

by *Paolo Luigi Rebecchi* The Italian Court of Auditors - Corte dei Conti - has jurisdiction in matters of public accounts and in others established by law. In particular, in the presence of damage to the treasury, the State or any public administration, the liability of directors and employees does not follow the ordinary rules of civil law, but assumes the peculiar characteristics of administrative and accounting liability. The essential elements of the above mentioned liability are identified by various provisions of the law and consist of:

The objective element (property/asset damages, but also non-material damages, in particular damages to the image) for finances of the State or a public body;

- The subjective element (intent or gross negligence),
- The causal link between the conduct and the harmful event

-the existence of the service relationship between the party causing the loss of revenues to the State and to the public administration.

The background element that characterises this type of liability is the attribution of jurisdiction to a specialised court which is the Italian Court of Auditors and the conferring of the power of action, exclusively to the regional public prosecutor of the Italian Court of Auditors as a public body that acts as an exponent of the "Italian state as community" and also regardless of the evaluation and the will of the entity that has suffered damages.

Administrative accounting liability, although based on general principles governing civil liability, carrying also the assumption of unlawful damage, is peculiar because it is aimed at ensuring the proper management of public money.

The aspects of substance, with respect to civil liability, relate to the subjective profile, limited to cases of intent or gross negligence, the personal nature of liability, with limited cases of joint and several liability, the special powers of the judge to "reduce" the amount of the charge borne by the guilty party, the limitation of the period of limitation to five years, the principle whereby liability does not extend to the heirs of the guilty party except in cases of unjustified enrichment. In terms of the legal order, regional jurisdictional sections or departments of the Italian Court of Auditors have been established in all regions and autonomous provinces, with headquarters in the capital of the region.

These sections or departments are courts of first instance in all matters assigned to the jurisdiction of the Italian Court of Auditors, including matters of administrative liability.

Appealing against decisions of the regional jurisdictional sections or departments shall be allowed at the central jurisdictional sections or departments, or for rulings/ decisions issued by the regional jurisdiction section or dept. of Sicily, to the relevant jurisdictional appeals section or dpt.

The Joint Sitzings of the Italian Supreme Court of Appeals (Corte di Cassazione) have jurisdiction to decide on conflicts of jurisdiction and matters referred by the central or regional sections, or at the request of the Prosecutor General.

Rulings of the Italian Court of Auditors may also be appealed against or challenged before the Italian Supreme Court of Appeals (Corte di cassazione) for matters of jurisdiction and before the above mentioned court of appeals, preventive regulations can be issued, before (the case is) decided on the merits in the lower courts/ in the courts of first instance, to establish jurisdiction. During an appeal, the duties of the Public Prosecutor are performed by the Prosecutor General of the Italian Court of Auditors or by assistant prosecutors assigned to the office of public prosecutor.

The Prosecutor General also has duties of coordinating regional prosecutors.

Liability proceedings of first instance are initiated by regional prosecutors before the respective regional sections or departments.

Before starting the trial, the regional prosecutor carries out enquiries consisting in acquiring information relating to cases of damage (loss of revenues) and performing investigations. The preliminary phase concludes with a dismissal order or with the summons. Prior to this, the adoption of precautionary measures of a financial nature, in particular attachment prior to issuing the ruling, may be requested.

Information for initiating investigations comes from complaints received or reports of a loss of revenue which are required from managers of public administrations, bodies of internal control of the above mentioned administrations or public entities and other entities established by specific provisions of law. The same reports of the Italian Court of Auditors during an audit may be appropriate to determine the commencement of an investigation by the public prosecutor's (accounts) office. Information on damages, which should be concrete and specific, can also be obtained from other sources of information such as news sources or exposed individuals or associations.

The regional prosecutor's offices also employ the investigative activities of the police and in particular the Guardia di Finanza (the Italian Financial Police). Italian laws reforming the Italian Court of Auditors and the organisational arrangements of the Police Corps itself have identified it as the main body of police support to the Italian "Court of Accounts" or Italian Court of Auditors.

Especially important are the relationships between criminal and accounting proceedings. In fact, implementing provisions of the Italian Code of Criminal Procedure provide for mandatory disclosure by the public prosecutor of criminal courts with regard to accounting in the event of prosecution for offences about a charge with regards to the Italian State. Likewise, the criminal court public prosecutor must give notice in the event a coercive measure is adopted. The above reporting system has been reinforced by a 2001 law that provides for criminal convictions for crimes against the public administration to be forwarded to the Public Prosecutor's office at the Court of Accounts.

The Italian Criminal Procedure Code also provides for effects in accounting in criminal rulings which have become irrevocable, despite having to clarify that there is a general principle of autonomy of the various processes, except for special cases.

The Public Prosecutor while carrying out preliminary investigations may request via notice records and documents kept by administrative and judicial authorities and may order direct investigations and inspections of public administrations and third-party contractors, including private owners, who are receiving financial benefits in charge of public budgets, may make use of technical advisers, delegate obligations to officials of government, order the production of records and documents and seize them; delegate inquiries or special requirements to the Guardia di Finanza (Italian Financial Police) and other police forces.

The public prosecutor, before issuing the summons in court, must invite the person allegedly responsible for the damage to deposit, within a period of no less than thirty days following the notice, their comments and any documents. During the same period, the alleged perpetrator may request to be heard in person.

The accounting process, initiated with the summons issued by the Regional Prosecutor, is governed by rules of procedure in its special aspects and what is not covered by these rules, by the Italian Code of Civil Procedure.

In this way, in rulings before the Italian Court of Auditors, restrictions regarding the acquisition of evidence provided for the criminal trial shall not apply.

The judge has the power to obtain *ex officio* from the administration and the parties, records and documents deemed necessary to decide on the case and also to order the public prosecutor to inspect these directly. The judge also has the possibility to order the examination of witnesses and to admit other evidence which it deems appropriate. These broad powers of investigation, including of an unofficial nature, of the judge of the Italian Court of Auditors, find a unique correspondence with the powers of investigation provided for the proceedings before the Court of Justice of the European Union whose laws provide that "The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal": The two rules of procedure, of the Italian Court of Auditors and of the European Court, then go on to offer a further specification when they state that the judge has the power to dispose of "the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved ...". It may be noted that in actual judicial reality (courtroom practice), evidence underpinning the rulings of administrative liability is mostly, of a documentary nature.

It is possible, but not frequent, to admit witnesses. The appointment of a technical expert or consultant is also used. Instead, the taking of evidence on oath is excluded due to the unavailable nature of those involved.

The notion of "documents" referred to in accounting opinions is in its broadest sense. In particular, in legal action over liability, the following are obtained and considered as acceptable: inspection reports, resolutions of public authorities, domestic regulatory actions, expense documentation, contracts executed by public officials, reports drawn up by public officials during administrative investigations, reports and records relating to criminal investigations, court records for criminal, administrative, civil or tax proceedings, rulings rendered by courts of other jurisdictions, hearing minutes drafted by the public prosecutor's (accounting) office in pre-trial investigations, technical reports issued by bodies of the public administration or the technical consultant appointed by the public prosecutor's (accounting) office itself.

Having highlighted the relevance of documents in accounting process and especially the possibility of admitting in the above legal actions inspection reports and the reports of the investigating bodies, it is also possible to use reports drawn up by OLAF in fraud investigations, which are equivalent to documents drawn up by inspection bodies and national investigation services. To this respect, the OLAF must comply during on-the-spot-checks with the rules and practices governing officials of the Member State concerned.

The new OLAF regulations on investigations provides in particular that OLAF, when drafting the final report should take into account the national law of the Member State concerned. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. The above reports shall be subject to the same evaluation rules applicable to national administrative reports and have the same probative value.

Taking a look now at activities of accounting jurisdiction on fraud damaging the resources of the European Union, it can be seen that this area of case law has gradually consolidated.

It covers the whole of the public funding for economic and social development on the basis of the programs contained in EU legislation and national legislation.

The principle that has held up the development of accounting jurisdiction in this area was that of assimilation, originally provided for in article 280 of the EU Treaty and which is now contained in art. 335 of the Treaty on the Functioning of the European Union according to which, inter alia, "... Member States shall take to counter fraud affecting the financial interests of the Union, the same measures as they take to counter fraud affecting their financial interests ...".

The issue posed two key legal issues: the notion of damage and the extent of jurisdiction.

As pertains to damages, it was found that, with regard to the costs, at least with regard to structural funds, the principle of additionality means that offences relate at same time to national resources (State or Regional) and to European resources.

Accounting case-law has confirmed that even with regard to European resources damage occurs within the national administration (state, region, local authority or other) of the recipient of the community resource that, once assigned to the entity, becomes part of its own resources.

The misuse of these resources results in damage to the entity itself and to the community the entity represents.

This approach was endorsed by the Italian Supreme Court of Appeals (Corte di Cassazione) where a ruling in 1999 ruled in the case of funds provided by the European Social Fund for vocational training, that the body which suffered the damages was the region, to which [the Constitution] devolves jurisdiction and as a result, to the community that resides there.

This principle is then extended to cases involving other areas of Community action (agriculture or infrastructure) based on the consideration that the unlawful diversion or misappropriation of funds results in a substantial nullification of disbursement, considered in the same way as national states and the Union are deemed integrated into a unitary arrangement with regard to policies established by the Treaty.

The Italian Supreme Court of Appeals or Cassation (Corte di Cassazione), had already in 1996 considered, in the matter of aggravated fraud that the Community should be considered a public body in our system as well as in that of the union's.

Even the Italian Court of Auditors, in 1989, in customs matters, stated that "... damages are caused to the EEC's revenues whenever a Member State verifies an evasion of customs duties on goods from non-member countries. ..."

The central feature that allows to identify a situation of damage to the State, also with regard to cases relating to European resources is the improper allocation of resources for purposes other than those provided, so that it defeats their purpose of disbursement, and that can be seen in several situations:

- at the time of disbursement, if it is disposed of outside of the requirements of law and fact;
- following disbursement, during the term of the obligation to use it if it is not complied with or if this constraint is infringed;
- at the moment in which the right to recover it emerges and action is not taken promptly.

This allows to include in the present case both situations where there is a criminal offence ("Community fraud" in the proper sense) as well as situations where there may be an irregularity that substantially affects the purpose of the loan/financing.

In this way, damage or losses in revenue linked to Community resources can be traced largely through two situations:

- On the one hand due to the "waste" of resources diverted for other and unlawful purposes, and to the consequent failure to achieve the objective of developing or supporting the economy to which Community funding is aimed for (in the event of fraud in the failure to increase the revenue of the Community budget);

-and on the other hand to the direct responsibility of the Member State who must prove that the fraud cannot be attributed to their lack of management and control and the possible consequences in the event that the Commission considers to charge the State the cost of fraud or of irregularities.

In particular, jurisprudential experience so far shows that damage situations which are genuinely prosecuted have been found for the most part to be a waste of resources. In particular, the action of liability, which is of an administrative and accounting nature often covers cases of fraud in the strict sense (intentional) as regarding what concerns the mere irregularity, the recovery procedure initiated by the administrative managing authority appears to be working. Otherwise, when it comes to criminal cases it causes an interference with the administrative procedures, which are suspended pending the outcome of criminal trials. In the case then of outcomes of criminal proceedings with rulings on the prescription or extinguishment of offence due to other causes, the consequences from an administrative standpoint are almost non-existent, but leave open the matter of recovery, in relation to what has been a particularly effective action by the regional prosecutor's offices of the Court, especially when even a precautionary measure was exercised for a set time.

As for subjective profiles of jurisdiction, cases of liability proceedings have initially determined as possible causes during the administrative and accounting procedures, the officials in charge of payment and control procedures, as well as of omissions, mostly malicious and with criminal implications, or grossly negligent.

In the field of vocational training, however, a thought had began to form on that the necessary relationship of service could be achieved also in respect of private entities implementing training programs.

The joint sittings of all divisions of the Supreme Court of Appeals (Corte di Cassazione), repeatedly dealing with the problem of jurisdiction, had welcomed this approach, stating, with regard to business, or at least to those in charge of the actual implementation of the courses, that they are in a service relationship with the financing / awarding body and this implies subjection to the jurisdiction of the Italian Court of Auditors concerning liability for loss of revenue.

A key moment in defining the scope of jurisdiction in this matter was then marked by the order of the Italian Supreme Court of Appeals (Corte di Cassazione), Joint Sittings of the civil sections, number 4511 of 1 March 2006.

The case considered by the Supreme Court of Appeals adhered to a loan granted under an operational Community programme for regional development. The defendant company before the Italian Court of Auditors in liability proceedings had been accused of having improperly requested and then obtained a loan of Italian lire 355.2 million for the construction of a snowmaking system to be built in a tourist resort.

The Joint Sittings of the Supreme Court noted that the development of case-law interpretation in the matter, which had matured in relation to the progressive work of the administration through subjects that had not been integrated into it and the more frequent operation of this outside of the schemes of the accounting regulations of the Italian State for purposes of acknowledging the jurisdiction of the Italian Court of Auditors, the heading under which the management of public funds is carried out is completely irrelevant, as this may consist in a relation of public employment or service, but also as an administrative concession or a private contract and have specifically stated that "... the centre of gravity for discriminating ordinary jurisdiction from accounting jurisdiction has shifted from the capacity of the subject (which may well be a private

or a non-economic public body) to the nature of the damage or loss and objectives pursued, so that where the private body, due to its choices, adversely affects the program imposed by the public administration, a program in respect of which its involvement has been requested by means of granting aid, and the incidence is such to be able to determine a misuse of the purpose pursued, the latter is producing a loss to the public body (even by merely subtracting from other companies funding that could lead to the implementation of the plan, as specified and approved by the public entity with the collusion of the entrepreneur itself), in respect of which it is accountable before the court accountant ... ".

The Joint Sitzings of the Italian Supreme Court of Appeals in affirming the jurisdiction of the Italian Court of Auditors in respect of the company that had received the funds, incidentally also argued that accounting jurisdiction is not questioned even in respect of the defendant credit institution in liability proceedings as concessionaire for failing to supervise.

The order, therefore, on the one hand, confirmed the equivalence for the purposes of the importance of administrative and accounting liability, of national and Community funds.

Secondly, it stated clearly and with reference to each assumption of payment of public funding (whether national or EU) carried out within the framework of economic and social development programs and (and therefore not just based on the sole assumption initially established with regard to vocational training) the extension of the general framework of subjective positions within the jurisdiction of the Italian Court of Auditors, so that there is a jurisdiction not only against public officials involved in an improper use or distribution of funding, but also directly against the beneficiary, either as an individual (as is often the case in the agricultural sector), or as a legal entity governed by private law, whether or not corporate form, and in respect of parties, both public and private, including private entities (as in the case of concessionary banks) who have carried out investigations or controls in financing processes.

The ruling of the Italian Court of Auditors is thus integrated with the other systems of judicial and administrative protection, assuming a significance that goes beyond the already mentioned possible case of initiating decisive measures of caution, constituting a judicial investigation against the beneficiary which can be used even with regard to the European Union, as an expression of the effective and specification for the protection of community resources by the Member State.

The additional step that has been registered in terms of scope of jurisdiction was that relating to the subjective positions of directors of legal entities directly benefiting from the funds.

In cases of fraud of the above mentioned persons, under criminal offences, they are normally subject to legal action, but in civil law, the relation with the administration that pays the funds is established with the recipient company. The possible initiating of civil proceedings by the administration does not guarantee recovery as frequently, the offence is extinguished due to prescription.

Even recovery actions that may eventually be implemented by the public administration relate to the Company and not to its directors.

This situation has highlighted serious findings in recovery actions, as these often related companies without actual total estate assets and often close to failure, with not even the guarantee instruments provided by contract as sureties working properly.

In this way, as was done for the cases of "accounting" liability asserted against entities managing funds for vocational training, trials concerning revenue liability in cases of community fraud, particularly after 2006, were exercised jointly both in respect of legal entities who were beneficiaries as well as in respect of their CEOs.

Even with regard to this situation, the Joint Sitzings of the Italian Supreme Court of Appeals, ruled a result on preventive regulations and appeals or challenges against rulings by the Supreme Court of Appeals.

In this way, in 2006 the Italian Supreme Court of Appeals (Corte di Cassazione) affirmed the existence of accounting jurisdiction even against the chairman and the general manager of a private legal entity (Confcooperative Molise) who is the beneficiary of the loan.

Over the following years, parallel to the increase in accounting legal proceedings, numerous decisions have been issued by the Italian Supreme Court of Appeals which constantly confirmed the details previously mentioned.

For example, in 2010, it was claimed that the Italian Court of Auditors has jurisdiction over an action for the loss of revenue proposed not only against the company for whom the public contribution has been paid, but against those who directly (CEO) have distracted the sums subject of the grant, and in doing so frustrating the aims of the public administration.

The Supreme Court has also clarified the scope of its jurisdiction to private parties, who are not the direct beneficiaries of the funds, nor directors of companies or receiving entities, but mere "intermediaries" between the public administration and the beneficiary, stating that in such cases jurisdiction exists only when a concrete practical involvement in the process of disbursement or perception through the creation by it of activities can be proven as actually necessary and related to the procedure. Thus, while jurisdiction has been affirmed in respect of an accountant who had certified the financial soundness of the applicant, including through accounting falsifications, jurisdiction was excluded in the case of mere external assistance or collaboration activities by private professional.

The Joint Sitzings of the Supreme Court of Appeals then excluded accounting jurisdiction in the event that disbursement of the funds did not occur as part of an economic or social development "program", but concerned straight grants to be made to act as mere support or compensation (the case then dealt with contributions for earthquake victims).

Regarding the limits of jurisdiction, it was later claimed, by the same accounting case-law, that even in the event where the financing of works has been received by the awarding authority as part of an infrastructure program (whether European or national) and the public body is in this case, the "final beneficiary", accounting jurisdiction does not exist against companies or private companies contracting works which may be involved in incidents of fraud in respect of the procurement or supply. In such cases, the private sector participates only indirectly in the management of public resources whose origin and destination constrained by the infrastructure program, incorporates only a single financing possibility for the institution.

During the course of 2013 subsequent rulings or decisions confirm the prevailing view in case law.

Finally, in 2013, the Italian Supreme Court of Appeals (Corte di Cassazione) has upheld the jurisdiction of the Italian Court of Auditors in the field of financial liability for any damages suffered by "direct" funds of the European Union.

The decision established jurisdictional preventive regulations as part of an accounting sentence originated from an issue regarding the case of transnational grouping of organisations and companies, recipients of funding provided directly by the European Union in the field of technological innovation and search. The issue originated from investigations conducted by the European Anti-Fraud Office (OLAF) in cooperation with the Guardia di Finanza (the Italian Finance Police), and also received the collaboration of during the investigation phase, of the Public Prosecutor's Office at the Court of Milan and the Regional Prosecutor of the Italian Court

of Auditors for the Lombardy region with an assumption of loss in revenues to the EU of around Euro 50 million.

Following the court summons (subpoena), some defendant beneficiaries had raised objections to a preliminary ruling on jurisdiction at the Italian Supreme Court of Appeals (Corte di Cassazione).

The ruling, duly substantiated, is of particular interest as, in addition to affirming the existence of accounting jurisdiction with respect to fraud committed directly to the detriment of the European Union, the work to obtain an overview of the accounting jurisdiction in the field of Community funds, carries out a comprehensive review of the principle of autonomy between accounting decisions and other decisions, including those initiated in the civil law proceedings by the administration that suffered the loss, even when the latter identifies itself with the European Commission and also offers a definition of the legal nature of the Union, as a public body, within the scope of our legal system. The ruling, citing in particular article 335 of the Treaty on the Functioning of the Union clearly states that the principle of assimilation must be applied in the area of jurisdiction of the Italian Court of Auditors in all cases to protect the budget of the European Community against fraud while an opposite view would constitute a breach of EU law due to the failure to extend in respect of the Community budget, measures of national law aimed at deterring and combating fraud.

It should also be pointed out that even in proceedings of the lower courts and in proceedings before the Italian Supreme Court of Appeals, the European Commission has intervened in full support of Italian accounting jurisdiction, to highlight its importance in protecting European financial resources even in respect of the ascertained inadequacy of the criminal system, not limited only to the Italian context.

As for the assumptions that in practice have been the subject of accounting judicial activity, behaviours highlighted mainly concern obtaining financing on the basis of false statements, failure to complete the funded activities, the production of false documentation on the activities, the purchase of new or used machinery or the fictional representation of purchases not made, failure to meet the subjective requirements for accessing finance, including the receipt of contributions in agriculture by persons subject to measures of anti-mafia prevention, non-compliance of the requirements relative to the destination of goods that have been produced through funding, irregularities in implementing vocational training courses, the collusion of CEOs and public officials in charge of performing inspections, the shared liability of lenders processing the granting of subsidies or loans, lack of enforcement of sureties, failure to achieve the capital requirement by the company, which determines its suitability for receiving funds, and is obtained by submitting forged documents and as a result of failure to conduct checks/inspections. Some recent first instance decisions have also included the liability of top executives of a national entity in charge of making payments in agriculture for implementing a fraudulent system for illegally obtaining contributions or even the formation of an organisation designed to obtain funding for non-existent projects headed by a regional Councillor for productive activities, with the involvement of private owners of companies participating in the division of contributions.

For quantitative data, during 2013, a total of 107 rulings were issued in the lower courts or courts of first instance for a total amount of convictions of Euro 95.9 million.

With regard to appeals, 33 rulings were issued for a total amount of convictions of Euro 26.7 million

With regard to the summons of the regional prosecutor's offices during 2013, 180 summons

were issued for a total amount in Euro of 111.7 million.

Global data for the 2008-2013 period is as follows. At first instance a total of 509 rulings have been issued for a total amount of convictions of Euro 332,06 million. During the same period summons issued are in total 947 for a total amount in Euro of 728.2 million

The general framework outlined earlier also resulted in gradual coordination activities or support, with investigation bodies, the OLAF and the accounting and criminal courts.

Judicial activity of the regional prosecutor's offices is supplied, in this area, as well as from reports that come from administrative authorities and OLAF, from information from the Guardia di Finanza (the Italian Finance Police).

For more than ten years a specific system of communications has been initiated from the General Command of the Italian Finance Police (Guardia di Finanza), which systematically sends to the Public Prosecutor's office a copy of the reports submitted to it by various administrations following the conclusion of investigations relating to Community fraud.

Between 1 January and 31 December 2013, the Guardia di Finanza (the Italian Financial Police) forwarded to the Public Prosecutor's office 177 reports relating to EU fraud amounting to € 95.2 million (taking into account also in the amount of of national co-financing).

Even the Agriculture, Food and Forestry unit of the Carabinieri has forwarded reports on fraud or undue receipt of funds in the field of agriculture grants, for a total in 2013, of 15 reports amounting to Euro 4.8 million.

Global data of the reports received (and forwarded to the appropriate regional prosecutors) for the 2008-2013 period shows the number of 1,183 for a total amount of Euro 805.1 million.

With regard to the OLAF, on 23 June, 2006, the protocol of cooperation with the Prosecutor General of the Italian Court of Auditors was signed in Brussels at the end of the 4th Conference of Anti-Fraud Prosecutors General.

This protocol was first confirmed and renewed in 2013, with a new Administrative Cooperation Agreement (ACA), according to the terminology required by the new regulation number 883/2013. The above agreements provide for an ongoing collaboration and investigative reporting between prosecutors of the Italian Court of Auditors and the OLAF. Of particular interest, inter alia, in the new agreement is the forecast for OLAF's assistance also in the enforcement of convictions of the Court that relate to direct funds (and which fall under the jurisdiction, in respect of the administration that suffered the loss in revenues, of the European Commission's legal Service).

At the same time, within the scope of the Public Prosecutor's Office at the Italian Court of Accounts a network of contacts between public prosecutors general and regional prosecutors' offices has been launched that can directly link up with the OLAF in relation to specific investigations.

The matter has also led to a strengthening of links with the criminal courts, which were already provided for in the rules previously mentioned.

In fact, by means of circular letter of 30 December, 2010 sent to Prosecutor Generals of the Italian Courts of Appeal, the Prosecutor General of the Supreme Court of Appeals emphasized the importance of the subject of protecting the financial interests of the Italian State and of the European Union, indicating the expansion of accounting jurisdiction described above, and calling on criminal courts to inform prosecutor generals of all cases of prosecution for offences that regard losses in revenue to national and European finances and also of cases involving individuals who, while not being public officials, now fall under the jurisdiction of the Italian Court of Auditors.

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