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ADMINISTRATIVE SANCTIONS IN CREDIT AND SAVINGS

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1. INTRODUCTION

Administrative sanctions are a particularly important subject in the Italian and European legal order, and doctrine and jurisprudence have always paid much attention to it. Important and controversial is also the purpose of the administrative sanctioning authority, in relation to the difference with the scope of criminal law; both measures are considered afflictive and with a deterrent effect, and the result is that, on substantive issues, it is not easy to grasp the difference. Even the Italian legislature, on the other hand, has repeatedly "moved" some precepts from criminal law to administrative law, with the result that, in these cases, the penalty was not imposed by the judge but by the same contracting owner of supervisory powers and control over the relative sector .

The interest in the matter has been turned on again in connection to the study of the regulation on independent administrative authorities, public administration completely independent from the apparatus of government, both from an organizational and functional point of view and to which are given tasks of regulation, supervision and sanction in particularly "sensitive" sectors (especially for the constitutional significance of the goods involved: competition, credit, savings, etc.). A prudential supervision is required, which involves assessments of particular complexity and therefore is preferably entrusted to bodies not connected to the governmental structure and function, and particularly skilled at the technical level. This explains the criteria for appointment, the composition and institutional position of independent authorities, linked to the need for "neutrality" with respect to the interests concerned, free from the function of primary satisfaction of public administration interests.

Among the powers of the independent authorities the sanctioning authority has a central role in connection with the general tasks of sectorial supervisory and regulation.

Just for the independent authorities the legislature has chosen to entrust the administrative judge with the protection against sanctions; in this sense, since 1990, the orientation that entrusted the civil courts with the competence on the opposition to administrative fines, has been reversed. A reversal that - after a number of significant steps

in the same direction - the administrative procedure code (2010) has completed, homogenizing, in this sense, the field of credit and savings and, therefore, with reference to the sanctions imposed by the Bank of Italy and the Italian Securities and Exchange Commission (CONSOB). Aspects that constitute the cutting edge of the doctrinal and jurisprudential discussion and debate on the subject.

2. ADMINISTRATIVE SANCTIONS AND ADMINISTRATIVE PROCEDURE CODE. THE MAIN POINT OF JURISDICTION

The most recent discussion on the subject of administrative sanctions regards therefore, the provisions of the administrative procedure code that establishes a special regime of protection of derogation, in some ways, compared to the discipline of General Law 689/1981. The question, as already mentioned, concerns the sanctioning power of the independent authorities, whose union has been entrusted to the exclusive administrative jurisdiction and the functional competence of the TAR of Lazio.

On the one hand, therefore, the code makes uniform a legal framework that is relatively disorganized and fragmented in the special laws relating to individual subjects; a formal and transversal union which contains, however, a definitive reversal on the subject; in the area of action of the independent authorities, as in some other important areas (such as. construction and urban planning), administrative sanctions are entirely excluded from the civil jurisdiction and brought back in the channel of judicial administration.

The framework revolves around three provisions: a) art. 133, paragraph 1, lett. I) which states: "*The administrative court has exclusive jurisdiction [...] on all disputes relating to any action, including sanctions [...] adopted by the Bank of Italy, by the Italian Securities and Exchange Commission, by the garantor Authority for competition and market, the Authority for Communications Guarantees, by the Regulatory Authority for Electricity and Gas and by other bodies established under the Law of 14 November 1995 481, the Authority for the Supervision of public works contracts, services and supplies, by*

the Commission of supervision of pension funds, by the Commission for assessment, transparency and integrity of public administration, the Institute for the supervision of private insurance [...]."

The Art. 134, paragraph 1, lett. c) provides that "*the administrative judge shall exercise jurisdiction with respect to the extended cognition in cases relating to [...] fines whose objection shall be referred to the jurisdiction of administrative courts, including those applied by the independent administrative authorities* .... ".

To close the framework the article 135, paragraph 1, lett. c), which entrusts the mandatory jurisdiction of the TAR of Lazio, Rome office, with disputes on acts, including sanctions, of the independent administrative authorities[1].

The system can therefore be reconstructed as follows: for appealing against the sanctions, in the exclusive administrative jurisdiction, there will be a full and extensive knowledge of the matter; for fines imposed by the independent administrative authorities, in particular, the functional jurisdiction of the TAR of Lazio is also established.

3. ADMINISTRATIVE SANCTIONS IN CREDIT AND SAVINGS

The main issues that arise[2] on the subject concern, therefore, the sanctions imposed by the independent administrative authorities, according to the new legal codes,

[1] Please not also that that all appeals against the acts of independent authorities, follow the accelerated proceedings under article 119 of the administrative procedure code; on this point M. FRATINI, *L'opposizione alle sanzioni dinanzi al giudice amministrativo,* in M. FRATINI (ed.) *Le sanzioni delle autorità amministrative indipendenti*, Padova, 2011, 1322.

[2] Among the subjects of exclusive jurisdiction there also are other important subjects such as the construction and planning.

the legal guidelines in place and the legislation of the European Union. The change - indeed - on the one hand generalizes some rules already laid down concerning protection of the market and competition, while on the other hand significantly innovates the previous structure.

It should be stressed, first, the attribution to the administrative judge of the same powers that Article. 23, l. 689/81[3] gives the civil courts, including the possible replacement of the union on the assessment of the seriousness of the facts and in relation to the amount of the fine. Solution already established by the courts[4], and provided for by Community rules on infringements of competition rules.

More structured, complex and innovative was the iter that, in the field of credit and savings, led to the attribution to the administrative judge of the competence on sanctions of the independent competent authorities. In these subjects, indeed, there had been an openness only on the law on savings (art. No. 262/2005) that, although it had uniformed rules of procedure, had left the Court of Appeals the power to decide on key assumptions of administrative sanctions of Consob and the Bank of Italy.

The Art. 4 of Annex 4 to the administrative procedure code, instead, has permanently eliminated the jurisdiction of the Court of Appeals, leading to a unity the exclusive jurisdiction of the administrative court on sanctions of independent authorities and focusing on the functional competence of the Regional Administrative Court of Lazio on the First trial. This is just one of the main innovations of the administrative procedure

[3] It may be useful to recall that Article. 23, fifth paragraph, l. 689/1981, was amended by section 26 of Legislative Decree no. 40/2006, in the sense that against the judgments of the peace officer we cn use the ordinary appeal rather than, as previously established, appeal per saltum before the Court of Cassation, cf. the point C. cost., n. 90/2008.

[4] Cass. Un. Ses. April 29 2005, No,. 8882, in *Giorn. Dir. Amm.* 2006, 179 commented by P. LAZZARA, *Le competenze comunitarie*; Cass. Un. Ses. January 5 1994, No. 52; Cons. State, March 2, 2004, No 926, even in this sense, cf. Cons. State, VI, Feb. 8, 2008, No 424.

code which gives the administrative judge the appeals against the sanctions of Consob and the Bank of Italy, previously entrusted to the ordinary jurisdiction and the jurisdiction of the Court of Appeals (Court of Cassation, SS.UU., September 20 2006, no. 20315; November 12 2002 no. 15885; May 25 2001, no. 225; in doctrine, M. Fratini, G. Gasparri, A. Giallongo, *Le sanzioni della Commissione nazionale per le società e la b*orsa, in M. Fratini (cured by) *Le sanzioni delle autorità amministrative indipendenti*, Padova, 2011, 464).

4. THE QUESTION OF JURISDICTION. THE PERSPECTIVE OF THE CIVIL COURTS

On this last point there is an ongoing conflict which began with the judicial order of March 25, 2011 in which the Court of Appeals considered significant and not manifestly unfounded the question of the constitutionality of these provisions, focusing particular attention to 'deletion of Art. F 187, paragraph 4, of Legislative Decree No 58/1998, resulting in removal of functional competence in the civil courts regarding administrative sanctions of Consob and the Bank of Italy.

The order raises many profiles of illegality of the new code, it is assumed - first of all - the violation of art. 76 of the Constitution, because the executive order would exceed the boundaries of the delegation of Article 44, L. 69/2009.

It is believed, from this point of view, that the delegation provision had requested the simple rearrangement of the “rules of the jurisdiction of administrative courts, even compared to other jurisdictions "and to" bring the rules in force at the jurisprudence of the Constitutional Court”; with no chance - believes the Court of Appeals- to change the current division between administrative and ordinary courts. It would therefore be unlawful to have moved a series of disputes (Article 187 f, d lg. 58/1998), from the civil jurisdiction of the Court of Appeal to the administrative Tar of Lazio. Legislative innovation that falls outside, according to the evaluation of the court, the simple "rearrangement" allowed by the delegation.

More incisive seems the criticism advanced in relation to Articles. 103, 113 of the Constitution, on the basis of the decision No. 204/2004 of the Court. With regard to administrative sanctions, no matter of administrative discretion would be considered, since the relative power is characterized by the canon of dutifulness and full protection of subjective legal situations, which soar, in fact, to the rank of individual right. The civil jurisdiction, in other words, would have a double anchorage in the duty-bound character of the sanctioning function and to the nature of subjective right of oppositional subjective legal situations.

Argumentative passage resting on the solid foundations of the case law of the united sections that, even after the entry into force of Article. 7, l. July 21, 2000 No 205, have confirmed the assignment to the civil jurisdiction of appeals against administrative sanctions imposed for violation of the rules on financial intermediation[5].

On this point, the Court does not escape from another hypothetical objection when it states that the sanctioning function can be considered only occasionally, and not inextricably, linked to the overall supervisory activities "*Given that the profile of supervision may well be concluded without the sanction and, conversely, the profile of sanctions must be implemented also on report by third parties, in the absence of supervisory activity.*" Supervision, insists the Court of Appeals, would be an expression of an administrative power while the sanctioning function would be exercise of a duty "bound" in the presence of the conditions. Again, the implicit reference is to the orientation of the united sections that excluded the assimilation of sanctioning authority and supervisory activities, for not rigidly predetermined mode of operation of the second[6].

[5] Cass. Un. Ses., January 24, 2005, No 1362; Cass. Un. Ses. March 18, 2004, 5535.

[6] Cass. Un. Ses. January 23, 2004, No 1235; Cass. Un. Ses. July 22, 2004, No 13709, relating to sanctions by the Bank of Italy.

Also the reference to the protection of the market, they add, is not a unifying and enough specific element ("special subject") to set up the union by the administrative judge of these different aspects of Consob.

Aside the considerations on excessive delegation, the grounds of the order raise some concerns, particularly about the supposed autonomy of the supervisory activities and sanctioning role; as if it could be conceived, formally and substantially, outside the duties of active administration, supervisory, control, etc.. by the Consob itself. In contrast, the administrative sanctioning authority (unlike the criminal authority) is characterized precisely by the close connection with the function and duties of administration of which is still expression. It is impossible to fully understand the supervision without the prospect, which is central on a systematic-legal level, of the sanctioning authority and all other powers of interdiction, attributed to the competent authority within the overall function.

In any case, even in the matter of abuse of the market, we can not assert the "entirely sanctioning" competence of Consob, which is not directly and closely related to the tasks of supervision and information considered as a whole.

Nor we can share the proposed articulation of the powers-duties of public administration and of subjective-legal situations of the parties concerned with respect to the different moments of supervision, control and sanction. Also from this point of view it should be noted, rather, that the operators involved in the system of financial intermediation (or of credit, with reference to the Bank of Italy) are subject to the supervision and control functions, as well as the sanctioning power of authorities, making it extremely difficult to imagine, at least formally, fully protected situations in such an authoritative context. In its favour, on the other hand, the order may draw the traditional configuration in terms of subjective right of the subjective-legal situations of the sanctioned. There is no need to investigate this point, this orientation being entirely consolidated in doctrine and in jurisprudence.

We can not believe that the subjective-legal situation (right), is not, even indirectly, related to the function of supervision and control, so that its protection would remain outside the exclusive jurisdiction clause.

Further doubts are entered in the order with respect to the concentration of all appeals of administrative sanctions of independent authorities, before a single judicial office (TAR of Lazio). A solution that appears to the national court conflicting with the canon of constitutional reasonable length of proceedings (Article 111, paragraph 2 of the Constitution) "*given that the distribution of the disputes themselves between more territorial courts provides a parallel treatment of processes, therefore with a shorter duration of each while the concentration in a single office necessarily entails a treatment in sequence, which ends up affecting the reasonable length of all of them.*"

Censorship, of great interest, seems reductive in terms proposed being primarily focused on organizational aspects, perhaps not directly affecting the level of constitutional legitimacy, nor relevant in the main proceedings before the Court of Appeals.

It is true, rather, that the concentration before a single judge of First Instance greatly stiffens the interpretation process and the natural course of law enforcement, anticipating the time of the unifying application, ordinarily entrusted to the State Council.

The structure of protection in the first trial, in other words, guarantees the fundamental value of diversity in law enforcement, except for the nomophylactic function of the court of the Palazzo Spada[7].

[7] On this point, cf. C. cost., n. 237/2007, which has expressed its opinion about the possibility of concentrating in the TAR of Lazio all disputes relating to waste emergency. The question of the constitutionality of was raised again on this point by Tar Campania, Naples, ord. November 18 2010, No 800, *Corr. merito*, 2011, 657, commented by V. Neri.

5. THE POSITION OF THE REGIONAL ADMINISTRATIVE COURT OF LAW (TAR) OF LAZIO IN TERMS OF ADMINISTRATIVE SANCTIONS ON CREDIT AND SAVINGS

In the opposite direction the Tar of Lazio ruled on a similar issue (sentence 9 May 2011, No 3934). The administrative judge analytically traces the issues raised in court by Consob dismissing them point by point.

First is considered the alleged violation of Article 76 of Constitution, manifestly unfounded, for excessive delegation. This is because the legislature, among the principles of the delegation, expressed the need for concentration of protection, also for a reasonable duration of the process[8]; from this perspective the reorganization of the existing rules on the administrative jurisdiction has been delegated, even compared to other jurisdictions.

The delegated decree would therefore properly extend the administrative jurisdiction to the sanctions of Consob - formerly attributed to the civil courts - according to the "*close connection between supervisory power, already constituting a public service in the areas referred to in Article 33 d. lgs. 80/1998 and sanctioning power*."

We are in the area of "concentration" of protection against all Consob measures, including sanctions, first assigned to another jurisdiction.

The most convincing passage of the grounds for the decision concerns precisely the observed connection between the administrative function of supervision and sanctioning powers.

[8] In this sense, most recently, A. MALTONI, *Considerazioni in tema di attività prcedimentali a regime privatistico delle amministrazioni pubbiche*, in *dir. amm*. 2011, p. 161.

This link poses probably the second function at the bottom of the general powers of supervision as already considered in relation to other independent administrative authorities.

The task of supervision sums up the whole series of powers of inspection, request for information and documents that characterize the control of financial intermediation markets.

That argument, binds to one of the main assumptions of the administrative procedure code which consists in welding between sanctioning authority and function of active administration, with the result that the acts are configured as sanctioning measures naturally assigned to the jurisdiction of administrative courts.

From the additional point of view concerning subjective lagal situations, the Tar believes that there are the conditions for the attribution to the administrative jurisdiction of the protection against the sanctions of Consob; in particular, the situation of the recipient of the administrative sanction is configured in terms (not of individual right but) of a legitimate interest, since the recipient is however opposed to the administrative power expression of technical discretion.

It is up to the administration, indeed, the appreciation of complex facts that integrate the violation, as well as in the quantification of the sanction according to the seriousness of the behaviour. Indeed, the sanctioning authority would require "*a balancing of public and private interests, aimed at the choice of the most proportionate sanction, which constitutes the exercise of administrative discretion*."

This argument is problematic in many ways; indeed, it seems that the amount of the fine can not be determined on the basis of an assessment of administrative discretion in the strict sense and therefore it does not depend on the comparative ponderation between public and private interests; this is because the punitive power must be subject to a condition more stringent than legality and predictability. Only the severity of behaviour established and the necessary deterrent effect of the sanction must guide the administration in the evaluation of actions to be punished. More relevant is the reference to "technical

discretion" (not administrative) just to indicate that the evaluation of Consob takes complex character while remaining linked to objective and predetermined technical parameters.

The question of jurisdiction could therefore be solved according to the reported link between sanctioning powers and duties of active administration without involving the treacherous terrain of subjective legal situations.

If it is true that the imposition of a sanction reflects a "power", it is equally true that in this matter there is a more stringent constraint than the rule of law so that the judicial review has always been extended up to the ability to change the amount of the sanctions imposed. This means that, beyond the formal classification of the legal-subjective situation asserted, the judge (ordinary or administrative) may replace the administration in assessing the gravity of the conduct and the consequent determination of the fine.

6. SUBSEQUENT COURSE

We must report then the decision by which the Council of State has considered its jurisdiction on a dispute brought before the entry into force of the new code and, therefore, at the time, a matter of ordinary courts (C. St., Section . VI, April 18, 2011, No 2359). In particular, the Board held that the rule in Article. 5, Code of Civil Procedure, according to which the jurisdiction is determined "with respect to the applicable law and the state of facts existing at the time of submitting the application," being directed to promote and not prevent, the perpetuatio iurisdictionis, may be invoked only in case of supervening lack of jurisdiction of the court and not in the reverse case in which there is the allocation of jurisdiction to the court that did not have it at the time of submitting the application.

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