

The Urban Management of Secondary Raw Materials in the Light of Commons Theory: Circular Economy in Action¹

SIMONE FRANCA, UNIVERSITY OF TRENTO, ITALY

Abstract

This paper intends to verify to what extent the theory of the commons and, in particular, the theory of shared administration can give useful suggestions in dealing with the problems of managing secondary raw materials, in a perspective compatible to the paradigm of circular economy. To this end, the discussion will be divided into three parts. First, the evolution of the regulatory framework for by-products will be analyzed in order to identify whether there is room for bottom-up mechanisms of by-product care. Second, we will examine to what extent by-products can be configured as commons, and what implications this has in the light of the Italian debate on commons. Third, the theoretical and practical scope of the theory of shared administration in the management of secondary raw materials will be analyzed. The analysis conveys the importance of embracing the commons theory and practice in order to concretely implement the circular economy paradigm with regard to the use of by-products.

1. Introduction

Secondary raw materials consist of production process residues or materials derived from the recovery and recycling of waste.

Within the context of waste law, such kind of materials was not distinguished from the general category of waste. The reason for this lack of distinction is rooted in the ratio of Council Directive 75/442/EEC of 15 July 1975 on waste. One of the recitals of the directive stated that *"the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment."* In this perspective, the widening of the concept of waste was considered instrumental for an increase of the safeguard to the environment (de Leonardis 2021, 167; Feliziani 2014, 56).² This perspective progressively changed³, leading to an assimilation of secondary raw materials to "products". More recently, such an evolution has been boosted in the perspective of reaching the goal of circular economy.

¹ This article derives from a paper presented at the IIAS 90th Conference, Public Governance for Climate Action (Track B3. Social Innovation, Commons and Administration, International Institute of Administrative Sciences), held in Brussels, on 15–18 December 2020.

² It should also be noted that the restrictive concept of waste adopted in Italy by Presidential Decree 10 September 1982, No 915 was considered in contrast with the European notion of waste (Iacovelli 2019, 201).

³ On the extent of these changes, see *infra sub par. 2*.

With its Communication "*Towards a Circular Economy: A Zero Waste Programme for Europe*"⁴, the EU Commission has singled out a general approach for the transition from linear to circular economy, based on a more efficient use of resources. In particular – and considering that circular economy does not involve only waste management – a step forward with regard to the field of secondary raw material management has been made through the enactment of the directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (from now on, "circular economy directive"), adopted in the context of the so-called Circular Economy Package.⁵

The EU legislator, although introducing significant changes, as will be specified *infra*, does not seem to significantly affect the concrete management of secondary raw material, since it leaves in this regard a wide discretion to the Member States in the implementation of the directive. From this point of view, the paradigm of circular economy may become a useful tool for Member States to enact industrial policies capable of favouring public-private partnerships for the management of by-products (Antoniazzi 2021).

Nonetheless, it is important to also consider the relevance of the local dimension, especially that of cities, as an autonomous legal space.⁶ In fact, in every urban context, local communities have specific features and may play a central role in the sustainable development and green governance.⁷ Hence, the margin of discretion left to member states seems wide enough to allow the activation of virtuous mechanisms in the management of by-products in a bottom-up perspective, enabling forms of collaborative economy (Molaschi 2020) mechanisms for the exploitation of such resources.

In this regard, it may be useful to refer to the theory and the practice of the commons, considering that they showed throughout time the capability of being instrumental to favour bottom-up initiatives to properly face the issues of local communities (Ciervo 2014).⁸ In particular, in the Italian context, the debate about commons has triggered the experience of shared administration: a model in which taking care of commons becomes an activity that can be jointly carried out by public administrations and citizens.⁹

In light of these reflections, this paper intends to verify to what extent the theory of the commons and, in particular, the theory of shared administration can give useful suggestions in dealing with the problems of managing secondary raw materials, in a perspective compatible to the paradigm of circular economy. To this end, the discussion will be divided into three parts. First, the evolution of the regulatory framework for by-products will be analyzed in order to identify whether there is room for bottom-up mechanisms of by-product care.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Towards a Circular Economy: A Zero Waste Programme for Europe*", COM (2014) 398.

5 The package was announced with the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Closing the Loop: An EU Action Plan for the Circular Economy*", COM (2015) 614.

6 Legal scholarship has thoroughly deepened the concept of the legal order of the city (on this concept, see Cavallo Perin 2019; Cavallo Perin 2013; Frug 1980. On the implications of the legal concept of the city beyond the municipality, see, among others, Auby 2016; Cammelli 2019; Cortese 2020; Roversi Monaco 2016; Tati 2020).

7 Consider, for instance, that over 85% of the GDP of the European Union comes from urban areas (see https://ec.europa.eu/regional_policy/en/policy/themes/urban-development/, last accessed on 16 January 2022). Note also that, at the global level, Agenda 2030 for the sustainable development determines as goal n. 11 the goal of sustainable cities and communities.

8 Bottom-up initiatives regarding commons become important also in a polycentric perspective, involving top-down action (see Mansbridge 2014, 10).

9 On this experience, see *infra sub par. 4 and 5*.

Second, we will examine to what extent by-products can be configured as commons, and what implications this has in the light of the Italian debate on commons.

Third, the theoretical and practical scope of the theory of shared administration in the management of secondary raw materials will be analyzed.

2. From waste to resource: the secondary raw materials between the Waste Framework directive and the case law

Within the context of the European Union, waste law represents a complex legal framework disciplined by several EU directives. In order to sketch out the main features of the legal concept of by-product it is hereby necessary to consider this body of legislation and especially the evolution of the concept of waste, also in the light of the case law.

The main legal act to consider is the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, also known as "Waste Framework directive" (from now on, "WFD").

As this name suggest, this directive represents the basic act in order to understand the legal architecture of waste management: therefore, it is also the central act in order to get a definition of the legal concept of waste.

In accordance with Article 3 (1) WFD, *"waste means any substance or object which the holder discards or intends or is required to discard."*

As one could immediately notice, the notion of waste is traced in a particularly broad way, in order to cover as many typologies as possible. Nonetheless, it is important to underline that the concept of waste is considered through a functional point of view: more specifically, the EU legislator has underlined the role of the holder (even when "required" to act) in "creating" a waste. The determination of the nature of the refusal ("discards") is left to the holder, in particular to his action and even to his intention ("intends"). As the European Court of Justice (from now on, "ECJ") stated several times, the classification of a substance or object as waste is to be inferred primarily from the holder's actions and the meaning of the term "discard".¹⁰

According to such a literal interpretation, the concept of waste is depicted as the result of the choice related to a good that used to be governed by ordinary rules of ownership. Furthermore, it has to be underlined that, according to Articles 10 and 11 of the WFD, the action of discarding can be interpreted as including disposal of waste, but also including actions of recovery (Backes 2020, 331).

In this perspective, the notion of waste may be seen as extremely broad. Nonetheless, the ECJ has played a central role in reducing the scope of application of this notion, distinguishing different situation.

For instance, the fact that a used substance is a production residue is considered evidence that it has been discarded or of there is the intention or requirement to discard it.¹¹ However, in the case law the concept of by-product soon emerged, i.e. any sort of *"goods, materials*

¹⁰ See among others case ECJ12 December 2013, *Shell Nederland*, C-241/12 and C-242/12, par. 37; case ECJ 24 June 2008, *Commune de Mesquer*, C-188/07, par. 53; case ECJ 18 December 2007, *Commission v. Italy*, C-263/05, par. 32.

¹¹ Case ECJ 15 June 2000, *ARCO Chemie Nederland*, C-418/97 and C-419/97, par. 84.

or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue, but as a by-product which the holder does not want to 'discard'.¹² Even if initially the ECJ was quite restrictive in its approach to by-products (considering them as included in the waste law scope of application)¹³, throughout time the Luxembourg Court established a new orientation, distinguishing by-products from waste.¹⁴ This distinction has also been included in the WFD through Article 5, which specifies the conditions to be met in order to consider a substance or object resulting from a production process the primary aim of which is not the production of that substance or object as a by-product.¹⁵

Another way by which the ECJ has restricted the notion of waste is through the concept of end of waste. The basic definition of end of waste is contained in Article 6 WFD.

A waste that has undergone a recovery, including recycling, operation and complies with specific criteria defined in Article 6 of the WFD may cease to be a waste. Also, the notion of end of waste has raised doubts only partly solved by the ECJ: it is necessary to underline that the ECJ considers that end of waste may be reached both by general regulation and case-by-case decisions, but it is necessary to avoid for this qualification to impact the environment or health of the individuals.¹⁶

In light of the above consideration, it can be noticed how the ECJ has gradually reduced the scope of application of waste law, allowing some secondary raw materials (originally included in the waste category) to be conceived again as normal goods.

2.1 The impact of the circular economy directive on the notion of secondary raw material

The legal framework as depicted above has been partly modified with the enactment of the circular economy directive. This directive has the aim of functionalizing EU waste law to the goal of circular economy.

As it has been stated, circular economy is a vague concept, susceptible of several different interpretations.¹⁷ In order to give this expression a concrete meaning we may try to offer a "geometrical" comparison. Circular economy is a concept born in contrast with linear economy: according to the latter, enterprises create positive externalities through productive processes exploiting resources and creating waste; according to the former, the products of productive processes are still considered resources that can open up a new process of production.¹⁸

¹² Case ECJ 18 April 2002, *Palin Granit*, C-9/00, par. 34.

¹³ See, among others, case ECJ 28 March 1990, *Vessoso and Zanetti* C-206/88 and C-207/88, par. 7, where the Court stated: "the concept of waste within the meaning of Article 1 of both Council Directive 75/442 and Council Directive 78/319 is to be understood as excluding substances and objects which are capable of economic reutilization." See also case ECJ 28 March 1990, *Vessoso and Zanetti*, C-359/88; case ECJ 10 May 1995, *Commission v. Germany*, C-442/92; case ECJ 25 June 1997, *Tombesi*, C-304/95.

¹⁴ Case ECJ 18 April 2002, *Palin Granit*, C-9/00, par. 34 and 35.

¹⁵ The conditions are the following: "(a) further use of the substance or object is certain; (b) the substance or object can be used directly without any further processing other than normal industrial practice; (c) the substance or object is produced as an integral part of a production process; and (d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts."

¹⁶ On the issue of defining the end of waste, see, more recently, case ECJ 28 March 2019, *Tallinna Vesi AS*, C-60/18.

¹⁷ Scholars have collected many examples of definition (see Kirchherr et al. 2017; Korhonen et al. 2018). It has been stated that the concept of circular economy is rooted in a market-economy way of thinking (Montedoro 2020, 179).

¹⁸ For wider studies on circular economy and its differentiation from linear economy, see, among others, Cocconi 2019, 2020; de Leonardis 2017a, 2017b, 2021; Ferrara 2018; Scotti 2019. With particular regard to the role of public intervention towards the goal of circular economy, see Celati 2021.

In light of the above considerations, it is possible to shift to the assessment of the impact of the circular economy directive.

From a general point of view, one may notice that this directive basically innovates the legal background through the regulation of the following elements: a) clearer definitions of the fundamental concepts of waste; b) new binding waste reduction targets, to be achieved at the EU level, with intermediate values by 2025 and final values by 2030; c) stricter methods and rules for calculating progress towards the targets; d) stricter requirements for the separate collection of waste; e) stronger commitment to strengthen the implementation of the waste hierarchy; f) minimum requirements applicable to extended producer liability schemes.¹⁹

With particular regard to the discipline of secondary raw material, it is important to analyze the modifications regarding by-products and end of waste.

With the amendment of Article 5 WFD, the discipline of by-products is revised and, in particular, the competence on the adoption of "measures" to ensure the status of by-products is assigned to State Members: essentially, with regard to by-products, without prejudice to the conditions for the classification of by-products already set out by the WFD, the competence to define the relevant criteria at the operational level, in compliance with the supervision of the Commission, is now of the Member States (Muratori 2018a, 525).

Similarly, also in the amendment of Article 6 WFD, the EU legislator has assigned the competence to the Member States on the adoption of measures to ensure that waste subject to a recycling or other recovery operation ceases to be considered as such.²⁰

In the framework of the novelties brought by the directive, with particular reference to secondary raw materials, from this brief analysis we can infer what follows.

A general consideration is that, taking into account the general set of objectives and measures, the approach of the EU legislator seems not new. Considering this whole legal framework, and as has already been noticed, the waste legal regime has always been inspired by an approach directed to the goal of circular economy (Cocconi 2020, 43): nonetheless, in comparison with the past, the circular economy directive provides stricter targets and even a more functional supervision and control system (Backes 2020, 341).

In addition, the EU legislator has limited the Commission's role to that of monitoring the implementation carried out by the member states. This approach is also common to other environmental legislation at the European level and, while it may raise problems of effectiveness²¹, it allows States to seek new means of implementation.²²

3. From waste law to commons approach

In light of such considerations, a concrete circular economy approach entails the reshaping of the means of secondary raw materials management: in this regard, the issue at stake is not a matter of setting objectives, but rather providing concrete instruments.

¹⁹ These elements are emphasized in Muratori 2018b, 141–148.

²⁰ See on this evolution Cocconi 2020, 16–19.

²¹ For example, the issue of effectiveness has been raised with regard to the proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM(2020) 80 final of 4 March 2020 (Giorgi 2021, 22–25).

²² In this perspective the EU legislator seems to build up a form of "experimentalist Governance". On this type of governance see, among others, Sabel and Zeitlin 2008.

In this perspective, it may be interesting to move towards a different approach, namely by referring to the theories regarding the management of commons, for at least three reasons.

First of all, secondary raw materials share many elements with commons, even if they maintain some peculiarities.

Furthermore, secondary raw materials and commons share the same consubstantial need of being regulated for becoming resources useful for the relevant community.

Finally, the management of commons (not only in Italy) has shown the rise of many practices of management of goods representing a model.

In order to properly outline a framework for secondary raw materials management based on commons theory and praxis, the following paragraphs will hence be dedicated to showing why waste can be seen as commons and which kind of repercussion are foreseeable when implementing the tools of commons management in waste management.

3.1 Some hints on the commons debate and the role of Italian legal theory

From the pioneer study of Hardin, legal scholars have become familiar with the so-called tragedy of the commons: according to this theory, some goods (the commons) when left to a collective and uncontrolled use may be undermined; in the worst scenario, this use can lead such goods to destruction (Hardin 1968).

According to Hardin the problem is caused by the non-exclusive and rival character of these goods: in other words, given that users cannot be excluded from the use of the common and, at the same time, users are rivals among them in this use, commons can easily be depleted.²³ Hardin believes the solution could be to shift from collective to private ownership.

From a totally different perspective, we can recall the results of Elinor Ostrom (Ostrom 1990). Ostrom showed that it is possible to lay down a different method of management of commons based on a voluntary and responsible self-organization by the community accessing the commons. The perspective of Ostrom – especially through the elaboration of the eight design principles for managing the commons (Ostrom 1999)²⁴ – underlines some other elements, namely the responsible use of commons²⁵ and the possibility of using commons in order to satisfy the needs of a local community.²⁶

²³ For a reading of Hardin's theory in this perspective see, among others, Bowles 2004, 128–131.

²⁴ The principles are the following: "1. Individuals or households with rights to withdraw resource units from the Common Pool Resource and the boundaries of the Common Pool Resource itself are clearly defined; 2. Use rules restricting time, place, technology, and/or quantity of resource units are related to local conditions and to provision rules requiring labor, materials, and/or money; 3. Most individuals affected by operational rules can participate in modifying operational rules; 4. Monitors, who actively audit Common Pool Resource conditions and user behavior, are accountable to the users and/or are the users themselves; 5. Users who violate operational rules are likely to receive graduated sanctions (depending on the seriousness and context of the offense) from other users, from officials accountable to these users, or from both; 6. Users and their officials have rapid access to low-cost, local arenas to resolve conflict among users or between users and officials; 7. The rights of users to devise their own institutions are not challenged by external governmental authorities; 8. Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises."

²⁵ This idea is implicit in the understanding of the 1st principle elaborated by Ostrom: this principle shows it is necessary to discipline "boundaries" in order to grant a responsible use of the good, without undermining it. Also, the idea of users' responsibility is linked to the system of accountability enshrined according to the 4th and 5th principles.

²⁶ This element is particularly clear according to many principles, but especially the 2nd and the 8th: in fact, the management of commons should be thought in the light of the concrete needs of local communities; even when commons are particularly wide, it should be provided a multi-layered organization in order to match the different local needs.

Against Hardin approach, other "narratives"²⁷ may be recalled about the commons, like the comedy of commons and the tragedy of anticommons.

The former – developed by Rose (Rose 1986) – has allowed it to understand that from a collective management of commons positive externalities or positive scale returns may be generated (Frischmann et al. 2019, 223).²⁸ The latter – developed by Heller (Heller 1998) – has demonstrated that forms of fragmentation of ownership on commons in too little forms of ownership may determine an underuse of commons²⁹: in other terms, trying to solve the issue of waste through a strictly market approach, transforming collective ownership in several private ownerships, may lead to another tragedy.

Thus, in order to sum up the different perspectives of the mentioned authors, commons may be seen as a typology of goods that require a peculiar strategy of management: a form of cooperative management of commons following the perspective of the comedy of commons (in order to avoid both the above-mentioned tragedies).³⁰

Bearing such considerations in mind, we can focus on the Italian debate, trying to isolate what can be understood as an Italian legal theory of commons.³¹

It should be noticed that many Italian legal scholars refer to commons as a concept pertaining to the Western legal tradition, especially rooted in Roman and medieval law (Ciervo 2012, 45; Dani 2014, 10). According to such a view, the "common" dimension is nothing new, but rather it is an alternative to ownership regimes that became more widespread in the modern era (Grossi 1977; Grossi 2019). This does not mean that the old concept can just be transplanted in modern times³²: in fact, looking at the contemporary Italian legal texts about commons one may notice the plural way to reconstruct the phenomenon of commons, not only grounding legal theories on the same, premodern concept of commons.

According to a recent classification (Cortese 2016, 39-42), some commons theories are instrumental to creating a new idea of the public: according to such theories, commons represent a means i) for opposing the stream of privatization (Mattei 2017b, 147, 2015, 2013, 2011; Mattei et al. 2007); ii) to develop forms of safeguard, also in the interest of future generations (Lucarelli 2007a, 2007b, 2015, 2021); iii) more generally, to bring back to the public sphere certain utilities in order to make them functional for the tasks of the democratic and social state (Rodotà 2013).

Second, there is another stream of authors conceiving commons as a factor triggering new forms of cooperation between administration and citizens, requiring responsible management from administration and citizens and also overcoming the distinction between private and public towards a model of shared private-public management (Arena 1997, 2016, 289-292, 2021, 3).

²⁷ The role of storytelling in the commons has been emphasized, especially in favouring the spread of applications and the exchange of opinions (Daniels 2019, 91-105).

²⁸ The expression "comedy of the commons" was originally developed in Rose 1986, 711-781.

²⁹ The expression of "tragedy of anticommons" has been employed (Heller 1998, 621-681). For example, this theory has been employed with regard to the establishment of renewable energy plants and transmission networks (Bellantuono 2014, 325-354).

³⁰ It is worth noting that, originally, Heller believed that the remedy of the tragedy of the anticommons could have been avoided only by leaving private ownership of commons to just few owners. Rather recently, Heller has stated that the vision of Rose is actually preferable with reference to some kind of commons (Heller 2019, 73).

³¹ We employ the expression "Italian legal theory" in accordance with the expression "Italian theory" as a philosophical stream based on Italian tradition. For an analogous use of the expression, see Cortese 2016, 58-61 who refers especially to Esposito 2014.

³² Regarding the risk of arbitrary use of the concepts employed in different historical periods, see Ferrante 2013, 329.

Considering all the issues raised by the several theories recalled so far, in harmony with part of the legal scholarship (Bombardelli 2016, 15–28, 2018a, 306–314), we may identify the following elements as typical of the legal phenomenon of commons: a) non-excludability; b) rivalry; c) responsible management; d) link to satisfaction of essential needs; e) being extraneous to market approach; f) reference to a common dimension; g) usability in absence of ownership; h) being beyond public-private dichotomy.

Nonetheless, such a list of commons' features need not be conceived too rigidly, ossifying the notion of commons, which should maintain, on the contrary, an open character (Gambaro 2013; Vitale 2013, VIII). As has been stated, the notion of "commons" conveys a wide range of different phenomena and has granted pervasiveness of the theme of commons in the most diverse legal and extra-legal contexts (Cortese 2018, 14). Moreover, it has been specified that the open character of the notion of commons allows it to move towards a different approach, underlining the role of interests: in other words, the reference to commons allows it to rethink the discipline of some goods focusing on the interests that are beyond their regime of management (Simonati 2016, 107–109, 2020, 168–172). In this way, the category of commons, even if not too strict, may be useful to make emerge the concrete asset of interests involved in a specific situation of goods' management.

3.2 Secondary raw materials as commons?

In light of the above considerations, we may notice many parallels between commons and secondary raw materials. For a long time secondary raw materials were considered as just waste: in this way, like all waste, they were considered to undermine the non-excludable and rival good of public hygiene and wealth of environment.³³ In this way, they may trigger the typical situation of "tragedy of the commons", if left without any kind of regulation capable of limiting their impact on the environment. At the same time, looking at the problem of secondary raw materials through a merely market-oriented approach (such as, for instance, embracing a too liberal conception of circular economy) could lead to the risk of the opposite tragedy, the one of anticommons. The fragmentation of ownership on such goods may represent a disincentive in properly valourizing these goods, tragically leading to their underuse. On the contrary, by considering secondary raw materials in their nature, as a common resource³⁴, at disposal of the public and private actors independently from their own ownership, it may favour a real implementation of a circular economy compatible with the idea of sustainable development.³⁵ In this way, it may be framed as an approach based on a responsible use of the secondary raw materials by their users. Considering that these resources, whether underused or abused, may impact on the exercise of public functions – considering that the bad management of such resources may lead to an increase in the production of waste –, public administration, on one side, and civil society, on the other side, should take the chance to cooperate in regulating the management of secondary raw materials. This way of thinking may also be seen from a different perspective, if we focus on the interests involved in the management of such goods (Simonati 2020, 174) in accordance with the approach

³³ About management of waste as linked to the concept of public hygiene within the context of urban commons, see Frego Luppi 2016, 13.

³⁴ It is important to specify that the qualification of a good as a resource is not aimed at bringing about a market-approach of commons, favouring a capitalistic point of view on commons (see against the market-approach Donolo 2012, 19–20).

³⁵ On the interplay between these concepts, see Cocconi 2020, 1–21.

we presented before. There are many interests involved in the management of these goods, both public and private: moreover, such interests converge towards the same value, such as the safeguard of environment and public hygiene, but may also converge towards the goal of circular economy, when producing positive externalities for the community involved. In this way, the convergence may show the existence of a general interest, capable of being pursued through a common effort from administration and civil society.³⁶

To this end it may be interesting to dive deeper into a peculiar form of commons management experienced in Italy, based on the pursuit of general interest, which could be seen as a reference, in order to frame a model of shared management by administration and civil society actors.

4. Commons and shared administration: theoretical elements, actors and tools

In Italy, the model of shared administration has been theorized at the end of the last century.

According to this theory, the collaboration between administration and citizens may allow a solution of the problems of general interest better than the classical, vertical model, based on a separation between administration and (active) citizens.³⁷

This perspective was originally based on a reading of the relationship between public administration and citizens in the light of two constitutional principles: the principle of equality and the principle of autonomy.

The principle of equality, as enshrined in art. 3 (2) of the Italian Constitution in its substantial dimension, implies that the full development of every person is one of the main objectives of the administration³⁸: to this extent the administration is just a means for the realization of the individuals. Thus, the citizen cannot be understood as subject to public administration, but instead as a protagonist with the public administration of the full achievement of equality (Arena 1997, 45-46 ; de Pretis, 2022, 40).

The principle of autonomy, as provided in art. 5 of the Italian Constitution, apart from safeguarding local communities and institutions from the central ones, recognizes the capability of self-organization of such local communities (Benvenuti 2006a, 2719; Berti 1975, 288): more specifically, this "relational" version of the autonomy principle directs the self-organization into the development of paritarian relationship between public and private actors, each one conceived as a reference centre of different kind of interests (Arena 1997, 46-49).³⁹

Merging these two principles it is possible to create a constitutional ground capable of supporting the theory of shared administration.

In the following years, with the reform of the 5th Title of the Italian Constitution this theory has been boosted by a new principle: the principle of horizontal subsidiarity.

³⁶ For the distinction between the three different poles of public, private and general interest, see Arena 2020b.

³⁷ On the concept of "active citizens" see Arena 2006 and, on the organizational features see Bombardelli, 2022, 137-143.

³⁸ Since the administration is part of the Republic, the duties of the Republic, in this regard, are also on the administration. On the implication of art. 3 (2) of the Constitution for the public administration, with particular regard to positive actions, see, among others, Ainis 1992, 582-608; Cerri 1999, 7-24; D'Aloia 2002; Giorgis 2006, 105-111.

³⁹ This approach is clearly based on the concept of demarchy as described in Benvenuti 2006b, 957-960.

The principle of horizontal subsidiarity is now contained in Article 118 (4) of the Italian Constitution, which states "*The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.*" As has been stated, this principle entails that public intervention should be considered subsidiary to the assumption of subjectivity and responsibility by citizens (Pastori 2005, 1761)⁴⁰, and it can be fully understood if combined with the already mentioned articles of the Italian Constitution (Arena 2017).

It is interesting to note the link that was created between this theory and the theory of commons. Profiting from the open character⁴¹ of the notion of commons and from the scope of the horizontal subsidiarity principle, a regulation of commons has been developed based on secondary level sources (municipal regulations) drawn up according to a model developed by the association "Labsus" in collaboration with the Municipality of Bologna and then adopted by a significant number of Italian Municipalities.

One of the most important aspects of the discipline of these regulations is the provision of a specific legal instrument for the shared management of commons: the collaboration pacts.⁴² These are consensual acts conceived not only to regulate the relationship between the administration and active citizens with regard to the use of the good, but also three moments considered extremely relevant in the care of common goods, namely: i) the identification, involving the community at stake, of the need to be satisfied; ii) the definition of the modalities of access to the good in the framework of a community relationship; iii) the attribution of responsibilities that must be shared in the interventions on the good (Bombardelli 2018b, 563-566).⁴³

In this way, the shared administration theory has allowed it to give a theoretical background to a new form of administrative action⁴⁴ carried out by co-administrators.

Throughout the years the model has become quite widespread: from a quantitative point of view, this model has been enacted in 44 municipalities, and 830 collaboration pacts have been subscribed.⁴⁵

Moreover, the concept of shared administration has also been recently summoned by the Constitutional Court: the model of shared administration has been expressly recognized as grounded on the Italian Constitution and as providing a legal framework for the relationships between the third-sector actors and the public administration in pursuing the general interest.⁴⁶

In this perspective it is clear that the pole of general interest (and, consequently, the model of shared administration) may assume different forms: firstly, it is constituted by the relationship between the third-sector actors and the administration and, secondly, by the relationship between active citizens and the administration.

40 On the scope of the subsidiarity principle, see also Antonini 2000, 99-115; Cerulli Irelli, 2003, Rescigno 2002, 5-50.

41 See supra par. 3.1.

42 On the qualification and on the features of collaboration pacts, see, among others, Giglioni, 2022, 86-93; Giglioni and Nervi 2019, 272-278; Michiara 2016; Calderoni 2016; Fidelbo 2018; Franca 2018.

43 See also Mattei 2017a, 87-100 on the limits of the pacts of collaboration and their possible enhancement through more participation in the political choice of priorities.

44 The spread of regulations on the shared administration of common goods has given rise to the development of an administrative function, in particular a function of the enabling State (Chiti 2017).

45 Data according to the 2019 Report of the association Labsus.

46 Case Italian Constitutional Court, 26 June 2020, n. 131 (on this judgement, see Arena 2020a, 1449-1457; Cerulli Irelli, 2022, 24-26; Galdi 2020, 88-121; Rossi 2020, 1184-1196).

5. Some examples about the shared administration on the management of secondary raw materials

By accepting the model of shared administration of commons and importing it in the field of secondary raw materials management it is possible to develop and implement models of co-management of secondary raw materials, based on public-private partnerships. Regarding the forms of such a partnership, a good model could be seen in the collaboration pacts, adopted on the basis of shared administration municipal regulation. There are already some examples that may show the potentialities of this model in giving a framework to the management of secondary raw materials.

A first example concerns an initiative regarding the collection of unconsumed food in order to favour the consume of products that otherwise would be wasted. This initiative has been regulated by three collaboration pacts in the municipality of Genova.⁴⁷ This initiative is also particularly important because it concerns a particular kind of by-products, namely consume by-products: as has been stated, to fully embrace the idea of circular economy it should be necessary to include into the notion of by-products even the raw materials obtainable from under-consume of food (de Leonardis 2017a, 195).

Thus, in this case the collaboration pacts shape a new form of collaboration compatible with the circular economy model. The actors involved in this collaboration are both no-profit associations and for-profit organizations, and for such private parties the collaboration pacts also entail the application of principles such as transparency, proportionality and sustainability.⁴⁸ Moreover, the obligations of the parties regarding the target also include the sensibilization of citizenship⁴⁹, in the perspective of spreading the good practices.

A second interesting case concerns a classic topic of collaboration pacts: the regeneration of a public flowerbed. The interesting part is that in one of these collaboration pacts – namely one subscribed with the municipality of Trento⁵⁰ – the management of the flowerbed is implemented using recycled materials. This example is particularly important, since it shows how also the usual management activities typical of the shared administration model may have a spill-over effect of environmentally friendly best practices and especially in alignment with the circular economy paradigm. It should be underlined that this pact is very simple in its structure. Even if the pact is subscribed only by the municipality of Trento and a non-profit association, it obliges the parties to favour the participation of other citizens, especially the ones living in the neighbourhood.⁵¹ Within the pact it is expressly stated that the materials to be used for the regeneration activity should be recycled materials.⁵²

A third case that could be considered concerns again the municipality of Genova. In this case, the pact concerns the management of several centres for the reuse and reparation of goods.⁵³ The pact was subscribed by the municipality of Genova and three associations of

47 The collaboration pacts are available at <https://www.labsus.org/2019/03/genova-speranza-grida-piu-forte-la-comunita-di-ricibo/> (last accessed 16 January 2022).

48 Cf. art. 3 of the three pacts available at the link quoted in note 69.

49 Cf. art. 2 of the three pacts available at the link quoted in note 69.

50 The collaboration pact is available at <https://www.labsus.org/2019/07/trento-dallaiuola-allinteresse-generale/> (last accessed 16 January 2022).

51 Cf. art. 1 of the pact available at the link quoted in note 73.

52 Cf. art. 3 of the pact available at the link quoted in note 73.

53 The collaboration pact is available at <https://www.labsus.org/2021/06/riuso-e-riparazione-un-patto-per-leconomia-circolare/> (last accessed 16 January 2022).

active citizens. This pact can be considered different from the others because it has been conceived in the context of an EU project that also provides some source of financing. This circumstance shows that the form of activities conceived within the context of the model of shared administration can also be seen as a tool to attract funding, even from the EU.

6. Conclusions

At the end of this analysis, we may try to indicate some conclusions. The set of the objectives of circular economy, in parallel to the restriction of the scope of application of waste law, have opened up the possibility for all the member states to discipline the management of secondary raw materials, making a resource out of them. However, this opportunity requires sketching out concrete legal instruments in order to implement the circular economy model. From this point of view, the debate about commons showed to be useful both from a theoretical and a practical point of view. From the theoretical point of view, we assessed how the debate about commons may be seen as a good reference point in order to better understand the problems of secondary raw materials. From the practical point of view, we presented the paradigm of shared administration of commons, as a possible chance to give a flexible legal framework for the management of secondary raw materials. This form of management can be seen as advantageous from several points of view.

First, it favours a bottom-up approach to the problem of secondary raw material management. The collaboration pacts make the community the protagonist of this bottom-up initiative, generating social innovation and also favouring the acceptance of public choices by the citizenship.⁵⁴ The examples of collaboration pacts we analyzed may confirm this assumption.

Furthermore, it favours local solutions for the disposal of waste, as stated originally by Ostrom, but also by the best practices of the shared administration model. It is also worth noting that, as held by the EU Legislator, urban waste still represents a problematic issue to be regulated, especially considering the peculiarities of the community at stake.⁵⁵ In this perspective, dealing with secondary raw material at a local level may favour the finding of solutions.

Eventually, this approach may lead to a full embrace of the paradigm shift (de Leonardis 2017b) implied by the circular economy and to a factual implementation of this model, not only through a market-based approach. Circular economy, instead of being based only on incentives and regulation centred on the role of companies to recycle or reuse waste, can also be grounded on concrete sensibilization and activation of citizenship and third-sector actors.

In this way it is also clear that the notion of commons, especially as long as conceived through the lenses of shared administration, may represent a good lockpick in order to unhinge the actual setting of secondary raw materials management, focusing more on the asset of interests involved in the activity.

⁵⁴ On the capacity of collaboration pacts of being sources of social innovation, see in particular Ostanel 2017, 42-45.

⁵⁵ Cf. recitals 6-7 of the circular economy directive.

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Simone Franca (simone.franca@unitn.it) is a post-doc research fellow in Administrative Law at the University of Trento Italy. After attending the Academy of European Public Law (Athens-Sounion), he took the Intensive International Master of Law (I.I.L.L.M) in European Public Law and was awarded the "Luis Ortega" Thesis Prize.