SHORT NOTES

THE CONCEPT OF "PUBLIC INTEREST" IN THE CASE LAW OF THE ITALIAN COURT OF AUDITORS

*Giuseppe Franco Ferrari**

Abstract

This essay is about the concept of "public interest" in Italian public law. It examines the recent case law of the Italian Court of Auditors, which is both an external audit institution and an administrative court or tribunal with exclusive jurisdiction over certain issues of public law. It focuses on the latter function, more specifically on some recent developments concerning the concept of public interest. It identifies three related but distinct features or dimensions of public interest.

TABLE OF CONTENTS

1. Introduction

This short essay is about the concept of "public interest" in Italian public law. It focuses, in particular, on the case-law of the Court of Auditors. Three themes will be considered. First, the history and development of the Court of auditors will be briefly illustrated. Second, the Court's recent case law will be examined. Third, there will be a discussion of the various ways in which the concept of public interest emerges.

* Full Professor of Constitutional Law, University of Milan Bocconi

2. The Courts of Auditors: Continuity and Change

The Court of accounts is one of the oldest institutions in the Italian legal order. A Chamber of accounts was created as early as in 1389 at Chambery, at that time capital of the Grand duchy of Savoy. Between 1847 and 1859 King Carlo Alberto of Piedmont and Sardinia took three fundamental decisions concerning judicial review. First, he devolved all the controversies concerning tax and fiscal matters, including those concerning the property of the Crown, to ordinary judges. Second, he founded the Chamber of accounts in Turin, then capital of the Kingdom, responsible for all the administrative matters, besides the litigation about accounts. Third, in 1859[1], the Council of State, traditionally an advisory body, was entrusted with the power of handling all the case law of administrative nature. In the same year the Chamber of accounts was transformed into the Court of accounts or Court of Auditors, summing also the competences formerly belonging to the Comptroller General. In 1862[2] the same distribution of competences was extended to the whole of the newly (1861) created Kingdom of Italy[3].

Since then, the jurisdictional and consultative functions of the Court of accounts have been revised several times[4], though its structure and competences have remained almost untouched. The Constitution of 1947 has confirmed its importance and functions[5]. It ought to be said at the outset that Italy has not only an equivalent to the French *Conseil d'Etat*, an administrative court with exclusive jurisdiction over many issues of administrative law, but also attributes judicial capacity to the Court of auditors, particularly with regard to the financial liability of both civil

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[1] Act of Parliament of 30 October 1859, no. 3707.

[2] Act of Parliament 14 August 1862, no. 800. For a retrospective, see *I 150 anni della Corte dei conti, Raccolta di Materiali* (Court of Auditors, 2012), 9 ff.

[3] Similar Courts existed in Parma, Florence, Naples, and Palermo. The last two, created respectively in 1817 and 1818, were preserved for some years in order to get rid of the existing load and may be due to their good performances: see G. Landi, *Istituzioni di diritto pubblico delle Due Sicilie (1815-1861)*, II, (1977) 971 ff.; C. Ghisalberti, *Corte dei conti (storia)*, Enc. Dir., vol. X (1962) 853 ff.

[4] See, for example, the decrees of 13 August 1933, no. 1038 and 12 July 1934, no. 121. Within the more recent legislation, see the legislative decree of 15 November 1993, no. 453 and the Act of Parliament 14 January 1994, no. 20.

[5] Article 100 (2) of the Constitution. For further remarks, see G. Carbone, *Art.100*, in *Commentario della Costituzione* (1994) 64.

servants and elected administrators and the retirement treatment of State employees. The Court is also an important actor in the country's accountability chain, because it carries out the oversight of public expenditure. Finally it has retained a consultative role towards the executive and legislative branches of government[6].

3. Some recent developments in the Court' case law

Arguably, the case law of the Court, both in its jurisdictional and oversight activity, is important for the interpretation of the concept of public interest. Though public interest is a typical essentially contested concept[7], its conceptualization along about 150 years of Italian constitutional and administrative history can be traced through the lenses of the Court's decisions. This evolution has become growingly evident in the last twenty-five years or so, after the waves of privatization and liberalization of the public sector, partially autonomous and yielded by the need of reducing the stock of government debt, which has reached unprecedented levels, and partially imposed by EU politics.

The Court has tried to preserve its sphere of competences notwithstanding the reduction of the dimension of the public sector. Sometimes it has succeeded in expanding it, thanks to the necessity of introducing different forms of spending review, both at the national and the local level, which has favored the expansion of oversight on public finance, considered as a whole. As of consequence, the concept of public interest has been evolving in order to keep new phenomena inside the scope of the Court's jurisdiction, as well as of its oversight, even when some concepts had to be stretched to unexpected and questionable boundaries. Such expansion has been tolerated and sometimes ratified by Parliament, lest a reduction of the powers of the Court

[6] F. Forte, G. Eusepi, *A profile of the Italian state Audit Court: An agent in search of a resolute principal*, in Eur. J. of Law & Economics 1 (1994) 151–160; F.M. Rossi, *Public Sector Accounting and Auditing in Italy*, in I. Brusca, E. Caperchione, S. Cohen, F.M. Rossi (eds), *Public Sector Accounting and Auditing in Europe*, IIAS Series: Governance and Public Management (2015) 125-141.

[7] W.B. Gallie, *Essentially Contested Concepts*, in Proceedings of the Aristotelic Society (1955), 56.

might be considered a relaxation of oversight over public expenditure.

The swelling of the notion of public interest has been gradual and often imperceptible, but steady and impressive, from different viewpoints. First of all, several decisions taken by the Court of Auditors in its judicial capacity have sought to include in the sphere of liabiility for damage to the public treasury or misconduct in the management of public funds banks and other subjects entrusted with the disbursement of money. On the basis of legislative provisions issues since 1979[8], the Ministry of Industry (later renamed of the Economic Development), began to allot grants-in-aid to projects to be selected through calls for bid, in order to sustain the economy of Southern and insular regions. Banks were used as simple suppliers or distributors: they had no concrete prerogative in terms of inspection or on-the-spot investigation in order to verify whether the beneficiary did own all the requisites to obtain the benefit. On the contrary, they were formally instructed by a Ministerial decree to check only the presence of formal requirements as prescribed by the statute. Some years after the grants had been distributed, when police investigation revealed abuses due to lack of substantial requisites, diversion or misappropriation of funds, or similar causes, the Courts of Auditors began to treat banks as public agents or concessionaries. It hold that they should have acted with full diligence, carried out their duties with careful attention, exactly in the same way they would have felt obliged to act should the money had been theirs. Therefore they were often held liable for damages according to their assimilation to public agents, in the name of a notion of public interest which is imposed *a posteriori* on private subjects initially used as simple terminals of a process of money distribution. Several decisions taken by both the Court's lower and appeal panels defined and refined this interpretation[9]. A sort of service relationship was presumed to exist between the administration entrusted with the preliminary verification of the requisites and the bank responsible of the payment. The quality of the public interest protected was the same on the side of the

[8] Act of 3 April 1979, no. 95.

[9] See e.g. Corte conti, Sez. giur. Lazio, 1 December 2011, no. 17/2012; Sez. giur. Sardegna, 14 March 20113, no. 142/2013; 12 November 2014, no.24/2015;

administration and of the agent or concessionary, who was consequently bound to restore the whole damage caused to the inland revenue. Only repeated signals from bank to administration could justify the acquittal of the bank on a basis of extraordinary diligence.

There are even stronger reasons for the courts of accounts to consider banks, acting as treasurers of local authorities, and therefore not as mere executors of orders, responsible of the correct ascription of sums to the different headings, qualifying the interest pursued by both public entities and treasurers as public on the same footing[10]. Furthermore, civil servants working as accounting agents are deemed obliged to a compelling and extended measure of diligence in the protection of public interest in handling public money: administrative controls may not suffice, while high standards of fairness, integrity and care have to be necessarily deployed both in managing public goods and in organizing the administrative structure of public authorities[11].

Accordingly, the Courts of Auditors may interfere with the discretionary choices made by public bodies in order to check whether the implementation of public interests has been properly carried out, without exceeding the limits of their jurisdiction[12]. Prudence and diligence, convenience and means-ends relationship, correctness in investment managing can thus be controlled under strict scrutiny techniques. Effectiveness is the main value to be protected by the accounting jurisdiction[13]. The consistency of discretionary measures with the public goals which

[10] See e.g. Corte conti, Sez. II appello, 30 June 2010, no. 265; Sez. giur. Lazio, 13 February 2014, no. 161. See e.g. Banca d'Italia, *Eurosistema, Tematiche istituzionali*, (2016) 189 ff. The responsibility of the treasurer is sometimes presupposed under a sort of juris et de jure presumption of guilt, against which the agent is only admitted to prove not to have committed the fact, while most authors prefer to qualify his conduct as responsibility for breach of obligation.

[11] See e.g. Corte conti, Sez. giur. Veneto, 12 May 2016, no. 71. Professionals entering relationships with public subjects do not ordinarily incur responsibility actioned in the courts of accounts: as far as lawyers are concerned see e.g. Cass. Sez. Un. 18 December 1998, no. 12707; panel doctors under contract with the National Health Service can be responsible for over-prescribing or for serious mistakes, and in the same way public work directors and inspectors, auditors, and so on.

[12] See e.g. Cass. Sez. Un., 21 February 2013, no. 4283; Corte conti, Sez. Giur. centrale, 8 June 2010, no. 405;

[13] Now see art. 3 of d.lgs. 26 August 2016, no. 174.

public bodies are requested to achieve and the concrete details of their initiatives are included in the jurisdiction of the Courts of Auditors[14]. For example, the opportunity for local authorities of buying swaps, derivatives or other risky equities can be scrutinized according to informal criteria of specific opportunity and foreseeability, both on the side of the advisor and the buyer[15]. Also the choice of realizing a public work and even the way in which it is conceived can be subjected to strict scrutiny in terms of concreteness and actuality of the public interest[16]. Similarly, the awarding of public grants to private subjects must be carried out with the greatest attention to the public interest pursued, checking their compatibility with the real needs of the local economic and job situation[17]. As a consequence, all damages yielded by unfair conduct in handling public money must be restored in civil courts for breach of legal or contractual obligations but at the same time the responsible agent can be sanctioned in the interest of the efficient use of public resources and of the future efficient working of the public administration[18].

Another area where the notion of public interest is attributed a very wide meaning is the area of the supervision on local authorities which have reached a condition of financial difficulty immediately preceding bankruptcy: in such cases, the regional panels of the Courts check whether their task are carried out in the interest of the whole community, for the sake of collective resources which need to be managed in terms of effectiveness and efficiency[19].

That said, it must be added that public interests do not necessarily have economic nature: in the administration of real estate, for instance, the Courts suggest that profit is not always the dominating factor, since immovable can be fruitful in other

[14] E.g. Cass. Sez. Un., 2 April 2007, n. 8096.
[15] E.g. Corte conti, Sez. I giur. centr. app. 16 December 2015, no. 609.
[16] E. g. Corte conti, Sez. II giur. app., 21 October 2009, n. 500; Corte conti Lombardia, Sez. contr., 15 November 2016, n. 328.
[17] Corte conti, Sez. giur. Sardegna, 8 July 2016, n. 163.
[18] E.g. Cass. Civ., III Sez., 14 July 2015, no. 14632.
[19] See e.g. Corte conti, Sez. Giur. riunite in speciale composizione, 11 December 2013, no. 5; the same interpretation can be found in several decisions of the Constitutional Court: 29/1995, 470/1997, 267/2006, 179/2007, 198/2012, 60/2013.

perspectives[20]. Non-patrimonial interests can be worth of protection, provided that their use is sufficiently motivated, and that the disposal of a property is aimed at providing some utility to the public entity which decides to alienate it.

A stricter notion of public interest is applied when the Courts of Auditors is requested to decide about the regularity of the expense incurred by regional or town councilmen[21]. Daily allowances and all expense accounts must be used with extreme care, implying a strict functional link between the expense and its public aim. The formal regularity of the account documents is irrelevant: the only factor to be considered is the finalization of the use of public resources to a public interest strictly considered. Buying books or newspapers treating topics relating to the political or administrative functions might not be allowed; having meals with mayors or aldermen in order to discuss administrative subjects is highly suspect.

4. Three dimensions of the public interest

Although the concept of public interest has its roots in older phases of public law, it continues to evolve. Several interests have been identified in the Court's case law; some emerge from time to time according to cycles in the economic and financial condition of the State and of the other public authorities, while others have become stable and are frequently mentioned by the Court's decisions. The recent case law of the Court of Auditors shows also that there are three related but distinct dimensions of the public interest.

First of all, interests belonging to the sphere of protection and promotion of public ownership and of the eminent domain are legally relevant because of their instrumentality to collective needs. Any damage caused to them obviously deserves indemnification, though it may be difficult to assess its quantitative dimension. A loss of income may be easily quantified; the same applies to expenses unlawfully authorized. However, the

[20] See e.g. Corte conti, Sez. contr. Molise, 15 January 2015, del. No. 1; Sez. contr. Campania, 25 September 2015, del no. 205/2014.

[21] See e.g. Corte conti, Sez. contr. Emilia-Romagna, 8 November 2016, no. 106; Sez. giur. Molise, 26 September 2016, no. 42;

violation of a prohibition may generate economic consequences of uncertain amount.

Secondly, some collective interests may be regarded as being part of the public interest when they have an economic value, that is to say a measure of the benefit provided and such benefit cannot be individually and separately enjoyed. Collective goods, in the economic sense, are the best example, though after the 1970s of the last century many Constitutions have started to refer to some of them. The protection of the environment as a constitutional good or value is the most prominent case of such change. Interestingly, according to the Court of Auditors, the recognition of a public interest to the preservation of the environment as a constitutional good implies the recovery of damages economically calculable.

Thirdly, collective interests can also concern immaterial goods entrusted to the care of public structures or authorities. Given the number and extension of collective interests in the welfare state, the case law of the Court of Auditors frequently considers the damages to such interests. For example, damages can derive from the inefficient use of public resources, the alteration of the order of priorities in the administrative action, the failure in reaching prescribed standards through the investment of financial and human resources in a public service, or, finally, corruption. It is much harder to issue sanctions against low performance of services or inefficiencies in the economic and financial balance of a public agency as represented in a budget or other financial documents. Even immaterial or moral damages can be related to a serious prejudice to the corporate image of a public authority, equivalent to a public interest, or even right[22]. Such possibility is quite recent, since until at least 1997 it was completely excluded: the turning point has been an important decision of the Court of cassation in grand chamber[23], that has been adopted as a landmark case and confirmed by unanimous decisions of both Court of cassation and courts of accounts later on[24].

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[22] See A. Venturini, *Danno c.d. "morale" patito dal soggetto pubblico: natura e giurisdizione della Corte dei conti*, Dir. proc. amm., 2000, 907.

[23] Cass. Sez. Un., 21 March 1997, no. 5668.

[24] See e.g. Cass. Sez. Un. 98/2000, 14990/2005; Corte conti, Sez. riunite 23 April 2003, no. 10.