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## The Italian Administrative Procedure Act and Public Authorities' Silence

Vera Parisio  
lawreview@hamline.edu

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## THE ITALIAN ADMINISTRATIVE PROCEDURE ACT AND PUBLIC AUTHORITIES' SILENCE

*Vera Parisio\**

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### I. INTRODUCTION

The omission of public powers is regarded by Italian academic commentators as one of the most troubling topics in administrative law. It is a matter of the utmost importance, as the effective enjoyment of many fundamental rights depends upon the Public Powers' activity and it presupposes that the administrative procedure resulting from such an activity has a regular conclusion. Additionally, Article 41 of the Charter of Fundamental Rights of the European Union effectively lends focus to the

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\* Professor Vera Parisio is full Professor of administrative law at the "Dipartimento di Giurisprudenza" of the "Università degli Studi di Brescia" (parisio@jus.unibs.it; verapar@tin.it) This text presents, with the appropriate modifications, the presentation given during the meeting "Administrative Law Discussion Forum" held at Luxembourg University on June 5th and 6th 2012, organized by Prof. Herwig Hofmann. Many thanks to Miss Laura Mignone for the help in translating.

subject of public authorities' silence, as it enunciates (among other fundamental rights) the right to a good administration.<sup>1</sup> The second paragraph of the Article states that administration has the obligation to give reasons for its decisions.<sup>2</sup> It is plain that silence does not permit persons affected by the administration's activities to discover the administration's motivations.

Until the enactment of Law No. 241 on August 7, 1990 ("*Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*" - *New rules regarding the administrative procedure and the right to access to administrative documents*),<sup>3</sup> no specific provision of law regulated administrative procedure in a general way.<sup>4</sup> Therefore, the legal protection of private individuals was quite difficult when public powers omitted to act.<sup>5</sup> The situation was made even more difficult by the lack of specific rules on the general principles of administrative procedure in the Italian Constitution.

When drafting Article 97, legislators restricted themselves to dictating principles (one on the statutory reserve and one on the pursuit of public administration's good performance) only in the matter of the organization of public offices.<sup>6</sup> Legislators did not address administrative

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<sup>1</sup> See Raffaele Bifulco, *Diritto ad una buona amministrazione*, in COMMENTO ALLA CARTA DEI DIRITTI FONDAMENTALI DELL'UNIONE EUROPEA 290 (Raffaele Bifulco, Marta Cartabia & Alfonso Celotto eds., 2001); ALESSANDRA SERIO, IL PRINCIPIO DI BUONA AMMINISTRAZIONE PROCEDURALE (2009).

<sup>2</sup> Charter of Fundamental Rights of the European Union art. 41, Dec. 18, 2000, 2000 O.J. (C 364) 18. The second paragraph of Article 41 ("Right to good administration") states that "this right includes the obligation of the administration to give reasons for its decisions." *Id.* Section 3 of Law No. 241/1990 establishes that:

save in the situations provided for under subsection, every administrative measure, including those regarding administrative organisation, staff and the conduct of public competitive examinations, must include a statement of reasons. The statement of reasons must set out the factual premises and the points of law that determined the authority's decision, as these emerge from the preliminary fact-finding activities.

Legge 7 agosto 1990, n. 241, translated in Catharine de Rienzo, *The italian administrative procedure act*, 2 ITALIAN J. PUB. L. 370, 373 (2010).

<sup>3</sup> The text of Law No. 241/1990 is available (in Italian) at [www.normattiva.it](http://www.normattiva.it). For an English translation, see de Rienzo, *supra* note 2. For a wide analysis of administrative procedure as legal institution and for the bibliography as well, see Aldo Sandulli, *Il procedimento*, in TRATTATO DI DIRITTO AMMINISTRATIVO: DIRITTO AMMINISTRATIVO GENERALE 944 (Sabino Cassese ed., 2000). For commentary to Law No. 241/1990, see CODICE DELL'AZIONE AMMINISTRATIVA (Maria Alessandra Sandulli ed., 2011); Giorgio Pastori, *The origins of law no. 241/1990 and foreign models*, 2 ITALIAN J. PUB. L. 257 (2010); Raffaele Bifulco, *The constitutional importance of law 241/1990*, 2 ITALIAN J. PUB. L. 359 (2010).

<sup>4</sup> The legislature had regulated only specific administrative procedure with sectoral laws.

<sup>5</sup> In fact, in default of an act that could be appealed, it became impossible to address the administrative judge.

<sup>6</sup> Article 97 of the Italian Constitution provides:

activity, as they thought that regulation of this area could make development of Article 97 less fluid. However, little by little, the regulations in Article 97 became general principles of administrative activity, in order to offer private individuals greater protection.

Public authorities' omissions, most significantly in the conclusive phase of the administrative procedure, have always posed a threat to the private individual who, until the enactment of Law No. 241/1990, could count only on the intervention of the administrative courts. The courts, with bold judicial creations that will be mentioned hereafter, going beyond the letter of the law, tried to force the public officer to act, using the judgment. In particular, courts extended some principles set for specific procedures (e.g. those in the matter of expropriation) through analogy to other unregulated procedures.

The irreplaceable role of the administrative courts,<sup>7</sup> in particular the Council of State,<sup>8</sup> has been emphasized since the beginning of the 20<sup>th</sup> century and has manifested itself in judgments that include historical legal milestones<sup>9</sup> and recent cases.<sup>10</sup> Many of the provisions contained in Law No. 241/1990 are taken from administrative court decisions.

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Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration. The regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials. Employment in public administration is accessed through competitive examinations, except in the cases established by law.

Art. 97 Costituzione [Cost.], available at [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

<sup>7</sup> See PAOLO GROSSI, INTRODUZIONE AL NOVECENTO GIURIDICO 132 (2012) (stressing the essential role of the administrative courts). Grossi stressed that not only national courts but also the European Court of Justice when using a case method have the task to build and protect "the Europe of rights." *Id.* at 133. The judge has the role of guardian of the legal system's values and controller of their consistency with the civil society's ever-changing needs. *Id.* See also VERA PARISIO, PUBBLICI SERVIZI E FUNZIONE DI GARANZIA DEL GIUDICE AMMINISTRATIVO (2003).

<sup>8</sup> The Council of State is "Consiglio di Stato" (the Supreme Administrative Court).

<sup>9</sup> For selected important judgments issued by the divisions of the Council of State, sitting jointly, see Cons. Stato, sect. IV, 22 agosto 1902, n. 429, Giur. it. 1902, III, 343; Cons. Stato, A.P., n. 8/1960; Cons. Stato, A.P., n. 10/1978, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>10</sup> See, e.g., Cons. Stato, A.P., 29 luglio 2011, n. 15, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it). For a commentary to this case, see Maria Alessandra Sandulli, *Brevi considerazioni a prima lettura dell'Adunanza plenaria del Consiglio di Stato n. 15 del 2011*, RIVISTA DI DIRITTO PUBBLICO (2011); Vera Parisio, "Direttiva Bolkestein," *silenzio-assenso, D.I.A.; liberalizzazioni temperate, dopo la sentenza del Consiglio di Stato, ad. Plen. 29 luglio 2011 n. 15*, IL FORO AMMINISTRATIVO T.A.R. 2978-3004 (2011); Enrico Zampetti, *DIA e SCIA dopo l'Adunanza plenaria n. 15/2011: la difficile composizione del modello sostanziale con il modello processuale*, DIRITTO AMMINISTRATIVO, 811-55 (2011).

In the situation of a legislative vacuum, the administrative courts, first the Council of State alone and then together with the Regional Administrative Courts (“*Tribunali amministrativi regionali*” or “T.A.R.,” established in 1971), would not permit the omissions of public authorities in the conclusive phase of the administrative procedure to greatly prejudice the private individual’s case. However, it must be pointed out that before Judgment no. 500 of 1999, passed by the joint sitting of the divisions of the Court of Cassation,<sup>11</sup> the possibility to obtain compensation for damages in cases of inactivity on the part of public administration was practically nonexistent. In fact, previously it was supposed that only legitimate interests and not subjective rights would arise against the exertion or, better, the lack of exertion of power. Only subjective rights, pursuant to the prior interpretation given to Article 2043 of the Civil Code by the Court of Cassation, could guarantee the compensation of damages.<sup>12</sup>

Since the beginning of the 19<sup>th</sup> century,<sup>13</sup> Italian academic commentators of administrative law have been very concerned with identifying ways to ensure access to administrative justice in the cases of omissions by the public powers because of the lack of specific rules.<sup>14</sup> In so doing, these commentators contributed to the development of an important line of administrative cases.<sup>15</sup> Today, the phenomenon of inactivity in the execution of administrative procedure is slightly smaller. On the one hand, Italian legislators have tried to improve the organization of the offices. On

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<sup>11</sup> Cass., S.U., 22 luglio 1999, n. 500; see also Vera Parisio, *Primi brevissimi spunti di riflessione in tema di risarcimento del danno per violazione di interessi legittimi alla luce della sentenza della Cass. Sez. Un. n. 500 del 1999*, RIVISTA GIURIDICA DELL’EDILIZIA 1224 (1999) (analyzing this case).

<sup>12</sup> CODICE CIVILE [C.C.] art. 2043. Article 2043 of the Civil Code, which compels the author of a malicious or negligent act to compensate resulting damages, could not be implemented in cases of failure to issue a measure, as the public administration’s silence would not have infringed any subjective right.

<sup>13</sup> Authors who studied administrative inactivity at the beginning of the 20<sup>th</sup> century were deeply influenced by private law literature, as the latter was developed earlier than the former. In a private law view, silence kept by the parties is considered to be “non facere” without any specific meaning (“*qui tacet neque negat, neque utique fatetur*”) with certain exceptions provided for by law. Among the most ancient, see Oreste Ranelletti, *Il silenzio nei negozi giuridici*, RIVISTA ITALIANA PER LE SCIENZE GIURIDICHE XIII (1892); Umberto Borsi, *Il silenzio della pubblica amministrazione ed i suoi effetti processuali*, RIVISTA DI DIRITTO PROCESSUALE CIVILE 127 (1932).

<sup>14</sup> ALDO TRAVI, *SILENZIO-ASSENSO ED ESERCIZIO DELLA FUNZIONE AMMINISTRATIVA* (1985).

<sup>15</sup> For a general description of the subject of silence of public administration, see ALDO M. SANDULLI, *MANUALE DI DIRITTO AMMINISTRATIVO* 656 (XV ed. 1989); VERA PARISIO, *I silenzi della pubblica amministrazione. La rinuncia alla garanzia dell’atto scritto* 39 (1996) [hereinafter PARISIO, *Silenzi*]; *Silenzio della pubblica amministrazione*, in *DIZIONARIO GIURIDICO DI DIRITTO PUBBLICO* 229 (Sabino Cassese ed. 2006); *Il silenzio della pubblica amministrazione tra prospettive attive e fattuali, alla luce delle novità introdotte dalla l. 11 febbraio 2005, n. 15 e dalla l. 14 maggio 2005, n. 80*, IL FORO AMMINISTRATIVO T.A.R. 2798 (2006).

the other hand, they have tried to strengthen the public officers' liability.<sup>16</sup> The need to decrease public spending, which has now reached prohibitive levels (120% of the gross domestic product) suggests that petition to the administrative courts be made completely residual, as it has become very expensive not only for the petitioner but also for the State itself, which must face increasingly heavy justice expenses.

## II. LAW NO. 241/1990: THE ECONOMIC VALUE OF TIME

The enactment of Law No. 241/1990 (called the "Administrative Procedure Act")<sup>17</sup> represents the first extraordinary effort to enforce Article 97 of the Italian Constitution.<sup>18</sup> In fact, the principles of "good administration,"<sup>19</sup> impartiality, and rule of law<sup>20</sup> presuppose that there are general written rules which provide precise duties to the public powers.

An administrative procedure must conclude in due time with a written measure. A new consciousness of the importance of time is arising. Time has an economic value,<sup>21</sup> and therefore public powers have the duty to respect the "right"<sup>22</sup> to obtain a measure within the time limit provided for by

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<sup>16</sup> See Legge 4 marzo 2009, N. 150, available at [www.normattiva.it](http://www.normattiva.it) (called Law Brunetta) ("Delega al Governo finalizzata all'ottimizzazione della produttività del lavoro pubblico e alla efficienza e trasparenza delle pubbliche amministrazioni nonché disposizioni integrative delle funzioni attribuite al Consiglio nazionale dell'economia e del lavoro e alla Corte dei conti" should be understood as "Enabling act to the Government aiming at the optimization of the productivity in public offices and at the efficiency and transparency of public administrations as well as work and State Court of Auditors").

<sup>17</sup> L. N. 241/1990. For a general idea about the codification of administrative procedure in Europe, see Sabino Cassese, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 13 (2007); JÜRGEN SCHWARZE, *DRIT ADMINISTRATIF EUROPÉEN* 1309 (2009).

<sup>18</sup> For a good analysis of Article 97 of the Italian Constitution, including certain less recent but ever important studies, see UMBERTO ALLEGRETTI, *L'IMPARZIALITÀ AMMINISTRATIVA* (1965); ANTONIO ANDREANI, *IL PRINCIPIO DI BUON ANDAMENTO DELLA PUBBLICA AMMINISTRAZIONE* (1979); GIORGIO BERTI, *LA PUBBLICA AMMINISTRAZIONE COME ORGANIZZAZIONE* 100 (1968); MASSIMO S. GIANNINI, *ISTITUZIONI DI DIRITTO AMMINISTRATIVO* 112 (1990); CESARE PINELLI, *Commento agli artt. 97 e 98*, in COMMENTARIO ALLA COSTITUZIONE (Giuseppe Branca ed., 1993). More recently, the principle of good administration has been studied also in conjunction with the principle of simplification of the administrative procedures. See SERGIO PIGNATARO, *IL PRINCIPIO COSTITUZIONALE DEL "BUON ANDAMENTO" E LA RIFORMA DELLA PUBBLICA AMMINISTRAZIONE* (2012); F. Merusi, *La semplificazione: problema legislativo o amministrativo*, 3-4 NUOVE AUTONOMIE 338 (2008).

<sup>19</sup> See Alberto Zito, *Il diritto ad una buona amministrazione» nella Carta dei diritti fondamentali dell'Unione Europea e nell'ordinamento interno*, RIVISTA ITALIANA DI DIRITTO PUBBLICO COMPARATO 427 (2002) (discussing the principle of good administration in the Italian legal system).

<sup>20</sup> Inactivity of the administration could be considered a breach of these principles and a violation of some criminal prescriptions as well. See CODICE PENALE [C.P.] art. 328.

<sup>21</sup> See MARIACONCETTA D'ARIENZO, *LA TUTELA DEL TEMPO NEL PROCEDIMENTO E NEL PROCESSO* (2012).

<sup>22</sup> In our administrative legal system the "right" to obtain a measure in time is not a proper right but is considered a legitimate interest. This interest is legally protected only if

law. Before the enactment of Law No. 241/1990, the element of time was not as important as it has become. Formerly, an applicant's only basis for complaint was the presence of errors in the measure. A delay in issuing a measure did not have any legal consequences. The new importance granted to the respect of time is doubtless connected with the need to commence an activity as soon as possible, since one might lose money and opportunities during any waiting period. This is particularly important at a time like the present, when the government must find ways to awaken a sluggish economy.

The quick diffusion of tacit consent as a way to end the administrative procedure confirms this trend. This legal institution is the most appropriate to facilitate the development of those activities that need a previous authorization. But there is something more to add: silence as tacit consent is being, little by little, substituted by the self-declaration model (now, the "SCIA" model), that will be clarified hereafter.

The enforcement of EU Directive No. 2006/123<sup>23</sup> has deeply influenced the quick substitution of SCIA for tacit consent in the Italian legal system. In Law No. 241/1990, we find all the above mentioned components of tacit silence and SCIA. In addition, there are the so-called silence non-compliance, the so-called tacit denial and, last but not least, the so-called "*silenzio-devolutivo*" (silence which has the effect to modify the original competence of the subject in charge of issuing the measure), which only apply to internal measures issued during the procedure before its conclusion.<sup>24</sup>

In the Italian administrative legal system, Law No. 241/1990, which is constantly modified, represents a group of principles aimed at equalizing public power and private individuals; when this is not possible, it strengthens guarantees for the individual who has to face an administrative power that is unilateral by nature.<sup>25</sup> This law shows that every action of the public power must be carried out with respect for two opposite principles: the need to speed up the performance of procedures and the pursuit of "quality" in the result of the administrative action. The balance between celerity and quality

the applicant, according to the factual circumstances, has the titolarity of a substantial position. This interpretation derives from the administrative courts' decisions, especially of the joint sitting (Adunanza plenaria) of the divisions of Council of State. See Cons. Stato, 15 settembre 2005, n. 7, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>23</sup> "Bolkestein Directive" 2006/123, 2006 O.J. (L 376) 36 (EC), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu).

<sup>24</sup> See L. n. 241/1990 § 17 (which will be discussed in Section III.B.).

<sup>25</sup> In Law No. 241/1990, important guarantees are provided: Section 7 establishes the obligation to communicate the procedures' commencement to the parties who will be directly affected by the final measure (and also to those who are required by law to intervene); Section 10 establishes that the competent authority shall, before the issuance of a measure refusing an application, communicate to the petitioner the reasons for refusing such an application; Section 22, finally, guarantees the right to access to administrative documents. L. n. 241/1990.

is rather difficult, but this tension is inevitable as, in a democratic society, both are needed at the same time.<sup>26</sup>

### III. THE LEGAL REGULATION OF PUBLIC POWERS' SILENCE IN LAW NO. 241/1990

Even after the modification of the second part of the Italian Constitution carried out by the constitutional Law No. 3 of October 18, 2001, no explicit legislative competence is mentioned to regulate the general principles of administrative procedure. The administrative procedure passes across different subjects, and competence follows in relation to them. Administrative procedures that deal with regional matters will be stated by regions themselves; on the contrary, procedures dealing with statutory matters will fall under State competence.

Law No. 241/1990 (Section 29) states that regions and local authorities regulate administrative procedures pertaining to their respective fields of competence, not only pursuant to constitutional principles, but also pursuant to principles concerning the guarantees for individuals with regard to the administrative action, laid down by Law No. 241/1990.<sup>27</sup> Administrative silence and remedies against it must be equal across the entire national territory, even if details such as the duration of the administrative procedure vary by region.

Before enactment of Law No. 241/1990, the administrative silence was considered by law, in a small number of enumerated cases, to be a fictitious positive decision (“*silenzio-assenso*” or tacit consent), or a fictitious negative decision (“*silenzio-diniego*” or tacit denial). When no legal provision was provided to qualify silence as equivalent to a positive or negative measure, the silence of public administration was regarded as non-compliance (“*silenzio-inadempimento*”).<sup>28</sup>

#### A. SECTION 2: THE IMPORTANCE OF RESPECTING THE TIME LIMIT TO END THE PROCEDURE

It was only in 1990 that Italian legislators expressly codified in Section 2 of Law No. 241/1990 the principle that public authorities have the

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<sup>26</sup> See PARISIO, SILENZI, *supra* note 15.

<sup>27</sup> L. n. 241/1990 art. 29. Among the guarantees are: the obligation to conclude administrative procedures within a scheduled time limit (Section 2, ¶ 2); the obligation upon the administration to identify and communicate the name of the officer in charge of the administrative procedure (Sections 4–6); the obligation to let private individuals participate in the administrative procedure (Sections 7–11); the obligation to guarantee access to documents (Sections 22–25).

<sup>28</sup> See VERA PARISIO, *L'inerzia della pubblica amministrazione in Italia tra procedimento e processo*, in SILENZIO E PROCEDIMENTO AMMINISTRATIVO IN EUROPA: UNA COMPARAZIONE TRA DIVERSE ESPERIENZE 161 (Vera Parisio ed., 2006) [hereinafter Parisio, *L'inerzia*].

duty to conclude a procedure with an explicit measure and within 30 days, if no other different time limit is provided for by law or regulations.<sup>29</sup> Since then, as a general principle, inactivity of the administration is illegal. Although various national administrative bodies can set different time limits in compliance with their own needs, such time limits generally cannot exceed 90 days. In only very extraordinary cases, the 90-day time limit can be extended up to 180 days.<sup>30</sup> Section 2, in its most recently updated version,<sup>31</sup> strongly confirms that the administrative procedure must conclude with the adoption of an explicit measure. So, once again, the silence kept by public powers, during the procedure or simply in its final phase, is illegal. This does not mean that, once the time limit expires, public authorities lose the power to issue the due measure, but it implies that the public officer becomes responsible for the delay in the adoption of the measure.

In fact, the lack of an explicit measure is implicitly considered by the legislature as non-compliance (“*silenzio-inadempimento*”). It is not a fictitious negative act but a simple “*non facere*.” In fact, paragraph 8 of Section 2 states that silence kept by public powers is regulated by the Administrative Trial Code (“C.P.A.”),<sup>32</sup> which governs, in Articles 31 and 117 of C.P.A., the judge’s ascertainment activity in cases of omission by the public administration; this topic will be resumed later. The last change made to Section 2 added that, in cases where administrative judgments accepting the applicant’s petition against the silence non-compliance of the public powers are “*res iudicata*,” they are immediately sent to the State Court of Auditors (“*Corte dei conti*”).<sup>33</sup> This legal rule is extremely important as it should strengthen public officers’ liability.

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<sup>29</sup> L. n. 241/1990 § 2, available at [www.normattiva.it](http://www.normattiva.it). For a very good analysis of Section 2, see MARCELLO CLARICH, *TERMINE DEL PROCEDIMENTO E POTERE AMMINISTRATIVO* (1995); Marco Lipari, *I tempi nel procedimento amministrativo: certezza dei rapporti, interesse pubblico e tutela del cittadino*, *DIR. AMM.* 291 (2003).

<sup>30</sup> See L. n. 241/1990 § 2, ¶ 4. The procedures concerning the acquisition of Italian citizenship and those concerning immigration are excluded from the field of application of Section 2, paragraph 4. Independent Authorities (e.g. Antitrust – Italian Competition Authority, Autorità per l’energia elettrica e per il gas – Regulatory Authority for Electricity and Gas, Garante per le comunicazioni - Authority for Communications, and so on) can state their own time limits to conclude their respective procedures in a discretionary way. However, these time limits have to be reasonable and sustainable.

<sup>31</sup> Legge 4 aprile 2012, n. 35. Section 2 has undergone many changes during recent years. In fact, the time limit to conclude the administrative procedure, in compliance with Legge 14 maggio 2005, n. 80, had been extended to 90 days and then changed to 30 days.

<sup>32</sup> Legge 15 febbraio 2010, n. 140. Articles 31 and 117 c.p.a. provide for a special type of trial for public authorities’ silence. They allow the judge to perform only the binding measure in substitution of public bodies.

<sup>33</sup> In the Italian legal system, the Constitution states that Corte dei conti is an institution whose role is mainly to safeguard public finance. Art. 100 Cost. Moreover, it pursues also a jurisdictional function. Article 100 of the Italian Constitution states that the Corte must make an “a priori” audit of the legality of the governmental acts and also an “a posteriori” audit of the state budgets management. *Id.* In the jurisdictional field, Corte dei

The State Court of Auditors' competence means that failing to issue the administrative measure within the due time limit can yield economic damage; this clear consciousness of the economic value of time can be found throughout the entire text of Law No. 241/1990.<sup>34</sup> Public officers' liability could be verified under the judgment of liability, which is one of the most important tasks of the State Court of Auditors.

Paragraph 9 of Section 2 underlines the connection between failing to respect the time limit for concluding the administrative procedure and public officers' liability.<sup>35</sup> In fact, such failure is one of the most important elements in an evaluation of the performance both of the public officer who is in charge of the administrative procedure and of his manager.

It seems that, after the last modification of Section 2, Italian legislators have realized that omissions of public powers are also linked to a poor organization of offices. The failed timely conclusion of an administrative procedure can be an important sign of a deficiency in the management of human and financial resources. Paragraph 9-*bis* of Section 2 obliges the government to determine among the chief executive officers the one who becomes competent to issue an administrative measure in substitution of the inactive officer.<sup>36</sup> Moreover, the legal roles contained in paragraph 9-*bis* of Section 2 (concerning the possibility of substituting the inactive officer), demonstrate, once again, that the silence of administration cannot be considered a fictitious negative act.

As the Italian academic commentators of administrative law have stressed,<sup>37</sup> unfortunately, the communication of the administrative judgment to the State Court of Auditors is not a real deterrent to impede omission by public powers, given that the liability for damages caused by the public administration can be demonstrated only in cases of strong violations of due diligence by the public officer. In the Italian legal system, this is difficult to

conti's duties are mainly the judgment of responsibility for damages caused to the State or other public bodies by their own officers or public administrators. In addition to this competence Corte dei conti also decides on cases concerning civil and military pension benefits. Last but not least, Corte dei conti rules on special responsibility for accounts, connected with the management of public money or property.

<sup>34</sup> See L. n. 241/1990 § 2, ¶ 2 (establishing the obligation to conclude procedures within a scheduled time limit); L. n. 241/1990 § 16, ¶ 2 (allowing the administration to proceed if the mandatory opinion has not been issued in the due time limit).

<sup>35</sup> L. n. 241/1990 § 2, ¶ 9. Failing to respect the administrative procedure time limit does not lead to a withdrawal of the public officer's power to issue the measure, but simply constitutes an evaluation element of the public officer's performance. *See id.*

<sup>36</sup> L. n. 241/1990 § 2, ¶ 9-*bis*. This paragraph also states that every public body has the duty to publish on its website the name of the officer who is competent to issue the measure in substitution to the officer originally competent so that the private individual can obtain the requested measure. *Id.*

<sup>37</sup> See Marcello Clarich, *La certezza del termine del procedimento amministrativo: un traguardo in vista o una chimera?*, 7 *GIORNALE DI DIRITTO AMMINISTRATIVO* 693 (2012).

establish because very often public officers justify their delays by adducing reasons such as shortage of office staff and excessive workload, which are not verifiable by private individuals.

### 1. *Section 2-bis: The Delay's Consequences*

Section 2-*bis* of Law No. 241/1990 states that public bodies are obliged to compensate damages caused by fraudulent or negligent non-observance of administrative procedure time limits.<sup>38</sup> All litigation concerning the right to recover damages falls within the competence of the administrative court. The action for damage compensation must be filed within five years.<sup>39</sup>

Section 2-*bis* constitutes a missed opportunity for the legislature to provide for an automatic indemnity in favor of individuals suffering from such delays. It should have been established that this automatic indemnity be given “*ex lege*,” without any proof of the negligent or fraudulent behavior of public bodies. On the contrary, in the current wording of Section 2-*bis*, the failure to conclude an administrative procedure within due time falls only within the compensation of damages judgments.<sup>40</sup> The presence of such a provision implies that the private individual must actually commence a legal action, which has become a very expensive and uncertain undertaking in Italy.

The text of Section 2-*bis* is not completely clear because it does not specify whether the compensation of damages is granted when the applicant lacks the requirements provided for by law to obtain the delayed measure. The administrative courts’ decisions strongly affirm that the simple fact that public bodies have delayed the administrative measure is not enough to guarantee the right to damage compensation.<sup>41</sup>

Administrative courts do not seem to give importance to the passage of time itself, whereas in a capitalistic economy based on rational computation<sup>42</sup> of all costs involved, time itself has an economic value.<sup>43</sup> As the academic commentators of administrative law have pointed out, neither Section 2 nor Section 2-*bis* offer an effective remedy against public powers’

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<sup>38</sup> L. n. 241/1990 § 2-*bis*. The obligation to compensate damages is due only in cases where the petitioner effectively had the right to obtain a favorable measure.

<sup>39</sup> *Id.* In the Italian legal system, the prescription period of five years means that damage has been produced outside a contractual relationship (liability according to *lex Aquilia*).

<sup>40</sup> *See id.* The recognition of an automatic indemnity would have been much more advantageous to the individuals, who, in this way, would not have had to demonstrate the officer’s fraud or negligence.

<sup>41</sup> Cons. Stato, A.P., 15 settembre 2005, n. 7, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>42</sup> For instance, the entrepreneur before setting up a new factory has to calculate with care the time necessary to obtain the permission to build provided for by law.

<sup>43</sup> *See* 1 MAX WEBER, *ECONOMIA E SOCIETÀ* 294 (1995).

silence. They have some kind of symbolic value, but cannot avoid the unpredictability of time and results of the authorization administrative procedures. This is a factor that decidedly disadvantages Italy's economic development. The cost of going to court and all the attendant difficulties related to proving the negligent or fraudulent behavior of public bodies will not spur public powers to consider respecting time limits to be a real priority.<sup>44</sup>

## 2. *Section 2: Non-Compliance with the Measure (“Silenzio-Inadempimento”)*

As previously stressed, Section 2 of Law No. 241/1990 sets forth a duty to conclude, by an explicit measure, administrative procedures within scheduled time limits, and, whenever tacit consent is not applicable,<sup>45</sup> silence means non-compliance within the given time limit.<sup>46</sup>

The original wording of Section 2 stated, indirectly and when read together with Section 20 of Law No. 241/1990, that silence was equivalent to non-compliance as a matter of general principle, except for cases in which tacit consent or tacit denial were provided for by law.<sup>47</sup> This legal rule was strictly linked to the principle that administrative procedure has “naturally” to be concluded through an express measure, because only through an express measure can you verify the line of reasoning followed by the administration during the administrative procedure, thus also allowing the community to exercise a sort of “social control” over the procedure itself.

Since the original wording of Section 2 had to be analyzed in conjunction with Sections 19 (DIA then SCIA) and 20 (tacit consent), the conclusion was that Sections 19 and 20 represented an extraordinary way of concluding a procedure, while Section 2 (silence non-compliance) was the ordinary way. On the contrary, in the current text of Law No. 241/1990, because of the modifications to Sections 19 and 20 that will be mentioned hereafter, the combined interpretation of Section 2 with Sections 19 and 20 determined that the usual way to conclude an administrative procedure has

<sup>44</sup> See Clarich, *supra* note 37, at 695.

<sup>45</sup> L. n. 241/1990 § 20.

<sup>46</sup> See Aldo M. Sandulli, *Questioni recenti in tema di silenzio della pubblica amministrazione*, FORO ITALIANO III 128 (1949); FRANCO LEDDA, *IL RIFIUTO DI PROVVEDIMENTO AMMINISTRATIVO* (1964); FRANCO G. COCA, *IL SILENZIO DELLA PUBBLICA AMMINISTRAZIONE* (1971). These three studies remain an essential starting point for the analysis of this kind of silence, even if they are not recent. The quoted Authors, along with their studies, have helped administrative courts to overcome the model of tacit denial silence in favor of the model of silence non-compliance, since silence of public powers could not be considered as an explicit act but as a simple fact (*non facere*) of public administration. A joint sitting of the Council of State finally confirmed this type of silence in 1978. Cons. Stato, A.P., n. 10/1978, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>47</sup> See L. n. 241/1990 § 2; L. n. 241/1990 § 20. In the original wording, public authorities had the obligation to conclude procedures in due time by way of an express measure.

become tacit consent, while tacit denial is applicable only in the limited cases stated by law. In all other cases, when tacit consent is not applicable,<sup>48</sup> silence non-compliance will be implemented.<sup>49</sup> This quick diffusion of tacit consent is also related to the enforcement of EU directive 2006/123 (Bolkestein Directive) that will be covered hereafter.

Until Law No. 15/2005, in cases of public authorities' silence, the applicant had to challenge the defaulting authority before filing a petition in the administrative court. If the applicant received no answer within 60 days, he or she could warn the administration to perform the requested measure within 30 days. Should the time frame expire without the measure having been issued, the applicant could finally have access to the administrative court. This system was unsatisfactory for being too slow and essentially useless. After the enactment of Law No. 15/2005, which modified Law No. 241/1990, the applicant can directly accede to administrative court.<sup>50</sup> The administrative judge, however, cannot infringe the domain corresponding to the exercise of administrative discretionary powers.

Public administrative silence has the value of a refusal to perform the measure only when public bodies are obliged to perform such measure. This obligation occurs not only when it is provided for by law, but in every case in which the protection of fairness and equity requires it.<sup>51</sup> Silence non-compliance should be sought with a declaration within the time limit related to the right for which such judicial protection is sought. Administrative courts cannot substitute themselves for the silent administrative bodies through issuance of an explicit measure.

Resulting from the Italian approach to separation of powers, administrative courts cannot order a measure with specific content because only public administration is to weigh public interests, and has a democratic entitlement to do so. Articles 31 and 117 C.P.A. provide for a special type of trial for public authorities' silence. The time limit to address the administrative court is sharply reduced (30 days), when compared with the usual 60-day limit. If the public bodies do not act within the time limit, the Court appoints a "*commissarius ad acta*," that is, a public officer, who

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<sup>48</sup> See *infra* Section III.D.

<sup>49</sup> See L. n. 241/1990 § 25, ¶ 4 (providing an example of tacit denial); see also *infra* Section III.E.

<sup>50</sup> See Legge 11 febbraio 2005, n. 15. Once the time limit established to conclude the procedure has expired, the invitation to perform is no longer necessary.

<sup>51</sup> See Cons. Stato, sez. V, 13 marzo 2011, n. 1431, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); T.A.R., Piemonte, 30 luglio 2009, n. 2125, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); Cons. Stato, sez. V, 21 ottobre 2003, n. 6331, Cons. Stato 2003, I, 2273; Cons. Stato, sez. IV, 17 giugno 2003, n. 3405, Cons. Stato 2003, I, 1355; Aristide Police, *Il dovere di concludere il procedimento e il silenzio inadempiuto*, in CODICE DELL'AZIONE 227-46 (Maria Alessandra Sandulli ed., 2011).

performs the required measure in substitution of the originally competent public administration, (as the court is not allowed to perform it).<sup>52</sup>

**B. SECTION 17: DEVOLUTIONARY SILENCE CONCERNING EXPERT EVALUATION**

Section 17<sup>53</sup> presents an interesting expression of the so-called “*silenzio devolutivo*” (devolutionary silence) that occurs when the expert evaluation required by law or regulation for the adoption of a measure from specific offices is not provided within 90 days from the request. The officer in charge of the procedure must then request said expert evaluation from other organs of a public administration, from public bodies with equivalent qualifications and technical ability, or from universities. Therefore, failure to give an expert evaluation caused a modification of the competence. This modification is not considered in the cases of evaluations that have to be produced by authorities responsible for the protection of environment, landscape and territory, or public health.<sup>54</sup> This type of silence concerning the adoption of internal measures represents a quite satisfactory solution, as it is not necessary to address a judge, but instead the public powers themselves in order to obtain the defaulting evaluation by a different public body.

The system set in Section 17 is different from the one established for advisory activities in Section 16.<sup>55</sup> In fact, if the opinion requested is not given in 20 days starting from the receipt of the request, the officer in charge of the procedure can choose between going on independently from the expression of the opinion or waiting for it.<sup>56</sup> If the opinion concerned is optional, then the requesting authority shall proceed without the defaulting opinion. If we read Section 16 in conjunction with Section 1 of Law No. 241/1990 (in which the principle of not making procedures more complicated is settled),<sup>57</sup> we can see that the legislators disfavor requests of optional opinions as they make the procedure more onerous. That is the reason why the officer in charge of the procedure must proceed independently from the expression of the optional opinion if the time limit has expired. In cases of silence in which the required mandatory or optional

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<sup>52</sup> See Vera Parisio, *I Riti Speciali – Section 2 and 3*, in *IL NUOVO PROCESSO AMMINISTRATIVO* 664 (Roberto Caranta ed., 2010).

<sup>53</sup> L. n. 241/1990 § 17, available at [www.normattiva.it](http://www.normattiva.it).

<sup>54</sup> L. n. 241/1990 § 17, ¶ 2. Such evaluations cannot be carried out but by the competent authority, as its assessment is considered irreplaceable.

<sup>55</sup> See L. n. 241/1990 § 16, available at [www.normattiva.it](http://www.normattiva.it).

<sup>56</sup> *Id.* It is a discretionary evaluation, which pertains to the officer in charge of the procedure, who is, however, obliged to give reasons for proceeding or waiting for the tardive opinion. If the timeframe expires without the optional opinion having been communicated, the requesting authority must proceed independently of the expression of opinion.

<sup>57</sup> L. n. 241/1990 § 1, ¶ 2 (“The public administration shall not make a procedure more onerous unless extraordinary and justified requirements resulting from the preliminary fact-finding activities make such action necessary.”).

opinion must be issued by public bodies in matters involving the protection of the environment, landscape, territory and public health, the officer in charge shall wait until such opinion is issued.<sup>58</sup> Otherwise, the public administration to which the officer in charge belongs shall address the administrative court, as this is a case of silence non-compliance concerning an internal measure.<sup>59</sup>

We have seen that the reaction against silence in performing internal measures varies in relation to the nature of the requested measure. Only for expert evaluations is there a real obligation to ask for a substitution, as they are necessary to conclude the preliminary inquiry of the procedure. On the contrary, advisory activity is not necessary to complete the procedure, but simply to help the public body to make a better decision. However, the system described in Section 17 decidedly allows for better “quality” in the final measure (even if it makes the procedure longer), as it permits thorough knowledge of all the facts and interests involved. The system described in Section 16 seems much more flexible because, in the case of an opinion requested by law, it depends only on the discretion of the officer in charge of the procedure to decide whether research aimed at improving the “quality” of the final measure will take precedence over the quick conclusion of the procedure. Speed in performing the measure cannot always guarantee its “quality,” that is to say, a measure which represents a form of good administration.

Where the protection of the environment and human health is concerned, it is the legislator that decides how the procedure must progress, because those values are considered too important to be jeopardized. These values prevail on procedural celerity, as set out in Sections 19 and 20, as well.<sup>60</sup> In fact, one of the most important characteristics of Law No. 241/1990 is the enhanced value granted to environmental and human health concerns, when compared to other important values like the celerity of procedure.

### ***C. SECTION 19: THE START-UP ACTIVITY NOTIFICATION (SCIA)***

Section 19 of Law No. 241/1990, like many others, has been modified various times during the last twenty years. Section 19 originally ruled a different legal system of liberalization, the so-called self-declaration

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<sup>58</sup> These opinions must necessarily be acquired in the procedure because the interests and values implied are deemed to be of the utmost importance.

<sup>59</sup> See Vera Parisio, *Parere*, in *DIZIONARIO DI DIRITTO AMMINISTRATIVO*, - IL SOLE 24 ORE (Marcello Clarich ed., 2007); *Commento all'art. 16*, in *CODICE DELL'AZIONE AMMINISTRATIVA* 695 (Maria Alessandra Sandulli ed., 2011); *Silenzio della pubblica amministrazione*, in *DIZIONARIO DI DIRITTO AMMINISTRATIVO*, - IL SOLE 24 ORE (Marcello Clarich ed., 2007).

<sup>60</sup> See L. n. 241/1990 § 19; L. n. 241/1990 § 20.

procedure (DIA),<sup>61</sup> which now has been replaced by the start-up activity notification (SCIA).<sup>62</sup> The rules on SCIA directly replace the ones on DIA, contained in every state or regional source, even in the field of town planning administration. However, SCIA is not applicable in cases involving possible endangerment of the environment, health, or landscape.

The principles of procedural simplification and liberalization are deeply rooted in the Italian legal system,<sup>63</sup> and have been strengthened by Directive 2006/123/EC.<sup>64</sup> They are fundamental principles of administrative action<sup>65</sup> and fall within the exclusive State legislative competence; therefore only agents of State law are competent to rule on SCIA. Regional regulations, which may be very different from each other, could lead to a distortion of commercial competition. This choice shows once more that the traditional legal authorization system is in deep crisis and not sustainable in our economy any longer.

As for DIA, the individual does not request an authorization, but rather he or she communicates the commencement of an activity under his or her own responsibility. Qualified technicians check the compatibility of the activity to be commenced with legal requirements.<sup>66</sup> Submission of the declaration and commencement of the activity are contextual. Public authorities, within 60 days, ascertain any possible failure to satisfy the requirements provided for by law. In such a case, the administration, with a reasoned measure, prohibits prosecution of the activity and imposes the

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<sup>61</sup> For a more complete portrayal of the institution of DIA, see Aldo Travi, *Dichiarazione di inizio di attività*, in 2 ENCICLOPEDIA DEL DIRITTO 343 (2008); Emanuele Boscolo, *La segnalazione certificata di inizio attività tra esigenze di semplificazione ed effettività dei controlli*, 3–4 RIVISTA GIURIDICA DELL'URBANISTICA 580 (2010); P. MARZARO GAMBA, *LA DENUNCIA DI INIZIO DI ATTIVITÀ EDILIZIA* (2005).

<sup>62</sup> See Corte Cost., 27 giugno 2012, n. 164, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

<sup>63</sup> See Nino Paolantonio, Walter Giulietti & Fiorenzo Liguori, *La segnalazione certificata di inizio attività*, in CODICE DELL'AZIONE AMMINISTRATIVA 749 (Maria Alessandra Sandulli ed., 2011) (providing an excellent overview of SCIA while analyzing Section 19 of Law No. 241/1990). The SCIA legal institution in its implementation has troubled both public powers and individuals as legal rules to apply for the requirements are not clear. See Maria Alessandra Sandulli, *Dalla D.I.A. alla S.C.I.A.: una liberalizzazione "a rischio"*, 6 RIVISTA GIURIDICA DELL'EDILIZIA (2010); *Semplificazione, certezza del diritto e braccia legate* (2005), available at [www.giustamm.it](http://www.giustamm.it); see generally EMANUELE BOSCOLO, *DIRITTI SOGGETTIVI A REGIME AMMINISTRATIVO. L'ARTICOLO 19 DELLA LEGGE 241/1990 E ALTRI MODELLI DI LIBERALIZZAZIONE*, (2001).

<sup>64</sup> “Bolkestein Directive” 2006/123, 2006 O.J. (L 376) 36 (EC), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). The “Bolkestein Directive,” or “Directive on Services,” takes its name from the Commissioner for internal markets, Frits Bolkestein, who proposed it; it was specifically implemented in Italy with d. lgs. No. 59/2010. See *infra* Part 3.4.1.

<sup>65</sup> See Corte Cost., 9 novembre 2009, n. 282, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it); Corte Cost., 16 giugno 2005, n. 236, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it). In these judgments, it is stated that simplification of the administrative procedure as a general principle falls under the state legislative competence and prevails on the principle of state-regions' shared competence in the field of land-use planning.

<sup>66</sup> See Corte Cost., 27 giugno 2012, n. 164, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

removal of any damaging effect. The administration, however, must grant the interested person a time period within which he or she can make the activity compliant with existing regulations.

As already mentioned, the rules on SCIA pertain to the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory<sup>67</sup> and therefore fall within the exclusive State legislative competence.<sup>68</sup> This limitation of regional competences is explained by the aim of ensuring an undifferentiated enjoyment of civil and social rights safeguarded by the Constitution.

The immediate performance of activities subject to SCIA underlines its qualification as a liberalization institution, and not as an instrument of administrative simplification like tacit consent, as will be later shown. In the Italian legal system, Article 41 of the Constitution provides for a subjective right to conduct economic activities, once the individual has proven fulfilment of all requirements, as certified by a qualified technician.<sup>69</sup> Individuals seeking to commence activities of economic interest cannot wait for the extended period of time needed for the release of an authorization. SCIA and DIA share the same nature, that is to say they are both private acts and not tacit authorizations, as the administrative courts' decisions have ruled,<sup>70</sup> and in both cases the public authority restricts itself to controlling "*ex post*" the existence of the requirements provided for by law. Just like DIA, SCIA also must be accompanied by self-declarations in substitution of certificates and attested affidavits, as well as by certifications from qualified technicians.

Both SCIA and DIA establish that responsibility and all criminal consequences resulting from the commencement of an activity in the absence of requirements provided for by law, fall on the individual. The legal rule of SCIA is different from that of DIA, as after the 60-day time limit has elapsed (60 days from the submission of SCIA),<sup>71</sup> the public administration can intervene only upon imminent danger of severe and irreparable damage to the artistic and cultural heritage, environment, health, public security, or national defence. Such intervention is subject to a motivated ascertainment of the impossibility to protect such interest by firstly making private individuals adhere to existing regulations.

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<sup>67</sup> See Art. 117 ¶ 2(m) Cost.

<sup>68</sup> The legislature itself established that the obligations for public authorities to guarantee the individual's participation in the procedure, to identify the officer in charge, and to conclude the procedure within a scheduled time limit represent, pursuant to Article 117 ¶ 2(m) of the Constitution, the determination of the basic level of benefits relating to civil and social entitlements which have to be guaranteed with homogeneity throughout the entire national territory. See L. n. 241/1990 § 29, ¶ 2-*bis*.

<sup>69</sup> See Art. 41 Cost.

<sup>70</sup> See Cons. Stato, A.P., 29 luglio 2011, n. 15, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>71</sup> The time limit is 30 days for SCIA in building matter which is a branch of land-use planning.

**D. SECTION 20: TACIT CONSENT (“SILENZIO-ASSENSO”)**

Section 20,<sup>72</sup> like Sections 2 and 19 of Law No. 241/1990, has been modified many times during the last years as public powers’ omissions have increased and halting economic activity has deeply troubled the Italian government. After the enactment of Law No. 80/2005, tacit consent has transformed from a legal institution applicable only in peremptory cases provided for by a regulation into a general mode of concluding administrative procedures.

Tacit consent means that administrative inactivity, by virtue of a legal provision, becomes equivalent to an explicit measure.<sup>73</sup> So the plaintiff can commence his or her activity as if an authorization has been issued. This explains why the traditional authorization scheme is not affected. The responsibility for the illegality of the activity falls on the administration (whereas it falls on the individual in the SCIA domain) because the administration permitted, with its omission, a fictitious positive act, equivalent to an explicit measure, to consolidate itself. By virtue of equating silence with an affirmative measure, the individual can carry out his or her activity as if the administration had actually issued the requested measure.

The model of tacit consent does not aim at judicial review,<sup>74</sup> but simply at acceleration of the administrative procedure, as tacit consent recognizes the rights of the individual concerned. Even if the Italian legislators, especially in the implementation of the European Directive

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<sup>72</sup> L. n. 241/1990 § 20, available at [www.normattiva.it](http://www.normattiva.it).

<sup>73</sup> In Spain, tacit consent is the general way to conclude the administrative procedure, with some exceptions strictly provided for by law. The implementation of Directive 2006/123 has strengthened this legal institution. See V. Aguado I Cudolà, *Silencio y procedimiento administrativo en España*, in *SILENZIO E PROCEDIMENTO AMMINISTRATIVO IN EUROPA: UNA COMPARAZIONE TRA DIVERSE ESPERIENZE* 41 (Vera Pariso ed., 2006); A. C. Nettel Barrera, *El silencio positivo en la Directiva de Servicios y los límites a su aplicación en la jurisprudencia*, 1 *REVISTA JURÍDICA DE CATALUÑA* (2011); M. Sánchez Morón, *Precisiones jurisprudenciales sobre el recurso contra la inactividad administrativa (comentario a la Sentencia del Tribunal Supremo de 3 de diciembre de 2008)*, 43 *JUSTICIA ADMINISTRATIVA* 49 (2009); J. Tornos Mas, *La nueva acción frente a la inactividad administrativa del artículo 29 de la Ley de la Jurisdicción contencioso administrativa de 1998. Especial referencia a su ámbito objetivo*, in *LA JUSTICIA ADMINISTRATIVA* (2003); A. C. Nettel Barrera, *Los procedimientos formalizados como ámbito de aplicación del silencio positivo. Comentario a la sentencia del Tribunal Supremo de 28 de febrero de 2007*, 18 *CUADERNOS DE DERECHO LOCAL* (2008).

<sup>74</sup> The administrative courts use “silenzio-assenso” (tacit consent) and “silenzio-acoglimento” (tacit acceptance) with more or less the same meaning. For a general overview of tacit consent and for a complete bibliographical reference, see Vera Pariso, *Silenzio della pubblica amministrazione* in *DIZIONARIO DI DIRITTO AMMINISTRATIVO, - IL SOLE* 24 ORE (Marcello Clarich ed., 2007); Pariso, *L’inerzia*, *supra* note 28, at 161; Travi, *supra* note 14. Travi is the author who has analyzed tacit consent in the most accurate way among the Italian academic commentators; in his studies he underlines that Section 20 of Law No. 241/1990 shall be read as a rule in which the theory of “*ex lege*” legitimation has to be abandoned in favor of tacit consent as typical legal evaluation. For an accurate compilation of the theories regarding the nature of tacit consent, see PARISO, *SILENZIO*, *supra* note 15, at 127–40.

2006/123, have looked to annulment when DIA is not applicable, we cannot ignore that the conditions required for a possible annulment are strict and not very easy to apply. Additionally, third parties (i.e., the neighbor of the individual who asks for a building permission) are required to exercise some control over the administrative action and to cooperate with the administration, which is not always easy.

Should third parties consider the tacit consent illegal, they could attack it as if it really were a measure and demand its annulment to the judge, indicating the date of submission of the application and the time limit within which the measure should have been issued. Such proceeding would be an annulment trial, in compliance with the traditional model of the administrative trial, also confirmed by the Administrative Trial Code (C.P.A.).<sup>75</sup> In the same way, by virtue of this equation of silence with an affirmative act, public powers themselves can use the power of withdrawal or of *ex officio* annulment.

Tacit consent does not represent a form of participation of the individual with the administrative activity. The aim of tacit consent is to avoid individual suffering resulting from the inefficiency of public administration. In the current text of Section 20,<sup>76</sup> if the public administration neither answers within the time limit nor asks for a “service conference,”<sup>77</sup> then silence is equivalent to consent, but with some important exceptions, including the protection of environment and health, or when EU legislation does not provide for a formal measure, or in the case of tacit denial. The exceptions will be identified by one or more governmental decrees.

Although the legislators excluded some major subjects from the domain of the application of tacit consent, tacit consent has become a common way to conclude administrative procedures, in spite of the Constitutional Court’s numerous calls to use tacit consent only in very limited cases where a low degree of discretion is involved.<sup>78</sup> In any event, many troubles still exist when one is obliged to choose between tacit consent and SCIA, as the rules in Sections 19 and 20 of Law No. 141/1990 are very badly written. In compliance with the line of cases of the administrative judges, if nothing is particularly prescribed, SCIA shall not be applied if the omitted act is discretionary.<sup>79</sup> The presence of public powers’ discretion discourages the implementation of SCIA; on the contrary, “*silenzio-assenso*” can be acceptable only if discretion is low. The risk deriving from the increased use of tacit consent in administrative procedures destined to end

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<sup>75</sup> Article 29 of the Administrative Trial Code provides for the general annulment trial to be exerted within the peremptory time limit of 60 days.

<sup>76</sup> L. n. 241/1990 § 20, available at [www.normattiva.it](http://www.normattiva.it).

<sup>77</sup> A service conference is a formal agreement between two or more public administrations, with internal rules and purposes. See L. n. 241/1990 § 14, available at [www.normattiva.it](http://www.normattiva.it).

<sup>78</sup> See Corte Cost. 27 gennaio 2006, n. 26, available at [www.giurcost.it](http://www.giurcost.it).

<sup>79</sup> The characteristics of SCIA and the lack of actual protection for third parties make SCIA not applicable in cases of discretionary acts.

with discretionary acts is loss of the essential content of administrative activity, by violating Article 97 of the Italian Constitution. It means a violation of the “good administration” principle, as no motivation for using public power can be found.

### **1. The “Bolkestein Directive” and its Impact on the Italian Legal System**

The “Bolkestein Directive”<sup>80</sup> was enacted by the European Community (now European Union) in order to fully implement the fundamental freedoms of establishment and to provide cross-border services, as set out in Articles 43 and 49 of the Treaty,<sup>81</sup> through the elimination of every legal obstacle to the implementation of a real internal market of services. The excessively onerous administrative procedures to which the exercise of an activity is subject must be rated among those obstacles.

This Directive was specifically transposed into the Italian legal system with d.lgs no. 59/2010,<sup>82</sup> and very recently with d.lgs no. 147/2012.<sup>83</sup> The latter simply specified certain rules already set out in d.lgs. no. 59/2010 and did not implement anything particularly novel, restricting itself to a legislative update in order to clarify the prescriptive frame in force. The directive on services, according to its transposition into the Italian legal system, has basically transformed the traditional authorization system from rule into exception.<sup>84</sup> It is linked to Italian government action in the matters of liberalization and simplification to facilitate the necessary recovery of the competitiveness of the Italian economy. In fact, the directive on services has always been considered one of the most important measures to aid economic growth since it helps overcome the legal obstacles that stand in the way of freedom of establishment and free cross-border services in the Member States.

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<sup>80</sup> “Bolkestein Directive” 2006/123, 2006 O.J. (L 376) 36 (EC), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). See Jean-Bernard Auby, *La transposition de la directive services*, 3 DROIT ADMINISTRIF (2010); Enrico Leonardo Camilli, *Il recepimento della direttiva servizi in Italia*, 12 GIORN. DIR. AMM. 1239 (2010); MICAELA LOTTINI, *IL MERCATO EUROPEO, PROFILI PUBBLICISTICI* (2010).

<sup>81</sup> See Giuliano Fonderico, *Il manuale della commissione per l’attuazione della direttiva servizi*, 8 GIORN. DIR. AMM. 921 (2008).

<sup>82</sup> Decreto Legislativo 26 marzo 2010, n. 59, available at [www.normattiva.it](http://www.normattiva.it). D.lgs. stands for decreto legislativo. It is a type of delegated legislation from the parliament to the government.

<sup>83</sup> Decreto Legislativo 6 agosto 2012, n. 147, available at [www.normattiva.it](http://www.normattiva.it); see Francesco Tuccari, *La trasposizione della direttiva “servizi” in Italia alla luce del primo decreto correttivo e le recenti riforme anticrisi: verso un mutamento paradigmatico d’intervento sulle attività?*, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it) (providing an analysis of this legislation).

<sup>84</sup> See NINO LONGOBARDI, *IL SISTEMA POLITICO-AMMINISTRATIVO E LA RIFORMA MANCATA. TEMI, SINTESI, APPROFONDIMENTI, CONSIDERAZIONI 157* (1999) (strongly underlining this point); see also Franco Gaetano Scoca, *I provvedimenti autorizzatori*, in *DIRITTO AMMINISTRATIVO* 267 (Franco Gaetano Scoca ed., 2011).

Article 17 of d.lgs. 59/2010 states that should there be any overriding reasons relating to the public interest (public health, public security, public order, etc.), the authorization procedure can lawfully conclude with an explicit measure.<sup>85</sup> A well-known principle of the Italian legal system (also in Sections 16, 19 and 20 of Law No. 241/1990) is confirmed: the protection of interests considered extremely important requires the taking of an explicit act. In fact, only with an explicit measure can the logical evaluation procedure followed by public administration to perform the act be checked. When transposing the directive, the Italian legislature clearly gave *D.I.A.* the value of a key reference model, while tacit consent is used only where specifically stated. Neither “*Silenzio-rifiuto*” (silence as non-compliance) nor “*silenzio-diniego*” (silence equivalent to a fictitious negative act) is applicable, also because they are in contrast with the philosophy underlying the “Bolkestein Directive,” that is to facilitate the transaction of business.<sup>86</sup>

***E. SECTION 25, PARAGRAPH 4: AN EXAMPLE OF SILENCE AS TACIT DENIAL (“SILENZIO-DINIEGO”)***

Section 25, Paragraph 4 of Law No. 241/1990<sup>87</sup> contains an interesting example of tacit denial, that is to say silence considered by law as a fictitious negative act.<sup>88</sup> It settles that the request to have access to administrative documents shall be deemed refused when thirty days has

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<sup>85</sup> D.L. n. 59/2010 art. 17. The principle, which has already been analyzed in relation to Sections 16 and 17 of Law No. 241/1990, is here reaffirmed. Pursuant to this principle, authorization procedures linked to the protection of particularly important interests (such as health and environment protection) must conclude with an explicit measure, so that the important task of controlling the logical evaluation procedure followed by the administration to issue the measure can be carried out.

<sup>86</sup> In Greece, the rule of negative legal effects of the administrative silence has traditionally been prevalent in the administrative law, with the exceptions of some scattered provisions concerning, for example, the supply of electricity and the approval of environmental impact studies for which a silent approval of the individual’s petition was provided. Nowadays, Greek administrative law seems to be evolving toward the expansion of the cases of tacit consent, due to the implementation of Directive 2006/123; this has also stimulated important modifications in the Greek system of administrative justice. See Chryssoula P. Moukiou, *Le renouveau du silence administratif ou “la quadrature du cercle.” Quelques réflexions à propos de la règle du silence-acceptation selon le droit administratif hellénique et le droit comparatif*, in *SILENZIO E PROCEDIMENTO AMMINISTRATIVO IN EUROPA: UNA COMPARAZIONE TRA DIVERSE ESPERIENZE* 119 (Vera Parisio ed., 2006).

<sup>87</sup> L. n. 241/1990 § 25, ¶ 4, available at [www.normattiva.it](http://www.normattiva.it).

<sup>88</sup> In the French legal system, by tradition, silence has always been considered as an implicit rejection of the request. This implicit decision is formed on the basis of a rule of law applicable in cases where the administration has remained inactive for a period of two months, following a request by the citizen concerned. This fictional decision represents the “prerequisite decision” (“*decision préalable*”) necessary for the quashing proceedings, as well as for proceedings concerning substantive disputes. See Camille Broyelle, *Le silence de l’administration en droit administratif français*, in *SILENZIO E PROCEDIMENTO AMMINISTRATIVO IN EUROPA: UNA COMPARAZIONE TRA DIVERSE ESPERIENZE* 3 (Vera Parisio ed., 2006).

passed from the time of request, without any result. In a case of either expressly or tacitly denied access, the requesting party has the right to make a petition to the Administrative Regional Court (T.A.R.), asking for a declaration of his or her right to have access to the requested documents. The Administrative Regional Court in first instance and the Council of State in appeal (pursuant to Article 116 C.P.A.), after hearing the parties, decide within a very short time following a special model of trial in chambers, ending with an “*actio ad exhibendum*” directed to the administration that denied the access, if such denial is deemed illegal.

Nowadays, cases of tacit denial are very rare, as the philosophy underlying this model of silence is to prevent the individual from starting an activity without the prescribed authorization. This is sharply in contrast with the movement of liberalization and simplification, which is widely spreading in the Italian legal system. In compliance with the decisions of the Council of State, the model of tacit denial (also called “*silenzio-rifiuto*” by the judges, rather than “*silenzio-inadempimento*”) was born to make access to the court possible, since the administrative trial has always been a quashing proceeding. The administrative courts, little by little, have expanded the legal protection of the applicant unjustly penalized by the administration’s inactivity, through the substitution of silence non-compliance for tacit denial.<sup>89</sup>

In a case of silence non-compliance, the legal protection of the applicant is easier, as (see Articles 31 and 117 C.P.A.) she or he has a one-year time period within which to address the court, starting from the moment in which the request was presented.<sup>90</sup> Once the time limit has expired, the equation of silence with a fictitious negative measure would force the individual to make a petition to the administrative court within 60 days. So the model of tacit denial could be overcome only with a court decision that quashed the fictitious illegal measure. The protection of the individual concerned was very limited as the time limit of 60 days starting from the consolidation of the tacit denial was a peremptory time limit. Moreover, even if the fictitious measure had been quashed (but not when discretionary powers were involved), an explicit positive measure to commence the activity was always necessary, as the judge could not issue the measure instead of the public powers.

Furthermore, tacit denial entails the risk of presenting silence as an ordinary way to conclude administrative procedures, when it should actually be considered a sort of “pathological” one, since the “physiology” of the system requires an explicit measure, with some exceptions. These are the

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<sup>89</sup> See Cons. Stato, A.P., 4 dicembre 1989, n. 16, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it); Cons. Stato, A.P., 4 dicembre 1989, n. 17, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>90</sup> Such a time limit is peremptory.

reasons why this type of silence is disappearing<sup>91</sup> from our legal system and has been referenced only in Section 25, paragraph 4.

#### IV. CONCLUSION

Even if the Italian legislators have been taking an opposite direction, substituting little by little silence non-compliance with tacit consent, and then tacit consent, first with DIA and after with SCIA, in my opinion the preferable way to conclude the administrative procedure should be with a formal act. Only an express measure allows for effective control over the way public power is used.

Article 41, paragraph 2 of the Charter of Fundamental Rights of the European Union recognizes the right to a good administration, and so introduces the obligation to give reasons for administrative decisions. In the case of discretionary measures, tacit consent (and obviously tacit denial as well) would infringe the principle of good administration, now raised to the rank of fundamental right. The European Court of Justice's decisions show that the respect of procedural rules, such as that regarding the duty to conclude the procedure by an explicit measure, guarantees the correct dialogue between authorities and private individuals.

The "crisis" of the traditional authorization scheme has contributed to the quick diffusion of SCIA, a model of liberalization of economic activities. Unfortunately, this model, even if it allows for the immediate commencement of activity so that the applicant is not damaged by possible omissions of public administration, does not guarantee real legal protection for third parties, even if joint sessions of the divisions of Council of State have tried to protect the interests of third parties, by introducing "*praeter legem*" new jurisdictional actions, in addition to the traditional quashing action.

Instead of considering tacit consent as the general way to conclude the administrative procedure, the legislature should make a greater effort to prevent omissions and better organize public activity, especially when discretionary powers are involved.

Public powers' silence still remains an example of "maladministration," which is always a threat to the economic development of Italy. The wider diffusion of legal institutions like SCIA, in my opinion, is not the best solution to stimulate economic growth. In fact, the risk of losing many procedural guarantees is very high, especially when the rules are not well written. Moreover, the legal protection of the plaintiff is still limited by the restrictions for the administrative courts, in terms of whether they can substitute themselves for public authorities when evaluations of the public

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<sup>91</sup> See Decreto Presidente della Repubblica 20 ottobre 2001, n. 380, art. 37 (called "Consolidated law on building"). "Decreto del Presidente della Repubblica" is a kind of decree that is ruled by the government and then issued by the President of the Italian Republic.

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interest must be made, even pursuant to the new code of administrative procedure.

Public administration must be reinvented by introducing new models of organization, public officers' liability must be strengthened, and control by the State Court of Auditors must become more effective.