

DOMENICO SICLARI, *THE EUROPEAN COURT OF AUDITORS. THE EFFECTIVENESS OF ITS FUNCTIONS IN THE PRESENT FINANCIAL CRISIS*, EUROPEAN PUBLIC LAW SERIES - BIBLIOTHÈQUE DE DROIT PUBLIC EUROPÉEN. VOLUME CVIII. EPLO (EUROPEAN PUBLIC LAW ORGANIZATION) - OSSERVATORIO DELLE POLITICHE PUBBLICHE PER LE AUTONOMIE. UNIVERSITÀ MEDITERRANEA DI REGGIO CALABRIA, 2013, PP. 168.

*Giuseppe Cogliandro**

"Give an account of thy
stewardship,
for thy mayest no longer be
steward"
(Luke XVI.2)

This essay by Prof. Domenico Siclari has two objectives. The first is to demonstrate that, according to the European Treaties, "control of financial management¹ must be carried out by a structure external to the controlled entities" (p. 18). This statement refers to the difference between internal control and external control, which I shall discuss later.

The second is to highlight that *accountability*, i.e., the obligation to "give an account" of public funds by individuals who have used them, "is of fundamental importance for a democratic government" (p. 19).

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¹ On this topic, G. Cogliandro, *The assessment and control system in Italy*, in L. Vandelli (ed.), *The administrative reforms in Italy: experience and perspectives*, (2000), 181.

The principle of *accountability*, as I have already had occasion to note², finds its most solemn formulation in the Gospel's *redde rationem* (Luke XVI. 2) in art. XV of the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789, which established that "*La société a le droit de demander compte à tout agent public de son administration*".

This legal institution, already known to Roman law, which imposed on the *quaestores* and the *provinciales* the duty to *rationes referre* (give account), through the accounts (*rationes relatae*) of the state of the treasury and administration, is now enshrined in Art. 81 of the Italian Constitution³ and is usually found also in other contemporary legal orders.

The first chapter of Domenico Siclari's book concludes with the identification of four categories of "Supreme Audit Institutions" (p. 37):

1. Courts (of Auditors) in charge of administrative controls holding judicial office
2. Collective bodies devoid of judicial office
3. Auditing offices independent of the Government and headed by a Comptroller (Auditor) General
4. Models of control directed by centralized entities, holders of operational functions on a territorial basis.

The expression "Supreme Audit Institutions" (hereafter: SAI) used by Siclari is now in consolidated use in international practice.

In my opinion, this term is inappropriate, however, as these institutions do not have a higher rank than other control structures, as, however, one might infer from the use of the term "Supreme."

In fact there is no hierarchical relationship between the internal auditing body and the external auditing body⁴.

² G. Cogliandro, *Gestione [Conto di]*, *Digesto*, IV edizione, vol. VII Pubblicistico, (1992), 1.

³ An essential work on this issue, despite the amendment due to Constitutional Law, 1/1202 is an analysis of by S. Bartole, in *Commentario della Costituzione*, G. Branca, (ed.) Art. 78-82, *La formazione delle leggi*, volume II, (1979) 197.

⁴ G. Cogliandro (ed), *I rapporti tra controllo interno e controllo esterno*, in *Corte dei conti e Servizi di controllo interno: i rispettivi ruoli*, *Atti dell'incontro di studio organizzato dalla Corte dei conti e dalla Conferenza dei Servizi di controllo interno delle Amministrazioni dello Stato* (2000) 17.

Legislative decree 286 of 1999 on internal auditing (as amended by Legislative Decree 150 of 2009) provides - in addition to ascertaining the lawfulness, regularity and appropriacy of administrative action - two internal auditing structures: one appointed to verify the effectiveness, efficiency and cost-effectiveness of administrative action (*management control*); the other with the authority to assess the adequacy of the choices made when implementing plans, programmes and means of implementing policy (*strategic control*). Management control is established by the executive at the head of an organizational unit to whom it responds and reports; strategic control is established by the political and administrative decision-maker to which, symmetrically with management control, it responds and reports.

On the other hand, external auditing is carried out by institutions, governed by rules which must have constitutional relevance, answering and reporting to Parliament.

Consequently, the appropriate expression is not Supreme Audit Institutions, but "External Auditing Institutions."

After this long digression, it is time to return to the work by Prof. Siclari, who notes that within the framework of the European institutions "the constant factor is the provision of subsequent auditing of the management of administrations from the dual points of view of financial control and performance monitoring." Hence the conclusion that, taking into account their distribution into geographical areas, "the two auditing models constitute a constant given, apart from performance monitoring in Greece" (p. 38).

Naturally, the focal point of the examination of the Supreme Audit Institutions concerns their functions. However, a specific problem arises regarding the exercise of judicial functions in respect of the responsibility of public agents. In this regard, it is obvious that SAIs, set up as auditing bodies, *never* hold judicial office. The converse is not true, however. It is not true that all external auditing institutions going by the name of Court or Tribunal (*Cours des Comptes*, the *Tribunal de cuentas*, *Bundesrechnungshof*, etc.) *always* exercise judicial functions. This is true for some Courts, but not for all. And in any case, this is not

true and will not be true in the future, contrary to what has been said⁵ concerning the European Court of Auditors⁶.

Another important aspect of Siclari's analysis regards the European parameters of control⁷, namely, (besides lawfulness and compliance, subject to further analysis) the principles of effectiveness, efficiency and economy (p. 85).

This matter is now regulated by art. 30 of Financial Regulation no. 966/2012 of the European Parliament and Council of 25 October 2012, which lays down as follows:

"1. Appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness.⁸

2. The principle of economy requires that the resources used by the institution in the pursuit of its activities shall be made available in due time, in appropriate quantity and quality and at the best price.

The principle of efficiency concerns the best relationship between resources employed and results achieved.

The principle of effectiveness concerns the attainment of the specific objectives set and the achievement of the intended results."

Italian legislation also obliges public authorities to comply with the criteria of sound financial management. There are, however, some incongruities within the legislative framework.

Art. 7, paragraph 7, of Law 131 of 2003 states that the "Regional Sections of the Court of Auditors ascertain ... the *pursuit of the goals* set by the State or Regional laws from the perspectives of both principle and programme, according to their respective areas of jurisdiction, *as well as the sound financial management* of local authorities and the execution of internal controls, reporting

⁵ C. Astraldi De Zorzi, *Le Corti dei conti europee: esperienze a confronto*, Amm. Cont. St. enti pubbl. (1998), 441.

⁶ G. Cogliandro, *I controlli nel sistema comunitario*, in M.P. Chiti, G. Greco (eds.), *Trattato di diritto comunitario europeo*, II (2007), 2nd ed., 539.

⁷ G. Cogliandro, *Il controllo in Italia e nell'Unione europea*, 2 Riv. trim. sc. amm. scolastica (2007), 12.

⁸ G. Cogliandro, *Verso la terza "riforma" del controllo interno?* in A. Cerri, G. Galeotti (eds), *Efficienza ed efficacia dell'azione pubblica*, Quaderno n. 3/2008 Nova Juris Interpretatio, (2010), 12.

on the results of audits only to the boards of the controlled entities."

The terminology used by the legislature is tautological: "the pursuit of goals," in fact means the same as "administrative effectiveness", a concept already included, as we have seen, in the phrase "sound financial management".

The expressions "lawfulness and regularity"⁹ and "sound financial management" diverge both at regulatory and conceptual levels.

Both the European legislation¹⁰, and the Italian Court of Auditors consider the two notions to be distinct. The European text is very clear in this regard: "The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether financial management has been sound (Art. 287 Treaty on the Functioning of the European Union- TFEU). The Italian rule is equally unequivocal on this point (even if formulated in non-technical language). Article 3, paragraph 4, of Law 20/1994 states that "The Court of Auditors carries out [...] the examination of the management of the accounts [...] verifying the legality and regularity of the management [...] (*and*) [...] a comparative evaluation of the costs, methods and time employed in the performance of administrative activities".

Also on the theoretical level, there are major differences between the concepts of legality/regularity and sound financial management.

The *first* difference is that legitimacy is an absolute concept: an act is either lawful or unlawful; it cannot be a little lawful or too unlawful. On the other hand, efficiency is a relative concept, a notion involving quantity, a ratio between values or quantities. Management can be totally efficient or inefficient, but usually it is slightly or very efficient (30%, 50%, 70% etc.). It follows that efficiency is measured (and the same goes for effectiveness), whereas legality is affirmed or denied.

⁹ G. Cogliandro, *Legittimità: variazioni su tema tra sinonimia e polisemia*, in Atti del LIII Convegno di Studi di Scienza dell'Amministrazione, *Il principio di legalità nel diritto amministrativo che cambia*, (2008), 569, and at www.giustamm.it.

¹⁰ G. Cogliandro, *Corte dei conti delle Comunità europee*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, II (2006), 1578.

The *second* regards parameters: rules for the ascertainment of lawfulness ("compliance with the law"); these are not legal, but quantitative criteria from the world of business in the assessment of efficiency and effectiveness.

The *third* regards the subject. Lawfulness can only regard an act, whereas efficiency and effectiveness involve the completion of an activity or management (to be understood as the set of actions geared towards the acquisition of revenue and the payment of expenses), given that the result cannot be achieved before the relevant activities begin.

Consequently, unlawfulness and efficiency (similar considerations apply to effectiveness) are autonomous and compatible ideas, but on different planes: one does not presuppose or necessarily exclude the other. A decision, an initiative, or an action can in fact be lawful *and* efficient; and they can also be lawful *but not* efficient or, conversely, efficient *but not* legitimate. Lastly, they may be, alas, *neither* lawful *nor* efficient.

The last chapter of Siclari's book concerns relations between the European Court of Auditors and the national Supreme Audit Institutions¹¹. The European Court has the power to ascertain the proper use of EU funds in line with the principles of subsidiarity and proportionality. The main relationship between the European Court and the national Courts is founded, however, on the principles of partnership and co-administration and on the need to respect loyal cooperation.

To conclude this review of Domenico Siclari's fine book, I would like to quote from a contribution presented at the 59th Varenna Conference in September 2013 by Vitor Caldeira, President of the European Court of Auditors on the purpose of the audit of public finances in the Union: "public finances represent an important 'bond' between citizens and the government. Ultimately, governments are responsible for making use of public funds to meet the needs of the citizens. For this reason, citizens must be kept reliably informed on compliance with the democratically decided laws and that the expected results of public policies have been met. I feel I can say that one of the

¹¹ On this subject, see also M.A. Rucireta, *La collaborazione tra istituzioni nazionali di controllo e Corte dei conti europea nella forma dei "controlli cooperativi"*, 1-2 Rivista della Corte dei conti (2014), 552.

primary functions of the auditing of public finances is to help meet that need for transparency"¹².

¹² V. Caldeira, *Il coordinamento del controllo sulle finanze pubbliche nell'Unione europea*, 1-2 *Rivista della Corte dei conti* (2014), 343.