

**BEHAVIOURAL PUBLIC LIABILITY**

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**INDEX**

**1. BEHAVIOURAL PUBLIC LIABILITY: INTRODUCTORY REMARKS.  
RELATIONSHIP WITH LIABILITY FOR UNLAWFUL  
ADMINISTRATIVE ACTION. JURISDICTION**

**2. SPECIFIC CASES:**

*2.1 Liability for breach of duty of custody*

*2.2 Liability for delay in administrative action and for breach of duty of  
procedural fairness*

*2.3 Liability for breach of duty of supervision*

*2.4 Liability for illegal acquisition of land*

*2.5 Liability for precontractual unfairness and for lawful administrative action*

*2.6 Liability caused by failure to implement EU Directives*

## **1. BEHAVIOURAL PUBLIC LIABILITY: INTRODUCTORY REMARKS. RELATIONSHIP WITH LIABILITY FOR UNLAWFUL ADMINISTRATIVE ACTION. JURISDICTION**

Until the introduction of an action for damages before Administrative Courts, public liability arising from unlawful administrative action was virtually excluded in the Italian legal system.

On the contrary, the liability of public authorities for behaviour and practical activities has been acknowledged since the second half of the 19th century and indeed for a long time has been considered the only kind of public liability accepted in our legal system<sup>1</sup>.

Public liability has not been considered as an autonomous or special model of liability because of its connection with activities that do not consist in the exercise of administrative power and therefore more easily fit in private law categories, such as rights instead of legitimate interests, this form of<sup>2</sup>.

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<sup>1</sup> On public liability in general, also for reference, see COMPORTI G. D., *Responsabilità della pubblica amministrazione*, in *Dizionario di diritto pubblico*, a cura di CASSESE S., vol. V, Milano, 2006, p. 5125; RACCA G. M., *L'evoluzione della responsabilità della pubblica amministrazione*, in GAROFOLI R., RACCA G. M., DE PALMA M., *La responsabilità della pubblica amministrazione e risarcimento del danno dinanzi al giudice amministrativo*, Milano, 2003. Favourable to an extension of liability in the public-law area was already CAMMEO F., *Commentario delle leggi sulla giustizia amministrativa*, I, s.d., p. 877.

<sup>2</sup> However, scholars had underlined the need to adapt private-law provisions to public authorities, especially in relation to fault, by suggesting a no-fault scheme for public liability: ORLANDO V. E., *Saggio di una nuova teoria sul fondamento della responsabilità*, in *Arch. dir. pubbl.*, III, 1893, p. 251.

Besides, Art. 28 of the Constitution, in providing for the liability of the State and civil servants for the breach of rights, has acknowledged that public liability lies on the same foundations of the private law of tort<sup>3</sup>.

From then on, the efforts of both courts and scholars have been towards the assimilation of administrative liability to the one provided by the private law of tort for individuals and companies reducing those privileges that, albeit justified by structural and functional peculiarities of public bodies, might bring to the application of a more favourable regime for public authorities.

Nowadays, as a result of the extension of the protection for damages, no administrative activity – whether performed under private or public law – can be said to be exempt from liability whether it infringes rights or legitimate interests.

Since 1998, when for the first time a statutory act introduced the possibility to seek damages before administrative courts, claims for damages have to follow two alternative routes: if damages are connected with the exercise or non-exercise of administrative power, they have to be claimed before administrative courts, whereas if they are the result of simple administrative behaviour which is not connected with the exercise of power, they have to be sought before civil courts<sup>4</sup>.

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<sup>3</sup>Reminds how public liability, such as acknowledged by sect. 28 Cost., is shaped on the absence of special characters and is subject to the common private-law principles SCOTTI E., *Appunti per una lettura della responsabilità dell'amministrazione tra realtà e uguaglianza*, in *Dir. amm.*, 2009, p. 535. On the nature of State liability for illegal action of its officials – whether direct or indirect – see GRECO, *La responsabilità civile dell'amministrazione e dei suoi agenti*, in *Diritto amministrativo*, a cura di MAZZAROLLI L., PERICU G., ROVERSI MONACO F., ROMANO A., COCA F.G., Bologna, 2001, p. 1727.

<sup>4</sup> Sect. 7 of Administrative Courts Act gives administrative courts all the controversies "concerning legitimate interests and, in special fields determined by the law, civil rights, in relation to the exercise or non-exercise of administrative powers regarding acts, decisions or agreements or behaviour directly or indirectly linked to the exercise of power".

Legislative decree no. 104/10 (our Code of Administrative Proceedings) has given the administrative courts the power to judge over whatever administrative conduct as long as it is connected with the exercise of power and it has stated its exclusive jurisdiction on the liability for delay in the exercise of public power. As a result, civil courts jurisdiction is now residual and confined to liability for behaviour not connected with the exercise of an administrative power and material activities.

Nonetheless, the identification of areas of liability whose recognition remain reserved to the civil courts is not easy, because it relies on a criterion that is not clear in its application: the courts are entrusted with the difficult task to ascertain when damages are directly or indirectly connected to the exercise of power and when they arise from simple factual behaviour.

The existence of different jurisdictions is not without consequences: even if the model of public liability comes from the private law of tort, the elements of the liability scheme are interpreted in a different way by the two judges.

Leaving aside contractual liability, which mainly follows private law, public liability has been based by civil judges on the general private law tort clause, as stated in Art. 2043 of our civil code<sup>5</sup>, and only in particular cases on other provisions of the civil code that include forms of strict liability.

As to the rationale of administrative courts' jurisdiction on public liability cases, the theoretical foundations of public liability have been highly controversial, since scholars have suggested either that it is a special area of the law of tort or that it might be a branch of

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<sup>5</sup> Sect. 2043 c.c. (Tort liability): "Whatever malicious or culpable act that causes unfair harm to someone binds who committed it to restore damages." Who seeks damages has to give evidence of the event, of its unlawfulness, of causation and of fault or malice.

contractual liability, on account of the special relationship that develops between individuals and public bodies during administrative proceedings<sup>6</sup>.

Civil courts, unlike administrative ones, require specific evidence of the facts that constitute liability, namely fault.

However, perhaps also thanks to the different approach of the administrative courts, there have been interesting developments in the recent case law of civil courts on administrative liability, attempting to broaden the application of the general clause of *neminem laedere* to administrative activities, and to release the so-called “restraint net”<sup>7</sup>.

Recent case law also shows a general confluence of civil and administrative courts towards the acknowledgement of a higher number of no-fault liability hypotheses, with the consequent enhancement of the public bodies prevention role.

On the contrary, administrative courts, whilst trying to relieve individuals from the burden of evidence in relation to the fault element, have a stricter approach towards the proof of damages, both in their existence and in their amount.

In the following paragraphs we will focus on the hypotheses that have recently given rise to significant case law or to new and particularly interesting issues.

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<sup>6</sup> On the identification of a special model of public liability, see GAROFALO R., *La responsabilità dell'amministrazione: per l'autonomia degli schemi ricostruttivi*, in *Dir. amm.*, 2005, p. 1.

<sup>7</sup> Which has been advocated in relation to the liability for unlawful administrative acts, as reminded by SCOTTI, *cit.*, p. 522.

## **2. SPECIFIC CASES:**

### ***2.1 Liability for breach of duty of custody***

New trends are developing in the case law on liability for breach of duty of custody, especially when damages arise from the lack of (or bad) maintenance of public roads and public properties.

Until a few years ago civil courts did not apply Art. 2051 c.c., which provides a hypothesis of no-fault or strict liability, and furthermore applied with particular rigour Art. 2043, which was more favourable to public bodies.

The claimant was required to give evidence of causation and damages as well as of the existence of a “pitfall” which he could not see nor foresee, with the consequent inversion of the burden of proof as stated by Art. 2051 c.c.<sup>8</sup>.

The courts used to argue that, especially in the case of public roads, the extension and the general use granted to the public implied that the public owner could not be bound to a strict duty of custody and therefore they mostly denied the award of damages, granting them only when a “trick” or “peril” was proved to exist. In these cases the duty of custody of the administration was replaced by a duty of prevention and self-responsibility of the individuals.

A more recent trend in case law, which is now consolidating, tends to restrict the scope of Art. 2043 and its more onerous evidentiary regime in favour of the application of Art. 2051 c.c., albeit courts argue that, especially in relation to public property, public use

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<sup>8</sup> Sect. 2051 c.c. (Damages caused by things held in custody): «Everyone is liable for any harm caused by things that he holds in custody, unless he proves a fortuitous event».

exposes the property to unforeseeable and often indeterminate risks for administrative authorities that are in charge of its custody and maintenance<sup>9</sup>.

Although a minority case law still relies on the need to protect public bodies from potentially indefinite risks, civil courts are starting to exclude that damages arising from the use of public property or due to lack of maintenance of public goods or infrastructure<sup>10</sup> can be ruled under the provision of the general clause of civil liability (Art. 2043 c.c.) and tend to refer them to the provision of Art. 2051 c.c.<sup>11</sup>, consequently applying to the claimant a more favourable evidentiary that such a norm involves<sup>12</sup>.

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<sup>9</sup> Typical is the case for motorways, in relation to which, also considered the contractual relationship between the manager and the user, our Supreme Court recognises the application of sect. 2051 c.c.: see Cass., sez. III, 6 June 2006, n. 15383, in *Danno e resp.*, 2006, 1145; Cass., sez. III, 6 June 2008, n. 15042, in *Foro it.*, 2008, I, 2823, with comment by PALMIERI, *Custodia di beni demaniali e responsabilità: dopo il tramonto dell'insidia, ancora molte incertezze sulla disciplina applicabile*. In favour of the application of sect. 2051 c.c., in a case involving an accident caused by a oil stain on the road, though in the specific case concluding that the damages had been produced by external causes, Corte d'Appello di Trento, sez. distaccata di Bolzano, 10 August 2009, n. 172, in *www.lexitalia.it*. On the nature of the liability of who has the duty of custody, as interpreted by our Supreme Court, see Cass., sez. III, 19 gennaio 2010, n. 713, in *Danno e Resp.*, 2010, 10, 921, con nota di MANINETTI P., *Responsabilità oggettiva: come e perché*.

<sup>10</sup> As to the duty of maintenance of sewerage, in favour of the application of sect. 2051 c.c., see Cass., sez. III, 19 March 2009, n. 6665, in *Foro it.*, 2010, I, 562. See also Cass., SS.UU., 5 March 2009, n. 5287, in *Demanio e Patrimonio pubblico*, 2009, 26.

<sup>11</sup> In this direction, see Cass., sez. III, 23 January 2009, n. 1691 (in *Danno e Resp.*, 2009, 3, 322), which, beginning by quoting the words of Corte Costituzionale in judgment n. 156 of May 10 1999, has stated that «the relevant factor for the application of sect. 2051 is in the capability of exercising a power of control and supervision on public infrastructure, since the absence of this factor cannot be inferred by the extension of the road and/or the general use of it by third parties, those being mere signs, but only as the result of a complex research on the specific facts of single case». The Supreme Court confirmed previous judgments in which it had underlined, in relation to public roads, «the need that the duty of custody has to be inquired not only with regard to extension of the road, but also considering its features, its position, its security systems and all the available technical instruments of control, since those factors can influence the users' expectations. Also relevant can be their distance

These significant developments in case law towards a wider recognition of no-fault areas of liability have been favourably considered by scholars, who advocate a more frequent use of presumptive tools also in the area of liability for unlawful administrative action, thus hypothesising a common evolution towards the acknowledgment of a no-fault scheme of public liability<sup>13</sup>.

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from urban centres (see Cass. n. 3651/2006; n. 15384/2006)». On other cases in which the courts have argued in favour of a duty of custody and on the consequent application of sect. 2051 c.c., see DONADONI P., *La responsabilità civile nella pubblica amministrazione tra onere di custodia e cd. "insidia o trabocchetto"*, in *Contratto e impresa*, 2008, 145 ss. Recently, in the opposite direction, Trib. Brindisi, sez. distaccata di Fasano, 7 April 2011, n. 38, in [www.lexitalia.it](http://www.lexitalia.it), that confirmed the traditional opinion striking out the application since the claimant had failed to give proof of an invisible pitfall.

<sup>12</sup> As to the burden of proof on behalf of the claimant, see Cass., sez. III, Ord. 9 October 2008, n. 24881 (in *CED Cassazione*, 2008) that specified that «who seeks redress of the prejudice suffered as a result of lack or insufficient road maintenance has to prove, according to the private law liability principles, that damages were caused by the thing supposed to be in custody, according to the factual circumstances of the case. Such a proof consist of the evidence of the event and causation with regard to the thing in custody and can be given also presumptively, since damage itself is already evidence of "anomalous result", i.e. of the objective diversion from a diligent behaviour. The claimant is therefore exempted from proving the existence of a "trick" or "pitfall" – foreign to sect. 2051 c.c. – or of the concurrence of a external cause that are not imputable to the conduct of the person who has the duty of custody. Being an exception to the general rule stated in sect. 2043 and 2697 c.c., sect. 2051 provides for a case of inverted burden of proof, by burdening the person in charge of the custody with the possibility of relieving himself from the presumptive liability by showing evidence of a fortuitous event (strict liability), and give proof that the event was not foreseeable nor avoidable with the expected diligence, considered the powers that he has over the thing in custody and the correspondent duties of control, supervision and diligence that require the adoption of all possible measure able to prevent and avoid the production of damages to third parties». See also Cass., sez. III, 22 April 2010, n. 9546, in *Bollettino legisl. tecnica*, 2010, 6, 567.

<sup>13</sup> For the proposal of the extension of presumptive fault also to unlawful administrative action, see COMPORTI G. D., *Il cittadino viandante tra insidie e trabocchetti: viaggio alla ricerca di una tutela risarcitoria praticabile*, in *Dir. amm.*, 2009, p. 663. In the same direction, AVANZINI G., *Nuovi sviluppi nella responsabilità delle amministrazioni per danni derivanti da attività pericolose e da cose in custodia*, in *Dir. amm.*, 2010, p. 297. European Court of Justice also moves towards a no-fault liability scheme: Corte Giust., sez. III, 30 September



Decisions on damages caused by wild animals<sup>14</sup> or by dangerous activities<sup>15</sup> are still in favour of the application of Art. 2043 c.c. instead of other stricter liability schemes. With respect to these scholars call for a wider application of the presumptive liability schemes provided for by artt. 2050 and 2052 c.c. can be applied instead, in order to enhance the preventive rationale of liability and bind public bodies to a stricter compliance with security and surveillance duties<sup>16</sup>.

### ***2.2 Liability for delay in administrative action and for breach of duty of procedural fairness***

Although damages for delay in the adoption of a favourable administrative decision, in breach of the duty to complete proceedings stated by Art. 2 of the Administrative Procedure Act, represent a typical behavioural form of liability, they belong to the jurisdiction of administrative courts, according to the provision of Art. 30, par. 4, of the Code of Administrative Proceedings<sup>17</sup>.

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2010 (case C-314/09), in [www.curia.europa.eu](http://www.curia.europa.eu). In literature, see VALAGUZZA S., *Percorsi verso una "responsabilità oggettiva" della pubblica amministrazione*, in *Dir. proc. amm.*, 2009, p. 50.

<sup>14</sup> See Cass., sez. III, 8 gennaio 2010, n. 80, in *Resp. civ.*, 2010, 12, 814, with note by BENATTI F., *Danno da animali: sulle precauzioni idonee a prevenire il danno*. See also Cass., sez. III, 13 January 2009, n. 467, in *Mass. Giur. It.*, 2009.

<sup>15</sup> Cass., SS.UU., 11 January 2008, n. 584, (*Foro it.*, 2008, 2, 1, 451) in a case of responsibility of the Ministry of Health for HIV contagion due to blood transfusion. Also Cass., sez. III, Ord., 12 March 2010, n. 6117, in *CED Cassazione*, 2010.

<sup>16</sup> AVANZINI G., *Nuovi sviluppi*, cit., p. 281.

<sup>17</sup> Cass., SS.UU., 25 March 2010, n. 7160, in *Urb. e App.*, 2010, 791, with note by SPEZZATI A., *Giurisdizione in materia di risarcimento per danno da ritardo della p.a.*

Case law and scholars have clarified how in this case the right protected by the law is the right to the certainty of the length of the procedure, completely irrespective of the so-called right to a favourable decision, i.e., of the evidence of the right to a favourable decision.

Whereas previously case law held compensation of damages caused by a delayed administrative action depended on the outcome of the procedure and on the adoption of a decision whatsoever by the authority<sup>18</sup>, the reform of Art. 2 of Administrative Procedure Act recently made compensable damages caused by such a delay, even in the absence of a negative decision and anyway independently from the demonstration of the right to a favourable decision.

Art. 30 of our Code of Administrative Proceedings therefore implemented what was already stated by the law n. 69/09, thus finally releasing the entitlement to damages from the effective end of the administrative procedure. According to the provision of Art. 30, damages for unlawful delay have to be sought at most within 120 days after that one year passed from the statutory deadline for the completion of procedure.

As to the elements of tort, the claimant has to give evidence both of causation and fault, since Art. 30 expressly states that damages have to be a «consequence of the malicious or culpable lack of compliance with the statutory terms for the completion of procedure»<sup>19</sup>.

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<sup>18</sup> Cfr. Cons. Stato, Ad. Plen., 15 September 2005, n. 7, in *www.giustizia-amministrativa.it*, according to which: «The system of protection of legitimate expectations – when their holder relies on a judicial statement for their fulfilment – allows the award of pecuniary remedies only when the expectation, that cannot be satisfied by the adoption of an administrative decision, has a substantive content connected with the failure or the delay in the adoption of the decision».

<sup>19</sup> Criticism of the provision about fault can be found in GOTTI P., *Osservazioni in tema di risarcibilità del danno da ritardo della p.a. nella conclusione del procedimento*, in *Foro amm. - Cds*, 2010, p. 2473.

Case Ia recognising in futile expiry of the procedure completion term the sufficient element in most cases to demonstrate the subsistence of the subjective element of the offence, or at least to apply the acquisitive method (giving the judge the power to collect evidence on this element) tends instead to apply a more rigorous criterion for the demonstration of damage and its quantification<sup>20</sup>.

As to the nature of damage that can be restored, in a recent decision the administrative judge not only awarded damages that constitute an economic loss, but also restored the so-called biological damages<sup>21</sup>.

The introduction of an *ad hoc* form of action for damages due to unlawful delay in the adoption of administrative decisions aroused the interest of scholars and has fueled the idea that public liability can rise from procedural impropriety independently from the demonstration of the right of the claimant to a specific outcome of the procedure<sup>22</sup>.

This issue is linked with the theme of liability for breach of legitimate expectations<sup>23</sup>. The damage occurs occurs when an authority releases a decision in favour

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<sup>20</sup> CHIEPPA R., *Il danno da ritardo (o da inosservanza dei termini della conclusione del procedimento)*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>21</sup> See Cons. Stato, sez. V, 28 February 2011, n. 1271, in *Danno e Resp.*, 2011, 5, 543, that awarded the claimant existential damages caused by the two-year delay for the adoption of a planning permission, from which depended the only business of the claimant. As to non-economic damages, see also Cons. Giust. Amm. Reg. Sic., 26 October 2010, n. 1334, in *Foro amm. - CdS*, 2010, 2500, that awarded moral damages caused by a two-decade length of a compulsory purchase of land procedure, resorting to the Supreme Court case law according to which non economic damages are restorable when the uthority infringed constitutional personal rights.

<sup>22</sup> SCOTTI E., *Appunti per una lettura della responsabilità*, cit., p. 568 underlines the importance of a foundation of liability on the breach of behavioural principles that can lead to monetary redress independently of the entitlement to the fulfilment of a substantive legitimate expectation.

<sup>23</sup> On legitimate expectations and their legal protection, also for reference, see GIGANTE M., *Il principio di tutela del legittimo affidamento*, in *Codice dell'azione amministrativa*, a cura di SANDULLI M.A., Milano, 2011, p. 130.

of the individual which turns out to be unlawful and later annuls it. In such cases, time had brought the claimant to rely legitimately on the consolidation of the favourable effects of the decision.

The case in point is subject to two different readings, which lead to different conclusions as to the choice of the competent judge. If one claims that damages flow from the unlawfulness of the initially favourable decision, the jurisdiction of the administrative courts will follow. If, on the contrary, one argues that damages are the result of the overall administrative conduct and not of the effects of the decision, then jurisdiction will belong to the civil courts, that insofar are the “natural judges” of administrative behaviour.

In this area it is worth highlighting the development of a new case-law of our Civil Supreme Court that states the jurisdiction of the civil courts on damages caused by the breach of legitimate expectations on the consolidation of the legal effects that follow favourable administrative decisions<sup>24</sup>.

Supreme Court judges deemed that in such circumstances the claim has no connection to the exercise of administrative powers, also because the latter had been lawfully exercised<sup>25</sup>.

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<sup>24</sup> Cass., ss.UU., judgments n. 6594, 6595 e 6596 of 23 March 2011, in *www.federalismi.it*, on very similar cases: in the first one, damages had been caused by the administrative annulment of a planning permission followed by a demolition order; in the second one, damages were caused by the demolition of a building that had been erected after the release of a planning permission that had been quashed by judicial review; in the third one, the claimant sought damages following the execution of a construction contract that had been deemed ineffective after the annulment of the tender procedure by judicial review.

<sup>25</sup> The Supreme Court defended its jurisdiction by arguing that: «the planning permission, being unlawful and therefore lawfully annulled, stands as a pure behaviour of the authority that issued it, behaviour that is in breach of sect. 2043 tort general clause, which from the author extends to the State, because such an act, in its apparent lawfulness, had given rise in its receiver to a legitimate expectation that he could start the construction».

The judges in this case stated that «the claimant seeking damages does not contest the unlawful exercise of powers, that sacrificed its substantial interests, but holds the culpability of an administrative conduct consisting in the adoption of a favourable decision, that later on has been either quashed by a judge or annulled by the same authority, and this conduct has consolidated its expectations and given rise to practical effects, that later on had to be lawfully eliminated».

Should this case law become consolidated, other cases could follow in which civil courts will award damages for the breach of procedural rules that, albeit somehow linked to an administrative decision, do not directly flow from it: in such cases damages are the consequence of simple administrative behaviour and not of an unlawful administrative decision.

New hypotheses of public liability could also be foreseen in connection to the breach of procedural duty of fairness even if they do not cause the annulment of the administrative decision in force of the provision stated in Art. 21-*octies* of Administrative Procedure Act, since the new course of administrative action would not lead to a different outcome.

In conclusion, the potential for a new civil jurisdiction, that has been debated among scholars<sup>26</sup>, if on the one hand could bring to more effective remedies for the individual, on the other hand could make even more difficult for the claimant the choice of the court, thus jeopardizing the principle of effectiveness and unification of judicial protection.

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<sup>26</sup> Criticism of the judgments in SANDULLI M. A., *Il risarcimento del danno nei confronti delle pubbliche amministrazioni: tra soluzione di vecchi problemi e nascita di nuove questioni*, in [www.federalismi.it](http://www.federalismi.it). For the opposite view, see CAPONIGRO R., *Questioni attuali in un dibattito tradizionale: la giurisdizione nei confronti della pubblica amministrazione*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

### ***2.3 Liability for breach of duty of supervision***

Although on principle administrative courts should now hold jurisdiction on damages caused by non-exercise of public powers, among which the ones connected with the duty of supervising private business that have a relevant public interest (such as bank and insurance activities), civil courts recently exercised their jurisdiction by stating that a Minister can be held responsible for failing to exercise supervision over banking and investment companies whose conduct had resulted in a loss suffered by private investors.

In particular, a group of investors were awarded damages caused by the lack of a diligent supervision and information on the activity of investment companies by the competent authority (Consob)<sup>27</sup>. The Supreme Court argued that when public authorities act in breach of the general clause of good faith and fairness they go beyond their discretionary powers and therefore are liable under Art. 2043 c.c. before civil Courts<sup>28</sup>. The importance of the judgment lays in the statement that the culpable omission of public powers is relevant as such, as the cause of liability because it breaches the general clause of *neminem laedere*.

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<sup>27</sup> See Cass., sez. III, 27 March 2009, n. 7531, in *Foro it.*, 2009, 12, 1, 3354, that recognized a «macroscopic culpable failure» of the Ministry of Industry for delaying the adoption and the publication of the revocation of the license to exercise of investment activities and for failing to inform investors of the risks connected to the investment company financial situation.

<sup>28</sup> See Cass., sez. III, 23 March 2011, n. 6681, in *Resp. civ.*, 2011, 6, 435, that confirmed the Court of Appeal judgment that gave redress to a group of investors that had been damaged by the lack of control on the activities carried out by an investment brokerage company.

## ***2.4 Liability for illegal acquisition of land***

Until the last decade, the problem of the so-called indirect compulsory acquisition of land, in the absence of a legislative framework, was settled by the courts through the resort to the concepts of “acquisitive occupation” and “usurpative occupation”<sup>29</sup>.

The first occurred when the procedure of compulsory purchase of land, based on a valid administrative act would go on in an irregular way, whereas the second one occurred when no administrative act at all was adopted and the acquisition of land simply happened *de facto*.

In both cases the owner was entitled to the payment of damages but the property, after being transformed and subdued to public destination, became irreversibly acquired by the public authority.

The contrast of such a consequence with the European Convention on Human Rights brought the legislature to enact a provision – Art. 43 of Compulsory Acquisition of Land Act 2001 – by which public authorities were allowed to amend a flawed procedure by the adoption of a decision providing the transferral of property to the public authority and the compensation of damage suffered as a result of the removal of the property<sup>30</sup>.

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<sup>29</sup> On “acquisitive occupation”: CONTI R., *Occupazione acquisitiva, tutela della proprietà e dei diritti umani*, Milano, 2006.

<sup>30</sup> Sect. 43 of Compulsory Acquisition of Land Act 327/2001 (Use of private property for aims of public interest): «1. Having balanced the competing interests, the authority that uses private property for the public interest without having previously adopted a valid acquisition act, can dispose of it and acquire it to its properties provided that the private party is given the monetary redress of damages. 2. The acquisition act: a) can be adopted even if the first act of the acquisition procedure has been annulled by judicial review; b) gives account of the circumstances under which the authority decided to use the property, mentioning the day in which the occupation started; c) determines the amount of the damages sum and orders its payment within the next thirty days, with no consequence on a judicial claim, if already started; d) is notified to the owner of the property under the terms of Civil Process Code; e) Implies the transfer of property from the private owner to the authority; f) is immediately reported on the Land

The provision has recently been declared unconstitutional<sup>31</sup> and this raised again the problem of compensation of those damages suffered by individuals when the compulsory acquisition of land is not obtained by means of a legal procedure<sup>32</sup>.

The following case law so far has stated that, once the possibility to amend the flawed procedure by adopting an *ad hoc* administrative decision has been repealed, public authorities have the duty to negotiate the acquisition of land with the owner and to compensate the damage for the illegal occupation of the land occurred until the completion of the contract that duly transfers the property from its original owner to the public authority<sup>33</sup>.

The case law states that, in the absence of a valid entitlement for the acquisition of land, the property is not transferred because of the simple material transformation of the property itself, for such an effect would be in contrast with the European Court of Human Rights' case-law, thus stating that in this case the conduct of public authorities constitutes a «permanent tort».

For compensation of damages, the judges agree on saying that it has to be calculated on the basis of the market value of the property when the completion of the

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Register; g)...*omissis* 3. If the acquisition act is challenged by judicial review or the owner asks for the restitution of the property, the authority or the user of the property can ask the judge to award damages only without ordering the restitution of the property».

<sup>31</sup> Corte Costituzionale, judgment 8 October 2010, n. 293, in *Urb. e App.*, 2011, 1, 56, with note by MIRATE S., *L'acquisizione sanante è incostituzionale: la Consulta censura l'eccesso di delega*.

<sup>32</sup> On the effects of the declaration of unconstitutionality of sect. 43 see PATRONI GRIFFI F., *Prime impressioni a margine della sentenza della Corte Costituzionale n. 293 del 2010*, in [www.federalismi.it](http://www.federalismi.it) e MARI G., *L'espropriazione indiretta: la sentenza della Corte costituzionale n. 293 del 2010 sull'acquisizione sanante e le prospettive future*, in *Riv. giur. ed.*, 2010.

<sup>33</sup> Cons. Stato, sez. IV, 28 January 2011, n. 676 e 1 June 2011, n. 3331, both in [www.lexitalia.it](http://www.lexitalia.it).



agreement with which the property right is transferred from the private party to the new public owner occurred<sup>34</sup>.

According to a different opinion, the material transformation of land is suitable by itself to transfer the property in favour of the public authority as a result of the application of the private law institution of “specification”. In such a case the private would be entitled to compensation calculated on the market value of the property on the day of its acquisition by the public authority<sup>35</sup>. The action, which is based on a compensation and not on a damages claim, would have to be brought before administrative courts, since in the beginning a lawful procedural act was adopted even though it was not followed by its due continuation.

On principle, then, administrative courts hold jurisdiction when the acquisition of land has started with a first valid administrative decision, while civil court can intervene only when the transformation and the subsequent acquisition of land has occurred *de facto*, in lack of any administrative procedure entitlement albeit indirect<sup>36</sup>.

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<sup>34</sup> See TAR Lazio, sez. II-*quater*, 14 April 2011, n. 3260, in [www.lexitalia.it](http://www.lexitalia.it). See also Cons. Giust. Amm. Reg. Sic., 2 May 2011, n. 351, in [www.lexitalia.it](http://www.lexitalia.it), according to which the illegal use of private property implies for the public authority the payment of two distinct damages: the first one restores the loss of the property while the second one has regard to the lack of use of the property (or either of its monetary value) during the period of occupation. See also Cons. Giust. Amm. Reg. Sic., 19 May 2011, n. 369, in [www.lexitalia.it](http://www.lexitalia.it), as to the determination of the amount of damages.

<sup>35</sup> See TAR Puglia - Lecce, sez. I, 24 November 2010, n. 2683 and 29 April 2011, n. 785, both in [www.lexitalia.it](http://www.lexitalia.it).

<sup>36</sup> See Cons. Stato, Ad. Plen., 30 July 2007, n. 9, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

### ***2.5 Liability for precontractual unfairness and for lawful administrative action***

As a general principle pre-contractual public liability, which is based on Articles 1337 and 1338 c.c., occurs when a public authority, in the course of contractual negotiations with private parties, behaved, or fail to behave, in contrast with the principles of good faith and correctness, with which it has to comply according to the general rule stated in Art. 2043 tort liability clause<sup>37</sup>.

In this area as well, after the introduction of damages claims in judicial review procedure, the system provides a two-tier jurisdiction: administrative courts when public liability depends on the acknowledgment of a flawed administrative procedure or decision, civil courts when administrative conduct which resulted in the breach of contractual negotiations, is not linked with an administrative decision or procedure, but occurred in a private-law relationship.

For example, civil courts have jurisdiction when an individual seeks damages claiming that a public authority acted in breach of the fairness principle in the course of the purchase of a real estate unit, because it failed to disclose all the legal conditions regarding the sale of the property<sup>38</sup>.

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<sup>37</sup> On precontractual public liability, in general, see RACCA G. M., *La responsabilità precontrattuale della pubblica amministrazione tra autonomia e correttezza*, Napoli, 2000.

<sup>38</sup> See Cass., SS.UU., 24 June 2009, n. 14833, in *Mass. Giur. It.*, 2009, and TAR Calabria - Catanzaro, sez. I, 3 May 2011, n. 574, in [www.lexitalia.it](http://www.lexitalia.it), which stated that administrative courts have jurisdiction only in relation to precontractual liability connected to public procurement procedure and not in relation to the sale of property.

Administrative Courts are in charge of the administrative conduct resulting in the annulment of a public procurement tender procedure<sup>39</sup>.

The latter are the most frequent causes of administrative precontractual liability in administrative law.

In particular, as to public behaviour that may result in tortious liability in the course of a tender procedure aimed at the awarding of public contracts, the Consiglio di Stato<sup>40</sup> recently stated that pre-contractual liability may occur both when the tendering procedure is quashed by a judge, and: «a) when a public authority calls off a tender because it changes its project, and many years have passed since the first act of the tender procedure; b) because the project cannot be realised any more due to technical reasons; c) because the public authorities realised that the procedure was flawed from the beginning and it had to be consequently annulled from the start; d) when a public authority calls off the tender or refuses to sign the contract after the adjudication decision, because of lack of funds»<sup>41</sup>.

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<sup>39</sup> For the case law, see Cons. Stato, sez. VI, 17 March 2010, n. 1554, in *www.lexitalia.it*. As to scholarly opinion, see CREPALDI G., *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento*, in *Foro amm. - CdS*, 2010, p. 868; RACCA G. M., *Contratti pubblici e comportamenti contraddittori delle pubbliche amministrazioni: la responsabilità precontrattuale*, in *Nel diritto*, 2009, 281.

<sup>40</sup> Cons. Stato, sez. V, 7 September 2009, n. 5245, in *Danno e Resp.*, 2009, 11, 1106.

<sup>41</sup> In the same direction see Cons. Giust. Amm. Reg. Sic. (judgment 25 January 2011, n. 83, in *www.lexitalia.it*) that recognised precontractual liability in a case in which by mistake the envelope containing the offer of the only tenderer had been opened before the formal opening of the procedure and the authority had therefore annulled the entire procedure.

Decisions also stated that the legitimate annulment of preliminary acts for project finance or the unjustified interruption of negotiations can bring to pre-contractual liability if they result in the culpable violation of a legitimate expectation borne by the private party<sup>42</sup>.

In such cases liability has been declared despite the lack of administrative unlawfulness on the basis of the unfair behaviour of the public party, which had violated the legal expectation of the private party upon the positive conclusion of the negotiation<sup>43</sup>.

As to the type of damages, on account of Art. 1337 and 1338 only the so-called negative interest can be redressed, i.e. damages that rise from the useless employment of contractual efforts. Therefore, both expenses and the lost occasions will be restored, as long as they will be proved by the claimant and not just asked for in a general form.

## ***2.6 State liability by failure to implement EU Directives***

Recent Supreme Court decisions have introduced new developments in relation to State liability for breach of the duty to implement EU Directives that, albeit being non self-executing, confer rights to individuals, also clarifying the liability scheme and the terms for the proposal of the action.

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<sup>42</sup> In this case the unfair behaviour of the authority is connected to the procurement procedure and therefore to administrative courts' jurisdiction: see Cass., SS.UU., Ord. 9 February 2010, n. 2792, in [www.lexitalia.it](http://www.lexitalia.it). TAR Sicilia - Catania, sez. I, 15 April 2010, n. 1090, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), clarified that liability depends on two conditions: one, positive, is a behaviour that gave rise to a legitimate expectation on the conclusion of negotiations; the other one, negative, is the absence of a justification for the interruption of negotiations. For an example of a rigorous inquiry on the fault of the behaviour of an authority that had revoked the tender procedure for lack of funds, see TAR Sicilia - Palermo, sez. I, 4 February 2011, n. 210, in [www.lexitalia.it](http://www.lexitalia.it).

<sup>43</sup> TAR Lombardia - Brescia, sez. II, 16 March 2010, n. 1239, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), stated that even the lawful annulment of the preliminary steps of a private finance project can be a source of liability, since the authority should have made an accurate cost-benefit analysis before starting the procedure that it was then forced to terminate. The judgment explains why in that case contractual liability was not available instead.

Despite some precedents adverse to the acknowledgement of public liability for lack of implementation of EU Directives<sup>44</sup>, the main trend was in the direction of qualifying the breach of the duty as a tort ex Art. 2043 c.c.<sup>45</sup>.

A recent Supreme Court decision has stated the contractual liability of the State by resorting to an *ex lege* obligation<sup>46</sup>.

According to the Supreme Court, the conduct of the State is unlawful but only with respect to EU law, thus being unfit to fall in the tortious scheme of Art. 2043 c.c.<sup>47</sup>.

In this view, the breach of the duty of implementation can give way to a compensation claim, whose prescription would consequently expire in ten years and not in the five-year time provided for by Art. 2043 c.c.

A more recent Supreme Court decision has further developed these principles by confirming that State liability in this case does not fit in the general tort clause but is

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<sup>44</sup> Cass., sez. III, 1 April 2003, n. 4915, in *Danno e Resp.*, 2003, 7, 718, with note by SCODITTI E., *Il sistema multi-livello di responsabilità dello Stato per mancata attuazione di direttiva comunitaria*.

<sup>45</sup> See Cass., sez. lav., 9 April 2001, n. 5249, in *Foro it.*, 2002, I, 2663 and *Id.*, sez. III, 12 February 2008, n. 3283, in *Danno e Resp.*, 2008, 5, 581.

<sup>46</sup> Cass., SS.UU., 17 April 2009, n. 9147, in *Foro amm. - CdS*, 2274, with note by GIANNELLI A., *La responsabilità del legislatore per tardivo recepimento della direttiva, modelli a confronto*. The judgment recognizes the entitlement of specializing doctor to damages caused by the failure of the State to pay them according to the provisions of an EU Directive which had been never implemented.

<sup>47</sup> Criticism on the autonomy of domestic law and on the category of EU illegality in expressed by SCODITTI E., *La violazione comunitaria dello Stato fra responsabilità contrattuale ed extracontrattuale*, in *Foro it.*, 2010, I, 175 ss. Among monographic studies on the issue, see BIFULCO, *La responsabilità dello Stato per atti legislativi*, Padova, 1999 e FERRARO F., *La responsabilità risarcitoria degli Stati membri per violazione del diritto comunitario*, Milano, 2008.

referrable to contractual liability, because it stems from the violation of a statutory obligation<sup>48</sup>.

The judgment stated that the omission results in a permanent obligation to redress damages in favour of the individuals who might have been given rights had the Directive been implemented. As to the limitation of action, the Supreme Court has connected it to the moment in which the obligation rose, also specifying the regime of the prescription in case of partial implementation of the Directive.

The Supreme Court judgment was published only two days before the European Court of Justice intervened on the same issue, by way of preliminary ruling, and stated that is not in contrast with European Law the provision of prescription time-limit for the action aimed at protecting rights conferred by a EU Directive, even when the Directive has not been implemented, provided that the delay has not been caused by the State itself<sup>49</sup>.

Therefore, the Supreme Court interpretation of the time-limit provision is more favourable than the one given by the European Court of Justice.

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<sup>48</sup> Cass., sez. III, 17 May 2011, n. 10813, in [www.diritto24.ilsole24ore.com](http://www.diritto24.ilsole24ore.com).

<sup>49</sup> Eur. Court of J., sect. I, 19 May 2011 (case C-452/09), in [www.curia.europa.eu](http://www.curia.europa.eu).