A law-enactment game:
the Government- Council of State interaction In Italy

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Abstract

In this paper we present preliminary findings of the analysis on the political determinants of Council of State activation. The Council of State, that in the Italian political system is both the highest administrative court and a consultative body of the government, provides a mandatory *ex-ante* control on a specific type of government's acts (regulations). We test the hypothesis that certain political circumstances (government division, presence of alternation) can influence governments propensity to chose regulations instead of other types of acts, activating more the Council of State as a consequence.

The Council of State. A peculiar institution under investigated from a political science perspective

The Council of State is one of the most enduring institutions of the Italian political system. Born in its very origin (1831) as a sort of consultative authority of the King, the Council of State has been able to modify its political functions and to successfully adapt to the different regimes (Meny 1994). Actually, it is at the same time the highest administrative court (the second and ultimate level of decision after the regional administrative tribunals) and a consultative body of the government. As government consultative body, Council of State provides a compulsory *ex-ante* control on important categories of government's acts: regulations. This control wants to ensure that the acts provided by the government are coherent with primary laws and with the administrative procedures. At the same time, this control anticipates the orientation of the institution, in case it should act as a court. As a court, the Council of State could in fact examine in appeal the legitimacy of the regulations adopted by the government.

The peculiar configuration of the institution, that belongs to both, the executive and the judicial power, has traditionally led governments to co-opt Council of State members in key administrative positions inside ministries (head of cabinets, head of legislative office, legal adviser). This made its members an influential *élite*. Several Italian law scholars (see for all Cassese[1], 2014) argue that the Council of State has been acting as an administrative and therefore, indirectly, as a political consultant of the government. The biographies and the *cursus honorum* of its members have been object of the study of history of public administration's scholars[2].

Nevertheless, this *élite* has been also highly criticized, especially in recent years. Some commentators have underlined the negative effects of the conflict of interests of the institution[3]. Others have repeatedly accused the Council of State of being a "caste",

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1 Sabino Cassese is a prominent Italian jurist and public administration's scholar. Minister of Public Service during Ciampi government (1993-1994), he is currently a judge of the Constitutional Court.

2 One of the most accurate research is Melis (2006), on Council of State members' biographies between 1861 and 1948.

3 The negative effects concern the quality of the control that the institution should exercise. A 2015 article by a newspaper editorialist reports this fact http://ricerca.repubblica.it/repubblica/archivio/repubblica/2015/03/22/come-battere-la-corruzione-e-come-costruire-la-nuova-europa29.html?ref=search

whose members take advantage of their position, accumulating public offices and the relative salaries[4]. A recent report provided by Monti Government[5] includes the Council of State's consultative function on regulations in the "external causes" for the late implementation of several primary laws.

Regardless of the criticism of commentators, it is a fact that governments have traditionally opted for Council of State members' expertise inside ministries[6]. The necessity to anticipate the decisions of the institution when performing its legal *ex ante* control and, eventually, when acting as a court, explains the governments' preference for reserving key positions inside ministries to the Council of State members[7]. The credible threat, for government, of having its acts stopped or nullified by the Council of State have also contributed to the predominance of legal, bureaucratic control over secondary legislation acts. This has been at the expense of other types of evaluations, more oriented to the analysis of the policy outputs and outcomes.

Except for the study of Righettini (1998), which is focused on Council of State members' extra-judicial offices, the interaction of Council of State with Government has never been investigated from a political science perspective. In this paper we try to test the hypothesis that peculiar political conditions could trigger Council of State intervention. In particular, we relate specific political variables (government division, presence of alternation) to government's propensity to chose between different types of secondary legislation acts. Some acts imply the Council of State intervention, others don't. As a consequence, we verify if there are political conditions in which governments are more prone to activate the Council of State.

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4   A 2009 article from the column *Palazzo* (literally "the Palace") of the magazine Espresso reports the benefits of the extra-judicial offices http://espresso.repubblica.it/palazzo/2009/10/08/news/consiglio-di-stato-e-di-casta-1.16244
5   See the 2013 report on the status of laws implementation of Monti government, p. 10 http://www.governo.it/Presidenza/ufficio_statistica/documenti/rapporto_amministrativo.pdf
6   The spread of the extra-judicial offices is well documented. Righettini (1998) collected the Council of State members' extra-judicial offices between 1948 and 1994. Data on extra-judicial offices between 1995 and 2005 can be found on a specific section of the journal *Consiglio di Stato: rassegna di giurisprudenza e dottrina*, Italedi. Data from 2006 up to now are publicly available on the administrative justice website.
7   This fact was confirmed in an interview with a legal adviser of the incumbent Council of Ministers.

A policy conserver court between the executive and the judiciary

The Council of State is structured around three consultative and four jurisdictional sections. One of the consultative sections (the "consultative section for normative acts") provides mandatory opinions on government's regulations. Currently, the Council of State has 104 judges, that rotate between the sections. The Council of Presidency of Administrative Justice[8] each year decides the sections' composition and judges are assigned to both, jurisdictional and consultative ones, throughout the course of their career. Council of State as a court can be activated only as second and last instance court for appeals against judgements of regional administrative tribunals. Regional administrative tribunals (TAR), set up in each region, are the organs of first instance against decisions of the executive branch. 50% of Council of State members is recruited among regional administrative tribunal judges with at least four years of experience; 25% is appointed by the government among university professors of law, lawyers admitted to specific Bars and with at least fifteen years experience, ministerial and other public administration's officials; 25% is selected through a competitive examination among regional administrative tribunals judges with at least one year experience, ordinary and military judges with at least four years experience, *Corte dei Conti*[9] judges, state lawyers with at least one year experience, chamber of deputies officials with at least four years experience, state officials with a law degree. It is not possible to attribute substantive policy preferences to the Council of State. Contrary to the case, for example, of Italian civil judges, administrative judges' national association is not organized into partisan factions[10]. Even Council of State members that hold extrajudicial offices do not have a long-term political affiliation. During the Italian "Second Republic" (1994-present), 88% of judges that held extrajudicial offices in more than one cabinet in the same policy sector was appointed by both, center left and center right

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8   The self-governing body of administrative justice.

9   Corte dei Conti is an Italian court responsible for the ex ante audit of Government acts' legality and for the ex post audit of the State Budget's management.
    http://www.corteconti.it/english_corner/chi_siamo/the_role_italian_corte_conti/

10 Trial courts' judges are organized in a national association whose factions reflect the traditional left-right conflict in the society (Guarnieri 1992). This association plays a relevant role in their Higher Council and in their judicial activity (Ceron and Mainenti 2015). Instead, the national association of administrative judges is not as relevant and it is not divided into partisan factions.

governments[11]. Council of State's behavior can be rather explained considering its institutional position (Ferejohn and Weingast, 1992). As government consultative body and as second instance court against executive branch decisions, Council of State checks if the exercise of public power is legal. In particular, Council of State opinions on regulations verify if the procedure to adopt them was correct and how well regulations comply with primary laws. With this kind of legal control, Council of State tends to limit ministerial discretion. This control can become convenient for coalition parties, when specific issues generate conflict between the ministries. We can consider the example of veterinary legislation. On veterinary issues, both Health and Agriculture Departments claim the competence to adopt regulations. Inter-ministerial regulations are usually adopted in these cases, but the risk of ministerial drift, even when an initial agreement between the ministers has been reached, persists in the implementation process. Council of State's control ensures that both the departments are involved and that the final draft of the regulation reflects the agreement between the ministries. In this sense, Council of State acts as a sort of "guardian" of the procedures. Moreover, Council of State is a policy conserver court (Steunenberg, 1997). As a policy conserver court, it is willing to maintain the *status quo* given by the existing regulations. The preference of Council of State for the status quo is related to two main factors. First, judges' turnover is particularly low: 94% of chairs of Council of State's sections in 1998 was already member of the institution 10 years before, in 1988. 90% of chairs of Council of State's sections in 2015 was already member of the institution in 2004[12]. Therefore, it is reasonable to assume that Council of State judges prefer the existing regulations, that they have already approved, to further regulations. Second, Council of State is interested in containing changes to the existing regulations in order to prevent the possible increase in litigation.

The choice between regulations and general administrative acts.

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11 Data on extrajudicial offices in four policy sectors: economy, education, justice, interior, defense, collected from the journal *Consiglio di Stato: rassegna di giurisprudenza e dottrina*, from Righettini (1998) and from the administrative justice website.

12 Data from: *Consiglio di Stato: rassegna di giurisprudenza e dottrina;* administrative justice website; official document *Ruolo di anzianità del personale del Consiglio di Stato e dei tribunali amministrativi regionali*, 2007, provided by Istituto Poligrafico e Zecca dello Stato.

Governments generally adopt regulations (*regolamenti*) to implement primary laws. Regulations can be approved by the single ministers, by the ministers jointly, by the president of the council of ministers and by the full cabinet[13]. Law scholars have nevertheless noticed that another category of acts: the general administrative acts (*atti amministrativi generali*) is used "as if" these acts were regulations. General administrative acts should not have an innovative and political content. But, according to law scholars, governments tend to use them as substitutes for regulations[14]. The procedure to adopt general administrative acts is in fact faster. While regulations are subject to the mandatory opinion of the Council of State[15], general administrative acts are not. Both the categories of acts can be subject to the judgment of the Council of State when acting as a court. But, only regulations' drafts must be submitted to the Council of State for its *ex ante* bureaucratic control. Council of State provides opinions, that can be positive, interlocutory or negative on each draft of regulation. In case of interlocutory opinion, the procedure becomes longer, because government has to resubmit a revised version of the draft to the Council of State. In case of negative opinion, government has to evaluate if complying or not with Council of State warnings, knowing that the Council of State could be called to judge the legitimacy of the same regulation as a court. The procedure can be summarized as follows, according to a game theoretical framework:

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13 Ministerial and inter-ministerial decrees (*D.M.*), President of the Council of Ministers decrees (*D.P.C.M.*), Presidential decrees (*D.P.R.*)

14 This tendency is strongly criticized by many law scholars. The phenomenon is literary defined as "escape from regulation" (see for example Albanesi 2011, Moscarini 2008, Marcenò 2011). Government would use general administrative acts instead of regulations to evade the *ex-ante* control of the Council of State.

15 The law n. 400/1988 on the Presidency of the Council of Ministers made the Council of State's opinion on regulations mandatory. Until 1997, the Council of State used to have 90 days to express its opinion. After the law n. 127/1997 on administrative simplification, the days became 45.

CoS [as a court]
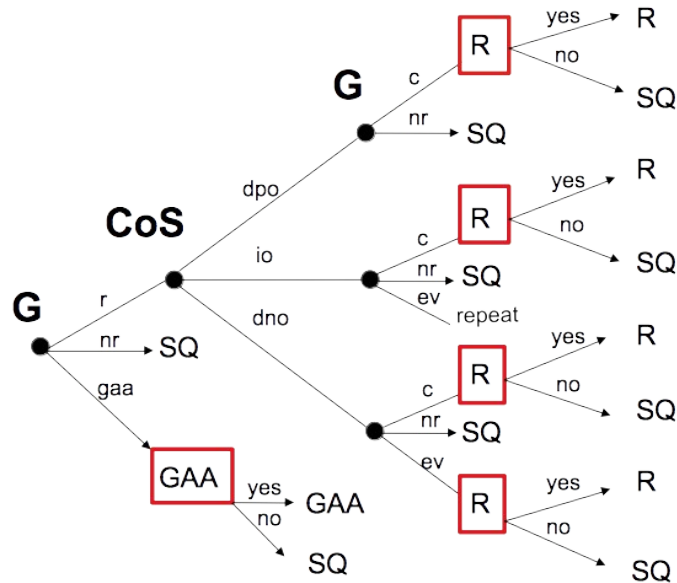
| Government moves first |

The CoS provides its opinion (positive, interlocutory, negative) on G's draft

G can comply with CoS' opinion (c), can evade it (ev), or can chose not to adopt R (nr)

The CoS as a court can eventually judge R and GAA's legitimacy

r = to adopt a regulation
nr = not to adopt any act
gaa = to adopt a GAA

dpo = definitive positive opinion
Io = interlocutory opinion
dno = definitive negative opinion

ev = evade (evasion can be partial)
c = comply with CoS opinion

R = regulation
GAA = general administrative act

SQ = status quo

Government can decide to adopt a regulation, not to adopt any act, preserving the *status quo*, or to adopt a general administrative act. If it decides to adopt a regulation, the procedure becomes particularly long in case the Council of State provides an interlocutory opinion. In these cases, if government resubmits a version of the draft that partially evades Council of State's indications, the interaction between the two institutions is repeated, and further interlocutory opinions are provided. Both regulations and general administrative acts can be confirmed, or can eventually be annulled by the Council of State acting as a court. In case they are annulled[16], the *status*

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16 According to the Italian code of administrative proceedings, the judge that examines a recourse against an administrative decision evaluates if the exercise of public power was legal. The annulment of administrative decisions can be due to breach of law, misuse or abuse of power, lack of competence.

quo preceding the regulation is restored.

The table below shows the median value in number of days separating the date of the laws and the date of the decrees. When the decree is a regulation, the Council of State is activated and provide its *ex ante* control. When the decree is a general administrative act, the Council of State is not activated. Five policy sectors are included in the analysis: economy, education, interior, justice and defense.

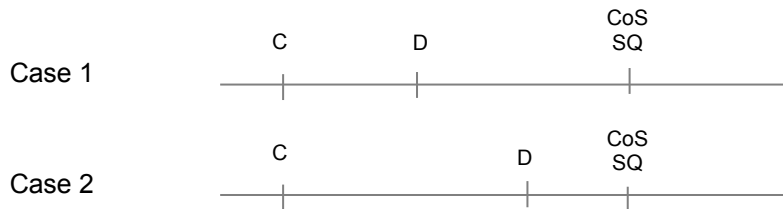| Number of days separating the date of the law and the date of the decree. Median value.		
Policy sectors	Regulations	General Administrative Acts
Economy	565	252
Education	586	176
Interior	700,5	318
Justice	652	404
Defense	973	830
Data from 1988 to 2014. Personal computations on information available on the juridical database *Leggi D'Italia*		

In all the policy sectors, the procedure to adopt a decree without Council of State intervention is faster. In economy and justice policy sectors, regulations require more than twice the number of days of general administrative acts to be adopted. In education policy sector regulations take three times the days of general administrative acts to be adopted. Difference in days between regulations and general administrative acts is less relevant in defense policy sector. Defense is also the policy sector where the implementation of both types of decrees take more time.

A model of Council of State activation

Do political circumstances influence the choice between different types of secondary legislation acts? In other words: are governments more prone to adopt regulations, activating the Council of State as a consequence, under specific political conditions? In order to illustrate the logic of the interaction between government and the Council of State, we use a very simple spatial model. Imagine that two parties form a government in a unidimensional policy space, on a left-right continuum. Parties' ideal points are

located in C and D. Status quo is located in point SQ. Council of State's ideal point coincides with SQ. Status quo can be modified if the two parties find an agreement. However, the closer the status quo to the coalition range, the more risky seems to be the agreement for party D.

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                              CoS
                 C       D    SQ
Case 1        ---|-------|----|--------
                 
                              CoS
                 C          D SQ
Case 2        ---|----------|-|--------
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Even if the two parties find an initial agreement, during the process of law implementation party C could move the final policy in a position closer to its ideal point and further from the initial status quo for party D (Case 2). If the status quo is considerably far from coalition range (Case 1), Council of State's activation, whose ideal point coincides with the status quo, is an obstacle to change. Vice versa, when government heterogeneity is higher, Council of State's activation could ensure that the initial agreement between C and D is respected. Council of State's control on regulations concerns the compliance with legal and administrative procedures. For instance, Council of State's opinions always verify that the final draft of a regulation is subscribed by all the ministers involved[17]. Binding the ministers to the respect of specific bureaucratic procedures, the Council of State reduces their discretion in the process of regulations' adoption. Therefore, similarly to other control devices employed at the executive level[18], the Council of State control can be an used as an instrument to manage the conflict between the divergent preferences of the ministers. In particular, we expect that governments tend to activate more the Council of State when they are more divided and policy change is limited. We can formulate hypothesis 1 as follows:

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17 (and not by the permanent secretaries only or by junior ministers, for example). Council of State's opinions generally verify also the technical-juridical accuracy of the act, its coherence with the overall legal system and the eligibility of the minister or of the government to regulate the issue, according to the law.

18 According to Thies (2001), coalition partners "keep tabs" on each other appointing junior ministers to hostile ministers. For Martin and Vanberg (2005) coalition parties use legislative institutions to mitigate agency problems within the coalition.

H.1 We expect the ideological division to have a positive impact on the number of regulations (on Council of State activation).

Which circumstances make instead the status quo position far from coalition parties ideal points? When alternation takes place. It is the case of Gov 2, in which parties C and D ideal points are considerably far from the status quo inherited by the previous government (Gov 1).
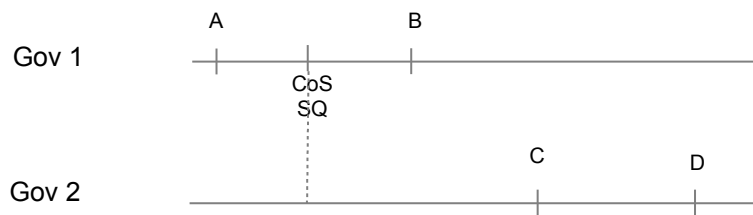
Both parties C and D prefer a new status quo to the status quo given by the agreement between parties A and B of Government 1. If a law of Gov 2 introduces the possibility of a consistent policy change, each agreement between C and D is preferred to eventual shifts in the direction of the old status quo. For this reason, in these circumstances we expect coalition parties to be less prone to activate the Council of State and to opt for implementation acts alternative to regulations. A second hypothesis can be formulated as follows:

H.2 We expect the presence of alternation to have a negative impact on the number of regulations (on Council of State activation).

Data and variables

We collected original data on regulations and general administrative acts[19] adopted on the initiative of five ministries: economy, defense, interior, justice and education[20],

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19 All types of ministerial and governmental decrees are included (*D.M.*, *D.P.R.*, *D.P.C.M.*). Data were collected from the juridical database *Leggi d'Italia*. To select general administrative acts equivalent to regulations we have followed law-scholars indications. In particular, Moscarini (2008) provides a sort of *vademecum* based also on the Council of State jurisprudence.
20 These policy areas are not interested by the 2001 constitutional reform (*riforma del Titolo V della*

between the 1988 and 2014.

The dependent variable "Council of State" is operationalized as a dummy variable that points out if the decree is a regulation or a general administrative act. That is: if the decree has been submitted to the Council of State or not.

The independent variables concern the political circumstances that may affect the choice to make a regulation, activating the Council of State, or to make a general administrative act, not activating the Council of State. According to our hypotheses, these variables capture government division and the possibility to make policy changes (presence of alternation). To measure government ideological heterogeneity and alternation, we have considered party positions on 4 policy dimensions: increase services *vs* cut taxes, pro permissive social policy *vs* anti, pro decentralization of decision *vs* anti, environment over growth *vs* growth over environment, derived from different expert surveys (Laver, Hunt 1992), (Benoit, Laver 2006), (Curini, Iacus 2008), (Di Virgilio et al. 2015). Government division is operationalized as the absolute value of the distance of the most extreme parties of the coalition. This variable is called "Range". Range variable assumes value zero for "technical" governments (Dini government 1995-1996, Monti government 2011-2013), which do not have political parties' members as ministers. "Alternation" is operationalized as the the difference in ideological position between the previous and the current government and it is calculated, according to Tsebelis (2004), by finding the mid-range position of each government and taking the difference between two successive governments. The control variable "F_Round" points out that the law from which the decree derives has already generated others decrees in the past. This may influence the choice between regulations and general administrative acts, because an existing regulation can be modified only by another regulation. "Minoritygov" is a dummy variable that controls for the presence of minority governments. Because minority governments need the support of parties external to government coalition, the measure of government heterogeneity (range) could not be able to capture the actual level of government division. Moreover, minority government Prodi 1 (1996-1998), that enjoyed external support from the post-Communist party *Partito della Rifondazione Comunista*, implemented a highly relevant

Costituzione) that has spread the competence to make regulations over central government and the regions.

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reform of public administration that substituted primary laws with regulations in specific sectors[21]. This may have produced an increase in the number of regulations adopted.

Descriptive statistics of dependent and independent variables					
Variables	N	Mean	St.Dev.	Min	Max
Dependent variable					
Council of State	1333	0,8492	0,3579	0	1
Independent variables					
Range taxes *versus* services	1333	5,0779	2,7372	0	9,37
Alternation taxes *versus* services	1333	3,2871	3,0681	0	8,13
Range average all dimensions	1333	5,7288	2,5125	0	9,41
Alternation average all dimensions	1333	2,9580	2,5934	0	7,19

Control variables					
F_Round	1333	0,2183	0,4132	0	1
minoritygov	1333	0,1522	0,3594	0	1

Preliminary findings

To test our hypotheses, we use a mixed-effects logistic regression. Mixed-effects logistic regression allows to control for unobserved heterogeneity constant over time and uncorrelated with independent variables. In our case, it controls for the characteristics and the specificities of the different policy sectors (economy, defense, interior, justice and education). Regulations and general administrative acts generated by primary laws previous to 1988 have been excluded from the analysis[22].

Because we consider the level of State intervention the most relevant element in the regulation of policy sectors included in the analysis, in the first model we calculate

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21 The so called *Bassanini* law (law n. 59/1997) introduced the "delegislation" mechanism in the simplification of the existing administrative procedures and in the organization of public offices.
22 Decrees generated by particularly old laws (even preceding the republican regime) can be reasonably considered as merely administrative decrees. They ensure the continuity of administrative action.

Range and Alternation variables on the dimension "increase services *vs* cut taxes".

Then, in the second model, we calculate Range and Alternation variables considering the average of all the dimensions that can be relevant for the regulation of the policy sectors considered: increase services *vs* cut taxes, pro permissive social policy *vs* anti, pro decentralization of decision *vs* anti, environment over growth *vs* growth over environment.

Determinants of Council of State activation

	(1)	(2)
Range taxes *versus* services	0,058** (0,028)	-
Range average all dimensions	-	0,081*** (0,029)
Alternation taxes *versus* services	-0,081*** (0,026)	-
Alternation average all dimensions	-	-0,077** (0,031)
F_Round	1,327*** (0,306)	1,285*** (0,306)
minoritygov	2,033*** (0,399)	1,963*** (0,398)
Constant	1,704*** (0,332)	1,509*** (0,345)
Number of observations	1158	1158
Number of groups	5	5
Wald chi2	53,44	53,89
Log likelihood	-456,309	-456,184

Dependent variable: decree subject to the Council of State's control. Mixed effects logistic regression. Robust Standard errors in parentheses.

*** p < 0,01; ** p < 0,05; *p < 0,1

Both the models confirm that Range variable has a positive effect on the probability to activate the Council of State. This means that more divided governments have a higher probability to adopt regulations, and therefore to recur to Council of State intervention. The statistical significance of Range variable increases passing from model 1, calculated

on "increase services *vs* cut taxes" dimension, to model 2, calculated on the average of all the dimensions. In particular, according to model 1, an increase of one point in government range produces an increase of 5,97% in the probability to trigger Council of State intervention. According to model 2, an increase of one point in range produces a 7,78% raise in the probability to activate the Council of State.

Both models confirm also that the variable Alternation has a negative impact on the probability to trigger the Council of State. The statistical significance of Alternation variable decreases passing from model 1 to model 2. According to model 1, an increase of one point in alternation determines a decrease of 7,78% in the probability to recur to Council of State opinions. According to model 2, one more point in alternation produces a decrease of 7,41% in the probability to adopt regulations. This preliminary result would confirm that when the status quo is far from coalition partners' preferences, Council of State's activation is less convenient. Both the control variables are positive and statistically significant. A decree deriving from a law that has already generated secondary legislations' acts has a higher probability to be a regulation (most of these decrees are regulations that amend already existing regulations). The dummy variable minoritygov confirms the expectation of a positive effects on the probability to adopt regulations.

Conclusions

Both, the control provided by the Council of State, and governments' use of general administrative acts instead of regulations have been criticized. From on side, the Council of State has been accused by several commentators[23] and politicians[24] of exercising a sort of veto power on government decisions: the "bureaucratization" of the decision-making due to its legal control would block the reforms and would decrease

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23 The political science scholar Angelo Panebianco reports the paralyzing effects of the bureaucratization of the decision-making on public administration activity:
http://www.corriere.it/editoriali/13_luglio_14/burocrazia-peso-enorme_9a20bc7e-ec4d-11e2-b462-40c7a026889e.shtml

24 Both former President of Council of Ministers, Romano Prodi, and current President Matteo Renzi have suggested to abolish the Council of State: http://www.romanoprodi.it/articoli/abolire-tar-e-consiglio-di-stato-per-non-legare-le-gambe-allitalia_7074.html;
http://www.serviziopubblico.it/puntate/2013/11/08/news/leader_adesso.html (1:48:10)

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public administration's efficiency. From the other, many law scholars have seen in the use of general administrative acts instead of regulations the attempt of governments to evade legal procedures established by primary laws, making an illegitimate use of their discretionary power[25]. The interaction between government and the Council of State is described in terms of power relations also by the recent journalistic debate: by imposing their "legal language" inside government departments, Council of State members would make decisions and procedures more complicated, supervising them at the expense of politicians[26]. This last aspect is in general at the basis of the existing studies on the Council of State, that are focused mainly on the relation between political and administrative élites. The relationship between politicians and bureaucrats is analyzed on the light of the traditional weberian separation between politics and administration. Dilemmas derive from the fact that the expertise of bureaucrats would decrease the politicians control on policy processes. These studies produce a detailed knowledge on the characteristics of the institution-Council of State, but their perspective is substantially static. They do not consider that the role of the Council of State can vary in presence of specific political circumstances. The analysis of the strategic interaction between the two institutions highlights this point. This study shows how government heterogeneity and alternation strengthen or decrease the Council of State power.

25 This use of the "atypical" regulations is described, among others, by Cintioli (2007)
26 A recent book on the Council of State by two Italian journalists is emblematically entitled *Nomenklatura*: who is really in charge in Italy (Mania, Panara, 2014).

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