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Interim measures and retroactive effect of remedies

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1. Introduction

I start my brief intervention by thanking the Organizers of the meeting for this important occasion, I am really delighted to introduce myself to such a noticeable audience.

The parterre is quite interesting and the encounter with homologous judges treating such conspicuous matters is definitely stimulating.

The Italian legislator allocates the review of NRAs decisions (and namely Agcom, the Italian Authority for the Guarantees in the Communications) to the Administrative Judge, in its capacity of a specialist having exclusive and excluding jurisdiction on the matter (art. 133 par. 1, lett. l), Legislative Decree 2 July 2010, n. 104), and concentrates all the litigation at the 1st instance into the functional competence of the Administrative Tribunal of Rome (art. 135, par. 1, lett. b), Legislative Decree 2 July 2010, n. 104), which I am honoured to represent here today.

The topic on which I have been invited to speak today is "Interim measures and retroactive effect of remedies".

It sounds like a twofold subject or, as I am inclined to believe, a dual angle of observation of the same problem as long as it comes to consider whether the remedies granted by review court have retroactive effect.

2. On the first issue: Interim measures.

2.1 In the Italian judiciary system the main procedure which can be introduced at an administrative court tends to annul an administrative act, apart from the condemnation

of the Administration to pay a sum of money or to issue an act; in all the aforesaid cases the judge may condemn the administration for damages.

While waiting for a final decision in the merit the plaintiff, by alleging that the execution of the challenged act causes him a heavy and irreparable damage, can obtain an order ([1])of suspensive effect of the contested act or an interim measure that in the meantime better ensures effectiveness to the decision itself (art. 55, par. 1, Legislative Decree 2 July 2010, n. 104)([2]).

The legal criteria for such a provisional measure can be summarized in the Latin expressions "*fumus boni iuris*" and "*periculum in mora*", i.e. a prospective positive outcome of the proceedings and a heavy and irreparable damage related to the execution of the challenged administrative act, which must be compared with the public interest involved in the case . The order must be grounded accordingly.

2.2 Crossing these criteria with the paradigm of the Authority's remedies (regulations, dispute resolutions, sanctions) we run into some noticeable cases in which the Court, by touching upon the ground of the complaint and the existence of a danger, has granted or otherwise refused the requested interim measures.

- In the matter of portability of numbers of fixed-line telephony and procedures for the migration of customers from one operator to another (Agcom, del. n. 41/09/Cir of 24 July 2009), the contested timing of the migration procedures was considered legitimately aimed at reaching a total symmetry among operators, whose organizational encumbrances were then meant to recede (Tar Lazio, III ter, 30 October 2009, n. 5045).

[1] The order is usually issued by a chamber. In case of extreme urgency, an interim measure is taken by the President of the chamber as soon as the plaintiff files his claim and later the chamber confirms the measure or does not (art. 56, Legislative Decree 2 July 2010, n. 104).

[2] Since 2000 some rules have been introduced to accelerate procedures. Among these one of the most effective is the possibility to decide immediately the dispute, by means of a concise explanation of the pertaining reasons, in occasion of the discussion on interim measures (art. 9, Law 21 July 2000, n. 205; at present: art. 60, Legislative Decree 2 July 2010, n. 104).
Such a possibility is allowed when the questions involved are very easy to solve or have already been solved in univocal way by jurisprudence or concern mere procedural aspects (for example, the claim was untimely, the administration has meanwhile revoked the challenged act or the plaintiff has otherwise no longer any interest in a decision of the case).

- For the use of frequencies of the digital television granted on the basis of the Authorities regulations, upon a cursory positive examination of the claimant, an interim order of revision of the contested act was given, in accordance with the requests of the plaintiff (Tar Lazio, III ter, 8 July 2011, n. 2486; id., 25 February 2011, n. 746); sometimes the order followed a judicial evaluation of technical profiles (i.e. the interferential situation) as emerging from records (id., 13 July 2010, n. 3161).
In other cases the ascertainment of technical profiles (the factual coverage of the same area of consumers as before) lead to a rejection of the interim measures request (id., 8 October 2010, n. 5743).
- On appeal of sanctions the Court (now: pursuant to art. 134, par. 1, lett. c), Legislative Decree 2 July 2010, n. 104) duly extended its control to the merit of the litigation (the pornographic character of the television programme, the irregular transmission of promotional messages, and so on) and rejected the request for suspension of the sanction (Tar Lazio, III ter, 7 July 2009, n. 3151; id., 4 June 2010, n. 3935).

3. On the second issue: retroactive effect of remedies.

3.1 The principle of retroactivity is seen with disfavor by the Italian legislator.
The law itself cannot provide but for the future and cannot have a retrospective effect (art. 25, par. 2, Constitution; art. 11, par. 1, preliminary provisions to the Civil Code).
A fortiori the NRAs remedies, being administrative acts subject to law, cannot have retroactive effect.
From a substantial point of view however there may be a deployment (an unfolding) in the past of the remedy's effects when the starting date of application is prior to its adoption.
This is bound to happen in the regulatory activity and is connected to the natural temporal scansion of the economic and technical conditions considered in the administrative measure.
For instance, according to art. 46 of the Legislative Decree 1 August 2003, n. 259 concerning the transparency obligations of the operators, Agcom can impose modifications in the offerings of reference made public by the operators themselves; in

some cases this administrative power has brought to a contested retroactive reduction of the tariffs from the Authority (Agcom, del. n. 417/06/Cons of 28 June 2006, introducing modifications in the offering of reference, entering into effect as from 1st January 2006; Agcom, del. n. 14/09/Cir of 24 March 2009, introducing modifications in the offering of reference, entering into effect as from 1st January 2009).

Moreover the retroactive effect was in accordance with art. 5 of Agcom, del. n. 4/06/Cons of 12 January 2006, which establishes the annual validity of the approved offering and its entering into effect as from January 1st of the year of reference.

3.2 Nevertheless it does not represent a formal breach of the principle of non-retroactivity of administrative acts.

As the Court has recognized, Agcom exercises a function of control on the content of the offering of reference and, if the latter is not conform to laws and regulations, the Authority imposes the elimination of the unlawfulness; the regulatory measure is then an act of control operating *ex nunc* but it is also a condition for the effectiveness of the offering as a whole, so that any modification in the offering itself operates *ex tunc* (Tar Lazio, III ter, 12 October 2007, n. 10230, in reference to Telecom Italia 2006 offering of services for interconnection to the public fixed-line telephony; id., 26 March 2010, n. 4722, in reference to Telecom Italia 2009 offering of wholesale services for full unbundling access to metal loops and subloops).

By this way the revision of the tariffs from the Authority operates not only on a prospective basis but also on a retrospective basis, i.e. in respect of a period that has already elapsed when the modification comes into effect.

4. An overall view of the question: a retroactive effect of remedies granted by review court.

4.1 *Retroactive effect of the remedy and interim measures.*

The retroaction of effects of the remedy, as long as it can be admitted, is of course an element that will weigh in the judicial evaluation of the ground of an interim measures request, as long as it substantiates or stresses a situation of *"periculum in mora"* alleged by the plaintiff, once the prospective outcome of the proceedings is positive.

Always with reference to price control matters, we can recall the case n. 1239/09 H3G versus Agcom. The plaintiff contested del. n. 667/08 Cons of 26 November 2008, concerning wholesale services of termination of fixed-line and mobile phone voice telephony owing to the fact that it imposed a scheduled reduction of tariffs for the operator in question as from 1 July 2010 in order to reach a total symmetry among operators in a reasonable time.

While appeal proceedings was pending the reduced tariffs entered into effect.

The 1st instance Court had rejected the request for suspension of the contested remedy (Tar Lazio, III ter, 1 June 2010, n. 2619), arguing that Agcom had made a correct use of the indicator of the costs borne by an efficient operator.

The judge of appeal however granted the interim suspension (Consiglio di Stato, 30 July 2010, n. 3754), having considered the existence of a heavy damage with reference to the alleged differentials among the scheduled reduction of the termination prices, the costs effectively borne by the plaintiff and the availability of frequencies (3).

In the meanwhile H3G had accordingly reset the peak tariff at the former, higher level and kept applying it until the final decision of appeal definitely confirmed the legitimacy of the remedy. Fixed-line and mobile telephony operators who had paid with reservation the higher termination prices eventually claimed back undue payments.

As a matter of fact in the case at issue the regulatory measure had imposed a price reduction on a prospective basis, i.e. in respect of an unelapsed time horizon and so from a formal point of view it was non-retroactive.

Nevertheless, thanks to a circular causation and on account of the duration of the controversy, a retrospective execution of the judicial pronouncements on the contested remedy at the end led to the factual retroaction of the effects of the measure.

4.2 *Final decision and retroactive effect of the remedy.*

[3] Afterwards the claimant was rejected in the 1st instance proceedings (Tar Lazio, III ter, 11 Febraury 2011, n. 1336) on the basis of the recognized full legitimacy of the contested deliberation; the decision was also confirmed by the judge of appeal (Consiglio di Stato, 23 May 2011, n. 3106).

To complete our survey we must yet consider that form of retroaction of remedies which descends from the outcome of the judiciary proceedings and is necessarily linked to the retroactive nature of the decision which annuls the contested act.

As a matter of fact the Court shall quash the invalid administrative act according to an *ex tunc* model, so that the effects of the act are made undone retroactively, and then remit the matter to the Authority which has to re-exercise the power "now for then" in order to amend or substitute the invalid act abiding by the rules and principles given by the Judge.

The modified or readopted measure will have the same date of application as the original contested act.

To this end it is interesting to quote a recent, conspicuous case n. 6639/09 CONTO TV versus Agcom concerning the control of the agreements among television operators for the access to the digital television Platform of Sky; the agreements in question were supposed to replace the former ones expired on 13 December 2007.

The plaintiff, a television operator accessing the Platform, basically contested Agcom, del. n. 233/09/Cons of 28 April 2009, insofar as it recognized certain common costs of the Platform as due also by the same operator.

SKY Italia, on its turn, claimed a larger participation of the accessing operator to the costs of the Platform.

It must be underlined that the regulatory decision, following a very articulated administrative procedure, had been adopted far after the entering into effect of the agreements in question and so it was necessarily meant to extend its effects also in the elapsed period.

The Court, also on the basis of a Decision of the European Commission C (2003) 1082 on the Commitments of the Network operator deriving from the concentration (SKY Italia), partially annulled the decision since it prevented Sky from recovering certain common costs of the Platform from the acceding operator, and ordered the Authority to amend the remedy accordingly (Tar Lazio, III ter, 6 October 2011, n. 7759).

So in this case the retroactive effect of the judicial decision emphasized the retrospective nature of the remedy as amended *now for then* by the same Authority as a result of the judiciary proceedings.

4.3 *The "horizontal" extension of the retroactive effect.*

To finalize our review it rests to consider how and to which extent the Authority feels obliged to execute a judicial decision involving a retroactive effect.

To cite an example, upon appeal of Telecom Italia the 2nd instance Court had stated that Agcom, del. n. 11/03/Cir, though introducing a legitimate asymmetric measure for Telecom, so much illegitimately had failed to establish specific criteria of reasonableness and proportionality for the prices of termination of alternative operators and define a time limit or a glide path for the perspective mitigation of the asymmetric measure in question (Consiglio di Stato, 10 July 2006, n. 4888/07); to this end the Judge demanded to the Authority the determination of the mentioned criteria and limits, that should be used also for the resolution of disputes concerning the prices of termination of alternative operators.

In Agcom, del. n. 39/08/Cir of 21 may 2008 the Authority, on giving execution to the judicial decision n. 4888/07, considered necessary to establish "now for then" – in reference to a period of time completely elapsed - criteria through which evaluate the claims from alternative operators for prices of termination different from those practised by Telecom Italia, but deemed it possible only in relation to the sole contractual relationships still interested by litigation and yet pending, whereas contractual relationships already agreed and closed, as freely arranged by the operators, could not be interested by those new criteria.

We can then conclude by saying that the retroaction of effects of a remedy, as amended or substituted by the Administration after a judicial review, is not absolute but it basically encounters a limit in the existence of situations and positions already defined, closed and undisputed.

* * *

Dear Organizers, dear Colleagues,

In the past few decades the huge boost of citizens' expectations vis-à-vis the State, as a remarkable effect of democracy, has been accompanied by an equal increase in society's demand for justice."([4])

In the field of electronic communications the daily challenge for the Judge is to tackle with essential resources, such as radio and television frequencies, numbers, rights of way.

The objective of the "Framework Directive" (2002/21/EC of the European Parliament and of the Council of 7 March 2002) is to establish a harmonised framework for the regulation of electronic communications networks and services.

A judge shall exercise his duty being fully independent and keeping a view to respecting the fundamental rights and freedoms of natural persons.

By this mention I finish my intervention and I thank you all for your courteous attention.

Rosa Perna

[4] "Today, those seeking justice constantly intermingle their expectations of fairness and impartiality with those of effectives and promptness ",Report by Prof. Luigi Berlinguer, "Improving the self-governance of the judiciary to meet citizens", at the 3rd European Conference of Judges on the issue "Which council for Justice?" held in Rome, 26-27 March 2007,