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CIVIL LIABILITY OF THE PUBLIC ADMINISTRATION. JURISDICTION AND PROCESS

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In the Italian legal order, the system of judicial remedies concerning the liability of the public administration is quite complex.

Generally speaking, a compensation issue does not need to be raised as a preventive measure before the administrative authority; it is accessible to everyone, regardless of nationality or citizenship, and can be summarised as follows.

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a) Non – contractual liability:

This concerns the liability for damage arising from conduct on the part of the administration, consisting in an action or in an omission, without the exercise of public powers.

In this case, the jurisdiction of civil courts applies, which have general jurisdiction on all “individual rights” (*diritti soggettivi*), to be distinguished from "legitimate interests" (*interessi legittimi"*) (art. 24 and 103 Const.; art. 2043 Civil Code).

Such action is time barred after five years, which run from the moment in which the harmful event has taken place.

The damage can be proved by the injured party, using all the means provided by the Italian Code of Civil Procedure: documentary evidence; witnesses; formal hearings; sworn evidence. The judge, moreover, can also appoint a technical consultant to better evaluate the facts and to quantify the damage. In all cases in which the quantum of damage cannot be precisely proved, it is awarded by the judge on the basis of an equitable evaluation (art. 1226 Civil Code).

The administration could also be ordered to make "specific restitution" (restitution in kind, *reintegrazione in forma specifica*), but the court may find that only the equivalent in damages is the proper remedy, if the restitution in kind proves to be too onerous for the defendant (art. 2058 Civil Code).

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b) Liability for unlawful acts

This refers to the cases in which the unlawful exercise, by the public administration, of an administrative power causes a damage (economic or otherwise).

In these cases Italian law provides for compensation for breach of a "legitimate interest". Therefore, the administrative courts have jurisdiction (art. 103 Const.; art. 7, Administrative procedure code, legislative decree 104/2004; former art, 7 l. 205/2000).

There has been a heated debate in case-law and among legal scholars concerning the relation between the action for annulment and the action for compensation of damages caused by the unlawful act itself.

The prevailing opinion, by the administrative courts, was that, in order to claim compensation for such damage, it was previously necessary to obtain the annulment of the harmful administrative act. Correspondingly - according to the same courts - in the case of harm caused by the public administration's delay in the emanation of the act, it was necessary to obtain a previous declaration of unlawfulness of the public administration's inertia (this was the thesis of the so-called "administrative prejudiciality", *pregiudizialità*

amministrativa: see Council of State, Plenary assembly – *Consiglio di Stato, Adunanza Plenaria* - decisions nn.4/2003[1], 12/2007[2]; The Court of Cassation – *Corte di cassazione* – followed, conversely, the opposite thesis: decisions 13659 e 13660/2006[3], 35/2008[4]).

Nowadays, a statutory compromise between the two theses has been reached under art. 30 of legislative decree 104/2010.

It provides that the action for compensation may be proposed also in an independent way; however the third paragraph of the same article provides that it shall be subject to a time limit of 120 days, which runs from the day on which the fact has happened or from the knowledge of the act (if the damage directly derives from the act itself)[5].

Furthermore, the same article 30 (par. 3) provides that the court, while awarding compensation, shall take into account "all the relevant circumstances of the fact and the general behaviour of the parties" and that, anyway, the judge "must not award

1 *Foro amm. CDS*, 2003, 877.

2 *Riv. giur. edilizia*, 2007, 1359.

3 *Dir. proc. amm.*, 2006, 1007.

4 *Resp. civ. e prev.*, 2008, 1360.

5 In the case of damages caused by the undue delay of the public administration in the adoption of an act (see art. 2 bis l. 241/1990), paragraph 4 provides that the time-limit of 120 days shall not accrue as long as the failure to fulfil lasts. Anyway, this time-limit runs from the time of one year after the deadline to provide has expired. In order to demonstrate the public administration's inertia, the individual shall respect this second time-limit (see art. 31, par. 2, legislative decree 104/2010).

compensation for damage which could have been avoided with ordinary diligence, including the use of all available legal remedies"[6].

In the short time since this reform no relevant case law ha yet developed, nor a prevailing interpretation established.

Nevertheless, the Council of State (Plenary assembly, n. 3/2011[7]) has already had the opportunity of giving its interpretation of this discipline, providing some clarification about the possible content of the judicial decision. In particular, it states that:

– the administrative court, in a proceeding for damages, may order to the public administration to adopt a specific decision. This is possible when the public administration does not have a discretionary margin of appreciation and, therefore, it is possible to establish with certainty that the complaint is legally well founded[8];

[6] A special discipline is provided by art 124, legislative decree 104/2010, in the case in which the damage depends on the breach of rules on public procurement. If the judge does not declare the ineffectiveness of the contract, the law provides for equivalent compensation of damages, which have been suffered and proved (paragraph 2). Moreover, the conduct during the proceedings of the party who, without justified reasons, has not required the award, or has not declared itself available to succeed in the contract, is evaluated by the judge in compliance with art. 1227 civil code. This latter provides that: if the culpable fact of the creditor has contributed to the damage, compensation is diminished with regards to the seriousness of the culpability and of its consequences (paragraph 1). Compensation is not awarded for damage which could have been avoided by the creditor, following the standard of ordinary care (paragraph 2). An even more particular discipline is provided for public procurement concerning strategic infrastructures (art. 125, legislative decree 104/2010): in this case, the possible precautionary suspension or the annulment of the award does not cause invalidity of the stipulated contract; compensation is possible, but just equivalent compensation.

[7] The decision is available at this website: *www.giustizia-amministrativa.it*.

[8] The Council of State bases its reasoning on art. 34, paragraph 1, letter c), legislative decree 104/2010. It provides that, during compensation proceedings, the judge could order the public administration not only to pay an amount of money, but also to adopt all measures that could guarantee the subjective juridical position.

– in order to dismiss the claim for compensation, the court has to verify the existence of two elements: that the harmful act has not been challenged by its addressee before the administrative courts, and that the administration has not been asked to use its powers to do justice (*autotutela*);

– as follows from the application of the so-called "bona fide" principle, even negative process choices could be theoretically considered relevant behaviours for the exclusion or the reduction of the harm, if it is established that the neglected active behaviour would not have been an important sacrifice for the party and that it could eliminate or reduce the damage[9].

It should be stressed that, in the case of an action for annulment, the compensation claim could be made during the proceeding or, anyway, within a time-limit of 120 days after the decision has become definitive (art. 30, par. 5); moreover, when, during a court proceeding, the annulment of the act is no longer of use to the claimant, the judge shall ascertain the act's unlawfulness if required for the purposes of making a claim (art. 34, par. 3).

It is therefore clear that, even without a strict "prejudiciality" requirement for the action of annulment before the claim for compensation, nevertheless the omission of a prompt challenge of the harmful act before the administrative courts produces serious disadvantages for the claimant, who risks loosing any possibility of compensation.

As to the finding and presentation of the evidence, the means of proof are those mentioned by legislative decree n. 104/2010 (artt. 63 ff.: documents, acquisition of

[9] The Council of State, in the above mentioned decision, has specified that the administrative judge must evaluate (even without being requested by the parties and acquiring all necessary means of evidence) if the foreseeable outcome of the judicial application for annulment and of the use of other means of guarantee could have entirely or partially avoided the damage (throughout a reasoning based on hypothetical causality that takes into account the claimant's conduct as a whole. In this case, the court can also use presumptions.

information from the administration, witnesses - only in writing -, administrative investigations); since 2000 (l. n. 205), the judge can also appoint technical consultants (art. 67, legislative decree 104/2010, at present they are mostly used cases of damage relating to public procurement procedures).

Finally, it has to be stressed that art. 34, par. 4, legislative decree 104/2010 says that in the case of pecuniary award, the court can limit itself, if the parties agree, to set the criteria under which the debtor shall propose to the creditor the amount of the payment within an adequate time-limit. If there is no agreement, or if obligated party does not fulfil its obligation, the court can be asked to determine the amount of money or the fulfilment.

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As to the execution of judicial decisions against the public administration, the general principle of art. 1740 civil code is applied: the debtor shall fulfil his obligations with all his goods, both present and future, except for the specific limitations provided by law.

These limitations, however, are quite numerous.

Many of the public administration's goods cannot be seized by creditors (these are goods in the so called "public domain" and all the goods with a specific public destination or aim). It follows that, practically speaking, generally only money can be seized by the creditor to satisfy his claim.

Moreover, the injured party must follow a specific procedure (art. 14**,** decree law 669/1996, converted into law 30/1997), which provides *inter alia* that a judicial proceeding can be started only after 120 day from the notification of the sentence to the administration.

This special discipline was not to be in conflict with European Law by the European Court of Justice (decision September 11th 2008, C-265/07[10]).

The competent courts for the execution of orders against the public administration are generally the civil courts (Court of Cassation, united sections, n 7578/2006[11]).

Another remedy is also available: the "compliance judgement" (*giudizio d'ottemperanza*), actionable in administrative courts. It is a special judicial procedure by which the public administration is ordered to give execution to a *res judicata*, whereby the court can order the payment of a compensatory amount of money, even substituting the administration if necessary. See art. 112, legislative decree 104/2010.

This procedure can be used also in the case mentioned above, when the public administration does not comply with the criteria established by the court for the determination of the compensation amount, in case of damage caused by the unlawful use of power.

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10 *Foro amm. CDS*, 2008, 2302.

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