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Defensive Bureaucracy in Italy: an Introduction

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Abstract

Defensive bureaucracy is considered one of the main factors that hinder the effectiveness of public administration's action. It is a wide notion, that deals with the delicate balance between the need for an efficient public administration and the need for holding public officers accountable for their actions. This introduction aims at defining the issue and to provide the general context for the following studies about the possible factors that influence the defensive attitude of public employees. The aim of the research is to deliver a tool for a first understanding of how the subject is shaped in the Italian legal context, by giving an interdisciplinary overview of the main aspects that concern the topic, in an attempt to contribute to the international doctrinal debate.

Keywords: public administration; bureaucracy; defensive; public officers

Riassunto. *Introduzione al numero monografico sulla burocrazia difensiva*

La burocrazia difensiva è considerata uno dei principali fattori che ostacolano l'effettività dell'azione amministrativa. Si tratta di una nozione ampia, che riguarda il delicato equilibrio tra l'esigenza di una Pubblica Amministrazione efficiente e la necessità di rendere i funzionari pubblici responsabili delle loro azioni. Questa introduzione mira ad inquadrare il tema e a fornire il contesto generale per gli studi successivi sui possibili fattori che influenzano l'atteggiamento difensivo dei dipendenti pubblici. L'obiettivo della ricerca è quello di consegnare uno strumento per una prima comprensione di come si configura la questione nel contesto giuridico italiano, fornendo una panoramica interdisciplinare dei principali aspetti che riguardano il tema, nel tentativo di contribuire al dibattito dottrinale internazionale.

Parole chiave: pubblica amministrazione; burocrazia; difensiva; pubblici funzionari

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1. Definition of the issue

In recent years, the Italian legal and political debate has revolved around what is perceived as one of the main criticisms of the public administration's action: the so-called defensive bureaucracy. The term has been borrowed by the field of healthcare, where the phenomenon of defensive medicine – i.e., doctors prescribing exams and cures in excess, or following standard protocols to avoid liability, placing second the real needs of patients – has emerged as an important field of study. With the expansion of the hypotheses of responsibility attributed to those operating in the medical field, practices of increasing or decreasing healthcare interventions aimed at avoiding litigation have emerged.

Later, the issue of defensive decision-making gained significance in the managerial field,

including the one carried out by public officers. Defensive behavior been defined as the situation that occurs «when professionals opt for the second-best option rather than (what they believe to be) the best option for their organization or client in order to protect themselves from potential negative consequences in the future» (Artinger *et al.,* 2018).

Law and economics comparative studies have been carried out to highlight the main aspects that show an impact on the defensive attitude of public officers. The elements that favor «unnecessarily delayed and overly cautious decisions» (De Mot and Faure, 2014; De Mot and Faure, 2016) include, among others, the uncertainty of legal standards of due care, the scale of damages if found negligent, the lack of public authorities' «liability for acting too cautiously», the limitations on the insurance policy, the lack of incentives in the PA internal organization. Many of these factors seem to characterise the Italian legal system (Battaglia *et al*., 2021).

In Italy, the problem of defensive bureaucracy dates back a long way. Among the possible elements that hinder the efficiency of public bodies, administrative and accounting liability has constituted the main focus of the Italian legislature. The reforms of the 1990s, which placed limits on liability actions and accentuated their sanctioning profiles, can be read in this sense. After Laws No. 19 and No. 20 of the 14th of January 1994, and the subsequent regulatory interventions on the administrative-accounting liability came into force, the Court of Auditors repeatedly raised a question of constitutionality concerning the restriction of liability contained in the reform.

With the pivotal judgment No. 371/1998, the Constitutional Court clarified that the provision on public liability «aims to determine how much of the risk of the activity should be borne by the administrative body and how much by the employee, in the search for a balance that makes the prospect of liability an incentive and not a disincentive for employees and public administrators». The Court deduced from the parliamentary work on this point «the intention to establish, about public administrators and employees, a regulatory framework in which the fear of liability does not expose them to the possibility of slowing down and inertia in the performance of administrative activities»[1].

[1] Constitutional Court, 11th November 1998, no. 371.

The above-mentioned decision shows that the spectrum of defensive bureaucracy already hovered over twenty years ago. Nevertheless, the goal of a «responsibility as a stimulus» does not seem to be achieved yet.

Recently, Italian legal scholars and public institutions have carried out empirical and theoretical studies on the topic. A 2017 survey among public officers showed a very high perception of the risk of being blamed and considered liable for their actions (Piersanti, 2017). A more recent survey, focused on the public procurement sector, has provided data on the hypothetical adoption of defensive decisions in certain typical scenarios by the single procedure managers interviewed, which appears to be lower than perceived, ranging between 10 and 20 percent of the total (Battini and Decarolis, 2020).

Some authors highlighted the increasing number of insurances for liability entered by civil servants as a sign of their fear of being sued for damages (Battini and Decarolis, 2019). Others have studied the wide presence of defensive behaviour in the specific field of public procurement, in the light of legal and economic principles (Cafagno, 2018; 2020).

At the opening of the Court year, the President of the Regional Administrative Tribunal of Rome referred to the «signature phobia» – the attitude of public officers of not acting to avoid responsibility – as one of the main factors that hinder the efficiency and efficacy of the Italian Public Administration (Savo Amodio, 2021, p. 10-11). The last Italian President of the Council of Ministers also referred to the paralyzing effect of this phenomenon at the inauguration of the 2021 judicial year of the Court of Auditors (Draghi, 2021).

The Italian legislator has recently adopted explicit measures to tackle this issue, showing an increasing awareness. Law Decree No. 76/2020 – the so-called Simplification Decree 2020 – has further limited the administrative responsibility of public officers for damages to the State and has modified the criminal provision on the abuse of power (Art. 323 of the Italian Criminal Code). The aim of the reform is to reduce the scope of judicial review by the Court of Auditors and by criminal judges over the administrative discretion and to shield civil servants from liability, in order to spur their action.

2. The research objectives

The topic has proved to be of particular interest for supranational institutions. The perception of a widespread defensive attitude by public officers has recently emerged in the context of an empirical study about the Italian administrative system carried out by the OECD.

More specifically, the idea of the present research stemmed from the «RAC – rating audit control – project: construction of a model to rationalise and simplify controls on businesses»; an international research project, promoted by the European Commission and carried out by the OECD, that focuses on increasing the effectiveness of administrative inspections and controls by better targeting, reducing duplications, and shifting the focus on enhancing compliance. The fieldwork on the implementation of the simplification measures recommended by the OECD has spurred the idea of carrying out a specific study about the possible factors that influence the delicate balance between the need for an efficient Public Administration and the need for holding public officers accountable for their actions, within the Italian legal framework.

The aim of the project is to provide a tool for a first understanding of how the subject is shaped in the Italian legal context, by giving an interdisciplinary overview of the main aspects that concern the topic, in the attempt to contribute to the international doctrinal debate, and in the context of the OECD regulatory policy. The work has been carried out thanks to the financial support of the OECD.

3. Notes for the comprehension of the Italian system of public officers' liability

One of the factors that is widely recognised as favouring defensive bureaucracy is the system of public officers' responsibility (Bottino, 2020). In the Italian legal system, civil servants are subject to different systems of liability (Tenore *et al.*, 2013):

- criminal liability (Palamara and Tenore, 2008);

- civil liability, that usually concerns the public administration as a legal entity, and, only indirectly, the single officer (Cossu and Trapazzo, 2018; Caringella and Protto, 2005; Follieri, 2004; Garri, *et al.,* 2003; Morbidelli, 1999; Fracchia, 1999);
- disciplinary liability, which concerns the relationship between the employer and the civil servant (Tenore, 2010; Noviello and Tenore, 2002; Di Paola, 2009; Sorace, 1998);
- managerial responsibility, that refers to those civil servants who are at the head of the administrative organisation (Bolognino and D'Alessio, 2010; Torchia, 2000; Donato, 2020);
- administrative – accounting (or fiscal) liability, that is the responsibility of a person who has a service (official) relationship with a public body and causes damage to the Public Administration, by breaching the duties arising from that relationship (Tenore, 2018; Altieri, 2012; Garri, 1991; Mirabella, 2003; Corpaci, 2002; Schlitzer, 2002; Cimini, 2003).

This last type of liability falls within the jurisdiction of the Court of Auditors and has a controversial nature (Schiavello, 1988; Tenore, 2018; Santoro, 2011; Police, 1997; Garri, 2012; Schiavello, 2001).

There are, mainly, two schools of thought:

- the civil law thesis, based on the compensatory-reparatory function of liability;
- the public law thesis, which recognises a repressive-sanctioning function, similar to the criminal one.

The civil law thesis is supported by important case law: the European Court of Human Rights expressly excluded the sanctioning-punishment nature of proceedings before the Court of Auditors (Conti, 2015; Pinotti, 2015; Goisis, 2017)[2].

Moreover, the Court of Auditors itself (Judgment 2/2017/QM of 30 January 2017[3]) recognised that there is no obligation to self-report facts causing damage to the State budget.

[2] European Court of Human Rights (2014), Sec. II, May 13, 2014, case no. 20148/09, Rigolio c. Italia.
[3] Retrieved from: https://www.corteconti.it/Download?id=2208675e-d5e5-4285-981d-a155cd94a9c1.

At the same time, however, the legislator, especially since the Nineties, has regulated administrative-accounting liability in a manner in some respects similar to criminal liability, providing, for example, the personal nature of the administrative responsibility – and, therefore, its non-transferability to the heirs (except in cases of unlawful enrichment of the predecessor) – and the obligation of the Public Prosecutor to carry out the investigation (Venturini 2007; Cimini, 2014).

The increasing emphasis on the sanctioning nature of public officers' administrative liability for damages caused to the P.A. has resulted in the introduction of stricter boundaries to this type of responsibility. For example, the limitation of liability of those jointly responsible for the fiscal damage only to those officers who have obtained unlawful enrichment or have acted with malice; the exclusion of judicial review on the merit of discretionary choices; the unlimited power of the Court to reduce the amount of compensation, based on the individual circumstances (aimed at avoiding that the employee is entirely responsible for harmful consequences due to organizational defects or inefficiencies of the administration to which he belongs) and the to take into account the advantages in any way achieved by the administration. These limits have been justified as means to prevent the phenomenon of defensive bureaucracy.

However, the most studied factor in relation to defensive bureaucracy is the psychological element necessary to attribute responsibility to the public employee. The subject emerged as early as the aftermath of the adoption of Decree-Law no. 543 of October 23, 1996, which generalized the limit of wilful misconduct or gross negligence to all public employees. Previously, the liability for ordinary negligence applied to all public employees, and the exception of the gross negligence was limited to certain sectoral categories.

4. The 2020 reform of civil servants' liability

The 2020 Simplification Decree has further limited (until June 2023, so far) the liability of public officers in matters of public accounts to cases where the production of the damage

results from a wilful conduct[4]. The limitation of liability envisaged in the reform does not apply to damages caused by omissions or inertia on the part of the agent (Crepaldi, 2021; Pagliarin, 2021; Carbone, 2021).

In addition, the reform has stated that the proof of fraudulent intent requires the demonstration of the will to cause damage. This provision has clarified that the psychological element of fraud must be interpreted in the light of criminal law.

Finally, the crime of abuse of office has been reformed.

The decision to limit, in the period of the ongoing health emergency, the subjective element for attributing administrative liability to wilful misconduct was openly dictated by the desire to hinder defensive bureaucracy (Torchia, 2020). A systematic reading of the decree shows how the restrictions on administrative responsibility are embedded in a broader reform, which aims to increase the efficiency of administrative action. The measures that provide for the ineffectiveness of administrative acts adopted after the deadline for the conclusion of the procedure; the publication on the websites of the administrations of the actual time required for the conclusion of administrative procedures with the greatest impact on citizens and businesses; the procedures for encouraging investment in relation to the awarding of public contracts are a clear sign of this[5].

The current pandemic context has given rise to a strong push towards the simplification and acceleration of administrative action, as to allow for an effective response to the crisis, as well as, more recently, compliance with the timescales imposed by the National Recovery and Resilience Plan for the implementation of the investments provided for therein.

The intention of the legislator was to reassure the employee on the irrelevance of damages caused by acts of gross negligence, and to spur his action, while discouraging inertia[6].

Administrative inefficiency, due to the omissive conduct of officials, has been tackled in a massive way by the Italian legislator over the years, through other simplification tools. For

4 See art. 21 Decree Law July 16, 2020, no. 76.

5 For an overview, please refer to the contributions by Macchia, Galli, Meoli, Saltari, Urbani, Banfi, Torchia, Clarizia P., Urbano and De Leonardis collected in issue no. 6/2020 of the *Giornale di diritto amministrativo*, dedicated to the analysis of this Decree Law.

6 On the *ratio* of the rule, see: Senato della Repubblica and Camera dei deputati, 2020.

example, in Italian law, the silence of the administration, over the deadline for concluding the procedure, is generally equivalent to a positive response; the law provides several systems for overcoming inertia in relations between different administrations; special procedural mechanisms are put in place to force the administration to decide; the damage due to delay of the P.A. can be requested by the private citizen. The "simplification decree 2021", furthermore, has provided for the identification of a person, within the top management of the administration, or an organizational unit, to which to attribute the power of substitution in case of inertia.

Finally, since 2012 the law states that «Failure to issue the measure, or the delay in issuing it, constitutes an element in the assessment of individual performance, as well as the disciplinary and administrative-accounting responsibility of the manager and the defaulting official»[7]. The novelty introduced by the "simplification decree 2020" appears, therefore, to reinforce a tendency, already present in the Italian legal system, to stigmatize omissive conduct to a greater extent than commissive conduct. However, this approach does not, to date, seem to have solved the problem of the "fear of signing", nor that of delays and the uncertain duration of proceedings.

Moreover, as specified in the previous paragraph, the Court of Auditors is already equipped with a wide range of tools to adjust the liability of the individual public servant in relation to the actual damage caused, to make the compensation proportionate to the seriousness of the individual's conduct and the concrete causal contribution of the latter to the production of the damage, and, above all, to protect the serene exercise of discretionary choices by public employees. Nevertheless, the literature has shown the difficulties of the Court in achieving a balance between its role as a guarantor and its purpose to act as a deterrent, partly because of legislation that is muddled and lacks a systematic approach (Aurisicchio *et al*., 2013).

Finally, the 2020 reform seems to have important repercussions on the insurance systems for covering damage caused by public officials. As mentioned above, the progressive extension of the concept of refundable damage, the increasing tasks attributed to officers

[7] Art. 2, par. 9, Law August 7, 1990 no. 241 as modified by Decree Law February 9, 2012, no. 5.

and managers and, at the same time, the more penetrating and widespread intervention of the Court of Auditors have led to the explosion of the insurance market for damages caused in the performance of the activity of a public employee (Battini and Decarolis, 2019). This trend has led the legislator to expressly prohibit insurance contracts paid by public bodies in favour of their own administrators to cover cases of administrative liability (while there are no restrictions on the administration wishing to offer its own employees cover for civil or "third party" liability). This phenomenon has been considered indicative of the existence «of a significantly high level of perceived risk for administrative officials and managers of incurring liability, especially of an administrative and criminal nature, in the exercise of their functions» (Battini and Decarolis, 2019). The accentuation of the public-sanctioning function and the limitation of the criteria for the imputability of administrative responsibility to wilful misconduct alone constitute an important limit to the possibility for public employees to be covered by insurance. In fact, Art. 1900 of the Italian Civil Code excludes the insurability of damage caused intentionally by the subject. Consequently, the limitation of liability to only malicious conduct reduces the possibility for public officials to be insured against damage they may cause in the exercise of their functions, and this could further exacerbate defensive attitudes.

5. The structure and the content of the research

While it is too soon to assess the concrete effects of the application of the reform enacted in 2020, it seems interesting to analyse the state of the art on the studies on defensive bureaucracy from different perspectives.

One of the main problems with defensive bureaucracy is that we are not dealing with a concrete and clear conduct. As stated in the literature, defensive bureaucracy «does not consist of acts, decisions or even omissions referable to specific obligations to act. It consists instead of more indefinite delaying techniques, of apparent choices, of delays permitted by the law, of formal acts that conceal substantial inertia, etc.» (Battini and

Decarolis, 2019). The difficulties of defining and detecting defensive attitudes are common to those described with regards to the wide notion of corruption, as recently emerged in the Italian legal system. Some authors have noticed how «the 'defensive' officer distorts to individual ends conduct that should be directed to collective ends, not unlike the corrupt officer. Whereas the latter pursues individual gain at a collective loss, the defensive officer foregoes collective gain to avoid the risk of individual loss» (Battini and Decarolis, 2019).

However, while in the field of corruption a series of wide-ranging measures have been adopted in the last decade, which have profoundly affected the organization and administrative action, defensive bureaucracy, as such, has been addressed mainly through a progressive mitigation of certain profiles of criminal and administrative-accounting liability of persons linked by a service relationship with the public administration. These interventions have been included in a broader context of reforms aimed at achieving the objectives of economy, efficiency, and effectiveness of administrative action, as corollaries of the broader principle of good administration, specifically aimed at speeding up administrative action in response to the systemic crisis created by the pandemic emergency.

Therefore, it has been argued that, along with the specific legislation on the Public Administration liability, other elements play a significant role in this regard, for example:

- the chaotic, contradictory and overflowing legislation and regulation;
- the lack of predictability of the consequences for breaching the law or regulations;
- the instability of Governments and the recurrent reforms that constantly change the legal framework where the Public Administration is called to operate;
- the criminalisation of entire sectors of administrative action;
- the lack of incentives and awards for good and fast decision-making;
- the rigidity of career advancement and wage increases, that are not related to the merit of public officers;
- the insufficient mechanisms of performance evaluation and internal controls;
- the lack of effectiveness of disciplinary measures for sanctioning inefficient civil servants.

This complex net of aspects calls for an interdisciplinary approach, that provides a wider

and systemic view of the topic, taking into consideration the liability regime, but also going beyond it.

To assess the factors that may influence the defensive attitude of the Italian public administration, in this monographic number, we start by providing a definition of the issue in the field where the term has been minted; namely, the healthcare. In the first essay, the phenomenon of defensive medicine is analysed in all its different aspects, with the aim of drawing lessons for the field of bureaucracy. Questions on how doctors' liability measures impact on the issue; on how organisational reforms may play a role; and on the importance of restoring trust in the doctor-patient relationship will be addressed.

The second essay focuses on the most evident aspects linked to defensive bureaucracy: the fiscal liability of civil servants. The topic is analysed focusing both on the literature and on the jurisprudence. It illustrates the main features of administrative liability and their evolution over the last decades. The analysis is aimed at examining to what extent the risk of being considered liable by the Court of Auditors does actually hinder the efficiency of the administrative action.

The third paper analyses the criminal provision on abuse of office, as a further factor that influences the defensive attitude of the Italian public administrations. In order to explain the 2020 reform, the author provides a historical overview on the main legislative modifications that intervened on the issue over time.

The fourth paper tackles the issue of the relationship between bad quality regulation and defensive practices. It provides important examples on how the design of administrative legislation in critical sectors, such as public procurement, favours defensive bureaucracy.

Finally, the last article traces and explains the main aspects regarding the subjective elements in civil servants' liability. The study of the relevant case law, mainly of the Court of Auditors, provides a very useful tool to understand the meaning and the possible impact of the 2020 reform on administrative responsibility.

The in-depth analysis of these five aspects, proposed by experts in each of the sectors analysed, is aimed at providing an informed overview of the Italian legislative, doctrinal and jurisprudence framework, where the phenomenon of defensive bureaucracy has developed.

6. Conclusive remarks

Defensive bureaucracy is a recurring theme in the Italian and international institutional debate. This calls for an in-depth analysis of the possible factors that influence the delicate balance between the need for an efficient public administration and the need for public officials to be accountable for their actions.

In this monographic number, the investigation has been carried out, within the Italian legal framework, on the assumption that, along with the specific legislation on the liability of public administration employees, other elements play a significant role in the defensive attitudes of public officials.

The analysis has been conducted mainly from a legal standpoint, not including statistical or economic studies, provided in other papers on the topic. Nevertheless, the approach has been interdisciplinary, as the study of the legal discipline of administrative accounting and criminal responsibility of public employees has been accompanied by a broader view of different aspects related to the in relation to defensive attitudes.

The comparison with the phenomenon of defensive medicine, contained in the first chapter, appears particularly useful. It shows that, even though the fear of litigation is undoubtedly an important factor that favors defensive attitudes, other aspects need consideration. The author of the chapter highlights, for example, the availability of alternative, non-judicial remedies for liability; the impact of the environment where the agent operates; the possibility of insurance covering for responsibility; the importance of the repetitional aspect; and the effects of a «social culture oriented to individual blame». Among the solution proposed, organizational measures and a focus on increasing trust in the doctor-patient relationship seem to play a very important role in tackling defensive bureaucracy.

The reconstruction of legislation and jurisprudence on administrative liability, contained in the second chapter, shows further important elements. First, mechanisms for mitigating and graduating sanctions and protecting the exercise of discretionary powers from responsibility, are present in the Italian legal system, at least since the Nineties. Those tools

are aimed, precisely, at reconciling the need to protect the public administration from the damages suffered, while, at the same time, avoiding a blockage in the administrative action. The enhancement of a public-sanctioning notion of this form of responsibility has entailed a series of measures for grading administrative responsibility. For example, the limit of liability only to those who have obtained unlawful enrichment or have acted with malice; the fact that discretionary choices cannot be questioned on their merits; the power of judges to reduce the quantum of compensation and the limitation of the subjective element necessary for imputing administrative-accounting responsibility to malice and serious fault. The reform introduced by the "2020 Simplification Decree" has focused on this last aspect, which has further restricted the attribution of commissioned conduct to only malice (interpreted under criminal law criteria), maintaining, however, the criterion of serious fault for omissions or inertia. The author of the chapter concludes by pointing out the lack of tools for measuring defensive bureaucracy. Also, he stresses the importance of considering broader legal framework factors, such as regulatory hypertrophy and instability, organizational confusion, and a lack of willingness to recognize real scope for discretion on the part of the administration. Moreover, the excessive legal-formal approach on the part of officers, their old age, the absence of technical bodies and, more generally, the absence of a sufficient selection on the merit are considered. The broad discretion of the Court of Auditors also emerges from the study and contributes to the uncertainty of the rules on liability. Those conclusions seem to be fully confirmed by the analysis of the case law on administrative liability carried out in the last chapter.

The chapter on the "Abuse of Office" crime is also rich in implications. The Author is particularly critical with regard to the 2020 reform. He focuses on the possible "clash" of interpretation with the Supreme Court, which does not seem to accept such a radical reduction of the crime. The chapter suggests a different approach, aimed at reducing the focus on the violation of the law, while focusing only on the pure misuse of power, considered as a significant distortion of the public function, with reference to its scopes and goals, and thus creating a more functional and less formal tool to tackle real abuses.

Finally, the last chapter, while keeping a legal background, offers extremely interesting

insights on the cognitive, and behavioral aspects that impact the defensive attitude of public employees. The Author draws some important conclusions. He suggests, first, a regulatory reform aimed at substantially reducing the costs of compliance, which represent a huge obstacle for public officials, while improving the effectiveness and quality of regulation. He also points out the need to enrich public policies through the analysis of the biases that emerge from the behavioral sciences (such as misperception of risk, inertia, status-quo, loss aversion, and so on) thus improving the quality of regulation and enriching traditional tools or rethink regulation and emphasizing evidence-based decision-making. Moreover, the need for increasing the effectiveness of the checks and internal controls on public officers' performance, by introducing a risk-based approach is stressed. Finally, the chapter focuses on increasing administration capacity, namely the professional skills needed for a modern and efficient public administration.

From all the important considerations contained in the following essays, a wide insufficiency of the Italian legal approach to the issue seems to emerge.

In particular, the "2020 Simplification Decree" has highlighted several critical points. In the first place, the limitation of responsibility for commissioned conduct has been considered a harbinger of responsibility on the part of public officials. The Court of Auditors has pointed out that «the fiscal litigation offers evidence of significant damages resulting, in equal measure, from active and omissive illicit conduct, mostly characterized by the psychological element of gross negligence, thus confirming the reasonableness and unfailing nature of the aforesaid threshold of responsibility» (Corte dei conti, 2022).

Secondly, the permanence of the criterion of gross negligence only for omissive conduct goes along with the numerous existing provisions aimed at stigmatizing the inertia of the public administration and remedying it at a legislative level. Italian administrative law, in fact, envisages various instruments to overcome the inertia of the administration, both in relations with citizens and in decisions involving several administrations, as well as mechanisms to discourage dilatory conduct by public employees. Therefore, the limitation of the subjective element to the sole conduct of the commission, in addition to creating a disparity of treatment in the attribution of fiscal responsibility, runs the risk of overlapping

with other existing provisions that have long stigmatized the failure or delay in issuing the measure.

Finally, the substantial impossibility of insuring oneself for administrative responsibility as configured by the reform (given the nullity of insurance contracts on malicious conduct), risks further accentuating the fear of signature. The possibility of taking out insurance policies on fiscal responsibility, on the one hand, reduces the paralysing effect deriving from the fear of responsibility and, on the other, makes it possible to increase the recovery rate of the sums subject to conviction by the Court of Auditors, which is currently particularly low, due to the frequent insolvency of the uninsured debtor. An accentuation of the compensatory nature of administrative liability, as opposed to the punitive nature, would, on the contrary, encourage the development of the market for insurance policies taken out by employees. Although it is acknowledged that this would risk neutralizing the deterrent effect with respect to unlawful or illegitimate conduct on the part of the administrative official, it has been pointed out that there are also «other instruments, such as disciplinary and penal liability, which, made more effective, appear even more appropriate for the purposes of sanctioning and deterrence» (Battini and Decarolis, 2019).

This complex web of aspects calls for an approach that provides a broader and more systemic view of the issue, considering the liability regime, but also looking beyond it. On this point, the approach to the prevention of corruption adopted by the Italian legislator in the last decade could constitute an important example from which to draw. Indeed, some factors such as organisational complication and regulatory uncertainty are among the causes that encourage both corruption and defensive behavior. Both phenomena are wide and difficult to measure and cannot be dealt with only by focusing on a legalistic-repressive approach.

Regarding corruption, significant organisational and procedural preventive measures have been introduced in the last decades in the Italian legal context, which has imposed on administrations a mapping of their activities, an identification of critical issues, and a consequent assessment of their management. The controls on that matter are shaped based on a risk management approach. Although the anti-corruption discipline has also been

considered as an element contributing to exacerbating the fear of signature by public employees, nevertheless, a more complex and articulated approach to liability would facilitate the identification of defensive conduct by public officials and managers and the consequent provision of dissuasive and preventive mechanisms, not necessarily limited to hypotheses of criminal violations or financial damage.

A good opportunity for tackling the problem lies in the recent provision on the Plan of activities and organisation (PIAO): a form of strategic planning that must be adopted by all public administrations and encompasses diverse existing forms of internal planning. The legislator assigned very ambitious objectives to the PIAO, which touch on almost all essential aspects of administrative action: the quality and transparency of administrative activity; the quality of services to citizens and businesses; the constant and progressive simplification and reengineering of processes; the structural organisation of public offices, the determination of their staffing and the planning of internal controls (Tubertini, 2022). An enhancement of strategic internal planning of PA activity and organisation represents an important occasion to improve, not only the performance of public officials and managers, but, in broader terms, the very effectiveness of administrative action, mitigating the effects of regulatory hypertrophy, enhancing both legal certainty, predictability, and, ultimately, reducing defensive behavior of public servants.

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