

**FROM NOTICES OF COMMENCEMENT TO CERTIFIED
NOTIFICATIONS: SUBSTANTIVE AND PROCEDURAL PROFILES**

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INDEX:

- 1. BACKGROUND ON THE INSTITUTION**
- 2. BUILDING REGULATIONS**
- 3. QUESTIONS ON THE LEGAL NATURE**
- 4. TOOLS FOR PROTECTING THIRD PARTIES**
- 5. CONCLUSIONS**

1. BACKGROUND ON THE INSTITUTION

Although it was formally codified in 1990, the institution of notice of commencement of operation (*'denuncia di inizio attività'*) actually has a series of precedents in all areas of administrative conformity of private business. These were obligations to report and notify about activities that were already subject to administrative control, in the context of legislative experiments that made Art. 19 of Law no. 241 of 1990, in some sense, a 'consolidation' of already operative praxes and disciplines¹.

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¹ On the subject of notices of commencement of operation (and of the various subsequent expressions used by legislators to refer to the institution), worth mentioning, among many, are: G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, Milan, 2000; M. BOMBARDELLI, *La sostituzione amministrativa*, Padova, 2004; E. BOSCOLO, *I diritti soggettivi a regime amministrativo*, Padua, 2001; ID., *La segnalazione certificata di inizio attività: fra esigenze di semplificazione ed effettività dei controlli*, in *Rivista giuridica dell'edilizia*, 2010, 580; ID., *SCIA e poteri in autotutela*, in *Urbanistica e appalti*, 2012, 1007; D. CORLETTI, *La denuncia di inizio attività*, in

A diachronic analysis is the main antidote for avoiding a dogmatic reconstruction of the institution, which not only is difficult on a theoretical level, but has also been proven wrong through documentary evidence by over two decades of legislation that does not yet allow the question to be considered as established within any kind of ‘system’ of administrative law². At the same time, starting from the laws allows us, in some way, to identify the boundaries and transformations of the phenomenon. It makes sense to begin this illustration with a few brief examples.

A businessperson who intends to set up his or her facilities for the distillation of alcohol and liqueur must give written notice, 15 days before the start of activities, to the Mayor of the local municipality, who can prohibit commencement or subject it to certain precautions when it is deemed necessary in the interest of public safety³. The same procedure is in place, for example, for highway service stations that distribute hydrocarbons⁴: today Art. 216 of the Consolidated Healthcare Laws⁵ still imposes this. Since 1934, prior written communication is required before commencement of certain activities that are particularly dangerous due to the production or use of gaseous substances that are harmful to health, and the local municipal Administration has the power not so

F. MASTRAGOSTINO (ed.), *Il Testo Unico sull'edilizia*, Bologna, 2005, 103; G. CORSO, *Liberalizzazione amministrativa ed economica*, in S. CASSESE (ed.), *Dizionario di diritto pubblico*, Milan, 2006, 3492; A. DI MARIO (ed.), *DIA e SCIA e tutela dei terzi*, in *Giurisprudenza italiana*, 2014, 1013; G. FALCON, *La regolazione delle attività private e l'art. 19 della legge n. 241/1990*, in *Diritto pubblico*, 1997, 411; ID., *L'autoamministrazione dei privati*, in *Procedimenti e accordi nell'amministrazione locale, Atti del XLII Convegno di studi di scienza dell'amministrazione*, Milan, 1997, 139; W. GIULIETTI, *Attività privata e potere amministrativo. Il modello della dichiarazione di inizio attività*, Turin, 2008; C. LAMBERTI, *La SCIA tra liberalizzazione e semplificazione*, in *Urbanistica e appalti*, 2013, 10; G. LAVITOLA, *Denuncia di inizio attività*, Padua, 2003; F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive del rapporto pubblico-privato*, Milan, 2011; L. MARTINEZ, *La dichiarazione di inizio attività: natura e regime giuridico*, Turin, 2008; N. PAOLANTONIO, W. GIULIETTI, *La segnalazione certificata di inizio attività*, in M.A. SANDULLI (ed.), *Codice dell'azione amministrativa*, Milan, 2010, 748; M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, in *Diritto processuale amministrativo*, 2012, 329; M.A. SANDULLI, *Dalla d.i.a. alla s.c.i.a.: una liberalizzazione "a rischio"*, in *Rivista giuridica dell'edilizia*, 2010, 478; S.S. COCA, *Gli atti di autoamministrazione*, in *Giurisprudenza italiana*, 2014, 1787; A. TRAVI, *La tutela nei confronti della d.i.a. tra modelli positivi e modelli culturali*, in *Diritto pubblico*, 2014, 15; ID., *La tutela del terzo nei confronti della d.i.a. (o della s.c.i.a.): il codice del processo amministrativo e la quadratura del cerchio*, in *Foro italiano*, 2011, 517; ID., *Dichiarazione di inizio attività (dir. amm.)*, in *Enciclopedia del diritto. Annali*, II, Milan, 2008, *ad vocem*.

² On these aspects, see M. RAMAJOLI, *L'esigenza sistematica nel diritto amministrativo attuale*, in *Rivista trimestrale di diritto pubblico*, 2010, 347. On the ‘historicist’ dimension of legal sciences, still relevant are the observations by S. CASSESE, *La storia, compagna necessaria del diritto*, in *Le carte e la storia*, 2009, 5 and *Il sorriso del gatto, ovvero dei metodi nello studio del diritto pubblico*, in *Rivista trimestrale di diritto pubblico*, 2006, 597.

³ Annex to Ministerial Decree 5 September 1994, part I, letter c), no. 10.

⁴ Annex to Ministerial Decree 5 September 1994, part II, letter c), no. 14.

⁵ Cf. Royal Decree 27 July 1934, no. 1265. This seems to have been the first law to introduce a means of monitoring construction from a health and hygiene perspective throughout Italy. On the subject, cf. G. MENGOLI, *Manuale di diritto urbanistico*, 6th edition, Milan, 2009, 1088.

much to prohibit the continuation of the business, but rather to restrict its commencement, within 15 days.

After the disaster in Seveso in 1976, which was caused by the dispersal in the air of a cloud of dioxin that had leaked from a chemical plant after an accident, European legislation first, followed by national legislation, established a series of rules for industrialists who intended to start businesses that could potentially cause significant accidents for people and the environment, such as for example petroleum product refining⁶. Art. 3 of Presidential Decree 175/1988 obligated manufacturers to carry out all necessary measures to prevent significant accidents and to notify or declare the intention to begin industrial activities⁷.

The models described until now can certainly be considered the background to the more modern notice of commencement of operation⁸. Besides, it is worth noting that these ‘communications’ are not really proper ‘notices’ (or ‘notifications’) of commencement of operation, which determine the power of the local Administration in a different way than a generic application. While an application is normally valid once it has been approved, the above examples are valid only after *subsequent inspection* by the public administration, which could potentially result in prohibitions and restrictions. So, rather than a procedural simplification, they end up being regulations that harm private business and produce a forced cooperation between the private sector and the authorities; this type of regulation might be considered to be connected to the so-called ‘precautionary principle’, which is

⁶ Cf. European Council Directive 82/501/EEC, 24 June 1982, on the risks from significant accidents connected to certain industrial activities, introduced into Italian legislation with Presidential Decree 17 May 1988, no. 175.

⁷ The situation outlined above changed with the passing of Directive ‘Seveso II’ (Council Directive 96/82/EC, 9 December 1996, on monitoring of risks of major accidents connected to certain dangerous substances) by means of Legislative Decree 17 August 1999, no. 334, and subsequent modifications to both normative sources. At a later stage came the so-called ‘Seveso II-bis’ (Directive 2003/105/EC of the European Parliament and of the Council, 16 December 2003, which modifies Council Directive 96/82/EC on monitoring risks of major accidents connected to certain dangerous substances, brought into effect with Legislative Decree 21 September 2005, no. 238) and, lastly, ‘Seveso III’ (Directive 2012/18/EU of the European Parliament and of the Council, 4 July 2012, on monitoring risks of major accidents connected to certain dangerous substances, bringing a change and subsequent annulment of Directive 96/82/EC of the Council, brought into effect with Legislative Decree 14 March 2014, no. 48).

⁸ Among others, see G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, op cit., 35; F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive del rapporto pubblico-privato*, op cit., 1; A. TRAVI, *La tutela nei confronti della d.i.a. tra modelli positivi e modelli culturali*, op cit., 17. Travi recalls how in the law on public safety passed by Giovanni Crispi (Royal Decree 30 June 1889, no. 6144) there were already particular cases that in some way were precursors of the model of the notice of commencement: for example, the ‘notices’ that the organisers of a public meeting had to give to the local public safety authority at least 24 hours before the event (Art. 1, later echoed in the Constitution of the Republic in Art. 17) or organisers of religious ceremonies or processions in public streets, with an advanced notice of at least three days. Cf. Also E. BOSCOLO, *I diritti soggettivi a regime amministrativo*, op cit., 61.

now contained in Art. 191, clause 2, TFEU, but which was first codified by European legislators in the 1990s⁹.

The first notice of commencement of operation *ante litteram* was issued in the 1980s by the Autonomous Province of Trento. Ahead of Italian legislation – which will be mentioned below – and dictating the general principles for the simplification and democratisation of the administrative action, Provincial Law no. 45 of 1988 in Art. 22 established that an appropriate legislative act would identify the restricted authorisation provisions to be substituted by a “*notification of interested parties*”, without prejudice to the powers of control of the provincial Administration¹⁰.

This is the background to Law no. 241/1990, with which, for the first time in the Italian legal order, the notification of commencement of operation was defined and regulated – implementing the principles of cost-effectiveness and efficacy of the administrative action per Art. 1 – as a tool for simplifying the administrative process¹¹. This framework was suggested by the systematic placement of Art. 19, in paragraph IV, on the same level as tools such as the meeting of local stakeholders and, most of all, tacit approval.

Art. 19 of Law 241/1990, in its original formulation, defined notification of commencement of operation as the institution through which whoever wanted to start to exercise a private business – subject by law to a consent agreement – was required to notify the competent Administration. The latter would then proceed to verifying the existence of the necessary conditions and legal requirements and, as appropriate and with due provision, prohibit the continuation of the activity and impose the removal of the business owner’s belongings unless, whenever possible, he or she had been able to conform the business to the regulations in effect within a timeline established by the same authority.

As clearly provided for in Art. 19, these regulations did not have a general application: a subsequent guideline established in what cases the new discipline of

⁹ On this point we must turn to M. P. CHITI (ed.), *Diritto amministrativo europeo*, Milan, 2013 and G. DELLA CANANEA, C. FRANCHINI, *I principi dell’amministrazione europea*, 2nd edition, Turin, 2013. For case law see, for example, CGE, 5 May 1998, C-180/96, *Regno Unito/Commissione*, in *Raccolta*, 1998, 2265; *idem*, 21 March 2000, C-6/99, *Greenpeace*, *ibid*, 2000, 1651. A recent in-depth analysis of the entire subject and its foundations in European law can be found in S. TORRICELLI, *Libertà economiche europee e regime del provvedimento amministrativo nazionale*, Sant’Arcangelo di Romagna, 2013.

¹⁰ Cf. Provincial Law of Trentino 25 November 1988, no. 45, annulled by Provincial Law of Trentino 30 November 1992, no. 23, which, effectively reproducing Law 241/1990, inserted the abovementioned Art. 22 of Provincial Law 45/1988 in Art. 23 of the Trentino law on the procedure.

¹¹ Cf. Law 7 August 1990, no. 241.

notification of commencement of operation could be applied and what procedures were excluded from it¹². The result was a relatively short list of activities that were acceptable with a notification of commencement of operation and, for those that could only begin after a certain period of time had expired, this would vary from two weeks to as much as one year¹³.

At this point, it might be useful to make a few general considerations on the meaning of the 1990 law. Legal theory tends to consider it, on the one hand, as the intention to simplify the administrative burden and shorten the authorisation process, so as to further simplify the procedure by eliminating these obligations and by transferring to the private business owner the burden of preparing and acquiring all the necessary documentation¹⁴; in reality, this means increased accountability on the part of the private business owner with respect to a reduced public administration, which is at least in part deprived of its power of authorisation¹⁵. On the other hand, some scholars acknowledge that in this situation of unrestricted authorisation, positions of subjective rights will exist, rendering the intermediation of the administrative authority superfluous in guaranteeing the formation of the authorisation, assuming that the effect could be produced directly by the private party¹⁶.

Among the various attempts to simplify the procedure outlined in Law 241/1990, one cannot help noticing, as has been done before¹⁷, that the notification of commencement

¹² We are referring here to Presidential Decree 26 April 1992, no. 300, which among other things was supposed to indicate cases in which the activity could begin immediately after submission of the notification (notification of commencement of business with immediate effect), or after the expiry of a fixed term (notification of commencement of business with deferred effect) according to the complexity of the assessments by the public administration.

¹³ Cf. Royal Decree 4 May 1925, no. 653. In 1993 the provisions of Art. 19 were modified by Art. 2, clause 10, of Law 24 December 1993, no. 537, indicating activities to which the notification of commencement of business did not apply, whereas Art. 19 of Law 241 of 1990 became the general rule. At this point the distinction between notification of commencement of business with immediate effect and notification of commencement of business with deferred effect disappeared: the applicant could start their business immediately.

¹⁴ Cf. A. PAJNO, *Gli articoli 19 e 20 della legge n. 241 del 1990 prima e dopo la legge 24 December 1993, no. 537. Intrapresa dell'attività privata e silenzio dell'amministrazione*, in *Diritto processuale amministrativo*, 1994, 23.

¹⁵ Cf. G. CORSO, *Liberalizzazione amministrativa ed economica*, *op. cit.*, 3494; M. MAZZAMUTO, *La riduzione della sfera pubblica*, Turin, 2000, 148. On the subject see also M. BOMBARDELLI, *La sostituzione amministrativa*, *op. cit.*, 250. On the concept of individual responsibility in creating a notice of commencement of operation, cf. in particular Council of State, Plenary meeting 29 July 2011, no. 15, as well as Italian Council of State, VI section, 9 February 2009, no. 717; V section, 15 April 2010, no. 2139; IV section, 13 May 2010, no. 2919.

¹⁶ Along these lines, cf. especially L. FERRARA, *Diritti soggettivi ad accertamento amministrativo. Autorizzazione ricognitiva, denuncia sostitutiva e modi di produzione degli effetti*, Padua, 1996, especially 74 ff. – where the concept of subjective right subjected to restricted administrative assessment is introduced – and, with specific reference to the discipline of notice of commencement of operation, 103 ff. This reconstruction is based on the initial arguments by A. ORSI BATTAGLINI, *Attività vincolata e situazioni soggettive*, in *Rivista trimestrale di diritto e procedura civile*, 1988, 33.

¹⁷ Cf. G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, *op. cit.*, 20.

of operation seems to have been rather effective, much more so than tacit approval as outlined in the subsequent Art. 20. While in cases regulated by this law the business owner's application involves adopting a provision, which at the end of a certain period of time is considered 'tacit', in the cases handled by Art. 19 what is missing is always the final act (and this reconstruction, as we shall see, was confirmed after the inclusion of the non-actionability of the notifications or certified notices)¹⁸.

This set up – which according to some legal theory is the consequence of Italy's membership of the EU and in particular of the principle of free circulation among the Member States of goods, people, services and capital¹⁹ – on an administrative level brings about the deregulation²⁰ that is typical of free-market competition. Basically, the most stringent actions of the Administration, such as authorisation and preliminary examinations, are replaced by blander ones which essentially amount to the obligation of the private party to notify the Administration: as has been effectively pointed out the system went from an authorisation managed by the local Administration to notification on behalf of the applicant, with the consequence of liberalising certain private businesses, which are legitimised based on the law and not on a broad-based administrative provisions²¹.

It is worth mentioning that the regulatory framework has changed a number of times: first in 2005, when the institution took the name of notification of commencement of operation ('*dichiarazione di inizio attività*')²²; then four years later with Law no. 69 in 2009, which aimed to promote economic development and competition, following the 'Great Recession' that started in 2007 and the financial crisis that followed²³; and again in 2010, with the decree that implemented the *Bolkestein* Directive in Italy²⁴.

¹⁸ Cf. P. LIGNANI, *I tempi del procedimento amministrativo*, in B. CAVALLO (ed.), *Procedimento amministrativo e diritto di accesso. Legge 7 agosto 1990, n. 241*, 2nd edition, Naples, 1993, 46.

¹⁹ Cf. V. CERULLI IRELLI, *Modelli procedurali alternativi in tema di autorizzazioni*, in *Diritto amministrativo*, 1993, 65.

²⁰ The expression 'administrative deregulation' comes from E. SCHINAIA, *Notazioni sulla nuova legge sul procedimento amministrativo con riferimento alla deregulation delle attività soggette a provvedimenti autorizzatori ed all'inerzia dell'amministrazione*, in *Diritto processuale amministrativo*, 1991, 186.

²¹ Cf. G. CORSO, *Liberalizzazione: le premesse di diritto europeo*, in *Istituzioni del federalismo*, 2007, 281. The 'liberalisation of private business' is also mentioned by the Council of State in two pronouncements made at General Meetings (17 February 1987, no. 7, in *Foro italiano*, 1988, III, 22 and 6 February 1992, no. 27, *ibid.*, 1997, III, 200), whereas other legal theories, not denying the simplifying aim of Art. 19, do not consider real liberalisation necessary, provided that the model of notice of commencement of operation still, technically, involves the exercising of an administrative activity. On this point see also V. CERULLI IRELLI, *Modelli procedurali alternativi in tema di autorizzazioni*, *op cit.*, 65.

²² With the passing of Decree Law 14 March 2005, no. 35. On the subject see, among others, C. FACCHINI, *La segnalazione certificata di inizio attività*, in *Azienditalia*, 2011, 11, 5.

²³ Cf. Law 18 June 2009, n. 69. This regulatory act reintroduced notification of commencement of operation with immediate effect for notifications regarding facilities that produce goods and services or carry out services as

The law that converted the decree law containing the corrective measure for 2010, four months after the last modification, redesigned Art. 19 in the version known today as certified notice of commencement of operation (*'segnalazione certificata di inizio attività'*)²⁵.

According to the emended law, all restricted acts of consent are replaced by a notice to which the applicant is required to attach all documents that in some way *certify* their request and allow the authority to make the necessary assessments (notifications in lieu of certifications, attestations, approvals, declarations of conformity, technical documents). All the activities described can commence on the date of submission of the notice²⁶, while the Administration maintains the power to prohibit continuation of the activity – within 60 days of receipt of the notice – and the power to revoke or annul the permit.

The context in which the 2010 reform came about is the increase in competitiveness by reducing the public sphere that manages the administrative authorisation procedures. The basic intention of lawmakers is to eliminate provisions so as to reduce the number of procedures and reallocate internal resources to other functions, empowering private individuals while at the same time burdening them with *prima facie* hidden costs. The solidity of the model is guaranteed by penal sanctions for whomever falsely declares or attests to the possession of the required prerequisites for conducting the business, with quite severe penalties (one to three years of prison).

Despite the strong impact of the last modification, many more innovations were added to the new notice of commencement of operation between 2010 and the end of 2014. These changes affected markedly procedural aspects regarding methods of submitting notices and attaching documents, the powers of internal review of the Administration (defined 'hybrid' or 'atypical' by some legal theorists)²⁷, building regulations and descriptions of the act of notifying and the role of third parties, all aspects that will be examined further on.

described in the so-called 'Services Directive' (Directive 2006/123/EC of the European Parliament and the Council, 12 December 2006, regarding services in the domestic market).

²⁴ Cf. Legislative Decree 26 March 2010, no. 59, which reintroduced the general distinction between notification of commencement of operation with deferred effect and the one with immediate effect.

²⁵ Cf. Law 30 July 2010, no. 122, which converted Decree Law 31 May 2010, no. 78. For a detailed analysis of the modifications to Art. 19 of Law no. 241 of 1990 see F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive del rapporto pubblico-privato*, *op. cit.*, 8.

²⁶ With the exclusion of cases in which the restrictions mentioned in 1 e 4-bis of Art. 19 apply.

²⁷ See F. LIGUORI, *Lo «Sblocca Italia» sbloccherà la s.c.i.a.?*, at www.giustamm.it.

At this stage, however, it is already important to at least mention how some of these recent regulatory changes were immediately challenged in the first instance at the Constitutional Court by various Regions and by both Autonomous Provinces for violation of regional competences and of the principle of fair cooperation between the State and the Regions²⁸; on the other hand, we cannot ignore how, despite numerous attempts to reform Art. 19 of the law on administrative activities, the institution in question still does not seem to have found a firm stand²⁹.

²⁸ This profile will be analysed in the subsequent paragraph, but it might be useful to detail here, even if only briefly, the direction of the Council board on the subject of notifications and certified notices of commencement of operation. There is ample case law on the subject. It shows first and foremost how the certified notice of commencement of operation is a continuation of the pre-existing notification of commencement of operation: if the latter was introduced into the Italian legislation with the aim of simplifying administrative procedures and lightening the burden of obligations on the private sector, then we can only deduce that this is also the context of the certified notice, “*equally aimed at simplifying procedures for permitting the exercise of activities that require monitoring*” on the part of public administration (Constitutional Court, 9 May 2014, no. 121, in *Giurisprudenza costituzionale*, 2014, 2118). After all, the current evolution of the entire administrative system is characterised by the “*increasing importance of the ‘principles of simplification’ in regulating certain types of procedures and in relation to specific interests that arise*”, as is the case in Art. 19 of Law 241/1990 (Constitutional Court, 27 July 2005, no. 336, in *Regioni*, 2006, 382). These principles of simplification, which the Italian legal order has known for a long time, are in turn a direct derivation from the EC (cf. Directive 2006/123/EC on services in the internal market) and should therefore be categorised among the fundamental principles of administrative action (see on this Constitutional Court 6 November 2009, no. 282, in *Giurisprudenza costituzionale*, 2009, 4377 and 9 November 2006, no. 364, in *Giurisprudenza costituzionale*, 2006, 3796). This is a specific provision “*at the start of the procedural phase that is structured according to a model of immediate legitimisation based on the principle of simplification of the administrative action and is aimed at facilitating business, while protecting the right of the applicant to a timely assessment by the competent Public Administration of the legal and factual prerequisites that can authorise the activity itself*” (Constitutional Court 121/2014).

²⁹ A 23 July 2014 draft law is currently being debated in the Chamber of Deputies (no. C.3098, since 12 May 2015) with which the Government is granted the authority to adopt a legislative decree for assessing precisely which procedures should be subject to notification of commencement of operation or tacit approval. The aim is to simplify the organisation of public administration through a reorganisation of state Administrations, a reform of management, the definition of ‘public scope’, a reconciliation of work-life balance and a simplification of administrative regulations and procedures. In particular see Art. 4 on the procedures subject to tacit approval within certified notices of commencement of operation, and the technical report at www.senato.it/leg/17/BGT/Schede/Ddliter/44709.htm. Part of the rulings contained in the abovementioned draft law, referring to the powers of internal review of public administration, were already captured in ‘act one’ of the so-called ‘*Riforma Madia*’, which debuted with the conversion of Decree Law 12 September 2014, no. 133, “*Unlock-Italy*”.

2. BUILDING REGULATIONS

After clarifying the general rule, we can now examine the role that it can play in building regulations³⁰. Again, it is worth giving a few brief details on the pre-existing legislation.

The historical predecessor is definitely Art. 26 of Law no. 47/1985, according to which certain work inside buildings was not subject to authorisation or granting provisions, which were replaced by a contract signed by a certified professional. The applicant was required to submit this to the Mayor at the start of work³¹.

Despite the provisions of Law no. 241 of 1990, it was not until 1995-96 that the notification of commencement of operation was codified in law for building regulations. During those years the Government issued, and soon after abrogated, a number of decree laws with the intention of simplifying building regulation procedures: notifications of commencement of operation were even considered in some cases an alternative to building permits or construction authorisations³².

It was Law no. 662 of 1996 that stabilised the regulation: work was now admissible through a notification of commencement of operation that previously would have required a building permit, as long as the notification was submitted to the Mayor within 20 days from the start of work³³.

³⁰ On the subject see, among others, G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, op. cit.; A. BIANCHI, *La denuncia di inizio attività in materia edilizia. Profili ricostruttivi dell'istituto con particolare riferimento alla tutela giurisdizionale del terzo*, in *Rivista giuridica dell'edilizia*, 1998, 147; A. CASSATELLA, *L'attività edilizia*, in D. DE PRETIS, A. SIMONATI (ed.) *Diritto urbanistico e delle opere pubbliche*, II edition, Turin, 2014, 55; D. CORLETTI, *La denuncia di inizio attività*, op. cit.; C. CUDIA, *La denuncia di attività edile fra modello generale e modello speciale: controindicazioni di una liberalizzazione apparente*, in *Diritto amministrativo*, 2003, 413; F. LIGUORI, *I modelli settoriali: d.i.a. edilizia e procedure semplificate in tema di rifiuti*, in M.A. SANDULLI (ed.), *Codice dell'azione amministrativa*, op. cit., 771; P. MARZARO GAMBA, *La denuncia di inizio attività edilizia. Profili sistematici, sostanziali e processuali*, Milan, 2005; R. MURRA, *La denuncia di inizio attività in materia edilizia*, in *Consiglio di Stato*, 2002, 317; G. PAGLIARI, *Corso di diritto urbanistico*, IV edition, Milan, 2010; M. RAMAJOLI, R. VILLATA, S.c.i.a., in *Enciclopedia del diritto, libro dell'anno del diritto*, Rome, 2012, 269; P. STELLA RICHTER, *I titoli abilitativi in edilizia. Commento al T.U. in materia di edilizia in vigore dal 30/06/03*, Turin, 2003.

³¹ Cf. Law 28 February 1985, no. 47.

³² For an example of a notification of commencement of operation replacing a building authorisation, cf. Decree Law 27 March 1995, no. 88 (see Art. 4, clause 7); for an example of a notification of commencement of operation replacing a building permit, cf. Decree Law 24 January 1996, no. 30 (see Art. 9, clause 7). This episode brought about the famous ruling by Constitutional Court 17-24 October 1996, no. 360, in *Foro italiano*, 1996, 3269, on the reiteration of decree laws that are not converted by Parliament.

³³ The notification had to be accompanied by a report by a certified project manager, who took on the role of an individual performing a service of public necessity and on completion of the work was required to issue a certification (Art. 2, clause 60, Law 23 December 1996, no. 662). The breadth and importance of the tasks

Later, the Consolidated Law on Building in 2001³⁴, which came into effect the following year, abrogated the laws of 1985 and 1996. With the intention of establishing a consistent legislation, the decree also attempted to solve the issues of coordinating between the general model, as outlined in Art. 19, and the specific model for building regulations³⁵.

It is also important to note that, even before the Consolidated Law came into effect, the so-called '*Legge obiettivo*' (Target Law) from the same year³⁶ – aimed at establishing procedures and methods for financing large-scale work for the 2002-2013 period – and the following Legislative Decree 301/2002³⁷ substantially changed the nature of notifications of commencement of operation in construction³⁸.

We can now examine Art. 23 Consolidated Law, as modified by Legislative Decree 301/2002 and partially by subsequent legislation³⁹, which governs in detail the current legislation on notifications of commencement of operation in construction.

The notification must be presented to the municipal administrative office at least 30 days prior to the actual commencement of work, with attached a signed report by a

assigned to professionals have, according to some legal theorists, shifted the focus from the notification itself to the moment of approval and verification by an expert: e.g. G. FALCON, *L'autoamministrazione dei privati*, *op. cit.*, 190. On this point, see also D. CORLETTI, *La denuncia di inizio attività*, *op. cit.*

³⁴ Cf. Presidential Decree 6 June 2001, no. 380.

³⁵ Since the notification of commencement of operation for construction was different to the general model as outlined in Art. 19, Law 241/1990, legal theory considered the two cases independent of each other: cf. G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, *op. cit.*, 77. In its original wording, Consolidated Law 380/2001 distinguished between work that required a building permit (Art. 10), construction work requiring no further approval (Art. 6) and work that was subject to notification of commencement of operation (identified on a residual basis by Art. 22): the aim, as described by some legal theorists, was to favour simplification as much as possible, rejecting the notion that the notification of commencement of operation for construction was in any way exceptional. Cf. A. AULETTA, *Ancora su s.c.i.a. e tutela del terzo: le questioni irrisolte e soluzioni prospettate, in attesa della pronuncia della Plenaria*, at www.giustamm.it, 6. In reference to Art. 6 Consolidated Law, Decree Law 25 March 2010, no. 40, allows for free activities, as well as a series of operations that can be carried out via 'communication' of the commencement of work (usually abbreviated to 'cia' or 'cil' in Italian).

³⁶ Cf. Law 21 December 2001, no. 443.

³⁷ Cf. Legislative Decree 27 December 2002, no. 301.

³⁸ In addition to the 'simple' notification of commencement of operation for minor construction work, a 'super notification of commencement of operation' was introduced at first as an alternative to a building permit for larger building renovation work (as is still the case today in Art. 22, clause 3, Consolidated Law). After that, clause 4 of the abovementioned article 22 of the Consolidated Law allowed the "ordinary-statute" Regions to extend or reduce, via laws, the scope of application of regulations on work subject to notification of commencement of operation, to the extent that notification of commencement of operation and building permits could be considered essentially equivalent institutions. The best known example of this is certainly contained in Regional Law of Lombardy 11 March 2005, no. 12 (see in particular Art. 41). On the theses developed by legal theory on the possible unconstitutionality of the national legislation introduced in violation of Art. 117, clause 3, Constitution, cf. P. STELLA RICHTER, *I titoli abilitativi in edilizia. Commento al T.U. in materia di edilizia in vigore dal 30/06/03*, *op. cit.*, 65; *contra* F. LIGUORI, *I modelli settoriali: d.i.a. edilizia e procedure semplificate in tema di rifiuti*, *op. cit.* 781. The Constitutional Court intervened on the matter, legitimising the legislation on the basis of the principle of town planning, as identified by the Council: cf. Constitutional Court, 1 October 2003, no. 303, in *Giurisprudenza costituzionale*, 2003, 5.

³⁹ Clauses 1-*bis* and 1-*ter* were introduced by Law 134/2012, *op. cit.*, which also modified clauses 3 and 4, whereas the current version of clause 8 is the result of Budget Law 2005 (Law 30 December 2004, no. 311).

certified project manager. If the Administration, after 30 days, finds that the requirements have not been met, it issues the applicant an order to not carry out the work. Once said work has been completed, it must be assessed via a certificate issued by a professional.

The relationship between the general model, as outlined in Art. 19 Law 241/1990, and the ‘construction’ model of the Consolidated Law has continued to be the subject of some controversy, both in legal theory and in the case law, despite the effects of the Consolidated Law on building requirements and of two other major reforms.

The first reform, which was already mentioned in the previous paragraph and dates from 2005, when – with the aim of bringing these two disciplines closer together⁴⁰ – Art. 19 of Law no. 241 of 1990 was changed so that any declared activity could begin after 30 days from the notification, removing the provision that excluded building permits from the scope of application⁴¹. However, the limits between the two models were still evident: on the one hand the restricting powers, which in the notification of commencement of operation for construction consist of prohibiting commencement of work, whereas in the traditional notification of commencement of operation they could also prohibit the continuation of work that had already begun; on the other hand, the different terms for the commencement of operation or for issuing restricting provisions of the public administration. For these reasons there was a tendency to highlight the nature of *lex specialis* of the Consolidated Law and, consequently, that the notification of commencement of operation as described in Art. 19 was applicable in construction (as in other special sectors) only in the presence of regulatory gaps and as long as it was compatible with the specific legislation⁴².

The situation did not really change with the second reform in 2010⁴³, after which, while on the one hand the expressions ‘certified notice of commencement of operation’ and the Italian abbreviation ‘scia’ replaced ‘notification of commencement of operation’ and the

⁴⁰ Among others, see F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive Del rapporto pubblico-privato*, *op. cit.*, 112.

⁴¹ Cf. Decree Law 35/2005 and Law 80/2005, both *op cit.*

⁴² Cf. F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive del rapporto pubblico-privato*, *op. cit.*, 113, which refers back to N. FILIPPI, *La nuova d.i.a. e gli incerti confini col silenzio assenso*, at www.giustamm.it; V. PARISIO, *Il silenzio amministrativo nell'attività edilizia*, in *Rivista giuridica dell'edilizia*, 2006, 207. In the case law, among others: Regional Administrative Tribunal of Sicily, Catania, I section, 9 January 2008, no. 74, in *Foro amministrativo TAR*, 2008, 251; Regional Administrative Tribunal of Emilia-Romagna, II section, 2 October 2007, no. 2253, at www.giustizia-amministrativa.it; Regional Administrative Court of Tuscany, III section, 15 May 2007, no. 742, *ibid.*; Regional Administrative Court of Piedmont, I section, 19 April 2006, no. 1885, *ibid.*, 2006, 865; Regional Administrative Court of Abruzzo, 1 September 2005, no. 494, in *Giurisprudenza italiana*, 2005, 2405.

⁴³ This refers to the conversion of Decree Law 78/2010 brought about by Law 122/2010, *op. cit.*, in particular Art. 49, clauses 4-*bis* and 4-*ter*.

Italian abbreviation ‘dia’, on the other hand the new Art. 19, as it was replaced, introduces legislation that intentionally replaces the notification of commencement of operation (see Art. 4-ter, second sentence, Law 122/2010). This was based on the ruling that the new certified notice of commencement of operation adheres to the principle of fair competition in accordance with Art. 117, clause 2, lett. e), Constitution, and is an essential part of provisions concerning civil and social rights in accordance with lett. m) of the same clause (Art. 4-ter, first sentence).

Thus qualified, the certified notice of commencement of operation has returned within the scope of the exclusive legislative power of the State, raising more than a few doubts on its constitutionality, which was the subject of various preliminary appeals to the Constitutional Court⁴⁴.

The judge ruling on the constitutionality of the certified notice of commencement of operation, who had expressed himself on more than one occasion on the compatibility of the certified notice of commencement of operation with the residual legislative power of the Regions, in 2012 with two distinct rulings⁴⁵ and in 2014 with another⁴⁶, declared the objections raised in the appeals to be unfounded. First of all the Court acknowledged that construction is part of ‘land management’, which is the jurisdiction of parallel legislative powers and, consequently, it is up to the State to determine the fundamental principles, which include administrative simplification⁴⁷. Secondly, it is equally true that, according to the Council, what legitimises the State’s right to intervene is the need to determine

⁴⁴ The plaintiffs complained first of all about the violation of regional competences on the subject of industry, crafts, trade, healthcare and organisation of regional offices as described in Art. 117, clauses 3 and 4, Constitution; secondly about the violation of the principle of fair collaboration between State and Regions as described in Articles 5 and 120 Constitution; thirdly about the violation of Art. 121, clause 2, Constitution, since the lawmakers had changed or modified regional laws without waiting for the individual Regional Councils to adapt to the principles of the national sources; lastly about the violation of regional competences on the subject of ‘land management’ as described in Art. 117, clause 3, Constitution, since the lawmakers had outlined a detailed regulation, bypassing the Regions’ prerogatives on subjects of parallel legislative jurisdiction. Furthermore, the plaintiffs argued, the lawmakers’ appeal to fair competition and to minimum levels of provisions regarding civil and social rights, i.e. to issues that are exclusively of national jurisdiction, has no connection with construction.

⁴⁵ Respectively, Constitutional Court, 20 June 2012, no. 164, in *Giurisprudenza costituzionale*, 2012, 1765, in the rulings in Emilia-Romagna, Liguria, Apulia, Tuscany and Valle d’Aosta, and 20 July 2012, no. 203, *ibid.*, 2012, 2966, in the ruling by the Autonomous Province of Trento. On the subject see G.L. CONTI, *Le dimensioni costituzionali del governo del territorio*, Milan 2007 and C. LAMBERTI, *La SCIA tra liberalizzazione e semplificazione*, *op. cit.*, 11, whereas for the position of the administrative case law, see F. LIGUORI, *I modelli settoriali: d.i.a. edilizia e procedure semplificate in tema di rifiuti*, *op. cit.*, 784.

⁴⁶ Constitutional Court, 9 May 2014, no. 121, *op. cit.*, in the proceedings brought by the Autonomous Region of Bolzano.

⁴⁷ On the subject see also Constitutional Court, 15 January 2010, no. 10, in *Giurisprudenza costituzionale*, 2010, 135.

fundamental levels of provisions concerning civil and social rights, which need to be guaranteed nationwide, so also in ‘special-statute’ Regions⁴⁸.

Legal theorists have generally leaned towards the non-applicability of the model to construction based on Art. 19, for at least three reasons. Firstly, due to the special nature of building regulations; secondly because these regulations are very detailed, as opposed to the summary remarks in Art. 19; lastly because the certified notice of commencement of operation refers to entrepreneurial, commercial and craftwork activities, without any explicit reference to construction⁴⁹.

As a consequence, the new wording of Art. 19 was applied to construction only with regard to procedures, terms for the commencement of operation and restricting/restorative powers, whereas for strictly construction-related aspects the reference source remained the Consolidated Law: this result was interpreted more as a sign of complication than simplification⁵⁰.

So the Government intervened that same year with a note from the Legislative Office of the Minister for Legislative Simplification in response to a question raised by the Region of Lombardy⁵¹. According to the document, the question on the applicability to construction of legislation on certified notice of commencement of operation “*can only have a positive response*” (p. 2)⁵².

⁴⁸ See judgement 164/2012. In other words, and to quote the same source again, what occurs is “*a concurrence of jurisdictions in which, in actual fact, the exclusive jurisdiction of the State prevails, since it is the only one that is able to allow the realisation of the abovementioned need*”. Consequently, Art. 117, clause 2, lett. m), Constitution, “*establishes necessarily uniform protections nationwide, a result which cannot be guaranteed by the Region, even if with a different degree of autonomy, whose legislative power is still restricted to the territorial jurisdiction of the authority (in whose legislative jurisdiction, moreover, there is no area attributable to the one outlined in Art. 117, second clause, letter m, Constitution)*” (judgement 203/2012), assuming that “*administrative activity can rise to the qualification of ‘provision’, of which the State has the authority to establish a basic level with regard to a specific right of individuals, companies, economic operators and private subjects in general*” (judgement 121/2014).

⁴⁹ Cf. P. AMOVILLI, *Le “complicazioni” in materia di semplificazione amministrativa. Brevi note in tema di segnalazione certificata di inizio attività (scia)*, at www.giustamm.it; W. GIULIETTI, *Il controverso impatto della L. n. 122 del 2010 sulla dia edilizia*, *ibid.*; contra E. BOSCOLO, *La segnalazione certificata di inizio attività: fra esigenze di semplificazione ed effettività dei controlli*, *op. cit.*, 580.

⁵⁰ Cf. F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive del rapporto pubblico-privato*, *op cit.*, 115.

⁵¹ Memo addressed to the Councillor for Land and Urban Planning of the Lombardy Region, no. 1340 from 16 September 2010, at www.semplicazionenormativa.it.

⁵² And this is based, among other things, on the literal interpretation of Art. 49, co. 4-ter, Decree Law 78/2010, which established the replacement of notifications of commencement of operation with the certified notice model “*as needed*” and of preparatory work, according to which the new notification of commencement of operation for construction is also attributable to Art. 19 (cf. Act S.2228, at www.senato.it/leg/16/BGT/Schede/Ddliter/dossier/35500_dossier.htm).

Yet the attitude of legal theory continued to be more or less sceptical about the possibility of the entire legislation around notifications of commencement of operation for construction being replaced by the certified notice model. In addition to the reasons already mentioned, it was argued that it was not possible to exclude from the scope of Art. 19 sectors governed by ‘notifications’, provided that the reform of 2010 was to do with ‘notices’; more specifically, if the judgement of the Ministerial Office formally stated the extension of the scope of application of the new norms to construction, the effect was basically limited to short-term legislation on commencing operation, excluding other elements of the legislation, such as for example the extension of certified notices of commencement of operation to building permits⁵³.

The controversial issue was resolved with the abovementioned *Decreto sviluppo* (Decree for Development) of 2011, which basically absorbed the Government approach as expressed in the abovementioned note, introducing into Art. 19 clause 6-bis, which on the one hand states that the deadline for the Administration to exercise its restricting/restorative powers is halved to 30 days and, on the other, the provisions regarding supervision of town planning and construction, responsibilities and sanction as defined by the Consolidated Law and regional laws remain intact⁵⁴.

The solution by lawmakers was not particularly well received by legal theorists. Beyond considerations on the usefulness (and indeed legitimacy) of inserting a law of authentic interpretation within the context of a decree of urgency – also preventing a Parliamentary debate, since the Government raised the question of confidence around the conversion law – what is most striking is the reduction of the period of time available to the Administration for the exercise of supervisory power. It was therefore easy to imagine that there would be many cases in which the authority, having failed to conclude the procedure in 30 days, would be forced to review internally, except for in cases of false or misleading statements or particularly serious damages such as those to artistic and cultural heritage, the environment, public safety and national defence⁵⁵. There also seems to be no cooperation with the norms of the Consolidated Law on the ‘simple’ notification of commencement of

⁵³ Cf. W. GIULIETTI, *Il controverso impatto della L. n. 122 del 2010 sulla dia edilizia*, *op. cit.*

⁵⁴ Cf. Art 5, clause 2, lett. b, no. 2), Decree Law 70/2011, converted from Law 106/2011, both *op. cit.*

⁵⁵ See clauses 3 and 4 of Art. 19, Law 241/1990. The case law has confirmed the illegitimacy of the injunctions issued by the Administration at the expiration of the deadline, per Art. 23, clause 6, Presidential Decree 380/2001, since the authority can, in such cases, only if reviewing internally (among others, Italian Council of State, VI section, 22 September 2014, no. 4780, at www.federalismi.it).

operation, which should be understood as being abrogated when replaced by a certified notice of commencement of operation, but they remain in effect for the aspects not affected by the new law of 2010-2011⁵⁶.

In this hotchpotch of laws and modifications⁵⁷, which, as we have seen, make interpretation difficult (and, as we will see, certainly do not make the judge's job any easier), a first true source of simplification, although relegated to the practical area, is the agreement 'Italia semplice' (Simple Italy) signed during the Unified Conference on 12 June 2014, which adopted a single model for building permit applications and the same for all certified notices of commencement of operation for construction⁵⁸. These forms, which if needed can be adapted to the specific requirements of the regional law, replace the more than 8,000 copies used until now and are also available online⁵⁹.

3. QUESTIONS ON THE LEGAL NATURE

Having reconstructed the normative evolution of the institution and examined the issues associated with its application specifically in construction, we must now focus on the question of its legal nature, for many years at the centre of a heated debate both in legal theory and in the case law⁶⁰.

⁵⁶ See F. MARTINES, *La segnalazione certificata di inizio attività: nuove prospettive del rapporto pubblico-privato*, *op. cit.*, 121. Worth mentioning is the insertion, by means of the so-called 'Decreto del fare' (Action Decree, Decree Law 21 June 2013, no. 69), of Art. 23-bis Consolidated Law, which allows those applying for a notice of commencement to request all the approval deeds necessary for the activity before or at the same time as the notice.

⁵⁷ On the subject we need to look back to A. CASSATELLA, *L'attività edilizia*, *op. cit.*, 55 and M.A. SANDULLI, *Il regime dei titoli abilitativi edilizi tra semplificazione e contraddizioni*, in *Rivista giuridica dell'edilizia*, 2013, 301.

⁵⁸ Agreement from 12 June 2014 between the Government, Regions and local authorities regarding the adoption of standard and simplified forms for applying for building permits and certified notices of commencement of building activities, in accordance with Art. 9, clause 2, lett. c) of Legislative Decree 28 August 1997, no. 281 (acts repository 67/CU).

⁵⁹ The online form can be found at www.magellanopa.it/semplificare/moduli/SCIA.html.

⁶⁰ For a detailed survey of legal theory prior to the recent modifications, see, among others: G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, *op. cit.*; M. BOMBARDELLI, *La sostituzione amministrativa*, *op. cit.*; E. BOSCOLO, *I diritti soggettivi a regime amministrativo*, Padua, 2001; G. FALCON, *La regolazione delle attività private e l'art. 19 della legge 241 del 1990*, *op. cit.*; M. FILIPPI, *La nuova d.i.a. e gli incerti confini con il silenzio assenso*, at www.giustamm.it, 2006; L. FERRARA, *Diritti soggettivi ad accertamento amministrativo. Autorizzazione ricognitiva, denuncia sostitutiva e modi di produzione degli effetti*, *op. cit.*; ID., *Dia (e silenzio assenso) tra autoamministrazione e semplificazione*, in *Diritto amministrativo* 2006, 759; R. GIOVAGNOLI, *Dia e silenzio assenso dopo la legge 80/2005*, in *Urbanistica e appalti*, 2003, 1374; F. LIGUORI, *Note su diritto privato, atti non autoritativi e nuova denuncia di inizio attività*, at www.giustamm.it, 2006; A. TRAVI, *Silenzio assenso e legittimazione ex lege nella disciplina delle attività private in base al d.p.r. 26 aprile 1992 n. 300*, in *Foro amministrativo*, 1993, 601; ID., *Silenzio assenso, denuncia di inizio attività e tutela dei terzi controinteressati*, in *Diritto processuale amministrativo*, 2002, 381. For a more detailed bibliography on the subject see E. ZAMPETTI,

It is important to highlight right from the start how Art. 6 of Deere Law 138/2011, which introduced clause 6-ter of Art. 19 of Law 241/1990, in stating clearly that “*certified notices of commencement of operation and notifications of commencement of operation are not tacit provisions that can be challenged directly*”, took a position within the debate, absorbing the dominant approach in administrative case law, consecrated by the Plenary Meeting of the Council of State in the well-known ruling no. 15/2011⁶¹.

Although there is currently no doubt as to the nature of certified notice of commencement of operation as a subjectively and objectively private act, it would still be useful to review, however briefly, the most important milestones in this debate, so as to appreciate the outcomes in terms of application that acceptance of one or the other thesis might have on an operational level.

Defining, on a substantial level, whether or not the notification of commencement of operation (and now the certified notice of commencement of operation) can be qualified merely as a simplified procedural form – which maintains intact its regulatory nature, albeit tacitly – or as a private-law act, an expression of a process of liberalisation of certain activities that are regulated in their legitimising prerequisites and methods of operation by the same law, is not just a theoretical question. This operation of legal qualification has some significant practical repercussions. First of all it conditions the identification of the legal nature of the position claimed against the public administration, both by the reporting agent and by a third party to the proceedings. Consequently, it affects the latter’s methods of protection if the Administration fails to exercise its prohibitive powers, aimed at preventing activities set up without or in violation of the legal requirements⁶².

Furthermore, the main issue that the notification/certified notice of commencement of operation raises, even before determining spaces for protecting third parties and

D.i.a. e s.c.i.a. dopo l’adunanza plenaria n. 15/2011: la difficile composizione del modello sostanziale con il modello processuale, in *Diritto amministrativo*, 2011, 811, note 1.

⁶¹ Italian Council of State, plenary hearing, 29 July 2011, no. 15, at www.giustamm.it, 2011, with a note by N. LONGOBARDI – W. GIULIETTI, *S.c.i.a.: un ventaglio di azioni si apre a tutela del terzo*; in *Foro italiano*, 2011, with a note by A. TRAVI, *La tutela del terzo nei confronti della d.i.a. (o della s.c.i.a.): il codice del processo amministrativo e la quadratura del cerchio*, 517 with a note by M.A. SANDULLI, *Brevi considerazioni a prima lettura di Adunanza plenaria n. 15 del 2011*; in *Diritto processuale amministrativo*, 2012, with a note by R. FERRARA, *La segnalazione certificata di inizio attività e la tutela del terzo: il punto di vista del giudice amministrativo*, 193 with a note by L. BERTONAZZI, *Natura giuridica della S.c.i.a. e tecnica di tutela del terzo nella sentenza dell’Adunanza plenaria del Consiglio di Stato n. 15/2011 e nell’art. 19, comma 6-ter, della legge n. 241/90*, 215 ff.; in *Urbanistica e appalti*, 2011, with a note by C. LAMBERTI, *La Plenaria si pronuncia sulla d.i.a.*, 1196.

⁶² F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, op cit. 133.

guaranteeing the principle of effective judicial protection, is the effectiveness of private-law theory itself⁶³.

As we shall see when we examine the various theses that developed, the trend in a lot of legal theory to categorise the certified notice of commencement of operation among tools of mere procedural simplification by linking it to the regulatory model is founded in the need to maintain intact the function of protection of public interest, making sure that the legislation of significant sectors of industry is not taken away from the sphere of public law⁶⁴.

It is no coincidence that for a long time the institution was equated, through legal fiction, to tacit approval and that even after leaning towards a private-law thesis, the administrative case law placed the protection of third parties firmly within the traditional annulment actions regarding the provision or omission thereof.

For a long time it was believed that the only way to guarantee an effective jurisdictional protection of the third party to the proceedings and ensure that significant industries were not excluded from public law and placed under the regulation of private law, in a logic of pure liberalisation, was to rebuild the institution in a public-law vein, so as to bring it back, in a forced way, into the regulatory framework⁶⁵.

According to the supporters of the public-law thesis, the notification of commencement of operation and now the certified notice of commencement of operation are situations in which permission is gradually granted and in which the public administration, after a private applicant has submitted their notice, 'acts' through its own inertia, failing to adopt an injunction against exercising the notified private business, thereby creating a tacit permit that basically authorises the activity from a subjective and objective administrative point of view⁶⁶.

⁶³ In this regard, see M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, in *Diritto processuale amministrativo* 2012, 1, 329.

⁶⁴ E. SCOTTI, *Tra tipicità ed atipicità delle azioni nel processo amministrativo (a proposito di adunanza plenaria 15/11)*, in *Diritto amministrativo*, 2011, 765.

⁶⁵ A. TRAVI, *La tutela nei confronti della d.i.a. tra modelli positivi e modelli culturali*, *op. cit.*, 15.

⁶⁶ For a detailed survey of the administrative case law in favour of the provisions-based thesis, see Italian Council of State, section V, 4 June 2004, no. 6910; section IV, 10 June 2003, no. 356; section V, 20 January 2003, no. 172; section IV, 22 March 2007, no. 1409; section VI 5, April 2007, no. 1550; 11 November 2008, no. 5811; 13 January 2010, no. 72; 8 March 2011, no. 1423; Regional Administrative Court of Veneto, section II, 20 June 2003, no. 3405; Regional Administrative Court of Lazio, Latina, 29 January 2007, no. 73; Regional Administrative Court of Lombardy, Brescia, 12 April 2002, no. 686 and 10 January 2009, no. 15; Regional Administrative Court of Lombardy, Milan, 17 October 2005, no. 3819; Regional Administrative Court of Campania, Naples, section IV, 12 January 2009, no. 68; Regional Administrative Court of Lazio, Rome, section II, 3 October 2008, no. 8750; Regional Administrative Court of Liguria, Genoa, 21 October 2009, no. 68; Regional Administrative Court of

The basic idea behind this theory is that the certified notice of commencement of operation is not a form for de-proceduralisation based on a choice to liberalise certain activities, taken away from the public-law authorisation regime and subjected to private law, but rather a mere tool of administrative simplification. As such, it does not eliminate the authorising power of public administration, nor does it change the legislation of the activity that is the subject of the notification, which is under public law, but it merely replaces the final measure expressed with an act of tacit approval by public administration, creating a significant silence that has authority, along the same lines as the institution of tacit approval, regulated by the subsequent article 20, Law 241/90⁶⁷.

Acceptance of this thesis has major consequences on both a substantive and procedural level.

From a substantive point of view the legal position of the applicant in relation to public administration is not a subjective right, but rather a legitimate interest that is aimed at securing a gain, since the exercise of the activity is subject to an act of assent, albeit silent, from the public administration; the subjective position of the third party to the proceedings that might be injured by the activity being notified, will be qualified, consequently, as a right to challenge the decision of a public entity⁶⁸. Also, according to this interpretation, the legitimisation of the exercise of the activity does not derive from the positive fact of its effective conformity with the law, but rather from the authorising tacit provision that is formed by the inertia of the public administration, following the usual pattern of 'rule-power-effect'.

A procedural corollary of this thesis is the statement according to which third parties that are injured by the tacit approval on the part of the Administration in the case of a submission of a notification or certified notice of commencement of operation are legitimised in reacting with the methods and timelines of standard appeal for the annulment of an administrative provision, in accordance with Art. 29 and 41 Administrative Procedure

Lazio, Rome, 3 October 2008, no. 8750. All the judgements mentioned can be found in *Foro amministrativo* and at www.giustizia-amministrativa.it.

⁶⁷ In legal theory, among the authors who subscribe to this theory see M. FILIPPI, *La nuova dia e gli incerti confini con il silenzio assenso*, at www.giustamm.it; V. CERULLI IRELLI, *Modelli procedurali alternativi in tema di autorizzazione*, in *Diritto amministrativo* 1933, 55.

⁶⁸ In favour of interpreting the subjective legal position of the applicant in terms of the right to challenge the decision of a public entity, see A. ANDREANI, *Gli interessi pretensivi dinamici nel procedimento amministrativo*, in *Diritto amministrativo*, 1994, 336; similarly, A. VACCA, *La natura giuridica della d.i.a. con particolare riguardo alla disciplina introdotta dall'art. 3, comma 1, D.L. 14 marzo 2005, n. 35, convertito con modificazioni nella L. 14 May 2005, n. 80*, in *Foro amministrativo*, Tar, 2006, 876.

Code, without having to start procedures for implied refusal.

Two requirements therefore go hand in hand: ensuring that the introduction of alternative regimes, such as the notification or certified notice of commencement of operation, does not diminish the scope of legal protection provided to third parties, resulting in a violation of the constitutional principle of effective protection; protecting the principle of legal certainty and legitimate expectation with regard to the applicant, by limiting any objections to the time limit on annulment.

Although motivated by this appreciable intention, the regulatory theory has nevertheless been the subject of some criticism, which has highlighted the dangers and, most of all, the fact that the hermeneutic operation that lies at its base cannot be shared.

It has been argued, first of all, that the thesis, which forces the institution into the area of public law, by resorting to a legal fiction that is not authorised by current regulations and giving meaning to mere inertia on the part of the public administration, in the absence of a legal requirement qualifying it, performs an unauthorised operation that goes well beyond the literal text of the law, betraying the same rationale that inspired the legislative choice⁶⁹.

The thesis has the evident limitation, first of all, of eliminating any substantial difference between the institution of notification/certified notice of commencement of operation and tacit approval, which lawmakers have proven to want to keep separate, regulating them in two distinct provisions that generate very different mechanisms with little to no overlap⁷⁰.

Moreover, by deriving the legitimisation to perform the activity not from its actual conformity with the law, but rather from the mere expiration of the deadline for issuing an injunction, as a result of an alleged tacit approval, there is the obvious risk that, if the third

⁶⁹ F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, op cit. 140. M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, op cit., 348.

⁷⁰ The difference between the notification/certified notice of commencement of operation and the institution of silence is well outlined by A. TRAVI, *La tutela nei confronti della d.i.a. tra modelli positivi e modelli culturali*, op cit. On the nature of tacit approval and the different situations that the certified notice of commencement generates, see also, among the many contributions to legal theory: G. FALCON, *La regolazione delle attività private e l'art. 19 della legge 241 del 1990*, op cit., 411. On the subject see also F.G. COCA *Il silenzio della pubblica amministrazione*, Milan, 1971; V. PARISIO, *I silenzi della pubblica amministrazione. La rinuncia alla garanzia dell'atto scritto*, Milan, 1996; A. ROMANO, *A proposito dei vigenti artt. 19 e 20 della L. 241 del 1990: divagazioni sull'autonomia dell'amministrazione*; E. ZAMPETTI, *D.i.a. e s.c.i.a. dopo l'adunanza plenaria n. 15/2011: la difficile composizione del modello sostanziale con il modello processuale*, in *Diritto amministrativo*, 2011, 4, 811. Also A. TRAVI, *La DIA e la tutela del terzo: tra pronunce del g.a. e riforme legislative del 2005*, in *Urbanistica e appalti*, 2005, Finally, F. TRIMARCHI BANFI, *Diritti, poteri e responsabilità nelle recenti riforme di alcuni procedimenti amministrativi*, in *Diritto pubblico*, 1999, 825.

party fails to appeal, the legitimising effect is established definitively, thereby effectively remedying a *contra legem* activity⁷¹.

Decisive with regard to the impracticability of this hermeneutic option is the modification to Art. 19 by Decree Law 78/2010, which – as mentioned above – by replacing the notification of commencement of operation with the certified notice of commencement of operation and by allowing the commencement of operation at the same time as the submission of the notice following the general model of notification of commencement of operation with immediate legitimacy, makes it inconceivable that a tacit approval could form following a protracted process⁷².

The majority position of the prevailing legal theory and of part of the case law has always argued against the regulatory and in favour of the private-law theory, which considers the certified notice of commencement of operation a subjectively and objectively private act⁷³.

This theory, based on claims against all the arguments in favour of the regulatory thesis, starts with the consideration that a private party that submits a notice draws its own legitimacy directly from the law, on the basis of a principle of personal accountability, without the need for any intervention by the authorising power of public administration, according to the alternative ‘rule-fact-effect’ pattern⁷⁴.

In other words, according to the supporters of the private-law thesis, the notification/certified notice of commencement of operation is not, at the same level as tacit approval, a form for procedural simplification, but rather a tool for liberalising certain activities, which have been removed from the authorising process and which private parties

⁷¹ F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, op. cit., 137.

⁷² Along these lines, see Italian Council of State, plenary meeting, 29 July 2011, no. 15, according to which, “*Apart from the complex situation of tacit approval with retroactive effect or the even more debatable thesis according to which tacit approval occurs before the deadline for issuing an injunction, in such cases, the passing of time does not produce documentary evidence of consent but rather prohibits an injunction against a business that has already previously begun*”.

⁷³ For a detailed summary of the administrative case law in favour of the private-law thesis see: Council of State, section IV, 13 May 2010, n. 2919; section VI, 15 April 2010, no. 2139; 29 January 2004, no. 308; 4 September 2002, no. 4453, at www.giustizia-amministrativa.it; Regional Administrative Court of Campania, 10 June 2011, no. 3099; Regional Administrative Court of Calabria, 23 August 2010, no. 915; Regional Administrative Court of Lombardy, 23 October 2009, no. 4886; Regional Administrative Justice Court of Trento, 14 May 2008, no. 111; Regional Administrative Court of Liguria, 22 January 2003, no. 113; Regional Administrative Court of Marche, 6 December 2001, no. 1241. All rulings can be found in *Foro amministrativo* and at www.giustizia-amministrativa.it.

⁷⁴ F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, op. cit., 145. L. FERRARA, *Diritti soggettivi ad accertamento amministrativo. Autorizzazione ricognitiva, denuncia sostitutiva e modi di produzione degli effetti*, Padua, 1996; E. BOSCOLO, *I diritti soggettivi a regime amministrativo. L'art. 19 legge n. 241/1990 ed altri modelli di liberalizzazione*, op. cit.

can legitimately perform simply by virtue of possessing the necessary legal requirements and by prior notification to the public administration, but without the need to wait for any permit, explicit or tacit, to be issued⁷⁵.

There are evident consequences on a substantial and procedural level to adopting this alternative interpretation of the institution.

First of all there is a radical change in the legal consistency of the subjective positions upheld by the private applicant and the third party to the proceedings in relation to the public administration.

The private applicant, legitimised directly by the law in performing the activity subject to notification, as long as they are evidently in possession of the prescribed prerequisites, and not by an act of tacit or explicit approval by the public administration, will be the holder of a subjective right, or rather a subjective position of advantage immediately recognised by the legislation, which authorises them to directly pursue their interest, after merely establishing a relationship with the public administration by submitting the notice⁷⁶. At the same time they will also have an interest in opposing the rulings as a result of which the public administration, in exercising its own powers of injunction and self-regulation, might intervene in a negative way on the exercise of the activity. The third party injured by the notified activity will have a legal position that can be qualified as an interest aimed at securing a gain through the public administration's exercise of its supervisory powers according to law⁷⁷.

There is also a change in the legal nature of the inertia of the public administration with respect to the private initiative beyond the deadline allowed by law for exercising its power of injunction, which, according to the supporters of the private-law thesis, will never

⁷⁵ In the legal theory, among those in favour of this thesis are A. TRAVI, *Silenzio assenso e legittimazione ex lege nella disciplina delle attività private in base al d.p.r. 26 aprile 1992 n. 300*, op. cit. G. ACQUARONE, *La denuncia di inizio attività. Profili teorici*, op. cit.; F. LIGUORI, *Attività liberalizzate e compiti dell'amministrazione*, Naples, 2000; S. VALAGUZZA, *La DIA, l'inversione della natura degli interessi legittimi e l'azione di accertamento come strumento di tutela del terzo*, in *Diritto processuale amministrativo*, 2009, 4, 1260; I. IMPASTATO, V. SANZO, *La natura giuridica della d.i.a. Tra tutela del terzo e potere di autotutela*, at www.giustamm.it, 2008, 3; F.G. SCOCA, M. D'ORSOGNA, *Silenzio, clamori e novità*, in *Diritto processuale amministrativo*, 2003, 3, 393. In this regard see also F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, op. cit., 147, note 19.

⁷⁶ L. FERRARA, *Diritti soggettivi ad accertamento amministrativo. Autorizzazione ricognitiva, denuncia sostitutiva e modi di produzione degli effetti*, op. cit., 213 ff.; E. BOSCOLO, *I diritti soggettivi a regime amministrativo. L'art. 19 legge n. 241/1990 ed altri modelli di liberalizzazione*, op. cit.

⁷⁷ On this point see W. GIULIETTI, *Nuove norme in tema di dichiarazione di inizio attività, ovvero la continuità di un istituto in trasformazione*, at www.giustamm.it 2006; G. GRECO, *Argomenti di diritto amministrativo. I lineamenti essenziali del sistema*, Milan, 2010; in case law, among the most recent, Council of State, section IV, 13 May 2010, no. 2919; section V, 22 February 2007, no. 948, at www.giustizia-amministrativa.it.

constitute an act of tacit or implicit consent, with subrogation of a regulatory and authorisation power that is in fact inexistent in the case in point, but rather a behaviour lacking any typical legal meaning.

Hence the significant impact from a procedural point of view on the matter of the jurisdictional protection of third parties.

The next paragraph will look at this aspect in greater detail, but for now it is important to note how the lack of a provision, even a tacit one, makes the traditional action of expiring or annulling impracticable, thereby raising the issue of identifying tools for protecting third parties, which, according to some supporters of the private-law thesis, should be found in the action against silence or breach on the part of the Administration, currently regulated by articles 31 and 117 of the Administrative Procedure Code. There are still doubts around the nature of the power of the competent public administration to which third parties would be required to appeal: whether it be in the exercise of powers of injunction, albeit subject to a short deadline and that might already have been used up after the relative action was propositioned; or sanctionary and repressive powers that are provided in a non-generalised way and do not always result in the adoption of restorative measures, with limited satisfaction for third parties; or residual powers of self-regulation that are limited to the discretionary nature described in Articles 21-*quinquies* and 21-*nonies* requiring the existence of a public interest that goes beyond the mere restoration of legality⁷⁸.

Beside these two opposing theories, there is also a third reconstructive approach that qualifies the notification/certified notice of commencement of operation as an act of self-administration that integrates the private exercise of public functions, as an expression of the constitutional principle of subsidiarity, the so-called “notification of commencement of operation in an administrative form”.

According to this interpretation, the legitimacy of the private party’s exercise of the notified activity does not derive from an act of tacit approval on behalf of the public administration, or directly from the law, but from the concurrence of two elements. The legal situation that arises after the expiration of the deadline for issuing an injunction is qualified as silence or breach, which has no decisive function insofar as it is a mere behaviour that confirms that

⁷⁸ F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, op. cit., 197.

the assessment has been performed. In this view the notification of commencement of operation is an act in the general interest performed by the third party, which operates on the grounds of private autonomy and not as an auxiliary to or substitute of the administrative apparatus, so their input ends up seeming alternative to and substituting the Administration's⁷⁹.

On a procedural level supporters of this thesis consider the only tool for protecting third parties damaged by the activity, an independent action of negative assessment aimed at obtaining a ruling with which an administrative judge verifies the lack of prerequisites attested to in the notice of commencement of operation and declares that the silence/breach by the public administration is illegitimate and reasonable subjective expectations are non-existent. Consequently, the compliance effect of this ruling generates the obligation for the public administration to remove the effects previously produced by the certified notice of commencement of operation⁸⁰.

The main argument against this hermeneutic approach, apart from the difficulty of imagining a hybrid figure that is born private and becomes public after the deadline has expired⁸¹, is contained in the new provisions on the immediate start of activities by the

⁷⁹ This is basically a hybrid act that is born private but becomes public as a result of the expiration of the deadline and the silence on the part of the public administration. In favour of this reconstruction are P. DURET, *Sussidiarietà ed autoamministrazione dei privati*, Padua, 2004, 189; F. GAFFURI, *I ripensamenti giurisprudenziali in merito alla questione relativa alla natura della denuncia di inizio attività e alla tutela del controinteressato dopo le riforme del 2005 alla l. 241/90*, in *Diritto processuale amministrativo*, 2008, 244; G. PASTORI, A. ROMANO, *Aspetti problematici del regime di talune attività private previsto dall'art. 19 della l. 241 del 1990*, in *Camera dei deputati, Atti parlamentari X Legislatura*, 429; G. GRASSO, *L'affidamento quale principio generale del diritto*, at www.giustamm.it, 2011; G. PASTORI, *Interesse pubblico e interessi privati fra procedimento, accordo e autoamministrazione*, in *Scritti in onore di P. VIRGA*, II, Milan, 1994, 1303. Opposed to this interpretation are G. FALCON, *La regolazione delle attività private e l'art. 19 della legge n. 241/1990*, *op. cit.*; ID., *L'autoamministrazione dei privati*, *op. cit.*, 139. Opposed to this thesis is A. TRAVI, *La tutela nei confronti della d.i.a. tra modelli positivi e modelli culturali*, *op. cit.*

⁸⁰ Protection of third parties in the forms of assessment is supported in case law by Regional Administrative Tribunal of Liguria, section I, 22 January 2003, no. 113 and Council of State, section VI, 9 March 2009, no. 717 with notes by E. SCOTTI, *Denuncia di attività e processo amministrativo: verso nuovi modelli di tutela?*, in *Foro amministrativo*, 2009, 488; S. VALAGUZZA, *La DIA, l'inversione della natura degli interessi legittimi e l'azione di accertamento come strumento di tutela del terzo*, *op. cit.*; A. LUPO, *Denuncia di inizio di attività in edilizia e tutela giurisdizionale delle posizioni di controinteresse: il Consiglio di Stato ammette l'esperibilità dell'azione di accertamento (atipica)*, in *Foro amministrativo*, 2009, 1567; F.F. GUZZI, *Dichiarazione di inizio di attività ed effettività della tutela giurisdizionale*, in *Rivista amministrativa della Repubblica Italiana*, 2009, 425; G. MANNUCCI, *La necessità di una prospettiva obbligatoria per la tutela nel modello della d.i.a.*, in *Giornale di diritto amministrativo*, 2009, 1079; 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*, in *Guida al diritto*, 2009, 477; M. MATTIUZZI *Dia edilizia, tutela del terzo e ammissibilità dell'azione di accertamento autonomo nel giudizio amministrativo*, in *Rivista giuridica dell'urbanistica*, 2010, 10.

⁸¹ Council of State, section VI, 9 February 2009, no. 717, at www.giustizia-amministrativa.it, according to which a very understandable concern for ensuring the effectiveness of jurisdictional protection for third parties "cannot end up distorting the nature of the institution, by transforming what is a private declaration into an act of the

applicant, even before the deadline for performing an assessment has expired⁸².

Another obstacle to the reconstruction of the certified notice of commencement of operation as an act of private exercise of administrative power would be the regulatory recognition of a power of injunction that is qualitatively distinct from and predates the power of self-regulation, to be exercised downstream without a need to remove the certified notice of commencement of operation.

The three theses examined – the public-law one, the pure private-law one and the median one of self-administration – even in the different interpretations of the institution, all share in common the denial that the notification of commencement of business results in an actual phenomenon of administrative substitution: the first one because it denies the notification of commencement of operation any legitimising effect, which it considers belonging only to the act of tacit approval by the administration; the second because it considers the notification of commencement of operation an act of bestowal of a right; the third because, while promoting citizens' input into the protection of common interest, it considers it an alternative to and not a substitution of an intervention by the Administration⁸³.

The current debate on determining the legal nature of the certified notice of commencement of operation seems to have found a definitive framework through the contribution of the Council of State as well as the legislative confirmation of the conclusions of the abovementioned clause 6-ter of Art. 19 of Law no. 241/90.

In particular, the Plenary Meeting of the Council of State, with the abovementioned ruling no. 15/2011, in criticising the theses of tacit approval and of the certified notice of commencement of operation in administrative form, on the basis of all the arguments mentioned, basically followed the private-law thesis, qualifying the institution as a subjectively and objectively private act, which legitimises the applicant's performance of an activity. In the reconstruction by the Plenary Meeting, the institute operates with a logic of liberalisation that subrogates altogether the prior act of consent by the Administration, but at the same time it does not place the activity outside the administrative order, given the availability *ex post* of administrative powers, either within a

administration or into a hybrid case that is born private and becomes public as a result of the expiration of the deadline and of the silence of the administration”.

⁸² In this regard, see F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, *op. cit.* 153.

⁸³ M. BOMBARDELLI, *La sostituzione amministrativa*, *op. cit.*, 257.

deadline (injunction powers) or after it (the residual power of self-regulation)⁸⁴.

In full accordance with the conclusions of the Plenary Meeting, at least from a substantive point of view, for the first time lawmakers contributed to clarifying the legal nature of the certified notice of commencement of operation, expressly ruling out that it constitutes a tacit provision that can be directly challenged and that its submission can result in a protracted process that legitimises the qualification of the silence on the part of the Administration as tacit approval.

4. TOOLS FOR PROTECTING THIRD PARTIES

At present it is possible to argue that there is clarity around the correct framing of the legal nature of the certified notice of commencement of operation as an objectively and subjectively private act, as well as around the scope of the tool as an expression of a policy of liberalisation of certain private activities (although it is a moderate liberalisation, without detracting from the public-law order, but rather replacing the *ex ante* exercise of an authorising power with an *ex post* supervisory/restrictive one).

The same cannot be said, however, of the issue of identifying tools of legal protection available to third parties injured by the exercise of the private activity that was the subject of the notice.

This issue continues to be at the centre of a heated debate in both legal theory and case law, especially after the abovementioned Decree Law 138/2011.

By taking a position on the issue, lawmakers on the one hand seem to have contradicted the entire system of third-party protection designed by the Plenary Meeting – significantly reducing its scope – while on the other hand leaving open the existing debate on the nature of the administrative powers to which third parties are entitled to appeal before proposing the only procedural recourse they are currently allowed – the action against silence and breach⁸⁵.

⁸⁴ In legal theory, in favour of the concept of notification of commencement of operation as an expression of only partial liberalisation, see M.P. CHITI, *Atti di consenso*, in *Diritto amministrativo*, 1996, p. 181.

⁸⁵ For an initial comparison of the opposing positions, see F. BOTTEON, *La scia dopo il d.l. 13 agosto 2011 n. 138: il legislatore contro l'Adunanza Plenaria in tema di tutela del terzo*, at *Lexitalia.it*, no. 7-8/2011; C.E. GALLO, *L'articolo 6 della manovra economica d'estate e l'adunanza plenaria n. 15 del 2011: un contrasto soltanto apparente*, at www.giustamm.it, 2011; R. GISONDI, *Il regime della tutela dei terzi contro la s.c.i.a. dopo la*

After an effective survey of the issue, it seems necessary to clarify who is the third party whose position is referred to, taking into account that the situation that arises after submission of a commencement of operation is part of the so-called ‘multipolar relationships’, which, while only being addressed to the submitter of the claim, in reality reflect a regulatory framework that includes other subjects whose interests are the object of the administrative action, although no legal relationship is established between them⁸⁶.

The term ‘third party’ refers to the subject who, although external to the relationship that is established between the Administration and the recipient of the provision, and to the subsequent administrative relationship, is nevertheless the holder of a qualified interest, which cannot be explained as a mere reflection of the situation of the applicant that is taken into account by the law, since the norm, in regulating the exercise of a certain activity and in establishing its legitimate assumptions, entitles them to ask for protection against the failure to observe the rules themselves. And they are legitimised both when requesting a restrictive order from the Public Administration, and when activating legal protection in the case of disputes over the exercise of administrative powers set in place to protect the established rules⁸⁷.

It is however obvious how going beyond the traditional public-law thesis and abandoning the conception of the certified notice of commencement of operation as an act of tacit approval have raised doubts around the identification of the tools of protection available to third parties in the case of damaging activities started in the absence of legal requirements or in opposition to them.

The solution of the Plenary Meeting was to offer a very well structured and complete system of third-party protection, which however was not exempt from criticism and doubts, since, although starting from the private-law nature of the notification of commencement of operation, ruling no. 15/2011 reconstructed third-party protection as an action of annulment of the denial of the exercise of the power of injunction that would

manovra di August 2011 ed il decreto correttivo del codice del processo amministrativo: un'interpretazione costituzionalmente orientata per evitare il deficit di effettività, at www.giustizia-amministrativa.it.

⁸⁶ On the concept of multipolarity and the notion of certified notification of commencement of operation, see F. TRIMARCHI BANFI, *Il “terzo” nel diritto amministrativo: a proposito di semplificazioni*, in *Diritto processuale amministrativo*, 2014, 25.

⁸⁷ F. TRIMARCHI BANFI, *Il “terzo” nel diritto amministrativo: a proposito di semplificazioni*, *op. cit.*, 30. See also F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, *op cit.*, 172 e M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, *op cit.*, 352.

implicitly form once the law had expired⁸⁸.

In other words, the Plenary Meeting ascribed to the thesis supported by some legal theory according to which the inertia of the Administration following the submission of the certified notice of commencement of operation, beyond the expiration of the deadline for the exercise of the powers of injunction, had the effect of a significant silence, even in the absence of an explicit regulation that qualified it that way, establishing itself as a tacit provision of denial of the exercise of those powers⁸⁹.

The acceptance of this thesis had significant consequences on a procedural level in terms of protection of the third-party, who, after the expiration of the mandatory deadline for exercising powers of injunction, could have resorted to the traditional action of annulment, invoking silent refusal, which formed as a consequence of inertia on the part of the Administration, in the ordinary time limit starting from the full acknowledgement of the adoption of the damaging act, as well as complementing it, the action of public-law condemnation (so-called 'action of fulfilment') aimed at obtaining a ruling that would impose on the Administration the adoption of the denied injunction⁹⁰.

With regard to the areas of protection available to third parties in the period of time prior to the deadline for exercising powers of injunction, made necessary by the

⁸⁸ Opposed to the thesis of the Plenary Meeting regarding the qualification of inertia on behalf of the public administration as silent refusal, among others, L. BERTONAZZI, *Natura giuridica della S.c.i.a. e tecnica di tutela del terzo nella sentenza dell'Adunanza plenaria del Consiglio di Stato n. 15/2011 e nell'art. 19, comma 6-ter, della legge n. 241/90, op. cit.*, 233; A. TRAVI, *La tutela del terzo nei confronti della d.i.a. (o della s.c.i.a.): il codice del processo amministrativo e la quadratura del cerchio*, in *Foro italiano*, 2011, III, 591; E. ZAMPETTI, *D.i.a. e s.c.i.a. dopo l'adunanza plenaria n. 15/2011: la difficile composizione del modello sostanziale con il modello processuale, op cit.*, 794.

⁸⁹ We are referring to the thesis by G. GRECO, *La Scia e la tutela dei terzi al vaglio dell'Adunanza plenaria: ma perché dopo il silenzio assenso e il silenzio inadempimento, non si può prendere in considerazione anche il silenzio diniego?*, at www.giustamm.it.

⁹⁰ Even before the measure, recourse to an action of fulfilment in the administrative process was already admitted by a judicial decision of the Plenary Meeting of the Council of State with ruling no. 3 of 23 March 2011, at www.giustizia-amministrativa.it, and confirmed in the subsequent ruling 15/2011; on the subject of certified notice of commencement of operation in legal theory in favour of exercising this action even before it was codified into law, see L. TORCHIA, *Condanna e adempimento nel nuovo processo amministrativo*, in *Giornale di diritto amministrativo*, 2011, no. 1187 ff.; A. CARBONE, *Fine delle perplessità sull'azione di adempimento*, in *Foro amministrativo*, Tar, 2011, 1499; D. VAIANO, *L'azione di adempimento nel processo amministrativo: prime incertezze giurisprudenziali*, in *Giurisprudenza italiana*, 2012, 714; E. FOLLIERI, *Le azioni di annullamento e di adempimento nel codice del processo amministrativo*, at www.giustizia-amministrativa.it; R. GISONDI, *La disciplina delle azioni di condanna nel nuovo codice del processo amministrativo*, at www.giustizia-amministrativa.it; M. RAMAJOLI, *Le tipologie delle sentenze del giudice amministrativo*, in R. CARANTA (ed.), *Il nuovo processo amministrativo*, Turin, 2011, 573; A. CARBONE, *L'azione di adempimento nel processo amministrativo*, Turin, 2012. Opposed to the admissibility of a condemnatory action, in the procedural framework prior to the second corrective, see A. TRAVI, *La tipologia delle azioni nel nuovo processo amministrativo*, in *La gestione del nuovo processo amministrativo: adeguamenti organizzativi e riforme strutturali. Atti del LVI Convegno di studi amministrativi di Varenna del 23-25 settembre 2010*, Milan, 2010, 75. In general, for a discussion of the subject, see comments by M. CLARICH, C.E. GALLO, E. FOLLIERI, F. MERUSI, G. VERDE, A. ROMANO TASSONE, S. MENCHINI, B. SASSANI, L. DI MARCO, in *Guida al diritto, Dossier*, 2011, 82.

generalisation of the model of notification of commencement of operation with immediate legitimacy, the Plenary Meeting allowed recourse to an atypical assessment, the legal foundation of which is found in Art. 34, clause 2, Administrative Procedure Code. This action is aimed at obtaining, over the course of the judgement and up until the expiration of the deadline for adopting powers of injunction, the necessary cautionary measures for preventing that, pending the definition of the judgement, the exercise of the notified activities might cause irreparable damages to third parties. After the deadline, if the public administration does not adopt any prohibition measures, the action is instrumental in obtaining a ruling that confirms the existence or not of prerequisites for adopting rightful prohibition provisions, with subsequent automatic conversion of the original assessment action into a request for appeal to the provision, without the need for proposition of additional motives⁹¹.

It has been widely shown that, basically, the solution proposed by the Plenary Meeting relativised, if not indeed went beyond, the strict time constraint of the deadline for verification, in contrast to the regulatory fact and established an atypical type of protection, granted by the prior assessment of the illegal exercise of activities on behalf of the applicant, although disguised in the action of tacit annulment of denial of the injunction⁹².

This framework was completely subverted by the subsequent measure carried out by lawmakers, who, within a few weeks of the ruling of the Plenary Meeting, issued the already mentioned Decree Law 13 August 2011, adding to the original text of Art. 19 of Law 241/90 clause 6-ter and including, as the only form of third-party protection, recourse to action against silence or breach, per Art. 31 Administrative Procedure Code, which

⁹¹ On the question of the practicability of an atypical action of assessment even before the measure established by the Plenary Meeting, see, among others, G. GRECO, *L'accertamento autonomo del rapporto nel processo amministrativo*, Milan, 1980; E. CASETTA, *Osservazioni sull'ammissibilità di decisioni di mero accertamento del giudice amministrativo*, in *Rassegna di diritto pubblico*, 1952, 146; B. SASSANI, *Impugnativa dell'atto e disciplina del rapporto. Contributo allo studio della tutela dichiarativa nel processo civile e amministrativo*, Padua 1989; P. STELLA RICHTER, *Per l'introduzione all'azione di mero accertamento nel giudizio amministrativo*, in *Scritti in onore di Giannini*, Milan, 1988, I, 1 ff.; R. GISONDI, *D.i.a. ed accertamento autonomo: il Consiglio di Stato separa l'interesse legittimo dal potere: nota a margine Council of State, 9 February 2009, 717*, at www.giustamm.it, 2009; A. FORMICA, *Dia e accertamento nel processo amministrativo*, in *Urbanistica e appalti*, 5/2009, 573. In case law, opposing the admissibility of the action of mere assessment in the presence of authoritative acts, limiting its use to the protection of subjective rights on the basis of exclusive jurisdiction, see Council of State, section V, 6 October 1999, no. 1343 and section VI, 20 October 1998, no. 1399 at www.giustizia-amministrativa.it. For general recourse to such action, see Council of State, 9 February 2009, no. 717 in *Urbanistica e appalti*, 5/2009, with a note by A. FORMICA, *op cit.* and at www.giustamm.it, with a note by R. GISONDI, *D.i.a. ed accertamento autonomo: il Consiglio di Stato separa l'interesse legittimo dal potere: nota a margine Cons. Stato, 9 febbraio 2009, 717, op cit.*

⁹² E. ZAMPETTI, *D.i.a. e s.c.i.a. dopo l'adunanza plenaria n. 15/2011: la difficile composizione del modello sostanziale con il modello processuale, op cit.*, 794.

comes about in the light of a submission of a claim aimed at requesting ‘verifications’ by public administration⁹³.

Welcomed favourably due to its definitive positioning with regard to the legal nature of the certified notice of commencement of operation as a private act, the regulatory thesis, however, has failed to start a new debate in legal theory, after raising many questions.

First of all the regulation places on the third party the onus of activating a procedure by submitting a claim that is indisputably considered by case law to be a prerequisite of admissibility of the action of silence or breach on the part of the public administration and, therefore, an indispensable condition for access to jurisdictional protection⁹⁴. It has been objected that, as in all situations in which a private claim is not a requirement for adopting the act, this amounts to forcing the applicant to start a procedure in a wholly artificial manner, only to see the deadline expire without a result, almost as a surreptitious replay of the institution of notice to comply⁹⁵.

As has also been pointed out, this regulatory innovation reopens the question of areas of third-party protection, insofar as it triggers the recourse to silence-breach, traditionally conceived for the non-exercise of extensive powers, which do not expire at the end of the deadline, in a case in which there are powers of injunction and restorative powers that are subject to a time limit and so must be exercised before it expires⁹⁶.

⁹³ Claus 6-ter of Art. 19 Law 241/90 is as follows: “*The certified notice of commencement of operation and the notification of commencement of operation are not tacit provisions that can be challenged directly. Claimants can request assessments by the administration and, in the event of inertia on its part, avail themselves exclusively of the action detailed in Art. 31, clause 1, 2 and 3, Administrative Procedure Code*”. For a comment on the regulatory change: G.P. CIRILLO, *L’attività edilizia e la tutela giurisdizionale del terzo*, at www.giustizia-amministrativa.it; G. GRECO, *Ancora sulla Scia: silenzio e tutela del terzo (alla luce del comma 6-ter dell’art. 19 L. 241/90)*, in *Diritto processuale amministrativo*, 2014, 651.

⁹⁴ On the consequences of the failure by the third party to submit a claim, see Council of State, section IV, 4 February 2013, no. 500, at www.giustizia-amministrativa.it, according to which the absence of a claim is in itself a sufficient element on which to base the inadmissibility of the appeal; along the same lines is Regional Administrative Justice Court of Trento, 24 October 2013, no. 346, at www.giustizia-amministrativa.it. Regarding the minimum requirements that the claim must possess in order to be a suitable foundation for an obligation to provide and set up a legally significant silence, see Regional Administrative Tribunal of Lombardy, section II, 12 April 2012, no. 1075 at www.giustizia-amministrativa.it. On the non-retroactive nature of the regulation and its non-applicability to pending judgements, see Council of State, 3 October 2014, no. 4962, at www.giustizia-amministrativa.it, which considers the ruling in clause 6-ter of Art. 19 Law 241/90 an ‘innovative’ and not merely interpretative, regulation of a ‘substantive’ rather than procedural nature.

⁹⁵ See M. RAMAJOLI, R. VILLATA, *Procedimento. S.c.i.a. (voce)*, in *Enciclopedia del diritto, Libro dell’anno del diritto*, 2012, *op. cit.*; similarly, although on a different issue, A. CARBONE, *Azione di annullamento, ricorso incidentale e perplessità applicative della modulazione degli effetti caducatori*, in *Diritto processuale amministrativo* 2013, 2 447.

⁹⁶ G. GRECO, *Ancora sulla Scia: silenzio e tutela del terzo (alla luce del comma 6-ter dell’art. 19 L. 241/90)*, *op. cit.* 646; M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, *op. cit.* 342. On the specific nature of the rite of silence as

There is still much debate around how to determine the types of assessments that third parties can perform with particular reference to the nature of administrative powers to which they are authorised to appeal from the public administration when presenting a claim that might generate silence or breach.

According to the likely majority opinion in case law, which is supported by some of the legal theory, a third party cannot request the exercise of powers of injunction, once their period of use has expired, since these are exhausted powers by which the claim could never obligate the public administration to act. The only power to which a third party can appeal is self-regulation, which, according to many, must be exercised in accordance with the parameters described in Articles 21-*quinquies* and 21-*nonies* Law 241/90 (existence of reasons of public interest, reasonable term, weighting of the interests of the recipients and other parties)⁹⁷, without prejudice, in the case of false declarations by the private party, to the possibility of requesting the adoption of a sanctionary power per Art. 21, clause 1, which, by its very nature, can never possess traits of discretionary power⁹⁸.

Significant on this point will be the reform proposals aimed at restricting the powers of self-regulation of the Public Administration on the subject of *ex officio* withdrawal and annulment, as described in Draft Law no. 1577 of 23 July 2014 which, in Art. 5, limits – in more detail than the regulations currently in force – the Public Administration’s ability to intervene with self-regulation⁹⁹.

With specific reference to the exercise of these powers with regard to the certified

described in Art. 19 of Law 241/90, see Regional Administrative Tribunal of Veneto, section II, 5 March 2012, no. 298, at www.giustizia-amministrativa.it. For a reconstruction of the position of administrative case law in the light of the latest regulatory modification of Art. 19 Law 241/90 see A. DI MARIO, *Dia e scia e tutela dei terzi*, in *Giurisprudenza italiana*, April 2014, 1013.

⁹⁷ The administrative case law has recently come out in favour of the public administration, after the expiration of the 60-day deadline for exercising powers of injunction, only being able to exercise powers of self-regulation and of applying to these powers all the limits that are normally imposed on it. On the subject see Regional Administrative Court of Lazio, section II-*quater*, 8 January 2015, no. 192, at www.giustizia-amministrativa.it.

⁹⁸ Regional Administrative Court of Tuscany, section II, 24 August 2010, no. 4882; Regional Administrative Court of Lazio, section II, 2 February 2010, 1408; Regional Administrative Court of Emilia Romagna, section II, 2 October 2007, no. 2253 at www.giustizia-amministrativa.it; more recently Regional Administrative Court of Abruzzo, 11 September 2014, no. 661; Council of State, section IV, 4 February 2014, no. 500, at www.giustizia-amministrativa.it. The question of the scope of the Administration’s power of self-regulation on request by private parties was recently discussed by Council of State, section IV, 6 December 2013, no. 5822, at www.giustizia-amministrativa.it. In the legal theory in favour of the thesis that limits third-party requests for self-regulation, see M. CLARICH, *Manuale di diritto amministrativo*, Bologna, 2013, 176.

⁹⁹ In general and not only in reference to the issue under examination, the regulation is supposed to limit the ability to withdraw provisions due to a change in circumstances only to cases in which the change was not foreseeable at the time the provision was adopted and, for authorisation and funding provisions, it excludes withdrawals based on a new evaluation of the public interest; it also imposes a time limit on the possibility of *ex officio* annulment, except for cases of violation of regulations on the procedure or form of the acts whenever, due to the restricting nature of the provision, it is clear that the regulatory content could not be different to the one actually adopted.

notice of commencement of operation, these restrictive measures have, in part, already been applied through the abovementioned Law 164/2014, which, in modifying clause 3 of Art. 19 of Law 241/90, seems to have limited the Administration's ability to intervene with self-regulation on an existing certified notice of commencement of operation, after the expiration of the deadline for exercising powers of injunction, only to protect the specific interest listed in clause 4 (cultural and artistic heritage, environment, health, public safety, national defence)¹⁰⁰.

In other words, according to the earliest and most widely recognised interpretations of this recent regulatory action, the power of self-regulation validates the general power of injunction even after the deadline has passed, but only for protecting so-called 'sensitive interests'.

With reference again to the majority opinion, and with regard to the powers to which a third party can appeal, it is still debatable – aside from the issue of the scope of the powers of self-regulation that can be exercised in the context of certified notice of commencement of operation – whether the court seised must rule only on the mere obligation to act, since it is a form of control on the exercise of discretionary power, without extending the judgement to the merits of the question, or if it can replace the Administration by establishing that a certain action would have had to be prohibited¹⁰¹.

According to an opposing reconstruction, which does not consider the legislative ruling to be in antithesis with the conclusions of the Plenary Meeting, the regulation limits a third party to requesting to exercise rightful powers of injunction, although already exhausted after the expiration of the deadline. In this perspective, the judgement on silence has undergone a true metamorphosis, going from the assessment on powers illegitimately not exercised yet persistent to an assessment on a power that has been exercised but not exhausted, activating that power as of now, by order of a judge. This is basically an assessment ruling with retroactive effect, which can remove the obstacle of the exhausted

¹⁰⁰ For an initial review of the scope and possible effects of the "sblocca Italia" decree on the subject of certified notifications of commencement of operation, see

A. AULETTA, *Le modifiche alla s.c.i.a. introdotte dal decreto "sblocca Italia": verso la soluzione dell'enigma del richiamo all'autotutela? Qualche spunto riflessivo*, *op. cit.* and V. LIGUORI, *Lo "sblocca Italia" sbloccherà la s.c.i.a.?*, *op. cit.*

¹⁰¹ On the atypical and restricted nature of self-regulation as described in Art. 19, see Council of State, IV, no. 4309/2014 at www.giustizia-amministrativa.it. In the legal theory, see L. BERTONAZZI, *Natura giuridica della S.c.i.a. e tecnica di tutela del terzo nella sentenza dell'Adunanza plenaria del Consiglio di Stato n. 15/2011 e nell'art. 19, comma 6-ter, della legge n. 241/90*, *op. cit.*, 215, A. TRAVI, *La tutela del terzo nei confronti della d.i.a. (o della s.c.i.a.): il codice del processo amministrativo e la quadratura del cerchio*, *op. cit.*, 517.

power by a judge's order to the public administration to submit a provision that it should have adopted during the course of the procedure of certified notice of commencement of operation¹⁰².

Of a different opinion is that part of legal theory that maintains that after the passing of this regulation, the areas for third-party protection have been greatly reduced, raising doubts and concerns around the unconstitutionality of the new regulation. It is argued that the claim that can cause a silence-breach cannot have as object the exercise of powers of injunction since, before the deadline has expired, no breach is discernible, whereas afterwards the power in question ceases to exist. At the same time, however, there is a rejection of the idea that the same claim can involve only powers of self-regulation, assuming that, by their own discretionary nature, from which the immunity of the condition derives, and due to the strict limits to which they are considered to be subject even in the area of certified notice of commencement of operation, since the interest in restoring legality is not sufficient, the request to exercise them can never satisfy the conditions of the third party. It is argued that the claim is aimed at allowing the third party to activate repressive-restorative powers as described in Art. 21, clause 2, Law 241/90, given the multipolar nature of the relationship that emerges after submission of the certified notice of commencement of operation, as well as the independent consistency of the third party's legal position, which cannot be explained as a mere reflection of the applicant's situation¹⁰³.

In this view, the entitlement generated by the Administration's conduct creates an obligation only in its relationship with the applicant, prohibiting it from activating *ex officio* its own powers of injunction after the deadline has expired, but has no effect on the third party, who remains entitled to activate the sanctionary powers of the public administration. While the public administration is not legitimised in adopting *ex officio* repressive-restorative provisions after the deadline for exercising powers of injunction have expired, this legitimisation does exist when the exercise of these powers is requested by the third party, which has the right to demand the implementation of the current regulatory

¹⁰² For this reconstruction, in the legal theory, G. GRECO, *Ancora sulla Scia: silenzio e tutela del terzo (alla luce del comma 6-ter dell'art. 19 L. 241/90)*, *op. cit.* In case law, in favour of the actionability of the powers of injunction even beyond the deadline, see Regional Administrative Tribunal Lecce, section III, 18 September 2013, no. 1937, and Council of State, section IV, 6 December 2013, no. 5822 at www.giustizia-amministrativa.it. In opposition, F. LIGUORI, *Le incertezze degli strumenti di semplificazione. Lo strano caso della d.i.a.- s.c.i.a.*, at www.giustamm.it, 2014.

¹⁰³ In favour of this interpretation is F. TRIMARCHI BANFI, *Diritti, poteri e responsabilità nelle recenti riforme di alcuni procedimenti amministrativi*, *op. cit.*, 49. Opposed is A. TRAVI, *La tutela nei confronti della d.i.a. tra modelli positivi e modelli culturali*, *op. cit.*

framework, which includes the interest of the third party itself. Basically, this thesis tends to consider the repressive-sanctionary powers outlined in Art. 21, clause 2, Law 241/90 as restricted laws that do not have statutory limitations, since they are designed to oppose a permanent administrative fault independently of limits and discretionary nature of the powers of self-regulation¹⁰⁴.

There are also more extreme positions that argue that after the power of injunction has been exhausted, third-party protection is placed exclusively within the context of civil-law guarantees of the rights in a dispute between private parties, before an ordinary court and therefore recognised only in subordination to the possession of a subjective right¹⁰⁵.

5. CONCLUSIONS

If it is true, as has been written¹⁰⁶, that ‘administrative liberalisation’ means to eliminate or remove the administrative obstacles that get in the way of conducting private activities, it is undeniable that the model of notification of commencement of operation is very close to administrative simplification, which, as mentioned, is one of the main aims of the original introduction of Art. 19, despite the fact the numerous reforms mentioned have tried, and very often succeeded, in making the discipline more and more complicated¹⁰⁷.

There are many corollaries to this thesis.

One might argue, for example, as has been noted in the previous paragraphs, that the notification and notice of commencement of operation are nothing more than measures put in place by private parties as substitutes to the act of consent by the Administration, and which are undoubtedly aimed at protecting a private interest, but which “*the objective dynamic of the procedure forces to take on significant traits for achieving the public*

¹⁰⁴ Along these lines see also M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, op cit., 351; G. FALCON, *La regolazione delle attività private e l’art. 19 della legge n. 241/1990*, op cit., 450.

¹⁰⁵ Cf. E. BOSCOLO, *I diritti soggettivi a regime amministrativo*, op cit., 247. Along these lines see also A. TRAVI, *La tutela del terzo nei confronti della d.i.a. (o della s.c.i.a.): il codice del processo amministrativo e la quadratura del cerchio*, op cit., 519.

¹⁰⁶ Cf. G. CORSO, *Liberalizzazione amministrativa ed economica*, op cit., 3492, for whom in administrative liberalisation, as noted, the degree of freedom obtained by the private individual depends on a mitigation of the conditions on conducting business imposed by the authority (*ibid*, 3493).

¹⁰⁷ As noted, it would be mistaken to qualify liberalisation as a tool of simplification: “*the private business owner aspires to liberalisation not because it simplifies the administrative action, but rather (...) because it reduces his obligations and thereby makes him freer*”. In other words, simplification is referred to as a means of liberalisation, and not vice versa. Similarly, G. CORSO, *Liberalizzazione amministrativa ed economica*, op cit., 3494.

interest”, equal to or present at the same time as the private interest¹⁰⁸. In so doing, the interested party, far from adopting the point of view of the authority that protects the public interest, takes precautions against the possibility of inertia on the part of the public administration that might be damaging.

But one might also imagine that the ‘global’ nature of this technique of generalisation might cause the progressive disappearance of all restricted authorisation provisions¹⁰⁹ or even the acknowledgement of a legal situation of subjective right of the private applicant with regard to the legitimate exercise of the activity and the assessment phase of the Administration, assuming that from the reading of Art. 19 there is no doubt about the fact that the applicant can commence operation immediately after the submission of the notification/notice, and consequently there can be no recourse to meaningful silence once the deadline of 30 or 60 days has passed¹¹⁰.

As far as construction is concerned, lawmakers’ efforts to simplify (or, perhaps, liberalise) are appreciated. An example is ordinary maintenance of buildings, which initially required building permits, then planning permits, and later were categorised under free building activities¹¹¹. However, the regulatory framework is still very, perhaps excessively, fragmented. Alongside the general regulations outlined in Art. 19, the constitutionality of which is still debated¹¹², the framework outlined in Presidential Decree 380/2001 is still in effect. As noted, this still permeates the construction industry with nuances of liberalisation: from activities that need no further approval (Art. 6, clause 1) to a mere communication of notice (Art. 6, clause 2), to notification of commencement of operation as alternative to building permit (Art. 22, clause 3) to any regulations of ‘ordinary-statute’ Regions (Art. 22, clause 4).

From a procedural point of view, the lack of clarity on the nature of the powers that a third party is entitled to request from the public administration, and lawmakers’ silence with regard to the content of the specific action against silence-breach have in some

¹⁰⁸ Cf. M. BOMBARDELLI, *La sostituzione amministrativa*, *op cit.*, 260.

¹⁰⁹ Cf. L. FERRARA, *Diritti soggettivi ad accertamento amministrativo. Autorizzazione ricognitiva, denuncia sostitutiva e modi di produzione degli effetti*, *op cit.*, 151.

¹¹⁰ Cf. M. MAZZAMUTO, *La riduzione della sfera pubblica*, *op cit.*, 200. The author believes we can “fantasise” about a retroactive authorisation (*ibid.*, 199).

¹¹¹ See, respectively, the Law from 28 January 1977, no. 10, and the Law from 25 March 1982, no. 94, and finally Presidential Decree 380/2001, quoted above.

¹¹² On the subject cf. M. CLARICH, *Problemi di costituzionalità e molte incertezze applicative: ecco perché non funzionerà*, in *Edilizia e territorio*, *Sole 24 Ore*, 31 July 2010, sceptical about the possibility of the institution’s compliance with the principle of fair competition as described in Art. 117, clause 2, Constitution of the Italian Republic.

way facilitated the proliferation of hermeneutic operations which, in the attempt to avoid eroding the areas of legal protection for third parties, have often ended up forcing the literal facts, trying to remedy the consequences of the legislative choices through recourse to the procedural protection tools provided by the Administrative Procedure Code. This did not end up being an optimal choice, as already noted, for at least two reasons.

On the one hand there is a tendency to decouple the tools of jurisdictional protection from the configuration of the institution of substantive law, although these aspects are intimately intertwined with one another. If the legislation, in an attempt to simplify, intended to modify the legal order governing an activity, removing it from the traditional regulatory model, this can only be reflected in the contents of jurisdictional protection, and this change should not be neutralised through interpretations that, by forcing the literal facts, betray the substantive nature of the institute. What might end up occurring is a problem of ‘retention’ of the regulation with regard to the constitutional principles of the right to defence and effective protection¹¹³.

On the other hand, the system of the actions currently envisaged in the Administrative Procedure Code is unsuited to providing adequate third-party protection, since they are all conceived in relation to substantive disciplines within a regulatory regime, where the distinguishing feature of the institution consists in the upstream suppression of this *modus operandi*¹¹⁴.

It has been pointed out that the only solution to this lack of regulation might be for lawmakers to intervene, thereby acknowledging the existence of a gap within the Code¹¹⁵.

Other authors have pointed out, also in this context, the need to ensure that a tool conceived with the aim of simplifying does not end up turning into its opposite, entailing the recourse to ‘hybrid’ institutions such as ‘moderate’ liberalisation, ‘atypical’ self-regulation (non-discretionary in the conditions and free of the structural limitations established by Articles 21-*quinquies* and 21-*nonies*), the ‘*sui generis*’ procedure on silence (where the object of the judgement is dissociated from the object of the requests of a third party that brought it about and transformed it into a judgement aimed at ‘exhuming’ already

¹¹³ In this regard, see A. TRAVI, *La tutela del terzo nei confronti della d.i.a. (o della s.c.i.a.): il codice del processo amministrativo e la quadratura del cerchio*, 517 ff.

¹¹⁴ F. MARTINES, *La segnalazione certificata di inizio attività. Nuove prospettive del rapporto pubblico-privato*, *op. cit.*, 206.

¹¹⁵ For this, see M. RAMAJOLI, *La s.c.i.a. e la tutela del terzo*, *op. cit.*, 330.

extinguished powers)¹¹⁶.

It is evident how, in this way, the logic of simplification and liberalisation of Art. 19 would be fatally betrayed, causing the substantial crisis and subsequent failure of an institution that for years, as we have seen, has been keeping lawmakers' drive towards reform constantly on the alert.

¹¹⁶ Cf. F. LIGUORI, *Le incertezze degli strumenti di semplificazione. Lo strano caso della d.i.a. - s.c.i.a.*, *op. cit.*, 31.