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PUBLIC AUTHORITIES LIABILITY ARISING FROM UNLAWFUL EXERCISE OF POWERS

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[1] Please note that Maurizio Cafagno drafted paragraph one and eight, while Mariano Fazio wrote paragraphs from two to seven.

1. LEGAL EXPECTATIONS AND COMPENSATION FOR DAMAGES: JURISPRUDENTIAL EVOLUTION

Within Italian Administrative law, personal positions depending on the exercise of powers by public administrative authorities are known as "*legal expectations*" ("*interessi legittimi*").

National judges denied in the past that offences to legal expectations could raise compensations for damages caused by public administrative authorities.

Unlawful decisions could grant access to judgments to void such decisions at the most, but they did not allow claims for money to put damaged persons in the same position they were before decision had been taken.

Accordingly, public administrative authorities were exempt from civil liability due to unlawful exercise of their public powers.

This trend went into crisis only recently, at the beginning of the '90s, under the pressure of European community law.

It dates back to that period, for instance, the implementation (by article 13 of now-repealed Law 142/1992, dated 19th February 1992) of the first European directives, named "ricorsi" (i.e. "appeals") (namely directive 89/665/CEE and directive 92/13/CEE), which obliged Member States to grant competitors the right to calim for damages when prejudiced by breaches of community provisions governing the awarding proceedings of public works and supply contracts (these subjects were undoubtedly entitled to legal expectations, despite of domestic taxonomies).

In the same period of time, it was also issued the well-known judgment "*Francovich-Bonifaci v Italian Republic*" (released within joint judicial proceedings C-6/90 and C-9/90), according to which the European Court of Justice considered a member State

liable for damages caused to a citizen due to the lack of national implementation of a European Directive (see SORACE, *Diritto delle amministrazioni*, 380).

These novelties did not change the traditional opinion which denied the right to claim for damages, as the courts initially qualified them as exceptional measures (see Italian Supreme Court, Civil Divisions (*Cassazione Civile*), United Divisions, judgment n. 2667/1993, dated 5th March 1993). Anyway, they paved the way for a forthcoming change.

The change eventually occurred with the landmark judgment n. 500/1999, issued by Italian Supreme Court's United Civil Divisions on 22nd July 1999.

In this judgment, the Italian Supreme Court overturned the previous opinion and stated that public administrative authorities could be held liable on the gound of civil law, for damages caused in the exercise of their powers. The Supreme Court also added that even offences to legal expectations could cause an "*unlawful damage*" ("danno ingiusto") according to article 2043 of the Italian Civil Code (hereinafter "ICC"), not differently form offences to personal rights ("*diritti soggettivi*").

In its judgment, the Supreme Court qualified article 2043 of the ICC not just as a second-rate provision sanctioning behaviours forbidden by other provisions, but as a first-rate provision, suitable to sanction damaging conducts directly; and it expressly stated that "*an offence to a legal expectation raises liability falling within Lex Acquiliae, as well as an offence to a personal right or a different relevant juridical interest, for the purposes of qualifying the damage as unlawful*".

Accordingly, a legal expectation can be coherently considered as an "*advantageous position pertaining to a person in relation with a utility – "a good of life" , subject to an administrative decision, which grants to that person powers useful to affect the correct exercise of their powers by the public administrative authorities, in order to provide for the possible conversion of such an expectation into the good*".

The Supreme Court, admitting full refund of these positions, stated from this very first historic judgment that the award of a claim to get damages repaid by equivalent does

not require a previous claim against the offensive decision before the administrative judge, since the civil judge could pre-emptively ascertain the unlawfulness of the decision in order to qualify as unlawful the conduct of the public administrative authority (see herein-below).

2. RECENT STATUTORY PROVISIONS

One year later, the path opened by judgment n. 500/1999 was followed by the legislator .

Truly speaking, Legislative Decree n. 80/1998 had already allowed administrative judges to award compensation for damages within 'exclusive jurisdiction' matters (that is matters wherein administrative courts have jurisdiction with regard to personal expectation as well as personal rights). Nevertheless, according to the opinions before the issue of judgment n. 500/1999, one could still doubt that the above-mentioned provision would regard liability cases other than those arising from offences to personal rights.

In any case, Article 7 of the Law n. 205/2000 dissolved the uncertainties, as it granted administrative judges the power to award compensation for damages in the exercise of their 'general jurisdiction of legitimacy'.

More precisely, the provision, which amended article 35 of the Legislative Decree n. 80/1990 as well as Article 7 of Law n. 1034/1971, stated that "*administrative regional courts can also judge, within their own jurisdiction, all issues involving a possible compensation for damages, even granting specific performance, as they can judge on different consequent financial rights. Ordinary civil judges can retain resolution of all preliminary issues concerning state and capability of private individuals, except when they deal with the right to stand before courts, as well as the resolution of issues regarding claims against false proof*".

On this basis, once resolved a few minor discrepancies, civil and administrative courts have come to the conclusion that within the current legal framwork administrative

judges have the right to grant compensation for damages raising from offences to legal expectations, overcoming the previous model envisaged by judgment n. 500/1999 on the basis of the former procedural law (see Italian Constitutional Court, judgment n. 191/2006 and Italian Supreme Court, United Civil Divisions, judgment n. 13659/2006).

Recent codification of the administrative judicial procedure, enacted with Legislative Decree n. 104/2010, has confirmed the model built by Law n. 205/2000.In fact, the new Code states on one hand that "*administrative courts within their general jurisdiction of legitimacy can judge claims concerning deeds, decisions or non-performances by public administrative authorities, including those related to compensation for damages emerging from offences to legal expectations and other resulting financial rights, even if such claims are initiated in an autonomous way*" (see article 7, paragraph 4) and, on the other, that "*it is possible to ask for compensation for unlawful damages arising from illegitimate exercise of administrative (discretionary) activity or non-exercise of the mandatory one*" (see article 30, paragraph 2).

3. ISSUES CONCERNING PROOF AND AMOUNT OF DAMAGES

According to the majority of administrative judgments, which mantain the reasoning traced by judgment n. 500/1999, the general rule addressing compensatory obligations of the public authorities emerging from illegitimate administrative decisions is article 2043 of the ICC (see, among most of the judgments, Consiglio di Stato, Fifth Division, 11th April 2011; Consiglio di Stato, Fifth Division, 6th May 2011, n. 2725).

According to this provision, the current leading opinion qualifies as elements of the tort an offence to a juridical position not justified by a provision of law, a financial damage, the causal nexus between damaging event and the public administrative authority conduct and the personal/subjective requirement, to be converted into wilful wrongdoing or gross or slight negligence (Consiglio di Stato, Fifth Division, 6th July 2009, judgment n. 4325).

Even if there are different opinions on the nature and general regulation of the liability within the academia and the case-law (see herein-below, paragraph 6), hereinafter we will still analyse the prevailing interpretative model and therefore focus on some issues concerning the application of the model proposed by the landmark judgment of the United Civil Divisions of the Italian Supreme Court.

One of the most sensitive issues arising from judgment n. 500/1999, which represents the basis of some interpretative uncertainties still unsettled, regards the treatment of damages emerging from offences to th so called pretentious expectations ("*interessi pretensivi*") due to discretionary decisions.

At that time, the judgment stressed the need of distinguishing, for the purposes of ascertaining a relevant financial damage that could be compensated, between offences to expectations concerning the preservation of a good (so called 'oppositional legal expectations') and offences to expectations to the acquisition of a good (so called 'pretentious expectations').

In fact, if an offence to the first ones does necessarily involve a sacrifice to a good of life, because the related enjoyment does exist before the decision, an offence to the second ones requires to evaluate the entitlement to the good of life denied by the public administrative authority in the case.

The different nature of claims for compensation for damages produced by unlawful exercise of administrative activities depending on the oppositional or pretentious nature of the legal expectation is still confirmed by courts, even if not in the same terms of judgment n. 500/1999 (see Italian Supreme Court, Third Civil Division, 23rd February 2010, judgment n. 4326; Administrative Regional Court of Campania, Salerno, Second Division, 13th September 2010, judgment n. 11028; Consiglio di Stato, Fifth Division, 21st April 2006, judgment n. 2256).

In fact, it is clear that it is more difficult to ascertain the right to the good of life, from which the possibility to get compensation for offences to legal expectations depends on, when the public administrative authorities exercise a discretionary power.

The judgment is instead less difficult when referred to a constrained activity, since in this case "in determing the damage one is confronted with a problem not different from that arising when a personal right is offended" (see Sorace, La responsabilità). As in the case of an offence to a personal right, it will be sufficient to ascertain the legal requirements to the right and therefore state that the public administrative authority should have adoptded the decision to grant the right in the case.

Conversely, when the offence is caused in the exercise of discretionary action, it can be difficult to determine if the damaged persons could have pursued and mantained the desired good in the case the unlawful activity was not performed.

Within this class of cases, the judicial evaluation of what a right for a good for life consists in, to be performed by way of a prognostic assessment, threatens to interfere with the powers reserved to the public administrative authorities.

Within these guidelines, the Italian jurisprudence developed two main opinions:

a) a more restrictive approach acknowledges the possibility to perform a prognostic assessment (and accordingly it deems possible to grant compensation for damages originating from non-assignment of the good) when the exercise of a constrained activity is involved, whereas it rules out this possibility when the activity involved is a discretionary one (see Consiglio di Stato, Fifth Division, 29th January 2008, n. 248).

Coherent with this approach it is the idea that "when the expectation does relate to a discretionary activity, a private citizen, in order to obtain compensation for damages due to the offence, should previously wait for the express recognition that he/she is entitled to the good of life (where such a recognition can be awarded directly by the public administrative authority or after a judgment for compliance). Only and exclusively when this recognition is obtained it is possible to claim for compensation for damages, which, in this case, will be reduced to the sole prejudice suffered by delayed achievement of the desired good" (see on the subject DE LEONARDIS).

b) A second opinion (see Consiglio di Stato, Sixth Division, judgment n. 5323/2006), moving from the critical statement that "*a judgment to determine the right (to the good for life) stiffens too much the activities performed by the public administrative authorities and postpones unreasonably the chance to obtain compensation for damages, forcing the judge to deny the compensatory claim for lack of requirements and to reset in motion the administrative procedure that, exercising its power once again it appears to be paradoxically split between the exigency to perform the judgment and the fear to put in place the requirements for the claim for compensation for damages*" holds that, on the contrary, in cases where "*according to the dicta of the administrative judge, it is not easy to reissue the administrative activities, the damage which could be claimed against the administrative public authorities has to be seen within the perspective of a loss-of-chance*".

General Meeting of Consiglio di Stato number 13/2008 – gathered in order to identify the proper moment in which it could be possible to evaluate the claim for compensation for damages due to an offence of (pretentious) legal expectations in the case of annulment of a discretionary decision and, more particularly, to determine "*if such an evaluation should be assessed only after the new exercise of the discretionary power, or immediately, and therefore leaving aside the re-exercise of the power, with prognostic evaluation executed ex ante*" opted for a solution of the conflict which can be seen, for certain reasons, as a compromise.

From one side, in fact, it admitted that it is possible to compensate the damages even when the good for life has not been recognised, and, from the other side, it conditioned the compensation to the exercise of a power that, according to an evaluation of legitimacy, it allows to qualify the consequent administrative activity substantially as a binding one.

As for the objective requirements due to establish an unlawful action, further difficulties as well as interpretative doubts are related to the possibility to determine a relevant financial damage when a public administrative authority offences formal or procedural expectancies.

With a certain degree of approximation, the main jurisprudential trends on the subject can be summarized as follows :

a) according to the first opinion, the sole unlawfulness of the administrative activity of the case is not sufficient to determine a compensatory obligation for the public administrative authorities (see Consiglio di Stato, Fifth Division, 24th December 2008, n. 6538);

b) according to a second minority opinion, violation of such expectancies can give rise to a pre-contractual liability (see Consiglio di Stato, Fourth Division, judgment n. 875, dated 7th March 2005) and it is conceptually apt to give birth to a compensatory damage which can be considered as autonomous and different from an offence to a good of life (see, paragraph 6).

c) according to a different middle-sided, so to speak, opinion, it is possible to compensate not the offence to the formal expectancy per se, but more precisely the consequences that such an offence can create on a good of life (as for this opinion, see Consiglio della Giustizia Siciliana, judgment n. 363, dated 28th April 2008, particularly as for the passage of the judgment which reports that "*failure of the notice as well as of the communication, when the decision has been voided for different reasons, can reflect its consequences as for the possible compensation for damages arising from an unlawful decision, if such a failure has worsened the damage*".

4. (FOLLOWING) CHANCES AND DAMAGES ON MATTER OF CONTRACTS SIGNED BY PUBLIC ADMINISTRATIVE AUTHORITIES

Difficulty of proof and determination of damages do assume peculiar characteristics in the case of tenders procedures, since in this field of law the higher is the .degree of discretionality the harder is the proof of the substance of chances forfeited by unlawful decisions.

In an attempt to frame the case, administrative courts primarily stated that a loss of chance consists in a "*financial entity, juridically and economically subject to autonomous evaluation*" and that the related damage consists in "*a financial damage whose object is the loss not of a financial advantage but of the mere chance to obtain such financial advantage according to an ex-ante evaluation*" (see Consiglio di Stato, Third Division, 31st May 2011, judgment n. 3278).

As far as the burden of proof is concerned, the claimant must bear it proving his/her probability to obtain the good of life (required to be higher than 50 per cent according to the case law) or by way of presumptions (see Consiglio di Stato, Third Division 31st May 2011, n. 3278; Regional Administrative Court of Lombardia, Brescia, Third Division 15th October 2010, judgment n. 4044).

In the case of lack of proof, Courts agree that an equitable evaluation of damage pursuat to article 1226 of ICC is not admissible (since this evaluation "can be used to face the impossibility of proving not the existence of compensatory damages but their exact amount" (see Consiglio di Stato, Third Division, 31st May 2011, judgment n. 3278).

As for the determination of the amount of damages, judges focused their attention on the proof of lack of profits, which is related to a positive expectancy to sign the contract (see CLARICH).

According the prevailing opinion on the matter, the lack of profits can be determined on a lump-sum basis, applying the standard criterion that grants 10% of the starting bid for the auction, reduced by the offer delivered by the company interested in, which has to be reduced up to 5% in the case the company is not able to prove that it has not been able to use other equipment and workers to fulfil other supplies contracts (see Consiglio di Stato, Sixth Division, judgment n.14/2010).

A different and even less trailed opinion does, on the contrary, requires more stricly a rigorous proof (such as the one inferable from the exhibition of the offer proposed) of the percentage of the profits the company could have actually gained from the contract award (see Consiglio di Stato, Sixth Division, 11th January 2010, judgment n. 20).

5. ISSUES CONCERNING THE SUBJECTIVE REQUIREMENT OF AN UNLAWFUL ACTION

The analysis of the subjective requirements for an unlawful decision is difficult because the doctrinal and jurisprudential debate on this subject is intertwined with the one dealing with the nature of the responsibility.

It is well known that regimes concerning negligence and its proof are different depending on the fact that contractual, precontractual or extra contractual liability is involved (see herein-below).

Confusion is increased by the fact that there are ambiguous solutions within the judicial practice, which tend to mingle different models and disciplines and that, even if they do formally recall article 2043 ICC, tend in fact to construe the subjective requirement "*in peculiar terms, exempli gratia, introducing relevant compromises or reversing the burden of proof*" (see Travi, *Presentazione del tema del convegno*, in *La responsabilità della pubblica amministrazione per lesione di interessi legittimi*).

To simplify the issue, even if we are conscious that there are greys areas on this subject, the theoretical landscape does offer the following possible scenarios:

a) before judgment n. 500/1999, in the case of damages caused by legal activity and flawed decisions, the negligent nature of the public administrative authorities did not require to take into account evaluations other than the mere existence of the unlawfulness, (see Italian Supreme Court, United Civil Divisions, 22nd May 1984, judgment n. 5361). The case was referred to as negligence per se (namely "*in re ipsa*" – which could not substantially be defeated by adverse proof).

b) judgment n 500/1999 changed the trend and introduced the need for an actual assessment of the existence of the subjective requirement, to be conducted within the

criteria of correctness, good administration and impartiality, with regard to (not the single officer, but) the public administrative authority of the case, as a whole.

This construction was not exempt from critics.

First of all, some courts underlined the difficulty of qualifying an entire organization as "negligent", instead of a physical person (see Consiglio di Stato, Sixth Division, 6th July 2004, judgment n. 5012).

Secondly, it emerged that the use of the criteria themselves (namely, good administration, correctness and impartiality of the public administrative authorities), which theoretically are useful to determine the unlawfulness of decisions, could involve an undue overlay of the two enquiries (the one concerning negligence and the one concerning the flaws of the decision)

Finally, it was observed that the infringement of the criterion of the good performance (by the public administrative authority of the case) can raise responsibility for negligence, provided that the conduct is just inappropriate and, therefore, not necessarily unlawful (see CARINGELLA F., *Corso di diritto amministrativo*, Milano, 2005, 518).

c) In an attempt to avoid these practical difficulties, some scholars and judges tried to adopt the criteria used by the European Court of Justice in order to assess negligence for breach of community law on matter of liability of institutions and Member States.

Under this perspective, someone suggested that it would be possible to ascertain the negligence of the organization when the decisional unlawfulness had raised severe breach of law, to be determined in accordance with presumptions such as, *exempli gratia*, nature of the administrative activity, unambiguousness of the legislation, participation of the private citizen (see Consiglio di Stato, Fourth Division, 14th June 2001, judgment n. 3169; Consiglio di Stato, Fifth Division, 18th March 2002, judgment n. 1562; Adminitrative Regional Court of Sicily, Catania, Third Division, 21st June 2005, judgment n. 1047).

A scholar (see Sorace, La responsabilità) thoroughly observed that even the opinion that, on the influence of the community-law judgment on matter of liability of Member States, tends to condition liability to the fact that the unlawfulness shows some degrees of 'justifiableness' (see on the subject, Consiglio di Stato, Fifth Division, judgment n. 995/2007), in substance "still comes back and asks for gross negligence by the public administrative authorities".

d) The attempt to follow the path traced by the European Court of Justice has not itself been exempted from critics. Among the arguments against the sole correponpondece of negligence to serious breaches, it is remarked that such a limitation does not have any legal underpinning and that the concept of negligence does have to be traced back to "the procreative process of the unlawful activity and its ability to prejudice the trust of citizens, and to the degree of unconformity to the legal criteria governing the exercise of powers" (see Consiglio di Stato, Fifth Division, judgment n. 4239/2001; Consiglio di Stato, Sixth Division, judgment n. 1261/2004).

A further opinion took inspiration from these critics. Such an opinion, even if it adheres to the theory that traces liability back to the extra-contractual scheme, erects unlawfulness as a basis to set up a presumption of negligence, therefore requiring the public administrative authorities to prove that it was incurred in a case of justifiable mistake (see among the others Consiglio della Giustizia Amministrativa Siciliana, 18th November 2009, n. 1090; Consiglio di Stato, Sixth Division, 9th May 2008, n. 2763; Consiglio di Stato, Sixth Division, 7th October 2008, n. 4812; Consiglio di Stato, Sixth Division, 17th July 2008, n. 3602; Consiglio di Stato, Sixth Division, 13th February 2009, n. 775; Consiglio di Stato, Fifth Division, 20th October 2008, n. 5124; Consiglio di Stato, General Meeting, 3rd December 2008, n. 13).

This solution clearly tends to corrupt somehow the structure of the Lex Aquiliae model with elements of contractual law (see on the subject Consiglio di Stato, Sixth Division, 4th April 2011, n. 2102).

As we can see shortly, the extreme development of this conceptual idea can be traced in the theory according to which the flawed exercise of a public power and its following offence to legal expectations are theoretically able to set up a contractual liability, emerging from "social contact" (see herein-below, paragraph 6).

e) As for the concept of wilful wrongdoing, case law is peculiarly poor.

Instead, the main topic dealt with by scholars who reflected on the subject concerns the need to determine if the fraudulent intent (meaning conscience and will of the wrongdoing) implies the offensive conduct of the officer cannot be referred to the organization.

With some degree of approximation, two main opinions are confronted on the issue.

According to the first one, actions characterized by the will of causing a damage to a third party, such as those creating criminal activities, would interrupt the relationship officer-organization; therefore the consequences of the wilful wrongdoing could not be attached to the legal entity.

As for the second opinion, instead, the fraudulent intent could not erase the nexus of causation existing between the unlawful behaviour of the officer and the exercise of the administrative function; according to this theory, in order to exclude the legal entity's liability it would be necessary that the activity performed by the physical person fell entirely outside his/her own functions (see Italian Supreme Court, Third Division, 6th March 2008, judgment n. 6033).

6. ALTERNATIVE PROPOSALS OF ORGANIZATION OF LIABILITIES ARISING FROM UNLAWFUL EXERCISE OF POWERS

The framework of all the different theories proposed to classify the liability arising from unlawful exercise of power, alternative to the scheme approved by judgment n. 500/1999, can be summarized in the following way.

It is useless to remark that such options involve relevant differences on the gound of legal applicable regimes Apart from the subjective requirement, the differences regard the statute of limitation, the determination of damages able to be repaired, the date on which legal interests and currency appreciation become applicable .

a) Following the Civil remark on the so called liability from "social contact", some authors and some judges support the theory that the "contact" set up between citizens and public authorities can build up a proper duty, due by the public administrative authorities, to act correctly, under good faith, correctness and impartiality, in accordance with article 1173 ICC.

A breach of a duty like this could originate contractual liability within the terms of article 1218 ICC.

Among the major inferences that can be drawn from such an approach, there is the possibility of receiving a compensation for damages even regardless of the assignment of a good for life to which a legal expectation is ordinarily linked with.

This theory is still a minor one (see Consiglio di Stato, Fifth Division, 27th November 2010, judgment n. 8291), even it has been sustained by civil courts (see Italian Supreme Court, First Civil Division, 10th January 2003, judgment n. 157) as well as by administrative-law ones (see Consiglio di Stato, Sixth Division, 20th January 2003, n. 340) that continue to partially uphold it even at present (see Regional Administrative Court of Puglia, Lecce, First Division, 21st December 2006, n. 6040; Regional Administrative Court of Puglia, Lecce, Second Division, 3rd April 2007, n. 1492; Regional Administrative Court of Lazio, Division Three-ter, 21st February 2007, n. 1527; Regional Administrative Court of Puglia, Bari, Third Division, 13th May 2009, n. 11399).

b) A different approach is proposed by a scholar (namely RACCA G.) who sees, inside the administrative activity having authoritative nature, " a possible double order of relationships between administration and private citizens": alongside situations which could produce unlawfulness by administrative actions and where you can see the private citizen as "entitled to legal expectations as well as claims to get the annulment of the offensive action of the case", there would be other situations where the citizen is, on the contrary, "entitled to proper personal rights", which give birth to "a duty of correctness pending on the public administrative authorities" (see on this subject ROMANO TASSONE A.).

In other words, according to this opinion, authoritative relationships with public administrative authorities are (also) marked by the existence of personal juridical positions (having the characteristics of "personal rights") that involve goods different from the one guaranteed by the final decision.

c) A sort of application of this construction can be found in the case law opinion, developed withe regard to selective procedures, which frames the liability of the public administrative authorities as a pre-contractual liability, according to article 1337 of the ICC.

More precisely, according to this theory such a liability couls arise when the damage suffered by the private citizen comes from a conduct performed by the public administrative authority of the case which breaches the rules that protect "legal reliance" of the parties involved in a pre-contractual negotiation (see Consiglio di Stato, General Meeting, n. 6/2005; Consiglio di Stato, Fifth Division, 6th December 2006, n. 7149; Consiglio di Stato, Fifth Division, 16th March 2011, n. 1627, which stated that the damages caused by "*internal annulments of public tenders for contracts due to faults pointed out by the public administrative authority involved only after the final award or that the public administrative authority itself could point out at the very beginning of the procedure for the tender*" can be compensated).

d) A further different opinion, moving from the idea that article 2043 of the ICC comprehends in general the liability from unlawful exercise of powers, but denying that the relationship occurring between a public administrative authority and a private citizen can be

qualified as pre-contractual relationship or as a negotiation, supports the "special nature" of the liability arising from public powers.

According to this opinion, the procedural provisions that vested administrative judges with the power of compensating damages caused by offences to legal expectations should have a substantial value and should be qualified as an autonomous legal basis for liability due by public administrative authorities (see Consiglio di Stato, Sixth Division, 16th March 2005, judgment n. 1057).

e) Finally it should be noted that there are also hybrid case law solutions and proposals of calssification which more or less expressly are prompt to blend features of the aquilian regime with elements of the contractual or precontractual one (see Consiglio di Stato, Sixth Division, 4th April 2011, n. 2102)

7. INDEMNIFICATION BY SPECIFIC PERFORMANCE

The now-repealed article 7 of the Law that introduced Administrative Regional Courts within the Italian administrative-law system (statute law n. 1034/1071) granted administrative judges, in its texts enacted according to article 35 of Legislative Decree n. 80 dated 31st March 1998 and article 7, paragraph 4, of Law n. 205/2000 afterwards, the power to "examine, within its own jurisdiction, all issues involving possible compensation for damages, even by way of specific performance, as well as other consequential financial rights".

The provision, as for its passage concerning the possibility of obtaining specific performance, gave birth to a strong debate, which involved three main positions (see TRAVI A., Processo amministrativo).

a) The first opinion held that the possibility to have indemnification through specific performance, in accordance with article 7, would have allowed a new remedy – similar to that granted by the German law – in order to obtain, within the ordinary judgment

of legtimacy, an order to the public administrative authorities to issue a decision capable of granting to the damaged person the good of life related to the offended legal expectation of the case (as for this opinion, see Administrative Regional Court of Veneto, First Division, 9th February 1999, judgment n. 119)

b) On the contrary, a second opinion held that the above-mentioned provision does imply a reference to the ordinary indemnification by way of specific performance (see Consiglio di Stato, Sixth Division, 18th June 2002, judgment n. 3338; Consiglio di Stato, Sixth Division, 21st May 2004, n. 3355; Consiglio di Stato, Sixth Division, 15th November 2005, n. 637; Consiglio di Stato, Sixth Division, 9th June 2008, n. 2763; among the authors see TRAVI A., Processo amministrativo).

c) Different jurisprudential decisions showed the intention of improperly overlapping the concept of indemnification by specific performance with the phenomenon of ultra-constitutive consequences of annulment sentences (see, exempli gratia, Administrative Regional Court of Lombardia, Third Division, 30th April 2003, judgment n. 1091).

At present, article 30 of Administrative Procedural Code clearly states, that a claim for compensation can involve restitution by equivalent as well as indemnification by way of specific performance.

The content of article 7 of Law n. 1034/1971 has therefore been replaced by a provision according to which "it is possible to claim for compensation for damages through specific performance, if all requirements of article 2058 of the ICC do exist" (see article 30, paragraph 2 of the Italian Administrative Procedural Code).

Accordingly, it is clear that an administrative judge can issue compensation for damages by way of specific performance in the very same cases a civil judge would be entitled to do so (see A. TRAVI, Lezioni)

8. THE DEBATE ON PREJUDICIALITY

The acknowledgment of public authorities liability for offences to legal expectations has originated a coordination issue between compensation for damages and the constitutive remedy of annulment.

Within its judgment n. 500/1999, the Italian Supreme Court expressed the view that a damaged person could claim for compensation without pre-emptively proceeding against the offensive administrative decision.

Later on, the Italian Supreme Court confirmed this opinion (see ordinances nn. 13659 and 13660 released on 13th June 2006 and ordinance 13911 issued on 15th June 2006 as well as judgment n. 30254 dated 23rd December 2008) and mantained that the two remedies are autonomous, even after the administrative judges were granted the power to issue judgments for compensation (see above, paragraph 3), stating also that if the administrative judge of the case would decline a compensatory claim on the basis of the lack of pre-emptive exercise of the claim for annulment, he/she would have incurred in a case of jurisdiction denial, that could have been appeald before the Supreme Court itself.

On the contrary, administrative judges preferred to follow the opposite opinion, confirming on many occasions the prejudiciality of the claim for annulment towards the claim for compensation (see Consiglio di Stato, General Meeting, 22nd October 2007, n. 12; Consiglio di Stato, Sixth Division, 21st April 2009, n. 24369).

The opposition between the two opinins has been in some ways reconciled by the recent enactment of the new procedural code.

In fact, Article 30 of Legislative Decree n. 104/2010 expressly authorizes the exercise of the claim for compensation for damages arising from offences to legal expectations without the previous exercise of the constitutive claim for annulment within the limited period of 120 days starting from the day when the damaging action occurred or the day when the damaged person became fully aware of the offensive decision.

Third paragraph of the article further states that "the judge, when he/she has to determine the amount of damages, must evaluate all factual circumstances of the case and behaviour of all parties as a whole and, in any case, he/she has to dismiss compensation for damages that could be prevented by use of ordinary diligence, even through the remedies provided for by the the law".

Consiglio di Stato stated in its judgment issued through General Meeting on 23rd March 2011 (judgment n. 3) that the legislator, with the introduction of Article 30 of the administrative procedural code, "has *finally intended to show that he appreciates the theory of the pure (procedural) prejudiciality, as long as he appreciated the one of the full autonomy between the two remedies, and has reached a solution that, without taking into consideration the non-exercise of the claim as an abstract and aprioristic procedural estoppel, evaluates the conduct as a specific fact to be assessed within the frame of the general behaviour of the parties, as to deny compensation for damages that could be avoided through petition for annulment*".

This authoritative precedent, therefore, finally reached the conclusion that the omitted exercise of a claim against the offensive decision, even if it does not create a procedural estoppel to the exercise of the claim for compensation for damages, it can anyway become relevant for the purposes of article 1227 of the ICC, which states that compensation is not due for damages a creditor could avoid through ordinay diligence.

Finally, it is worth saying that incorrect exercise of a public power can be realized, not only through an action, but also by an omission, which can cause damages too. This subject is not addressed herein, as it will be object of a specific essay to be issued in this review later on.

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