iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

COMPETENCE

ANNUAL REPORT - 2011 - ITALY

(May 2011)

Prof. Vittorio DOMENICHELLI – Prof. Lucia CIMELLARO

INDEX

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.

.

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.

5. BIBLIOGRAPHY

ANDREANI A., *La competenza per territorio dei tribunali amministrativi*, Milano 1974.

CARPENTIERI P., *Le questioni di competenza*, in *Dir.proc. amm.*, 4, 2010, 1239.

CHIEPPA R., *La competenza e il suo regime*, in *Il Codice del processo amministrativo*, Milano, 2010, 99 ss.

CONSOLO C., *I regolamenti di competenza e giurisdizione nel nuovo codice del processo amministrativo*, in *Dir.proc.amm*., 2010, 808 ss.

POLICE A., *La competenza*, in SCOCA F.G. (a cura di) , *Giustizia amministrativa*, Torino, 2011, 129 ss.

ROMANO A.-VILLATA R., *Commentario breve alle leggi sulla giustizia amministrativa*, Padova, 2009, 3, III, 2.

SCOCA F.G., *Specialità e anomalie del Consiglio di gustizia amministrativa per la Regione siciliana*, in *Dir.proc.amm*., 2007, 1 ss.

SCOCA F.G., *Tribunali amministrativi regionali*, in GUARINO, Dizionario *amministrativo*, II, Milano 1983, 1558.

STELLA RICHTER P., *La competenza territoriale nel giudizio amministrativo*, Milano 1975.

TRAVI A., *Lezioni di giustizia amministrativa*, Torino,2010, 217 ss e 273 ss.

6. WEB SITES

www.giustizia-amministrativa.it

www.giustamm.it

www.lexitalia.it