

THE JURISDICTION OF THE ADMINISTRATIVE JUDGE

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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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