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Interim relief from the Court

the Italian experience

Honourable Chairman,

Let me thank the Organizers of the event for this conspicuous occasion, I am really pleased to introduce myself to such a noticeable audience and enrich the debate on the relevant issues in the Agenda.

I attend my duties at the Administrative Court of Rome, the organ of administrative justice of 1st instance which basically deals with disputes between citizens and public bodies, and that has come to represent a sort of "Hub of the Administrative Justice" in Italy today, considering the sensitive nature of litigations brought before the Judge and the dimension of interests involved.

I am very pleased to steer the attention of the Participants towards the Italian legal system, a system of *Civil Law* basically founded on the legislative sources of the law and leaving to the Judiciary the task to apply the positive provisions upon their correct interpretation.

I do hope that in the present debate, as focussed on interim measures from the Court, the Italian model can offer a useful and stimulating example of the judicial recourse to provisional measures, especially when they aim at protecting European rights or rights having a constitutional rank coming into consideration in domestic litigation.

The Italian model of administrative proceedings

Before entering the topic at hand, we must state that the Italian administrative proceedings - recently refurbished by a complex work of reform – is regulated and scanned by a the Code of the Administrative Proceedings, enacted by legislative decree n° 104/2010; the "Code" sets some basic principles for the administrative trial - some of them of European derivation - such as: slenderness and simplification of the proceedings, reasonable time of the process (article 6 European Convention for the

Protection of Human Rights and Fundamental Freedoms - ECHR), concentration and effectiveness (article 13 ECHR) (1), full implementation of the debate through the respect of the adversarial principle.

These principles find expression also in the interim, precautionary phase of the proceedings.

The principle of an "effective remedy before a national authority", as set by article 13 ECHR, is pursued through the arrangement of a fairly wide set of actions, all giving rise to cognizance proceedings: an action for annulment of administrative decisions; an action for compensation for damages; an action against "the silence" (i.e. inactivity) of a public administration and, as from 2012, an action for the order to administration to issue a certain act (as a substitute for the annulled act).

The enforcement of the judgements is guaranteed through a special action, namely through the "*giudizio di ottemperanza*" (i.e. enforcement proceedings).

We must also consider that as a general rule the jurisdiction of the administrative judge is a jurisdiction of legality, implying a verification of the legitimacy of the administrative act and not of the decision's substance (possibility of a different administrative decision) so that the judge cannot interfere with the merit of the discretionary choice made in the act and take a decision in the place of the administrative authority (2).

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2 As for the limits of the national judge's review of the acts of an administrative authority, it has been pointed out that the administrative judge can with a full cognition check the facts considered in the proceedings as well as the evaluation process through which the Authority has come to apply the very rule of law, undisputed being however that, where the legitimacy of the action and the correct use of the underlying technical rules have been ascertained, the jurisdictional review cannot go beyond so as to substitute the judge's evaluation to the one already effected by the Administration, who remains the sole subject in charge of the exercised powers (Ex multis: **Cons. Stato, VI, 12.2.2007, n. 550; Cons. St., VI, 10.3.2006, n. 1271; TAR Lazio, Rome I, 24.8.2010, n. 31278; id., 29.12.2007, n. 14157; id., 30.3.2007, n. 2798; id., 13.3.2006, n. 1898).**

In process of time, the national courts have definitely come to affirm the lawfulness of a stronger, more incisive review of the judge, even on acts of the national regulatory authorities (especially of antitrust authority, characterized by a high level of technical discretion as well as by the use of indeterminate juridical concepts having their roots in the economic science), oriented to a full and effective tutelage of the individual juridical situations deducted in litigation. This intrinsic review of the judge has lately been deemed as comprehensive of a re-examination of the technical evaluations made by the Authority as well as of the economic principles and the indeterminate juridical concepts applied (**Cons. St., VI, 20.2.2008, n. 595; 8.2.2007, n. 515)**, and is to be conducted by the judge by having recourse to rules and technical knowledge belonging to the same disciplines applied by the Administration, also with the aid of experts (**Cons. St., VI, 23.4.2002, n. 2199).**

Also in the field of electronic communications the judge has finally relinquished its previous reluctant attitude towards the cognizance of the material issues underlying the highly technical matter at hand, and reconsidered his own role by enriching his practise with the jurisprudential attainments already registered in the contiguous antitrust sector (**Cons. St., III, 2.4.2013, n. 1856; 28.3:2013, n. 1837; Tar Lazio, Rome, I, 14.4.2014, n. 4032; id., 21.6.2013, n. 6259; III ter, 14.12.2011, n. 9739**), so resulting more consistent with the trends emerged in the forum for national judges organized by the European Commission in order to elaborate and disseminate an *acquis communautaire* for the sector (see, for instance: "Seminar on predictable market regulation and effective right of appeal", November 26, 2012; "Implementing the revised regulatory framework in electronic communications", November 29, 2011).

The described legal context is aimed at conflict resolution as far as the judge's attention is focussed on the requests of the applicant, not only in view of a due tutelage of individual rights and legal interests but, as far as possible, also keeping an eye on the settlement of the conflict.

This having considered, I do hope that in the present debate as focussed on interim measures from the Court, the Italian model can offer a useful and stimulating example of the judicial recourse to such an instrument, especially when it aims at the protection of European rights or rights of constitutional rank coming into consideration in domestic litigation.

I shall focus my attention on interim measures given by a chamber in the precautionary phase of the administrative proceedings, which is the most common situation. ([3])

The precautionary phase of the proceedings

It is a functional phase, instrumental in the decision on the merits of the claim, aimed at ensuring effectiveness to the final decision through the granting of provisional measures under certain conditions (interim measures). In practise the granting of provisional measures apt to avoid that the contested administrative acts generate final modifications in the factual reality more often represents the only chance of protection of the citizens; it follows that the interim measure is essential to grant the positive end of the proceedings and its practical utility, saving the good to which the claimant aspires and that could be damaged owing to the duration of the trial.

The legal requirements for a provisional measure. According to the Code of the Administrative proceedings, the applicant, while waiting for a final decision on the

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[3] Sticking to the procedure, the provisional measures are generally issued by a chamber in case of a **heavy and irreparable prejudice** alleged by the plaintiff (art. 55 of the Code).
In cases of **extreme gravity and urgency**, an interim measure is taken by the President of the court, as soon as the applicant files his claim, and is later approved or revoked by the Chamber in the first non public hearing (art. 56).
Only in situations of **exceptional gravity and urgency**, the applicant may ask for the issue of an "ante causam" interim measure, before he files his claim (measure "ante causam") and a proceeding is initiated (art. 61): as a matter of fact the Code has extended the applicability of "ante causam" interim measures to all trials before the administrative Court, generalizing an instrument provided for the sector of public procurement procedures and public contracts by special legislations.

merits, by alleging that the execution of the challenged act causes him a heavy and irreparable prejudice, may ask for the adoption of interim measures which, under given circumstances, are likely to appear suitable to better ensures effectiveness to the decision itself (art. 55, par. 1, of the Code). The legal requirements 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 prejudice during the time necessary to come to a decision on the claim, which must be compared with the public interest involved in the case.

The judicial order, to be released upon a cursory examination of the case, must be grounded accordingly.

In the practical applications the reference to a "prejudice" has been considered comprehensive also of injuries other than property damages (i.e. damages of economic or patrimonial nature, bankruptcy for undertakings), such as the damage to reputation (like in case of antitrust fines) or the violation to the right to express one's ideas (in cases concerning radio and video broadcasting: Tar Lazio, I, 4.7.2013, n. 2634; id., 21.6.2012, n. 2174).

The idea of the irreparability of the prejudice has been interpreted in different ways, sometimes as the attitude of the damage not to be refunded, in other cases as something further and different, not precluding the issue of an interim measure when the prejudice is refundable with the final decision.

Generally speaking, in the view of balancing the different interests involved in the case, the Judge shall consider all probable consequences of the act on all the interests invested by it and potentially apt to be injured, as well as on the public interest. As acute doctrine has underlined, the Judge should take into account also the effects that the interim measure might produce towards the Administration and towards the nominally opposed parties, by making a comparative evaluation of interests according to non codified criteria, based on his own wise appraisal. ([4])

[4] When the measure may cause irreversible effects, the judge can order the plaintiff to give a caution money, except in cases concerning fundamental rights of the person or other goods of primary constitutional relevance. The rare application of money caution in the interim phase is due, on one hand to the incidence of provisional measures on fundamental rights, on the other hand to a certain vagueness in the wording of the provision, and finally to the peculiarity of the interests in consideration in the administrative proceedings – where the damage caused to the public interest by the suspension of

Legal models of measures

The Code confirms the atypical character of the interim measures identifying them as the measures, among them the injunction to pay a provisional sum of money, more suitable to ensure the effectiveness of the decision on the claim. The principle of atypicalness is the result of a long transformation of the traditional suspensive order, due to its inability to safeguard the claimant anytime the contested act was a negative act or a default of the Administration, which could not be technically suspended.

Crossing the legal requirements with the paradigm of the Administration's acts we run into different forms of protection which the Court, by touching upon the ground of the complaint and the existence of a danger, can grant or otherwise refuse during the precautionary phase of the proceedings.

The practice has identified the following models:

1) suspensive orders, which suspend the execution of the contested act, generally until the definition of the case on the merits: they are proper and useful when the claimant is interested in keeping his own juridical sphere unchanged and unaffected by the administrative act;

2) propulsive orders (remands), which urge the Administration to renew the procedure, with a new examination of the contested act, an implementation of the investigation or the evaluation of profiles, also substantial ones, previously disregarded.

By means of this technique the Judge can intervene in a moment when it is still possible to avoid that the alleged violation produces its effects and, as far as practicable, to readdress the following behaviour of the Administration, which is of critical importance not only for the good conduct of the public subjects but also for the competitiveness of the country as a whole.

Inside this technique we find two macro-categories:

I. Orders which remand the case to the Administration, having recognized more or less explicitly the utility of a new examination of the question "in the light

administrative acts is often more serious than the damage covered by the caution, so that the balancing of interests involved is made by the Court in advance, when evaluating if the claim is grounded.

of the grounds" of the claim ([5]); in these cases the propulsive order does not oblige the Administration to exercise its powers in a predetermined direction and towards a predefined result.

II. Orders which remand the case to the Administration, with punctual indications for a new investigation and/or the definition of procedural requirements, reasoning paths or evaluation elements to be taken into account ([6]); in these latter cases the intervention of the Judiciary, even though does not contain the obligation to conclude the administrative procedure with a predetermined result, nevertheless is surely more influential and incisive on the conduct of the Administration.

3) positive orders (substitute orders), through which the Judge directly adopts the determinations necessary to avoid that the time required for the definition of the trial thwarts (frustrates) the interest of the claimant irreparably; they can be admitted as far as the Administration has no discretionary power to question the good result of the pending proceedings and are useful when the claimant is interested in modifying his own juridical sphere by means of an administrative act.

Practical examples

With reference to the different kinds of provisional intervention above considered, we will now inspect the most recent jurisprudential attainments registered in Italy in the matter of interim measures granted by an administrative Court.

[5] **Council of State**, **ord. n. 5009/2011**, on a denial of transfer of an official in spite of the health conditions of his spouse; **TAR Calabria**, ord. n. 28/2013, on confidential information of the Prefect on Mafia-like nature of the claimant's acquaintances; **TAR Lombardia**, **ord. n. 379/2013**, on the expiry of a concession of a public space in a protected area to exercise a commercial activity, and the duty of the Administration to indicate another equivalent pitch outside the area; **TAR Toscana**, **ord. n. 809/2011**, on the denial of authorization to exercise games by means of visual display units.

6 **Council of State**, **ord. n. 4084/2011**, on a denial of updating of residence permit for foreigners; **TAR Lazio**, **ord. n. 1808/2012**, on a denial of concession for the construction and exercise of a clearance space in the Grand Ring Road in Rome; **TAR Lombardia, Brescia ord. n. 111/2012**, on the revocation from the office of town councillor for non attendance at the meetings: the act merely took formal note of the justification given by the party concerned, without however considering it, with an evident lack of reasoning; **TAR Sicilia**, **ord. n. 561/2013,** on a denial of authorization to the transfer of a chemist's shop from the centre of the town to another city district: the administrative act lacked in reasoning, not having duly considered the factual concentration of chemist's shops in the centre - it has been ordered to the Administration to evaluate the request again, primarily with reference to the new seat indicated by the claimant and eventually also to different seats to be proposed, if necessary, by the Administration itself, also taking into consideration the consumers' wants.

1) SUSPENSIVE ORDERS: right to health and scientific research (The Stamina Method), environmental law (The lagoon of Venice), state aid (Airports of Milan), competitive procedures;

a) Right to health and scientific research - <u>The Stamina Method</u> ([7]) : on the experimentation of the "stamina method", proposed by a private foundation, the Court suspended the ministerial decrees concerning the appointment of a scientific Commission for the experimentation of the method (due to a lack of objectivity and impartiality of the members) and the following acknowledgment by the Ministry of the negative opinion expressed by the Commission on the experimentation itself (due to incompetence and cursory investigation of the Commission);

b) Environmental law - **The lagoon of Venice** ([8]) : on a severe limitation of transit in the Canal of Giudecca for passenger ships of a certain gross tonnage, introduced by the Harbour Office of Venice for the protection and safeguard of the natural environment of the Lagoon of Venice; the Court suspended the act for infringement of the principle

[7] A very famous case in a sensitive matter (health and scientific research) has concerned the ministerial decrees on the experimentation of the "stamina method", contested by a private foundation proposing this method. The decrees concerned the appointment of a scientific Commission for the experimentation of the method and the following acknowledgment by the Ministry of the opinion expressed by the Commission on the exclusion of the experimentation of the stamina method.
In the precautionary phase the Court has suspended both the decrees (**TAR Lazio**, **ord. n. 4728/2013**), having deemed that:

- in the nomination of the scientific commission for the clinical experimentation has not been granted the objectivity and impartiality of the judgment, thus harming the work of the whole organ, where the members have approached the experimentation in a biased way, having already expressed a negative opinion on the method before examining the pertaining documentation;
- in the acknowledgment of the negative opinion expressed by the Commission, the Ministry has not considered that no legal provision entrusts the Commission with the task of evaluating the existence of conditions to initiate the experimentation; in any case, the decision of initiating or not the experimentation would have required a thoroughly investigation than the one – fast and cursory - made by the collective organ.

8 The Harbour Office of Venice, in alleged execution of a ministerial decree (D.M. n. 79/2013), had issued an order establishing: for the year 2014 a limitation of transit in the Canal of Giudecca of passenger ships of a gross tonnage superior to 40.000 GT; for the year 2015 a prohibition of transit in the Canal of Giudecca of passenger ships of a gross tonnage superior to 96.000 GT.
The object of the measure was the protection and the safeguard of the natural environment of the Lagoon of Venice.
The undertaking in charge of the handling of traffic operations in the city port contested the act.
The administrative court (**Tar Veneto**, **ord. n. 178/2014**) suspended the order for infringement of the principle of graduality set in the mentioned decree, for which the limitation of transit could be provided only on condition of the availability of alternative practicable waterways: the order lack this specific requirement.
Besides the order lacked an adequate preliminary investigation on the factual elements and of risks connected to the transit in the canals in question, especially of ships of such tonnage, and a proper balance of elements which founded the limitations imposed.

of graduality set out in the ministerial regulation, since the act had not considered the possible availability of alternative practicable waterways.

c) State aids - Airports of Milan ([9]) : on a note of the Italian Administration concerning the starting of an administrative procedure for the recovery of a very relevant amount of money (about 452 million euro), unduly transferred from a parent company to a totally controlled company on the occasion of a capital increase made within a corporate group, in charge of the management of airport services in Milan, in alleged violation of art. 107 of the Treaty; the note, based on a decision of recovery of the European Commission, had been served to the Municipality of Milan as shareholder of the parent company.

The Court suspended the act, having held the illegitimacy of the request for recovery towards the Municipality, which was a mere shareholder of the private legal entity making the capital increase, and also the heavy and irreparable damages deriving from the execution of the act to the Municipality of Milan and to the Milan airports.

However, the judge of appeal reformed the suspensive order owing to the superiority of the public interest, including the general interest of the European Community.

d) competitive procedures (public tenders and procurements, selective procedures): in competitive procedures the suspensive order represents an ordinary

[9] In particular, the Municipality contested the acts of the procedure before the administrative court in Milan, asking for the annulment and, as a provisional measure, for the suspension of them.
The court granted the suspension of the acts (**Tar Lombardia, III, ord. n. 553/2013**), having considered:
a) on one hand that a proceedings on the validity of the decision of the Commission was already pending before the Tribunal of the European Union;
b) on the other hand that at a cursory examination the grounds of the claimant did not appear without foundation :
- in particular, the transfer of money in the period 2002-2010 for the capital increase of SEA Handling S.p.A., totally controlled by SEA S.p.A., was not to be referred to the Municipality of Milan but to the private legal entity Sea spa, of which the Municipality was a mere shareholder; as an effect, the request for recovery towards the Municipality was illegitimate;
- from the execution of the contested note a very heavy and irreparable damage would derive to the Municipality of Milan considered as a public administration and as a representative entity of the territorial community; the subsequent recovery of the sum from SEA spa would determine its insolvency and probably its bankruptcy with very serious consequences for the employees (about 2300) and for the regular execution of handling operations at the Milan airports.
But the judge of appeal reformed the suspensive order of the 1st instance Court and rejected the request for interim measures, having deemed the superiority of the public interest, included the general interest of the Community, also considering the request from the European Commission to give prompt execution to the decision of recovery (**Council of State, IV, ord. n. 3756/2013**).

instrument to give interim relief to a participant who has contested a positive act of the procedure, such as the evaluation of the technical or economic offer of an undertaking, the admission of a participant to the procedure, the evaluation of qualifications or tests of a participant, the minutes of the Commission, the provisional or final classification of the participants, the nomination of the winning participant, the adjudication of the public contract to an undertaking.

In public tender procedures it is relevant to notice that the judge has traditionally been reluctant to grant an interim measure in cases in which the Administration had already close the contract to be adjudicated (Council of State, V, ord. n. 5207/2011).

This trend has lately changed; in most cases the judicial suspension has been granted, although limited to the effects of the adjudication and with a remand to the Administration for a decision on the contractual relationship with the third party until a pronouncement on the merits was delivered (Council of State, IV, ord. n. 1680/2013; id., VI 5810/2010). In some cases however interim measures have directly concerned the effects of the contract already closed (Council of State, IV, decr. n. 1590/2013; id., V, ord. n. 4677/2011).

2) PROPULSIVE ORDERS (REMANDS): education (National qualifying examinations for Senior Lecturer), telecommunications (the transition to the digital television).

e) Education - National qualifying examinations for Senior Lecturer (10): In the precautionary phase of the proceedings against a denial of qualification, interim

10 In the recent animated litigation brought against the Ministry of Education in matter of national qualifying examinations for Senior Lecturer – associate professor, in the precautionary phase the Court has sometimes given interim measures by issuing a remand to the Administration for a new examination of the single candidates by a different Commission, in cases of:

- an absence in the first Commission of experts in the peculiar scientific area of the candidate (**Tar Lazio, ord. nn. 1332/2014 and 1351/2014);**
- a divergence in the evaluation of the Commission from the opinion expressed by the appointed external expert (**Lazio, ord. n. 1113/2014)**;
- inadequacy of the evaluation of the publications of the candidate (**Tar Lazio ord. n. 1115/2014);**
- a lack of evaluation of the candidate's qualifications and curriculum vitae (**Tar Lazio, ord. n. 1347/2014);**
- inconsistency between the final judgment of inability rendered by the Commission and the positive evaluations given by single members **(Tar Lazio, ord. n. 1363/2014).**

measures have been given in the form of punctual remand to the Administration for a new examination of the single candidates to be operated by a different Commission, in adherence with the specific indications given by the Chamber (the presence of experts in the peculiar scientific area of the candidate; the consistency between the final judgment rendered by the Commission and the evaluations given by single members; the relevance of the opinion expressed by the appointed external expert; the adequacy of the evaluation of the candidate's publications, qualifications and curriculum vitae; an so on).

f) Telecommunications - the release of digital radio frequencies in Band 800 MHZ ([11]): a brilliant example of the intervention of the administrative judge in the precautionary phase of the proceedings to grant interim measures has been lately offered by litigation in the matter of radio and video broadcasting, in which the judge has tried to give substantial protection to the position of the applicants by granting the formal respect and the correctness of the administrative procedures concerning the transition to the terrestrial digital television.

In particular, with regard to the release of frequencies in "Band 800 Mhz" - devoted to the broadband mobile services and previously attributed to local operators in regions already digitalized - legislative provisions have introduced a form of voluntary release of the frequencies in question to the State for a valuable consideration.

In this case the role of the administrative judge has been decisive to grant the largest participation to the procedure, by ordering the Ministry to re-open the terms – already

[11] In Italy, the transition of video broadcasting to the digital system has suffered from factual circumstances and legal criticalities linked to the previous disorderly, unregulated asset of the ether, resulting in a heavy, unusual and animated ligation before the administrative judiciary, on the part of all kind of operators, national and local, incumbents and minor operator. In controversies where radio frequencies, which are a public and scarce and so a contestable resource, are demanded by different operators, each alleging a plausible preferential title (the area of service already exercised, the prior use of the transmitting plant, the good faith in using the radio frequencies) the principal question that the judge had come to pose to himself concerned the exact "role" to be attributed to the Court in such a sector: a neutral examiner of the legitimacy and legality of the acts of the Administrations involved in the allocation and allotment procedures of the frequencies, or otherwise a sort of Super Authority which recognizes and grants the rights of the claimants, till he comes himself to assign the right channel to the just operator? The answers articulated by the actual pronouncements have gone in the first direction.
Nevertheless the judge has played a central role in the definition of the market of digital television as a whole.
At the end of 2010 the Italian Government had to release the frequencies in "Band 800", in order to devote them to the broadband mobile services according to international agreements and European provisions.
With reference to regions not yet digitalized, where the switch off of analogical transmissions had taken place without allotting frequencies in "band 800", in some cases the Court has ordered the Administration a new examination of the situation of the claimant operators not usefully qualified in the public procedures called for the assignment of the frequencies (**Council of State, ord. n. 1296/2012; TAR Latium, ord. n. 2174/2012, id., n. 3046/2012).**

elapsed – so that the local broadcasters, after an initial tepid attitude towards the relevant procedure, could assent the release, as this would correspond to the general interest to the widest participation of the operators (TAR Latium, ord. n. 1978/2012 and n. 1979/2012); such measures made it possible to maximize the participation and, as an effect, to readdress the following behaviour of the Administration and set limits to future litigation in the matter.

3) POSITIVE ORDERS: telecommunications (the transition to the digital television); competitive procedures (public tenders and procurements, examinations, qualifying examinations: the admission with reservation, i.e. *sub condicione*); telecommunications (Centro Europa 7);

g) telecommunications (the transition to the digital television) : still with regard to the release of the frequencies in "Band 800 Mhz", it is interesting to mention that in areas where the voluntary release of band 800 had not been completed, the Ministry initiated procedures of elimination. In cases of exclusion of operators from the classifications giving right to the assignment of digital frequencies, the Court – in presence of the prescribed legal requirements for granting an interim measure - has sometimes arrived to directly authorize the operator to go on using the frequency previously held (Council of State, ord. n. 1196/2013; id., n. 1620/2013, n. 2552/2013; TAR Latium, ord. n. 266/2013, id., n. 546/2013, n. 547/2013, n. 1271/2013, n. 1559/2013, n. 5188/2013), or to occupy another resource having the same characteristics, to be identified by the Ministry (TAR Latium, n. 571/2013; id., n. 851/2013 and n. 4987/2013).

h) competitive procedures (public tenders and procurements, examinations, qualifying examinations: the admission with reservation): I will not quote any particular case concerning the measure in question, because the admission with reservation has become the ordinary way to protect the interest of the applicant any time he contests an act of exclusion from a tendering or a selective procedure or from examinations and qualifying procedures.

The admission with reservation in competitive procedures is a meaningful example of an atypical use of the interim instrument and represents one of the first expressions of the evolution of the interim protection from a measure aimed at preserving the status quo of the applicant while waiting for a decision on the merits, to an instrument of temporary transformation of the existing situation with propelling rather than conservative purposes.

Against an act of exclusion from a competitive procedure, the uselessness for the applicant of a mere suspension of the act made it necessary, in process of time, to elaborate a provisional atypical interim measure, able to correspond with the needs of protection of the affected party: the admission *sub condicione* to the procedure, i.e. a positive act of the judge provisionally operating though subject to the final scrutiny on the merits of the pending claim. And the effect of this provisional measure is not only the admission with reservation to the procedure or to the exam, but also the utilization of the relevant title – in case of positive result of the procedure – although with reservation of the final result of the pending claim; provided, of course, that the titles and qualifications *medio tempore* obtained by the applicant unavoidably decay in case of unfavourable judgment.

i) the case Centro Europa 7: a final reference to the epic case of Centro Europa 7 represents a must. I assume that the audience is familiar with it.

It was the national private television operator most damaged from the application of the Italian transitory regimes in the radio and video broadcasting sector, holding rights to broadcast but having no radio frequencies to exercise the broadcasting.

After a long lasting controversy this operator has recently brought a new action before the administrative judge in order to have the Italian Administration comply with the administrative agreement closed with the Ministry of Economic Development in execution of the judicial decisions closing the long lasting controversy, stating the right of the operator to have frequencies in order to exercise his rights to broadcast and ordering the Ministry to pronounce again on the demand for frequencies from Europa 7

(12). The frequency had then been allotted in 2008 but it was not sufficient to respect all the technical conditions provided in the Agreement; in particular, the operator had obtained the due frequency and the pertaining plants indicated in the Agreement, but not the patch frequencies necessary to reach all the areas of the national territory as provided in the Agreement, especially those connected to the main plant of Monte Penice in Lombardia. And so in the precautionary phase, the Chamber has supplemented that radio frequency by ordering the Administration to assign the operator free frequencies to broadcast from the plant of Monte Penice (TAR Latium, ord. nn. 1220/2012, 7206/2012 and decision n. 3516/13).

The case at hand is exemplary also from the point of view of the effectiveness of provisional measures, which can be brought to execution through an enforcement proceedings – conceived as an incident of the precautionary phase - in case of non compliance of the Administration with the judicial interim order. As a matter of fact, the Ministry has not given execution to the interim order of its own free will; the applicant has then initiated an enforcement action of the provisional measures so that the Chamber has ordered the Administration to execute the previous interim measure; the measure has been finally executed by a third subject, the so called *Commissario ad acta,* appointed by the judge as an auxiliary of his, to act in compliance with the judicial instructions and in place of the administration, taking any measure required to enforce the decision.

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At this point, before closing my short intervention, I will provide some explanatory figures.

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12 The decision of the case Europa 7 had needed a reference to the European Court of Justice for a preliminary ruling.
The Court of Justice had held that art. 49 of the Treaty and, from the date on which they became applicable, the European Directives on electronic communications, as well as Article 4 of the Competition Directive, must be interpreted as precluding, in television broadcasting matters, national legislation, the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria (**ECG, 31 January 2008, C380-05, "Centro Europa 7" v. Ministry of Communications and Authority for the Guaranties in the Communications).**
The Council of State then ordered the Ministry of the Economic Development to pronounce again on the demand for frequencies from Europa 7.

In 2013 at Tar Latium - Rome about **13.000** appeals against the Public Administration have been filed, of which roughly **6.000** (i.e. **47%**) containing a request for interim measures. Of these requests, only **1.440** have been granted (i.e. **23.21 %**), 2.246 have been rejected (i.e. 36.21%) and the remaining 40% has had a different result.

The statistical data at hand express a confident approach of the public in the request for an interim protection; they show as well a prudent attitude of the judge to grant the requested measure, a special attention in verifying the existence of the legal requirements.

Therefore my conclusion is that the precautionary phase certainly represents a critical moment of the administrative proceedings; it would be consequently desirable to preserve and even emphasize the significance of such a phase since it qualifies the judicial system with the characters of transparency and reliability, and definitely increases the efficiency of the jurisdiction as well as the confidence and the satisfaction of the customers with the judicial system as a whole.
