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# DEFENSIVE BUREAUCRACY AND RESPONSIBILITY IN THE ITALIAN ADMINISTRATIVE SYSTEM (DEBRIS)

## 1. Brief description of the project

Italian bureaucracy is caught between a rock and a hard place. On the one hand, it must apply legislation from various national, local and international sources which is copious, confused and constantly changing, while juggling decisions that impact an increasing number of interests and therefore call for complex procedures involving an array of stakeholders. On the other, civil servants face extremely strict scrutiny which privileges procedure rather than results and with an accompanying regime of liabilities in terms of disciplinary measures. A level of scrutiny that has become increasingly pervasive in recent decades in the fight against corruption.

In this context, bureaucracy has a defensive reaction. Officials avoid responsibility by avoiding making decisions, by shifting the burden to others, or by seeking opinions or rulings from supervisory bodies to shelter themselves from the risk of administrative or criminal sanctions due to any supposed illegality in their conduct. Defensive bureaucracy has thus become the main bottleneck in the Italian administrative system and is the subject of this project.

The project involves 4 Units, comprising both administrative and criminal lawyers, as well as experts from the School of National Administration (SNA), which participates as a sub-unit of PI Unit.

The main deliverables are as follows:

- A comparison of the Italian system of liabilities with that of other European countries;
- A critical analysis of the imbalance between the over-developed regime of liabilities for procedural errors and the under-developed system of accountability for results in the Italian civil service;
- A set of criteria, based on the analysis of case law, to provide officials with safe guidelines for a non-arbitrary exercise of discretionary administrative powers;
- A comprehensive evaluation, carried out according to a matrix structure, of the impact of various forms of liability (criminal, administrative and civil) in four sensitive areas of administrative action: public procurement, environment, urban planning and external assignments;
- Preparation and submission (through the SNA and its Behavioral Unit) of questionnaires and structured interviews to relevant groups of administrative officials, to evaluate the risk they perceive in making decisions;

- Establishment of a Permanent Observatory on Defensive Bureaucracy to collect, systematically organize, and disseminate relevant data and information to civil servants and other relevant stakeholders;
- The organization, in collaboration with SNA, of training initiatives aimed at clarifying and contextualizing the risk of liability in specific sectors of administrative activity;
- A research report indicating potential reforms to the regulatory framework stemming from the analysis carried out.

## 2. State of the art

Italian bureaucrats often lack adequate training and must apply copious, confused and continuously modified legislation. They also clearly perceive the risk of liability, in the various forms envisaged, cumulatively, by the legal system. This leads the bureaucracy to over-precaution. Civil servants pursue their own personal interest in avoiding liability, neglecting the public interest. Thus, public interest pays the price and despite the need for greater resilience, for more timely and courageous decisions, the perspective of liability represents a brake on efficiency.

Defensive bureaucracy is by no means a form of "legitimate" defense. On the contrary, we could indeed say that it is a variant of the corruption virus. The corrupt civil servant pursues individual gain with collective loss. The defensive bureaucrat avoids the risk of individual loss by sacrificing collective gain. In both cases private interest is unlawfully pursued in place of the public interest. But the "defensive" variant is more subtle, disguised, above all it is not recognized by the immune system of legal checks and balances, which focuses almost exclusively on the "offensive" variant.

In the most recent period, political and institutional awareness of the importance of the phenomenon has spread. The problem of defensive bureaucracy was underlined by the drafters of the so-called Piano Colao (June 2020), by Premier Draghi in his opening speech for the judicial year of the Court of Auditors (February 2021), by the Antitrust Authority in its annual report on competition law in 2021, by the President of the Administrative Tribunal of Lazio (February 2021 and March 2022), by the President of the Council of State (March 2022) and by the Attorney General of the Court of Auditors. According to the OECD, "In Italy, measures introduced to control the risk of corruption expose public officials to the risk of judicial processes with serious penalties, and the number of judicial proceedings against public officials has increased significantly since the early 2000s. While pursuing integrity, these discourage public servants from taking action or from seeking positions of responsibility. For example, public servants in administrations recently subject to judicial investigations are less likely to behave proactively [OECD, 2021].

Italian Legislature has attempted to address this issue and a reform was introduced in articles 21 and 23 of decree law N.76 issued 16 July 2020, with the declared purpose of contrasting "defensive bureaucracy". The Constitutional Court has also expressly recognized the importance of this objective, affirming that it is sufficient to justify the urgency of legislative intervention (C. cost., No. 8/2022). The topic of this research is therefore now widely considered as an essential problem, blocking the administrative system, and which must be urgently addressed to ensure the economic recovery of the country.

### 3. Methodologies, objectives and results that the project aims to achieve

This project analyses the causes of defensive bureaucracy in the Italian system and aims to identify possible remedies. It is based on the following research hypothesis and methodological assumptions.

In the first place, defensive bureaucracy is a phenomenon widely perceived by operators, as mentioned above, but still relatively little studied in the scientific field. There are some significant contributions. However, systematic studies are still lacking, tracing the multiple dimensions of defensive bureaucracy, identifying the forms it takes, verifying correlations between regulatory structures and behavioural practices. The project aims to fill these gaps to generate an evidence-based taxonomy of the causes and consequences of defensive bureaucracy.

Secondly, the project starts from the idea that the reforms mentioned above were too specific and did not address a phenomenon that has deep structural causes in sufficient depths to resolve the issue in any stable and lasting fashion. A more systematic and comprehensive analysis of the impact of the entire liability system on the excessively cautious approach of the Italian bureaucracy is required.

Thirdly, project participants doubt that the solution to the problem can simply come from legislative reforms reducing the scope and intensity of liability. Defensive bureaucracy depends not only on the real risk of liability, but also and above all on its perceived risk [Bottino, 2017]. This in turn is magnified by the degree of uncertainty (ex-ante) civil servants face on how their conduct will be evaluated (ex post) by the courts and other monitoring bodies.

In this perspective, initiatives providing clarification and harmonization of criteria and standards for officials could help predict ex ante the consequences of administrative action, both in terms of ascertaining responsibility and defining the sanctioning treatment. Defensive bureaucracy can also be fought by increasing, rather than decreasing, responsibilities, provided this action focuses on the results achieved, rather than merely the faults and errors committed in the attempt to achieve them. The role of insurance and a hypothetical no-fault regime will also be considered.

The project takes an empirical approach. The analysis will focus on jurisprudence and practice, examining case studies and specific sectors of the administration. Surveys and experiments will be designed to test the perception of liability and to explore the causal relationship between liability and defensive bureaucracy. Particular attention will be paid to how the results achieved could be applied to improve the performance of the bureaucracy, freeing it from a defensive approach. In this perspective, the close cooperation with experts in public management, judges, and institutions such as the Court of Auditors and the National School of Administration are crucial for the success of the project. Finally, the project has an interdisciplinary character. It is based in particular on collaboration between scholars of administrative law (Viterbo - VT; Milan - MI; Pavia - PV) and criminal law (Bologna - BO), but it will also include insights from non-legal disciplines, starting with psychological and behavioral sciences.

The research project structure is divided into 5 work packages. WP 1, 4 and 5 are transversal in nature, as they refer to topics of general relevance to the project (WP1) or to dissemination and management activities (WP4 and WP5). WP 2 and WP3, on the contrary, have a vertical dimension as they consist of an analysis of the phenomenon of defensive bureaucracy that collates types of responsibility and sectors of administrative activity in a matrix structure.

Tables below lists all WPs and Deliverables and illustrate in more detail the matrix structure of WP2 and WP3. A more detailed description of the Units follows.

WP	Deliverables	Title	Responsible Unit	Contributing Institution	Unit of
WP1 State of the Art and Transversal Topics	D1	Comparing European Liability Systems	VT	BO	
	D2	The Dichotomy between Liability and (Lack of) Accountability in the Italian System	VT	MI	
	D3	Legal Uncertainty and Defensive Bureaucracy: How to Predict Court Assessment	PV		
	D4	Who is Afraid of Liability: Analysis of Perceived Risk through Questionnaires and Interviews	MI-SNA	VT	
	D5	Causes of Defensive Bureaucracy and its Remedies: A Tentative List	VT	MI, BO, PV	
WP 2 Types of Liability	D6	Criminal Liability and Defensive Bureaucracy (Evolution and Caselaw)	BO	PV	
	D7	Administrative Liability and Defensive Bureaucracy (Evolution and Caselaw)	MI		
	D8	Judicial Review, Tort Liability and Defensive Bureaucracy (Evolution and Caselaw)	PV		
WP 3 Sectors of administrative action	D9	Public Procurement and Public Contracts	BO (D6); MI (D7); PV (D8)		
	D10	Environment	BO (D6); MI (D7); PV (D8)		
	D11	Building and Urban Planning	BO (D6); MI (D7); PV (D8)		
	D12	External Assignments and Consultancy	BO (D6); MI (D7); PV (D8)		
WP 4 Dissemination	D13	Defensive Bureaucracy Permanent Observatory	VT - SNA	MI, BO, PV	
	D14	Training for Public Servants	VT - SNA	MI, BO, PV	
	D15	Proposals for Reforms	ALL		
WP 5 Project Management	D16		VT	MI, BO, PV	

	<i>Criminal Liability</i>	<i>Administrative Liability</i>	<i>Judicial Review and Tort Liability</i>
<i>Public Procurement and Public Contracts</i>	<i>BO (D6-D9)</i>	<i>MI (D7-D9)</i>	<i>PV (D8-D9)</i>
<i>Environment</i>	<i>BO (D6; D10)</i>	<i>MI (D7; D10)</i>	<i>PV (D8; D10)</i>
<i>Building and Urban Planning</i>	<i>BO (D6 ; D11)</i>	<i>MI (D7 ; D11)</i>	<i>PV (D8 ; D11)</i>
<i>External Assignments and Consultancy</i>	<i>BO (D6 ; D12)</i>	<i>MI (D7 ; D12)</i>	<i>PV (D8 ; D12)</i>

### The Viterbo Unit

The Viterbo Unit will be responsible for dissemination and project management activities (WP 4 and WP5) and for some Deliverables of WP 1, namely D1, D2 and D5. The National School of Administration (SNA) will take part to the project as a sub-section of the Viterbo Unit. It will be responsible for WP 1 - D4 and for WP4 - D14, in cooperation with the Milan Unit.

First, as defensive bureaucracy seems to be more strongly felt in Italy than in other countries, the Unit will carry out a comparative analysis (D1). The system of responsibilities governing Italian bureaucracy has some unique characteristics, including a prosecution unit within the Court of Auditors which automatically investigates potential liability independently from the administration potentially damaged. The comparison of this system with that of other European countries may partly explain why defensive bureaucracy has become such a widespread problem in Italy and could perhaps inspire proposals for a broader reform of the regulatory framework than that already introduced (D15).

Secondly, the Italian system presents an imbalance between liability in terms of procedure and accountability in terms of results. The first is highly developed, in various forms and declinations. It scrutinizes compliance with rules and procedures and punishes the offensive variant of maladministration. However, it favours the spread of defensive maladministration. Reforms in the 1990s aimed at making managers accountable for the results they delivered, or failed to deliver, have remained largely unapplied.

The Unit will carry out an analysis of the reasons underlying this imbalance between the different forms of responsibility (D2), questioning its respective functions (sanctions, compensation, incentives) and areas of application. Also in this case a critical analysis of the current system can fuel proposals for reform aimed at neutralizing the over-cautionary attitudes of the Italian bureaucracy (D15).

D1 and D2 of WP1 are chronologically placed at the start of the research project and logically inspire the vertical analysis conducted by other research units in WP2 and WP3, while deliverable D5 is placed downstream of this analysis (See Section B.1.3). The Viterbo Unit, together with all other units, will try to draw some general lessons from the sectoral analysis carried out and to identify the regulatory sectors, the type of regulations and the most significant jurisprudential orientations in determining the defensive reactions of the bureaucracy and the possible remedies to reduce its impact.

Finally, The Viterbo Unit, with the full involvement of all other units, will take the lead in carrying out dissemination (WP4) and project management (WP5) activities.

Dissemination activities (WP4) will involve three main aspects. Firstly a permanent observatory on defensive bureaucracy (D13) will be set up, in collaboration with the Court of Auditors and with experts drawn from the world of the judiciary and public management. The observatory will collect, systematically organize, and disseminate relevant data and information to operators, host talks and opinions from qualified experts and produce guidelines and operational suggestions to help Italian bureaucracy assess liability risks more accurately, reducing the current gap between perceived and actual risk.

Secondly, in collaboration with the SNA, training initiatives will be organized to raise awareness among officials on the issue of defensive bureaucracy and clarify and contextualize the risk of liability with reference to specific sectors of administrative activity (D14).

Lastly the final research report will include some possible reforms of the regulatory framework that the analysis conducted suggests experimenting (D15).

### **The Bologna Unit**

The Bologna Unit will be responsible for Deliverables D6 (WP2), and D9, D10, D11 and D12 (WP3). The Unit will also contribute to dissemination and project management activities (WP 4 and WP5) and to Deliverables D1 and D5 (WP1).

Firstly, the research unit will examine the prohibitive level of pressure that criminal law has reached within the public sphere, particularly focusing on public procurement and public contracts, environment, building and urban planning, external assignments and consultancy.

The Italian regime of criminal liability for public officials is characterized by a high rate of legislative vagueness combined with a pervasiveness of punitive actions, even when administrative discretion is involved. This tendency has caused the progressive spread of so-called 'defensive bureaucracy', where public officials, potentially exposed to an excessive and disproportionate exercise of punitive action, prefer hyper-precautionary behaviours that undermine the efficiency of the administration as a whole. The UNIBO research unit intends to examine the issue through a comparative analysis in order to identify the peculiar concerns emerging both from legislation and case law (D1).

The latest legislative reforms have contributed to exacerbate the hypertrophy of the punitive system by modifying, in radical terms, the traditional categories of criminal responsibility for public agents. The continuous amendments aiming to broaden punitive legislation (i.e. introducing more severe sanctions while increasing the offences' vagueness through l. 190/2012 and 69/2015, culminating in l. 3/2019, the so called Spazzacorrotti) - have delivered what appear to be almost an 'artificial' set of vague crimes. Since many legislative texts are extremely vague and grievously ambiguous, case law has assumed a subsidiary function, interpreting criminal offences in an extensive manner to maximize the exposure of the public agent to criminal risk. In particular, the Court of Cassation has significantly extended the boundaries of offences connected to bribery in public procurement, paving the way for similar applications which have only recently been reconsidered (Cass., section VI, 5536/2022). It therefore seems useful to enhance research by examining the interpretative canons followed by the highest national Courts (D6), focusing on public procurement and public contracts, environment, building and urban planning, external assignments and consultancy.

Considering the growth of 'defensive bureaucracy', it is also necessary to examine the essential role played by public prosecutors: the threat of being exposed to the negative experience and potential reputational damage caused by the opening of criminal investigations - sometimes manipulated to emphasize efforts to fight corruption - is likely to lead to a substantial paralysis of administrative action (chilling effect) to the detriment of the constitutional purposes that (should) guide public agents.

### **The Pavia Unit**

Regarding the investigations of types of liability (WP 2), the Pavia Unit will deal with judicial review by administrative judges on administrative actions and the various forms of civil liability that the public administration may incur (D8).

Public officials are seldom called directly to answer for the damages caused by the decisions they take and their actions in the performance of their function. However, if the administration is required to pay compensation, it in turn seeks redress from the official involved.

This indirect pressure contributes significantly to the risk perceived by officials, and induces phenomena of defensive bureaucracy, these are as serious as the conditions for the various forms of civil liability of the public administration are imprecise. Moreover officials lack the in-depth knowledge of the relevant case law to evaluate the risk involved correctly.

The research aims to fill this gap, developing accessible knowledge in the WP 3 sectors based on real examples of behaviours that can give rise to disciplinary action and liability, identifying areas of action within which officials can comfortably take decisions without fear of incurring liability.

Since the rules on liability are intimately connected with the principles that govern the correct exercise of the administrative function, it is also necessary to investigate the field of judicial review by administrative judges, and its coherence with those principles governing the regulatory and procedural framework officials must comply with.

The Unit will also provide a contribution to the Bologna Unit under D6, on the use of administrative law by criminal judges, and the comparison between the jurisprudential orientations of criminal judges and administrative judges in sectors WP 3.

As regards the cross-sectional investigations of WP 1, the Pavia Unit will specifically deal with the issue of the uncertainty of the parameters that in general terms should guide the administrative action ex-ante and that are instead established ex-post according to a case-by-case approach, often with conflicting orientations and without coordination between the jurisdictions involved (D3).

Based on the comparisons obtained from the vertical analyses D6, D7 and D8, an attempt will be made to identify the foreseeable contents of discipline for each of the sectors concerned in WP 3 in order to provide officials with safe guidelines for a non-arbitrary exercise of discretionary administrative power.

This area of research is based on the hypothesis that officials are required to make complex technical assessments and discretionary choices within an unclear legal framework due to an essential lack of feedback between jurisprudential processing and administrative practice.

The lack of mutual feedback between judicial practice and administrative activity could hardly be resolved with interventions by the legislator, which would cause further excessive rigidity. Conversely, cognitive interventions aimed at forming corpora (sets of specific guiding criteria) based on jurisprudential indications, such as those that the research aims to elaborate, would be of great efficacy.

### **The Milan Unit**

The Milan Unit-MI will be responsible for works packages in "types of liability" (WP 2) and "sectors of administrative action" (WP 3), and for some deliverables of WP 3, namely D7-D9, D10, D11, D12.

In particular, the research of the Unit will focus on the relationship between defensive bureaucracy and administrative liability (in terms of evolution and case law), and how this relationship is expressed in specific sectors of administrative action: public procurement and public contracts, environment, building and urban planning, external assignments and consultancy.

First of all, it is important to consider that the Italian legal system of administrative liability is different from all other European legal systems (D7).

In other European legal systems public administrations that suffer economic damage caused by administrators and officials, autonomously decide whether to seek compensation via legal proceedings. Whereas in the Italian legal system public administrations damaged by their officials and administrators have two paths to seek compensation.

The first form is mandatory, an official complaint is made to the Public Prosecutor of the Court of Auditors, identifying the administrators and public officials responsible and quantifying the economic damage suffered. The Public Prosecutor investigates and decides whether to file the complaint, or whether to sue the administrators and public officials involved before the Jurisdictional Sections of the same Court of Auditors.

The second form, on the other hand, is optional: together with the complaint to the Public Prosecutor, public administrations can also directly cite the administrators and officials who have caused them economic damage before an ordinary judge.

Due to the “ne bis in idem” principle, and if public administrations intend to pursue both of these forms of protection, when one form of protection obtains compensation for economic damage, the other form fails. This particular configuration of the Italian legal system is, in itself, an important cause at the origin of the defensive bureaucracy (D7): administrators and public officials perceive, for the same harmful fact, a high risk of being judged both by the Court of Auditors and in an ordinary court.

From this point of view, and with empirical analysis, the research aims to verify what is constantly affirmed by the reference literature: public administrations rarely appear to act autonomously, devolving the task to the jurisdiction of the Court of Auditors. After this first analysis, the research will continue by considering how the responsibility of public administrators and officials is decided by the Court of Auditors, and why legislative and jurisprudential uncertainties are capable of strongly increasing defensive bureaucracy.

In this phase of the research we will proceed again with an empirical method, and through two steps: first with reference to the general discipline of administrative liability, and to its application by the Court of Auditors, in its temporal evolution (“first step”: D7); then with regard to how administrative responsibility is applied in specific sectors of administrative action (“second step”: D9, D10, D11, D12).

With the “first step” we want to verify how and to what extent defensive bureaucracy is increased by the permanent tensions between the legislator and the jurisprudence of the Court of Auditors and the Supreme Courts in defining the elements of administrative liability.

In the last twenty years, and in a continuous tug of war the legislator has constantly intervened to limit the perimeter of the Court of Auditors jurisdiction because of the risk of administrative liability and an aggravation of the causes of defensive bureaucracy.

On the other hand, the Court of Auditors emphasizes that many trials and cases end with an acquittal of the administrators and officials who caused the economic damage to public administrations, or with a sentence that condemns them to compensate only a part of the entire economic damage. Thus the real risk of administrative liability is limited to the unlawful conduct of administrators and public officials who are seriously negligent or malicious, and that therefore it is inappropriate to designate fear of liability as a cause of defensive bureaucracy. The purpose of the research is to identify a stable “balance point” between legislation and jurisprudence, the assumption of decision-making risk by public agents and the assumption of risk to be borne by public finances. This balance, and the “second step” of our research, we feel can be more easily identified within specific sectors of administrative action (and not, in general, with reference to all the activity of public administrations): sectors in which administrators and public officials make discretionary and complex choices, often involving multiple public and private actors.

Indeed, it is within these sectors that the decision-making risk of public agents, and the consequences in terms of liability, including administrative liability, are highest: it is here that the perception of this risk is directly proportional to the degree of defensive bureaucracy.

The research continues to employ empirical analysis, since the sectors of administrative activity are so precisely identified (D9, D10, D11, D12): public procurement and public contracts; environment; building and urban planning; external assignments and consultancy.

The aim is to identify the decision-making choices and administrative procedures that - on the basis of the reference regulatory and caselaw framework - maximize the risk perceived by administrators and public officials, in relation to their own administrative liability within these sectors.



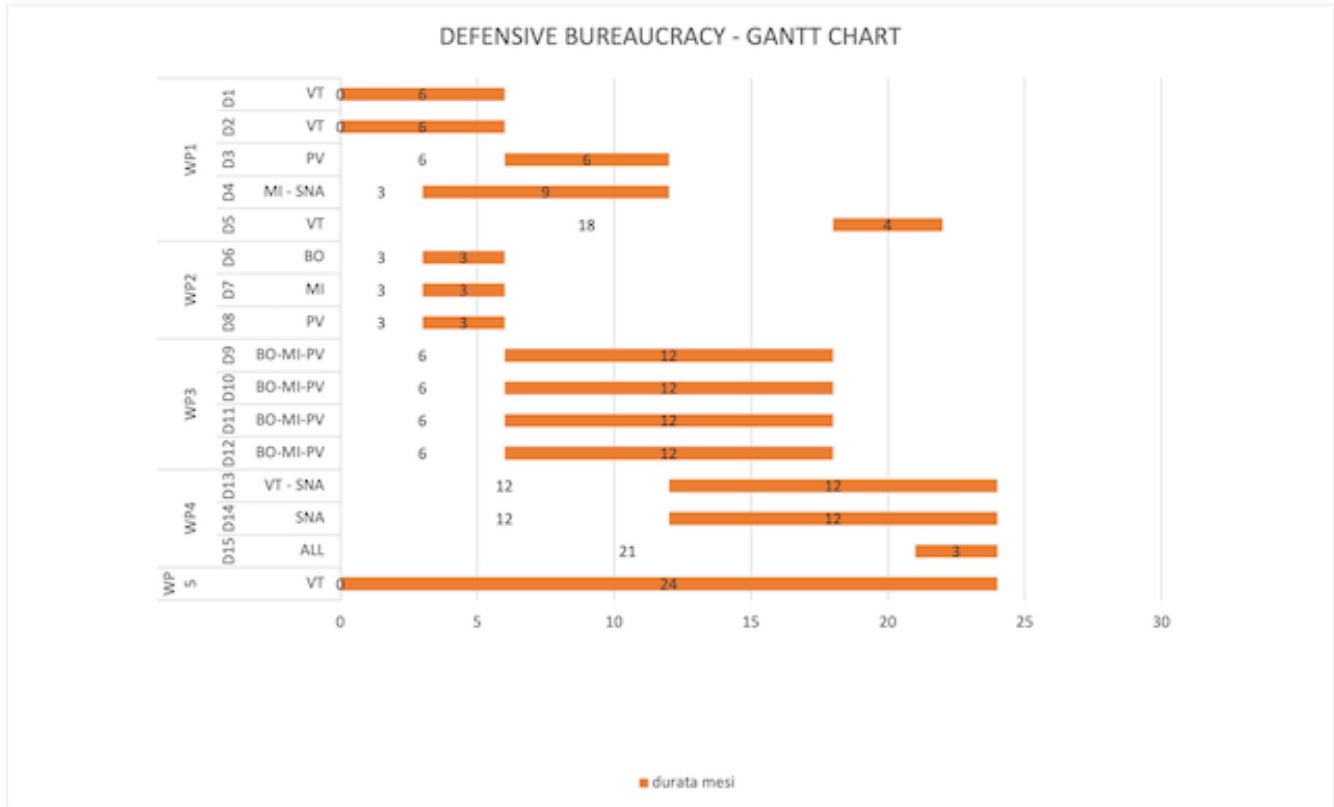
To this end the research will also make use of the studies traditionally dedicated - in both Italian and international literature - to the theme of administrative behaviour and behavioural public administration.

It is a question of verifying, in the so-called “architecture of choice” of public agents, the recurrence of choices based on specific heuristics (in particular the heuristics of availability, representativeness, prospect and framing), often subject to related biases. These heuristics and biases have a strong effect on the perception of decision-making risk, of the risk’s liability, and on the adoption of defensive bureaucracy mechanisms.

It is therefore through understanding these behavioural mechanisms of public agents that it may be possible to identify the reasons underlying their decision-making choices, and at the basis of their choices of defensive bureaucracy, in order to propose positive adjustments and change.

## 4. Project development

To complete the project and achieve expected targets, respecting budget and deadlines, we propose a Work Breakdown Structure divided in 5 Work Packages and developed as per the Gantt Chart in Table below, organized according to the Deliverables illustrated in Section B.1.2. M1 stands for Month 1, etc.



### WP1 - D1-D2 (M1-M6)

The project will start with WP 1 (State of the Art and Transversal Topics). The Viterbo Unit will take the lead in D1 and D2. However, these cross-cutting and preliminary activities require the full cooperation of all the Units in the initial period of the project development, inasmuch as they define the state of the art and the shared knowledge bases of subsequent investigations.

D1 (Comparing European Liability Systems) aims at placing the Italian system of civil servants' responsibilities in the European and international context, through a comparative survey. The investigation will be led by the Viterbo Unit in close collaboration with the Milan Unit. The analysis will focus on the specific elements of the Italian system that could represent exasperating factors for defensive bureaucracy behaviour in public officials.

D2 (Liability and (Lack of) Accountability in the Italian System) examines the overall picture of the types of responsibilities that exert pressure on Italian civil servants and their relationships and mutual overlaps. Different forms of liability may contribute to defensive bureaucracy. Criminal, civil, disciplinary, administrative and accounting liability may have different impacts on administrative decision making. Their overlap and the imbalance between the strong pressure of forms of liability and the poor development of accountability systems for results can generate over-precaution leading to an approach that disregards the objectives and outputs and focuses on primarily compliance.

### **WP1 - D3 (M6-M12); D4 (M3-M12)**

Research activities relating to two other WP1 transversal topics will also be launched in the early stages of the project.

D3 (Legal Uncertainty and Defensive Bureaucracy: How to Predict Court Assessment) addresses one of the main factors on which the defensive bureaucracy depends, that is the degree of uncertainty of public officials about the way in which their conduct will be evaluated by the courts. The regulatory uncertainty generally determines a tendency to over-precaution. It has been argued, from the perspective of the economic analysis of law, that “when the law is vague or ambiguous, chilling behaviour is more likely” (J. De Mot, M. Faure, 2014). The Pavia Unit will take the lead in this part of the project, with the main objective of drawing from the analysis of the case law more precise indications of conduct. The expected duration is 6 months.

D4 (Who is Afraid of Liability: Analysis of Perceived Risk through Questionnaires and Interviews) constitutes an important part of the project led by the SNA. Questionnaires and structured interviews will be prepared and submitted to relevant groups of administrative officials through the SNA. This will allow us to evaluate the risk they perceive in making decisions in relation to the issues and sectors examined. The SNA also has a Behavioural Unit staffed with psychological experts which will make it possible to carry out experimental analysis.

### **WP2 - D6, D7, D8 (M3-M6)**

WP2 (Types of Liability) and WP3 (Sectors of Administrative Action), taken together, are the bulk of the research project. This part has a matrix structure, as it combines types of liabilities and sectors of administrative action, evaluating the impact on defensive bureaucracy of each form of liability in each sector. Leadership is distributed among three Units according to the type of liability taken into consideration and its respective jurisdiction: The Bologna Unit for criminal liability (D6); The Milan Unit for administrative liability (D7); The Pavia Unit for tort liability(D8). Investigations involve two steps. WP2 represents the first step. It focuses, in each of the areas of competence of each unit, on the overall examination of case law, indicating the main doctrines referable to each form of liability and illustrating their evolution over time. Indeed, it is an overarching hypothesis of the research project that the pressure of the Italian liability system has grown enormously in recent decades, transforming defensive bureaucracy from a physiological phenomenon into an institutional emergency. This first level of analysis channel the identification of the most sensitive sectors of administrative activity from the point of view of defensive bureaucracy, confirming, or suggesting modifications to, the structure of the subsequent phase of the analysis. WP2 results will also feed D3 analysis on the relationship between regulatory uncertainty and defensive bureaucracy.

### **WP3 - D9, D10, D11, D12 (M6-M18)**

The second step of the central part of the research project (WP3) concerns the correlation between the administrative regulation of certain sectors of administrative activity and the risk to the officials who apply it of incurring various forms of liability. Therefore, the three units involved (BO, MI, PV) will examine the same sectors, each from the point of view of the type of liability for which they are responsible. The choice of sectors will be based on the results of WP2 as well as on surveys conducted by the SNA under WP1-D4.

However, the hypothesis here is that there are at least four areas of particular importance from the point of view of the defensive bureaucracy, due to the complexity of the rules and the impact of the administrative decisions to be taken.

The first relevant sector is Public Procurement and Public Contracts (D9). It represents an economic sector with a value of around 10 percent of GDP and which has recently been targeted by many legislative reforms, some springing from European regulations.

However, while such reforms favour non-automatic mechanisms for awarding contracts, the civil service tends to refuse the exercise of this discretion and to privilege the application of automatic criteria as a “comfort-zone”, precisely for fear of incurring liability. It is therefore an area particularly exposed to the phenomena of defensive behaviour. This is further demonstrated by the continuous interventions of the legislator aimed at entrusting the construction of public works to extraordinary bodies (commissioners), endowed with ample powers to derogate from the ordinary rules on tenders.

Environment (D10) is a second important sector. It is also affected by the impact of European legislation, in implementation of which the sanctioning regime for conduct likely to harm the environment has been tightened up. Under the pressure of this sanctioning regime, administrative officials are called upon to take difficult decisions, such as the authorization of industrial plants, which must balance the environmental interest with other public interests, such as economic development and employment.

Or public officials have to make equally difficult choices, such as the location of waste dumps, which raise conflicts between different territorial communities, inspired by the "not in my backyard" logic. The real or perceived risk of liability can represent a crucial distortion factor in the adoption of such administrative choices.

Similar considerations could be repeated for the other two sectors examined, which concern, on the one hand, the responsibilities of administrative officials, especially local authorities, regarding the issue of building permits and, in general, the control of compliance of building activities with respect to urban planning rules (D11), and, on the other hand, issues relating to External Assignments and Consultancy (D12). The importance of the latter sector has recently increased significantly for at least two reasons. On the one hand, the freeze on hiring due to the financial crisis has forced public administrations to resort to external consultants. On the other hand, anti-corruption regulations have multiplied legal constraints concerning the procedures for choosing consultants, the remuneration that can be attributed, and the hypotheses of conflict of interest that preclude external assignments. All these rules call into question the liability of both those who assign the task and those who receive it.

#### **WP1 - D5 (M18-M22); WP 4 - D13 and D14 (M12 - M24), D15 (M21-M24)**

In the final part of the research the results achieved in the sector analyses carried out in the previous phase by each unit will be collated, drawing more general conclusions. The Viterbo Unit will lead this activity with the full collaboration of the whole research group (WP1, D5 - Causes of Defensive Bureaucracy and its Remedies: A Tentative List). Secondly, beginning in M12 and up to the end of the project, dissemination activities will be carried out. As already illustrated (See section 1.B.2 - Tasks of the Viterbo Unit), these provide for the establishment of a Defensive Bureaucracy Permanent Observatory (D13), the implementation of training initiatives, mainly with the collaboration of the SNA (D14) and the elaboration of some reform proposals.

#### **WP5 (M1-M24)**

Project management activities are crucial and obviously accompany the entire development of the project itself (WP5). The Viterbo Unit will coordinate the project's partners to effectively synchronize all the project's activities. Regular meetings will be organized with the Research Units' leaders, as well as the other experts and institutions involved in the project. Special attention will be devoted to the dissemination of individual deliverables, the discussion of project's results, and the establishment of a dialogue with key stakeholders, including a close dialogue between public officials and judges, in order to foster mutual trust.

## 5. Possible application potentialities and scientific and/or technological and/or social and/or economic impact

This research project can have a high economic impact, generating scientific knowledge and immediately applicable reform proposals, in particular, to improve the implementation of the National Recovery and Resilience Plan (PNRR). Defensive bureaucracy is now widely perceived as a fundamental factor in the crisis of the administrative system, which, in turn, is reflected on the political and economic system.

PNRR provides for the reform of Italian public administration, considered as a “horizontal reform”, which conditions the achievement of all the other objectives of the plan. It insists on regulatory and administrative simplification and the need to overcome the slowdown factors (so-called “bottlenecks”) that prevent the implementation of projects and, more generally, affect the timeliness of administrative action. Some of the sectors examined in this project (procedures in environmental matters, urban planning, tenders) are expressly mentioned by the PNRR and it is planned to identify “600 administrative procedures in sensitive areas of discipline for citizens and businesses, which will be simplified and reengineered by June 30, 2026”.

In this context, remedies against “defensive bureaucracy” constitute an essential dimension. The attitude of over-precaution of public employees is itself a factor in slowing down administrative procedures. Therefore, to identify the “bottlenecks”, it is necessary to look not only at the structure of the proceedings and the complexity of the rules, but also to consider the officials’ point of view.

Officials are called upon to adopt administrative decisions in the context of a pervasive liability system and in conditions of growing uncertainty, sometimes of real emergency.

The liability regime of public employees is an element which, interacting with the complexity of the discipline to be applied, reflects on the speed and quality of administrative action. An administrative simplification policy that neglects the dimension of responsibility and its effects on the conduct of administrative officials, would be doomed to failure. Often the slowdown in procedures is not the product of a true length or tortuosity of the procedural structure, but of a set of incentives that discourage initiative and instead reward the inertia of the bureaucracy. This has perhaps become the main “bottleneck” that blocks the functioning of the Italian public administration.

The perspective taken by this project, as illustrated in the previous sections, is precisely that of examining in concrete the interaction between the sectoral regulatory frameworks and the system of responsibilities applied by the courts with reference to the administrative choices for the application of these frameworks. Past experience has shown that both general simplification solutions, applicable horizontally to all procedures, and reforms aimed at limiting the scope of the civil servant liability regime in general terms, can produce useful results, but are in the long run insufficient. The PNRR correctly foresees the identification of specific procedures to be simplified, with solutions concretely adapted to each of them. The research project, therefore, may have important applications in the context of the regulatory and administrative simplification policy envisaged by the PNRR for the next few years, integrating the perspective of defensive bureaucracy and the effects of the liability system.

The project can also contribute to the implementation of the PNRR through reform proposals, based on the analysis carried out, which aim at a rebalancing of the system of responsibilities, that is, increasing the role of accountability for the results with respect to the various forms of liability that punish illegitimate conduct. The approach in the PNRR is that of a result-based administration. It makes defensive bureaucracy a serious threat. Defensive administration becomes an obstacle when moving to a result-based administration where resources are provided according to the achievement of the objectives and the deliverables. Providing the appropriate incentives to effective administrative decision making may remove the motivations to engage in defensive administration. Behavioural sciences, applied by SNA Behavioural Unit, can also contribute to exploring causes and to understanding the consequences of defensive bureaucracy.

Furthermore, the project can contribute to other objectives of the PNRR related to public administration, starting with that of training. Defensive bureaucracy, as highlighted in the previous sections, is a product of officials’ ex ante uncertainty about the way in which the legitimacy of their conduct will be assessed ex post. This uncertainty can be reduced by increasing officials’ knowledge, i.e. with adequate training.

Training must certainly cover the legislative rules that the official must apply. But this is not enough. These rules are often subject to different interpretations by the courts and jurisdictions that manage the various forms of responsibility that apply cumulatively to the same episode of administrative life. The systematic analysis of these guidelines, which this project aims at, as well as the production of guidelines and their dissemination through tools such as a permanent observatory, can nourish the training of officials, also through the collaboration of the SNA. And this training can reduce defensive bureaucracy and more generally ensure the timeliness of administrative action.

Finally, defensive bureaucracy is often also the product of a lack of communication and mutual trust. On the one hand, officials perceive a higher liability risk than the real one, because they are not familiar with the orientations of the courts. On the other hand, judges often have a knowledge of the administration filtered exclusively by the laws that regulate it, which they always use as an ex-post evaluation parameter of the administrative action. Also for this reason, in distinguishing negligent, grossly negligent or malicious conduct, they take a different perspective from that of public officials, forced to make the same ex ante assessments, more quickly, with scarce resources at their disposal. The involvement of public managers and components of the courts in the project, as well as their collaboration in the training activities and in the development and implementation of a permanent observatory, can also contribute to bringing perspectives closer and building common views capable of reducing the perception of risk that feeds the phenomenon of defensive bureaucracy.

The research results could be also used for the development of a database focused on identifying the decision-making rules specific to the sectors under research and the associated accountability rules. Therefore an IT consultancy will be in charge of developing the prototype of this database, which could be tested through the SNA and subsequently opened to civil servants on the observatory's website.

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