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ACTIONS IN THE NEW CODE OF ADMINISTRATIVE PROCESS

ANNUAL REPORT – 2011 - ITALY

(June 2011)

Prof. Vittorio DOMENICHELLI

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1. INTRODUCTION

The new code of administrative process (c.p.a.) for the first time generally disciplines the cases that can be submitted before the administrative judge: the action of annulment (Art. 29), the action of conviction (Art. 30), the action opposing silence and the declaratory judgement of nullity (Art. 31). It is not possible to deal here with the problem of legal action before the administrative judge, a problem which has absorbed scholars of the administrative process for a long time. It is sufficient to note here that the difficulties of

classification initially depended on the ambiguity around the jurisdictional nature of the Council of State and the defining of legitimate interest as a legal position of substantive nature. Once these doubts were resolved, it was possible to elaborate the theory of jurisdictional administrative action on the basis of that of an action before the ordinary judge, and consequently proceed to systemize the actions that can be put before the administrative judge, moreover anchored to the action of impugnment of an administrative provision which has been the only true jurisdictional administrative "action" for a long time. At the end of the last century, thanks to scholars and case law, also under the impetus of some European regulations, the legislator had amended the system of actions, without moreover impairing the impugnment structure of the administrative process, above all enriching it with the action for compensation for damages ensuing from damage to legitimate interest, for a long time denied in the Italian legal system (Legislative Decree *D.lgs.* 80/1998 and Law 205/2000). An amendment that set in motion the profound transformation of the system of actions specified by the Code, but previously elaborated by scholars, and followed to a certain extent by case law as well.

2. **PROPOSABLE ACTIONS: FROM THE COUNCIL OF STATE COMMITTEE'S OUTLINE TO ENGROSSMENT.**

The new Code devotes a specific discipline to actions and can with good reason consider that it constitutes the heart of the Code, seeing that the action outlines the relationship between law and proceedings. The discipline of the actions set out in the Code, nonetheless, seems to be the result of the consolidation of the discipline previously in force rather than a true reform, as on the contrary the mandate foretold. In fact, Parliament had identified amongst the guiding principles and criteria the regulation of actions and the functions of the judge through the forecast of *declarative and constitutive judgements and convictions, fit to satisfy the winning party's claim* (Art. 44, para. 2 let. b no. 4 L. 69/2009).

Despite this the Code does not appear to be a simple reorganization of the rules in force and prevailing case-law trends, but can become the starting point for a further evolution of the administrative process.

Prompted by their intention to fully carry out the mandate, the Commission set up at the Council of State had drawn up a draft Code that forecast, in addition to the three actions currently foreseen in D.lgs. 104/2010, the action of verification of the existence or non-existence of a disputed legal relationship and the action of fulfilment as well as executive and precautionary actions.

The Commission's outline, reorganized by Executive intervention, has been streamlined, in particular exactly the part about the actions, the actions of verification and fulfilment having been deleted and the executive and precautionary ones transferred to the part concerning the specific discipline of the respective proceedings.

In the heat of the moment the first comments on the final text were rather critical, since, beyond reorganization of the regulations, the Code did not reach the goal of aligning administrative justice to the levels of protection required by the Constitution and European jurisprudence. (A. Romano Tassone, F. Merusi) Besides, the justifications produced for the revision of the outline of the Code, in particular, did not appear very convincing, on the basis of alleged and undemonstrated needs to reduce public spending that instead would appear to conceal a concept of justice which in the confrontation between authority and liberty sees the sacrifice of the latter, (A. Pajno).

Subsequently more articulate opinions and appraisals have appeared, asking the question whether it is still possible, going beyond the literal data and playing on the principles which inspired the Code (*in primis* the principle of effectiveness of protection), to deduce interpretatively the action of mere verification and the action of fulfilment.

Some scholars (A. Travi) maintain that the list contained in Chapter II, Title III of Book I of the Code is peremptory in nature and does not permit the introduction of actions that the legislator has deemed it necessary to expressly exclude. Other scholars (E. Follieri, M. Clarich), on the contrary, consider that the Code has laid down an open system of

actions and that consequently atypical actions can also be proposed, within which could fall the action of fulfilment and the action of verification formally expunged by the Government.

Preliminarily to the examination of the actions which can be proposed before the administrative judge, it should be observed that Chapter II devoted to actions does not exhaust the catalogue of actions provided not only by the Code, but also by other sources of regulation. In addition to precautionary and executive actions, no longer expressly mentioned in Chapter II, but disciplined respectively in Articles 55 and 112 of the Code, think for example of the action relating to access (Art.116 c.p.a.), whilst the action for the efficiency of public administration is disciplined by Legislative Decree 198/2009.

In the light of that, it can be asserted that Chapter II does not contain a complete and exhaustive organic whole of the feasible actions in proceedings, so that the elimination of the action of verification and the action of fulfilment in the engrossment could have been a mere simplification, the action of fulfilment being traceable within the action of conviction for failure to exercise mandatory administrative activity (Art. 30, paragraph 2) and in the action opposing silence (Art. 31), with verification of the obligation to act and with the possibility of obtaining an order to act from the judge (Art. 34, para. 1, let. b.). As to the action of verification, the fact remains that verification of rights cannot be excluded from exclusive jurisdiction (precisely since it also recognizes *ratione materiae* rights) and it had already been accepted by case law even before the Code; whilst the verification of legitimate interests, without disputing the documents, is admitted within the action of conviction (cf. Art. 30, 2nd para.).

The typology of the actions, common both to the general jurisdiction of legitimacy and to exclusive jurisdiction, follows the traditional tripartition of actions of annulment (constitutive), verification (declaratory) and conviction, drawn up within the realms of civil proceedings, although with the specificness of administrative judgement. The principle of typicality of the actions is toned down moreover, on one side by the introduction of flexible elements, found both in the plurality of the applications that can be submitted by the

claimant and sub-dividable in different ways in relation to their need of protection (Art. 32), and in the multiplicity of the verdicts that can be obtained from the judge (cf. Art. 34).

If this plurality were exploited by scholars and case law, it could lead to the construction of actions which are not rigidly anchored to typologies that are each separate from the other, but linked to the subdivision of the proposable claims and the verdicts obtainable from the judge; claims and verdicts conforming to the specific need of protection and redress of the damages for which the administrative proceedings must be predisposed, on a par with civil proceedings.

2.1 The action of annulment

The Code, even though admitting the principle of plurality of actions, shows however a clear preference for the action of annulment. Indeed Art. 29 is placed at the beginning of Chapter II to underline that the action of annulment is still the «queen of actions» (M. Clarich), whilst in the Council of State Commission's outline, the action of annulment was, as it were, one of many, being placed between the action of verification and the executive action.

The action *de qua* is attemptable in the traditional cases of transgression of a law, incompetency and misuse of power within the time limit of forfeiture of sixty days from communication or knowledge of the damaging act (excepting cases of disputes on matters of public contracts in which the time limit is reduced to 30 days: cf. Art. 120, 5th para.). The centrality of the action of annulment is observed by the fact that the administrative process continues to maintain as its subject matter the exercise or non-exercise of administrative power as is reaffirmed by Art. 7, para. 1, though related not to measures alone, but also to acts, agreements and behaviour if they are "even indirectly ascribable to the exercise of that power".

The action of annulment provided for by the Code, however, seems to be connoted differently compared to the past, since in order to ensure the effectiveness of protection the

judge's verdict must «contain the order that the decision be implemented by the administrative authority» (Art. 88) and the formula according to which the verdict of annulment must safeguard the administrative authority's further measures has disappeared (Arts. 26, L.1034/1971 and 45, R.D. 1054/1924). That is why the judge's verdict annulling the act does not stop at the moment when it is quashed, but can contain further provisions, amongst which stand out those aimed at ensuring the sentence and the non-suspended judgements are carried out, which was previously reserved to the judge in compliance proceedings and that can now already be adopted during cognizance (Art. 34, para. 1, let. e) and, more generally, all those provisions aimed at guaranteeing satisfaction of the legal situation inferred in the trial (Art. 34, para. 1 let. d).

2.2 The action of conviction

The action of conviction, as outlined in Art. 30 c.p.a., takes form first of all (but not only) as an action for compensation of damages for injury to rights in cases of exclusive jurisdiction, but also to legitimate interests in the jurisdiction of legitimacy, in the case of damages caused by the unlawful exercise of administrative activity or by the non-exercise of mandatory administrative activity. It is provided as a general rule that the action of conviction can be presented simultaneously with another action (*in primis* the action of annulment), but it can be proposed independently as well in cases of exclusive jurisdiction or in cases disciplined by the same article (Art. 30, 1st para.: which confirms once and for all the collapse of the so-called preliminary administrative action, on the subject of which see *infra*).

The contents of the independently proposable action of conviction for the compensation of damages are outlined both by Art. 30, 2nd para. (for cases of unlawful exercise of administrative activity or non-exercise of mandatory administrative activity) and by Art. 30, 3rd para., (which explicitly recognizes the claim for compensation for damage to legitimate interests regardless of impugnment of the provision causing the damage), as well as for damages ensuing from non-observance of the time limit of the close of proceedings.

Nevertheless, if there is symmetry between the proposable actions and issuable verdicts, from reading Art. 34, under the entry "Judgements on the Merits", the inference is that the contents of the conviction can also be more varied in comparison with what Art. 30 would have us perceive. In fact the judge can condemn the administration, as well as to compensate damages (for the equivalent or in a specific form), also to adopt «*appropriate measures to satisfy the subjective legal situation inferred in the trial* » (Art. 34, para 1, let. c). The very ample formula used by the code appears suited to comprise every type of regulative measure, without exception, thus including the order to issue a provision against an unlawful refusal or in the case of inactivity: the latter being a case in point for which the action opposing silence is foreseen, aimed at ascertaining the administration's obligation to act in accordance with Art. 31, 1st para., but which can well be aimed at obtaining a judge's order to the administration remaining inactive to act within a time limit (ex Art. 34, 1st para. let. b).

It should be noted that some scholars (M. Clarich, E. Follieri) have considered they can read into the expression «*appropriate measures to satisfy the subjective legal situation inferred in the trial*» (but one could also add into the order to act just mentioned) confirmation of the implicit introduction of the action of fulfilment, whilst for other scholars (A. Travi) it is about a lack of coordination in the drawing up of the final text, since the delegated legislator's intention would have been to not introduce the generalized action of fulfilment (it being perhaps superfluous, as the same results can be reached during compliance proceedings).

Another important aspect introduced by Art. 30 is represented by the relationships between impugnatory protection and compensatory protection, that is so say between the claim of annulment of the unlawful measure damaging a legitimate interest and the claim for compensation for damages produced by the same. Remember how a deep contrast was created on this point between the Council of State and the Supreme Court (*Cassazione*) with regard to what is called "preliminary administrative action". In particular, the highest administrative judge had held that an action of compensation regarding damage caused by measures which were not impugned in good time within the time limit of forfeiture was not attemptable, whilst the Supreme Court, on the other hand, upheld the independence of the

action of compensation, attemptable in the period of limitation of five years independently from prior impugnment of the damaging act.

The Code, recognizing the possibility of independently proposing the compensatory action compared to the action of annulment, intends to overcome the controversy on the preliminary administrative action, even if it circumscribes the autonomy of the action of conviction to compensation with a series of limits: first of all by fixing a forfeiture time limit of 120 days in place of that of limitation, a time limit which starts running from the day in which the damaging fact happened or from knowledge of the provision if the damage stems from it; secondly establishing that in determining compensation the judge assesses the real circumstances and the overall behaviour of the parties and excludes compensation of damages that could have been avoided by using ordinary care, even through trying out the instruments of protection provided, obviously including the act of impugnment of the damaging act and the relevant precautionary application. The mechanism provided for by the Code seems to constitute an implicit reference to Art. 1227 of the Civil Code (c.c.), among other things explicitly referred to by Art. 124 c.p.a. concerning protection on the subject of contracts. And exactly as provided by Art. 1227 c.c., the Council of State's Plenary Assembly no. 3/2011 has recently confirmed that the choice not to make use of impugnatory protection can influence the legitimacy of the compensatory claim, being assessable as behaviour contrary to good faith and to the principle of correctness in bilateral relations: so excluding the possibility of compensating damages that could have been avoided bringing into action all the protective instruments (impugnatory and precautionary) the code offers.

All things considered, the provision of the time limit of forfeiture together with the onus of impugnment tend to enhance the action of annulment. Besides it has been asserted that the new Code, in regulating the relationships between the action of annulment and compensatory action, has introduced a sort of concealed preliminary nature (Pajno) since mere compensatory action would risk taking shape as «little more than a school case» (Clarich).

Nonetheless, the Code is concerned with coordinating the action of annulment with the compensatory action, establishing that in the eventuality that an action of impugnment has been put forward, compensatory action can be formulated during the trial and in any case up to 120 days from the sentence becoming final and even during compliance proceedings (ex art. 112, 1st para.), so permitting the claimant to choose the legal strategy of waiting for the outcome of the annulment trial in order to then submit and articulate the claim for compensation (Art. 30, para.5).

2.3 The action opposing silence and the declaratory judgement of nullity

Art. 31 provides for two independent actions: the action opposing silence and the declaratory judgement of nullity. With reference to silence, the rule disciplines the substantive assumptions of the action, whilst the aspects that are more strictly related to the trial are disciplined by Art. 117 c.p.a.. The action opposing silence, as is well-known, has magisterial origins: it started out as an action of verification aimed at verifying the administration's obligation to act. Over time the content of the action has evolved and starting from the 10th 1978 Plenary Assembly the possibility was advanced, within the limits of binding acts, for the judge to go beyond mere verification of the unlawfulness of silence and to pronounce a decision on the legitimacy of the petition. Once this chink was opened, cautiously at first and then opening ever wider, the idea has been established that the subject matter of the trial is not silence in itself, but the claim asserted by the claimant.

Between 2000 and 2005, the legislator had intervened to discipline the trial on administrative inaction, introducing an accelerated proceeding and the possibility for the judge to also pronounce a decision on the truth of the claim. Most case law has affirmed that the power of cognizance of the truth of the claim only exists in the case of bound provisions, the judge having to limit himself to declare the obligation to act where discretionary assessments are at stake. Art. 31 has therefore acknowledged the trend of the majority of case law that has limited the verdict on the truth of the claim only to cases of bound activity, moreover introducing the eventuality in which the activity takes

discretionary shape in the abstract, but in concrete terms not leaving further margins for exercising it. It could be a question of complex proceedings in which discretion is already exercised, for example in root planning choices, so binding the subsequent act of authorization.

The action directed at guaranteeing protection towards the inactivity of the public administration is linked to the obligation, provided for by Art. 2 of L.241/1990, to conclude the proceedings with a provision expressed within prearranged time limits. The claim is not subject to forfeiture time limits and may be proposed as long as the non-execution continues and in any case within a year from expiry of the time limit for conclusion of the proceedings, maintaining intact the possibility of re-proposing the petition to start proceedings where the conditions recur.

The sentence, as mentioned, may not limit itself to verifying the obligation to act, but, in accordance with Art. 34, also contain the order to the administration that remained inactive to act within a time limit that Art. 117 specifies to be as a rule not longer than thirty days. Where necessary it is provided that an *ad acta* commissioner charged to carry out the activity can be nominated.

Art. 31 has, moreover, outlined the action of nullity as a distinctive action of verification, its object being the structural pathology of the administrative provision. The substantive position is defined by Art. 21 *septies* of L.241/1990, whilst the discipline of the trial is regulated in somewhat concise terms by paragraph 4 of Art. 31. The application addressed to the verification of nullities provided for by the law must be proposed within 180 days, except for nullities relating to acts issued in avoidance or violation of the sentence (Art. 114, 4th para. let. b). Nullity of the act can, however, always be opposed by the resisting party or be officially found by the judge. Even though it is not mentioned, the counter-applicant could also object nullity, provided that they have an interest in it.

Some perplexity could arise with reference to the question of the allocation of jurisdictions, since in the face of a null provision there could be a subjective position with the basis of a right and so have the jurisdiction of the ordinary judge, excepting matters of

exclusive jurisdiction in which the administrative judge also recognizes some rights, in which case the action of nullity is certainly to be submitted before the administrative judge.

2.4 The problematic nature of the action of verification

In the sphere of administrative actions the action of verification merits some reflection, an action that, as mentioned, had been contemplated by the Council of State Commission but deleted from the list of actions in the final draft.

In tune with scholars who for some time have already upheld the admissibility of the action of verification in the administrative trial, Council of State case law in recent times has also upheld that the action of verification may be attemptable independently, even in the absence of an express prescriptive provision within matters of exclusive jurisdiction, as it is directed to the verification of the existence (or foundation) of a disputed right.

In particular, the action of verification has been recognized in the cases of declaration of the start of an activity – today included in exclusive jurisdiction by Art. 133 of the Code – to allow a third party to go to the administrative judge and have the declaration of the start of an activity (Council of State, sect. VI, 717/2009: 2139/2010) that is damaging to their own legal sphere declared illegitimate.

More in general, nevertheless, it is being discussed whether the action of verification is admissible in the jurisdiction of legitimacy, doubting that an instrumental situation like legitimate interest is susceptible to verification without also involving the administrative power correlated to this situation and consequently considering that this could permit a possible avoidance of the onus to impugn the damaging provision.

The Code had meant to overcome this formulation by introducing a specific action of verification in the Commission's draft, as mentioned, also in the light of overcoming of preliminary administrative action, that nonetheless the Government thought fit to remove from the final draft, even if verification is consubstantial to the power to judge and so

should always be admitted when an administrative relationship or its extent, substance or duration is disputed.

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COMPETENCE

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Prof. Vittorio DOMENICHELLI – Prof. Lucia CIMELLARO

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1. PREAMBLE

Competence - within administrative jurisdiction - denotes the part of jurisdiction that is up to each branch of the jurisdictional structure made up of the Council of State (Consiglio di Stato), regional administrative Tribunals (TAR) and the Council of administrative justice for Sicily (Consiglio di giustizia amministrativa per la Regione siciliana). Competence is assigned according to the criteria of degree, territory and subject matter.

Until the TAR were established, which occurred with 1971 Law no.1034, in the Italian legal system the problem of division of competence on the basis of degree did not exist, since there was only one degree of justice that took place before the Council of State.

It was this law that indicated the TAR and Council of State as branches of jurisdictional administration, a structure reaffirmed today by the Code of administrative procedure (2010 Legislative decree no.104) that, in Art. 5, paragraph 1, identifies as branches of administrative jurisdiction in the first degree the TAR and the regional tribunal of administrative justice for the autonomous region of Trentino – Alto Adige (the discipline of which, the following 3rd paragraph, reserves the Special Statute of the Region and the related rules for implementation) and, in Art.6, recognizes the Council of State as the branch for the last degree of administrative justice. The only exceptions to this system are represented by the confirmation of competence of the Council of State in the sole degree for the execution of the final judgement in the case of amendment of the sentence appealed and by the identification of the Council of administrative justice for the region of Sicily as judge of appeals against judgements issued by the Sicily TAR.

The TAR are set up in each Region and their seat is in the regional capital; in eight Regions detached sections are also set up based in the provincial capitals. In Trentino - Alto Adige the TAR is based in Trento and has an autonomous section in Bolzano, provided with more extensive competence with respect to the other TARs.

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2. MANDATORY TERRITORIAL COMPETENCE

In Italian Administrative procedure the main criterion of division of competence is that of territory, formerly regulated by the 1971 TAR law, in articles 2 and 3, depending on a series of rules relating to the traditional model of administrative procedure as being judgement of opposition to documents. Today the discipline, notably changed, is contained in Art. 13 of the C.P.A. (Code of Administrative Procedure), and is no longer laid down exclusively with reference to the opposition to documents and measures, but is extended to disputes that concern agreements or the conduct of public administrations (amongst which,

in accordance with paragraph 2 of Art.7 C.P.A., are included "….also subjects equivalent to them or in any case required to respect the principles of administrative procedure).

First of all it is provided that the TAR in whose area the public administration that issued the document or carried out the agreement or conduct opposed is based is 'unavoidably' competent. Nevertheless, above all in order not to excessively burden the Lazio TAR, where many public administrations are based, the criterion of the seat of the agency is mitigated by that of the efficacy of the document. Thus the combination of criteria already ratified in the TAR law is confirmed and, so, if the documents (or the agreements or conduct) opposed produce immediate and direct effects restricted to the territorial area of a Region, it is mandatory that the TAR within the area of which these effects are produced is competent (Art. 13, para. 1). Clarifications of the law are stated in these terms (Council of State, section VI, 17 July 2007, no. 4033).

The criterion of the seat of the agency appears to be reaffirmed in para. 3 of the same article 13, where, with regard to the documents of public subjects other than State administrations with effectiveness beyond the region, the competence of the TAR in whose area the agent Authority is based is ratified, whilst for documents of state administrations with effectiveness beyond the region the competence of the Lazio TAR based in Rome is established.

For petitions opposing silence, the leaving out of the regulations, one must consider the provision omitted and so the area of the effects of the conduct of omission, with the consequent competence of the local TAR if these effects remain limited to the local area (see for example Cons.Stato, section VI, 5 June 2006, no. 3349).

Para. 2 of Art. 13 C.P.A. is plain, on the other hand (like the previous Art. 3 of the TAR law) with reference to disputes on the subject of civil service personnel (the non-privatized part today): on this subject mandatory competence falls to the TAR within whose area the premises of service is situated (known as the civil service tribunal), meaning the premises where the employee is formally based on the basis of a legally existing working relationship at the time the opposed document is issued (Council of State, Section IV, 22 March 2005, no.1238). It should be remembered that, in accordance with para. 1, lett. O), and para. 2 Art. 135 of the Code, disputes relating to working relationships of DIS, AISI

and AISE personnel are, instead, devolved to the functional competence of the Rome seat of the Lazio TAR.

Art. 47, para. 1, of the C.P.A. affirms – reaffirming what was already inferred from Art. 32, para.3, TAR Law – that the division of disputes between TARs with seats in the regional capital and the detached Section is not considered a matter of competence. The latter, in fact, constitutes a functional arm of the wider unit of which it is part.

The matter must be raised by the parties, other than the petitioner, in the act of court appearance or anyway with an document filed no more than 30 days from the expiry of the term of 60 days from the accomplishment of service of the petition to them. The President of the TAR acts on this with a non-opposable order stating the grounds, having heard the parties who made the request. So the provisions of Art. 15 are not applied in these cases, with the exception of paragraphs 8 and 9 of the same, if precautionary measures have been set, which we will pause to consider below.

Moreover secure kinds of cases are those of functional competence ex art. 14 of the Code, relating to which the division between TAR in the regional capital and the detached Section is also considered, an evident exception with respect to the previous system of rules, a really matter of mandatory competence and therefore is wholly subject to the discipline contained in articles 15 and 16 C.P.A.

Note that the C.P.A. does not specify how one is to identify the competent TAR for petitions put forward in cases of exclusive jurisdiction other than civil service, when it is a question of verifying subject rights or a sentence to pay sums of money. For these cases, some authorities have, in the past, proposed reference to the seat of the administration called to court, whilst prevailing case law has rather considered applicable the rule in Art. 20 C.P.C.(Code of Civil Procedure) (according to which, for cases relating to obligation rights, the competent judge is the one of the place in which the obligation produced in the proceedings arose or must be performed), that is the provisions of Art. 25 C.P.C. (which also refers to the place where the obligation arose or must be performed: see Cons. Stato, section V, 26 September 2000, no. 5108).

Moreover, regarding trials for compensation, connected to a sentence of annulment, administrative jurisprudence – faithful to the prejudicial argument - has

affirmed the competence of the TAR called to decide on the application for annulment (Cons. Stato, AP,18 October 2004, no. 10).

It is important to emphasize that one of the most significant changes of the 2010 Code is represented by its having ratified as mandatory the territorial competence of the regional administrative tribunals, where on the other hand Art. 31, TAR Law, held that this competence could be derogated; it could not be noted as a matter of course by the judge, but only objected by the interested party with the rule of competence to be put forward by the final date of twenty days from the appearance before the court and, furthermore it could not constitute grounds for appeal.

Today the rule of mandatory territorial competence, also extended with regard to precautionary measures, demonstrates its intention to overcome some distortions produced by the previous discipline that permitted the parties, in particular the petitioner, to choose the administrative judge in the first instance (known as forum shopping) who should have pronounced a decision in the case of petitions for precautionary measures even if he was clearly incompetent, and also in the case in which the rule of competence had been raised. The new discipline sets out that if the judge considers himself incompetent he cannot adopt any precautionary measure (Art. 15, 5th para., and Art. 55, 13th para.,C.P.A.).

3. MANDATORY FUNCTIONAL COMPETENCE

In the system of regulations previously in force a distinction was made between cases of functional competence identified by case law (Cons.Stato, section VI, 27 July 2007, no.4190) and cases identified by special laws that assigned certain documents or relationships to a TAR other than the one ordinarily competent on the basis of criteria that determine territorial competence.

In the new structure, competence being declared mandatory as a general principle, the cases of functional competence are characterized not so much by this point of view as, precisely, by being based on special rules. For them – pertaining to particularly delicate subjects – it is required that they be dealt with and settled, already in the first instance, by the same, uniform jurisdiction. The most important cases of functional competence are

those provided for today by para. 1 of Art. 14, C.P.A., that remits to the mandatory competence of the Lazio TAR, Rome seat, disputes indicated by the subsequent Art.135 and all the others that are referred to this Tribunal by law. Other cases of functional competence, indicated in the following paragraphs of Art.14, are the mandatory competence of the Lombardy TAR for petitions put forward against the provisions of the Authority for Electricity and Gas (based in Milan), as well as the mandatory competence of the compliance judge ex art. 113 of the Code. This article provides that the petition for compliance must be put, regarding sentences of the administrative judge, to the judge who issued the provision about which the question of compliance is about: competence is also of the TAR for its provisions confirmed in appeal with the grounds that it has the same regulating content and is in conformity with the first degree provisions (In case law, see Cons.Stato sect.VI, 20 January 2009, no. 243).

Amongst other cases of functionally mandatory competence, in para.3 of Art.14 reference is made to every other judgement for which the law or the Code identify the competent judge with criteria other than those in Art. 13 on territorial competence.

4. COURT FINDINGS OF INCOMPETENCE, REGULATION OF COMPETENCE AND RELATED SYSTEM

The discipline on this point, contained in Articles 15 and 16 of the Code, diverges noticeably from that laid down by Art.31 of the TAR Law.

In accordance with the new regulations, in every stage of first degree justice, unless a decision has turned up on the regulation of competence by the Council of State, the lack of competence (territorial or functional) can by noted as a matter of course by the TAR with an order also indicating which TAR is to be considered competent. If within the term of 30 days from the communication of the order the case is reassumed before the judge announced as competent, the trial continues before the same and does not give rise to any forfeiture (Art.15, para.1, and Art.16, para.2). The order of the judge resorted to who declares his own competence or incompetence is moreover impugnable, within 30 days of

service or 60 days from its publication, with the regulation of competence (art. 16, para. 3) which in this case is not a precautionary instrument, but becomes a "subsequent" means of opposition that nevertheless follows the discipline in Art. 15 relating to "precautionary" regulation.

Lack of competence can also constitute specific grounds for appeal of the charge of the judgement opposed before the Council of State "that, explicity or implicitly, decreed on competence" (art. 15 para. 1).

Thus the judgement that decided on competence together with merit, implicitly or even explicitly, is subject to ordinary appeal which can be based on the TAR's incompetence only. In this case the Council of State annuls the judgement and restores the documents to the competent TAR ex art. 105, para. 1, C.P.A.(if, on the other hand, the lack of competence is not produced as specific grounds of appeal one will build on the internal point judged ex art. 329, 2nd para., C.P.C., and in analogy to what is provided in Art. 9 C.P.A. on the topic of lack of jurisdiction).

Coming now to the precautionary rules of competence, it should straightaway be said that articles 15 and 16 of the C.P.A. outline different types.

First of all paragraphs 2 and 3 of the Code refer to the regulations as a petition of the interested party.

In this respect, with an obvious difference with respect to the previous discipline (art. 31, 2nd para., TAR law) which established, barring some exceptions, the possibility to put forward a petition within 20 days of the date of appearance before the court, in the new code a notable extension of the terms within which the regulations can be proposed can be noted.

Furthermore, whilst Art.31, TAR Law, legitimized only "the party resisting or intervening in the trial" to propose the regulation of competence, Art. 15, para. 2, C.P.A., using the generic expression "each party" would appear to legitimize to the purpose the petitioner as well: besides it is not impossible to suppose that the petitioner, realizing his

error or doubting the competence of the TAR resorted to, wishes to give rise to a clarification in order to prevent any appeal by the losing party, should the same TAR have implicitly considered, deciding on merit, its own competence.

Paragraph 2 of Art.15 consents the exercise of this faculty "until the case is decided in the first instance".

In accordance with the same paragraph "the regulations are proposed with a petition served on the other parties and filed, together with copy of the documents useful in order to decide, within 15 days from the last service at the secretary's office of the Council of State".

It is to be remembered that, with regard to the identification of the "other parties", prevailing case law has for some time been oriented at considering as such those who can legitimately contradict: the counter-interested, even if they are not appearing (see Cons. Stato, sect. IV, 21 January 2009, no. 293), or at the most the omitted counter-interested, present in court (see Cons. Stato, sect. VI, 5 January 2001, no. 22).

Paragraphs 3 and 4 of Art. 15 establish that the Council of State accepts the decision on the regulation of competence in Council Chamber with a binding order for the TAR in which it indicates the TAR competent and also provides for the costs of regulation. This judgement on costs "remains effective even after the sentence that defines the judgement, barring other decrees expressed in the sentence". So the TAR can amend what has been decided in the Council of State's order as to costs, constituting in any case, the regulation of competence, not a means of opposition, but a court incident relating to the judgement of first instance.

If the judgement is returned before the TAR declared competent within the final term of 30 days from service of the order pronouncing a decision on regulation, that is within 60 days of its publication, no forfeiture will take place (art., 15, 4th para., C.P.A.). In default of this, the judgement will be declared extinct ex art. 35, para. 2, lett. a, of the Code.

Nothing is said about the case, with reference to the case of regulation as a petition of the interested party, in which precautionary petitions have been proposed (and the TAR has not officially registered its incompetence). Evidently the tribunal should not consider itself deprived of the power to decide on the precautionary application despite the regulation proposal, even though naturally having to consider the effects of such a judgement temporary, as ratified in para 8.

Another type of regulation of competence is that officially required by the same TAR and regulated by paragraphs 5 and 6 of Art. 15 C.P.A..

Paragraph 5 assumes that a precautionary petition has been proposed by the claimant and that the TAR resorted to, even though not recognizing its own competence, does not decide to make provisions in accordance with Art. 16, para. 2, that is directly finding its own incompetence with an order that also indicates the competent TAR: this could happen in the case in which the judge is in doubt as to his own competence or is convinced that the parties would not be disposed to be acquiescent to the court's findings of incompetence, and wishes to prevent their opposition to the related order.

In these cases the administrative judge will request the regulation of competence with an order indicating the TAR it considers competent and will not have to decide on the precautionary application. Paragraph 6 determines some aspects of the trial.

As has already been mentioned, once the regulation of competence has been requested from the Council of State as a matter of course, the TAR resorted to cannot pronounce a decision on the precautionary application. Regarding this para. 7 of Art. 15 makes clear that "in defaults of proceedings as in para. 6, the petitioner can repropose the precautionary applications to the TAR indicated in the order as in para. 5 (that is the one with which the regulation of competence was requested) and the same decides in any case on the precautionary application, so even in the case that it in turn considers itself incompetent: this is certainly in order not to render ineffective a precautionary measure not agreed with the requisite timeliness.

Besides it is a secure fact, in the same provisions, what is set out in para. 8 that provides for the extreme operation of the precautionary measures adopted by the judge declared incompetent, which in any case lose their efficacy after thirty days from publication of the order regulating competence. Finally para. 9 specifies that "the parties can always re-propose the precautionary applications to the judge declared competent".

Furthermore it is necessary to point out the power of the Council of State, resorted to during the precautionary appeal, (art.62, para.4, C.P.A.), to raise before it violation by the judge in the first instance of rules on competence; in this case the supreme counsel submits the matter to the cross-examination of the parties and decides with an order, indicating the competent TAR in accordance with para. 4 of Art. 15.

It has already been remembered that, in the case in which the judge notes his incompetence as a matter of course, whether or not a precautionary measure has been requested, he must indicate with an order the TAR he considers to be competent, before which the trial will be reassumed (para.2, art.16 C.P.A.). Paragraphs 3 and 4 of Art.16 provide a further hypothesis of regulation for this eventuality, that can be requested as a matter of course by the judge before whom the trial is reassumed in accordance with para. 2.

In this case the procedural provisions contained in paragraph 6 and the following paragraphs in Art. 15 of the Code should anyway be applied.

This discipline of competence is all in all too complex, and one that certainly needs to be simplified. Corrective proposals are already under consideration along these lines.

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THE JURISDICTION OF THE ADMINISTRATIVE JUDGE

ANNUAL REPORT - 2011 - ITALY

(May 2011)

Prof. Vittorio DOMENICHELLI – Prof. Paola SANTINELLO

INDEX

1. INTRODUCTION: THE DIVISION OF JURISDICTIONS

Italian administrative law is organised following a system of double jurisdiction. This principle is stated by the Constitution (articles 24, 103 and 113), which - substantially absorbing the former discipline – bases the division of disputes between an ordinary judge and an administrative judge on the *causa petendi*, that is the nature of the legal position of the injured subject (respectively subject law and legitimate interest), with the exception of, as will be mentioned below, cases of exclusive jurisdiction, in which it is up to the administrative judge to be "also" cognizant of the rights of a subject, (as in Constitution Art. 103). It is interesting to point out the very recent sentence of the United Sections of the

Court of Cassation (Italian Supreme Court) dated 14 April 2011 no. 8487, where it is stated that the ordinary judge is also "permitted to be cognizant of legitimate interests, to know and if necessary rescind an act of the Public Administration, and to consequently bear on subordinate relationships according to the different types of jurisdictional intervention provided for".

Furthermore, there are special administrative jurisdictions like the Court of Auditors (*Corte dei conti*) and the National Water High Court (*Tribunale superiore delle acque pubbliche*).

The theme of the division of jurisdictions has long been the subject of normative arrangements, creative mediations of jurisprudence and consideration of the law. The milestone of this process of tidying up the subject is currently represented by the Code of Administrative Procedure, Legislative Decree 2 July 2010, no. 104, which has essentially kept the features and limits of the jurisdiction of the administrative judge unaltered (from the criterion of division according to the legal position of a subject – indeed, as mentioned, provided for by the Constitution - to the compensatory safeguard for damages caused by harm to legitimate interest, to the exclusion of jurisdiction on acts issued by the Government in the exercise of its political power, and so on).

2. RECENT REFORMS AIMED AT GUARANTEEING MARKET COMPETITION AND FUNDING CUTS IN PUBLIC COMPANIES

The Code confirms the structure of administrative jurisdiction (that is the various powers of cognizance and decision-making of the administrative judge) in *general jurisdiction of legitimacy, exclusive and extended to merit.*

Art. 7 of the Code, first of all, devolves to administrative jurisdiction "disputes in which an issue is raised about legitimate interests and, in particular matters stated by law, about the rights of a subject" (para. 1). It has been noted how this provision, compared to the text of art. 103 Const., does not reproduce the word "also" before "the rights of a

subject". However, interpreters consider that this provision is in line with what is called "living law", as required anyway by proxy law. In fact, it is well-known how the constitutional court has on more than one occasion stated that in the definition of the limits of exclusive jurisdiction it is first of all necessary for the dispute to involve *closely linked* legal positions of subject law and legitimate interest, (see sentence 204/2004). But the same Court has recently added that, if it is true though, in line with the historic reasons at the origin of the set-up of this jurisdiction, it is normally necessary for a tangle of legal positions to exist within which it is difficult to identify the descriptions identifying the single positions of the subjects, it cannot be excluded that the cognizance of the administrative judge can have as its aim *even the rights of the subject only*, provided that the administration acts as an *authority* and that is, through the use of administrative powers that can be exercised both through unilateral and authoritative acts and through consensual forms and, lastly, through conduct (sentences 259/ 2009 and 35/2010).

In its entirety, administrative jurisdiction is therefore linked to the *power of public administration*, in which the Code includes "also the subjects equivalent to it or in any case bound to respect the principles of administrative proceedings" (for a broader idea of the concept of Public Administration see also Art. 1-ter of L. 241/1990). This is clarified by the same Art. 7, paragraph 1 c.p.a. (code of administrative procedure), according to the provisions of which disputes devolved to administrative jurisdiction are those "concerning the exercise or non-exercise of administrative power".

Furthermore, they "concern measures, acts, agreements or conduct also indirectly ascribable to the exercise of this power, carried out by the public administration": being a general clause aimed at explaining the ratio of the different cases of administrative jurisdiction in uniform terms. That explains how if "disputes relating to acts, measures or omissions of the public administration are attributed to the general jurisdiction of legitimacy of the administrative judge…." (art. 7, paragraph 4) and cases of jurisdiction of merit are indicated by law and by Art. 134 of the Code (art. 7, paragraph 6), "agreements" and "conduct" fall within exclusive jurisdiction only.

If many uncertainties about the renewal of consensual activity (agreements) do not exist to the exercise of the power of authority (see art. 11, l. 241/1990), the issue of "conduct" has always appeared much more delicate and complex. The constitutional court has lastly made the distinction - now absorbed by the Code – between disputes relating to "conduct linked – even "indirectly" – to the exercise, even if unlawful, of a public power" and "conduct" carried out where power is lacking, that is through mere fact only, for which the related devolution to exclusive jurisdiction is to be regarded constitutionally unlawful, (sentences 204/2004 and 191/2006).

2.1 General jurisdiction of legitimacy

Originating as a judgement of supreme opposition (consisting solely in ascertaining the unlawfulness of an administrative act and resulting in its repeal), the traditional general model of administrative jurisdiction has continued to assert itself for a long time, despite new provisions on the subject of administrative justice (see. law 205/2000) having already marked it as being surpassed through the expansion of powers of cognizance and of decision-making of the administrative judge, explicitly permitting the administrative judge to deliver sentences of conviction for damages and compensation, specifically.

There has been a further turning point with the Code, that, after having sanctioned the general principle for which "administrative jurisdiction insures full and effective protection in accordance with the principles of the Constitution and European Law" (Art. 1 c.p.a.), invests the administrative judge with more extensive *investigative powers* – according to Art. 63 c.p.a. the judge can ask for clarifications or documents; allow witness evidence in writing; order checks to be carried out or, if it is indispensable, arrange for technical advice; also arrange the gathering of other means of evidence provided for by the code of civil procedure, with the exception of the formal examination and oath – and more extensive *decisive powers*, with the result that, at least implicitly, the possibility is allowed to also issue declaratory and investigative judgements, as well as convictions to adopt all

appropriate measures to protect the legal position of the subject produced before the court (cf. art. 34, para. 1, lett. c), c.p.a.). Art. 7, para. 4, c.p.a. , furthermore includes disputes (also) "relating to damages for injury to legitimate interests and to other consequential proprietary rights, even if introduced autonomously" (so settling the much debated question of the administrative preliminary question), providing that the forfeiture time limit of 120 days is respected, provided for by Art. 30 c.p.a., which, amongst other things, if the necessary conditions exist, provides for compensation for damages specifically, in accordance with Art. 2058 c.c. (see also art. 34, para. 1 lett. c). And more, Art. 31 c.p.a., regulating action against silence, gives power to the judge to pronounce on the truth of the claim produced in court (in the case of bound activity) and to establish nullity provided for by the law.

2.2 Exclusive jurisdiction

As previously mentioned, in some particular matters provided for by the law, where the tangle of legal positions ascribable as much to subject law as to legitimate interest is difficult to disentangle – that is, one makes an issue of the rights of a subject provided that they are linked to the exercise of administrative power – disputes are reserved for the "exclusive" jurisdiction of the administrative judge.

The scope of exclusive jurisdiction has been defined by subsequent legislative steps (see in particular articles 33 and 34 of legislative decree 80/1998, succeeded by Art. 7 of law 205/2000), but essentially redrawn by constitutional law, the principles of which have now been absorbed in the Code, together with a structural acknowledgement (art. 133 c.p.a.), even though it is non- peremptory (exceptions have been made for "further provisions of law"), of the different and very numerous cases in which this jurisdiction applies.

So the 2010 legislator has confirmed the "full jurisdiction" of the exclusive administrative judge, to whom fall the *investigative powers* now provided for in the first instance – and extended as already mentioned to the general jurisdiction of legitimacy –

from Art. 63 c.p.a., and the *decisive powers*, already recognized by the previous discipline, and now by Art. 7 c.p.a., at para. 1, at para. 5 ("…the administrative judge is also cognizant of the disputes in which there is an issue of rights of the subject, also for the purposes of compensation), at para. 7 ("The principle of effectivity is fulfilled through the concentration before the administrative judge of any form of protection of legitimate interests and, in the particular matters indicated by the law, of the rights of the subject"). Remember, moreover, that Art. 30, para. 2, c.p.a., after having provided that, as much for the jurisdiction of legitimacy as for matters of exclusive jurisdiction, "the conviction for unjust damages deriving from the unlawful exercise of administrative activity or from the non-exercise of a binding one can be asked for", adds that "in cases of exclusive jurisdiction compensation for damages from injury to the rights of a subject" can also be asked and, more, referring to both jurisdictions that "if the necessary conditions exist as provided for by article 2058 of the civil code, damages in specific form can be requested".

It can be noted, to conclude this point, how the most significant changes made by the Code of Administrative Procedure have been concerned with general jurisdiction of legitimacy, rather than the exclusive one and that the two tend to align themselves substantially, although the *single court model of full jurisdiction* that was expected has not been totally realized and the general jurisdiction of legitimacy has not completely lost its original character of supreme opposition (ZITO).

2.3 The jurisdiction of merits

Merits jurisdiction is *extraordinary* and is exercised only in disputes indicated by the law and by Art. 134 c.p.a.. On the basis of this article such disputes, fewer in number compared to the past, have the purpose of: a) putting into effect enforceable jurisdictional judgements or final judgements in the scope of the court as in Title I of Book IV; b) acts and operations on the subject of elections, assigned to administrative jurisdiction; c) pecuniary sanctions, dispute of which is devolved to the jurisdiction of the administrative judge, including those applied by independent administrative authorities; d) disputes over

the boundaries of regional authorities; e) refusal to grant film permission as in article 8 of law 21 November 1962, no. 161.

The administrative judge in the exercise of this jurisdiction, compared with that of legitimacy, has greater decisive powers at his disposal, which are not limited to the annulment of the administrative act impugned, but spread to the possibility of taking the place of the administration (Art. 7, para. 6, c.p.a.) specifically through the adoption of a new act, or amendment or reform of the act impugned (Art. 34, para. 1, lett. d, c.p.a.). Nevertheless, it should be pointed out that the rules on the merit judge's control have always met with sporadic and limited enforcement, such that this jurisdiction, even after approval of the Code, is considered a "historic remnant".

3. LACK OF JURISDICTION

If substantially (the division of jurisdiction), the Code has not introduced very significant changes, the rules more closely connected to trial, especially regarding lack of jurisdiction and "*translatio iudicii*", reveal some originality.

Art. 9 c.p.a. – overtaking the precedents of the Plenary Assembly of the Council of State (*Consiglio di Stato*) (see decision no. 4/2005), but absorbing more recent trends of the united sections of the Supreme Court (*Corte di Cassazione*) (see no. 24883/2008 e n.3200/2010) – provides that the lack of jurisdiction can be pointed out by the judge, also official, only in the court of primary jurisdiction, and that in appeal and other courts of contest this is only possible if the lack of jurisdiction is produced with the specific reason "against the charge of the contested judgement that, implicitly or explicitly, has decreed on the jurisdiction", with the consequence that if the primary stage decision that examined the merit of the dispute is not contested from the point of view of jurisdiction, this is strengthened as the authority of the administrative judge.

Another new element – from the viewpoint of continuity of trial and integration between jurisdictions (DE PRETIS) - consists in the codification of the principle,

introduced in a general way by the c.p.c. (code of civil procedure), of the *translatio iudicii*, by which when jurisdiction is declined by the administrative judge in favour of another national judge or viceversa, *the trial and substantial effects of the application are safe facts,* provided that the case is re-proposed before the judge indicated in the judgement declining jurisdiction, within the peremptory term of three months from it being made final (Art. 11, para. 2 c.p.a).

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L'INSTRUCTION DANS LE CONTENTIEUX ADMINISTRATIF ITALIEN

COMPTE-RENDU ANNUEL - 2011 - ITALIE

(Mai 2011)

Pr. Carlo Emanuele GALLO

SOMMAIRE:

1. LE CODE DU CONTENTIEUX ADMINISTRATIF.

Le Code du Contentieux administratif, approuvé par la loi du 2 Juillet , 2010, n° 104, régit dans le deuxième livre, consacré au contentieux administratif de première instance, le régime de la preuve et les pouvoirs du juge.

Ces dispositions reflètent en partie ce qui, auparavant, avait été requis par la loi et a été reconnu comme correct par la jurisprudence et la littérature, et introduisent quelques nouvelles dispositions.

2. LA CHARGE DE LA PREUVE.

Le procès administratif italien est un procès de parties: ce sont les parties qui formulent leurs questions et demandent au juge les mesures conséquentes. La règle générale devrait être, par conséquent, la charge de la preuve: si la partie qui invoque le droit ne prouve pas les allégations de fait, son application doit être rejetée.

Le procès administratif est destiné à contrôler l'exercice du pouvoir de gouvernement et le citoyen est clairement en difficulté pour trouver du matériel de l'enquête, puisque le matériel est normalement disponible dans l'administration qui exerce le puissance et adopte l'acte que le requérant conteste. Dans cette situation, sur la base de la littérature faisant autorité, la jurisprudence a jugé que le requerant n'a pas une charge de la preuve complète, mais plutôt juste une charge de commencement de preuve; il doit soumettre au juge une reconstruction crédible de la réalité. Ce sera le même juge, qui utilsera ses propres pouvoirs dans la recherche de la vérité. De cette manière, le contrôle sur l'activité administrative est exercé aussi précisément que possible, de même que l'intérêt public étant en cause (une reconstruction complète de la question est Bertonazzi L.).

Ce système ne s'applique pas lorsque le citoyen affirme que cette administration a manqué à son obligation: dans ce cas, l'administration n'exerce pas la puissance, ne prend pas une vraie mesure, et, par conséquent, doit être considéré que le citoyen est en mesure de démontrer qu'il correspond à ses questions. Dans ce cas, le fardeau de la preuve est complète.

La regle générale qui se souvient n'est pas changé après que la loi du 7 août 1990, n° 241 a reconnu le droit du citoyen d'obtenir tous les documents qui sont utiles pour sa protection dans le procès, et cela parce que l'exercice de ce droit ne modifie pas le délai du recours juridictionnel, qui, par conséquent, peut aussi expirer lorsque le demandeur, sans faute de sa part, n'a pas encore reçu les documents sur lesquels faire valoir ses propres questions.

Le Code du Contentieux confirme cette orientation (ainsi R. CHIEPPA, M. CLARICH, C.E. GALLO, C. SALTELLI), comme le Conseil d'Etat a reconnu dans la décision de l'Assemblée plénière du 23 Mars, 2011, n° 3. Le Code, en fait, donne encore plus pleinement que les lois pertinentes précédentes, le pouvoir d'instruction au juge, qui peut ordonner l'examen de documents, la visite des lieux, les verifications, les expertises, l'enquête.

La seule mesure d'instruction que le juge ne peut pas disposer sans demand de parties est la déposition des témoins (article 63 du Code).

Il s'ensuit que si le Code prévoit que c'est aux parties de fournir la preuve qu'ils sont à leur disposition (article 64) cela signifie seulement que lorsqu'un individu est confronté à la puissance de l'administration a la charge de principe de la preuve et lorsqu'il est confronté à l'obligation de l'administration a le fardeau de la preuve: l'ordonnance de procédure, par conséquent, donne au juge un large pouvoir discrétionnaire (F.G. SCOCA, P. CHIRULLI).

Le comportement des parties est également significatif à un autre régard: le Code (article 64, ce qui est nouveau) prévoit que le tribunal devrait considerer acquis les faits pas spécifiquement contesté par les parties constituées.

3. L'ACCÈS AU FAIT.

Le juge administratif dispose d'un accès complet à la réalité: il peut, et doit, si nécessaire, pour déterminer totalement la réalité du fait qu'il est représenté par le requérant et d'autres parties de la procédure: le juge peut déclarer les faits sans être obligé de considérer les faits comme indiqué par l'administration.

En vertu du Code de procédure administrative (article 63, qui est une nouveauté), le juge administratif peut utiliser tous les moyens de preuve qui sont admis dans le procès

civil (sauf l'entrevue officielle et le serment que n'est considére pas comme éligible dans le procès administratif).

Et ainsi, le tribunal peut reclamer des documents, un'enquête, un'expertise, des eclaircisements administratifs, peut ordonner l'inspection des lieux, peut ordonner l'exécution d'une vérification.

Le tribunal peut aussi disposer la déposition des témoins (même cela est une nouveauté du Code), mais seulement si la chose est requise par les parties; les témoins doivent repondre par des déclarations écrites et que, afin de rendre plus rapide l'enquête sur l'affaire.

4. LE PRÉSIDENT ET LA SECTION DANS L'INSTRUCTION.

Dans le procès administratif il n'y a pas un moment spécifiquement dédié à l'acquisition de l'épreuve.

La compétence dans le domaine de l'enquête est donnée, en général, au le président et a la section. Le président peut intervenir lorsqu'il considère, après l'examen des demandes des parties; il doit seulement attendre, en règle générale, le délai pour la constitution de l'administration, qui doit produire les documents nécessaires à la décision de l'affaire. Le président peut confiée à un autre juge toute requête (seulement la section peut ordonner la verification et l'expertise).

La section, quand il est investi par la décision de l'affaire, peut ordonner toutes les misures d'instruction; pour éviter le retard de la decision, le Code (Art. 65) prévoit que la section doit etablir la date de la prochaine audience pour la discussion.

5. CONCLUSIONS.

Les pouvoirs d'instruction des juridictions administratives ont toujours été utilisés avec prudence; en règle générale, le juge s'est limité à l'acquisition de documents, comprenant les actes sur lesquels l'administration a adopté la mesure. Cette approche est justifiée et compréhensible si on considère que l'administration reconstruit habituellement exactement la réalité des faits, mais parfois se trompe dans l'interprétation des règles régissant ses activités.

Dans le procès administratif a toujours été plus importante la discussion sur les questions de droit que le débat sur des questions de fait.

Néanmoins, alors qu'en fait la question est posée, devrait être donné une réponse complète, avec une conclusion qui ne laisse aucune zone d'incertitude: le juge administratif, par conséquent, peut reconstruire la réalité, quand en a besoin de le faire. Un problème particulier concerne le contrôle des choix de l'administration: dans ces cas, il est difficile de distinguer si la loi avait pour but de donner à l'administration une competence technique unique, qui ne peut donc être évaluée par d'autres, ou si, au contraire, il a simplement voulu donner à l'administration la tâche de faire le choix de la technique la plus appropriée.

Devant la tendance à contrôler les activités de l'administration avec un contrôle complet, comme la Constitution prévoit, dans ses articles. 24, 103, 111, 113, le Code veut éviter que les très qualifiés évaluations techniques d'une administration peuvent être contredites sur la base d'une expertise: l'expertise peut être ordonnée seulement si elle est essentielle si, c'est-à dire, que l'évaluation technique de l'administration publique en aucune manière ne peut pas être considérée comme correcte.

Dans l'ensemble, même à l'égard de l'instruction, l'expérience du procès administratif, qui a maintenant plus de 130 ans d'histoire, est considéré comme positive.

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JURISPRUDENCE

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JURISDICCIÓN CONTENCIOSO-ADMINISTRATIVA

INFORME ANUAL - 2010 - ESPAÑA

(Mayo 2011)

Prof. Jesús GONZÁLEZ PÉREZ

ÍNDICE

1. IDEA GENERAL

La regulación del proceso administrativo ha sido objeto de múltiples modificaciones el ultimo año. A principios de mayo de 2010 entraron en vigor las reformas necesarias para la implantación de la nueva oficina judicial en este orden jurisdiccional (Ley 13/2009, de 3 de noviembre). Asimismo, entraron en vigor las normas promulgadas durante ese año: la LO 1/2010, de 19 de febrero, que excluye del conocimiento de los Tribunales del orden jurisdiccional contencioso-administrativo los recursos directos o indirectos que se interpongan contra las Normas Forales fiscales de las Juntas Generales de los Territorios de Alava, Guipuzcoa y Vizcaya (añadiendo un apartado d) del art. 3 de la LJCA), la Ley de 5 de julio de medidas contra la morosidad de las operaciones comerciales y la de 5 de agosto de modificación de la legislación de contratos del sector público. Y ya en 2011, algunas de las normas de la extensa Ley 2/2011 de 4 de marzo, de Economía Sostenible, afectan a la Ley reguladora de la Jurisdicción contencioso-administrativa.

De aquí la importancia de las obras generales aparecidas últimamente sobre la regulación del proceso administrativo. Como la de SANTAMARIA PASTOR (Ley reguladora de la Jurisdicción contencioso-administrativa, Comentario, Ed. Justel); la que coordinó MARTINEZ VARES (Contencioso-administrativo, Comentarios y jurisprudencia), que, al estar escrita por prestigiosos Magistrados de la Sala de lo Contencioso-Administrativo, ofrece la garantía de conocer la opinión de los más altos intérpretes de la normativa vigente, y, ya en 2011, después de la Ley Economía Sostenible, la 6ª edición de mis Comentarios a la Ley de la Jurisdicción contencioso-administrativo, editada, como las anteriores, por Civitas.

2. IMPLANTACIÓN DE LA NUEVA OFICINA JUDICIAL Y OTRAS REFORMAS

La Ley 13/2009, de 1 de noviembre, de reforma de la Legislación procesal para la implantación de la nueva Oficina Judicial ha sido la que ha afectado y modificado a mayor número de artículos de la LJCA. El art. 14 modifica 66 artículos de esta Ley.

La reforma tiene como finalidad esencial aumentar las competencias de los Secretarios judiciales, reduciendo la de los Jueces y Tribunales, lo que les permitirá centrarse en las funciones esenciales de juzgar y hacer ejecutar lo juzgado, lográndose una mayor agilidad de los procesos, superando en lo posible la tremenda lentitud de la Justicia. Al no limitarse la competencia de los Secretarios a actos de ordenación (diligencias de ordenación) del proceso y dictar unos nuevos tipos de actos procesales denominados decretos (no definitivos y resolutorios), ha sido necesario regular los recursos admisibles contra sus actos, a los que se dedica un nuevo artículo (el 102 bis), que establece que:

- Contra las diligencias de ordenación y decretos no definitivos será admisible recurso de reposición.
- Y contra los decretos que pongan fin al procedimiento o impidan su continuación o los demás que se determinan expresamente un llamado recurso de revisión ante el Juez o Tribunal. Y contra la resolución de éste recurso de apelación o casación en los supuestos previstos en los artículos 80 y 87.

Por otro lado, la LO 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la Legislación procesal para la implantación de la Oficina judicial, añadió una DA 15ª a la LOPJ en la que se establece el requisito de un depósito de escasa cuantía para interponer recursos en los distintos órdenes jurisdiccionales, cuyo fin principal –dice el preámbulo– es, “disuadir a quienes recurran sin fundamento jurídico alguno, para que no prolonguen indebidamente el tiempo de duración del proceso, en perjuicio del derecho a la tutela judicial efectiva de las otras partes personadas en el proceso” destinándose los ingresos que puedan generar por el uso abusivo del derecho al proceso de modernización de la Justicia.

3. ÁMBITO DEL ORDEN JURISDICCIONAL CONTENCIOSO-ADMINISTRATIVO

Dos de las disposiciones dictadas en el último año afectan al capítulo primero del Título I de la Ley de la Jurisdicción: la LO 1/2010, de 19 de febrero y la Ley 34/2010, de 5 de agosto, que modificó la Ley de Contratos del Sector público.

3.1. La LO 1/2010 de 19 de febrero

Esta Ley modificó el art. 9.4. LOPJ, que reduce el ámbito del Orden judicial contencioso-administrativo y, congruentemente, añadió al art. 3 de la LJCA, un apartado, el d), que excluye del conocimiento de esta jurisdicción –y le atribuye en exclusiva al TC– "los recursos directos ó indirectos que se interpongan entre las Normas Forales Fiscales de las Juntas Generales de los Territorios de Alava, Guipuzcoa y Vizcaya", dictados en el ejercicio de sus competencias exclusivas garantizadas por la DA 1ª de la CE y reconocida en el art. 42,1 del Estatuto de Autonomía del País Vasco (DA. 5ª,de la LOTC). Una correcta interpretación de la DA 1ª a la LJCA hacia innecesaria esta modificación.

3.2. La Ley 38/2010, de 5 de agosto.

El artículo 21.2, LCSP (añadido por la Ley 34/2010, de 5 de agosto), atribuye al orden contencioso-administrativo jurisdicción «para resolver las cuestiones litigiosas relativas a la preparación, adjudicación, efectos, cumplimiento y extinción de los contratos administrativos. Igualmente corresponderá a este orden jurisdiccional el conocimiento de las cuestiones que se susciten en relación con la preparación y adjudicación de los contratos privados de las Administraciones públicas y de los contratos sujetos a regulación armonizada, incluidos los contratos subvencionados a que se refiere el art. 17, así como de los contratos de servicios en las categorías 17 a 27 del Anexo II, cuyo valor estimado sea igual o superior a 193.000 euros del que pretendan concertar entes, organismos o entidades que, sin ser Administraciones públicas, tengan la condición de poderes adjudicadores. También conocerá de los recursos interpuestos contra las resoluciones que se dicten por los órganos de resolución de recurso previstos en el art. 311 de esta Ley». Se reitera así la

doctrina de los actos separables que había elaborado la jurisprudencia y ya había recogido la Ley de 1.956 y se extiende la jurisdicción a las cuestiones que se planteen en materia de contratos sujetos a regulación armonizada y a los otros que se determinan.

4. CONTENCIOSO-ADMINISTRATIVO EN MATERIA DE CONTRATACIÓN EN EL SECTOR PÚBLICO

Las normas procesales administrativas, al aplicarse a los litigios planteados en materia de contratación del sector público, han sido objeto de importantes modificaciones, aparte de la ampliación del ámbito de esta orden jurisdiccional, a que me refiero en el apartado anterior.

4.1. La Ley 34/2010, de 5 de agosto

La Ley 34/2010, de 5 de agosto, que incorporó al Ordenamiento español el contenido de la directiva 2007/66/CE en materia de contratos del sector público, ha introducido importantes modificaciones en la LCSP y en la LJCA. Entre ellas la creación de unos órganos especializados, dotados de cierta independencia para conocer de los recursos y reclamaciones en vía administrativa que se determinan.

La composición de estos órganos en los ámbitos de la Administración general del Estado, de las Comunidades Autónomas y de las Corporaciones Locales, se regula en el art. 311, LCSP. Conocerán de los recursos especiales en materia de contratación contra los actos que se determinan en el art. 310, LCSP y de las reclamaciones de los procedimientos de adjudicación de los contratos en los sectores del agua de la energía, los transportes y conocimientos posibles a que se refiere el art. 101 de la Ley 31/2007, de 30 de octubre.

El recurso especial que se regula en los artículos 310 a 319, tiene carácter potestativo y su interposición producirá los efectos de quedar en suspenso la tramitación del procedimiento de contratación.

Como dice el preámbulo de la Ley, la finalidad de la reforma no fue otra que reforzar los efectos del recurso, permitiendo que los candidatos y licitadores que

intervengan en los procedimientos de adjudicación puedan interponer recurso contra las infracciones legales que se produzcan en la tramitación de los procedimientos de selección contando con la posibilidad razonable de conseguir una resolución eficaz.

Para ello, la Directiva establece una serie de medidas accesorias para garantizar los efectos de la resolución que sé dicte en el procedimiento de impugnación. Una de tales medidas es precisamente la suspensión del acuerdo de adjudicación hasta que transcurra un plazo suficiente para que los interesados puedan interponer sus recursos. Congruente con ésta, se prevé también, que la suspensión de los acuerdos de adjudicación se mantenga hasta que se resuelva sobre el fondo del recurso o, al menos, sobre el mantenimiento o no de la suspensión.

Por otra parte y con carácter general se prevé la facultad de los recurrentes de solicitar la adopción de cualesquiera medidas cautelares tendentes a asegurar los efectos de la resolución que pueda adoptarse en el procedimiento de recurso o a evitar los daños que puedan derivarse del mantenimiento del acto impugnado.

4.2. La medida cautelar del pago inmediato de la deuda

Quizás, la más novedosa de las modificaciones de la regulación del proceso administrativo durante este último año haya sido la introducción de la medida cautelar de pago inmediato de la deuda, introducida por la Ley 15/2010, de 5 de julio. De aquí que haya suscitado el interés de la doctrina en las publicaciones periódicas, como ponen de manifiesto los siguientes trabajos: En el diario "La Ley" núm. 7472 de 21 de septiembre de 2010, el de DORREGO DE CARLOS y JIMENEZ DIAZ, La nueva regulación de la morosidad de las Administraciones públicas: criterios prácticos de aplicación del régimen de la Ley 15/2010, y, en "El Consultor de los Ayuntamientos y de los Juzgados", los de AYALA MUÑOZ, La Ley 15/2010, de 5 de julio, ¿un nuevo procedimiento judicial para demandar a las Administraciones públicas en caso de morosidad?. (núm. de 18 de octubre de 2010), y SANCHEZ CERVERA, La medida cautelar de pago inmediato de la deuda, introducida por la Ley 15/2010, de 5 de julio, y su aplicación al amparo del privilegio de

inembargabilidad previsto en el 173 Texto refundido de la Ley Reguladora de las Haciendas Locales (nº 8 de 30 de abril de 2011).

El desorbitado endeudamiento de las Administraciones por la insensata actuación de las personas que detentan el poder en cada una de ellas acometiendo actividades, muchas veces innecesarias, careciendo de fondos para hacerlo, conduce fatalmente a la imposibilidad de pagar a los contratistas, no ya en los plazos legales sino en plazos muy superiores con la consiguiente repercusión en las economías de las empresas y en la grave crisis que padecemos.

Y a nuestros geniales legisladores no se les ha ocurrido otra cosa que establecer lo que llaman "medida cautelar de pago inmediato de la deuda", que más se parece a un proceso ejecutivo…. El mecanismo que establece y regula en el nuevo art. 200 bis de la LCSP es el siguiente.

- Establecer un plazo para que las Administraciones hagan efectiva las deudas.
- Transcurrido este plazo, los acreedores podrán reclamar a la Administración contratante el cumplimiento de la obligación y el pago, en su caso de los intereses.
- Si transcurre un mes sin que la Administración hubiese contestado, se entenderá reconocido el vencimiento del plazo de pago y los interesados podrán incoar proceso administración en relación a la inactividad de la Administración, pudiendo solicitar como medida cautelar el pago inmediato de la deuda. Pero ¿cómo?.

La Ley prevé que se siga el procedimiento para acordar y hacer efectiva la medida cautelar. Notificado el auto al órgano administrativo, éste dispondrá "su inmediato cumplimiento", siendo de aplicación lo dispuesto en el art. 134 del Título IV, según la regla del art. 134.1 de la LRJPA.

Luego ante la resistencia de los titulares de los órganos administrativos, estaremos ante las enormes dificultades que plantea todo intento de hacer efectiva una condena de pago de una cantidad liquida, dificultades que se dan aunque ya exista sentencia investida

en cosa juzgada. Y cuando no hay dinero ni posibilidad de obtenerlo no podrá hacerse efectivo, ni de modo "inmediato" ni de otro modo. "Lo que es imposible es imposible y además...".

5. MODIFICACIONES INTRODUCIDAS POR LA LEY 2/2011, DE 4 DE MARZO, DE ECONOMÍA SOSTENIBLE

La Ley de Economía Sostenible ha afectado a la regulación de buena parte de los sectores del Ordenamiento jurídico, con las consiguientes repercusiones en el proceso administrativo. La DF 43ª modificó la Ley 34/2002 de 11 de julio de Servicios de la Sociedad de Información y de Comercio Electrónico y el Texto refundido de la Ley de propiedad intelectual de 1.996, así como los correlativos de la LJCA.

5.1. Autorizaciones judiciales

Las modificaciones introducidas en las Leyes 34/2002 y de la Propiedad intelectual se concretan en exigir la autorización judicial para realizar ciertas actividades: adoptar las medidas necesarias para que se interrumpa la prestación de servicios o para retirar los datos que vulneren los principios que se establecen. A los que figuraban inicialmente, la Ley de economía sostenible ha añadido «la salvaguarda de los derechos de propiedad intelectual».

5.2. Competencia

La competencia para otorgar la autorización se atribuye a los Juzgados Centrales de lo Contencioso-administrativo, modificando en tal sentido el art. 9.2, LJCA.

5.3. Recursos

Se admite recurso de apelación contra los autos dictados sobre la autorización judicial (art. 80.1. d) LJCA).

5.4.Procedimiento

Se añade a la LJCA el art. 122 bis, que regula los procedimientos para obtener la autorización.

5.5. Modificación de la DA 4ª, apartado 5, LJCA

Esta DA 4ª enumera una serie de actos contra los que era admisible recurso contra la Sala de lo contencioso-administrativo de la Audiencia Nacional.

La Ley de Economía Sostenible modifica el apartado 5, que queda redactado así:

> «5. Los actos administrativos dictados por la Agencia Española de Protección de Datos, Comisión Nacional de Energía, Comisión del Mercado de las Telecomunicaciones, Comisión Nacional del Sector Postal, Consejo Económico y Social, Instituto Cervantes, Consejo de Seguridad Nuclear, Consejo de Universidades y Sección Segunda de la Comisión de Propiedad Intelectual, directamente, en única instancia, ante la Sala de lo Contencioso-Administrativo de la Audiencia Nacional».

Y suprime el apartado 6.

6. JURISPRUDENCIA

La jurisprudencia de los Tribunales del Orden contencioso-administrativo ha seguido manteniendo la rígida interpretación formalista de los últimos años, con objeto de impedir el acceso del mayor número de recursos posibles ante los Tribunales Superiores, a fin de acelerar la Justicia.

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JUDICIAL REVIEW AND REMEDIES IN A NUTSHELL

ANNUAL REPORT - 2010 - Germany

(Mai 2011)

Prof. Dr. Klaus Ferdinand GÄRDITZ

INDEX

1. CONSTITUTIONAL LAW

Judicial review and remedies in administrative law are profoundly influenced by constitutional law. The current German corpus of administrative court procedure is based on constitutional guarantees, especially the effective recourse to the courts as a means to protect individual freedom rights. In fact, constitutional demands growing in detail over the past 60 years have forged a coherent system of judicial remedies putting the administration under effective control..

1.1 Guarantee of Effective Judicial Review

Article 19 paragraph 4 of the German Constitution (*Grundgesetz* – Basic Law) guarantees any person whose rights are affected by public authorities a general recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The guaranteed recourse is, according to the established jurisdiction of the Federal Constitutional Court, more than a mere right to file a request. It is the guarantee of effective judicial review. The Federal Constitutional Court has moulded detailed aspects of effectiveness out of the abstract constitutional provision. As a result, the whole administrative court procedural law is interspersed with constitutional stuff.

Due to the guarantee of effective judicial review, the legal control of the administration is vested in ordinary and special courts. Administrative jurisdiction is exercised by independent courts separated from the administrative authorities. There are special administrative courts, but they are organized as an ordinary court. According to Article 97 of the Basic Law, judges shall be independent and subject only to the law. Judges are appointed for life.

1.2 Organization of Administrative Courts

According to Article 74 paragraph 1 No. 1 of the Basic Law, the Federation has legislative power extending to the court organization and procedure. Based on this power the federal legislation enacted the Code of Administrative Court Procedure.

Regarding Article 95 of the Basic Law, the Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour and social jurisdiction. In accordance with Article 92 of the Basic Law the remaining courts – the large body of the judicial branch – are courts of the constituent states (Länder). As a result of the special federal structure of Germany, judicial review of the administration rests with the administrative courts of the Länder, at least in principle. It is even within their jurisdiction to control the federal administration.

The organization of the courts remains within the legislative competence of the Federation (see the aforementioned Article 74 paragraph 1 No. 1 of the Basic Law). According to federal law, administrative courts of the Länder shall be the Administrative Courts (the first instance competent in most cases) and one Higher Administrative Court (primarily a court of appeal with power to review the relevant facts) in each state; in the Federation it is the Federal Administrative Court, which shall have its seat in Leipzig. The competences of the Federal Administrative Court primarily include the legal control of the Länder courts as a court of appeal regarding federal law. The Federal Administrative Court has only a very limited jurisdiction as a first instance.

In addition to the general administrative jurisdiction, there are special administrative courts. Fiscal Courts are competent to rule on matters of tax law. The jurisdiction of the Social Courts includes cases arising under the public social security system. Even ordinary courts have jurisdiction over specific administrative law cases. They act as functional administrative courts. The most important administrative law cases within the jurisdiction of ordinary courts are the review of administrative acts of the antitrust and competition authorities, energy regulation law, and public liability.

Judicial review of parliamentary statute law is monopolized in the Federal Constitutional Court and 16 constitutional courts of the constituent states with regard to Article 100 paragraph 1 of the Basic Law: If a court concludes that a law enacted by parliament on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Länder court with jurisdiction over constitutional disputes where the constitution of a constituent state is held to be violated, or from the Federal Constitutional Court where the Basic Law is held to be violated.

2. STATUTE LAW

2.1 The Code of Administrative Court Procedure

The rules of administrative court procedure and provisions on the organization of courts are laid down by federal statute law, the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*). There are special (but similarly structured) codes regarding fiscal courts and social courts: the Code of Fiscal Court Procedure (*Finanzgerichtsordnung*) and the Code of Social Court Procedure (*Sozialgerichtsgesetz*). In addition, there are complementary provisions on administrative court procedure in profusion, scattered on various administrative statutes, e. g. in the laws on energy and telecommunications regulation, the law on judicial review and remedies regarding environmental procedures, or in the German antitrust law.

2.2 General Principles of Administrative Court Procedure

Remedies to administrative courts are, at least in general, restricted to plaintiffs that can claim the impairment of an individual right. In accordance with Section 42 paragraph 2 Code of Administrative Court Procedure an action shall only be admissible if the plaintiff claims that his/her rights have been violated by the relevant administrative act

or its refusal or omission. As a consequence, neither a mere interest of the plaintiff nor public interests in the legality of administrative actions are sufficient to grant a standing.

Regarding the procedure at court, there are some general principles an administrative court has to apply. There is the fundamental right to be heard (Article 103 paragraph 1 of the Basic Law) demanding the court to consider every relevant aspect brought forth by the plaintiff or by another party during the procedure. In addition, German administrative court procedure is an inquisitorial system of administrative justice. Thus, the court has to examine the relevant facts ex officio. The court is not bound to the submissions or to the motions for the taking of evidence of the relevant parties (Section 86 paragraph 1 Code of Administrative Court Procedure).

2.3 Remedies

The Basic Law guarantees effective recourse to the courts, as far as any person can claim that his/her rights are violated by public authority (see above). Thus, the Constitution warrants an effective and coherent system of remedies against all acts of state that affect the citizens. The Code of Administrative Court Procedure offers an adequate set of remedies, at least if the code is interpreted in conformity with the Constitution. Nonetheless, remedies are divided into separate actions with different requirements for the admissibility of an action and with different competences of the courts to remedy a request.

The most important actions are the rescissory action (*Anfechtungsklage*) and the enforcement action (*Verpflichtungsklage*) according to Section 42 paragraph 1 Code of Administrative Court Procedure, as both actions are applicable to administrative acts, the common legal form of an administrative measure. An administrative act is a sovereign decision of a public authority on a specific case under public law. According to Section 42 paragraph 1 Code of Administrative Court Procedure, the plaintiff can request by means of an action the rescission of an administrative act or the sentencing to issue a rejected or omitted administrative act. If the dispute does not rest on the questioned legality of a valid administrative act the code offers an action for a declaratory judgement

(*Feststellungsklage*): The establishment of the existence or non-existence of a legal relationship or of the nullity of an administrative act, according to Section 43 Code of Administrative Court Procedure, may be requested by means of an action if the plaintiff has a justified interest in the establishment being made soon. In addition, there is an unwritten (but constitutionally demanded) residual action that, like an omnibus clause, covers every request that is not explicitly codified within the Code of Administrative Court Procedure, the so called general action for performance (*allgemeine Leistungsklage*). Thus, recourse to the courts is made independent from the legal form of administrative measures, and a comprehensive system of actions against every act of state that might impair individual rights is established.

A successful rescissory judgement rescinds the relevant administrative act and, thus, eliminates any of its effects that impair the plaintiff's rights (see Section 113 paragraph 1 Code of Administrative Court Procedure). If an enforcement action or a general action for performance proves to be well-founded, the administrative court puts the obligation incumbent on the administrative authority to effect the requested official act (see Section 113 paragraph 5 Code of Administrative Court Procedure). If the administrative authority does not comply with the relevant judgement, the final verdict can be enforced against the authority through the court (see Section 167 et sequ. Code of Administrative Court Procedure).

Prior to lodging a rescissory or enforcement action, according to Article 68 Code of Administrative Court Procedure the lawfulness and expedience of an administrative act shall be reviewed in preliminary proceedings by administrative authorities. The functions of preliminary proceedings are, on the one hand, to offer the public administration an instrument of self-regulation and, on the other hand, to grant the applicant an additional remedy to settle conflicts without involving the courts. Notwithstanding that, federal law enables both federal and state legislation to establish exceptions and exclude preliminary proceedings for certain subjects. A broad scope of statute provisions in federal and state administrative law has taken advantage of this facility. A couple of constituent states have generally abolished preliminary proceedings, recently, to reduce bureaucracy and to accelerate procedure.

2.4 Interim measures

According to Section 80 paragraph 1 Code of Administrative Court Procedure an objection raised by a plaintiff and a rescissory action automatically enfold suspensory effect, that means that the relevant administrative measure may not be enforced until the court hands down a decision. Thus, there is no need to provide additional interim measures as long as the suspensory effect lasts. Nonetheless, there are various legal exceptions and restrictions reducing the suspensive automatism. The administration can avoid the suspensory effect if the relevant administrative act is replenished with a special clause providing for immediate enforcement. In those cases, on request by the plaintiff, the court dealing with the main case may completely or partly order or restitute the suspensory effect in accordance with Section 80 paragraph 5 Code of Administrative Court Procedure.

In all other cases, Section 123 Code of Administrative Court Procedure empowers the administrative courts to provide interim measures with regard to a pending dispute. On request of the plaintiff, the court may, even prior to the lodging of an action, provide interim measures regarding the subject-matter of the dispute if the substantial danger exists that a right of the plaintiff might be considerably impeded. Interim orders are also admissible to settle an interim condition regarding a contentious legal relationship if a regulation by court appears necessary, above all in order to avert major disadvantages or prevent immanent force.

3. IMPACT OF EUROPEAN LAW

European Union law has a deep impact on the German system of administrative court procedure, as European Union law depends on national courts enforcing European law and improving its effectiveness in the decentralized European enforcement system. The general aim of effectiveness followed different paths to influence national law. From a European perspective a plaintiff that takes recourse to the courts to file a European law

based claim is an effective instrument to put the decentralized administrative enforcement of European Union law and the national administrations under effective judicial control. As a result, the narrow concept of standing under German administrative court procedure law has been widened step by step to fit the European demands regarding effective decentralized judicial review. Although European law does not demand a systematic shift from an individual rights based standing to a concept of 'objective' control, the effectiveness of European Union law depends on a broad access to national courts and is based on a more or less instrumental concept of individual rights. Therefore, a substantial interest in the enforcement of an EU directive or regulation may be sufficient to create an individual right and an appropriate standing before the national courts, even though German administrative law doctrine might have qualified the relevant provision as 'merely objective' (that means not granting individual rights). In effect, European Union law has opened the recourse to the courts, in particular in disputes concerning environmental standards.

A recent decision of the European Court of Justice shows obvious conflicts between, on the one hand, the European approach of a wide access to justice as a means of public control and, on the other hand, the narrow concept of standing of the German administrative court procedure law. Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment warrants that members of the "public concerned" have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the relevant Directive (Article 3 paragraph 7 and Article 4 paragraph 4). In contrast, the German law on judicial review and remedies regarding environmental disputes (*Umweltrechtsbehelfsgesetz*) grants standing only as far as an organization could claim an infringement of a provision granting individual rights (not necessarily to the organization itself but to any individual subject). This statute obviously proved to be unsuitable to translate the wide access to justice concept of Directive 2003/35/EC into adequate German court procedural law. Thus, the European Court of Justice, in a Judgement from 12 May 2011 (C-115/09), unsurprisingly (and rightly) quashed the German attempt to evade an effective transformation of the Directive.

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