iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

ADMINISTRATIVE INTERNAL REVIEW

ANNUAL REPORT - 2011 - ITALY

(February 2011)

Prof. Margherita RAMAJOLI

INDEX

1. INTRODUCTION

Administrative decisions adopted at second instance are characterised by the fact that then relate to previous administrative decisions (so-called **internal review**).

Furthering public interest requires that the administration have the power to review its previously rulings when validity or appropriateness are in doubt, adopting, if necessary, related measures.

Copyleft – Ius Publicum

The administration is required to protect the public interest on an ongoing basis by, for example, reversing decisions as a way of protecting their goals even though this may create problems with regard to the rights and legitimate expectations created with the decision at first instance and the resulting reliance of private individuals on the stability of the decision.

Currently, Article 21-*quinquies* and Article 21-*nonies* of Italian Law no. 241/90, introduced by Law no. 15/2005, regulate the reversal, *ex officio* annulment and confirmation of decisions, expressly codifying the most important administrative internal reviews, which are thus typified in general terms and no longer left, as before, to development through case law and the academic literature.

However **case law** is still **essential in this area**, contributing to delineating the general features of internal review, with particular reference to issues of jurisdiction (section 3), indemnity payments following the reversal of an administrative decision (section 4) and the power of internal review in cases where a provisional award has been made (section 5).

Furthermore, it needs to be mentioned that in 2010 has been enforced the "advance notice of the intention to appeal to the courts" that puts the administration in a position to decide whether or not to "take action under internal review" (section 2).

2. ADVANCE NOTICE OF THE INTENT TO APPEAL TO THE COURTS AND THE EXERCISE OF THE POWERS OF INTERNAL REVIEW BY THE TENDERING AUTHORITY

The new Article 243-*bis* of the Italian Code of Public Contracts, introduced by Article 6 of Italian Legislative Decree no. 53/2010 transposing Directive 2007/66/EC, has provided for a **notice of appeal requirement to the tendering authority in the area of public procurement.**

Copyleft – Ius Publicum

This "advance notice of appeal" puts the administration in a position to decide in good time whether or not to "take action under internal review" procedures in light of suspected irregularities. It is a **preventive dispute resolution mechanism centred on the exercise of the power of internal review**.

Individuals who intend to appeal to the courts must inform the tendering authorities of the presumed violations and of their intention to file an appeal. The notice must contain a concise summary of the presumed irregularities in the administrative decisions and the grounds for the appeal that the party intends to raise in the proceedings, without prejudice however to the right to raise different or additional grounds for appeal in the proceedings.

This notice may be presented at any time before the interested party has filed an judicial review; it does not prevent the further continuation of the tender procedures, or the commencement of the grace period for the conclusion of the contract determined pursuant to Article 11(10), or the commencement of the time limit for the filing of an judicial review.

Within 15 days of receipt of the notice, the administration must "communicate its own views in relation to the grounds indicated by the interested party, and decide whether or not to take action under internal review". There no requirement to adopt an internal review before the above time limit, but simply a decision as to whether or not to initiate the review procedure.

However, this decision cannot be a mere decision over whether or not to exercise internal review powers, but must contain indications as to whether or not the grounds raised are well-founded.

Consequently, although the law is silent on this point, it may be appropriate to involve any other interested parties in the review proceedings, such as the successful party, through the notice of the initiation of proceedings pursuant to Article 7 of Italian Law no. 241/1990.

Copyleft – Ius Publicum

A failure by the administration to respond to the notice is considered equivalent of a denial ("equivalent to a refusal of internal review"). Both the failure by the undertaking to give notice as well as the silence on the part of the tendering authority amount to conduct proceedings may be assessed for the purposes of the decision on costs, as well as pursuant to Article 1227 of the Italian Civil Code on contributory negligence, and hence the level of compensation may be reduced "in line with the seriousness of the negligence and extent of the consequences that resulted from it".

"The total or partial refusal of internal review, whether express or tacit", may be challenged only along with the decision to which it refers or, if the latter has already been challenged, by filing additional grounds (new paragraph 6 of Article 243-*bis* of the Italian Code of Public Contracts, introduced by Article 3 of Annex 4 to Italian Legislative Decree no. 104/2010).

The **advance notice** of the intention to file an appeal **will have a marginal role in reducing litigation**. The reason lies both in the very short time limit of 30 days for the filing of an appeal with the courts, as well as the fact that providing notice does not entail the suspension of the time limit for filing an appeal with the courts, nor of the grace period for the conclusion of the contract.

Accordingly, the specific arrangements put in place to govern the advance notice transform the institution from a dispute prevention mechanism into a mere instrument with the function of notifying the administration of the existence of the risk of irregularities in the award procedure.

3. JURISDICTION OVER DECISIONS TO WITHDRAW PUBLIC FUNDING

In 2010 there was a significant body of case law concerning **the division of jurisdiction between the administrative courts and the ordinary courts over cases involving decisions to withdraw public funding**. A settled view has been established

Copyleft – Ius Publicum

which uses a general criterion to regulate the division of jurisdiction based on the identification of the "procedural segment" affected by the reversal and its "reason".

Administrative case law follows the settled case law of the Supreme Court of Cassation (Cass., sez.un., 17 febbraio 2010, n. 3679) and distinguishes between the **"static" occurrence of the award of funding** and the "dynamic" situation relating to the use of that funding.

The former falls under the **jurisdiction of the administrative courts**, whilst any other aspect relating to the manner in which the funding is used and compliance with the commitments undertaken falls under the jurisdiction of the ordinary courts (Cons.Stato, sez. VI, 11 gennaio 2010, n. 3; sez. V, 16 febbraio 2010, n. 884; 23 settembre 2010, n. 7088; 10 novembre 2010, n. 7994).

Moreover, the issue of jurisdiction over public funding is also governed by the normal criteria regulating jurisdiction based on the nature of individual legal rights.

A private party has a **legitimate interest** when the dispute concerns not only the procedural stage prior to the award of the benefit, but also the subsequent stage if **the funding has been annulled or used unlawfully or due to the fact that it went against the public interest from the outset**.

On the other hand, such a person will have an individual right if the dispute arises during the disbursement stage of the funding or the withdrawal of the subsidy on the basis of an alleged breach by the recipient; this is also the case for challenges to decisions classified as revocation, expiry or termination, provided that they result from the alleged failure by the beneficiary to abide by the obligations assumed in return for the award of the funding.

In fact, this activity is not authoritative, and there is no balancing of the public interest against that of the private party; it is rather necessary to assess, now on an equal footing, whether or not the parties have complied with the obligations accepted or imposed following disbursement of the funding (Cons.St., sez. V, 16 febbraio 2010, n. 884; sez. VI,

Copyleft – Ius Publicum

3 giugno 2010, n. 3501; Cons.Giust.Amm.Reg.Sic., 21 settembre 2010, n. 1232; Cons.St., sez. V, 10 novembre 2010, n. 7994; Tar Umbria, Perugia, sez. I, 23 giugno 2010, n. 383; Tar Trentino Alto Adige, Trento, sez. I, 24 giugno 2010, n. 164; Tar Sicilia, Palermo, sez. I, 29 novembre 2010, n. 14192).

Thus, for example, a withdrawal due to the insolvency of the beneficiary undertaking and the finding that it is impossible for the undertaking to fulfil the obligations undertaken when the funding was granted is not the expression of a power of internal review through a new balancing of the public interests involved in the decision to award the funding. It falls under the jurisdiction of the ordinary courts since it impinges upon the individual right "to the continuation of the funding, claimed to have been violated due to the failure to meet the prerequisites for an end to disbursement of the benefit and, therefore, for the breach objected to by the administration" (Cons.St., sez. VI, n. 3/2010; sez. V, n. 7088/2010).

4. INDEMNITY PAYMENT FOLLOWING THE REVERSAL OF AN ADMINISTRATIVE DECISION

Case law has on various occasions had the opportunity to specify the rules governing the institution of the indemnity payment made by the administration to an individual directly affected by the reversal pursuant to Article 21-*quinquies* of Italian Law no. 241/1990.

A **prerequisite** for the award of an **indemnity payment** to the individual who directly suffers the detriment is the **lawfulness of the decision to reverse** (so-called responsibility of the public administration for lawful acts). In the event that the reversal is unlawful there may possibly be grounds for compensation for damage (Cons.St., sez. V, 10 febbraio 2010, n. 671; 6 ottobre 2010, n. 7334).

Contrary to what occurs in situations involving the compensation for damages due to liability, for which the negligence of the party that caused the damage is an essential

Copyleft – Ius Publicum

prerequisite, in cases involving an indemnity payment **it is not necessary to ascertain any negligence on the part of the administration** (Cons.St., sez. V, n. 671/2010; n. 7334/2010).

A **reversal without an indemnity payment is not unlawful**: the failure to make an indemnity payment does not have the effect of vitiating or invalidating the reversal decision, but simply permits the private party to take action to obtain the indemnity payment (Cons.St., sez. V, n. 7334/2010). In particular, the indemnity payment will be due to the private party if "the legitimate reversal … impinges upon long-standing relations (on an administrative act with lasting effect) and is caused by supervening reasons of public interest, by a change to the factual situation or by a new assessment of the public interest" (Cons.St., sez. VI, 17 marzo 2010, n. 1554).

The prompt adoption of a decision to countermand the decision to reverse does not in itself preclude an indemnity payment: the indemnity payment is subject only to the occurrence of "detriments to the parties directly affected", but may impinge upon the quantification of the indemnity due (Cons.St., sez. V, n. 671/2010).

If the reversal was due only to a clear material error, or the damage was brought about by negligent conduct by the private party, then no indemnity payment will be due (Cons.St., sez. VI, n. 1554/2010); even in the cases involving the reversal of the provisional award of a public contract there will be no indemnity payment (on this specific point, see below).

The **indemnity payment must be limited to the "actual loss"**, as expressly provided for under paragraph 1-*bis* of Article 21-*quinquies* of Italian Law no. 241/1990. Case law has interpreted actual loss to include the cost of participation in the tender procedure due to breach of the "entitlement not to be involved in pointless negotiations" (Cons.st., sez. V, n. 671/2010; n. 7334/2010). In any case, the prerequisites are not met for requesting reimbursement of the cost of participation in the event that the undertaking obtains compensation of the damage resulting from the failure to make the award; in this

Copyleft – Ius Publicum

case, there can be no greater benefit than that resulting from the award (Cons.St., sez. V, n. 671/2010).

Also in cases involving lawful reversals, private parties may suffer recoverable damages, and which are not limited only to those leading to an indemnity payment; in this case the damages do not result directly from the reversal, but from other irregularities (either procedural or of another nature) committed by the administration (Cons.St., sez. V, 21 aprile 2010, n. 2244; n. 7334/2010).

It has also been clarified in the case law that it is possible to cumulate, within the same proceedings, claims for compensation (on the basis of the unlawful nature of the reversal) and claims for indemnity payments (on the basis of the actual violation caused by lawful yet harmful conduct) due to the effects of the reversal. If the private party challenges the lawfulness of the reversal and seeks compensation, he may however also make a claim in the alternative for an indemnity payment, in the event that the claim for compensation is ruled groundless; the indemnity payment is in fact a residual remedy (Cons.St., sez. VI, 17 marzo 2010, n. 1554).

On the other hand, the administration need **not** make **any indemnity payment** in cases involving a "**reversal as penalty**" or "**reversal by expiry**" in which, in the cases provided for under statute, it reverses a favourable decision under the terms of the legislation as a consequence of the recipient's conduct when the latter breaches specific legislative provisions. In fact, in these cases the reversal does not depend on considerations of expediency, but is the mandatory consequence of a breach of the law (Cons.St., sez. V, 13 luglio 2010, n. 4534).

5. AWARDS AND INTERNAL REVIEW POWERS

All definitive decisions within a tender procedure, from the tender notice to the definitive award, may be reversed under internal review procedures. Article 11(9) of the Italian Code of Public Contracts refers to the "exercise of powers of internal review in the

Copyleft – Ius Publicum

cases permitted under applicable legislation" and therefore results in the automatic application of the provisions of Italian Law no. 241/1990 (see also Article 2(3) of the Code).

Different arrangements apply to cases in which it is the **provisional award** that is reversed. In these cases, case law considers that if the administration decides to reverse the provisional award, then **the commencement of the relative procedure need not be notified to the provisionally successful tenderer** (Cons.St., sez. V, 12 febbraio 2010, n. 743; sez. VI, 6 aprile 2010, n. 1907; 9 aprile 2010, n. 1997; Tar Lazio, Roma, sez. II, 30 aprile 2010, n. 8975; sez. III, 9 settembre 2010, n. 32177) .

Where a definitive award has been made the successful tenderer is in a qualified legal position and therefore may enter into dialogue with the administration, "presenting facts and submitting observations and assessments aimed at best identifying the concrete and current public interest"; on the other hand, **the provisionally successful tenderer only has a *de facto* expectation** that the procedure will be concluded and has not received a qualified award (Cons.St., sez. V, n. 1997/2010; Tar Lazio, Roma, sez. II, n. 8975/2010; sez. III, n. 32177/2010).

It has thus been concluded that in order to eliminate that expectation and the provisional award, it is sufficient to adopt a decision to defer "by which the tendering authority gives its decision supported by reasons not to proceed to the definitive award and pre-announces the reversal of the decisions taken during the intervening period" (Cons.St., sez. V, n. 1997/2010; Tar Lazio, sez. II, n. 8975/2010; sez. III, n. 32177/2010).

The decision not only does not require the separate initiation of a procedure, but does not even require particular motivation: it is sufficient for example to give notification that it is not possible to initiate the implementation of projects on grounds for reasons out of its own control and that it intends to annul the tender procedure previously held, by decision that is sufficient to constitute notice of a provisional award (Cons.St., sez. V, n. 1997/2010). However, there is no lack of judgments at first instance in which it has been held that the administration is always under an obligation to assess the interests affected, to

Copyleft – Ius Publicum

carry out a detailed inquiry – albeit without the right to make representations – and to give adequate reasons for its choice (Tar Lazio, sez. II, n. 8975/2010).

Moreover, in cases involving the reversal of a provisional award **there is no obligation to make an indemnity payment**: the indemnity payment is due only in the event that decisions with enduring effect are reversed and not also in cases involving the reversal of decisions with unstable or ephemeral effects, such as a provisional award (Cons.St., sez. VI, 17 marzo 2010, n. 1554; Tar Sicilia, Palermo, sez. I, 13 aprile 2010, n. 4945).

6. BIBLIOGRAPHY

BARTOLINI A., FANTINI S. E FIGORILLI F., *Il decreto legislativo di recepimento della direttiva ricorsi: il nuovo rito in materia di appalti, lo standstill contrattuale e l'inefficacia del contratto*, in *Urb.app.*, 2010, 638 ss.

CASSATELLA A., *Una nuova ipotesi di annullamento doveroso?*, in *Foro amm.-Tar*, 2010, 810 ss.

GOISIS F., *L'annullamento d'ufficio dell'atto amministrativo per illegittimità comunitaria*, in *Dir.amm.*, 2010, 439 ss.

DE NICTOLIS R., *Il recepimento della direttiva ricorsi*, in www.giustizia-amministrativa.it, par. 8 ss.

LIPARI M., *Il recepimento della "direttiva ricorsi": il nuovo processo super-accelerato in materia di appalti e l'inefficacia "flessibile del contratto*, in www.giustamm.it, 33 ss.

PAVONI S., *La revoca della stazione appaltante alla luce della più recente giurisprudenza*, in *Resp.civ.prev.*, 2010, 1123 ss.

Copyleft – Ius Publicum

PERTICARARI R., *Annullamento in via di autotutela e interesse pubblico*, in *Urb.app*., 2010, 714 ss.

PONTE D., *L'informativa in ordine all'intento di proporre ricorso*, in *Urb.app.*, 2010, 762 ss.

USAI S., *Revoca dell'aggiudicazione e comunicazione di avvio del procedimento*, in *Urb.app*., 2010, 454 ss.

VILLATA R. e RAMAJOLI M., *Il provvedimento amministrativo*, Torino, 2006

7. WEB SITES

www.giustizia-amministrativa.it

www.giustamm.it

www.lexitalia.it

Copyleft – Ius Publicum