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The Subjective Element in Public Liability
Reasoned Case Law Review

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Abstract

In the brief case law review, the judgments of the Court of Auditors on fiscal responsibility will be analysed. The objective is to verify the presence of stable and clear criteria to distinguish the hypotheses of liability for gross negligence from those of liability for wilful misconduct, which positively guide the official's behaviour.

Keywords: case-law, wilful misconduct, negligence, public liability

Riassunto. *L'elemento soggettivo nella responsabilità erariale. Rassegna giurisprudenziale ragionata*

Nella breve rassegna giurisprudenziale verranno analizzate le sentenze della Corte dei conti in materia di responsabilità erariale. L'obiettivo è verificare la presenza di criteri stabili e chiari per distinguere le ipotesi di responsabilità da colpa grave da quelle di responsabilità per dolo, che orientino positivamente il comportamento del funzionario.

Parole chiave: giurisprudenza, dolo, colpa, responsabilità erariale

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1. Introduction

As discussed in more detail in the preceding papers, Law-Decree No. 76 of 16th of July 2020, converted with amendments into Law No. 120 of 11th of September 2020, made important changes to the legal regime of administrative accounting liability (Atelli *et al*., 2020). Article 21, second paragraph, of the so-called Simplification Decree provides that: «Limited to acts committed from the date of entry into force of this decree and until 31 December 2021[1], the liability of persons subject to the jurisdiction of the Court of Auditors in matters of public accounting for the liability action regulated by Article 1 of Law No. 20 of 14th of January 1994, shall be limited to cases where the production of the damage resulting from the conduct of the person acting is willfully intended by him. The limitation

[1] Indeed, due to the regulatory intervention of Law-Decree no. 77 of 31 May 2021 (Article 51, paragraph 1, letter h), the deadline was extended to 30 June 2023.

of liability provided for in the first sentence shall not apply to damage caused by the omission or inertia of the agent». The first paragraph of the same article further provides that: «Proof of willful intent requires the demonstration of the damaging event».

The new regime therefore excludes administrative liability for gross negligence and limits liability for acts of commission to willful misconduct. This limit does not apply to damages caused by omission or inaction.

2. Case law on the subjective element of intent

The new rules provide that, in the case of acts of commission, «the intention of the harmful event» must be proved. The new law has clarified the nature of "intent" in relation to administrative liability, the exact definition of which has long been the subject of conflict between doctrine and jurisprudence (Carbone, 2020). On the one hand, it is possible to identify a criminal conception of willful misconduct, according to which liability can be imputed if the agent has the intention of causing damage; on the other hand, a civil conception, according to which willful misconduct is presumed to be the result of a voluntary breach of duty, without the awareness of causing unjust damage being necessary. (Miceli and Zambuto, 2021; Caso, 2004).

Prior to the reform, the prevailing doctrine, and part of the jurisprudence[2], had already identified the intent of administrative liability in the «notion of criminal law outlined in Article 43 of the Criminal Code [...] thus taking shape, in the face of damage intended and desired as a consequence of its action». [...] of expected and intended damage because of one's action» (Tenore, 2018, p. 367). The Court of Auditors, however, for a long time, had identified willful misconduct with the mere will to fail to fulfill the obligations of service, without requiring the awareness of acting unjustly to the detriment of others[3]. This is the

[2] *Ex multis*: Court of Auditors, sec. reg. jurisd. Campania, 29 February 2012, no. 250; Court of Auditors, sec. jurisd. I, 14 November 2011, no. 516; Court of Auditors, sec. reg. jurisd. Campania, 17 September 2010, no. 1633.

[3] *Ex multis*: Court of Auditors, sec. reg. jurisd. Tuscany, 10 June 2020, no. 152; Court of Auditors, sec. reg. app. Sicily, 27 November 2014, no. 461; sec. jurisd. reg. Tuscany, 30 March 2017, no. 60; sec. III centr. app., 9 February 2017, no. 74; sec. jurisd. reg. Piedmont, 16 April 2018, no. 34; sec. jurisd. reg. Liguria, 18 November 2019, no. 195; 27 December 2019, no. 232.

«so-called contractual intent, which can be seen in the intentional intention not to fulfill an obligation or in the will preordained to the violation of a specific obligation inherent in the contractual relationship»[4] or rather «in the consciousness and willingness to fail to meet their obligations and duties of office and in the intent knowing not to fulfill the obligation involving, among other effects, also those to embrace, in addition to the foreseeable damage (art. 1225 c.c.), even that not foreseeable (art. 1218 c.c.)»[5].

For example, in a liability case brought before the Court of Auditors, Jurisdictional Section for the Region of Sardinia, against the management of a public investment company (Società Finanziaria per lo Sviluppo della Cooperazione S.p.A.) for damages – in excess of €8 million – caused by an erroneous investment, the Court held that «what is found [...] is contractual fraud, in the sense understood by the Supreme Court, according to which, for the configurability of fraud in the non-performance or incomplete or inexact fulfillment of the performance due by the debtor, it is sufficient to be aware of the duty to perform a given service and intentionally omit to perform it, without the requirement of awareness of the damage also being necessary (See judgment no. 25271 of 16 October 2008 and the case law cited therein). It is therefore not necessary here to establish whether and to what extent the defendant was aware that unfair damage might result from his conduct (i.e. that he was aware of the exact nature of the type of investment proposed by R.), nor is it necessary to establish whether criminal intent can be recognized in the present case, since this is a matter for another court to determine»[6].

The identification of intent on the part of the State with that of a contractual nature has led to a reversal of the burden of proof: if the intent consists of the same objective element as the offense – i.e. the breach of service obligations – a general presumption of guilt is established and the public servant is obliged to prove the absence of the subjective element (Longavita, 2017; Canale *et. al*, 2019).

This reconstruction has emerged with force as regards the liability of accounting officers

4 Court of Auditors, sec. reg. jurisd., Calabria, December 14, 2011, no. 632.

5 Court of Auditors, sec. reg. jurisd. Umbria, December 20, 2006, no. 405, in the same sense: Court of Auditors, sec. jurisd. II App., May 29, 2017, no. 340; Court of Auditors, sec. reg. jurisd. Lazio, November 13, 2015, no. 449

6 Court of Auditors, sec. reg. jurisd. Sardinia, February 27, 2009, no. 294.

for budget deficits. In fact, the Court of Auditors has recently affirmed that «from a historical point of view, the accounting officer's liability is presented as an obligation of restitution, in which the functional connection with Article 1218 of the Civil Code, in direct connection with the provisions governing the obligations of the custodian of other people's assets, determines the exemption, for the plaintiff, from the burden of providing proof of guilt on the part of the debtor. The orientation under review is still shared by the majority of case law, to which the court intends to give its full adherence and ensure continuity, according to which it is not necessary for the court to seek proof of the existence of fraud or gross negligence on the part of the accounting officer since the latter is required to prove that he is guilty of fraud or gross negligence, according to which it is not necessary for the Judge to seek proof of willful misconduct or gross negligence on the part of the accounting officer since the latter is required to prove that the shortfall or qualitative deficiency is the result of damage not attributable to him, due to force major or unforeseeable circumstances, and that the necessary procedural measures and precautions were taken in good time to preserve the money or goods received (*ex multis*: II Central Jurisdictional Section, Sentence no. 69 of 2004; I Central Jurisdictional Section, Sentence no. 318 of 2002; Piedmont Jurisdictional Section, Order no. 4 of 2019; Lazio Jurisdictional Section, Sentence no. 672 of 2012; Apulia Jurisdictional Section, Sentence no. 88 of 2002)»[7]. Jurisprudence has therefore clarified that in the case of the accountant, there is a real presumption of fault in relation to the shortfall, qualified in terms of a legal reversal of the burden of proof, with the effect that the subjective requirement of willful misconduct or gross negligence emerges in "re ipsa", as can be deduced from a plain reading of Articles 33 and 194 of the aforementioned Royal Decree No. 827 of 1924.

The scheme of wilful misconduct, linked to contractual liability, is undoubtedly suited to administrative liability as it was governed in the past by Article 82 of Royal Decree no. 2440 of 18 November 19237[8] and Article 18 of Presidential Decree no. 3 of 10 January

[7] Court of Auditors, sec. reg. jurisd. Piedmont, 17 September 2020, no. 66.

[8] «An employee who, by act or omission, even if only negligent, in the performance of his duties, causes damage to the State, shall be liable to pay compensation. When the act or omission is due to the act of several employees, each one shall be liable for the part he has taken in it, taking into account the powers and duties of his office, unless he proves that he acted on a superior order which he was obliged to carry out».

1957[9], but the wording of Article 1 of Law no. 20/1994 prior to the 2020 reform had already conformed the liability of the State to the model of ordinary citizenship, which is more favorable to the private party in terms of proof of subjectivity.

Indeed, the Court of Auditors has repeatedly clarified that «in line with the thesis that accredits the non-contractual nature of administrative liability, willful misconduct consists in the intention to cause damage, which is accompanied by the voluntary nature of the undue conduct»[10]. Precisely in light of this definition, in order to verify the existence of the so-called «malicious intent», «it is not enough to knowingly violate the obligations of service but the will to produce the harmful event is required. Malicious intent can be established where, together with the knowledge of the cause of the damage, there is evidence of further awareness of the reality and specific content of the damage. In other words, the so-called «erarial» intent is to be understood as a subjective state of mind characterized by the awareness and will of the action or omission "contra legem", with specific regard to the violation of the legal rules governing and regulating the exercise of administrative functions and to its harmful consequences for public finances»[11]. As a result, from the evidentiary point of view, «it is the Prosecution's burden to prove the existence of willful intent or gross negligence for the purposes of attributing the damage caused pursuant to Article 1, paragraph 1, Law no. 20/1994»[12].

The amendment introduced by Decree-Law no. 76/2020 intends to definitively overcome the jurisprudential contrasts and aims to exclude any form of presumption of guilt, obliging the plaintiff to provide rigorous proof of intent.

It will be interesting, then, to see how the Judges of the Court of Auditors will apply the new limitation of administrative liability, in particular for those hypotheses bordering on

[9] «The employee of the State's administrations, including those of an autonomous system, shall be obliged to compensate the administrations for damages resulting from violations of service obligations. If the employee has acted on an order which he was obliged to execute, he shall be exempt from liability, without prejudice to the liability of the superior who gave the order. However, the employee shall be liable if he has acted on the instructions of his superior».

[10] Court of Auditors, joint sections, 10 June 1997, no. 56, but also in Sec. II, 26 October 2011, no. 549, Sec. I, 14 November 2011, no. 516

[11] Court of Auditors, sec. reg. jurisd. Veneto, 12 January 2016, no. 5; sec. I cent. 14 November 2011, no. 516; sec. 2, 26 October 2011, no. 549, sec. reg. jurisd. Tuscany, 07 October 2002, no. 739, sec. III, 28 September 2004, no. 510, sec. reg. jurisd. Veneto, 28 January 2004, no. 104

[12] Court of Auditors, sec. reg. jurisd., 23 September 2019, n. 337.

gross negligence, falling within the category of the so-called "possible willful misconduct" (understood as acceptance of the risk of harmful consequences), much discussed in doctrine (Cimini and Valentini, 2022; Amante, 2022), but rarely applied in case law[13].

3. Case law on the subjective element of gross negligence

The limitation of administrative-accounting liability provided for, temporarily, by Decree-Law No 76/2020 does not, however, apply to damage caused by omission or inaction, for which the criterion of gross negligence remains valid.

Based on previous law on administrative liability, public employees were considered liable for damages committed even with slight negligence. The limitation of public liability to gross negligence was first introduced with reference to specific categories of public employees and then generalized with the intervention of Article 3, paragraph 1, letter a), of Decree-Law no. 54 of 23 October 1996, converted, with amendments, into Law no. 639 of 20 December 1996, which amended Article 1, paragraph 1, of Law no. 20 of 14 January 1994. In the pivotal, and already mentioned in the previous essays, judgment no. 371 of 11th of November 1998, the Constitutional Court recognized the legitimacy of the limitation of liability for fault, since it was in line with the *ratio* of the rule. The restriction of administrative liability responds «to the purpose of determining how much of the risk of the activity must be borne by the system and how much by the employee, in the search for a point of equilibrium such as to make, for employees and public administrators, the prospect of liability a reason for stimulation, and not a disincentive»[14].

There is no precise definition of gross negligence, therefore, the interpretation provided by case law is of particular importance.

The jurisprudence of the Court of Auditors seems to be in agreement in recognizing a «normative» conception of guilt that «making use of various terms (gross violation of rules, absolute disregard of the most basic rules of common sense and prudence, foreseeability of

[13] Among them, see Court of Auditors, sec. II, 18 March 2015, no. 127.
[14] Constitutional Court, Judgment no. 371/1998, cit.

the damaging event, contemptuous disregard of one's duties) which implies a judgment of disvalue to be ascertained in relation to the concrete and specific damaging cases, arising from the comparison between the conduct required and the conduct actually observed by the agent»[15].

Fault must therefore be assessed in concrete terms, indicating «the professional diligence, expertise and prudence required in relation to the type of public service performed or the office held»[16]. It is precisely this concrete assessment of serious misconduct that excludes every abstraction and imposes that the judgment is reported to the moment of the damaging conduct, in fact «The assessment of the existence of the subjective element of serious misconduct for the purposes of public liability must be carried out according to a prognostic assessment, in the sense that it is necessary to verify, with an ex ante assessment, whether the imprudence committed was inexcusable. It is therefore necessary to go back to the time when the conduct was carried out and to observe whether, from such a perspective, it was reasonably foreseeable or probable that the harmful event would occur and only if the assessment gives a positive result, it is possible to affirm the existence of gross negligence»[17]. The judgment on the discrepancy between the behaviour due and the behaviour carried out, therefore, must have regard both to the circumstances of the case (objective profile of the degree of gilt) and to the characteristics of the agent (subjective profile of guilt)[18].

In a recent ruling, for example, the Piedmont Regional Section of the Court of Auditors acknowledged the responsibility of some officials of the regional body for the right to study the anomalous management of a tender procedure for the award to a private operator of the surveillance and cleaning service in university residences, annulled by the Regional Administrative Court. In this case, the Court of Auditors found that «the conduct of the defendants appears to be characterized by serious misconduct, both because they were, by definition, highly qualified, specialized and experienced in the field of tenders and, above

15 Court of Auditors, sec. II app., 22 December 2016, no. 1391.
16 Court of Auditors, sec. reg. jurisd. Veneto, 30 August 2017, no. 99.
17 Court of Auditors, sec. reg. jurisd. Abruzzo, 3 May 2017, no. 48.
18 Court of Auditors, Sec. I jur., Centr. App., Oct. 14, 2019, No. 227/A.

all, because it is a well-known and established principle that the criteria for assessing tenders in the context of tendering procedures, set out in the tender specifications, which constitute the fundamental *lex specialis* of the procedure, can never be amended or supplemented after the opening of the package [...].Ultimately, the Chamber finds in the conduct of the defendants those characteristics that the prevailing case law of this Court has long identified to integrate the subjective element of serious misconduct, namely inexcusable negligence, great superficiality and carelessness, as well as neglect of the public interest, in direct connection with the foreseeability of the event of damage»[19]. Well, the Court of Auditors itself emphasizes that the assessment carried out on the subjective element is in line with the prevailing jurisprudence, which «for the purpose of verifying the existence of serious misconduct, has for some time abandoned the old psychological conception of culpability, identified by the psychic link between the subject and the fact, currently favoring the normative conception, according to which culpability is the judgment of reprehensibility for the anti-dover attitude of the will that it was possible not to assume; [....] From the acceptance of the normative conception of culpability, there follows the need to assess the action producing a harmful event, for the purposes of examining the presence of gross negligence, in relation to the circumstances of the fact and the condition and capacity of the agent»[20].

The accounting judge, therefore, is entrusted with an interpretative task with flexible boundaries, characterized by a high degree of discretion (Pagliarin, 2021). In fact, «in order to identify the concept of serious misconduct, it is necessary to assess not only the criteria that distinguish the institution in general, but also the relative nature of diligence, expertise and prudence, borrowing the paradigm set out in the second paragraph of Article 1176 of the Civil Code, according to which, in the obligations inherent in the exercise of a professional activity, the assessment of diligence must be carried out with regard to the specific nature of the activity carried out»[21].

If it is true that the judicial power is granted a wide margin in the interpretation of

[19] Court of Auditors, sec. reg. jurisd. Piedmont, 2 May 2021, no. 161.
[20] Court of Auditors, sec. reg. jurisd. Piedmont, 2 May 2021, no. 161.
[21] Court of Auditors, sec. reg. jurisd. Piedmont, 17 May 2019, n. 77.

concrete cases for the purposes of assessing serious misconduct, on the other hand, this power encounters the limit of administrative discretion, so that «with reference to the subjects subject to the jurisdiction of the Court of Auditors, the "non-independence on the merits of discretionary choices"»[22] has been recognized.

In order to protect the autonomy of the administration in the exercise of its functions, the Court of Auditors cannot charge responsibility in relation to purely discretionary activities, so that «the choices made by the administration in the exercise of its discretionary power can be reviewed only when the limits of the public interest, the cause of the power exercised and the respect for the principles of logic and impartiality are violated, and the means chosen can be considered inadequate only in the event of absolute and incontrovertible extraneousness with respect to the purposes of the administration»[23].

Precisely in relation to the discretion to assess the subjective element, the Court of Auditors has therefore, over time, drawn up specific guidelines based on the detection of «symptomatic figures», the presence of which is an indicator of gross negligence (Spasiano, 2021). From the very extensive case law on the subject[24], it is possible to deduce the existence of gross negligence where it exists:

a. *foreseeability, preventability and avoid-ability of the harmful event*. The Court of Auditors, in fact, has clarified that «first of all, it is necessary to identify the legal basis of the precautionary rule that expresses, in terms of predictability, preventability and avoid-ability, the extent of the conduct – diligent, prudent and prudent – on which the legislator has placed the trust to prevent and avoid the risk of negative financial consequences for the Treasury. Consequently, the knowledge, or the knowability (predictability) on the part of the agent and the operating conditions (preventability, avoid-ability) in which the conduct was carried out shall be verified»[25];
b. *serious disinterest in the performance of duties*: «With specific reference to the allegation of omissive offences, conduct characterized by absolute disinterest and

[22] Constitutional Court, 24 July 1998, no. 327.
[23] Court of Auditors, sec. reg. jurisd. Friuli-Venezia Giulia, 11 June 2001, no. 116.
[24] In particular, the recognition offered is reported in Court of Auditors, sec. reg. jurisd. Abruzzo, 4 August 2021, no. 208.
[25] Court of Auditors, sec. III app., 4 August 2021, no. 358.

contemptuous disregard for official duties is taken into account for the purposes of integrating the subjective requirement of serious misconduct»[26];

c. *failure to exercise the minimum degree of care required*. In a case of fiscal responsibility recognized in the context of recourse by a Health Authority for sentences suffered by the same in civil proceedings for compensation for damages paid to the parents of a child who died as a result of professional conduct seriously culpable ascribable to doctors, the Court clarified that «Serious misconduct takes the form of behavior inconsistent with the minimum of diligence required in the specific case and marked by evident inexperience, superficiality, negligence and failure to comply with service obligations»[27];

d. *total negligence in examining the facts and applying the law*. A lawyer defending a public body was found to be financially liable when he submitted a notice of appeal against an unfavorable judgment without any grounds of appeal, causing the body to suffer the loss of the case and be ordered to pay the costs. In that case, the Court acknowledged that «the defendant's conduct, on the basis of an ex-ante assessment, falls within the extreme profiles of gross negligence with foresight, not only because it lacks the minimum level of prudence and expertise that can be expected of a lawyer for a public body, but also because Mr. R. was in a position to foresee the consequences of his conduct. R. was able to predict an inauspicious outcome with reference to the submission of a notice of appeal that was so sloppy as to be foreseeably judged irremediable before the Court of Appeal (see Court of Appeal of Turin, sec. Lav, judgment no. 226/2019)»[28];

e. *the macroscopic deviation from the pattern of conduct connected with the function*. For example, in a case brought against a medical manager who, without authorization from the structure to which he belonged, had accepted the role of manager of a foundation, the Court of Auditors – confirming the acquittal at first instance – excluded the subjective element of serious misconduct since it was not «possible to

[26] Court of Auditors, sec. reg. jurisd. Apulia, 15 June 2021, no. 565.
[27] Court of Auditors, sec. app. reg. Sicily, 23 January 2012, no. 18.
[28] Court of Auditors, sec. reg. jurisd. Emilia-Romagna, 5 November 2021, no. 360.

find in the complex case concerning the medical manager in service at the A.P. the failure by Dr. S. G. A. to comply with the minimum diligence required of those working in the public administration, or the deviation from the model of conduct connected with the function. the failure by Dr. S.G. A. to observe the minimum level of diligence required of those working in the public administration, or the deviation from the pattern of conduct connected with his duties without observing the common rules of conduct»[29];

f. *contemptuous disregard of official duties*. For example, the fiscal responsibility of a mayor who had extended a first-level management position despite the abolition of such classification was denied since «the "mere" violation of the law or the rules of good administration is not sufficient *ex se* to constitute serious misconduct (Court of Auditors, sec. reg. jurisd. Piedmont, 14 March 2019, no. 37) which presupposes instead an abnormal and inexcusable neglect of official duties (Court of Auditors, sec. jurisd. reg. Piedmont, 20 September 2021, no. 411), assessed in the specificity of the concrete case»[30];

g. *gross superficiality in the application of the rules of law*. In the case of the reporting of out-of-pocket expenses for the reimbursement of members of a council group, the Court held that «their reporting, not justified by adequate and contemporary documentation suitable to demonstrate the inherent nature, as well as the approval of large catering expenses, most of which were made in a small number of establishments, denote a lack of accuracy in reporting and control, indications of inexcusable negligence and gross superficiality, which constitute gross negligence»[31];

h. *the equivocal personal interpretation of clear provisions of law*. This profile characterized the subjective element of guilt in the conduct of a former mayor of Rome in entrusting to lawyers of the free bar an assignment for the defense of a case: «the subjective element of serious misconduct, in particular, can be found in the violation of clear legal provisions, not characterized by exegetic complexity with regard to the

[29] Court of Auditors, sec. reg. jurisd. Sicily, 29 November 2021, no. 200.
[30] Court of Auditors, sec. reg. jurisd. Valle d'Aosta, 24 November 2021, no. 23.
[31] Court of Auditors, sec. reg. jurisd. Liguria, 1 June 2021, no. 95.

conferral of external appointments»[32].

4. Conclusions

While acknowledging the Court of Auditors' efforts to draw up an inventory of hypothetical cases in which the subjective element of serious misconduct can be found, it cannot be denied that the judgments refer the case to definitions whose legal content is uncertain and, for that reason, make the case of liability for serious misconduct an abstract and uncertain category, in the recognition of which the discretion of the court remains strong (Pecchioli, 2022).

These elements of vagueness in administrative liability weaken its deterrent function: the uncertain nature of liability and the ambiguous attitude of case law prevent employees from accurately discerning legitimate conduct from "risky" conduct and, as a result, induce them to refrain from any activity to avoid incurring liability profiles (so-called defensive bureaucracy).

The objective of the reform introduced by Law Decree no. 76 of 16 July 2020 – which reduced the scope of administrative liability for acts of commission to gross negligence, precisely in order to combat the phenomenon of defensive bureaucracy – does not seem to be a definitive solution, until the boundaries of gross negligence and, more generally, the criteria for condemning civil servants for administrative liability are clearly delineated (Padovani, 2020).

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