Informed decision making, Judicial review and complex facts

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The relationship between the duty to investigate and the duty to cooperate

• The ACA general report findings: general rules complemented by specific rules

• There is a duty to investigate. This duty exists by definition in ex officio proceedings but also in proceedings by application. The scope of investigation is determined by the administration in ex officio and by both the parties and, to a limited extent, by the administration in by application proceedings.

• We can distinguish two cases:
  • 1) The scope of the duty to investigate by the administration is independent from parties’ contribution
  • 2) The scope of the duty to investigate is dependent upon parties contribution’. The duty of the administration results in incentivizing or sanctioning parties for failure to cooperate
The relationship between the duty to investigate and the duty to cooperate

• The duty to cooperate
• The parties duty to cooperate with the administration varies according to:
  • 1) the subject matter of the activity
  • 2) whether the proceeding is ex officio or by application
• The duty to cooperate can translate into
  • A) an obligation to present evidence (smaller group of MSs)
  • B) an obligation to substantiate the claim by making statements (larger group)
• The duty to cooperate is not always enforceable. When it exists its enforceability results in dismissal of the application or in very limited cases in fines
The relationship between the duty to investigate and the duty to cooperate

• Is there a relationship between the duty to investigate by the administration and the duty to cooperate by the parties?

• Yes! But it varies depending on the intensity of the duty to cooperate

• The duty to investigate tends to be wider when the duty to cooperate is narrower

• The duty to investigate by the administration tends to be narrower in scope when the duty to cooperate is wider
The Italian answers to the questionnaire: a quick summary

• 1) The administration has a duty to investigate the facts in order to make an informed decision.

• 2) Parties have to cooperate in the fact finding process according to the duty of loyal cooperation. They have to provide the administration with truthful and reliable information.

• 3) There might be differences between proceedings ex officio and proceedings by application. In proceedings by application it is the party’s responsibility to collect and convey truthful and complete information but the administration has both the power to verify and the power to further investigate the facts.

• 4) **Incomplete versus false information.** The administration has a limited duty to collaborate with the party when it appears that information are missing or inaccurate (soccorso istruttorio). It does not have such a duty when the provided information is false.

• 4.1) When private parties supply incomplete or inaccurate information the administration should require its correction. The administration can ask the parties to provide the missing information.

• 4.2) When private parties supply false and deceiving information no duty to cooperate and elicit truthful information on the administration exists. On the contrary the provision of false information may have procedural or substantive negative consequences. (exclusion from the procurement, rejection of the application for building permission).
Asymmetry of information and informed decision making

• The duty to cooperate mitigates and reduces asymmetric information.
• Two forms of asymmetric information
• Asymmetric information between the judge, the administration and private parties
  • 1) Asymmetry of information between the administration and private parties
  • 2) Asymmetry of information between the judge and the parties
• When there is asymmetry of information between the judge and the parties the judge can:
  • A) ask the parties to provide information through preliminary investigation
  • B) order ex officio expert witness to provide the judge with the necessary information and knowledge to identify and interpret the relevant facts (artt. 64 ff. c.p.a)
The evolution of judicial review in the Italian system of administrative justice

• Discretion in judicial review: to determine the relevant facts, to interpret and to evaluate them. Discretion is higher in interpretation and evaluation

• There is a consistent trend towards full judicial review but with different intensity in the various domains

• The main driver of wider judicial review is warranting the right to effective judicial protection

• The principle of effectiveness and effective judicial protection as the foundations of the broader scope of factual and legal inquiry in reviewing administrative activities.

• The scope of judicial review is not unlimited. Balancing legality and effective judicial protection in defining the scope of judicial review

• **The limits of judicial review**: the principle of legality and the separation of power. The Court cannot replace and substitute the administration

• The differences between judicial review of independent regulatory authority and branches of the administration. Does regulatory independence matter to defining the scope of judicial review?

• Judicial review increases the accountability of independent regulatory authorities. It preserves the independence from executive power.
The objectives of judicial review: Reducing asymmetry of information

• Judicial review and informed administrative decision making. Who should provide the information?
  • I) Asymmetric information between the administration and private parties
  • A) when the administration has cheaper and easier access. Reversal of the burden of proof
  • B) when the private parties have cheaper and easier access. Power of the administration to seek information from the parties
• Administrative bounded rationality and the necessity to fill informational gaps. The administration and the Independent administrative authorities have to obtain information from private and public actors.

• Judicial review scrutinizes both whether and how information have been gathered by the administration
  • A) failure to search for the necessary information
  • B) inaccurate fact finding
• Can/should the judge fill the gap?
• Can/should the judge correct inadequate information gathering?
• The scope of judicial review when the administration fails to address asymmetric information in the context of factual complexity
• PRINCIPIO DISPOSITIVO CON METODO ACQUISITIVO
The scope of judicial review: comparing the review of regulatory and individual administrative acts

• The distinction between administrative regulatory and non regulatory acts

• 1) The distinction between review of regulatory and non regulatory acts in urban planning and construction law

• 2) the distinction between review of authorities with and without regulatory power

• A) Independent authorities exercising regulatory powers (ARERA, AGCOM, ANAC)

• B) Independent authorities exercising sanctioning powers (AGCM)
The scope of factual investigation: Ex officio powers and effective judicial protection

• The factual inquiry and the limits of ultrapatita
• The allocation of functions between parties and judge
• Expanding ex officio powers to warrant effective judicial protection?
• Raising ex officio questions expands the scope of judicial factual inquiry
• The power to raise questions of its own motion and the factual inquiry: the example of unfair contract terms and unfair trade practices.

• The correlation between the right to effective judicial protection and informed administrative decision making
The scope of judicial review in complex factual situations

• Factual versus technical complexity
• Reducing asymmetric information between the administration and the private actors, between the judge and the parties
• Decomposing factual complexity
• The power of the judge concerns:
  • A) the scope of fact finding
  • B) The control over the coherence and consistency of factual representation
  • C) The falsifiability of the underlying scientific theory (Cons. stato, sez. III, 2708/2015)
The scope of judicial review: Review of the facts

- I) **Review of fact finding** in the preliminary investigation (istruttoria procedimentale). Review of the methodology of fact finding by the administration. Review of the outcomes.

- II) **Review of the content of the facts**
  - A) truthfulness/falsehood
  - B) logic, overall consistency
  - C) falsifiability (CDS, sez. III, 5708/2015)

  «10. Le censure dell’appellante, che muovono da un malinteso senso degli effetti conformativi del *dictum* giudiziale, sono viziata da un fondamentale errore metodologico, che consiste nell’assolutizzare il valore del modello economico dell’orientamento al costo, cioè che né la Commissione, nelle sue osservazioni, né questo Consiglio, nella sentenza, hanno inteso fare, dimenticando che esso, al pari di ogni ipotesi scientifica, può essere falsificata, come insegna l’epistemologia moderna, e non è dunque un dogma o un punto di partenza indispensabile, ma semmai il risultato, preferibile o meno, di una indagine rigorosamente condotta sul piano istruttorio dall’Autorità competente.

- 10.1. Il sindacato giurisdizionale sull’esercizio della discrezionalità tecnica, persino in sede di ottemperanza, ha ad oggetto che la *falsificabilità*, e non già la falsità, del modello scientifico prescelto dall’Amministrazione e verifica se tale modello, una volta prescelto dall’autorità competente, sia poi applicato da essa coerentemente e conformemente alle premesse, regole e ai principi propri di quel modello e, cioè, *iuxta propria principia*, senza giungere a risultati aberranti o, per la divergenza del risultato rispetto al fine del potere esercitato, sconfinanti nell’eccesso di potere.»
Review of the theory to select and interpret the relevant facts

- **Regulatory decisions must be evidence based.** The regulator has to make informed decision based on technical and scientific evidence. Judicial review concerns
  
  1) **The choice by the administration of the scientific method to select the appropriate facts.**
  
  - The judge can question whether the economic theory permits to select the relevant facts
  
  - **Examples**
    - Different economic theories used in competition law to define an unlawful agreement or/and unfair trade practice
    - Different economic theories used in regulation to determine and calculate tariffs
    - Different medical theories to define whether the appropriate therapies have been chosen (vaccines, therapy against cancer)

  2) **The choice by the administration of the appropriate scientific method to correctly interpret the facts**

  - The judge can question whether the choice of the theory permits the correct interpretation of the fact
  
  - Example: choosing between art and architecture to evaluate the landscape. Whether the art history or the architectural theory best allow to evaluate the violation of landscape law

  3) **The concrete application of the scientific method to the fact**
The scope of facts review

• When can the Judge quash the regulatory acts? Limits and powers of the judicial review in the case of gas transport tariffs in Italy

• (C. St., sez.VI, n. 2888/2015)

• Despite the Judge “cannot substitute himself to the regulator”, his competence must not be “restricted to an external exam of the discretionary analysis”, but has to be extended also to:

• “the exact representation of the facts”;  
• “the matching of the regulation to the actual data”  
• “the reliability of technical operations”  
• “the correctness of the criteria applied, according to the parameters of the relevant discipline”
Neither abstain nor replace

• The ‘psychological’ risks of ‘physiological’ complexity of regulatory decisions in the case of gas distribution tariffs in Italy (C. St., sez.VI, n. 162/2016)

• The case on gas distribution tariffs is particularly interesting for what could be considered as a ‘psychological’ approach. The starting point was, as usual, the acknowledgment that “Regulatory choices on tariffs are often highly complex and technical, and require a knowledge of sectoral disciplines, both economical and technical.”

• The Italian Council of State affirmed that, the Judge “must re-use the same technical criteria as the Regulator” in order to “verify from the inside” whether the regulatory choice is “reliable and reasonable”.

• In that case, the Regional Administrative Court of first instance had quashed the regulatory act “stopping at the surface”, looking only at what “looks reasonable”, and “considering inadequately motivated every non-immediately-intelligible choice”.

• On the contrary, the Administrative Judge has the duty to “go beyond the appearance” and to verify “the effective rationality” of the regulatory choices, including:
  • - connecting the rate of return on private risk investments to 10-years Italian State Bonds
  • - increasing the ratio between venture capital and debt capital
Preliminary conclusions: Neither abstain nor replace

• The scope of judicial review: when facing complex factual settings the Italian administrative judges neither abstain from investigating nor replace the administration in fact finding. They engage in deeper investigation collaborating with the parties.

• Judicial review can scrutinize the exercise of regulatory power with differences between Independent Administrative Authorities and branches of the administration

• In the former, the scrutiny can involve the choice and the appropriatness of the method to select and interpret the facts. In the latter the scrutiny verifies reliability, reasonableness, internal consistency and lack of arbitrariness

• When the review is limited to reasonableness, logics and lack of arbitrariness the judge can impose procedural guarantees by requiring the administration to engage operators in order to find the most adequate and well informed solution
Preliminary conclusions

• The scope of judicial review is wider for AAI than for the administration.

• The differences between AAI and administrations (branches of the executive) are more significant in relation to regulatory acts. Partial convergence occurs in relation to sanctioning.

• There is a divergence between constitutional values and fundamental rights in defining the scope of judicial review.

• In the past the reference to constitutional values (landscape, environment, health) has determined the limits of judicial review. Currently the reference to fundamental rights protection expands rather than limits the scope of judicial review.