

## The right to good administration and the administrative inaction: a troubled relationship\*

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### Introduction

The quality of the relationship between public bodies and the citizen is an essential element in the life of our society and democracy. The more this relationship is efficient and satisfactory the more citizen's rights are respected and guaranteed. Despite the obviousness of this assertion, still many legal orders, by means of their public administrations, often betray these values when they relate with their citizens. Too often public administrations assume an authoritarian approach and seem to ignore what it's currently named as good administration, a multifaceted concept that entail an administration that pursue properly and efficiently the public interest while being respectful of the rights and interests of "les administrés".

One of the key objectives of a good administration and generally of administrative law hinges on people being able to obtain a prompt decision following their instance. However in our time one of the most insidious plagues in the relationship between public authorities and the recipients of administrative decision, is the inaction of administration, in other terms the lack of reaction to the request submitted, an important issue that in legal literature is acknowledged as «administrative silence». Whenever administrative authorities do not act in response to a private citizens' request, or fail to give a timely decision, this behavior can generate a great discomfort in the applicant, with reference to the state of uncertainty, especially when economic resources has been invested. In this perspective, the ignorance on the dossier outcome emerge as a typical device of supremacy of one subject over the other<sup>1</sup>. A good decision is a prompt and certain decision and a good administration is an institution that timely respond to the applications of its citizens. To this end, this paper aims to analyze the implementation of the right to good administration in Italian legislation with regards to one of its most significant element: the right to have a timely decision from public administration.

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\* *Sottoposto a referaggio.*

<sup>1</sup> FENSTER M., *The Opacity of Transparency*, in *Iowa Law Review*, 91, 2006, 885 ss.; M. AINIS, (a cura di), *Informazione potere libertà*, Torino, 2005; G. ROSSOLILLO, *Popolo europeo, potere costituente e costruzione dello Stato federale europeo*, in *Il Federalista*, 2007, 196; W. LIPMANN, *L'opinione pubblica* (1921), Milano, 1963; J. HABERMAS, *The Structural Transformation of the Public Sphere: an Enquiry into the Category of the Bourgeois Society*(1962), Cambridge, 1989, (trad. It. *Storia e critica dell'opinione pubblica*, Roma- Bari, 1971); L.V. MALOCCHI, *Opinione pubblica*, in *Nov.mo Dig. It.*, vol. XI, Torino, 1965, 1034 ss.; N. MATTEUCCI, *Opinione pubblica*, in N. BOBBIO, N. MATTEUCCI, G. PASQUINO (a cura di), *Dizionario di politica*, Torino, 1983, 733 ss.; M. CASTELLS, *Comunicazione e potere*, Milano, Università Bocconi editore, 2009.

### 1. *The right to good administration*

The right to good administration is currently normative recognized only at European level as far as in Italian law it has not yet been explicitly codified. According to this provision, an administration deserves the qualification of ‘good’ (*bonne*, proper), mainly when it handle the issues regarding any person impartially, fairly and within a reasonable time. More explicitly, when its decisions are justified and the person concerned by an individual prejudicial administrative measure is heard before its release<sup>2</sup>. The relevance of the issue was originally recognized in the European case law, as both the European Court of Justice and the Tribunal of First Instance proclaimed good administration as fundamental principle of European law<sup>3</sup>, and after expressly codified in the Charter of fundamental rights of the European Union adopted in 2007<sup>4</sup>. Lastly the Treaty of Lisbon recognized to the rights, freedoms and principles set out in the Charter the same legal value of the Treaties<sup>5</sup>.

However since 2000 the European Ombudsman repeatedly emphasized the relevance of this principle wishing that the inclusion of this right in the Charter could have had a “broad impact on all existing and future Member States, helping to make the 21st century the century of good administration”<sup>6</sup>.

<sup>2</sup> Article 41 “Right to good administration” provides: « 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; - the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language». On the right to a good administration in European law see *ex multis* J. WAKEFIELD (ed.), *The right to good administration*, Kluwer Law International, 2007; LORD MILLETT, *The right to good administration in European law*, in *Public Law*, 2002, 309 ss.; J. MENDES, *Good Administration in UE Law and the European Code of Good Administrative Behaviour*, op. cit., 4; On this principle in Italian literature see F. TRIMARCHI BANFI, *Il diritto ad una buona amministrazione*, in M. P. Chiti – G. Greco (a cura di), *Trattato di diritto amministrativo europeo*, Milano, Giuffrè, 2007, I, 49 ss.; E. CHITI, *Il principio di buona amministrazione*, in E. Chiti, C. Franchini, M. Gnes, M. Savino, M. Veronelli, *Diritto amministrativo europeo – Casi e materiali*, Milano, 2005, 39 ss.; R. BIFULCO, *Diritto ad una buona amministrazione*, in R. Bifulco, M. Cartabia, A. Celotto (eds.), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, 2001, 290; S. RICCI, *La “buona amministrazione”: ordinamento comunitario e ordinamento nazionale*, Torino, 2005; D. SORACE, *La buona amministrazione e la qualità della vita nel 60° anniversario della Costituzione* in [www.costituzionalismo.it](http://www.costituzionalismo.it), 2008; L. PEGORARO, *Esiste un “diritto” ad una buona amministrazione? (Osservazioni critiche preliminari sull’(ab)uso della parola “diritto”)*, in *Istituzioni del Federalismo*, 2010, 543 ss. ; M.T. P. CAPUTI JAMBRENGHI, *Buona amministrazione tra garanzie interne e prospettive comunitarie (a proposito di “class action all’italiana”)*, in [www.giustamm.it](http://www.giustamm.it), 2010.

<sup>3</sup> See *inter alia* Court of Justice judgment of 31 March 1992 in Case C-255/90 *P Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403.

<sup>4</sup> Official Journal of the European Union C 303/17 - 14.12.2007

<sup>5</sup> Treaty of Lisbon in O.J. 2007/C 306/01 at Article 6 paragraph 1, states: « The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties». On the evolution and prerogatives of administrative law in the European legal system see R. CARANTA, *Les exigences systémiques dans le droit administratif de l’Union européenne*, in *Annuaire de Droit de l’union Européenne*, 2012, 21 ss.

<sup>6</sup> J. SODERMAN, *Public Hearing on the draft Charter of Fundamental Rights of the European Union, Preliminary remarks*, Speech of the European Ombudsman, 02 February 2000, in <http://www.ombudsman.europa.eu/activities/speech.faces/en/355/html.bookmark>. See also XXX

As it's well known article 41 of the Charter, which is actually the only normative reference, enumerates in a non-exhaustive manner the duties that make part of the right of good administration. In European legal systems good administration has been understood and used in several meanings covering both a legality review and a control over non-legal aspect of administrative action. In the European perspective in effect the fulfillment of good administration requires a combination of legal and non-legal rules<sup>7</sup> that includes firstly procedural guarantees that can ultimately lead to the annulment of the vitiated act or to a compensation of damages, secondly legal rules that structure the exercise of discretionary power in line with the correct pursuance of the public interest in each case and, finally, non-legal rules that define standard of conduct directing at ensuring the proper functioning of the administrative services supplied to the public<sup>8</sup>. The latter are mostly displayed by Ombudsman's interventions that in many occasions affirmed that «there is "life beyond legality" and that maladministration does not, therefore, always imply illegality»<sup>9</sup>, while good administration requires the respect not only of legal obligations, but also to be service-minded and ensure that members of the public are properly treated and enjoy their rights completely<sup>10</sup>.

With the adoption of the European Code of Administrative Behavior it was explained in more details what the principle of good administration should mean in practice. The Code, directly applicable only to civil servants and institutions of the European Union, includes procedural rights and duties, substantive rights as well as general principles of administrative law and rules of ethical behaviour but, according to European Commission position<sup>11</sup>, it remains a valuable source to understand the meaning of good administration in European law.

From a general point of view it seems that the definition provided in European law and soft law is not complete, since there were selected only some of the several expectations of persons dealing with public institutions and bodies, leaving out of the 'umbrella right' some of them and including others that were already provided in the Treaty<sup>12</sup>. The only common denominator is the intention of establish them as public subjective rights of a fundamental nature<sup>13</sup>.

However the right to good administration as codified at European level undoubtedly influenced a positive trend towards the strengthening of procedural rights of individuals affected by administrative decisions in most Member States of the European Union. In this sense a

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<sup>7</sup> As pointed out by Advocate General Slynn in his Opinion in Case 64/82, *Tradax v. Commission* [1984], ECR 1385.

<sup>8</sup> J. MENDES, *Good Administration in UE Law*, op. cit., 5.

<sup>9</sup> *The principle of good administration in the recommendations of the European Ombudsman*, Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the EUNOMIA Project Capacity-Building Seminar on 'Ombudsman's Intervention: Between the Principles of Legality and Good Administration', Sofia, Bulgaria, 17 September 2007.

<sup>10</sup> *Legality and good administration: is there a difference?*, Speech by the European Ombudsman, P. Nikiforos Diamandouros, at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007, in <http://www.ombudsman.europa.eu/speeches/en/2007-10-15.htm>.

<sup>11</sup> There is in fact no intention to transform the Code into a regulation. See intervention of Mr. Piebalgs in the plenary debate on 23 October 2008 in <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20081023+ITEM-004+DOC+XML+V0//EN&language=EN>

<sup>12</sup> J. MENDES, *Good Administration in UE Law*, op. cit., 4.

<sup>13</sup> L. AZOULAI, *Le principe de bonne administration*, in *Droit administratif européen*, J. Dutheil de la Rochère et J.-B. Auby (dir.), Bruxelles, 2007, 493 ss.

number of national Administrative Procedures Acts have been enacted or reformed over the past 15–20 years, pointing in the direction of a higher degree of regulation of the administrative procedure as well as increased focus on ethical frameworks<sup>14</sup>.

Despite right to good administration is nowadays commonly accepted in the practice as a fundamental principle in the relationship between public administration and citizens, though its meaning has been differently interpreted by case law, scholars and institutions both at European and national level<sup>15</sup>.

With regard to the Italian legal order, as formerly mentioned, there's no rules that expressly recognize good administration as a general principle. Indeed if we look to the effectual rights that are granted to Italian citizens from Law n. 241/1990 (*Rules on the administrative procedures*) and from the administrative case law, an even wider right to good administration can be acknowledged on the side of Italian citizens<sup>16</sup>. Starting from the important decision of Italian Corte di Cassazione n. 500/1999 that admitted the compensation of damage even for positions of legitimate interests and through the several reforms of Law n. 241/1990 (particularly in 2005) that strengthen the guarantees of the individuals affected by administration's activities, good administration become a right ordinarily granted even to Italian citizens<sup>17</sup>. Increasingly essential principles of impartiality and good performance of public administration stated in Article 97 of Italian Constitution with regard to organization of public offices were extended to administrative activity<sup>18</sup>. This process led to a new scenario in the guarantees provided to individuals much more closed to the spirit of good administration: the problem is that often the reforms have been introduced thinking more from the perspective of the administration than from that of citizens<sup>19</sup>. The outcome is that in order to find a tangible demonstration of this principle in Italian system we have to search in the administrative case law, mainly in the decisions on «eccesso di potere»<sup>20</sup> where we can find reference to the principle of loyalty, proportionality and reasonableness, than in the administrative procedures where too often the economic logic of results and competitiveness has marginalized that of the democratization of administrative action.

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<sup>14</sup> For an overview on current regulation on good administration in the Member States of the European Union see the results of the survey commissioned from the Swedish government to the Swedish Agency for Public Management: «Principles of Good Administration in the Member States of the European Union» in <http://www.statskontoret.se/globalassets/publikationer/2000-2005-english/200504.pdf>

<sup>15</sup> For an overview on different enforcement of good administration principle in EU member states, see C. HARLOW R. RAWLINGS, *National administrative procedures in a European perspective: pathways to a slow convergence*, in *www.ijpl*, 2, 2010.

<sup>16</sup> See D. SORACE, *La buona amministrazione e la qualità della vita*, op. cit., 3.

<sup>17</sup> It is worth noting that in Italian administrative legal system the legal positions linked to the «right» to good administration are mostly qualified as «legitimate interest» rather than proper rights. These interests are legally protected only if the applicant, according to the factual circumstances, has the entitlement 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>18</sup> Article 97 of Italian Constitution states: «Public offices are organized according to the provisions of law, so as to ensure the efficiency and impartiality of administration».

<sup>19</sup> A. SANDULLI, *The Italian Administrative Procedure Act: back to the future*, in *Italian J. Pub. L.* 370, 373 (2010).

<sup>20</sup> Law n. 241/1990 at Section 21-octies (Voidability of Measures) states the three cause of voidability of a administrative act: «1. Administrative measures that have been adopted in breach of the law or are vitiated by excess of power or by lack of specific jurisdiction shall be voidable.

## 2. *The duty to take a decision in a reasonable time-limit*

One of the rights included in the principle to good administration is the duty to take a decision in a reasonable time limit. Is it commonly acknowledged that dealing "properly" with people means dealing with them promptly, without undue delay and in accordance with published time limits. When one of the part of the relationship is an administrative body the disadvantage for the counterpart is obviously wider.

The omission of public administration to react within the set legal time-limits is today generally seen as a prejudicial condition to struggle in order to gather two goals: protecting citizens from government abuse and avoiding inefficiency in administration.

From a comparative perspective it emerges that in some legal orders, the right to have one's affairs handled within a reasonable time is constitutionally guaranteed, while in others, it is provided for in statutes, often in an administrative procedure act<sup>21</sup>.

Starting from European level, the first paragraph of Article 41 of the Charter of fundamental rights of the European Union declares that «*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*». Furthermore Article 17 of Code of Administrative Behaviour, entitle «Reasonable time-limit for taking decisions», states that «*The official shall ensure that a decision on every request or complaint to the institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt*». Then in February 2013 the European Ombudsman published the «Six Rules for Getting it Right - The Ombudsman's Guide to Good Public Administration» where in rule n. 1 is explicitly affirmed that «*Public bodies should avoid undue delay - particularly in cases where practical difficulties may arise for the individual as a result or where uncertainty may be created*»<sup>22</sup>.

For European institutions though, the respect of time limits for administrative decision taking represents a mandatory behavior that is also accurately monitored from both the European courts and the Ombudsman<sup>23</sup>.

In Italian legal system only in 1990 with Law No. 241/1990 the principle of the duty of administrative decision-taking was expressly codified. Still, the juridical qualification of the administration inaction represent an important achievement in Italian law as far as with this provision it has been generally recognized the duty to end the administrative procedure in a specific time limit with a written measure<sup>24</sup>. In particular, Section 2 of Law no. 241/1990 asserts that public authorities have the duty to conclude a procedure with an explicit measure within 30

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<sup>21</sup> For an overview of different legal systems see V. PARISIO (ed.), *Silenzio e procedimento amministrativo in Europa: una comparazione tra diverse esperienze*, Milano, Giuffrè, 2006

<sup>22</sup> *Six Rules for Getting it Right - The Ombudsman's Guide to Good Public Administration*, published February 2013, in [www.ombudsman.gov.ie/en/publications/guidelines-for-public-bodies/six-rules-for-getting-it-right/](http://www.ombudsman.gov.ie/en/publications/guidelines-for-public-bodies/six-rules-for-getting-it-right/).

<sup>23</sup> Court of Justice judgment of 15 October 1987 in Case 222/86 Heylens [1987] ECR 4097; Court of First Instance judgments of 6 December 1994 in Case T-450/93 Lisrestal [1994] ECR II-1177, 18 September 1995 in Case T-167/94 Nölle [1995] ECR II-2589.

<sup>24</sup> Law no. 241/1990, par. 2.

days, if no other different time limit is provided for by law or regulations. Since then, as a general principle, inaction of the administration is considered illegal<sup>25</sup>.

Though, according to Section 2, various national administrative bodies can set different time limits in compliance with their own needs. Such time limits generally cannot exceed 90 days and only in very extraordinary cases, this time limit can be extended up to 180 days<sup>26</sup>. Section 2, in its most recently updated version, strongly confirms that the administrative procedure must conclude with the adoption of an explicit measure<sup>27</sup>. 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. As a consequence, the lack of an explicit measure is implicitly considered by Italian legislature as non-compliance (“silenzio-inadempimento”) because the administrative body violates the legal binding duty to administrative decision-taking in a certain time limit<sup>28</sup>. The reaction of the law to this omission is stated at paragraph 8 of Section 2 prescribes that inaction kept by public powers is regulated by the Code of Administrative Judicial Procedure (“C.P.A.”), which governs, in Articles 31 and 117 of C.P.A., the judge’s ascertainment activity in cases of omission by the public administration<sup>29</sup>.

This section assumes great relevance because for the first time in Italian legal system has been generally and clearly codified the principle of the duty of administrative decision-taking and the consequences related to its infringement. In particular, the duty to act in the perspective of Law no. 241/1990 is not intended, consistently to the traditional approach, as a vehicle to better pursue the satisfaction of the public interests, but in a new interpretation as a way to give response in a reasonable time to the instances of the persons that expects a decision from administration. In other words it was legally codified the «right to prompt administrative decision-making», i.e. the right of individuals to have an answer from administration within a reasonable time and was consistently provided, in case of its violation, juridical effects in favor of the inquirer.

It is worth remembering that Italian legislator in the last years introduced more remedies against the administrative omission.

Firstly, Section 2-bis of Law No. 241/1990 regulates the right to damage compensation for the delay of administrative authorities. This provision states that public bodies are obliged to compensate damages caused by fraudulent or negligent nonobservance of administrative

<sup>25</sup> On this see F. SCOCA, *Il termine come garanzia del procedimento*, in *www.giustamm.it*, n. 9, 2005;

<sup>26</sup> According to paragraph 4 of Section 2 Law n. 241/1990 it’s allowable to go beyond these limits only for procedures relating to the acquisition of Italian citizenship and those regarding immigration.

<sup>27</sup> On the duty to end the administrative proceeding timely see A. FIGORILLI – M- RENNA, *Commento all’art. 2*, in A. BARTOLINI, S. FANTINI, G. FERRARI, *Codice dell’azione amministrativa e delle responsabilità*, Nel diritto, Roma, 2009, p. 105 ss.; A. POLICE, *Il dovere di concludere il procedimento e il silenzio inadempimento*, op. cit., 237 ss.; A. COLAVECCHIO, *L’obbligo di provvedere tempestivamente*, Torino, Giappichelli, 2013.

<sup>28</sup> On this see V. PARISIO, *The Italian Administrative Procedure Act and Public Authorities’ Silence*, op. cit., 10.

<sup>29</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. V. PARISIO, *The Italian Administrative Procedure Act and Public Authorities’ Silence*, op. cit., 12. On the special trial against public authority silence in Italian legal order see M. OCCHIENA, *Art. 31. Azione avverso il silenzio e declaratoria di nullità*, in R.GAROFOLI - G.FERRARI (Eds.), *Codice del processo amministrativo*, Roma, 2012, II ed., 579 ss.; M. RAMAJOLI, *Forme e limiti della tutela giurisdizionale contro il silenzio inadempimento*, in *Dir. proc. amm.*, 2014, 709; A. POLICE, *Il dovere di concludere il procedimento e il silenzio inadempimento*, in M.A. SANDULLI (Ed.) *Codice dell’azione amministrativa*, 2011, 227 ss.

procedure time limits<sup>30</sup>. The legislator introducing the action for compensation for damages enabled the applicant to get a reparation for the discomfort related to the delay of administration, expressly recognizes the importance of time as an economic value. As all litigation concerning the right to recover damages, it falls within the competence of the administrative court. In the Code of Administrative Judicial Procedure at Section 30, par. 4, is provided a specific action in favor of individuals that demonstrate to suffer a damage related to the failure of administration to conclude an administrative procedure, when the damage is imputable to the delay<sup>31</sup>. The action for damage compensation must be filed within 120 days starting after one year from the expiring of the due date. Strictly this remedy does not guarantee an effective protection to the attendant both for the cost of going to court, both for the difficulties to prove the negligent and fraudulent behaviour of public bodies when non respecting time limits. Furthermore the obligation to compensate damages is due only in cases where the petitioner effectively had the right to obtain a favorable measure. The case law on the subject shows that 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, but the attendant must demonstrate that its damage is strictly related to the inaction of public administration<sup>32</sup>.

In addition to the punitive damages in case of undue delay, the Decreto-legge 21 June 2013, no. 69 (converted in Law 9 August 2013, no. 98) has provided an automatic "indemnity for delay" in favor of individuals suffering from such delays. It has been established that this automatic indemnity is to be given "ex lege" without any proof of the negligent or fraudulent behavior of public bodies. According to Section 2, par. 1– bis the administration is obliged to pay a penalty payment for each day of administrative delay after the expiration of legal terms<sup>33</sup>. The reimbursement has to be understood in the government intention as an equality evaluation in the aim to balance the exigence to sanction the omissive behavior of administration (independently from its responsibility) with the need of comfort of the individual for the inconvenient situation<sup>34</sup>.

A further remedy in favor of individuals in the lack of administrative response is the activation of substitutive power. Section 2, paragraph 9 – bis of Law. No. 241/1990 introduced a

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<sup>30</sup> Section 2-bis (Consequences of an Authority's delayed Conclusion of a Procedure) 1. Public authorities and the parties referred to in section 1(1-ter) shall compensate any unjust loss or damage caused by their intentional or negligent failure to observe the timeframes for concluding a procedure. 2. Disputes relating to the application of the present section shall fall within the exclusive jurisdiction of the administrative court. The right to receive compensation for loss or damage shall be barred after five years.

<sup>31</sup> Section 30, of Code of Administrative Judicial Procedure confirmed the existing administrative case law *ex multis* Cass. Sez. Un., 25 March 2010, 7160, in *Urb e app.* (2010), with comment of A. SPEZZATI, *Giurisdizione in materia di risarcimento per danno da ritardo della p.a.*, E. STICCHI DAMIANI, *Danno da ritardo e pregiudiziale amministrativa*, in *Foro Amm. TAR* (2007), p.1145 ss.

<sup>32</sup> In this sense Cons. Stato, Ad. Plenaria, 15 settembre 2005, n. 7 in *Resp. civ. prev.* (2006), 1397, with comment by R. CARANTA - G. VECCI, *Inerzia, silenzio, ritardo: quale responsabilità per la pubblica amministrazione*, Cons. Stato sez. IV, 7 marzo 2013 n. 1406, in *Foro amm. CdS*(2013), 3078 with comment by N. SPADARO, *Ancora dubbi interpretativi sul danno da inerzia*.

<sup>33</sup> See R. CARANTA, *L'inerzia e il ritardo della pubblica amministrazione tra indennizzo e risarcimento*, in *Studi in onore di Giovanni Iudica*, Milano, 2014, 295 ss. F. DI LASCIO, *Le semplificazioni amministrative e l'indennizzo da ritardo*, in *Giorn. Dir. Amm.* 2013, p. 1168 ss.

<sup>34</sup> As undermined from the Council of Ministers in *Linee guida per l'applicazione «dell'indennizzo da ritardo nella conclusione dei procedimenti ad istanza di parte»*, Direttiva 9 gennaio 2014 of, in GU n.59 del 12-3-2014.

new figure who is in charge of the substitution in case of inaction of the officer appointed. After the expiring of time limits the applicant has the possibility to turn to the officer in charge and ask to enact the administrative measure within half of the due date provided by law or in alternative to nominate a *commissario ad acta* in order to take the decision.

In this way it is provided to individuals a concrete and immediate form of protection, certainly much more effective compared to the length of a judicial review, as well as less expensive. Basically for the inquirer is much more gratifying to get a quick decision (whether positive or negative) instead of living in the doubt. To this end this remedy that 'forces' the administration to decide is certainly the only one that has the advantage to assure to the applicant a concrete measure.

### 3. Administrative inaction and its meanings

The majority of legal systems fights the omission of public administration in adopting due administrative measures through different remedies that are generally connected under the discipline of administrative silence.

Administrative silence, though, is a legal institute of law that should be distinguished from that of administrative omission to act. An 'administrative omission to lack', intended as any lack of action by the public administration to exercise administrative activity which creates effects on legal positions of individuals, occurs every time a legal order guarantees to the interested parties the right to appeal before a jurisdictional authority<sup>35</sup>. In this case the lack of reaction within certain time limits doesn't mean anything, but gives simply to the inquirer the possibility to have access to the court and to hope in a decision who oblige the administration to act. According to the separation of powers principle, in many legal orders courts cannot order the administration to adopt a measure with a specific content when discretionary power of public administration are at state.

Administrative silence conversely, is a legal fiction of administrative law, a caused legally situation, according to which the inaction of public administration outstanding a certain period of time determines the production of legal effects on the inquirer. When public administration doesn't react to an application from an individual, the law attributes to this *de facto* silence a certain meaning, positive or negative, that produces the acceptance or rejection of the request submitted by the parties concerned<sup>36</sup>.

With reference to the administrative silence, legal systems can assume two different approaches, depending on the priority they choose to give to the public interest or to the individual interests. While the 'administration centric' approach to silence safeguards the administration primary control over its own activity and prefer to give to the lack of response on the request a negative meaning, the 'individual centric' approach focus its attention to the implied right of individuals to have a decision from administration within a reasonable time, and

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<sup>35</sup> On this see E. ÇANI, *Administrative Silence: omission of public administration to react as an administrative decision-making*, in *Studime Juridike (Juridical studies), Juridical Scientific Journal*, School of Magistrate, Tirana, no. 4, 2014, 151 ss.

<sup>36</sup> ID, 155.

furthermore provide that unreasonable delay in responding to a request or the lack of an explicit measure will correspond to a positive answer<sup>37</sup>.

In systems where public interest is emphasized, the primary aim is to safeguard the administration primary control over activities and to avoid that its policies could be affected by its inaction: in this perspective the natural significance of silence is the rejection of the application<sup>38</sup>.

This approach, focused on public interest, can give rise to difficulties in reference both to the European legislation and case law that give priority to the safeguard of individuals interests, both to the unfair and arbitrary supremacy of administration conflicting with a democratic legal order.

‘Individual centric’ approach instead, is based not on the idea that citizens’ interests must always prevail, but that public interest is better assisted when individuals can count on an efficient and not arbitrary administration. In this perspective, the natural meaning of administrative inaction is tacit consent following from the implied right of individual to an administrative prompt decision<sup>39</sup>. Actually in most member states of the European Union the administrative silence is expressly interpreted in this second approach. In particular, European countries such as Germany<sup>40</sup>, Portugal, Romania, Slovenia and Spain have included ‘tacit consent’ institute in their horizontal legislation (i.e. in their general laws on administrative procedures) while in other member states silent approval is foreseen only over sector-specific legislations (e.g. Sweden, Estonia, Finland, Ireland and Latvia)<sup>41</sup>. In other member states of the EU, the principle is only mentioned as such in administrative horizontal legislation with the requirement that it is implemented through sector-specific legislation (e.g. Austria, Czech Republic, Slovakia); Luxembourg instead has included in its horizontal administrative legislation a list of sectors for which the principle of tacit consent doesn’t apply (waste management, fight against pollution, etc.)<sup>42</sup>.

With regard to the normative framework of European Union, the ‘silent is consent’ principle is provided as an important principle. With the adoption of the Service Directive No. 2006/123<sup>43</sup> the principle of silent approval was expressly foresaw in order to facilitate freedom of establishment for providers and the freedom of providing services in the European Union. Even

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<sup>37</sup> For this distinction see G. ANTHONY, *Administrative silence and UK public law*, in *The Juridical Current*, 2008, Vol. 34-35, 39 ss..

<sup>38</sup> This is the case of Germany. On the administrative silence in German and Austrian legal systems C. FRAENKEL – HAEBERLE, *Il silenzio dell’amministrazione: echi d’oltralpe*, in *Dir. Proc. Amm.*, 2010, 1046 ss.; L. FERRARA, *Prime riflessioni sulla disciplina del silenzio-inadempimento con attenzione alla Saumnisbeschwerde austriaca*, in G. FALCON (Ed.), *La tutela dell’interesse al provvedimento*, Trento, 2001, p. 73 ss..

<sup>39</sup> G. ANTHONY, *Administrative silence and UK public law*, 41.

<sup>40</sup> Art. 42a of the German Code of Administrative Procedure, in order to ensure a rapid decision, provides the ‘fictitious approval’ (*Genehmigungsfiktion*) according to which if the time, within which the decision of an administrative authority on a application should have been taken, has passed the decision will be considered adopted, unless the law expressly provides otherwise.

<sup>41</sup> On the application of tacit consent model in EU Member States see the working paper of the European Commission’s 2012, Commission Staff Working Document, *Detailed information on the implementation of Directive 2006/123/EC on services in the internal Market*, in [http://ec.europa.eu/internal\\_market/services/docs/services-dir/implementation/report/SWD\\_2012\\_148\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_148_en.pdf).

<sup>42</sup> On this see E. ÇANI, *Administrative Silence: omission of public administration to react as an administrative decision-making*, op. cit., 155 ss.

<sup>43</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 J.B. AUBY, *La transposition de la directive services, Droit Administratif*, 3, 2010.

if the areas included in the Directive are numerous but not exhaustive of all administrative decision-making processes, though it's meaningful that European law requires the application of the rule of silent approval through national legislation of EU Member States as one of the instrument to simplify procedures and to reduce costs, duration and practical difficulties for service providers<sup>44</sup>.

#### *4. Administrative silence in Italy*

Italian legal system, as most of developed legal orders, incorporates elements of both the administration centric and individual centric approaches, as far as it provides a multifaceted regulation of administrative inaction.

As mentioned before, since the beginning of ninety's Italian legislator has set specific time limits for administrative proceedings and introduced different legal techniques in order to fight the delay of administrative authorities in dealing with individual applications. Before the enactment of Law No. 241/1990, the element of time was not contemplate as relevant. 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. From that date arise the awareness of the importance of time as an economic value and of the duty to respect the "right"<sup>45</sup> to obtain a measure within the time limit provided for by the law.

In different stages Italian legislator introduced new solutions in order to stimulate the administrative authorities to respect time limits and to give a timely response to individuals requests.

The amount of statutory interventions on this subject throughout over twenty-five years visibly attests the inadequacy of legislator efforts to solve the problem: the result is a complex body of regulatory norms that provides various remedies for "the administrative silence", definitively recognized as an official institute of administrative law and treated in Administrative law textbooks.

To this extent Italian regulation on administrative inactivity can be divided in two different statutory schemes. The dichotomy can be identified between 'meaning silence' and 'meaningless silence'.

In the first sense the lack of response of administration on an expressed request of an individual corresponds to an precise significance for the legal system. In this case, when administrative authority do not act in reaction to a private citizens' request, or fail to give a timely due decision, the 'meaning silence' scheme take place and a precise significance is recognized to the administration inactivity.

The 'meaning silence' scheme can be also divided in two different categories depending on the consequence, positive or negative, that can follow from the administration's inaction or failure to act.

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<sup>44</sup> See E. ÇANI, *Administrative Silence: omission of public administration to react as an administrative decision-making*, op. cit., 158 ss.

<sup>45</sup> With regard to the legal nature of this position see V. PARISIO, *The Italian Administrative Procedure Act and Public Authorities' Silence*, in *Hamline Law Review*, Vol. 36, 1.

With reference to the positive meaning, Law no. 241/1990, placed in the simplification chapter, states at Section 20 a general rule: every time an individual presents a request to public administration for the acquisition of a positive act, the unreasonable delay in responding within 30 days entails that the application has been accepted<sup>46</sup>. The administration inaction has though the same effect of the acceptance of the citizen's request and is interpreted by the legal order as a tacit consent act. If it is clear that this result is based on a juridical fiction as the legal effect is related to a simple omissive behavior of administration, nevertheless the legislator considers the silent act as an expressive act with all the consequence in terms of administrative and jurisdictional remedies. It must be underlined that with the introduction of the legal institute of tacit consent, the authorization scheme is not affected as far as the individual can start his or her activity, like if the administration had actually issued the requested measure.

The *ratio* of tacit consent model, consistently with the individual approach, is to simplify the dialogue between citizens and public offices and to avoid damaging resulting from the inefficiency of administration when non-discretionary powers are involved<sup>47</sup>. This means that it shouldn't be used when the decision of public administration involves a choice between public and private interests that is not previously regulated by law (binding activity).

According to this perspective, Section 20 states that the 'tacit consent' institute cannot be utilized when sensitive interests are at place. Italian legislator requires a formal administrative measure when delicate interests like environment, health, security or public order are involved<sup>48</sup>.

In a second sense, much less recurrent, the 'meaning silence' may lead to the rejection of the application. This is an exceptional hypothesis that will occur only when a statutory act expressly attributes to the inaction of administration a negative effect. In this second case the administrative inactivity has been equalized to a tacit denial act and the applicant has only the possibility to react against it through the administrative or jurisdictional remedies<sup>49</sup>.

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<sup>46</sup> Section 20 (Silence-equals-assent [Silenzio assenso]) 1. Without prejudice to the application of section 19, in procedures initiated by interested parties seeking the issue of an administrative measure, the silence of the competent authority shall be equivalent to a measure allowing the application, without the need for further applications or formal warnings, if the same authority does not communicate a measure refusing the application to the party concerned within the timeframe referred to in subsection (2) or subsection (3) of section 2, or does not proceed pursuant to subsection (2) below.

<sup>47</sup> In case of "administrative discretion" the Public Administration aims at a public purpose attributed to its care by law, by means of an activity of selection, acquisition, comparison and evaluation of public and private interests implied in its action. On discretionary power in administrative procedures see G. DELLA CANANEA - A. SANDULLI (Eds.), *The Italian Administrative Procedure Act*, in *The Italian Journal of Public Law – Special Issue*, 2010, passim.; G. CORSO, *Administrative procedures: twenty years on*, in *www.ijpl*, 2010.

<sup>48</sup> Section 2 at par. 4 of Law no. 241/1990 provides "4. The provisions of the present section shall not apply to instruments or procedures concerning cultural or landscape heritage, the environment, national defense, public security, immigration, asylum and citizenship, health or public safety, to the cases in which Community legislation requires the adoption of formal administrative measures, to the cases in which the law qualifies an authority's silence as refusal of an application or to those instruments and procedures established by one or more decrees of the President of the Council of Ministers upon the proposal of the Minister for the Civil Service, in agreement with the Ministers with competence".

<sup>49</sup> In French legal system, traditionally, 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 C. BROUELLE, *Le silence de l'administration en droit administratif français*, in V. PARISIO (ed.), *Silenzio e procedimento amministrativo in Europa*, op. cit.; Similarly in Germany the

In case of meaning silence, either when law associates to it a tacit consent or tacit denial, the person involved can make a petition to administrative court within 60 days against the tacit measure. If third parties consider the decision formed through tacit consent illegal, they could contest it as it were an express measure and claim for its annulment before the administrative 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 Code of Administrative Judicial Procedure (C.P.A.). 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. According to Italian administrative procedural law the judge can verify whether the issued act of the administrative authority was in accordance with the law and whether the administrative discretion was used in adherence with the spirit of the law, but the administrative courts basically have only the power to annul the disputed decision and not to replace it. In this perspective the only result the claimant can aim for is a new express decision from administration more suitable with his or her interests. Only where the discretionary power of the administrative body in taking a new decision after the judgment is absent or is otherwise reduced to nil and no further investigation is needed, the judge can go so far as to order the administration to issue a certain act (as a substitute for the annulled act)<sup>50</sup>.

The rapid overview of the different remedies provided in Italian law against the administrative silence or omission to act reveals that, despite the efforts, they cannot adequately guarantee the enforcement of the right to have a prompt answer from public administration.

At the actual state, the outcome that the applicant can achieve is still under the complete control of the administration, which is manifestly not a third part. While compensation damage is still too difficult to obtain from the court, the judge's ascertainment activity in cases of omission by the public administration can lead to the enforcement of the administrative measure but, except for binding activity, cannot indicate the content of the decision. In Italian system, based on the separation of powers, the judge could not issue the measure instead of the public powers because he would infringe the domain corresponding to the exercise of administrative discretionary powers.

Moreover the substitutive power, provided by Law n. 241/1990 at Section 2, par.9 bis, appears too self-referential and seems unlikely to guarantee a real protection. It remains an instrument still in the dominion of the administration as far as it take place right inside the same administrative bodies and between persons (i.e. colleagues) who work in the same organization.

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lack of reaction on a request means rejection and against the tacit denial the requesting party has the right to make a petition to the court C. FRAENKEL – HAEBERLE, *Il silenzio dell'amministrazione*, op. cit., 1054.

<sup>50</sup> On Italian administrative justice system in English see R. PERNA, *Italian experience in the administrative proceedings*, in Round table “*The development of administrative justice system in Russia: lessons to be learned from the practices in OECD member countries*”, Moscow 25 October 2013, in [https://www.giustiziaamministrativa.it/cdsintra/wcm/idc/groups/public/documents/document/mdax/otiz/~edisp/nsiga\\_3780763.doc](https://www.giustiziaamministrativa.it/cdsintra/wcm/idc/groups/public/documents/document/mdax/otiz/~edisp/nsiga_3780763.doc); M. COMBA – R. CARANTA, *Administrative Appeals in Italian Law: on the Brink of Extinctions or Might They Be Saved (and Are They Worth Saving)?* in D.C. Dragos – B. Neamtu (eds.), *Alternative Disputes Resolution in European Administrative Law*, Berlin-Heidelberg, 2014, 85 ss.

Likewise even with regard to the 'meaning silence' that can lead to a tacit consent or denial, is not to be taken for granted that for applicants it represents the best result<sup>51</sup>. While is undoubtedly a tool of acceleration and certainty of administrative action, though it neglects the obligation to give reason for administrative decision and the deprive the applicant of an express act which rests the best way to vanish doubts and uncertainties about the existence of a decision.

When discretionary measures are involved, administrative silence mechanisms, taken in both meanings, seem not in line with the fundamental right to good administration, that instead requires that persons affected by the administration's activities could have a written measure in due time and could easily discover administration's motivations.

## ABSTRACT

Right to good administration in European law represent an umbrella principle that involves many rights for individuals dealing with public institutions and bodies. Article 41 of the Charter of fundamental rights of the European Union includes in its non-exhaustive enumeration the duty to take a decision in a reasonable time limit. As it is well known, 'good' decision is a prompt and certain decision and a good administration is an institution that timely respond to the applications of its citizens. Leaving a person in the ignorance on the dossier outcome is a typical device of supremacy of one subject over the other. To this end, this paper aims to analyze the implementation of the right to good administration in Italian legislation with regards to one of its most significant element: the right to have a timely decision from public administration. Despite the various remedies provided in different stages by Italian legislator against administrative inaction, mostly through the i.e. tacit consent institute, nonetheless when discretionary measures are involved this mechanism seems not in line with the fundamental right to good administration that instead requires for persons affected by the administration's activities to have an express act in due time. A written, explicit measure definitively rests the best way to vanish doubts about the existence of a decision and uncertainties around its motivations.

Il diritto ad una buona amministrazione rappresenta un principio di ampia portata che comprende al suo interno diverse garanzie riconosciute ai soggetti che si relazionano con la pubblica amministrazione. Nell'ambito dei diritti riconosciuti dall'articolo 41 della Carta dei diritti fondamentali dell'Unione europea, sicuramente non esaustivo nella sua elencazione, rientra il dovere di dare una risposta agli istanti entro un termine ragionevole. Com'è noto una 'buona' decisione è prima di tutto una decisione rapida e tempestiva ed una buona amministrazione è quella che risponde nei tempi stabiliti. Lo stato di incertezza sull'esito della propria istanza rappresenta infatti uno degli strumenti più efficaci per esercitare la propria autorità su un altro soggetto. In questa prospettiva lo scritto analizza l'attuazione del diritto ad una buona amministrazione nel sistema italiano con riferimento ad uno dei suoi aspetti più significativi: il

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<sup>51</sup> See V. PARISIO, *The Italian Administrative Procedure Act and Public Authorities' Silence*, op. cit., 13.

diritto ad avere una rapida risposta dalla pubblica amministrazione. Nonostante i diversi rimedi predisposti nel tempo dal legislatore italiano di fronte al silenzio dell'amministrazione, tra i quali domina il silenzio –assenso, tuttavia ogni qual volta è interessato l'esercizio di poteri discrezionali tali strumenti non garantiscono il rispetto del diritto ad una buona amministrazione che invece richiede che le persone coinvolte dall'azione amministrativa abbiano diritto ad un provvedimento espresso e in tempo certi. Un decisione esplicita resta in fondo il modo più efficace per neutralizzare i dubbi sull'esistenza di una decisione e le incertezze sulle motivazioni dell'amministrazione.

**Tag:** good administration; administrative inaction; tacit consent; remedies.

**Parole chiave:** buona amministrazione; inezia; silenzio; assenso; rimedi