

ACTIONS IN THE NEW CODE OF ADMINISTRATIVE PROCESS

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1. INTRODUCTION

The new code of administrative process (c.p.a.) for the first time generally disciplines the cases that can be submitted before the administrative judge: the action of annulment (Art. 29), the action of conviction (Art. 30), the action opposing silence and the declaratory judgement of nullity (Art. 31). It is not possible to deal here with the problem of legal action before the administrative judge, a problem which has absorbed scholars of the administrative process for a long time. It is sufficient to note here that the difficulties of

classification initially depended on the ambiguity around the jurisdictional nature of the Council of State and the defining of legitimate interest as a legal position of substantive nature. Once these doubts were resolved, it was possible to elaborate the theory of jurisdictional administrative action on the basis of that of an action before the ordinary judge, and consequently proceed to systemize the actions that can be put before the administrative judge, moreover anchored to the action of impugment of an administrative provision which has been the only true jurisdictional administrative “action” for a long time. At the end of the last century, thanks to scholars and case law, also under the impetus of some European regulations, the legislator had amended the system of actions, without moreover impairing the impugment structure of the administrative process, above all enriching it with the action for compensation for damages ensuing from damage to legitimate interest, for a long time denied in the Italian legal system (Legislative Decree *D.lgs.* 80/1998 and Law 205/2000). An amendment that set in motion the profound transformation of the system of actions specified by the Code, but previously elaborated by scholars, and followed to a certain extent by case law as well.

2. PROPOSABLE ACTIONS: FROM THE COUNCIL OF STATE COMMITTEE’S OUTLINE TO ENGROSSMENT.

The new Code devotes a specific discipline to actions and can with good reason consider that it constitutes the heart of the Code, seeing that the action outlines the relationship between law and proceedings. The discipline of the actions set out in the Code, nonetheless, seems to be the result of the consolidation of the discipline previously in force rather than a true reform, as on the contrary the mandate foretold. In fact, Parliament had identified amongst the guiding principles and criteria the regulation of actions and the functions of the judge through the forecast of *declarative and constitutive judgements and convictions, fit to satisfy the winning party’s claim* (Art. 44, para. 2 let. b no. 4 L. 69/2009).

Despite this the Code does not appear to be a simple reorganization of the rules in force and prevailing case-law trends, but can become the starting point for a further evolution of the administrative process.

Prompted by their intention to fully carry out the mandate, the Commission set up at the Council of State had drawn up a draft Code that forecast, in addition to the three actions currently foreseen in D.lgs. 104/2010, the action of verification of the existence or non-existence of a disputed legal relationship and the action of fulfilment as well as executive and precautionary actions.

The Commission's outline, reorganized by Executive intervention, has been streamlined, in particular exactly the part about the actions, the actions of verification and fulfilment having been deleted and the executive and precautionary ones transferred to the part concerning the specific discipline of the respective proceedings.

In the heat of the moment the first comments on the final text were rather critical, since, beyond reorganization of the regulations, the Code did not reach the goal of aligning administrative justice to the levels of protection required by the Constitution and European jurisprudence. (A. Romano Tassone, F. Merusi) Besides, the justifications produced for the revision of the outline of the Code, in particular, did not appear very convincing, on the basis of alleged and undemonstrated needs to reduce public spending that instead would appear to conceal a concept of justice which in the confrontation between authority and liberty sees the sacrifice of the latter, (A. Pajno).

Subsequently more articulate opinions and appraisals have appeared, asking the question whether it is still possible, going beyond the literal data and playing on the principles which inspired the Code (*in primis* the principle of effectiveness of protection), to deduce interpretatively the action of mere verification and the action of fulfilment.

Some scholars (A. Travi) maintain that the list contained in Chapter II, Title III of Book I of the Code is peremptory in nature and does not permit the introduction of actions that the legislator has deemed it necessary to expressly exclude. Other scholars (E. Follieri, M. Clarich), on the contrary, consider that the Code has laid down an open system of

actions and that consequently atypical actions can also be proposed, within which could fall the action of fulfilment and the action of verification formally expunged by the Government.

Preliminarily to the examination of the actions which can be proposed before the administrative judge, it should be observed that Chapter II devoted to actions does not exhaust the catalogue of actions provided not only by the Code, but also by other sources of regulation. In addition to precautionary and executive actions, no longer expressly mentioned in Chapter II, but disciplined respectively in Articles 55 and 112 of the Code, think for example of the action relating to access (Art.116 c.p.a.), whilst the action for the efficiency of public administration is disciplined by Legislative Decree 198/2009.

In the light of that, it can be asserted that Chapter II does not contain a complete and exhaustive organic whole of the feasible actions in proceedings, so that the elimination of the action of verification and the action of fulfilment in the engrossment could have been a mere simplification, the action of fulfilment being traceable within the action of conviction for failure to exercise mandatory administrative activity (Art. 30, paragraph 2) and in the action opposing silence (Art. 31), with verification of the obligation to act and with the possibility of obtaining an order to act from the judge (Art. 34, para. 1, let. b.). As to the action of verification, the fact remains that verification of rights cannot be excluded from exclusive jurisdiction (precisely since it also recognizes *ratione materiae* rights) and it had already been accepted by case law even before the Code; whilst the verification of legitimate interests, without disputing the documents, is admitted within the action of conviction (cf. Art. 30, 2nd para.).

The typology of the actions, common both to the general jurisdiction of legitimacy and to exclusive jurisdiction, follows the traditional tripartition of actions of annulment (constitutive), verification (declaratory) and conviction, drawn up within the realms of civil proceedings, although with the specificness of administrative judgement. The principle of typicality of the actions is toned down moreover, on one side by the introduction of flexible elements, found both in the plurality of the applications that can be submitted by the

claimant and sub-dividable in different ways in relation to their need of protection (Art. 32), and in the multiplicity of the verdicts that can be obtained from the judge (cf. Art. 34).

If this plurality were exploited by scholars and case law, it could lead to the construction of actions which are not rigidly anchored to typologies that are each separate from the other, but linked to the subdivision of the proposable claims and the verdicts obtainable from the judge; claims and verdicts conforming to the specific need of protection and redress of the damages for which the administrative proceedings must be predisposed, on a par with civil proceedings.

2.1 The action of annulment

The Code, even though admitting the principle of plurality of actions, shows however a clear preference for the action of annulment. Indeed Art. 29 is placed at the beginning of Chapter II to underline that the action of annulment is still the «queen of actions» (M. Clarich), whilst in the Council of State Commission's outline, the action of annulment was, as it were, one of many, being placed between the action of verification and the executive action.

The action *de qua* is attemptable in the traditional cases of transgression of a law, incompetency and misuse of power within the time limit of forfeiture of sixty days from communication or knowledge of the damaging act (excepting cases of disputes on matters of public contracts in which the time limit is reduced to 30 days: cf. Art. 120, 5th para.). The centrality of the action of annulment is observed by the fact that the administrative process continues to maintain as its subject matter the exercise or non-exercise of administrative power as is reaffirmed by Art. 7, para. 1, though related not to measures alone, but also to acts, agreements and behaviour if they are “even indirectly ascribable to the exercise of that power”.

The action of annulment provided for by the Code, however, seems to be connoted differently compared to the past, since in order to ensure the effectiveness of protection the

judge's verdict must «contain the order that the decision be implemented by the administrative authority» (Art. 88) and the formula according to which the verdict of annulment must safeguard the administrative authority's further measures has disappeared (Arts. 26, L.1034/1971 and 45, R.D. 1054/1924). That is why the judge's verdict annulling the act does not stop at the moment when it is quashed, but can contain further provisions, amongst which stand out those aimed at ensuring the sentence and the non-suspended judgements are carried out, which was previously reserved to the judge in compliance proceedings and that can now already be adopted during cognizance (Art. 34, para. 1, let. e) and, more generally, all those provisions aimed at guaranteeing satisfaction of the legal situation inferred in the trial (Art. 34, para. 1 let. d).

2.2 The action of conviction

The action of conviction, as outlined in Art. 30 c.p.a., takes form first of all (but not only) as an action for compensation of damages for injury to rights in cases of exclusive jurisdiction, but also to legitimate interests in the jurisdiction of legitimacy, in the case of damages caused by the unlawful exercise of administrative activity or by the non-exercise of mandatory administrative activity. It is provided as a general rule that the action of conviction can be presented simultaneously with another action (*in primis* the action of annulment), but it can be proposed independently as well in cases of exclusive jurisdiction or in cases disciplined by the same article (Art. 30, 1st para.: which confirms once and for all the collapse of the so-called preliminary administrative action, on the subject of which see *infra*).

The contents of the independently proposable action of conviction for the compensation of damages are outlined both by Art. 30, 2nd para. (for cases of unlawful exercise of administrative activity or non-exercise of mandatory administrative activity) and by Art. 30, 3rd para., (which explicitly recognizes the claim for compensation for damage to legitimate interests regardless of impugment of the provision causing the damage), as well as for damages ensuing from non-observance of the time limit of the close of proceedings.

Nevertheless, if there is symmetry between the proposable actions and issuable verdicts, from reading Art. 34, under the entry “Judgements on the Merits”, the inference is that the contents of the conviction can also be more varied in comparison with what Art. 30 would have us perceive. In fact the judge can condemn the administration, as well as to compensate damages (for the equivalent or in a specific form), also to adopt «*appropriate measures to satisfy the subjective legal situation inferred in the trial* » (Art. 34, para 1, let. c). The very ample formula used by the code appears suited to comprise every type of regulative measure, without exception, thus including the order to issue a provision against an unlawful refusal or in the case of inactivity: the latter being a case in point for which the action opposing silence is foreseen, aimed at ascertaining the administration’s obligation to act in accordance with Art. 31, 1st para., but which can well be aimed at obtaining a judge’s order to the administration remaining inactive to act within a time limit (ex Art. 34, 1st para. let. b).

It should be noted that some scholars (M. Clarich, E. Follieri) have considered they can read into the expression «*appropriate measures to satisfy the subjective legal situation inferred in the trial*» (but one could also add into the order to act just mentioned) confirmation of the implicit introduction of the action of fulfilment, whilst for other scholars (A. Travi) it is about a lack of coordination in the drawing up of the final text, since the delegated legislator’s intention would have been to not introduce the generalized action of fulfilment (it being perhaps superfluous, as the same results can be reached during compliance proceedings).

Another important aspect introduced by Art. 30 is represented by the relationships between impugatory protection and compensatory protection, that is so say between the claim of annulment of the unlawful measure damaging a legitimate interest and the claim for compensation for damages produced by the same. Remember how a deep contrast was created on this point between the Council of State and the Supreme Court (*Cassazione*) with regard to what is called “preliminary administrative action”. In particular, the highest administrative judge had held that an action of compensation regarding damage caused by measures which were not impugned in good time within the time limit of forfeiture was not attemptable, whilst the Supreme Court, on the other hand, upheld the independence of the

action of compensation, attemptable in the period of limitation of five years independently from prior impugment of the damaging act.

The Code, recognizing the possibility of independently proposing the compensatory action compared to the action of annulment, intends to overcome the controversy on the preliminary administrative action, even if it circumscribes the autonomy of the action of conviction to compensation with a series of limits: first of all by fixing a forfeiture time limit of 120 days in place of that of limitation, a time limit which starts running from the day in which the damaging fact happened or from knowledge of the provision if the damage stems from it; secondly establishing that in determining compensation the judge assesses the real circumstances and the overall behaviour of the parties and excludes compensation of damages that could have been avoided by using ordinary care, even through trying out the instruments of protection provided, obviously including the act of impugment of the damaging act and the relevant precautionary application. The mechanism provided for by the Code seems to constitute an implicit reference to Art. 1227 of the Civil Code (c.c.), among other things explicitly referred to by Art. 124 c.p.a. concerning protection on the subject of contracts. And exactly as provided by Art. 1227 c.c., the Council of State's Plenary Assembly no. 3/2011 has recently confirmed that the choice not to make use of impugnatory protection can influence the legitimacy of the compensatory claim, being assessable as behaviour contrary to good faith and to the principle of correctness in bilateral relations: so excluding the possibility of compensating damages that could have been avoided bringing into action all the protective instruments (impugnatory and precautionary) the code offers.

All things considered, the provision of the time limit of forfeiture together with the onus of impugment tend to enhance the action of annulment. Besides it has been asserted that the new Code, in regulating the relationships between the action of annulment and compensatory action, has introduced a sort of concealed preliminary nature (Pajno) since mere compensatory action would risk taking shape as «little more than a school case» (Clarich).

Nonetheless, the Code is concerned with coordinating the action of annulment with the compensatory action, establishing that in the eventuality that an action of impugment has been put forward, compensatory action can be formulated during the trial and in any case up to 120 days from the sentence becoming final and even during compliance proceedings (ex art. 112, 1st para.), so permitting the claimant to choose the legal strategy of waiting for the outcome of the annulment trial in order to then submit and articulate the claim for compensation (Art. 30, para.5).

2.3 The action opposing silence and the declaratory judgement of nullity

Art. 31 provides for two independent actions: the action opposing silence and the declaratory judgement of nullity. With reference to silence, the rule disciplines the substantive assumptions of the action, whilst the aspects that are more strictly related to the trial are disciplined by Art. 117 c.p.a.. The action opposing silence, as is well-known, has magisterial origins: it started out as an action of verification aimed at verifying the administration's obligation to act. Over time the content of the action has evolved and starting from the 10th 1978 Plenary Assembly the possibility was advanced, within the limits of binding acts, for the judge to go beyond mere verification of the unlawfulness of silence and to pronounce a decision on the legitimacy of the petition. Once this chink was opened, cautiously at first and then opening ever wider, the idea has been established that the subject matter of the trial is not silence in itself, but the claim asserted by the claimant.

Between 2000 and 2005, the legislator had intervened to discipline the trial on administrative inaction, introducing an accelerated proceeding and the possibility for the judge to also pronounce a decision on the truth of the claim. Most case law has affirmed that the power of cognizance of the truth of the claim only exists in the case of bound provisions, the judge having to limit himself to declare the obligation to act where discretionary assessments are at stake. Art. 31 has therefore acknowledged the trend of the majority of case law that has limited the verdict on the truth of the claim only to cases of bound activity, moreover introducing the eventuality in which the activity takes

discretionary shape in the abstract, but in concrete terms not leaving further margins for exercising it. It could be a question of complex proceedings in which discretion is already exercised, for example in root planning choices, so binding the subsequent act of authorization.

The action directed at guaranteeing protection towards the inactivity of the public administration is linked to the obligation, provided for by Art. 2 of L.241/1990, to conclude the proceedings with a provision expressed within prearranged time limits. The claim is not subject to forfeiture time limits and may be proposed as long as the non-execution continues and in any case within a year from expiry of the time limit for conclusion of the proceedings, maintaining intact the possibility of re-proposing the petition to start proceedings where the conditions recur.

The sentence, as mentioned, may not limit itself to verifying the obligation to act, but, in accordance with Art. 34, also contain the order to the administration that remained inactive to act within a time limit that Art. 117 specifies to be as a rule not longer than thirty days. Where necessary it is provided that an *ad acta* commissioner charged to carry out the activity can be nominated.

Art. 31 has, moreover, outlined the action of nullity as a distinctive action of verification, its object being the structural pathology of the administrative provision. The substantive position is defined by Art. 21 *septies* of L.241/1990, whilst the discipline of the trial is regulated in somewhat concise terms by paragraph 4 of Art. 31. The application addressed to the verification of nullities provided for by the law must be proposed within 180 days, except for nullities relating to acts issued in avoidance or violation of the sentence (Art. 114, 4th para. let. b). Nullity of the act can, however, always be opposed by the resisting party or be officially found by the judge. Even though it is not mentioned, the counter-applicant could also object nullity, provided that they have an interest in it.

Some perplexity could arise with reference to the question of the allocation of jurisdictions, since in the face of a null provision there could be a subjective position with the basis of a right and so have the jurisdiction of the ordinary judge, excepting matters of

exclusive jurisdiction in which the administrative judge also recognizes some rights, in which case the action of nullity is certainly to be submitted before the administrative judge.

2.4 The problematic nature of the action of verification

In the sphere of administrative actions the action of verification merits some reflection, an action that, as mentioned, had been contemplated by the Council of State Commission but deleted from the list of actions in the final draft.

In tune with scholars who for some time have already upheld the admissibility of the action of verification in the administrative trial, Council of State case law in recent times has also upheld that the action of verification may be attemptable independently, even in the absence of an express prescriptive provision within matters of exclusive jurisdiction, as it is directed to the verification of the existence (or foundation) of a disputed right.

In particular, the action of verification has been recognized in the cases of declaration of the start of an activity – today included in exclusive jurisdiction by Art. 133 of the Code – to allow a third party to go to the administrative judge and have the declaration of the start of an activity (Council of State, sect. VI, 717/2009: 2139/2010) that is damaging to their own legal sphere declared illegitimate.

More in general, nevertheless, it is being discussed whether the action of verification is admissible in the jurisdiction of legitimacy, doubting that an instrumental situation like legitimate interest is susceptible to verification without also involving the administrative power correlated to this situation and consequently considering that this could permit a possible avoidance of the onus to impugn the damaging provision.

The Code had meant to overcome this formulation by introducing a specific action of verification in the Commission's draft, as mentioned, also in the light of overcoming of preliminary administrative action, that nonetheless the Government thought fit to remove from the final draft, even if verification is consubstantial to the power to judge and so

should always be admitted when an administrative relationship or its extent, substance or duration is disputed.

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