 1995

Giannini Massimo Severo, Diritto pubblico dell'economia, Bologna, 1985

Giannini Massimo Severo, Le basi costituzionali della proprietà privata, in *Politica del diritto*, 1971, 445

Grossi Paolo, La proprietà e le proprietà nell'officina dello storico, in Il dominio e le cose. Percezioni medievali e moderne dei diritti reali, Milano, 1992, 603

Grossi Paolo, Proprietà (diritto intermedio), in *Enc. Dir.*, XXXVII, Milano, 1988, 226

Guarino Giuseppe, Pubblico e privato nell'economia. La sovranità tra Costituzione ed istituzioni comunitarie, in *Quaderni cost.*, 1992, 21 ff.

Iannelli Antonio, La proprietà costituzionale, Camerino-Napoli, 1980

Iannello Carlo, Poteri pubblici e servizi privatizzati: l'"idea" di servizio pubblico nella nuova disciplina interna e comunitaria, Torino, 2005

Irti Natalino, L'ordine giuridico del mercato, Bari, 1998; Luciani, La produzione economica privata nel sistema costituzionale, Padova, 1983

Irti Natalino, Proprietà e impresa, Napoli, 1965

Libertini Mario, Impresa, proprietà intellettuale e Costituzione, in *AIDA*, 2005, 50

Luciani Massimo, Corte costituzionale e proprietà privata, in *Giur. cost.*, 1977, I, 1384

Luciani Massimo, Economia nel diritto costituzionale, in *Digesto pubbl.*, V, Torino, 1990, 375 ff.

Mangiameli Stelio, La proprietà privata nella Costituzione, Milano, 1986

Mattei Ugo, Proprietà, in *Digesto civ.*, XV, Torino, 1997, 432

Mengoni Luigi, Proprietà e libertà, in La Costituzione economica a quarant'anni dall'approvazione della Carta fondamentale, Milano, 1990

Mengoni Luigi, Proprietà e libertà, in *Riv. critica dir. priv.*, 1988

Morbidelli Giuseppe, Iniziativa economica privata, in *Enc. Giur.*, XVII, Roma, 1989

Nania Roberto, Libertà economiche e libertà d'impresa, in Nania, Ridola (cur.), I diritti costituzionali, Torino, 2001, I, 69 ff.

Natoli Ugo, La proprietà, I, Milano, 1976

Oppo Giorgio, L'iniziativa economica, in Aa.Vv., La Costituzione economica a quarant'anni dall'approvazione della Carta fondamentale, Milano, 1990, 70 ff.

Pace Alessandro, Iniziativa privata e governo pubblico dell'economia, in Scritti in onore di Tosato E., II, Milano, 1982

Pace Alessandro, Libertà «del» mercato e «nel» mercato, in *Politica del diritto*, 1993, 327 ff.

Perlingieri Pietro, Introduzione alla problematica della «proprietà», Camerino-Napoli, 1970

Pizzolato Filippo, Autorità e consumo: diritti dei consumatori e regolazione del consumo, Milano, 2009

Predieri Alberto, Pianificazione e Costituzione, Milano, 1963

Pugliatti Salvatore, La proprietà e le proprietà, in La proprietà nel nuovo diritto, Milano, rist. 1964

Rescigno Pietro, Per uno studio sulla proprietà, in *Riv. dir. civ.*, 1972, 1

Rescigno Pietro, Proprietà (diritto privato), in *Enc. Dir.*, XXXVII, Milano, 1988, 254

Rodotà Stefano, Il terribile diritto - Studi sulla proprietà privata, Bologna, 1981

Rodotà Stefano, Note critiche in tema di proprietà, in *Riv. trim. dir. e proc. civ.*, 1960, 1252

Sabatelli Francesca, Diritti economici e solidarietà ambientale. Spunti per una funzionalizzazione delle disposizioni costituzionali sui rapporti economici a fini ambientali, in Il diritto dell'economia, 2013, I, 211

Sacco Rodolfo, La proprietà, Torino, 1968

Salvi Cesare, Modelli di proprietà e principi costituzionali, in *Riv. critica dir. priv.*, 1986, 317

Santoro Passarelli Francesco, Proprietà privata e costituzione, in *Riv. trim. dir. e proc. civ.*, 1972, 955

Scaccia Gino, Il bilanciamento degli interessi in materia di proprietà intellettuale, in *AIDA*, 2005, 198

Spagnuolo Vigorita Vincenzo, L'iniziativa economica privata nel diritto pubblico, Napoli, 1959

Sticchi Damiani Ernesto, Studi in tema di liberalizzazioni: riflessi giuridici dell'evoluzione della disciplina, Torino, 2008

Veneto Gaetano, Le libere professioni: dal protezionismo corporativo alle liberalizzazioni. L'Italia e l'UE nel terzo millennio: il lavoro dei professionisti privati e pubblici, Bari, 2007

Vettori Giuseppe, Diritto dei contratti e "costituzione" europea: regole e principi ordinanti, Milano, 2005