

**THE ADMINISTRATIVE PROCEDURE AND THE
SIMPLIFICATION**

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1. THE NEED FOR SIMPLIFICATION

The need for simplification in relation to the action of public administrations has been recognised for a while now, because the exercise of public functions and services traditionally has been excessively time-consuming, at the expense of the very same citizens who should avail themselves of the action of public administrations¹.

As a response of this dysfunction of the system, in general due to the size that the administrative apparatus has reached, in relation to the interests that it has to protect², general principles have been developed for both the activity and the organization of the administration, principles which should foster the efficiency of the administrative action; in application of these principles, mechanisms have been introduced aimed at reducing the duration of the administrative procedure and at fostering the protection of private interests³.

Having regard to these principles, it cannot be denied that the simplification has been the proper response to the fact that public administration were acting in a way contrary

¹ “As recently pointed out Yves Meny, Tocqueville stressed, in the seminal description of the French State, right before the revolution of 1789, the complexity of the administrative system and of the procedures used at the time”, M. CLARICH, *Gli strumenti di semplificazione della burocrazia: deregolamentazione, decentramento, sportello unico, nuove forme di organizzazione amministrativa e nuovi modelli procedurali*, www.giustamm.it. On the state of the art on simplification in Italy, the research of Formez PA, “*Le nuove politiche di semplificazione. Un’indagine nelle regioni*”, www.formez.it. See, also, A. CELOTTO, M.A. SANDULLI, *Legge n. 241 del 1990 e competenze regionali: un “nodo di gordio”*, www.giustamm.it.

² See. *infra* par. 2.

³ See. *infra* par. 2.

to the principle of good administration (ex art. 97 Cost.)⁴. As a matter of fact, an excessively complex activity ultimately give rise to interventions, which cannot have a positive evaluation in relation to the comparison between resources employed and results obtained (and often between objectives programmed and results obtained).

For this reason the reduction of the duration of the administrative procedure can be considered as an expression of the principle of good administration, in relation to which public administrations have to act in a timely manner. In this sense, it has been argued the existence of a general principle of simplification, in particular, connected to the need of delegification, in other words the need to transfer the regulatory powers in relation to the procedures already regulated by the law so as to foster the administrative simplification (art. 20 of the law n. 59 of 1997)⁵.

In connection with the principles of cost-effectiveness and effectiveness the need of simplification has entered the Law on the administrative procedure (n. 241 of 1990), in particular, its Title IV.

⁴ On the notion of good administration and on its evolution, see, G. CORSO, *Manuale di diritto amministrativo*, Torino, 2010, 35 ss.; A. MASSERA, *I criteri di economicità, efficacia, efficienza*, in M.A. SANDULLI (edited by), *Codice dell'azione amministrativa*, Milano, 2010; A. SERIO, *Il principio di buona amministrazione procedurale: contributo allo studio del buon andamento nel contesto europeo*, Napoli, 2008.

⁵ For an analysis of the topic. S. CASSESE, *La semplificazione amministrativa e l'orologio di Taylor*, *Riv. trim. dir. pubbl.*, 1998, 703 ss.; F. MANGANARO, *Semplificazione dell'attività amministrativa e principio di legalità*, Reggio Calabria, 1999; V. CERULLI IRELLI, F. LUCANI, *La semplificazione dell'azione amministrativa*, *Dir. amm.*, 2000, 633 ss.; F. PATRONI GRIFFI, *La "fabbrica delle leggi" e la qualità della normazione in Italia*, *Dir. amm.*, 2000, 97 ss.; G. CIAGLIA, *La semplificazione dell'attività dell'amministrazione. La semplificazione normativa*, www.giustamm.it; M.A. SANDULLI (a cura di) *Codificazione, semplificazione e qualità delle regole*, Milano, 2005.

In this sense, specific mechanisms have been adopted, in application of the administrative simplification, and which, in some cases, were already provided by some sectorial regulations, to which the legislator has dedicated much interest because they have the effect of reducing the duration of the administrative procedure both when it ends up with a positive administrative act and when it ends up with a behaviour of the administration which has legal consequences.

Simplification is not just a program to reduce bureaucracy, but, in line with the Italian Constitution, it is a series of techniques and legal mechanisms, which also draw on the indications of the European union, aimed at fostering the integration of the market to overcome the obstacles raised by the complexity and time-consuming activity of the administrations of the member States⁶.

Amongst the simplification mechanisms of the administrative activity, some are aimed at improving the typical model of administrative activity, the administrative act procedure⁷.

⁶ M.A. SANDULLI, G. TERRACCIANO, *La semplificazione delle procedure amministrative a seguito della attuazione in Italia della Direttiva Bolkestein*, to be published.

⁷ On the topic see the analysis of di R. GAROFOLI, *Semplificazione e liberalizzazione dell'attività amministrativa nel contesto del riformismo amministrativo italiano degli ultimi decenni*, www.giustizia-amministrativa.it; M.A. SANDULLI (a cura di), *Il procedimento amministrativo fra semplificazione e partecipazione: modelli europei a confronto*, Milano, 2000 e 2001; S. PAPARO, *Per una semplificazione di risultato*, www.astrid-online.it; S. TOSCHEI, *Obiettivo tempestività e certezza dell'azione*, *Guida dir.*, n. 27/2009. For a general overview, G. ROEHRSEN, *Il giusto procedimento nel quadro dei principi costituzionali*, in *Disciplina generale del procedimento amministrativo*. Atti del XXXII Convegno di Studi di Scienza dell'Amministrazione. Varenna – Villa Monastero, 18-20 September 1986.

These can be divided into two categories, in relation to the kind of simplification involved . A simplification of the procedure, aimed at reducing the phases before the adoption of the act, and more in general, aimed at reducing the duration of the procedure (mechanisms which rationalise the duration of the procedure, “conferenza di servizi” and the agreements); a simplification which makes it easier for private operators to exercise the activities that are subject at least to the control powers of public administrations, also with the view of reducing the formalities they have to comply with (self-certifications and consent by silence), and also mechanisms of liberalization of private activities with the introduction of ex post control activities instead of ex ante ones (such as the s.c.i.a.).

In this section, some indications will be provided on the procedural simplification and on the new changes recently introduced by the Italian Legislator.

2. THE PROCEDURAL SIMPLIFICATION MECHANISMS

The importance of the mechanisms of procedural simplification has been recognised by the Italian Legislator which amended the Law n. 241 of 1990, to increase their application and effectiveness⁸.

The more recent amendments in relation to the simplification of the activity of public administrations have been introduced by the Law n. 69 of 2009 and by the Law n. 122 of 2010.

This recent laws which aim to foster the effectiveness of the administrative procedure have followed two different paths: they have rationalised the duration of the

⁸ For a general analysis on the rule on the administrative activity, in the light of the law n. 241 of 1990 as amended and modified, see, M.A. SANDULLI (a cura di), *Codice dell'azione amministrativa*, cit.

procedure (and the consequences which the administration might suffer if the time limits are not respected), and more precisely they have introduced modifications of the mechanism provided for in Title IV of the Law n. 241 of 1990, in other words, Law n. 69/2009 amended the regulations on the “conferenza di servizi”, on the consent by silence and on the d.i.a. by changing it into (s.c.i.a.).

In particular, in relation to the new deadlines of the procedure, it is worth mentioning, that the Legislator aimed at accelerating the procedure by indicating a 30 days deadline within which public administrations must conclude the procedure if a different deadline is not provided by the Law or by the same administrations⁹.

For the procedures of the local and regional administrations, in accordance with the new article 29 of the Law n. 241 of 1990, which has included amongst the essential level of provisions, which are an exclusive competence of the State, ex art. 117 of the Constitution, also the rules on the conclusion of the procedure within a specific time limit, they can be modified by local authorities regulations, in order to guarantee to the citizens an effective protection, and consequently avoiding possible differences between procedures of local administrations and procedure of national administrations¹⁰.

⁹ G. MARI, *La responsabilità della p.a. per danno da ritardo*, in M.A. SANDULLI, *Codice dell'azione amministrativa*, cit., 263 ss.

¹⁰ A. CELOTTO, *Il riscritto art. 29, l. n. 241/1990*, in R. GAROFOLI, *La nuova disciplina*, cit.; E. LAMARQUE, *L'ambito di applicazione della legge sul procedimento amministrativo*, in M.A. SANDULLI, *Codice dell'azione amministrativa*, cit., 1234 ss..

2.1 The deadlines of the procedure

It has already been said that a crucial element of the simplification are the deadlines of the procedure, an aspect to which much attention has been paid by the Legislator, aimed at reducing the duration of the procedure¹¹.

Before the adoption of the general Law on the administrative procedure, no rule existed in the Italian legal system which imposed on public administrations to conclude the procedure within a time limit and by the adoption of a formal act¹².

In the light of this fact, the Courts allowed private parties to review the silence of public administrations just after an injunction was issued by the same private party to the administration in question, applying art. 25 of the T.U. n. 3 of 1957¹³.

¹¹ F. GOGGIAMANI, *La doverosità amministrativa*, Torino, 2005; F. FIGORILLI, S. FANTINI, *Le modifiche alla disciplina generale sul procedimento amministrativo, Urb. e app.*, 2009, 916 ss.; A. POLICE, *Il dovere di concludere il procedimento e il silenzio inadempimento*, in M.A. SANDULLI (a cura di), *Codice dell'azione amministrativa*, cit., 228 ss..

¹² In some cases, public administrations were under the obligation of concluding the procedure within a deadline, as for example in relation to the Regional authorization necessary to open selling points, provided for by Law n. 426 of 1971, in accordance to which the decision of the administration should be made within 60 days from the request.

¹³ The statute of limitation was debated: in accordance with some scholars, this was the 60 days deadline provided for in relation to the review of the unlawful administrative act, as the interested party had a legitimate expectation; in accordance with others, this was the 10 years deadline as the interested party had a full right; in accordance with other scholars the deadline will renew *de die in diem*, until the administrative misapplication remains. In this sense, A.M. SANDULLI, *Il silenzio della Pubblica Amministrazione oggi: aspetti sostanziali e processuali*, in AA.VV., *Il silenzio della Pubblica Amministrazione. Aspetti sostanziali e processuali* (Atti del XXVIII Convegno di studi di scienza dell'amministrazione, Varenna 23-25 settembre 1982).

Law n. 241 of 1990 filled this gap, with article 2, which, for the first time, imposed to the public administrations an obligation to conclude the procedure within a time limit. In its first version, article 2 provided that public administrations should conclude the procedure within the time limit of 30 days (if not differently provided for by the Law, by a Regulation or by the administration itself) and by the adoption of a formal act.

Law n. 80 of 2005 amended this provision. Public administrations should conclude the procedure within the time limit of 90 days (if not differently provided for by a regulation ex Law n. n. 400 of 1988, for the national administrations and by their regulations in relation to national public bodies). Article 2 of the Law n. 241/90 was amended also by art. 7 of Law n. 69 of 2009, that with the aim of even more simplifying and improving the activity of the administrations, it reintroduced the time limit of 30 days, as provided by the previous version of article 2, before the 2005 amendments; and gave a new collocation to this regulation on the deadline of the procedure, which is now in front of the regulation on the determination of the deadline by the administrations¹⁴.

The amendments introduced by Law n. 69 of 2009 demonstrate that the Legislator wants to speed up the administrative procedure. Nonetheless, public administrations can determine longer than 30 days deadlines, in relation to their administrative procedures. However, in order to avoid that public administrations indicate deadlines which are excessively long, as it occurred in the past, the legislator rewrote article 2 by indicating maximum deadlines. Hence, n. 3 of article 2 now provides that the deadlines of the procedures of national administrations must not exceed 90 days. These deadlines have to be determined by a Decree of the President of the Council of Ministers (and not by Regulation), following the Proposal of the competent Minister together with the Minister for public administration, innovation and simplification. The national public bodies can determine the deadlines in accordance with their regulations.

¹⁴ D. RUSSO, *La nuova disciplina dei termini e della responsabilità per danno da ritardo*, in R. GAROFOLI, *La nuova disciplina del procedimento e del processo amministrativo*, Roma, 2009

Just in case longer deadlines are necessary, taking into account the administrative organization, the interests involved and the complexity of the procedure, the 90 days deadline can be exceeded. However, the deadlines cannot exceed the limit of 180 days. Moreover, the decrees which determine the deadlines that exceed 90 days have to be adopted by a particular procedure, following the proposal of the Minister for public administration, innovation and simplification, and after a previous deliberation of the Council of Ministers¹⁵. The 180 days limit can be exceeded only in the case of the procedure with which the Italian citizenship is granted and of the immigration procedure (art. 2, n. Law n. 241/1990).

Hence, with regard to the past, 2009-Legislator implemented the mechanism, provided in order to avoid a possible inactivity by PA (implementation of the rule on default terms), with specific time-provisions, which limit PA's discretion in stating the length of proceedings. While such terms may not exceed one hundred eighty days (with the exception of those hypothesis regarding citizenship and immigration), the PAs shall be obliged to re-state the length of proceedings, making them less cumbersome and lighter. Consequently, no one may face anymore the paradoxical situation of the past, in which PAs, establishing very long terms (in some cases, also thousands of days), caused new regulations to be even pejorative than the previous situation, based on the tacit-rejection mechanism pursuant to article 25 of Presidential Decree no. 3 of 1957¹⁶.

Article 7, paragraph 4, of Law no. 69 of 2009 provide an express derogation for proceedings regarding environment and for "verification or authorization proceedings concerning historical, architectural, cultural, archeological, artistic and landscape goods", whose timings are regulated, respectively, by existing laws and regulations on environment

¹⁵ C. CALVIERI, *Commento all'art. 29*, in BARTOLINI-FANTINI-FERRARI (edited by), *Codice dell'azione amministrativa e delle responsabilità*, Roma, 2010, 757 ss..

¹⁶ S. CIMINI, *Semplificazione amministrativa e termine procedimentale*, *Not. Giur. Reg.*, 1998, 163 ff.

and by the Code of Cultural Heritage and Landscape (Leg. Decree no. 42 of 2004). One derogation is also provided for proceedings to be implemented by warranty and supervisory Authorities, whose times shall be defined in accordance with their regulations, except as provided by specific regulations (article 2, paragraph 5, Law no. 241 of 1990).

With reference to suspension and interruption of terms, it is to be highlighted that 2009-regulation has opportunely erased the controversial reference to technical evaluations, which had been introduced by 2005-reform. Further hypothesis of suspension, however not exceeding thirty days, are still existing, regarding acquisition of information or certifications related to facts, status or qualities which are not attested in documents already owned by the PA or not directly acquirable by others Pas, and the use of the *conferenza di servizi*. Another still-existing hypothesis is provided by article 10-*bis* of Law no. 241 of 1990, which interrupts, and not only suspends, the term of the proceeding.

Exactly in light of the mentioned modifications, the final term of the proceeding has to be considered as a primary factor in order to evaluate not only the effectiveness, but also the lawfulness of the administrative activity, in practice, and the capacity, by the latter, to satisfy citizens' interests and needs.

Long terms – with particular regard to the juridical condition of the subjects who apply the PA in order to obtain extensive measures such as authorizations or concessions – often erase any usefulness for a person, and may result suitable for avoiding PA's obligation to conclude the proceeding¹⁷.

In this light, the obligatory of administrative activity has to be intended not only as obligation, for the PA, to take an express measure, but also as obligation to take such

¹⁷ M. CLARICH, *Termine del procedimento e potere amministrativo*, Turin, 1995; G. MORBIDELLI, *Il tempo del procedimento*, in V. CERULLI IRELLI (cured by), *La disciplina generale dell'azione amministrativa. Saggi ordinati in sistema*, Naples, 2006, 259 ss.; S.S. SCOCA, *Il termine come garanzia nel procedimento amministrativo*, www.giustamm.it.

measure within a sure term.¹⁸ Such obligatory represents a peculiar explication of the principle of legality, because it concerns not only the "negative" legality, to be deem as fundamental instrument, for the citizen, in order to avoid any arbitrary use of power, but also the "positive" legality, to be deem as positive assessment of the obligation to use such power, and to use it in due time for the citizen-sharer of public function.¹⁹ The reflections connected with legislative regulations which have been rotating since 1990 up to the present days are, indeed, that PA's first scope is the safeguard of public interest, that belongs to all citizens, who need to be confident of the certainness, of the quality and of the timeliness of administrative action, should the latter be an answer to the requests of the citizens, or otherwise an authoritative intervention.

The provision under article 2, paragraph 1, of Law no. 241 of 1990, hence, declares unlawful the non-use of administrative power within the given terms, or rather the silence-non-fulfillment of the PA. The expiring of terms without the PA having adopted any express measure does not determine – except for particular cases where silence has a specific meaning – the exhaustion of power from PA, but allows the person to start a

¹⁸ According to the most recent scholars, the "minimal content" of administrative duties is subdivided in three levels: duty of starting the tutelage of certain public interests by public subjects in force with the relevant power; duty of using the power and hence of taking decision(s) with regard to controversial situations and interests; duty of satisfying subjective juridical situations of citizens; A. CIOFFI, *Dovere di provvedere e pubblica Amministrazione*, Milan, 2005.

¹⁹ Legality, hence, in addition of being one external guarantee or one external tie to the exercise of the power, can be connected to the dutifulness of administrative activity in time, with regard to which, precisely, the citizen place himself as PA's interlocutor in light of one relation based on reciprocal duties and obligations. In such regard, see: F. BENVENUTI, *Il nuovo cittadino. Tra libertà garantita e libertà attiva*, Venice, 1994; O. RANELLETTI, *Principi di diritto amministrativo*, Padova, 1912; A. POLICE, *Doverosità dell'azione amministrativa, tempo e garanzie giurisdizionali*, in V. CERULLI IRELLI (a cura di), *Il procedimento amministrativo*, Naples, 2007.

judiciary action in order to obtain the implementation of the requested measure.²⁰ Such solution²¹, which has been created by administrative courts, on the basis of scholars' thesis, more than a century ago (see the well-known decision of the *Consiglio di Stato*, Section IV, of 22 August 1902), has solved the problem to find a mechanism in order to guarantee the citizen against the hypothesis of PA's inactivity (and hence a non-compliance with its obligation to take measures).²²

²⁰ As noted by A. TRAVI, *Commento all'art. 2*, in A. TRAVI (cured by) *Commentario alla legge 7 agosto 1990, n. 241*, the duty to finalize the proceeding with an express measure would be entirely useless, should the administration be entitled to adopt the final measure at will. The dutifulness to exercise the power, in other words, is such exactly in consequence (and just in consequence) of the existing of a final term within which, in connection with the duty to provide, a subjective juridical situation of pretending is (at least) strengthened, the latter assisted by suitable jurisdictional guarantee.

²¹ Which is not affordable to identify in the context of a system characterized by the appeal against the measure as primary protection: should the measure have been missing, in consequence of PA's silence, the system of administrative protection would face its crisis, showing all its weakness, in light of the fact that no measure could be appealed.

²² Thought not subject of this work, it seems useful to show (very synthetically) that the violation may determine a series of consequences, not only administrative, but also civil, criminal and accounting ones. First, as mentioned, the disrespect of proceeding's timetable may be appealed in front of administrative courts in order to evaluate PA's non-fulfillment (such action is now regulated by article 31 of the Code of administrative jurisdictional proceedings ("**c.p.a.**"), Leg. Decree no. 104 of 2010); in the latter case, should it be not the case of exercising discretionary powers by PA, administrative courts can also state the claim to be well-founded, and hence condemn PA to implement the due measure. In second place, the citizen, provided the existence of additional requirements, may act claiming compensation for damages suffered regarding its subjective position (article 2043 of Italian civil code and article 30 c.p.a.). Italian scholars and courts, however, still discuss on the fact that the only disrespect of proceeding timetable may cause a damage against the citizen, without any evaluation concerning the fact that the favorable measure was probably due. Should the thesis of the

2.2 Opinions and technical evaluations

The duty to fulfill with procedural time-schedules is strictly connected with the rules on the consultative phase – provided by articles 16 and 17 of the Law regulating administrative proceedings –, that is the inquiry activity which involves departments and bodies, normally collective, that are different from those which fulfill activities of active administration and that are equipped with special technical preparation and competence.²³

The consultative administrative activity consists in evaluations, expressed by means of opinions, and is intended to provide advice to the authorities which have to provide. In particular, such opinions consist in evaluations of technical opportunities, which are ancillary regarding the taking-measures activity. Consultative bodies do not carry their own interests, different from those of the proceeding authority, in the proceeding, while they only have to provide the deciding authority with the information in order to cure the due interests. In this light, consultative function may be defined as "neutral", "non-

existence of the "damage from simple late-fulfilling" prevail, a high-relevance principle of law would be affirmed on the route of simplification, that is the citizen has a real juridical pretension regarding the respect of procedural timetables, regardless of the due-character of the favorable measure. Culpable inactivity of PA, furthermore, may determine the personal liability of the subject responsible of the proceeding (article 7, Law no. 241 of 1990), both accounting (in case of malice or gross negligence) and also criminal (article 378 of Italian Criminal Code, indexed as "omission of deeds held by an office" ("*omissione di atti di ufficio*"). On such matter, M.A. SANDULLI (cured by), *L'amministrativista. Nuovo processo amministrativo*, Milan, 2010; R. GIOVAGNOLI, *Il risarcimento del danno da provvedimento illegittimo*, Milan, 2010; R. CHIEPPA, *Il codice del processo amministrativo*, Milan, 2010; P. QUINTO, *Il Codice del processo amministrativo ed il danno da ritardo: la certezza del tempo e l'incertezza del legislatore*, www.giustamm.it; G. MARI, *La responsabilità della p.a. per danno da ritardo*, cit..

²³ On the matter, V. PARISIO, *L'attività consultiva*, in M.A. SANDULLI (cured by), *Codice dell'azione amministrativa*, cit., 695 ss.; N. AICARDI, *Le valutazioni tecniche*, *ibidem*, 715 ss..

interested", because it does not show any prerogatives or interests of the body that fulfill such function, but otherwise it is addressed in order satisfy the best reconciliation of the functional interest of the administration applying for the opinion.

The regulations on consultative activity comply, in first instance, with a logic of participation, while they provide certain subjects to be heard in order to adopt a determined measure. The relevance of the need of simplification appears in the circumstance upon which the intent to make the activity of an administration quicker would be frustrated if, in case, during the inquiry phase, further interests should be involved in addition to those evaluated by the proceeding authority, the evaluation of such further interests had the effect to slow down or block PA's activity.

To this purpose, article 16, paragraph 1, of Law no. 241 of 1990 establishes that consultative bodies of PAs, listed in article 1, paragraph 2, of Leg. Decree no. 29 of 1993²⁴, have to release their mandatory opinions within twenty days from receipt of the relevant request.²⁵

²⁴ According to article 1, paragraph 2, of Leg. Decree no. 29 of 1993, Public administrations are all administrations of the State, therein included bodies and schools of any order and grade and educational institutions, State enterprises and administrations with self-managing organization, regions, provinces, municipalities, mountain communities, and their consortia and associations, universities, autonomous institutions social housing, chambers of commerce, industry, crafts and agriculture and relevant associations, all non-economical national, regional and local public bodies, administrations, enterprises and bodies of national health Service.

²⁵ It is not entirely clear if "consultative bodies" are only those bodies which exclusively implement consultative function. Missing further provisions, article 16 should not be interpreted restrictively, while law-maker's exclusive mean is the objective fulfillment of preparatory activities, "neutral", notwithstanding the fact that such function is implemented exclusively or in a subsidiary way.

With regard to optional opinions, instead, applied PAs shall communicate the final term of release of consultative deeds. Such term, however, shall not be higher than twenty days from receipt of the relevant request.²⁶

Article 16, paragraph 4, provides an interruption of the twenty-days term, should the applied body have represented well-motivated inquiry exigencies. The interruption (whose effect is a new entire flowing of the original term) may happen only once and, however, the opinion shall be definitely released within fifteen days from receipt of requested additional inquiry elements.

Useless expiration of term or no-request of additional inquiries shall allow active PA to proceed also in absence of the opinion, with only regard to mandatory opinions, except for opinions provided by PAs in force for environmental, landscape, territory, public health protection, as it will be better explained.

The faculty to continue with the proceeding is the clear transposition into inside-proceeding activities of the principle concerning the acceleration of administrative activity, fully provided by Law no. 241 of 1990. Undoubtedly, in light of the perspective to accelerate the ongoing of administrative action, such choice is embraceable, even if the

²⁶ Opinions have to be distinguished in optional and mandatory, depending on whether their request, and not their release, is, for deciding authority, optional or mandatory. Optional character of one opinion determines proceeding administration not being obliged by law to request it, being understood that, should such administration decide to request the opinion, the latter has to be considered and the administration has to explain the reasons under which the opinion was possibly not confirmed. As evidenced by combined provisions under articles 1 and 16 of Law no. 241 of 1990, the request of optional opinions is more and more deterred by the law, in light of the fact that such opinions determine a procedural burden and are often considered as means used in order to elude or share the responsibility. Mandatory opinions, however, shall be mandatory requested to the consultative body, under penalty of unlawfulness, for violation of law, of final measure. Even in the latter case, non-conformation to opinions has to be adequately explained by the proceeding administration.

following costs, arising from its implementation, cannot be ignored: indeed the proceeding inquiry (*istruttoria procedimentale*), which guarantees the quality of the measure resulting from the proceeding because it is the place where relevant facts and interests of such proceeding come out, may result incomplete. Law-maker preferred to leave the administration with the burden to decide between continuing the proceeding or waiting for the delayed opinion; such choice has determined a more flexible system, where the subject in force of the proceeding shall be the interpreter, assuming such decisions which better fit with specific factual circumstances. Law-maker, hence, seems not to have ignored risks connected with "mutilation" of proceeding in absence of the opinion, while he could have established the obligation – in stead of the faculty – to proceed in absence of the delayed opinion. The choice between continuing the proceeding and waiting for the delayed opinion concerns, *inter alia*, the scope of discretionary choices, and in consequence it shall be censured by administrative courts only in case of clear unreasonableness.

On the contrary, should optional opinions not be released within the 20-days maximum final-term, PA shall be obliged to proceed, with the same exception represented by opinions released by administrations which protect "strong interests" (environment, landscape, territory, health), with regard to which the need of a real and effective control by involved PAs derogates to the need of simplifying. To this purpose, it has to be specified that what matters, in order to establish the operational scope of the exception, is not the exclusive competence of the body releasing the opinions, but instead the objective (and not subjective) connection of the latter with the protection of the abovementioned values.

Opinions which concern the said matters shall be regulated by sector regulations, if existing, where it may be provided a final term longer than twenty days.²⁷ Should an

²⁷ It is what happens, for example, with regard to the opinion of Superintendency within the proceeding for releasing environmental authorization pursuant to article 146 of the Code of Cultural Heritage and Landscape, Leg. Decree no. 42 of 2004 and following amendments. Such opinion has to be communicated within the mandatory 60-days final term, and, should it be not released, requesting authority may proceed in his absence (provided the already-occurred adjustment of municipal

applicable sector regulation, to be applied as *lex specialis*, not exists, given the non-possible set-aside of the non-implementation of the opinion or, in hypothesis of article 17, the non-possible subrogatory intervention of other bodies or entities, with regard to the matters under consideration, it shall be mandatory waiting for the release of the (delayed) consultative deed, to be considered non-fungible, both objectively (with reference to its contents) and subjectively (with reference to the releasing authority). However, in hypothesis of silence by the consultative authority, the risk of a *sine die* stoppage of the proceeding is very serious. In order to remediate to such inconvenient, the responsible of proceeding, exercising its competences, may set a suitable final term, within which the consultative body has to release the opinion, which is essential for the proper fulfillment of the proceeding.

The opinion given in art.16 regards the object of the proceedings, while the technical evaluation mentioned in article 17 concerns the individual facts which must be known and appreciated in the preliminary hearings. The technical evaluation, therefore, is emerging as an integral part of the preliminary hearings in the strict sense and relates to the acquisition phase of the facts relevant to the decision and, therefore, must necessarily be obtained prior to the closure of the hearings (in fact in the context of art. 17, para. 1, it is used the expression "in advance"). The opinions, however, are involved one the hearings are finished, when all the really relevant data has been gathered, because only in this moment becomes possible to delineate the outcome of the proceedings²⁸.

planning instruments to the new landscape plans formed in accordance with Ministry of National Heritage and Culture).

²⁸ A. TRAVI, *Parere* (nel diritto amministrativo), *Dig. Disc. Pubbl.*, X, 616. Useful criteria for the distinction between advices and technical evaluations come from administrative case law, which states that the classification of an 'endoprocedimentale' appreciation as advice and not as technical evaluation is based on some symptomatic indices such as: the discretionary contributions or not peremptory "advice" on the future content of the final decision can not be reconciled with the

For art. 17 too, its actual application is to be implemented by comparing the arrangement with other relevant norms. If these rules already provide for mechanisms to overcome the inertia of a body or bodies questioned on the technical evaluation, these mechanisms are to consider prevailing on the one set in general by this article. Moreover, it must be assumed that the prevalence of special rule operates even where such mechanisms do not maintain the impartiality of the body to which the technical evaluation is entrusted upon supplementary or where they relate to sub-processes of technical evaluation which are competence of bodies accountable for sensitive interest, exempt by the general procedure. The reason is that the primary goal secured by art. 17 in the viewpoint of the citizen is the acceleration of the proceedings and not a guarantee of the reservation of the technical evaluation entrusted upon a separate organ from the proceeding PA or, in the case of sensitive interests, only upon those bodies accountable for such interests²⁹.

2.3 The “conferenza di servizi”

The ‘conferenza di servizi’ is a participatory simplifying model that, introduced in the late eighties with some sectorial regulations, was then generalized by l. 241/1990, being

technical character of an advice; the significant presence of technically non-qualified components exclude that the advisory activities may have technical nature; the "ratio" of the advisory intervention may sometimes be to ensure consistency to decisions entrusted to different authorities; if the advice revisits all stages of the procedure expressing in relation to them a general evaluation, the evaluation must be considered a "pure" advice (cfr. Cons. St., Comm. spec., parere 5 novembre 2001 n. 480/00, FI, 2001, III, 236 ss.)

²⁹ According to a prevailing interpretation, the principles expressed in art. 16 and 17, being functional towards the conclusion of the administrative procedure before the deadline, are to be regarded as principles relating to the basic level of performances (art. 117, para 2, letter m of the Constitution) pursuant to art. 29, para 2-bis of l. 241\1990.

subsequently revised several times on the functional and structural level (in particular with the l. 24/2000, 15/2005, and - most recently – with the l. 122/2010).³⁰.

The institute certainly simplifies and accelerates the process because contextualizes and makes contemporary requirements that otherwise would be legally next to each other and would lengthen the time of conclusion of the proceedings. In this way it is possible a direct comparison between the bodies and entities legally competent to define, with different functions and through separate and independent acts and measures, a specific case.

The ‘conferenza’ is thus the place where you make a coordination of public interests belonging to different administrations, allowing you to gather at one table the evaluation of the same and allowing - under certain conditions - the elimination of dissent expressed by the different administrations involved. Thus, on the one hand, the process of adoption of the measure is not likely to freeze as a result of even physiological conflicts between governments and, on the other hand, it avoids the delays connected to multiple separate proceedings³¹.

³⁰ According to part of the doctrine, still today the legislative framework, after the very recent innovations of 2009 and 2010, is imperfect and unsatisfactory as the law does not have the significance of a true general law, limiting itself merely to regulate the institution of the ‘conferenza dei servizi’ without addressing the impact that it has on the model of administrative action, on the procedure, on the exercise of the function, and on discretionality.

³¹ G. SCIULLO, *Gli istituti generali di semplificazione: la conferenza di servizi*, in G. VESPERINI, *Che fine ha fatto la semplificazione amministrativa?*, Milano, 2006; S. AMOROSINO, *La semplificazione amministrativa e le recenti modifiche normative alla disciplina generale del procedimento*, FA-TAR, 2005, 2635 ss.; D. D’ORSOGNA, *Conferenza di servizi e amministrazione della complessità*, Torino, 2002.

The law 241/1990 governs two types of ‘conferenza di servizi’: the ‘instructing’ one, to which refer paragraphs 1 and 3 of Article 14 of the l. 241/90, oriented to the contextual completion of the preliminary formalities and, in particular, to the comparison of the public interests; and that decisional one, provided for in paragraphs 2 and 4 of the same article 14, which allows you to reach the "procedural decision", that is the definition of the content of the measures to be enacted with tendentially binding effects for the bodies invited to the meeting.

In addition to these two figures, however, it must be added the case outlined and governed by art. 14-bis, that is the preliminary ‘conferenza di servizi’, that the doctrine classifies as "predecisoria": a peculiar case because it aims to verify, prior to the opening of the proceedings or the authorizatory processes, or in case previously with respect to the procedural moment elected for this purpose, whether there are the conditions for the successful conclusion of the proceedings themselves, up to identify corrective measures for the adoption of a "positive" decision.

The ‘instructing’ ‘conferenza di servizi’ is in turn divided into two types: the ‘uniprocedimentale’ or ‘monoprocedimentale’ or internal, and the ‘conferenza di servizi’ ‘pluri-procedimentale’ or ‘inter-procedimentale’ or external.

The first case is characterized by the fact that the ‘conferenza di servizi’ is organized by PA responsible for the procedure, in which the meeting itself is intended to operate, and has, at least from a formal point of view, no interference nor influence on other separate proceedings for the adoption of measures relating to the same issue, dealt by the same ‘proceeding authority’ issuing the invitation to the ‘conferenza di servizi’ itself.

The second case, on the contrary, requires the slope of more connected administrative proceedings and, despite being issued by the PA responsible for the overriding public interest, fits into all those related proceedings.

Both serve an ‘instructing’ function being unequivocally dedicated to "simultaneous examination" of the public interests involved either in the individual proceedings (Art 14, para 1) or in the related proceedings (Art 14, para 3), and have their

ratio in the 'convenience" of the contextual examination of the various interests at stake, allowing participants to be heard without taking part in the evaluation phase leading to the decision³².

Being a model whose inclusion in administrative procedures is only potential and available to the discretion of the competent authority, it must be considered that the instructing 'conferenza di servizi' moves in light of the result (or of the merits of the final decision) rather than of the formal legality, and reveals itself as a competence, recognized by law to the PA, to modify - limitedly and partially - of the procedural model envisioned by law in the presence of objective reasons for introducing in the preliminary stage an opportunity for the joint examination of the public interests.

The scope of the contextual examination is, however, different depending if you consider the 'conferenza di servizi' "uniprocedimentale" or "pluriprocedimentale." In the first case, in fact, there is only one body holding an 'active administration' position and there must be only a single decision by this body, while other public authorities, responsible for the other public interests involved, will participate in the proceedings not with decision-making powers, but necessarily with advisory or technical or informative. On this basis, the contextual examination is "relegated", at least formally, as already mentioned, to a mere 'instructing' function and, more broadly, procedural. In the second case, the issue appear

³² The reference to the opportunity is contained in the first paragraph of art. 14 (and must be considered implicit in the third paragraph), so that the use of the meeting is the result of a discretionary choice of the PA and is not an obligatory act, although it appears a *favor* by the parliament for the use of the 'conferenza di servizi' (Cons. St., sez. V, 8 maggio 2007, n. 2107). In force the 2009 regulation, this conclusion was not shared by those who believed that the phrase "as a rule" indicated that the failure to use the conference was the exception and therefore only the decision not to hold the conference itself should be motivated; this on the assumption that the summoning was basically a duty. Any doubt can be considered superseded by the 2010 act (ln 122) which has replaced the term "normally summons" with "may summon." The same conclusion must also advancing to the 'conferenza dei servizi' 'pluriprocedimentale'.

more complex. The conference interferes with multiple processes involved and related to the same activity or functional to the same outcome. In other words, it inserts itself into the procedural activity of several authorities who must make decisions legally dependent between themselves (that is, the related proceedings in the strict sense) or that have to take decisions anyhow referred, although under legally distinct headings, to the same case and, as such, regarding the same result, that is, the comprehensive regulation of the case. In this situation, the contextual examination is also related to primary interests, as by law intended to be protected by one of the decisions to be enacted. Therefore it seems inescapable the fact that the contextual examination involves a synthetic assessment (or, anyway, on the whole) inevitably different from that to which the individual bodies would be called –in the case of non-recourse to the ‘conferenza di servizi’ interprocedimentale. The contextual examination, in fact, formally without interfering with the tax regulations of the individual competencies of active administration, necessarily implies that all public bodies holders of related proceedings are conditioned, in their subsequent individual decisions, by the findings of the contextual evaluation of the various public interests involved, also in light of the discipline of dissent³³.

Article 14, paras. 2 and 4 of the Administrative Procedure Act (together with the subsequent arts. 14b and 14c) governs the two types of decisional ‘conferenza di servizi’, whose indication is, however, a duty. These two cases - functional to the simplification and acceleration of administrative proceedings insofar as they bring the concentration into a single framework of procedures and decision-making powers of a plurality of administrations, whose consent is necessary for the adoption of a particular decision - differ

³³ M.A. QUAGLIA, *La conferenza di servizi come strumento di semplificazione e di coordinamento degli interessi nel procedimento amministrativo*, *Quad. Reg.*, 2006, 39 ss.; R. GRECO, *La riforma della legge 241/1990 con particolare riguardo alla legge 69/2009: in particolare, le novità sui termini di conclusione del procedimento e la nuova disciplina della conferenza di servizi*, www.giustizia-amministrativa.it.

only to the extent that the first is related to the institutional activity of PA bodies and the second to the activity of those privates subject to administrative authorization.

The provision assumes, however, that the proceeding administrative body should acquire "agreements, concerts, go-ahead or consents under any name by other bodies." It is necessary to clarify this assumption, that the law makes it very broad for the latter category (acts of assent under "any name") tendentially comprehensive, but that the same law identifies starting from sufficiently defined cases. However, the decisional 'conferenza di servizi' can not always be instantiated when there is a need to acquire acts of consent in any case required: para 2 of art 14, l. 241/1990, in fact, establishes that the administration, announcing the conference, must request in advance the act of consent to competent PA bodies and may hold the meeting only if the latter did not respond within thirty days upon reception of the request.

The last section of the same paragraph states explicitly that the 'conferenza di servizi' may also be instated when the same time-frame it occurred the dissent of one or more of the administrations surveyed. In other words, the individual PA bodies, as holders of the competencies intended to be "affected" by the conference services, should be free to decide whether to pursue them independently or in 'conferenza di servizi', but as the exercise of those competencies is a duty, well may be called upon to exercise pursuant to art. 14, para 2, l. 241/1990 - once they have not activated themselves promptly. In this way, in fact, there is no interference with the autonomy of the exercise of the function, but the solicitation of its exercise in accordance with the general principles of administrative action and, in particular, with the prescribed times of the decision, which are relevant for both the general interest, as well as for that of any private recipient of administrative measures.

The competence for the summon of the 'conferenza di servizi' – obligatory when the requirements of the law apply (Art. 14, paras 2 and 4, l. 241/1990) - is entrusted upon the body holder of the prevalent public interest or "after informal understanding" from one of the bodies which are responsible for the overriding public interest (ie office call). The overriding public interest can be identified in the primary public interest pursued by the primary proceeding body. This, in the abstract, is not a problem in the case of 'conferenza

di servizi' 'uniprocedimentale', while it might originate them in the case of 'interprocedimentale' one.

The entitlement to request the 'conferenza di servizi' is also recognized to "any other authority involved", which includes each of the PA bodies which must rule on the acts of assent. The summoning question is not binding on the body responsible for the overriding interest to convene the meeting (summoning at the request of one of the parties), but it forces the competent body to respond and justify its decision³⁴. Deal with the summoning also paragraphs 4 and 5 of art. 14 l. 241/1990: in para 4 (prefiguring a case of autonomous kind of decisional 'conferenza di servizi') it is recognized the legitimacy of the request on the private individual, when its activity "is subject to acts of consent, under any name, pertaining to different administrative bodies", and it is settled the compulsory granting of the application and, therefore, of the summoning, and it is identified the body called to provide within the responsible administration for the adoption of the final decision; in para 5, with reference to the public concession, the competence for the notice is given to the grantor, which is the PA. The dealer may summon only if he has acquired the latter's consent.

In terms of participation, each authority involved has a single representative empowered by the competent body that expresses the will of the administration in a binding way. It must be considered, however, gained the consent that has not been expressed in the meeting, thus eliminating the possibility of expressing late dissent (consent by silence).

³⁴ Given that the provision was inspired by celerity speeds (see Cons. St., sect. VI, August 7, 2003, n. 4568), the terms for the summoning of the first meeting and its possible deferral are extremely short. The notice must reach the authorities concerned at least five days before the meeting itself; within the next five days administrations unable to participate can ask for a referral. Turning back to the time schedule of the 'conferenza di servizi', the l. 69/2009 introduced the ability to summon even the dealers and managers of public services potentially affected. M. SANTINI, *La conferenza di servizi*, Roma, 2008.

Also concerning this possibility, however, remain equipped with a more energetic protection certain types of "sensitive" interests of constitutional significance, such as environmental, territorial and historical-artistic and those pertaining to the protection of health and public safety. In case it is one of those agencies responsible for the protection of those interests to express dissent, the law states that the procedure will not block completely, thus demonstrating that the need for efficiency and simplification of administrative action does not retreat completely despite the importance of the interests considered. Para 3 of art. 14-*quater* provides in fact that the decision might not be taken at the 'conferenza di servizi', but may be reassigned within ten days for second-order assessments of the Council of Ministers, which shall act within sixty days, subject to agreement with the region or regions or involved local councils. If the agreement is not reached within thirty days, the decision can nonetheless be taken.

At the end of the joint conference it is the proceeding administration that shall adopt the resolution that concludes the proceedings. Such resolution, currently taken on the basis of prevailing opinions, has been subject to a progressive regulatory review³⁵. The legal framework, which provided initially for the requirement of a unanimous decision, has passed, under the law of November 24, 2000 n. 340, to a criterion of majority, until finally arriving to the current wording only under the law of February 11, 2005 n. 15 (pursuant to which "the administration proceeding shall adopt a reasoned resolution for the conclusion

³⁵ The problem is to clarify what is meant by "prevailing positions". It is certainly not a purely numerical criterion, since it is precisely this principle that the legislature sought to abandon eliminating the majority rule. The doctrine has made it clear that "*to determine which is the prevailing position, the proceeding Administration that is responsible for this resolution shall have regard to the individual positions that the authorities involved in the conference assume with reference to the power that each of them would have to determine the outcome, whether positive or negative, of the procedure, based on the individual sector laws*" (F. BASSANINI – L. CARBONE, *La conferenza dei servizi, il modello e i principi*, in V. CERULLI IRELLI, *La nuova disciplina generale dell'azione amministrativa*, Napoli, 2006).

of the procedure, having considered the specific results of the conference and taking into account the prevailing positions expressed on that occasion"). In fact, the majority criterion, putting on the same level all the involved public administrations, was likely to be in some way affected by their choice, due to the difficulty of identifying with certainty which were the public administrations to convene. In so doing, in fact, had foreshadowed the possibility for the proceeding administration to predetermine the outcome of the conference choosing who should be the voters, and some commentators rightly noted that the rigidly majority rule based solely on the quantitative prevalence, did not seem to coincide with a qualitative care of the public interest involved.

The current method of evaluating the results of the services conference (s.c. *Conferenza dei Servizi*) provides, therefore, the need to take account of the prevailing views expressed on the subject matter of the conference. The problem, obviously, is to clarify what is meant by the prevailing positions: it is certainly not a purely numerical criterion, since it is precisely this principle that the legislature sought to abandon eliminating the majority rule, but weigh the prevalence of positions is not a simple operation. The doctrine has made it clear that to determine which is the prevailing position, the proceeding administration that is responsible for this resolution must have regard to the individual positions that the different authorities assume within the conference, with reference to the power that each authority would have to determine the outcome of the proceedings in accordance with the laws of each sector³⁶. Of course that is a decision criterion that increases the discretion of the proceeding administration, which may, in fact, decide the positions that shall prevail. So, if on the one hand, such policy privileges resolutions which are closer to the prevailing public interest, on the other, also leaves a wide discretion to the proceeding administration that shall provide its resolution accompanied by a strong motivational memento. That said, it should be noted, however, that the time of adoption of

³⁶ V. CERULLI IRELLI, *Verso un più compiuto assetto della disciplina generale dell'azione amministrativa*, on www.astrid.online.it

the resolution pursuant to Art. 14 ter, paragraph 6-bis does not constitute the final measure, which is regulated by paragraph 9. This provides that the final order must be in accordance with the final resolution referred to in paragraph 6a and supersedes in all respects any authorization, license, authorization or act of consent however called under the competence of administrations involved or invited to participate, but found to be absent³⁷.

With reference to the two moments of the final resolution of the conference and of the final measure and what the relationship that binds them, it was argued that the first time would be the decision-that is the final result of the logical process decision-making, while the second would identify the constitutive moment of legal effects³⁸.

2.4 The agreements

The institution of the agreements, regulated in general with the law 241 of 1990, occurs in two distinct forms: the agreement between the Public Administration and

³⁷ Some commentators have pointed out that the provision of two separate phases is aimed to enable the persons concerned have as their referent only the responsible for the procedure and therefore a single administration, allowing in such way that the relation between the different institutions remains a fact internal to the proceeding (*endoprocedimentale*). On the other hand, the Court has, however, argued that the use of the procedural form of conferencing services does not alter the rules governing - in the ordinary and general - the identification of the issuing authorities, with the result that the appeal of final decision shall be notified to all the administrations in the Conference, which expressed opinions or determinations that the applicant would have had the burden to challenge singly, if they had been issued outside of the peculiar procedural module under consideration (see Cons. St., IV, 2 May 2007, n. 1920); M. SANTINI, *Note sparse sulla giurisprudenza in tema di conferenza dei servizi*, Urb. app., I, 2008.

³⁸ G. PAGLIARI, *La conferenza di servizi*, in M.A. SANDULLI, *Codice dell'azione amministrativa*, cit., 608 ss.; G.B. CONTE, *I lavori della conferenza di servizi*, *ibidem*, 653 ss

private³⁹, disciplined by art. 11 of mentioned Act and the agreement between Public Administrations⁴⁰, under art. 15.

The exercise of consensual administrative power is an instrument of simplification of significant innovation as, compared to the traditional exercise of administrative power in a unilateral and authoritative form, provides for the Administration searching for the consent of the individual or of other public administrations (in order to involve during the relevant proceedings also other interests than those protected by the proceeding public administration (PA) and, above all, in order to reduce the use of legal remedies), with a view more in line with the principles of democracy and the new shape of the social structure as a plurality of centers of power.

Proceeding with the first figure, the agreement between PA and private⁴¹ already represented, before the introduction of Law. 241 of 1990, an acknowledged model⁴² but did

³⁹ N. BASSI, *Gli accordi integrativi o sostitutivi del provvedimento*, in M.A. SANDULLI, *Codice dell'azione amministrativa*, cit., 560 ss.; P. D'ANGIOLILLO, *Accordi amministrativi e programmazione negoziata nella prospettiva del potere discrezionale*, Napoli, 2009; F. FRACCHIA, *L'accordo sostitutivo*, Padova, 1998; G. GRECO, *Accordi amministrativi tra provvedimento e contratto*, Torino, 2003; G. PERICU, *L'attività consensuale della Pubblica amministrazione*, in L. MAZZAROLLI, G. PERICU, A. ROMANO, F.A. ROVERSI, MONACO, F.G. SCOCA, *Diritto amministrativo*, Bologna, 2003; R. PROIETTI, *Gli accordi sostitutivi ed endoprocedimentali tra p.a. e privati*, in P. STANZONE, A. SATURNO, *Il diritto privato della pubblica amministrazione*, Padova, 2006.

⁴⁰ G. FALCON, *Le convenzioni pubblicistiche*, Milano, 1984; R. FERRARA, *Gli accordi fra le amministrazioni pubbliche*, in M.A. SANDULLI, *Codice dell'azione amministrativa*, cit., 673 ss.; E. STICCHI DAMIANI, *Attività amministrativa consensuale e accordi di programma*, Milano, 1992; L. TORCHIA, *Gli accordi di programma tra regioni ed enti locali, una ipotesi di lavoro*, REG GL, 1990, 220.

not find wide application mainly on the grounds that it did not produce any binding effect on the administration, which could well disattend the content adopting a different solution from that agreed⁴³.

In this context, art. 11 of l. 241 of 1990 has had a significant importance in giving to agreements between *PA* and privates a real legal effect, so that both parties are now bound to honor the commitment given by them in the agreement, with no prejudice to the right of withdrawal of the Administration for reasons of public interest.

As per art. 11 there are two formulas used by P.A. to reach agreement with the private: the first, in which the agreement identifies the discretionary decision of the administration (so-called *accordo endoprocedimentale*) and a second, in which the agreement literally replaces the final measure (so-called *accordo sostitutivo del provvedimento*)⁴⁴.

⁴¹ Which can be traced back in practice e.g. the case of consensual transfer in the expropriation field and development agreement (*convenzione di lottizzazione*), see F. CARINGELLA, *Manuale di diritto amministrativo*, Roma, 2010, p. 1371 e ss.

⁴² S. FANTINI, *Art. 11, l. n. 241 del 1990*, in A. BARTOLINI, S. FANTINI, G. FERRARI, *Codice dell'azione amministrativa e delle responsabilità*, Roma 2010.

⁴³ To the mentioned deficiency of properly juridical effects had reacted, indeed, the administrative case law, which imposed Authority when *pretoria* at least the need to use in a transparent way the power to deviate from the agreement, through a clear externalization in the motivation of the reasons which led the PA to act differently from what was agreed with the private, see. F. CARINGELLA, *Manuale di diritto amministrativo*, Roma, 2010, pp. 1349-1351.

⁴⁴ On the debate about the differences between the two types of agreements see R. GAROFOLI, G. FERRARI, *Manuale di diritto amministrativo*, Roma, 2010, pp. 931-932.

In the first version of the law 241/90 the two models were not perfectly substitutable, because the s.c. *accordi endoprocedimentali* enjoyed, potentially, a general application, but the law limited the conclusion of agreements in lieu of measures to cases specifically provided for. The l. 15/2005, inspired by the purpose of simplifying and then to encourage the expression of power by consensus⁴⁵, had the merit of eliminating the terms provided for in the original formulation of art. 11 and therefore of equalizing the scope⁴⁶ of the two models of the agreement, in an atypical reasoning⁴⁷.

As for the discipline (the conclusion of the agreement in any case based on the fact that an administrative proceedings has been duly started)⁴⁸ Law 241/90 does not contain a complete description, but paragraph 2 of art. 11 merely indicates that "*Unless otherwise provided, the principles of the Civil Code on obligations and contracts shall, mutatis mutandis, apply*", identifying, at paragraphs 2, 3 and 4-bis, some of the derogations applicable to the statutory regime, aimed to protect the public purpose which must be

⁴⁵ For a discussion on the exercise of consensual administrative power see S. LUPI, *Il principio di consensualità nell'agire amministrativo alla luce della legislazione e della giurisprudenza più recenti*, *Dir. amm.*, 2008, 691 ss.; G. PERICU, *L'attività consensuale della Pubblica amministrazione*, cit.

⁴⁶ With reference to the operativity of administrative agreements, and whether they apply to the mere discretionary activities or even to the discretionary-bound technique, Cons. St. sez. VI, 5 febbraio 2002, n. 2636 e Cons. St., sez. IV, 10 dicembre 2007, n. 6344; see N. AICARDI, *La disciplina generale e i principi degli accordi amministrativi: fondamento e caratteri*, RTDP, 1997, 1 ss.; R. GAROFOLI, G. FERRARI, cit., p. 938.

⁴⁷ To be interpreted, however, in a strict sense, since the agreement, as a form of expression of public power, shall satisfy the requirements and content required by law, see F. CARINGELLA, cit., p. 1352 ss.; G. TULUMELLO, *Il nuovo regime di atipicità degli accordi sostitutivi: forma di Stato e limiti all'amministrazione per accordi*, www.giustamm.it.

⁴⁸ F. CANGELLI, *Potere discrezionale e fattispecie consensuali*, Milano, 2004.

pursued even in the case of the exercise of administrative activity by consensus (agreement to be concluded "in each case in the pursuit of public interest"). Actually, the substantial prediction of the captioned rule has been enriched with the law 15/2005, with which, in order to favor the activity of consensual of the PA, has been inserted in art. 11 the paragraph 1-bis, according to which the proceeding may initiate a real negotiation, drawing up a schedule of meetings to which separately or jointly invite the recipient of the order or any respondent party.

From reading art. 11, paragraph 2, it is clear, therefore, that the agreements must be concluded in writing under penalty of nullity - in contrast to the principle of freedom of form in the field of private law - in order to allow the monitoring of compliance with the principle of legality of administrative action and verification of compliance with the public interest. Paragraph 3 requires, then, that the substitute agreements are subject to "*the same type of controls they are subjected to the measures in place of which are used*" and must be preceded by a "*determination of the PA which would have had jurisdiction in the adoption of the same.*"

In addition, as regards relations with third parties, the agreement can not be used to the detriment of the same, while respecting the constraint of the public purpose is also protected in a general way by the provision of a specific procedural rules, similar to that leading to the adoption of an act of the authorities and the special discipline of withdrawal exercised by PA pursuant to paragraph 4 of art. 11 (see below).

The contamination of the rules of private law and public law (as exemptions to the civil regulation) led to the a debated question of interpretation concerning the legal nature of the captioned agreements.

According to a first thesis they are supposed to be common contracts⁴⁹ which produce legal positions of right / obligation, with which the Administration exercises its

⁴⁹ G. MANFREDI, *Accordi e azione amministrativa*, Torino, 2001.

autonomy in negotiating - albeit with some special rules - without spending any public power⁵⁰. According to a different orientation, however, the agreements constitute an exercise of public power in the form of consensus⁵¹.

The debate is productive of a series of consequences, depending on whether you accept one or the other argument in comparison, in particular on the theme of the exercise of self-protection power by public authorities⁵², on the issue concerning the invalidity scheme, on the spectrum of civil rules applicable to agreements⁵³, and especially on the counter remedies for the breach of the Administration⁵⁴.

⁵⁰ For the arguments underlying the first and second orientations, R. GAROFOLI, G. FERRARI, cit., pp. 939 ss. and F. CARINGELLA, cit., pp. 1356 ss.

⁵¹ Among others, see G. GRECO, *Accordi amministrativi tra provvedimento e contratto*, Torino, 2003; V. CERULLI IRELLI, *Corso di diritto amministrativo*, Torino, 1997, p. 508.

⁵² According to the thesis of the autonomy of negotiations, the Administration - in addition to the remedy the withdrawal of expressly provided for by art. 11 - can not exercise any other powers of "public" self-defense to free itself from the consensual constraints or private self-defense (as this is exceptional in the civil system), but may only apply to the court to enforce any defects of the consensual act. The adherence to the thesis that the agreement would be operating, albeit consensual, on a public power basis, would mean that the PA is allowed to use, in addition to the instrument of withdrawal pursuant to art. 11, the cancellation *ex officio* of the illegitimate agreement pursuant to art. 21-*nonies*.

⁵³ According to the first argument the alleged pathology of the agreement will be manifested in the form of civil nullity, cancellation and termination. On the contrary, the publicist position considers that the invalidity regulation of the agreement boils down to defects of the administrative act pursuant to art. 21-*octies*.

It should be noted that the distances between the two thesis examined so far have been progressively reduced in the light of the disappearance of the dogma of the non-indemnifiability of legitimate interests (s.c. *interessi legittimi*) and, in particular, and of the admission of a revision by the administrative judge on the validity of the claim of the private⁵⁵.

The major issues of interpretation remain, in any case, the figure of the unilateral termination provisions of paragraph 4 of art. 11, in accordance with which the P.A. may terminate the Agreement for reasons of public interest occurred, notwithstanding the fact that it is required to pay compensation to the private eventually damaged⁵⁶.

The new art. 133, co.1, letter. a), which reproduces the provision previously provided under paragraph 5 of art. 11, orders that disputes concerning training, conclusion

⁵⁴ In the first case, the private citizen, in the event of infringement of the obligations assumed by consensus, may bring an action for accurate performance (*esatto adempimento*) or for termination, under such framework there are questions also on the possibility of allowing the remedy of specific performance execution pursuant to art. 2932 of the Italian Civil Code, assuming that otherwise, they would be required to challenge in front of the administrative judge the measure that does not comply with the agreement for abuse of power (within the relevant expiry period) and to activate the remedy of appeal against the refusal silence (*silenzio rifiuto*).

⁵⁵ Even admitting public orientation, you admit the possibility for the private citizen to ask for the compensation to withstand the default of the obligations undertaken by the Administration, as well as to ask the court to order to perform an action contained in the agreement, as a typical figure of self-constraint, see F. CARINGELLA, cit., pp. 1362-1363.

⁵⁶ According to the thesis of the consensual exercise of power, the withdrawal would be an act of public self-defense, which would be applicable to all the rules of participation, accepting the position of private law, however, would be an explication of the general rule of the art. 1373 of the Civil Code; see L. MONTEFERRANTE, *Ai confini del diritto pubblico: revoca e recesso nella legge sul procedimento amministrativo*, in *Il corriere del merito*, 3/2006, 367.

and execution of agreements which supplement or substitute administrative measures are devolved to the exclusive jurisdiction of the administrative courts⁵⁷.

With reference to the agreements between public administrations, the general regulatory model is art. 15 of l. 241/1990 while the most important representative figure, or the so-called program agreement is provided under art. 34 Legislative Decree no. 267 of 2000 (T.U. local authorities). Also in such case, the need for simplification is obvious and reconnects, as regards the conference services, to the benefits associated with exercise in collaboration of activities of common interest⁵⁸.

However, if the art. 34 regulates in detail the agreement, indicating – *inter alia* - elements such as which public administrations can be parties to the agreements or the specific modulation of the proceedings, Article. 15 does not give precise information about it and merely refers to the provisions under paragraphs 2, 3 and 5 of article 11 of law 241/1990. It is therefore provided, also in this case, the obligation to observe the written form under penalty of nullity, the compatibility with the principles of the Civil Code on obligations shall apply to the extent possible and contracts and agreements are subject to the same system of controls which are undergoing administrative measures they replace.

⁵⁷ This legal reference was actually adopted by those who favor the public position, because its constitutional justification would, according to the case law of the Court of Laws (*corte costituzionale*), consist in an area where the Administration still exerts a public power, albeit with consensual modalities. For a discussion on the agreements and exclusive jurisdiction and constitutionality of this choice, see. N. BASSI, cit. in M.A. SANDULLI, *Codice dell'azione amministrativa*, cit. e R. GAROFOLI, G. FERRARI, cit., pp. 956 ss..

⁵⁸ For more details, see S. LUPI, *Il principio di consensualità nell'agire amministrativo alla luce della legislazione e della giurisprudenza più recenti*, *Dir. amm.*, 2008, 691 ss.

Doubts have arisen, however, with reference to the absence of any reference to paragraph 4 of art. 11, which, as previously noted, governs the unilateral termination occurring for reasons of public interest⁵⁹.

Even in the presence of agreements between public administrations, finally, the jurisdiction is solely responsible for the administrative judge, as provided by the aforementioned art. 133, letter. a), n. 2.

2.5 The self-certification

The self-certification⁶⁰ is aimed at simplifying the administrative activities and at improving the quality of the relationship between public administration and administrated subjects; a self-certification relieves private subjects from the obligation of certifying

⁵⁹ According to the first thesis (which connects to the publicist position) the lack of connection does not prevent the PA to exercise the usual powers of self-protection. It is under discussion, in the context of this orientation, whether the Administration may withdraw without the limits of supervening reasons nor contingent compensation or, otherwise, shall comply with the standards contained in law 241/1990. Following another orientation, however, the absence of any reference to paragraph 4 would mean that the Administration, by entering into a contract of a private nature, can not unilaterally dissolve the link, unless by mutual dissent or through the courts, when the agreement is affected by defects, see. F. CARINGELLA, cit., p. 1373.

⁶⁰ G. BARTOLI, *L'autocertificazione: confronto tra la legge 15/1968 e la legge 241/1990*, Rimini, 1993; A. BENEDETTI, *Certificazioni "private" e pubblica fiducia*, in F. FRACCHIA e M. OCCHIENA (a cura di), *Certificazioni tra poteri pubblici ed iniziativa privata*, Milano, 2006; M. OCCHIENA, *l'autocertificazione*, in M.A. SANDULLI, *codice dell'azione amministrativa*, cit., 728 e seguenti , C. TAGLIANTI, *Trasparenza dell'atto amministrativo*, www.giustizia-amministrativa.it, D. VAIANO, *Commento art. 18, in Codice dell'azione amministrativa e della responsabilità*, Roma, 2010, 442 ss.

requirements and data for purposes of obtaining certain acts and/or deeds; in such cases, a (mere) declaration (accompanied by a minimum of formalities) would in fact suffice to the Public Administration (“PA”)⁶¹.

Art. 18 of law 241/1990 sets forth the general principles relating to those procedural steps, providing for information of both historic and evaluation nature on “*mere fact/circumstances*”, that might consist in certifications, as well as in other acts of a declarative nature that are not certifications (including, but not limited to, “*substitute declarations*”) that PA must consider in order to take its final decision⁶².

The said provision, in its original formulation, envisaged a process articulated in two fundamental steps. By the first step – see Paragraph 1 – the legislator (considering the low level of computerization at that period) attributed to self-certifications and to the documents listed in law No. 15/1968 the legal tools aimed at both simplifying the public decisional processes, and at relieving private parties from time and cost consuming queues at the public offices in order to obtain public certificates. By the second step – Paragraphs 2 and 3 – any interested party was on the one side required to merely declare (and no more to self-certify) facts, personal states and qualities that were already in the hands of the same public administration that received the declaration or of any other public administrations, thus imposing on the proceeding public authority the duty to obtain the said documents *ex officio*; on the other hand, the officer in charge of the proceedings would have to verify any facts, personal states and qualities that the “*same public administration [he belongs to] or any other public administration is bound to certify*”.

⁶¹ Definitely different from self-certifications is, nonetheless, the rule of acquisition *ex officio* of the necessary documents for the carrying out of the proceedings, v. M. OCCHIENA, cit.

⁶² N. DONATO, *L'autocertificazione tra certezza e semplificazione*, Dir. e proc. amm., 2009, 201 ss.; M. IMMORDINO, *La difficile attuazione degli istituti di semplificazione documentale - il caso dell'autocertificazione*, *Nuove autonomie*, 2008, 603 ss.

The “novel” of [new provisions enacted in] 2005 (i.e., law decree No. 35/2005, converted into law No. 80/2005), confirms the above approach in the new Paragraph 2 [of Article 18 of law 241/1990], and states that the *ex officio* document’s acquisition is the general rule governing the carrying out of any proceedings (even though actual application by the administrative offices is rather different), thus making the recourse to self-certification exceptional (and, in any case, qualifying it as an evidence of organizational inefficiencies).

Even though law No. 15/1968⁶³ has been repealed long time ago, it is worth pointing out that such law (which for sure anticipated the future evolution, but remained unimplemented for more than 20 years) envisaged that any citizen was allowed to produce to public authorities three different type of self-certifications: (i) declarations substitute of certifications, (ii) declarations temporarily substitute of certifications and (iii) declarations substitute of notorious act. Nonetheless, all the three above self-certifications compulsorily required the authentication (legalization) of the private party’s signature, a formality that actually prevented the reduction of the burdens weighing on citizens and the simplification of the public offices activities⁶⁴.

The above picture of self-certifications was deeply changed by the “*simplifying revolution*” contained in the so called “*Bassanini-bis Law*”, law No. 127/1997 and, specifically, in its Articles 1, 2 and 3 (subsequently modified by law No. 191/1998, the so called “*Bassanini-ter law*”) and by the relevant implementing regulation, D.P.R. No. 403/1998.

⁶³ G. BARTOLI, *L'autocertificazione*, cit.

⁶⁴ this is for the simple reason that the signature’s authentication replaced the queue at the public desk to get a certificate with the queue to obtain the signature’s authentication v. M. OCCHIENA, cit..

In particular, the rules implemented by the above provisions did actually confirm the full efficiency and operation of self-certifications, due *in primis*, to the abrogation⁶⁵ of the duty to certify the signature of the declaring certifying person (for both the declarations substitute of certifications and for the declarations substitute of notorious act)⁶⁶. The above changes did not imply the end of any formal verification for the said acts. Actually, upon abrogation of the duty of signature's authentication, Art. 2, Paragraphs 10 and 11 of law No. 191/1998, stated that the signature of the declarations substitute of certifications had to be made at the presence of the public officer entrusted with the duty to receive the relevant documents, or that the same declarations had to be filed jointly with a copy, although not certified, of a personal identification document of the signatory⁶⁷.

The evolution of the legislative and regulatory rules on self-certification has been definitively transposed in Section V ("*Laws referring to self-certifications*") of Part III ("*Simplification of administrative documents*"), of D.P.R. n. 445/2000 ("*Unique text of legislative's and guideline's about administrative documentations*").

Art. 46 D.P.R. n. 445/2000 states that a declaration substitute of certifications may be released [by the interested party] jointly with the relevant administrative application in

⁶⁵ In art. 3, paragraph 10, law n. 127/1997 and in art. 2, subsection 10 and 11, l. 191/1998.

⁶⁶ Art 3 of D.P.R. n. 403/1998 stated that, in lieu of authentications, that the substitute declarations of certifications could be released when making the request and be subscribed by the interested person in the presence of the officer, while the law Bassanini *ter* abolished the duty of authentication also for any declarations substitute of notorious act.

⁶⁷ The regulation of 1998 also stated the important rule by which substitute declarations (of certification and of notorious act) "*have the same time validity of the acts that they have replaced*" (art. 6). In addition, it is important to remember the fundamental reform brought with the law n. 127/1997 e by D.P.R. 403/1998 concerning the responsibility of public employees in the case of refusal to accept self-certifications.

order to prove “*in lieu of standard certifications those personal states, qualities and facts*” that are punctually listed in the same provision of law⁶⁸.

As concerns declarations substitute of notorious acts, art. 47, of D.P.R. 445/2000 reaffirms on the other hand that such declarations might be used to confirm either “*personal states and qualities or facts that are in the personal knowledge of the interested person*” (Paragraph 1), either “*personal states and qualities or facts related to other subjects that are in the personal knowledge of the interested person*” (Paragraph 2). The third Paragraph considers that, except for those cases excluded by law, in the relationship with public offices and licensors of public services, personal qualities and facts that are not certified can be proven by the interested person with a declaration substitute of notorious act.

With reference to the limits to the use of substitute declarations, according to art. 49 and except for certain special cases, they cannot replace “*medical, veterinary, healthcare certificates, or those certificates of origin or of EC compliance, and/or about trademarks or patents*”.

D.P.R. n. 445/2000 also draws a responsibility system composed of the responsibilities resting on the declaring person and those resting on the Public Administration and Public Officers.

As to the firsts, art. 76 of the cited D.P.R., states that anyone who releases false declarations, makes or uses false acts is “*punished pursuant to criminal laws and to the special applicable laws*”; in particular, the criminal faults are ideological false made by a

⁶⁸ *Inter alia*, date and place of birth, citizenship, civil and political rights, professional activity and economical and income’s situation.

private citizen in a public act (art. 483 criminal code)⁶⁹, false declarations about one's own or third parties' identity or personal qualities (art. 496 criminal code) false statements or declarations made to a public officer one's own or third parties' identity or personal qualities (art 495 criminal code)⁷⁰. In addition to criminal consequences, art 75, D.P.R. 445/2000 states that if, upon the verification of the substitute declarations, it emerges the falseness of the content of the declarations released by a private party, *"the declaring person decays from the benefits obtained and accorded by virtue of the administrative measure that was issued on the basis of the false declaration"*⁷¹.

In all the above situations, with the exception of any cases of willful misconduct and gross negligence, art. 73 of D.P.R. 445/2000 provides that any public administrations and their employees are *"exonerated from any responsibility for the issued administrative acts, whenever the adoption of the relevant act is the consequence of false declarations of false documents or of documents containing false data, produced (exhibited) by the interested party or by any other interested person"*.

Finally, the responsibility of public administrations and of their employees is characterized by a dual system. The first one concerns the duty of public offices to control

⁶⁹ V. ex multis, Cass. pen., V, 26 novembre 2009, n. 2978, Ced. Cass.; 16 aprile 2009, n. 25469, ivi ; 25 novembre 2008, n.6063, ivi; 2 ottobre 2008, n.40374, ivi.

⁷⁰ For the said two last crimes, see Cass. Penale , V, 21 luglio 2009, n. 35447, Ced cass. II comma 4 art. 76, cit., that states, moreover, that if the false declaration is released to obtain a public role or the authorization for a profession or an activity, *"The judge, in the more serious cases, is allowed to dispose the temporarily disqualification from public offices, professions or activities"*.

⁷¹ This provision of law is symmetrical to the one stated in art. 21 of law n. 241/1990, where in case of false substitute declarations made in those cases where declarations of start of an activity or consent by silence apply, in addition to the persecution by art. 483 of the criminal code *"the conformation of the activity or of its effects to law or to the provided indemnity it is not allowed"*.

the declaration made by public citizen. Art 71, D.P.R. 445/2000 states the duty for any public offices to make “adequate checks”: a) always and in any case, whenever there are consistent doubts about the faithfulness of a substitute declaration; b) by a random approach, in any other cases.

The second system of “public” responsibility involves the public officers. Art. 74, D.P.R. 445/2000 reaffirms the provisions of law No. 127/1997 and of D.P.R. No. 403/1998, and states that (i) the rejection of substitute declarations and of a notorious act “made in compliance with the law”, as well as (ii) the request of certificates or of notorious acts when there is “a duty of the public officer to accept the substitute declaration”, are considered breach of the office’ duties.

2.6 The consent by silence

With the consent by silence⁷² the law-maker provided a solution to the problem of the administration’s inactivity, i.e. to the problem of the lack of a final decision in proceedings started upon the private party’s initiative within the final term set forth by art 2 of law No. 241/1990. The applicant in such cases automatically gains the utility it pursued by submitting his application to the Public Administration through a law-defined mechanism (both on the preliminary assumptions and on the scope of application) that carries to the production of a legal effect with the same value of a positive final decision.

⁷² M. D’ORSOGNA, R. LOMBARDI , *Il silenzio assenso*, in M.A. SANDULLI (a cura di), *Codice dell’azione amministrativa* , cit., 801ss.; G. MORBIDELLI, *Il silenzio-assenso*, in V. CERULLI IRELLI (a cura di), *La disciplina generale dell’azione amministrativa*, Napoli, 2006, p. 268 e ss.; N. PAOLOANTONIO, *Comportamenti non provvedimenti produttivi di effetti*, in F.G. COCCA (a cura di), *Diritto amministrativo*, cit.; V. PARISIO, *I silenzi della pubblica amministrazione*, Milano, 1996; P.L. PORTALURI, *Note sulla semplificazione per silentium* (con qualche complicazione), in www.giustamm.it.

This mechanism is today of ordinary application, i.e. it does not require to be envisaged by an *ad hoc* provision of law, and is the consequence of the newly extended version adopted by law-decree No. 35 of 2005 converted into law No. 80/2005⁷³. Finally, D.lgs No. 59/2012, of implementation of the European directive on the liberalization of public services – upon clarification that “*For the purpose of the present decree, doesn't represent permit the declaration of initial activity (d.i.a.), in the art.19, Paragraph 2, second period, of the law 7 august 1990, n. 241*” (art. 8) and “*In the limits of the present decree, the access and the exercise of the activity of services represents expression of economic freedom and can't be limited in an unjustified and discriminatory way*” (art 10, subsection 1) – in view of simplifying the access at public services, made the permit's regime for the services activity as a merely residual option, and stated, by art. 17, that “*for purposes of releasing an administrative authorization for the access and performance of services activity considered in the present decree, the proceedings set forth by art.19, Paragraph 2, first period of law 7 august 1990, n. 241* [about d.i.a. today called s.c.i.a.] must be followed, or [but only] *if it so provided, the proceedings envisaged in art. 20 of the same law n. 241/1990*” [about consent by silence] shall apply, and that only if “*there is an imperative reason of general interest, it could be imposed that the proceedings ends with an express authorization*”.

⁷³ E. BOSCOLO, *Il perimetro del silenzio assenso per generalizzazioni, eccezioni per materia e norme previgenti*, Urb. E App., 2009; M.A. SANDULLI (a cura di), *Riforma della legge 241/1990 e processo amministrativo*, FA-TAR, supplemento al n. 6/2005; R.GIOVAGNOLI, *I silenzi della Pubblica amministrazione dopo la legge 80/2005*, Milano, 2005, 454 ss.; G. MORBIDELLI, *Il silenzio assenso*, in *la disciplina generale dell'azione amministrativa*, (a cura di) CERULLI IRELLI, Napoli, 2006, 269 ss., M.A.SANDULLI, *Riflessioni sulla tutela del cittadino contro il silenzio della pubblica amministrazione*, Giust. Civ., 1994, 485 ss..

It is a long time that the scholars' reconstruction of consent by silence in terms *attizi* (i.e. considering it as an express administrative measure) has been abandoned⁷⁴, and today the consent by silence is commonly set⁷⁵ in the larger category of the silence “*with a meaning*”, which is characterized for its ability to legally define the proceedings, although the Public Administration does not act in the exercise of any administrative function⁷⁶.

⁷⁴ O. RANELLETTI, *Teoria generale delle autorizzazioni e concessioni amministrative: Parte I Concetto e natura delle autorizzazioni e delle concessioni amministrative*, GI, 1894, XLVI, 7 ss.

⁷⁵ The scholars (upon noting that there is a contradiction in “obtaining” a voluntary act from a failure to exercise the administration’s powers) have first pointed out that “*silence*” is always based on the non-activity, and – with respect to the cases of silent approvals – have construed the relevant inactivity as a meaningful juridical fact, that - by law - produces juridical effects equivalent to those following an express approval. In substance, there is a sort of segregation between the mechanisms that produce the legal effects - that do not require the existence of a voluntary act - and the care of the particular interest at stake, that is taken into consideration under the aspect of the material legitimacy of the asset of interest, as modified by the consent by silence v. F. G. SCOCA, *Il silenzio della pubblica amministrazione*, Milano, 1971; A. TRAVI, *Silenzio assenso ed esercizio della funzione amministrativa*, Padova, 1985.

⁷⁶ Although the overcoming of the qualification of consent by silence in terms *attizi*, scholars and case law have adopted different approaches and reconstructions in order to justify the mechanism that produces favorable effects for the applicant. On one side there is the theory willing to reduce consent by silence within an *ex lege* legitimacy mechanism, v. DE ROBERTO, *Silenzio assenso e legittimazione «ex lege» nella legge Nicolazzi, D SOC*, 1983, 163 ss.; on the other hand, there is the position that considers consent by silence, (deprived of any meaning in terms of implied express measure) an intermediate way between the law and the specific circumstances of the single case; in particular including consent by silence among those “*juridical facts*” that “*by virtue of law, specifically signify a deny or an approval of the request from the applicant*”, v. A.M. SANDULLI, *Il silenzio della pubblica amministrazione oggi: aspetti sostanziali e processuali, Atti del XXVIII Convegno di studi di scienza dell’amministrazione - Varenna*, Milano, 1985, 53 ss.

In any case, the attribution to an “inactivity” of a typical legal value, and the ensuing production [by way of consent by silence] of the same effects that are commonly produced by a positive [and express] decision, is definitely conditional upon the strict compliance of the application to the law and to any requirements set forth therein⁷⁷.

Paragraph 4 of art. 20⁷⁸ lists the express limits to the application of consent by silence.

In principle, Paragraph 1 of art. 20 expressly excludes from the scope of application of consent by silence all the proceedings aimed at issuing measures of consent activated by way of a mere declaration that an activity has been started *ex art. 19* of law No. 241/1990⁷⁹.

The said Paragraph 1 of art. 20, outlines a series of cases whereby the application of consent by silence suffers important exceptions. The set of rules therein provided, in fact, also in view of certain important trends of the case-law, excludes that consent by silence applies to acts and proceedings regarding certain so called “sensitive” matters, that can be ascribed to [the application of] the constitutional principles of equity, solidarity, as well as protection of the individual, of the environment and of cultural and landscape assets.

⁷⁷ V. TAR Lazio, Latina, sez. I, 3 marzo 2010, n. 204, e TAR Puglia, Lecce, sez. III, 3 marzo 2010, n. 676.

⁷⁸ The discipline remained rather unchanged after the law change of 2009 (law n. 18 giugno 2009, n. 69) that just introduced the of “refuge” and “immigration”, as a merely specification of the “citizenship”.

⁷⁹ Some scholars affirm that proceedings that involve technical and not replaceable checks (abilitations) and proceedings where there is a limited capacity of the good the private party has applied for, should be excluded: v. G.VESPERINI, *La denuncia di inizio attività e il silenzio assenso*, GA, 2007, 83ss.

Consent by silence do not apply to the said subjects, whereby a silence by the public administration can not be held as an assent but (safe the cases of *silence-refusal*) has to be qualified as a breach [*of the duty to close the proceedings with an express measure*]⁸⁰.

Therefore, if the *ratio* of consent by silence is to protect the values of simplification of the administrative action, in view of a an efficient and expedite conclusion of the administrative proceedings, the express exclusion of consent by silence in certain specific cases is a direct consequence of the need to protect some certainly higher values. A further exception to the mechanism of simplification *per silentium*, due to an express provision of law, applies also in those cases whereby EU provisions require the adoption of formal administrative acts or in those proceedings listed in one or more Prime Minister decrees, upon proposal of the Ministry of Public Functions, with the consent of any other competent Ministers⁸¹.

Nevertheless, the general application of consent by silence does not imply that they shall apply in all cases. The calling of a services' conference by the interested public administration, as stated in the Paragraph 2 of article 20, within 30 days as of the filing of the application impedes the perfection of a consent by silence. The Administration, upon

⁸⁰ V. M. D'ORSOGNA, R. LOMBARDI, cit. that recalls N. PAOLANTONIO, *Comportamenti non provvedimentali produttivi di effetti giuridici*, in *Diritto amministrativo*, (a cura di) F. G. SCOCA, cit., 479 ss.

⁸¹ The exam of administrative case-law allows to take note that the rule that limits consent by silence to proceedings started upon initiative of the private party (as listed in Paragraph 4), is inflexibly and peremptory applied by administrative Courts; the latter, while interpreting the said provision, limit the scope of the rule only to the cases therein listed, and in no case allow an extension of the said exception to additional similar cases or to any other cases that are suspected to be excluded from the application of the general rules on consent by silence (Cons. St., sez. VI, 29 dicembre 2008, n. 6591, UA, 2009, 454 with comment of BOSCOLO, *il perimetro del silenzio-assenzo tra generalizzazioni, eccezioni per material e norme previgenti*, UA, 2009, 454).

evaluation of the circumstances, holds the power to stop the formation of consent by silence, and opt for an express decision which allows the actual evaluation of the involved interests, including the “*Juridical situations of the counter-interested persons*” as art. 2 states.

Subparagraph 5 of article 20 expressly states that the notice anticipating, pursuant to art. 10 *bis*, law No. 241/1990, the reasons of rejection of the application applies to the proceedings that may end by consent by silence. The officer responsible of the proceedings or the competent authority, therefore, can stop the formation a consent by silence in case they envisage the rejection of the application, and in such cases have to provide notice thereof to the interested party, thus triggering the application of the general rules governing the conduct of the proceedings for the adoption of an express final decision (i.e. the non-applicability of consent by silence)⁸².

Considering that the consent by silence is an alternative way of ending the administrative proceedings, the effects of t consent by silence should not be frustrated by the adoption of a negative decision, after expiration of the term for ending the proceedings; any such measure, being adopted at a time when there is no residual *potestas decidendi*, has to be considered invalid, in terms of illegitimacy⁸³ or even totally void⁸⁴.

On the contrary, upon formation of favorable measure consequent to a consent by silence, the administration might always decide to activate a self-protection procedure,

⁸² V. M. D’ORSOGNA, R. LOMBARDI, cit.; about the discussion on the practical consequences of the direct application of the art. 10-bis law. 241/1990 see R. GAROFOLI, G. FERRARI, *Manuale di diritto amministrativo*, cit., p. 643 e ss.

⁸³ See TAR Lombardia, Milano , sez. III, 7 giugno 2006, n. 1321.

⁸⁴ In this way see A. BARTOLINI, *La nullità del provvedimento del rapporto amministrativo*, Torino, 2002.

provided it acts in compliance with the requirements set for the exercise of the said power pursuant to law No. 241/1990, and thus provided its action fully respects the (strict) legal limits of the re-examination power and the warranties of participation granted to the interested party⁸⁵.

2.7 The SCIA

The mechanism in question was newly introduced by the Legislator (art 49, n. 4 *bis*, Law 30 n. 122 2010) which changed its prior denomination “declaration to start an activity” (d.i.a.) (previously, “notification to start an activity”) with the new “certified advise to start an activity” (s.c.i.a.), introducing some seminal modifications which extend the ambit of application of the mechanism and render it more effective⁸⁶, mechanism that is now of the utmost importance especially in the aftermath of the Bolkenstein Directive⁸⁷.

As the previous d.i.a., the s.c.i.a. favours simplification because it replaces “every authorization, license, concession, permit” with a previous advise of the interested party (with certifications or self-certifications), so that the private party can start immediately its

⁸⁵ See Cons. St., sez. V, 20 marzo 2007, n. 1339; Id., sez. VI, 17 marzo 2009, n. 1578; Id., sez. VI, 25 settembre 2006 n. 5628; TAR Sicilia, Palermo, sez. I, 20 agosto 2007, n. 1971; TAR Puglia, Lecce, sez. II, 5 febbraio 2007, n.297.

⁸⁶ M. CLARICH, *Dalla Dia alla Scia: molto rumore per nulla*, www.fiere24.ilsole24ore.com; F. DORO, *Dia e Scia*, Padova, 2010; R. BALASSO, *La segnalazione certificata di inizio attività (SCIA) e la discrezionalità amministrativa*, www.tecnosus.it; N. PAOLANTONIO, W. GIULIETTI, *La segnalazione certificata di inizio attività*, in M.A. SANDULLI (a cura di), *Codice dell'azione amministrativa*, cit., 749 ss..

⁸⁷ M.A. SANDULLI, G. TERRACCIANO, *La semplificazione delle procedure amministrative a seguito della attuazione in Italia della Direttiva Bolkestein*, cit.

activity and the public administration can exercise an ex post control on if all the requirements have been complied with.

This has the effect of abolishing the ex ante administrative procedure, because the control activity is ex post, and at the same time the private party is held responsible because it has to prove the fact that he/she complied with all the requirements.

Even though the ambit of application of the mechanism has been extend over the last few years, the Legislators wants to guarantee a more intensified protection to specific constitutional interest (such as national defence, public security, asylum and citizenship) in this case the application of the s.c.i.a. is excluded.

One the activity has been started, the administration can control the notification and all the documents presented. If the control is positive, the administration will neither adopt and act or communicate with the private party , if the control is negative the administration will hold the activity and order the removal of the effects which have already been produced, or will indicate a deadline to the private party in order to comply with the requirements.

After 60 days, the public administration can affect the activity in question: a) by exercising its powers of self- protection, already mentioned in relation to the consent by silence; b) through an interdictive procedure when the activity has been started on the basis of a self-declaration in substitution of a certification or on the basis of a self-declaration in substitution of an attested affidavit (false or mendacious); c) through an interdictive procedure if there exist a risk of damage to the cultural and artistic heritage, the environment, health, public security, national defence, after it has be accreted the impossibility of protecting those interest by obliging the private party to comply with the regulations in force”

Legal scholars and the Courts are now debating on the legal nature of the d.i.a. and s.c.i.a mechanisms and on the differences and analogies with the, already mentioned, mechanism of the consent by silence⁸⁸.

In this respect, two theories have been developed, which bring about momentous consequences especially in relation to the protection of third parties.

In accordance with the first theory, the d.i.a. (now s.c.i.a.) is not a simplification mechanism, but a liberalization mechanism of the private activities than can be exercised without a prior control of the administration. Hence, the mechanism is different from the consent by silence, which, on the contrary, comes with an administrative act and its is essentially a simplification mechanism. In accordance with the second theory (in line with the d. lgs. n. 59 of 2010), the d.i.a. (now s.c.i.a.) can be considered as an administrative act, in relation to which the administration has an authorizative power. Hence, this is not a liberalization mechanism but a simplification one; in relation to this theory, however the distinction between the s.c.i.a and the consent by silence is less evident⁸⁹.

Finally, a third approach tried to solve the above-mentioned inconsistency by proposing a sort of compromise solution. In fact, such approach stated that the Legislator in 2005, by referring to the self-remedy power (potere di autotutela), rather than taking a position on the nature of such legal institute, clarified that - even after the expiry of the term for the exercise of the inhibiting power (potere inibitorio) - the Public Administration still has a sort of “residual” power, to be considered as an extraordinary self-remedy power which is different from the traditional self-remedy power as it does not involve a second-level activity (provvedimento di secondo grado) relevant to an administrative order already

⁸⁸ F. VETRÒ, *Il Consiglio di Stato fa il punto sulla natura giuridica della Dia*, www.giustamm.it; G. MANNUCCI, *La necessità di una prospettiva obbligatoria per la tutela del terzo nel modello della dia*, *Giorn. dir. amm.*, 2009, 1079 ss..

⁸⁹ G. MORBIDELLI, *In tema di d.i.a. e di d.i.a. nuova*, www.giustamm.it.

issued⁹⁰. Therefore, the reference to articles 21-quinquies and 21-nonies of law no. 241/90, confirmed also by law no. 122/2010, complies with the theory pursuant to which the D.I.A. (nowadays the S.C.I.A.) is identified as an act of the private party/citizen from which it does not arise any silent approval: the self-remedy power set forth by article 19 (as amended and supplemented from time to time) represent just the power to adopt - even after the expiry of the ordinary term - the traditional acts necessary for the exercise of the inhibiting and/or repressive power, conditioned to – as the *ex officio* annulment - the existence of an actual and tangible public interest, further to, and different from, the one relevant to the mere restoration of the breached legality and the general balance of interests⁹¹. Such theory, however, does not seem to be in compliance with the strict interpretation of the law nor with the principle of autonomy of the sanctioning power as provided by article 21, which does not provide any limitation to the application of the most serious sanctions for unlawful activities.

In addition to the above, it was still to be considered the issue relevant to the protection of the rights and interests of third parties, for which the Council of the State

⁹⁰ Furthermore, as pointed out by scholars, while the reference to article 21-*nonies* is aimed at limiting the late action of the Public Administration under the same limitations of the *ex officio* annulment and, therefore, within a reasonable deadline, following to an evaluation in terms of conflicts of interests and public interest's, doubts arise out with respect to article 21-*quinquies*,. N. PAOLANTONIO, W. GIULIETTI, *La segnalazione certificata di inizio attività*, cit..

⁹¹ Please see the ruling of *Consiglio di Stato*, sez. V, 19 June 2006, no. 3586; and the opinion of scholars as F. LIGUORI, *Osservazioni sulla funzione e sulla disciplina delle dichiarazioni di inizio di attività edilizia*, in A. ROMANO, F.G. SCOCA, E. CASSETTA (edited by), *Studi in onore di Leopoldo Mazzaroli*, Padova, 109 ss.; F. GAFFURI, *La denuncia di inizio attività dopo le riforme del 2005 alla L. n. 241 del 1990: considerazioni sulla natura dell'istituto*, *Dir. amm.*, 2007, 369 ss.

(Consiglio di Stato)⁹² proposed another compromise solution according to which - by confirming the refusal of the thesis that qualifies the D.I.A. as an act producing a measure of implied approval - acknowledged the D.I.A. as a measure concerning the liberalization of private economic activities, with the consequence that for exercising such activities - differently from what occurs for the activities subject to the silent approval regime (regime di silenzio assenso) (regulated by a specific article) - it is not requested anymore the enactment of a title aimed at stating the relevant legitimacy (titolo provvedimentale di legittimazione)⁹³.

With respect to the protection of third parties' rights and interests, recent case law had developed an atypical declaratory action (*azione di accertamento atpica*) - to be proposed directly by means of a claim/challenge and without the prior need to call for the inhibiting power - aimed at ascertaining the requirements for the commencement of the activity through a simple statement/representation; with the specification that the ruling which ascertain the non-existence of the basis for the D.I.A. has "conformative" effects towards to the Public Administration; in fact, it imposes to the Public Administration to remedy to the situation arose out from such instrument, requiring also the cessation of the activity and the reparation/restoration of the works carried out until such moment and that such power - which is aimed to execute the implicit order included in the judgment of assessment - must be exercised irrespective from the expiring of the term set forth by article

⁹² Please see the famous ruling of *Consiglio di Stato*, sez. VI, 9 February 2009, no. 717, confirmed by the other judicial precedent of *Consiglio di Stato*, sez. VI, 15 April 2010, no. 2139.

⁹³ In relation to the theory according to which the D.I.A. is a private act (*atto del privato*) which does not determine any provision of silent approval (*silenzio assenso*) but on the contrary is based upon a relevant request to the relevant Administration, please see the aforementioned judicial precedent of *Consiglio di Stato*, sez. VI, 15 April 2010, no. 2139, and *Consiglio di Stato*, sez. IV, 4 May 2010, no. 2558.

19 and from the existence of the conditions of self-remedy provided for such article⁹⁴. Even considering the position of the interested counterparty as a mere interest⁹⁵, the abovementioned case law stated that the constitutional protection of the interests of such counterparty requires the existence of an autonomous action, at least in all cases where, missing the measure to be challenged, such action results necessary for the satisfaction of the (substantial) claim of the counterparty.

Is worth to point out that the legislative decree no. 104/2010, which includes the Code of the Administrative Procedure (Codice del processo amministrativo”) - by confirming the administrative exclusive jurisdiction in relation to controversies relevant to the declaration of commencement of activity (see article 133, paragraph 1, no. 3) - at article 34 states that “in no case the court may rule in respect of administrative powers not yet exercised”. The foregoing appears to be clearly an impediment to the proposal of an action aimed at obtaining a declaratory on the conformity of the S.C.I.A. pursuant to the mechanism suggested in the abovementioned case law, reducing again the protection of third parties towards the inactivity of the Public Administration in respect of the exercise of the inhibiting/repressive power; in fact, such application is subordinated to the elapsing of the relevant term (during which the illegal commencement of the activity might have already generated permanent damages to other competitors), even if enforceable without a prior formal notice and aimed at obtaining a ruling on the lawfulness of the claim (please see article 117 of the Code of Administrative Court Procedure), that in this case is represented by an assessment concerning the unlawful use of the S.C.I.A. and in the consequent obligation of the Public Administration to adopt its repressive powers

⁹⁴ Please see the judicial precedent of *Consiglio di Stato sez. VI*, 15 April 2010 no. 2139.

⁹⁵For a strong and a reasoned critique, please see O. FORLENZA, *In assenza di un potere conformativo della Pa l'istanza andrebbe proposta al giudice ordinario. Il terzo può esperire un'azione di accertamento per provare l'assenza dei presupposti della Dia*, Guida al diritto, 2009, fasc. 13, 96-111.

concerning the activities carried out without authorization, which are not subject to limits applicable to the self-remedy⁹⁶.

The legal nature of the S.C.I.A. and of the protection of third parties against its unlawful utilization, however, has been demanded to the “Adunanza plenaria del Consiglio di Stato” by means of the recent decision of the Section. IV, no. 14 of 15 January 2011.

3. OTHER MEASURES OF SIMPLIFICATION

The measures aimed at simplifying the administrative action were not limited to the provision of *ad hoc* legal institutes applicable to the proceedings, and were not limited to the IV section of the law on the administrative proceedings.

There are simplification measures that do not pertain to the proceedings (and that do not concern law 241/1990), but nonetheless interact with the proceedings and actually consist in measures that, when applied to the proceedings, do imply a simplification, such as, *inter alia*, telecommunications and the so called *unique desk*.

3.1 Telematics

It is several years that one of the most important target of the legislator is to computerize administrative procedures, in view of using the advantages of telematics to the

⁹⁶ With regard to the difference between the power arising out from the the judicial decision that denies the conditions of the d.i.a. and the power to be exercised by way of control or self-remedy, please see the judicial precedent of *Consiglio di Stato*, VI, 15 April 2010, no. 2139, cit..

different stages of the administrative proceedings and let also the public administration enter the “*computerized society*”⁹⁷.

On the assumption that computerizing is equivalent to simplifying (and, thus, it would be an implementation of the principle of efficiency), even since art. 2 of law No. 421/1992 the legislator delegated the government to adopt measures oriented towards the finalization of the public administrations computerizing process, the more rational use of computerized systems, so to make the administrative activity more efficient, improve the productivity of public employees and assure the interconnection of public administrations.

By such delegation the parliament gave a strong impulse towards the need to pursue a radical modernizing change in the public administrations procedures, specifically with reference to the technical equipment: not just the replacement of antiquated technical equipment but the global computerization of public entities, to be implemented not by isolated initiatives but by applying the principle of interconnection of all informative systems by any public administrations.

After the adoption of some legislative measures of less importance (including law No. 3407200), the need to enhance the use of computerized system was again addressed by the legislator of the 2005, that adopted a twofold approach aimed at increasing the use of computerized systems by the public administration.

On the one hand, the code of computerized administration was enacted (Legislative Decree No. 82/2005, then many times integrated and modified), a comprehensive instrument of reorganization that – both by way of merely declarative and programmatic statements and by discharging of certain traditionally administrative modalities - for the first time organically tackles the use of technological communications

⁹⁷ The same principles are also at the basis of certain European provisions (e.g. art. 8 Bolkestein directive).

in the public administrations and regulates the fundamental juridical principles applicable to the two most important instruments of today's technological progress: electronic format documents and electronic signature⁹⁸.

On other hand, law No. 15/2005 added to Section I of the law on administrative proceedings (241/1990) regarding the principles, art. 3-*bis* that stimulates all public administrations to use telematics, promoting its use in both the internal relationships and in those with private subjects.

The said provision, of a merely programmatic nature, stimulated the adoption of several additional measures by public administrations aimed at "dematerializing" the public activities, but nonetheless it had on the whole only a limited success, mainly due to the low level of the computerizing technologies adopted that would instead need a new architecture and new rules to fully match internet systems with the rules of public bodies and offices. In this respect, an internal problem of compatibility between computerized technologies and public proceedings was addressed, due to the rather different standards that inspire the organization of the digital net and that of the public administrations: while the first is oriented to the standard of cooperation, the Public Administration is oriented to the standard of hierarchy and competence⁹⁹; for the above reason, the participation to the proceedings necessarily has to be accompanied by measures aimed at preventing any

⁹⁸ Subparagraph 3 of art. 2 of this Code is noteworthy, inasmuch it states (similarly to art. 3 of D.P.R. n. 445/2000), that the rules regarding the use, the handling and the storage of telematics documents, as well as those regarding their computerized transmission, apply also to private subjects. In addition, an important part of this set of rules (in particular the ones concerning the access to and the use of telematics information) should be applied also to those subjects that are formally private but are materially public owned.

⁹⁹ See F. CARDARELLI, *l'uso della telematica*, in M. A. SANDULLI, *Codice dell'azione amministrativa*, cit., 421 ss.

informative distortions, or – otherwise – it would at the end be difficult to identify who is the subject allowed to act on the basis of a preset competence sharing.

It is possible to see some reflection of the above on the proceedings: in connection with the participation by different public entities to the proceedings, law No. 69/2009 (implementing the principle expressed in the said art. 3-*bis*) has recently included telematics among the procedural rules of the services' conferences works, (art 14 *ter*, part 1 of law No. 241/1990). "*the services' conference takes the determinations connected to the organization of its own works with the majority of the present members and may proceed by telematics systems*". And the said reference to telematics is not only justified because the Public Administrations should be up to date with the "*digital era*" but is also practically due to the needs of simplification that constitute the first reason why a services' conference is called.

The meaning of a similar reference to telematics, and innovative approach represented by it, may appear reduced when considering that, already in 2005, Paragraph 5-*bis* was added to art. 14 of law No. 241/1990 (still in force): "*by previous agreement among the administrations involved, the services' conference is called and conducted through the electronic available systems*". As concerns computerizing, the only way to construe an innovative role of art. 14-*ter*, is to enhance its interpretative value, as far as the said provision apparently remands to the conference' self-organization powers (that can be exercised by majority of the participants), in lieu of "*previous agreement*" considered in Paragraph 5-*bis* of art. 14 of law No. 241/1990, that, instead, seems to require the unanimous concert of all the interested public administrations.

3.2 The points of single contact ("sportello unico")

Of a different kind is the other "solution" falling amongst those simplification techniques which aren't procedural institutes in a strict sense: the point of single contact ("*sportello unico*").

It is a simplification tool having organizational features, which has gained particular importance in the productive activities' field starting from the entry into force of the Legislative Decree no. 112 of 1998, which, in relation to all the proceedings relevant to the realization, the extension, the termination, the reactivation, the localization and the re-localization of production plants, has provided the need of a centralized system "to which the interested parties can refer for all the formalities required" with the certainty that "the sole structure shall be responsible for the entire proceeding". Such provision was aimed at improving the *service functions* rendered by the public entity in favor of the companies and consisting in the collection and circulation, also online, of the information concerning the settlement and the development of the productive activities in the pertaining area (please also refer to article 3 of the Legislative Decree no. 447 of 1998).

The point of single contact model has been then improved by virtue of the Law Decree no. 112 of 2008 – providing, *inter alia*, "urgent provisions in relation to economic development, simplification and competitiveness" – which gave voice to the necessity to reduce the timing for the entry in the market (whence the famous slogan "a firm in one day", after which article 38 of the aforementioned law decree has been named), which is extremely dilated in consideration of the need to previously acquire the permits that the administrations delay to issue, in order to avoid an excessive increase in costs, to be beard by the start – up activity, caused by the slowness of the administration¹⁰⁰.

With the benefit of hindsight the institute has retained its original features and did not undergo substantial modifications compared to what had been regulated in the preceding years. The evolution of such institute has involved its effectiveness and not its structure. It is conceivable that the succession of the regulations relevant to the

¹⁰⁰ G. PIPERATA, *Lo sportello unico* (The single point of contact), *www.dejure.it*; M. SGROI, "Lo sportello unico per le attività produttive: prospettive e problemi di un nuovo modello di amministrazione" (The single point of contact for the productive activities: perspectives and problems of a new model of administration), in the Review *Dir. amm.*, 2001, pag. 1179 ff..

implementation of the point of single contact is primarily aimed at stimulating the numerous administration which were reluctant in implementing a similar structure.

The idea of a sole institutional interlocutor with which the interested parties can dialogue to obtain information in a simplified manner, and moreover, in a short time, in relation to an activity or a service they are willing to implement, has been applied in several European Union member countries¹⁰¹, and has been implemented by the very same Community with the adoption of the Directive 2006/123/EC (the so called services directive) with the aim of gaining the maximum possible competitiveness in the services market, by eliminating those obstacles to the member countries' internal markets "represented by the complexity, length and legal uncertainty of administrative procedures" (XXII recital of the directive)¹⁰². To this end, following the example

¹⁰¹ In Spain, were many autonomous communities, in collaboration with local bodies, have introduced time ago a system of points of single contact, then provided on a general basis by the law on the administrative proceeding; in France where the *Centres de formalités des entreprises* have been established in order to facilitate small and medium-sized firms in their relationship with the public administration; in Great Britain where the so called *one-stop shop* is becoming more and more widespread.

¹⁰² S. D'ACUNTO, *Direttiva servizi (2006/123/CE): genesi, obiettivi e contenuto*, The services directive (123/2006/EC): genesis, objective and content) Milan, 2009; please see also R. CHIEPPA, *Le nuove forme di esercizio del potere e l'ordinamento comunitario. Relazione per il 55° Convegno di Studi di Varenna* (The new forms of exercise of power and the communitarian regulation. speech for the 55° Meeting of Varenna), in which the author observes that "in the past communitarian regulation has been more attentive in exploiting forms of procedural simplification, suitable to the reduce the charges burdening the firms and the duration of the proceedings, while it has been "cold", if not contrary, with respect to the simplification instrument relevant to the conclusion of the proceeding, aimed at exonerating the administration from the obligation to issue an express measure".

of certain modernizing and good administrative practice initiatives undertaken at Community and national level, the directive establishes principles of administrative simplification, through the establishment, coordinated on a communitarian level, of a system of points of single contact, as well as with the introduction of specific provisions regarding the right to information, the online procedure and the definition of a common frame work for the authorization regimes¹⁰³.

In such view the directive requires the Member States to ensure that it is possible for providers to complete the procedures and formalities needed for access to the service activities through points of single contact (article 6), without prejudice to the allocation of functions and powers among the authorities within national systems (such concern has been expressed by the Italian legislator with the entry into force of the Legislative Decree no. 112/1998).

Furthermore, the directive aims at implementing an assistance system consisting in providing the companies with the information they have a right to receive in relation to the activities that they are willing to implement. The single points of contact should therefore provide all the information relevant to the requirements applicable to providers established in their territory, the contact details of the competent authorities enabling the latter to be contacted directly, the means of, and conditions for, accessing public registers and databases, the means of redress which are generally available in the event of dispute (article 7). Such information (which the administrative authority should keep up to date) needs to be provided as quickly as possible, in a clear and unambiguous manner and should be easily accessible at a distance and by electronic means.

Also in terms of assistance, the directive provides that the single points of contact – or other organisms such as the points of contact of the network of European Consumer

¹⁰³ T. DE LA QUADRA, F. DEL CASTILLO SALCEDO, *La direttiva sui servizi e la libertà d'impresa* (The directive on the services and the freedom of enterprise), *FA-TAR*, 2010, 1904 ss..

Centres – provide the relevant information also to the recipients, with particular regard to the information relevant to the access of the service activities related to the consumers’ protection, the means of redress which are generally available in the event of dispute with the provider and the contact details of the associations or organizations from which recipients may obtain practical assistance.

Our Legislative Decree no. 59 of 2009, in implementing the “services directive” has practically maintained unvaried the structure of the communitarian regulation, also by expressly recalling the internal provisions which already regulated the functioning of the single points of contact¹⁰⁴.

By considering all of these elements, one could easily argue that the novelty contained in the directive, and the internal regulation implementing it, must be identified not so much in the constitution of new simplification measures (in consideration of the fact that they were already widely provided by the internal legislations) but in the active coordination which the Member States are called to ensure amongst the internal competent administrations.

Such objective, which proves to be complex above all in consideration of the many levels of competence which can interest the service provider activities, has to be pursued by adapting the internal legislation to the communitarian regulation, in accordance with the constitutional principles governing the allocation of the competences.

¹⁰⁴ Please note that pursuant to article 25, paragraph 4, of the Legislative Decree no. 59 of 2009 the Municipalities which have not established a point of single contact, or in the cases in which the point of single contact should not comply with the requisites set forth by article 38, paragraph 3, letters 1) and a-bis) of the Law Decree no. 112 of June 25, 2008, converted with amendments into Law no. 133 of August 6, 2008, the exercise of the relevant functions should be delegated, also in the absence of express provisions, to the Chambers of commerce, industry, crafts and agriculture (“*Camere di commercio, industria, artigianato e agricoltura*”).

In such direction goes the adoption of the Legislative Decree no. 160 of 2010 (“Regulation for the simplification and the reformation of the regulation on the single point of contact for the production activities, pursuant to article 38, paragraph 3, of Law Decree no. 112 of June 25, 2008, converted, with amendments, into Law no. 133 of August 6, 2008”) which, aiming at standardizing the regulation relevant to the single point of contact, has repealed the Legislative Decree no. 447 of 1998. The Legislative Decree’s provisions relevant to the organization of the single point of contact for the productive activities and the implementation of the mandatory automated procedure provided in cases of applicability of the s.c.i.a, are effective starting from March 29, 2011, while those provisions relevant to the sole authorization procedure of the productive activities are effective starting from October 1, 2011.

Such regulation identifies in the single point of contact for the production activities (SUAP) the sole competent public body in relation to all the proceedings regarding the exercise of productive activities and the provision of services, except for the production plants and energy infrastructure, the activities related to the use of sources of ionizing radiation and radioactive materials, nuclear plants and facilities for the disposal of radioactive waste, the activities relating to prospecting, researching, production of hydrocarbons, as well as the strategic infrastructure and the production facilities of preeminent national interest¹⁰⁵.

¹⁰⁵ M.A. SANDULLI, G. TERRACCIANO, *La semplificazione delle procedure amministrative a seguito della attuazione in Italia della Direttiva Bolkestein* (The simplification of the administrative procedure after the implementation in Italy of the Bolkestein Directive), cit.