

# The importance of liability related to fiscal damage as a crucial evidential element in the accounting case.

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## Abstract

In the legal system concerning the financial protection of public interests, administrative-accounting responsibility can be defined as a first approximation, as the responsibility that employees of the Public Administration or, in any case, subjects who are linked with it by a relationship may incur service, for damage caused to it in the exercise of their functions and in violation of specific service obligations. In this context, the role of the Court of Auditors is inserted both in terms of control and jurisdiction, functions inextricably linked to each other and aimed at overseeing the correct use and conservation of public financial resources.

The purpose of the work is to demonstrate how the liability for tax damage can be considered as proof in the accounting process.

**Key words:** public administration, tax damage, Court of Auditors, trial, accounting process

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## 1. INTRODUCTION

In the official system concerning the financial protection of the public interest, administrative-accounting liability can be defined, to a first approximation, as the liability of the Public Administration officers, or, anyway, the subjects that are linked to it by a service relationship, for impairments caused by them in the exercise of their function and in violation of specific service obligations. From the previous definition we deduce that the discriminatory element, from a subjective profile is that of the loss of revenue, meaning an asset impairment suffered by the Public Administration, in the numerous roles in which it operates even when it acts *iure privato rum*. Under a subjective profile, special relevance is given to the position occupied by the author of the damaging conduct, who must be a public officer or a subject, albeit foreign, linked to the Public administration impaired by a service relation, that is, in a more ample sense, a functional relation that entails his admission in the organizational mechanism of the Administration, from which derives the observance of specific service obligations<sup>2</sup>.

The administrative-accounting liability constitutes one of the five liabilities the public officer might incur, as well as disciplinary liability, deriving from the violation of behavior rules linked to the status of public officer, criminal, civil, and managerial liabilities (limited to the managers' category).

A different configuration undergo the so called standardized and sanctioning particular cases, introduced by recent legislative provisions as atypical liabilities founded on regulations that do not identify specific conducts producing an impairment and constituting general clauses, like article 2043 c.c. regarding civil liability (from which it is distinguished for the particular position occupied by the agent).

The judicial nature of it is arguable: since it is directed toward reintegrating the asset of the Administration, the administrative-accounting liability has, according to the best tenet, a compensation nature. In the framework of such configuration, there exist conflicting dissertations, which give value to specific aspects of the discipline in its historical evolution, in the measure in which it is ascribable to the outline of the contractual liability for the preeminent value that is attributed to the profile of the violation of the obligations linked to the negotiation relation existing with the Administration, that is, the extra contractual liability as an expression of the general prohibition of the *neminem ledere*.

Particularly, after the reform of 1994 and other recent regulatory interventions, which introduced some particular cases of the so called pure sanctioning liability (that is, disconnected from the existence and quantification of the loss), some respected tenet has sustained the thesis of the repressive-sanctioning nature of the administrative-patrimonial liability, enhancing, to this purpose, the profile of the practicality of the action,

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<sup>2</sup> M. Atelli – P. Briguori – P. Grasso – A. Laino, Responsibilities for tax damage, Giuffrè, Milan, 2006.

exclusively ascribed to the accounting Prosecutor, as well as the centrality of the role of the damaging party as opposed to that of the impaired party, which is made clear by peculiar aspects of its protocol ( reductive power, non-transferability to the heirs, limitation of the liability and gross negligence, partiality of the liability, etc..). On closer inspection, a *tertium genus* applies, which sides with civil and contractual liability, with its own features made of the coexistence of sanctioning-preventive profiles with the compensation ones. In this context, the concept of loss liability intended as the main element and the starting point for the configuration of the evidence of liability within the accounting process fully sets itself<sup>3</sup>.

## 2. THE CONCEPT OF LIABILITY

The term “liability” is used, in our system, with multiple meanings, such as the ownership of an authority to act, the subordination to an obligation to comply, the obligation of a duty to respond of one’s own actions, to be ascribed to an agent or defaulting subject.

The traditional tenet maintained that the Public Administration was not equipped with the characteristics that were apt to make it a liable subject, considered the public-law nature of the State, which, at the same time is creator and guarantor of the rights, and that would never be held responsible for any unlawful act. Such previous orientation has been completely twisted, first from the orientation of the tenet and by the case law of the first half of the ‘900, and, subsequently, by the provisions set out by artt. 113 and 28 of the Constitution, which have introduced a system of generalized protection, before the Courts, against the acts of the Administration, as well as a form of civil, criminal and administrative liability ascribable to public entities and their employees.

Art. 113 states as follows: *Against the acts of the public administration, judicial protection of legitimate rights and interests is always admitted before the ordinary and administrative and ordinary judicial bodies. Such judicial protection cannot be excluded or limited to particular impeachment means or for specific types of acts. The law determines that judicial bodies can void the acts of the public administration in cases and with the effects provided for by the law itself.*

In particular, article 28 of the Constitution provides that .... *Agents and employees of the State and of public entities are directly responsible, according to criminal, civil and administrative laws, of the acts conducted in violation of rights. In such cases the civil liability extends itself to the State and to public entities.* Such regulation has erased all doubts regarding the responsibility of illegal acts from the Administration and its employees, but it has posed some interpretative problems in relation to the nature of the liability.

While, *ab origine*, it was believed that the liability would fall directly on the public employee and only indirectly on the Administration, the most recent orientations have confirmed the direct responsibility of the Administration. Such assumption is justified in light of the relation between organic identification that occurs between the employee and the Administration. As it is known, indeed, Public Administrations act through a physical person that is called “organ”, the action of whom is directly ascribed to the legal entity<sup>4</sup>.

In this respect, the organic relation is to be distinguished from the institution of representation, used in order to allow the legal entity, governed by private law, to exercise its own ability to act. While in the case of representation the represented party is only responsible for the effects of the action, which is anyway ascribed to the representative; if the organic relation persists, then action and effects are ascribed directly to the administration.

### 2.1 The different forms of liability

The reading of article 28 of the Constitution shows that the Public Administration and its employees can be subject to criminal, civil and administrative liability.

Criminal liability shows in all the hypotheses regarding the violation of criminal regulations and falls solely on the public employees that have violated these regulations within the exercise of their public functions. If the impaired subject is a private individual, the liability falls solely on the agent, without any repercussions on the Administration in the application of the principle of the personality of criminal liability. Therefore, the criminal regulation regarding both the identification of the elements of liability and the consequent sanctions, are applied

<sup>3</sup> L. Cavallini Cadeddu, The boundaries of the accounting jurisdiction in the recent jurisprudential evolution, in AA.VV., Administrative responsibility and accounting jurisdiction (ten years into the reforms), Proceedings of the Varenna Conference, Giappichelli, Milan, 2005.

<sup>4</sup> G. Corso, Judgment of responsibility before the Court of Auditors and constitutional principles, in Book. Rev. Court of Auditors, 1999, I, Rome.

without prejudice to the possibility, for the Administration, to undertake an administrative or accounting liability action against the employee, in which the unlawful act has determined impairment to the public entity.

The civil liability follows the violation, by individuals or public entities, of civil regulations. The structure of the tort as the condition for the attribution of the liability, is found in the examination of article 2043 c.c., which contains a regulation of the so called "Aquilian Liability", founded on the transfer of the damaging event from the impaired party to the damaging one, since the above mentioned regulation imposes, to the person who has caused an unjust impairment to another subject, the compensation of that impairment.

The translation of the impairment from one subject to another may happen only when there are elements that are deducted from the reading of article 2043 c.c., which states .... *Any fraudulent or culpable event that impairs others obligates the person who has committed the act to compensate for the loss.* This tells us that the tort exists any time an acting subject, exercising a culpable conduct, determines, for another subject, a damaging event that is considered unjust from our legal system. The level of injustice of the impairment determines the obligation, for the impairing party, to compensate the impaired party, provided that some conditions that are necessary in order to ascribe the liability exist, such as the liable conduct, the loss, the subjective element, the causal link.

Furthermore, the administrative-accounting liability is to be distinguished from the common law one for the subsistence of the relation of service between the agent and the administration, as well as the verification of the damage against a public subject<sup>5</sup>.

### 3. THE PECULIAR CONFIGURATION OF ADMINISTRATIVE-ACCOUNTING LIABILITY

The institution has as ancient origins, given that, after the Unitary State was created, the established law (Law dated 14 August 1862 no. n°800<sup>6</sup>) attributed to the Court of Accounts the jurisdiction over the accounts of accounting agents, extended from the general accounting law (Law dated 11 April 1869 n°5026<sup>7</sup>) against the administrative agents whom, within the exercise of their functions, had infringed the obligations related to their service, with the attribution of power of action to the Public Prosecutor at the Court of Accounts.

Presently, the fundamental tenet is found in the laws dated 14 January 1994 n°19<sup>8</sup> e 14 January 1994 n°20<sup>9</sup>, as modified by the law dated 20 December 1996 n°639<sup>10</sup>, which have deeply reformed the Institution in its substantial aspects, but also in its organizational ones, through the regional decentralization of the liability jurisdiction.

The reform has been finalized to grant, in the first place, the effectiveness of the judicial protection of the public financial interests, adjusting the Institution to the changed political and financial reality, which, after the war, had seen the expansion of the field of intervention of the Public administrations and the consequent multiplication of the loss risk for financial interests. On the other hand, it went toward the direction of the reinterpretation of the discipline geared toward the defense of civil liberties, in view of the consistency with the fundamental values linked to the protection of the passive subject of the judgment, included in the Italian Constitution even before the so called "Reform of the fair trial" (s.c. *due process of law*)<sup>11</sup>. What has resulted from this is a new structure of the administrative-accounting responsibility that has, first of all, managed to unify a discipline that was previously not reasonably differentiated for the different sectors of the Public Administration, and has increased its peculiarities in the effort to research a balance point between the protection of the interests of the impaired Administration and the protection of the damaging employee, and for the need, that was already detected by Cavour, to stimulate the non-discouragement of the administrative action because of the fear of heavy responsibilities.

The recalled specificities of the statute of the administrative-accounting liability identify, under a substantial profile, with the principles of personality and severalty of the liability and, for what concern the objective profile,

<sup>5</sup> M. Orefice, Public accounting law, Direkta, Rome, 2017.

<sup>6</sup> L. 14 August 1862, n. 800, Law of the institution of the Court of Accounts of the Kingdom of Italy, (G. U., 10 September 1862, no 214).

<sup>7</sup> Law 22 April 1869, n. 5026, On the administration of the assets of the State and on general accounting, (GU n.124 of the 5-5-1869) current to: 1-1-1870.

<sup>8</sup> Law 14 January 1994, n. 19, Conversion into law, with modification of the Law Decree dated 15 November 1993, no 453, providing rules in matter of jurisdiction and control of the Court of Accounts. (GU n.10 of the 14-01-1994).

<sup>9</sup> Law 14 January 1994, n. 20, Provisions on the matter of jurisdiction and control of the Court of Accounts (GU n.10 of the 14-01-1994).

<sup>10</sup> Law 20 December 1996, n. 639, Conversion into law, with changes, of the law-decree dated 23 October 1996, no. 543, providing urgent rules on the matter of Court of Accounts system. (GU n.299 of the 21-12-1996).

<sup>11</sup> A. Angiuli, The accounting procedural action in the framework of the due process, in Amm and State Cont. and Public Aut., Giuffrè, Milan, 2002.

with the systematic provision of the power of reduction of the charge, as an exception to the civil right of the impaired party to the full compensation of the loss.

Under the point of view of the trial, the unofficial nature of the action attributed exclusively to the Accounting Prosecutor (that is, a judge, rather than a mere trial substitute of the impaired Administration, that acts independently and autonomously in the interest of the System, recalls undoubted criminal suggestions. These characteristics have been emphasized after the implementation of the Accounting Justice Code, approved with Lgs.D. 26 August 2016 n°174<sup>12</sup>, which proposes again the principles and modalities inspired to logics that move toward the presumption of innocence and the elimination of any inquisitional residuals that appear completely alien to the civil proceeding.

The principle of personality stated in article 1, comma 1, Law no. 20 dated 1994 leads to the exclusion of objective and formal liability types linked to the role or the mere violation of the law, making the subsistence of a link and of a psychological element necessary. One corollary of this is the rule, constituting a visible exception to the civil liability rule, of the non-transferability of the administrative-accounting liability to one's heirs, except that for an hypothesis of unlawful accumulation of wealth of the subject with consequent accumulation of wealth of the heir.

A further exception, which is also a corollary of the principle of the personality of the liability, concerns the civil discipline of passive solidarity amongst debtors of one service; article 1 quater of Law n°20 dated 1994 embraces, indeed the opposite rule of severalty, based on which, if the impairment is caused by many people, the conviction of each is in line with the part that has concurred in the unlawful act, with an assessment of the different link and of the intensity of the psychological element of each participant. Passive solidarity relives, instead, against the participants that have obtained an illegal accumulation of wealth or have acted with malice<sup>13</sup>.

### 3.1 Accounting liability

Accounting liability is a form of patrimonial liability in which only some public employees denominated "accounting agents" may incur. The qualification of accounting agent is attributed *ex lege* to the subjects that handle money or other valuables of the State or that have material availability of goods. In more detail, accounting agents are: 1) The tax agents appointed to collect taxes; 2) the treasury agents, appointed with the custody of the money and the execution of the payments; 3) the recipient agents, appointed with the conservation of objects and materials belonging to the Public Administration.

The qualification of accounting agent is not only assigned to public employees, but also to private subjects (physical or legal persons) that establish a service relation with the Public Administration. Such qualification is, furthermore, rightfully assumed, since it is attributed expressly from a regulation set out by law, or, indeed, through the material interference of a subject in the management of public valuables or money. In this respect, the essential and sufficient elements needed so that a subject can undertake the qualification of accounting agent are: 1) the public nature of the entity the subject acts on behalf of; 2) the public nature of the money or the goods object of their management. The title on the basis of which the management is conducted is irrelevant, instead, and it can be a relation of public employment or service, an administrative concession, a contract or even be totally missing.

Obviously, the material approval of goods or public services not related to the conduction of a public function does not entail a conduct ascribable to a public agent and controllable by the Court of Accounts, but a real crime, subject to the investigation of the Criminal Court.

The employment of the qualification of accounting agent has effects on the liability regime in which the subject may incur<sup>14</sup>.

The charter of accounting liability, indeed, differs from the charter of administrative liability. While administrative liability may exist as a result of any unlawful conduct susceptible of fiscal damage, accounting liability arises in case of the non-observance of the main obligation of the accounting agent, that is the restitution of the

<sup>12</sup> LEGISLATIVE DECREE 26 August 2016, n. 174 Account Justice Code, implemented as per article 20 of law dated 7 August 2015, n. 124. (16G00187) (GU n.209 del 07-09-2016 – Ord. Suppl. n. 41).

<sup>13</sup> R. Scerbo, Administrative-accounting responsibility, in F. Manganaro (edited by), Public administration science, Editoriale scientifica, Naples, 2018.

<sup>14</sup> F. Di Salvo, D. Pupillo, Accounting agents, Quattrosoli, Rome, 1991.

valuables managed and protected, almost so as to appear as an *ex recepto*<sup>15</sup> liability. As per articles 33 and 194 of R.D. 23 May 1924 n°827<sup>16</sup>, the accounting agents are financially liable for the difference between the quantity of goods or services in their custody by right and the quantity that really exists. The numerical or qualitative lack of goods or valuables protected or managed entails the liability of the agent, the culpability of whom is presumed, and on whom weights the burden to demonstrate that the subtraction of the goods or money is not ascribable to them as an intentional subtraction, but rather it has happened by force majeure.

In other words, if in case of administrative liability it is the public prosecutor who has the obligation to demonstrate the culpability of the author of the loss, in case of accounting responsibility such culpability is presumed. The remaining structural components of the unlawful act (conduct, event, causal link) do not show any differences between the accounting offence and the administrative one.

Despite the differences between the two liability regimes, the administrative and accounting offence tend to merge toward a unitary category, the so called financial liability category, characterized by the production of a tax offence from a public (or assimilated) subject.

#### 4. THE FISCAL DAMAGE: RUDIMENTS

In the definition of administrative-accounting liability, a central role is covered by the constitutive element of the offence represented by the loss of revenue or fiscal damage, which presents itself as the first supplementary requirement of the responsibility that must be verified, so as to then proceed to the verification of all the other ones (subjective element, causal link, employment or service report).

In general terms, it is possible to define the fiscal damage as the detrimental consequence endured by the Administration by effect of the conduct of one of its employees (or of a subject linked to it by a service relation), brought about in violation (culpable or malicious) of their employment or service obligations. Such violation creates the requirement of the injustice of the loss.

However, it is important to give account of a different theory, according to which injustice does not coincide with the violation of the service or employment obligations, but with the violation of the obligation of public destination which characterizes the assets of the Administration.

The Regulations of State Accounting - articles 81 and 82 of R.D. n°2440 dated 1923<sup>17</sup> – which introduced, in the post-unitary System the Institution of the administrative liability, are limited to refer to the “loss” or “damage”, without any further specifications. For the direct liability of the accounting agents toward third parties (articles 22 and 23 of D.P.R. 10 January 1957 n°3<sup>18</sup> s.m.i.), instead, the “unjust loss” is provided, and it is defined as “the loss deriving from any violation of the rights of third parties”.

In a material exception, the loss is but a prejudice to the public assets, in the double exception of emerging loss and profit loss, according to the formulation of the “difference” between the consistency of the asset before and after the impairing event. In the outlined exception, the damage constitutes a phenomenon in the historical reality that manifests as an alteration of material goods and that consists, according to the case, in the loss or destruction of goods, in the supply of undue sums or in the missing acquisition of earnings.

In a dynamic exception, the concept of loss includes not only the prejudice to the assets, but also the impairment of any public interest that is legally protected. In this sense, the loss of profit manifests in the presence of an impairment of general interests of the social body, financially measurable, assumed as their own by the State and become, by choice of the system, public interests.

In this perspective, the requirement of the ownership is meant to allow the evaluation of the loss of interests, and, consequently, the administrative liability is finalized to ascertain the impairment inferred not to the assets of the entity, but to the efficiency, to the efficacy and to the impartiality of the administrative action.

The summary between the material and the dynamic meaning allows an elaboration of the understanding of fiscal damage, intended as public loss, that includes not only the deductions and the missing earnings having the features of capital gains, strictly speaking, but also the more ample category of the impairments to absolute

<sup>15</sup> The *ex recepto* liability is an objective liability hypothesis for the non-fulfillment of the obligation of things in custody. Custody is usually considered an ancillary obligation to the main one, which is the consignment one, as provided by art. 1177 c.c., according to which: “the obligation to consign a certain thing includes the obligation to keep it in custody till consignment”. G. D’Amico, Responsibility *ex recepto* and the distinction between obligations “of means” and “of result”. Contribution to the theory of contractual liability, ESI, Naple, 1999.

<sup>16</sup> Royal decree 23 May 1924, n. 827, Regulations for the administration of the assets and for the general accounting of the State.

<sup>17</sup> Royal Decree 18 November 1923, n. 2440 New provisions on the administration of the assets and on the accounts of the State.

<sup>18</sup> Consolidated act of the provisions regarding the statute of the civil employees of the State 12 (Published in the G.U. 25 January 1957, n. 22, O. S.)

rights and interests that are directly protected by the Constitution. The public Administration constitutes a point of reference for such rights and, in order to protect them, the System confers special powers to it<sup>19</sup>.

This allows the identification of the loss of profits even in the impairment of immaterial legal assets assigned to the administration that are susceptible of financial evaluations and are to be restored by way of equivalent measure.

#### **4.1 The features of the loss of revenue: indirect, direct and transversal loss**

The minimum requirements in order for a fiscal damage to manifest are certainty, effectiveness and actuality<sup>20</sup>.

The first requirement (certainty) may be considered integrated when the prejudice is indisputable in its material reality. On the basis of such requirement, no loss or hypothetical circumstances can be compensated.

The requirement of effectiveness constitutes an application of the non-coincidence between illicitness and harmfulness; therefore, no illicit conduct is only just harmful. It is not possible to compensate the mere non-compliance with the law, but only the harm that has derived from such non-compliance.

The requirement of actuality dictates that the loss may be compensated only when it materializes in a fact that determines impairment in the present time and not in the future. For example, the impairment is not considered actual: a) until the Administration has definitely lost hope to collect the credits because of them becoming statute barred; b) in the hypothesis in which the material undue disbursement provided by them does not (yet) follow the provisional deeds.

Within the framework of the fiscal damage, direct and indirect losses are separate.

A direct loss is the one suffered by the Administration by effect of the conduct of a public employee (or a subject linked to the Public Administration by a relation of service). For example, it is a direct loss the one deriving from the subtraction of a sum of money property of the Administration.

An indirect damage, instead, is the one originating from the conviction of the Public Administration, in the civil or administrative proceeding, for the unlawful conduct of one of its own employees. In such case, the Administration undergoes a prejudice for the fact that it has been called to compensate, as per article of the Constitution, the third party who has suffered a loss during service, that is, in the cases in which the Administration is convicted by the administrative judge to the compensation for illegitimacy of the administrative provision.

Lastly art 2, par. 4 of Law no. 20 dated 1994, has introduced the figure of the so called "transversal loss", that is the loss caused to an Administration that is not the one the employee belongs to. Subjects linked by a work or service relationship with a public Administration might be called to respond of losses caused to an Administration which is not the one they belong to.

Through the regulatory provision of the transversal loss the principle of direct liability as explained in article 28 of the Constitution has been implemented even in intersubjective relationships between Administrations.

### **5. THE MAIN PARTICULAR CASES OF FISCAL DAMAGE**

It is important to start by saying that the fiscal damage does not coincide only with the hypothesis of monetary decrease, but it can be identified in the missing correspondence between expense and utility. In this case, we are facing the impairment of a functional interest connected to the administrative action, that is, the missing achievement of the result is a loss that cannot be indemnified. The damage, in other terms, manifests in a non-functional and efficient employment of public resources, that is, the total or partial lack of utility in the destination of the public resources<sup>21</sup>.

To this damage are linked the hypotheses in which a distraction of public resources from the predetermined purpose happens. The employment of public money for purposes that are different than those set out by Law (or their use only partially compliant with those purposes) resolves in the impairment of the particular public interest identified and provided by the law that instituted the State's contribution<sup>22</sup>.

<sup>19</sup> P. Santoro, Accounting and Public Finance Manual, Maggioli, Rimini, 2010.

<sup>20</sup> A. Traversi, Liability for tax damage from crime. Defense of the defendant, Giuffrè, Milan, 2018.

<sup>21</sup> M. Fratini, Systematic compendium of public accounting, Law Academy, Roma, 2020.

<sup>22</sup> F. Merusi, From responsibility towards citizens to responsibility towards public employees towards the public administration, in D. Sorace (edited by), Public responsibilities, Cedam, Padua, 1998.

In view of the above, the main types of loss of profit can manifest in the following figures: 1) impairment from loss of *chance*; 2) loss from unlawful assignment of professional tasks; 3) damage to the competition; 4) loss from disruption; 5) loss from bribe; 6) reputation damage; 7) Damage to the EU.

#### Impairment from loss of *chance*

The word *chance* which derives from the Latin word *cadentia* (fall of the dice), expresses the concept of “good probability of success”. *Chance* is a true active item in the equity: it, therefore, is not to be seen as a future damage, linked to the reasonable probability of an event, but as a real, actual, certain damage linkable to the loss of a favorable prospect, already present in the assets of the subject. In brief, the loss of the possibility to achieve a unique result, in equity terms, sets up damage to the right to integrity of one’s own assets, the refundability of which is the consequence of the manifestation of a damage emerging from the loss of an actual possibility, not a useful future result. The damage that is indemnified is the one regarding the loss of an occasion. It is needed to quantify the damage on the basis of the possibility for success that the subject had at the time of the damaging event. What counts is that the “*chance*” that requires compensation corresponds to a good possibility to obtain a useful result. In this respect, in accounting jurisprudence there are records of pronouncements in which, in order to determine the impairment from a loss of chance caused to the Public Administrations by subjects linked to them by a service relationship, it has been considered as a chargeable behavior that one behavior that has determined the loss of an occasion for re-negotiation, for more favorable conditions, of a mortgage that was in course of resolution, determining, this way, a certain prejudice, consisting in an emerging loss.<sup>23</sup>

#### Damage from unlawful assignment of professional tasks

The constitutional principle of good performance of the administrative activity entails, as a corollary, that such action be conducted through the human resources the Administration can count on. The outsourcing of the administrative activity, therefore, is allowed only in case of objective impossibility or absolute inadequacy of the structure to complete the activity itself.

It is mandatory, for Public Administrations, to face all the daily institutional duties with the best and most productive employment of the human and professional resources they can rely on, making the recourse to external consultants and services only in the presence of specific needs to be met; such as: 1) The extraordinary and exceptional nature of the needs to be met; 2) the lack of adequate structures and personnel; 3) The character, limited in time, and the object, limited to the task or consultation assigned.

In our system of laws, there does not exist a general ban, for Public Administrations, to resort to external professionals through the establishment of consulting relationships. However, there is not even a general admissibility: the recourse to external professionals, indeed, is subject to the subsistence of the conditions highlighted above, meant to avoid: 1) a distorted use of public resources; 2) the overlapping of the functions (with consequent duplication of costs); 3) the impairment and demotivation of the internal professionals; conditions that, at the same time, are meant to identify, with objective and transparent modalities, the professional consultants, amongst those who are actually able to enhance the level of professionalism of the conferring entity.

Consequently, it is considered unlawful, as well as a source of fiscal damage, the conferment of assignments for activities that could have been conducted by internal personnel, or for the conduction of activities that were foreign to the institutional purposes of the entity or that resulted to be too expensive in relation to the possibilities of the budget.

The violation of the prerequisites and of the legal conditions for the conferment of assignments constitutes an unlawful conduct apt to manifest administrative liability. The fiscal damage, in this case, amounts to the cost sustained by the Administration for the assignment unlawfully conferred.

#### Damage to the competition

The assignment and the conduction of public works, services and acquisitions, as per the Public Agreements Code<sup>24</sup>, must be developed in respect of the principles of affordability, efficacy, promptness, and fairness.

<sup>23</sup> To this purpose, please see Court of Accounts, sec. Trentino, n°18 dated 2006.

<sup>24</sup> Legislative Decree 18 April 2016, n. 50, Code of public agreements, (G.U. n. 91 dated 19 April 2016).

Furthermore, the assignment must also respect the principles of free competition, equal treatment, non-discrimination, transparency, proportionality and public law.

Such principles impose, to the contracting Administration, to put the stipulation of the contract after a phase of public evidence, governed by public-law related rules, meant to define the best contractual counterpart. The selection of the private contractor through a procedure of public evidence grants the protection of the competition.

It is because of the relevance of the public interest protected by the public evidence procedure that it is important to verify the correctness in the conduction of the single procedure and the respect of the rules created to protect the principle of competition.

The violation of competition is understandable both under a subjective and an objective profile.

Under a subjective profile, the damage caused to the participants (or the potential participants) to the bidding is significant.

Under an objective point of view, there emerges the damage to the Administration for not having observed the rules of public evidence for the assignment of the contract. It is an impairment that manifests in the loss of the possibility, for the Administration, to choose amongst the best pursuable offers, following a bidding procedure oriented toward an adequate turnout of enterprises, with consequent useless waste of public resources. The loss of revenue, in this case, is labeled as “damage to the competition”, observable also independently from the evidence of a *deminutio patrimonii* to the expense of the public entity.

It is a damage the quantitative computation of which must be conducted equitably – as per article 1226 c.c., being a certain damage in the *an*, but an uncertain one in the *quantum* – taking into account the possible utilities that can be gained by the performances, should they be anyway conducted and enjoyed by the Public Administration.

#### Damage from disruption

With the term “damage from disruption” we intend the prejudice deriving from a bad service caused by an unlawful exercise of public functions, that is, by the disruption caused by the missing delivery of the service due.

The damage from disruption happens in the presence of a behavior that generates a prejudice to the organization and to the conduction of the administrative activity. Such damage overturns the mere violation of the obligations of service and manifest in a dispersion of human energies and instrumental public means. The damaging effect, therefore, is measured in terms of loss of value of the financial and productive factors of the Public Administration.

The damage from disruption, therefore, is related to the lesser result reached by the organizational mechanism, from which derives a prejudice to the usefulness, to the efficiency and to the affordability of the administrative action<sup>25</sup>. The damage remains even in the case in which the Public Administration has managed, in any other way, to anyway grant the delivery of the service.

Under the point of view of the quantification, it is a financial prejudice of difficult monetary evaluation, because of its intrinsic diffusivity due to the fact that it has to be measured not only in relation to the correct identification of the unjustified compensation and of its exact determination, (even evaluating the possible compensation advantages achieved by the Administration), but also taking into account the general management expenses of the public service that the damaging party should have correctly participated in during the historical period of reference in which the compromised provision of the service has happened. For these reasons, the determination of the damage happens with an equitable evaluation, assuming, as a basis of evaluation, the entity of the money received in the period in which the relation has taken place.

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<sup>25</sup> The terms efficacy and efficiency are very important in the corporate framework and in the framework of Public Administrations, as well as, in general, in the planning and control of any activity and are often indistinctively used as synonymous, even if, in truth, they reflect two different concepts. The first one indicates the ability to achieve the predetermined objective; the second refers to the ability to do it at the lesser cost and employing the minimum amount of indispensable resources. It is called efficiency when resources in one's available resources are used, in an economic way; whereas, it is called efficacy when the predetermined objectives are achieved. The concept of affordability sums up the preceding ones: the ability of a company, in the long run, to use in an efficient way its own resources, achieving its own objectives in an efficient way. The analysis of the alternatives that produce the maximum relationship between the results obtained and the means employed is crucial. M. Cucciniello, G. Fattore, F. Longo, E. Ricciuti, A. Turrini, Public Management, Egea, Milan, 2018.



### Damage from bribe

In corruption cases, the payment of a bribe is based on a bilateral relationship (*do ut des* or *do ut facias*) between the subject that makes the payment and the subject that receives it, in the hope, for the first one, to receive a financial profit, that cannot certainly be lower than the quantity of the amount paid, or else the bribe would be a financial loss for him.

The bribe, therefore, postulates a payback against the Public Administration from the private subject, through the mechanism of the translation of the bribe: the one paying the bribe transfers the financial burden of it on the Public Administration, increasing the financial value of its services (in passive contracts), that is, decreasing it (in active contracts). The payback represents a cost for the Administrations. In passive contracts, such cost manifests in a higher cost for the acquisition of goods or services. In active contracts, the cost manifests in a lesser gain for the Public Administration deriving from the provision of goods and services. Under the profile of the quantification, the damage is at least equal to the amount of the bribe promised or paid, since, in general, such cost, according to the *id quod plerumque accidit*<sup>26</sup>, comes from the private transferred on the price of the good or the service provided. The bribe phenomenon may also create damage to the image of the Public Administration. The payment of a bribe, indeed, if becoming a notorious fact, may integrate the damage to the reputation of the Administration, which marks a loss of credibility and prestige, generating, in the public opinion, the belief that the inveterate behaviors undertaken by their employees represent an ordinary way the entity normally acts.

### Reputation damage

The rights of legal persons to a professional identity and to their own image or reputation are protected by the Constitution and are inviolable. The impairment of such rights constitutes a source of liability. In case the damage is inferred by an employee of the Administration through an illicit conduct, whether willful or culpable, implemented in situations connected by immediate necessity with the duty of service, there emerges an administrative responsibility and a fiscal damage, that is, a sub species of damage to the reputation. Such damage covers the relationship that links the community of the subjects administered by the entity for which the unfaithful employee acts, and postulates the nullification, from the citizens or a category of subjects (users or providers of services) of the sense of trust in the correct functioning of the Public Administration system, as well as of the sense of belonging to the Institution itself. The damage to the reputation is identified in the offense to the respect of all those provisions created to protect competences, functions and responsibilities of public subjects and in the consequent alteration of its identity as guarantor institution, in front of the whole community, of the principles of transparency, lawfulness, impartiality and efficiency. It is a non-pecuniary damage, which can be indemnified through a sum of money as a compensation for the *vulnus* suffered.

In compensating the damage to the reputation, it is important to refer to the three different orders of parameters: 1) the objective criterion, which manifests in the weight of the event, in the repeating of the conducts and of the amount of the bribes collected; 2) the subjective criterion, which abides by the position covered by the responsible officer, with special reference to the importance of the function he is assigned to and to the sensitivity of the duties assigned to him, especially those directly linked to the institutional finalities of the entity; 3) the social criterion, in relation to the resonance of the public opinion assumed by the violation of the rules of legality and good trend, even in consideration of the widespread of the information from the media.

As well as these parameters, it is important to mention a recent regulatory intervention (Law 190 dated 2012 – s.c. Anticorruption Law<sup>27</sup>), which has established that, in the liability judgment, the entity of the damage to the image of the Public Administration deriving from a crime being perpetrated to the damage of the public administration itself, ascertained with a judgment that became final, is presumed, until proven otherwise, to be equal to twice the sum of money or of the pecuniary value of another utility illegally perceived by the employee.

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<sup>26</sup> *Id quod plerumque accidit* is a locution, in Latin, that is used in the legal jargon. It means: that which happens more often, that which happens usually; or else: the most probable case, that which constitutes a common experience. On the basis of such assumption, the legislator introduces the relative presumption, which inverts the onus of proof but leaves room for the rebuttal evidence. It has to be distinguished by the simple presumption (or *praesumptiones hominis*) that the law leaves to the free interpretation of the judge. It is said that there is a *praesumptio iuris tantum*, or the expression *praesumptio iuris et de iure* is used, when no rebuttal evidence is admitted. (n.dr.).

<sup>27</sup> Law dated 6 November 2012, n. 190, Provisions for the prevention and repression of corruption and crimes in public administration, Published in the G U 13 November 2012, n. 265.

The effect of the regulation under exam is that of forfeiting, in an assumptive way, the entity of the compensation, offering a clean point of reference, overturning the weight of providing evidence of a possible different quantification on the defendant.

It is also important to underline how, on the subject of the damage to the reputation of the Public Administration and on the related right to compensation for the damage, a textual amendment has intervened, as per article 17, par 30 ter of L.D. dated 1 July 2009 n°78, converted by law dated 3 August 2009 n°102, as modified by article 1, par. 1 c of the Law decree dated 3 August 2009 n°103, converted with law dated 3 October 2009 n°141<sup>28</sup> (s.c. Lodo Bernardo).

The Legislator of the textual amendment has established that an image/reputation damage of a public structure may exist and be charged before the accounting judge only if deriving from a crime. In the regulatory framework, the promotion threshold of the compensation action for a reputation damage before the accounting judge requires the existence of a relevant criminal particular case to which to trace back the tax profit prejudice. Therefore, the cases in which the action of the Accounting Public Prosecutor is legitimately accomplishable must be those for which the loss of profit is linked to a crime with the Public Administration that was ascertained with a judgment that became final. All this persuades us to think that, in the subject matter, the action of the Accounting Public Prosecutor must be deemed to be anchored to the existence of an irrevocable judgment for a crime against the Public Administration, or at least, to an information regarding the action of criminal law for a crime that has caused a damage to the Inland Revenue. In the first case, the possible indemnification is proposed within the term of thirty days from the communication of the irrevocable judgment; in the second, instead, the Accounts Prosecutor, informed of the legal action in place, will be able to evaluate the opportunity to wait for the result of it before issuing the writ of summons, relying on the suspension of the of the prescription period of the tax action, till the conclusion of the criminal case.

After the implementation of the Accounting Justice Code, the regulation that limits the admissibility of the question to specific cases remained. However, such regulation continues to adjourn to a provision that was abrogated by the Code itself (with reference to article 17, par 30 ter of L.D. dated 1 July 2009 no. 78).

*Last but not least*, an hypothesis of damage to the reputation in which it is eluded the previous criminal judgment, is the one recently introduced by the so-called Anticorruption law, which provides the liability of the anticorruption manager responsible for damage to the reputation in case of a corruption crime being committed by another subject, within the Public Administration, with a judgment made final.

To be exempt from any liability, the anticorruption manager must prove the following circumstances: a) that he has provided for the anticorruption plan required by law and that he has observed all he provisions set out by the same anticorruption law before the crime happened; b) That he has watched over the functioning and compliance with the above mentioned plan.

#### Damage to the EU

We can talk about damage to the EU only in case of damage of the financial interests of the European Union, which are represented, in the first place, by the so-called own resources. There is, therefore, a loss of profit of the European Union, for example, in case of VAT evasion (since all the member States must pay a VAT amount to the European Union and, consequently, an evasion in this sector produces a damage both to the Inland Revenue of the member state and to the EU Inland Revenue).

Given the fact that the National regulation of the administrative/accounting liability is homogeneous to the EU one, it is possible to operate a substantial equivalence of the damage to the EU with the damage to the National Inland Revenue. The damage to the EU, in such perspective, would appear as damage to an Administration that is different than the State's own as per article 1 of Law no. 20 dated 1994 and, therefore, it would constitute a founding element of the internal administrative-accounting liability.

#### **6. PRELIMINARY ACTIVITY OF THE PUBLIC PROSECUTOR OF THE ACCOUNTS: EVIDENCE VERIFICATION**

The new Accounting Justice Code is meant to regulate and detail the power to investigate of the Public Prosecutor, anticipating the most adequate guarantees for defense since the beginning of the preliminary phase.

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<sup>28</sup> LAD dated 3 October 2009, n. 141 Converted into law, with changes, Law decree dated 3 August 2009, n. 103, containing adjusting provisions of the anti-crisis law decree n. 78 dated 2009, (GU n.230 del 03-10-2009).

The preliminary activity of the Public Prosecutor of Accounts is determined by the so-called *notitia damni* to which follows the exercise of the powers assigned to him by the Law System, limited to the object of the information, being a preliminary investigation precluded in absence of actual and specific elements. So it is based on generic hypotheses and for a relevant period of time, since, in this way, it would become the exercise of a real control activity which goes way beyond the powers of the Body.

The Public Prosecutor of Accounts, as well as conducting any useful activity to the purpose of acquiring elements that are necessary to the exercise of the tax action, carries out, furthermore, investigations on facts and circumstances in favor of the person identified as a possible author of the damage. The intention was to explain the rule, which is similar to the one in force in the criminal proceeding framework, according to which the Public Prosecutor of Accounts must not only do something to prove the elements sustaining the prosecution, but he must also research elements in favor of the alleged infringer. So, an inescapable principle of guarantee, which wants the verification of the historical truth as an absolute value in the protection of the reasons of the Inland Revenue, obviously without losing sight of it, affirms itself. The regulation is not to be read as a derogation of the general principle in the topic of the burden of proof. The Public Prosecutor may provide the presentation of documents, as well as inspections and direct investigations in the offices of the Public Administration, of its contractors or beneficiaries of financial provisions against public income statements, the confiscation of documents, personal hearings, consultancies and surveys.

All of the investigation procedures must be motivated: the omitted or apparent motivation of the procedures, that is, the hearing collected in violation of the provisions of article 60 constitute the cause for the nullity of the investigation instrument and of the consequent operations (article 65). Such apparent predictable consequence constitutes a further and explicit reinforcement of the defense principles enhanced by the Code. An important innovation is the specific provision on the confidentiality of the preliminary investigation. The regulation aims at avoiding not only that "information leaks" compromise the results of the investigation or cause detriment to parallel investigative activities conducted by the Ordinary Judicial Authority the Public Prosecutor has received news of, but it also aims at avoiding that it may fall on the people that are object of investigation, whose liability hypothesis has not even been formalized in an invitation to infer, the disgrace deriving from damaging facts whose phenomenal existence and imputable position are still to be demonstrated. The above is stated in the knowledge that, unfortunately, the deplorable phenomenon of media publicity of relevant facts is not easily ascribable to standardized and standardizable situations, but to clear empowerment intents of the actors in the accounting trial, in the interest of the good progression of it and of the good reputation of the alleged infringers. Other rules regulate the conduction of direct inspections or investigations, the request of documents and information. It is important to notice, in this respect, the provision for which the documents and deeds published on the Public Administrations' websites must be acquired via the access to the websites themselves.

In relation to personal hearings (art.60) of an informed witness, it is provided that the person, upon request, may request the assistance of a trusted lawyer. The person subject to hearing has the obligation to appear in order to answer to the questions that are made to him. However, the same person, is not obligated to testify on facts that could lead to the discovery of a liability of his: in this case, he must be warned that if he intends to respond he has the possibility to be assisted by a trusted lawyer, whom absence prevents the continuation of the hearing, which is then deferred to a new date, according to the known latin brocard *nemo tenetur se detegere*<sup>29</sup>. Consequently, the Code sanctions with nullity the hearing that is conducted in violation of the above mentioned provisions regarding the presence of a trusted lawyer.

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<sup>29</sup> Such principles is verified in the Criminal Procedure Code of many countries, starting from the V amendment of the Constitution of the United States of America, where it is affirmed that no one "can be obligated, in any criminal proceeding, to testify against himself". The law system, in balancing the interests in place, prefers personal freedom and, according to a tenet, the honor of the person – to the interest in repressing the crimes. If all the subjects in the criminal proceeding would be obligated to unconditionally cooperate with justice to the point of incriminating themselves, it would not remove the moral freedom of the defendant, who has the right to choose whether or not to defend himself and how, even when guilty: in Italy this was recognized by the Law no. 932 dated 1969, on the basis of which the interrogation was no longer considered as an "obligatory narration to be held in truth to which the defendant is forced", but essentially conceived as a tool for the implementation of the right of defense agreed by article 24 of the Constitution. The Institutes that are meant to grant the right of the subjects involved in the criminal proceeding are different. Amongst these we indicate, in particular, the privilege against self-incrimination, which is recognized to the suspect and to the defendant: they are not expected to answer the questions asked to them, and can even lie. In this way, they can commit the crime of perjury, fake information to the Public Prosecutor, aiding and abetting. The privilege against self-incrimination is also recognized to the witnesses, who can oppose it, should a criminal liability of theirs emerge from the answers to the questions asked to them. The principle of the *nemo tenetur se detegere* counts even in the administrative proceeding. O. Mazza, The interrogation and examination of the accused in his proceedings, Giuffrè, Milan, 2004.

The regulation on personal hearings is inspired by the aim to reach a balance between the needs regarding the investigation of the loss of profit (fiscal damage) and the guarantees in defense of the alleged infringer. Indeed, on one side, in foreseeing the obligation to respond to the order of the Public Prosecutor to appear before him for a personal hearing, the investigation activity is objectively enhanced, on the other side, foreseeing the impossibility to proceed to a hearing of the alleged infringer in absence of a trusted lawyer and the sanction of nullity in case of violation of such provision, the defense guarantees are the ones to be objectively enhanced.

The Public Prosecutor may conduct a preliminary activity directly, or he can delegate the preparatory activities to the Finance Police or to other Police forces, even local Police, to the territorial Government offices and to the investigation services of the Public Administrations, identified on the basis of criteria of professionalism and territoriality. He can also make use of technical consultants. For inspections and investigations delegated to regional managers and officers there must be a previous agreement with the President of the Regional Office. The reference to the possibility to delegate to managers of the Public Administrations, that, moreover, codifies a procedure already in use and widespread, responds to the need to use and enhance their specific areas of knowledge, but it has been duly balanced with the need to not create continuity solutions in their physiologic activity as a result of the burdens deriving from the involvement in the preparatory activity in the investigation of the loss of profit. From here stems the need to take into account the territoriality criteria, avoiding useless and costly assignments, that are ontologically incompatible with the ratio of the entire proceeding and, obviously of specific professionalism criteria, that is obviously deemed to be non-fungible by the Public Prosecutor of Accounts operating within the scope of the evaluation of the efficacy of his own activity for investigation purposes of the historical fact.

The seizure of documents is not a delegable act, if only for its conduction. What stated above wants to underline the importance, but at the same time the necessarily invasive nature of the act, which must protect its dominion as a guarantee from the Public Prosecutor. It must be provided by means of a grounded decree (just like all the investigation documents), a copy of which is to be delivered to the manager of the office or to the subject that has available the documentation object of the seizure.

The person responsible for the legal affairs has the possibility to assist (without the right to be warned, and always provided its availability) to the operations that are to be carried out after the delivery of the decree, through research and acquisition of the documents and deeds to be seized.

When the object of the confiscation are letters, parcels, valuables, telegrams or other correspondence items, these are not to be opened or altered and the operating personnel is not to be advised; they will have to be delivered to the Public Prosecutor intact. The confiscation decree is claimable before the jurisdictional division of competence by whoever has interest in it, within ten days of the date of delivery of the decree. Within ten days of filing the claim, the Division will decide, in the council chamber, after having heard the parties. If he finds that the object of the investigation is uninvolved with the seized deed or document, he will provide for the immediate release of it.

If the deeds or documents can be found on the internet, according to obligations recently reinforced by the Legislator, the related acquisition must happen using the same websites. This must induce the Public Prosecutor of Accounts to a precise evaluation of the investigative interests, using more effective means whenever is observed the need for proof or integrations, even informal ones only possible to find on the internet, avoiding useless accesses (and the consequent media uproar) for verifications that can be conducted using the more effective obligations of transparency of the Public Administrations.

When, even following an invitation to infer, the new of a damage results to be unfounded or there are no sufficient elements to support, in a trial, the dispute of liability, the Public Prosecutor provides the dismissal of the investigatory folder.

The code introduces, as specific reason for dismissal for absence of gross negligence, the fact that the administrative action (that is deemed to be damaging) of the alleged infringer is conformed to the opinion given by the Court of Accounts during consultations<sup>30</sup>.

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<sup>30</sup> In the judgment for administrative responsibility, the opinions expressed by the Court of Accounts during consultations related to the control of local entities, are to be considered, should they be provided by the subject summoned in the same judgment; this in order that the Judge verifies the actual existence of the subjective element of the liability (gross negligence) and of the causal link, to the purpose of convicting the summoned alleged infringer. Indeed, should the administrative action of the administrators, of the managers and of the officers of local entities, comply with a previous opinion

On the topic of dismissal there are two more new pieces of information: the necessary stamp of the General Prosecutor on the dismissal decree and the evocation power of the investigatory file, conferred to the latter whenever persists a formal dissent with the investigative judge on the reasons for dismissal. The two provisions enhance the role and the responsibility of the Regional Prosecutors, as responsible for the office of the Public Prosecutor

Therefore, in the prospected situation, it becomes possible to affirm that the guarantee of the right of the parties to the evidence represents the necessary inspection in order to deem the evidentiary system in the accounting trial frame work, to be constitutionally oriented<sup>31</sup> and inspired to the following principles: 1) specificity and substantiality of the news of the damage, 2) full access to deeds and documents at the basis of the dispute, 3) obligatory conduction, under penalty of inadmissibility of the action, of the personal hearing possibly required by the alleged infringer, with the possibility of being assisted by a lawyer, 4) specification of the modality of exercise of the investigatory powers of the Accounting Public Prosecutor, 5) formalization of the dismissal provision<sup>32</sup>.

### 6.1 Completeness and sufficiency of the evidentiary system

Regarding the completeness and sufficiency of the evidentiary system that must accompany the fiscal summons, art. 94 of the Accounting Justice Code provides for the limits that are posed to the evidentiary acquisitions of the Division (“without prejudice to the burden of providing evidence that are in the availability of the parties regarding the facts that are at the basis of the questions, and the exception, the judge may provide technical consultancies, as well as order the parts to produce the deeds and documents that he deems necessary to his decision. The judge may require, by office, the Public Administration to provide written information related to the deeds and documents that are available to the Administration itself, which he deems necessary to acquire during the trial. The judge may proceed, at any stage and grade of the trial, to the informal interrogation of the alleged infringer, assisted by his lawyer, if summoned. The judge may admit the evidence means provided by the Civil Procedure Code, excluding the formal interrogation and the oath”).

The necessary attention of the prosecutors to the completeness of the evidentiary system derives, therefore, from the so-called evidentiary power of the Division, pertinent to the autonomous evidentiary power of the Council (founded on art 14 and 15 of the R.D. 1038/1933 aimed at the acquisition of evidentiary element not brought into the trial by the parties).

Such power– justified by the preeminent public interest to the safeguard and correct management of public money, under many aspects violated the principles of “fair trial”, both because it failed to comply with the principle of impartiality of the judge, both because it violated the principles of Cross-Examination and of “equality of arms, being able to put out of balance the dispute to the advantage of one of the parties and to the damage of the other; furthermore, it was a power that determined the avoidance of the regime of evidentiary preclusion provided to the parties and that expanded the process over the terms of a reasonable duration, in a further violation of art. 111 of the Constitution<sup>33</sup>.

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rendered by the Court of Accounts itself, albeit in the control phase, it is possible that such action is not able to cover: a) the instances of gross negligence; b) the causing factor of possible losses of profit, that have anyway happened in consequence of the same action.

<sup>31</sup> As affirmed by Taruffo, a fundamental guarantee related and linked to the right to evidence is the implementation of the cross-examination of the parties on the evidence, which is deemed to having been violated ... *With regard to the evidence ordered ex officio, the parties find themselves - de jure or de facto - unable to deduce contrary or different evidence on the same subject and to discuss the outcome of the evidence acquired ex officio.* M. Taruffo, *The right to proof in civil proceedings*, Riv. Dir. Proc., Cedam, Padova, 1984.

<sup>32</sup> A. Gribaudo (edited by), *The code of accounting justice*, commented on article by article, Maggioli, Rimini, 2017.

<sup>33</sup> Article 111 of the Constitution:

Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defense. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defense in the same conditions as the prosecution, as well as the right to produce all other evidence in favor of the defense. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted. In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defense counsel. The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct. All judicial decisions shall include a statement of reasons ( cfr. artt. 13 c.2 , 14 c.2 , 15 c.2 , 21 c.3]. Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts [cfr. art. 13], [cfr. art. 137 c.3. This rule can only be waived in cases of sentences by military tribunals in

It is to be noted that way before the Code, such power had been decreased by jurisprudence, compared to the source tradition. For judgments posed to the Court of Accounts, it was considered operating a principle that was “provisional with acquisition elements”, justified by the profiles of the action, pertaining to public law, and compatible with the principle of fair trial pronounced by art. 111 of the Italian Constitution, being limited to only one integration of the evidentiary material already provided by the parties<sup>34</sup>.

Art. 94 of the Code confirms the peculiarity of the accounting judgment, given the public and unavailable nature of the interests involved, and does not exclude any unofficial evidentiary acquisitions of the Division. However, preliminarily, it fully underlines that the onus of proof, that is, the onus of indicating the evidentiary means that prove the existence and the way of being of the facts in deduction, is to be borne by the parties.

The power of the Division to require that, by office, the Public Administration provides “all written information related to deeds and documents that are within the availability of the Administration itself, and which considers necessary to acquire in course of trial”, lessens, but does not deny the provisional principle. It is indeed important to consider that the reference is to deeds and documents the existence of which the Division has known of during the course of the trial, in relation to the deductions of the parties, and therefore of unofficial acquisitions based on evidence principles already falling within the data of the trial.

The Division will still be able to intervene with an acquisition method when the need arises (so that there is a “fair trial”) to re-establish a situation of substantial equality between the parties, if, concretely, the position of a summoned person appears out of balance to the purposes of the trial, compared to the position of the Public Prosecutor, as a consequence of the most relevant powers of investigation within the availability of the Regional Prosecutor. Furthermore, the Division will be able to intervene when one of the parties has encountered objective difficulties in acquiring elements of evidence of the facts he provides. Indeed, article 94 of the Code charges the parties with the obligation to provide evidence of the deducing facts with the parenthetical element “evidence that is in their availability”, which connects to the judicial principle of proximity of the evidence. Such principle entails that the onus of proof must be distributed taking into account the possibility, for each of the parties involved, to prove circumstances that fall into their respective fields of action, therefore, it is reasonable to charge the evidentiary onus on the party that is closer to the fact to be proved.

It is important to clarify that the Court Appointed Expert Witness (C.T.U.), which art. 94 allows the section to avail itself with, by office, albeit not being normally a means of proof, but only a technical supporting material of the Judge for the evaluation of the data of the trial, may become so when the proof of a fact, the assessment of a damage or of the causal link, as in the field of health damage, may not be obtained if not through specific technical cognizance and instrumentation.

The division will not be able to obviate, by office, to evidentiary impulses of the parties. Even if, in the ruling of liability, does not count the criminal principle that requires a proven guilty verdict beyond all reasonable doubts, but a principle of evidence for which it is considered sufficient a grade of similarity equal to the “most probable rather than the least”, the partial or insufficient evidence related to such factual data, will lead to the acquittal of the alleged infringer.

Finally, the organic regulation of the court hearing phase should hopefully lead the practice to re-evaluate the orality and the creation of means of proof in occasion of court hearings (incorporated evidence), that is, an effective jurisdiction culture, overcoming those criticalities that have often attributed, to the accounting process, an excessive recourse to documental/paper evidence or to evidence arguments formed, without a direct control of the accounting judge, either in the pre-trial phase or in another trial (mostly an investigation or a criminal hearing) .

This appears to be more necessary in an administrative-accounting liability judgment, in which the investigation plays an essential role, often pervaded with the opportunities for direct results, rather than with the psychological element of intent and/or gross evidence.

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time of war. Appeals to the Court of Cassation against decisions of the Council of State and the Court of Auditors are permitted only for reasons of jurisdiction [cfr. art. 137 c.3).

<sup>34</sup> G. Corso, The new art. 111 and the administrative process; general profiles, Report at the Accademia dei Lincei Conference, Rome, 28-29 marzo 2002.

## 7. CONCLUSIONS

The present financial emergency, which, inevitably, makes it necessary to hinder repeated and somehow intolerable waste of public resources, generates a legitimated demand for justice from the community. Impartiality and equidistance, which are indispensable elements for the protection of extended public finance, especially in a period of scarcity of resources, are a guarantee, which is difficult to replicate in institutional subjects that are not the Court of Accounts.

In the regulatory production of the last few years it has clearly emerged the orientation toward legislative interventions aimed at emphasizing the role of the Court of Accounts both on the side of the jurisdiction and on the one related to control, which are functions indissolubly linked to one another and put into place to monitor the correct use and conservation of public financial resources.

Regarding the judicial function of the Court, the legislative interventions have manifested, within the scope of measures for the containment of the public expense, in the introduction of forms of typed liability and in the provision of specific management limitations, the violation of which is considered illicit, with express provision of consequent monetary liability in the form of compensation.

The new interaction phenomenon of the extended public finance finds, in a National, neutral and constitutionally autonomous body, a secure and purposeful point of reference for the protection and the guarantee of the public resources managed at any level of government; a protection that is conducted by the Court of Accounts in the exercise of the duties of control and jurisdiction, the latter intended as the moment of closure of the system of objective guarantees.

The purpose of the action of the accounting judge must not only be that of reintegrating the impaired resources or to punish the person responsible for the loss, but also that of guiding, for the future, the conduct of the public employee, or, anyway, of the subject appointed with the conduction of the administrative activity, addressing him to the correct pursuit of those public interests established by the laws and that have been awarded public money. The indefectible character of the accounting jurisdiction and its meaning must be intended in the sense of the reasonable certainty that the illegal acts carried out during management are not exempt from liability. The liability judgment before the Court of Accounts is founded in the obligatory nature of the liability action of the administrators and public employees, following the inalienability of the subjective right within all public entities of compensation of the damage incurred by public resources consequently to the ownership of the community in all its forms, with the related guarantees of accounting jurisdiction.

Regarding the subjectivity of the liability action it is important to take into account that the Administration acting for the compensation before the judge, and through joining a civil claim in criminal proceedings, expresses a public interest, albeit sectoral, whereas the Public Prosecutor of Accounts acts as a "tutor" in order to help in the correct use of public resources violated by a crime.

As per the concept of "public accounting material", according to article 103, second paragraph, of the Constitution<sup>35</sup>, it includes all the judgments of accounts and liability and it is clear how the investigation of the above mentioned liability expresses itself in two orders of judgment, which, despite being different in the object (accounting liability and administrative liability in the stricter sense) and also, within certain limits, in the subjects, have, however, the purpose of protecting public money through the reintegration of the losses incurred by the Inland Revenue for management irregularities or for criminal behaviors.

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<sup>35</sup> Article 103 of the Constitution:

The Council of State and the other administrative justice bodies have jurisdiction for the protection of legitimate interests vis-à-vis the public administration and, in particular matters indicated by the law, also of subjective rights.

The Court of Auditors has jurisdiction over public accounting and other matters specified by law.

Military courts in wartime have jurisdiction established by law. In peacetime they have jurisdiction only for military offenses committed by members of the armed forces.

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