ADMINISTRATIVE PROCEDURES: TWENTY YEARS ON

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Abstract

This article argues that the law governing administrative procedures has a fundamental importance. Not only has it limited the discretionary powers of public authorities in order to prevent them from degrading into arbitrariness, but it has also introduced a set of legal instruments aiming at simplifying administrative action and liberalizing economic activities, in line with the principles of freedom enshrined in the EU legal order (and in part by the Italian Constitution itself). A retrospective of the last twenty years cannot ignore the fact that many elements of change have been attenuated by public administrations. Neither politicians nor *la doctrine* have always contrasted these obstacles to the enforcement of Law No 241/90. This has, however, contributed to addressing a significant part of the relationship between citizens and public administrations. It is for this reason that it should be considered a milestone in the Italian administrative system.

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I. A shield against administrative abuses and inertia.

When assessing, twenty years on, the impact of law no. 241/1990 on the relationships between citizens and the public administration in Italy, it is worth recalling a number of aspects of the situation as it was until the late eighties.

Before this law on administrative proceedings was passed, it was held that the administration had the obligation to proceed, but not always the obligation to issue a provision. And even when it had to issue one, i.e. to conclude the procedure with a decision, there was no obligation to do so within a set time limit. If it failed to do so, the interested party could only give notice to come to a decision within a time limit of no less than thirty days, and if, at the end of this time, nothing had changed, he would have to resort to an administrative judge contesting the so-called tacit rejection. Silence, even after notice and the deadline assigned, was fictitiously equated to a dismissal of the private individual's application. The latter could bring an action against it: and if the judge admitted the action (if for no other reason than that the rejection, being tacit, was without justification), he would rule that the administration should reach a decision. Often the administration would fulfil this obligation by dismissing the application which it had anyway dismissed with its tacit rejection: so, after much expense and effort, the citizen would be left with nothing for his pains.

Law no. 241/90 and subsequent laws which have modified it have served to fill this substantial lacuna to provide safeguards in three ways: stating that the proceedings must come to a conclusion within a prescribed time limit (established by law, regulation or organisation norm), and that it must conclude with the issue of an express measure (and not with silence) and that a delay by the administration gives the private individual the right to compensation for any unjust damages.

Before the law on procedure came into force, there was no general obligation to express the grounds for an administrative provision.

To justify such a conclusion, a first line of reasoning originates, somewhat surprisingly, from the Constitution. The Constitution states that the grounds must be given for all judicial decisions (Art. 111 Cost.), but says nothing concerning administrative decisions. As a result, it was argued, using classic

reverse logic, that there is no constitutional obligation to provide the grounds for administrative provisions.

Administrative case law, it is true, already contained a significant series of cases where the administrative authority was obliged to provide grounds: measures restricting the legal sphere of the citizen, measures removing, cancelling or revoking previous findings for the citizen, acts of comparative assessment, administrative decisions etc. However, only law 241/90 prescribes a general obligation to state the grounds for all administrative measures (except regulatory acts – i.e. regulations and acts of a general nature, such as town planning regulations or an economic programme). Art. 3 of the law also gives details about the contents of the grounds. They must indicate the assumptions of fact and the legal reasoning which led to the administration's decision on the basis of the findings of the preliminary inquiry. In this way the law also provides an indication of the structure of administrative proceedings establishing that this must include a preliminary inquiry: where, as specified later in art. 6, the "facts are officially ascertained" (i.e. the assumptions of fact together with the legal reasoning to form the grounds) "carrying out the necessary acts" (e.g., "technical assessments", "inspections", orders to produce documents, art. 6 cit.).

A defect in the preliminary fact finding or even a superficial consideration of the facts which the law requires for a decision to be made (for example, that the party requesting permission to build be the owner of the land or have the right to make use of it, or that the construction plans are compatible with the planning guidelines, that the land is not allocated to another building etc.) are detrimental to the final measure, making it illegitimate. Which means they constitute a violation of the law. In this way a practice in administrative case law finds support in legislation where a defect in the preliminary inquiry gives rise to an excess of power, and thus makes the act void.

II. From the right of defence to participation in administrative procedures.

Before the nineties, there was no general rule guaranteeing that both parties could submit their case and reply to the case of the other side in administrative proceedings.

The citizen knew that there was a proceeding regarding him only if he was the one who had begun it by applying for an authorisation, a licence, clearance etc., or only in cases where laws pertaining to a given sector required notification of the initiation of proceedings (e.g. expropriation, disciplinary proceedings).

And even if he was aware that the proceeding was pending, he knew nothing of the specifics of the activities of the offices handling the proceedings, and often did not even know which office or official was involved. The fact that officials were bound to professional secrecy was an obstacle even to the interested party, an obstacle that grew as the case was passed from office to office so that it became impossible, or in any case difficult, for the interested party to know which office was handling the dossier at any given time.

Even though *la doctrine*, as of the seventies, had addressed the issue of the adversarial approach in administrative proceedings, taking inspiration from the Constitution (e.g., from the principle of the impartiality of the Public Administration enshrined in Article 97 of the Constitution), there was a widespread conviction that the right to a defence could only be upheld at trial (Article 24 of the Constitution establishes that "the right to a defence is inviolable at every stage and moment of the proceedings" cf.) and that administrative proceedings were essentially unilateral in form.

Law no. 241/90 radically changes the existing legal framework, dedicating a whole chapter (III) to participation in administrative proceedings.

According to the new rules:

a) the interested party has the right to be notified of the initiation of proceedings (Article 7);

b) whether they have received such communication or not, the interested party has the right to intervene in the proceedings, presenting pleadings and documentation (Article 10 letter b);

c) having presented pleadings and documentation, the interested party has the right to have them assessed by the administration where they are pertinent to the case in hand (Article 10 cit.);

d) in order to prepare the pleadings in his defence, or which in any case represent his point of view, the interested party

has the right to see the files (Article 10 letter a) and, in general, to have access to the documentation of the administration (Article 22). The rule on access thus replaces the rules on professional secrecy. Access is denied only to documents covered by state secret or when the privacy of third parties would be violated (Art. 24);

e) the anonymity of the administration (the citizen does not know which office and which official is handling the case at any given moment) is covered by Law no. 241, which provides for a procedure officer, i.e. a natural person responsible for the investigation until the moment of the final order that he himself adopts or else for which he prepares the model for the office adopting it (Article 4). The interested party is informed of the name of the official in charge of the proceedings upon institution of the proceedings (Articles 4, par. 3, and 8 letter c), so that that citizens have a definite reference they can turn to at any time for information on the state of the proceedings.

The officer must oversee communication between the various offices involved in the proceedings and at the same time make sure the time limit is observed. In this way an attempt was made to avoid hold-ups in a given office because there is no-one pushing the case, at the same time blocking the other offices that have to work on the next step.

As in all legal systems where there is a general discipline governing administrative proceedings, the relationship between the administrative authorities and the citizen becomes subject to rules which are borrowed from judicial process.

Notice to the interested party that proceedings have been initiated against him has the same function as a notified writ of summons.By exercising the right of access and presenting pleadings and documents, the citizen exercises his right to a defence which is constitutionally recognised in civil, criminal and administrative process (Article 24 Const.). The obligation of the administration to conclude the proceedings with a definite decision corresponds to the prohibition of the denial of justice (*non liquet*) by which all judges must abide; the obligation to give grounds for the final decision corresponds to the obligation on the judge to give the grounds for a judgment but also any other judicial ruling (Article 111 of the Constitution).

There is joint input in the relationship between the administration and the private individual, and in the relationship between private individuals, when, as often happens, the administrative proceedings produce effects, favourable for some, unfavourable for others. Suffice it to think of a land grant which several persons seek to obtain, or the parcelling out of urban territory to which the neighbouring landowners are nominally opposed, or the choice of the area where public works are to be carried out, or an application to build an environmentally harmful plant, or a large shopping centre, etc. In all these cases all those involved in the proceedings express different and often opposing points of view: so the final decision is expected to solve a disagreement as if the administration had a judicial function.

In sum, it may be said that law no. 241 extended a number of features of the judicial process to administrative procedures.

III. Simplifying administrative action.

The length of administrative procedures depends not only on the substantial lack of sanctions for delay, but also, in certain cases, on the form of the particular proceeding. Consider, for example, when the stages follow a prescribed order – the opinion which must precede the decision, the technical assessment or appraisal which has to precede the decision. Consider also when more than one administrative authority is involved – each one representing a specific public interest or when the execution of a given private activity is subordinate to a number of administrative measures each of which is to lead to the conclusion of separate administrative proceedings. A further example might be setting up a large shopping centre requiring the assent of various levels of authority (municipal and regional), of authorities safeguarding the environment (e.g. who have to provide an assessment of any environmental impact), the local authority for roads and traffic (when the shopping centre has to be connected to an arterial road) or health (the local health authority monitoring health conditions within the complex) or safety (fire extinguisher systems and assessment by the Fire Brigade).

In all these cases, the inertia of one of the competent offices will bring the proceedings to a halt because it will prevent the next office along the chain from operating, or because it prevents the

completion of the series of authorisations to which the individual is subject.

To cope with such problems, Law no. 241 adopted a series of measures aiming to "simplify administration" (chapter IV of the law).

First, concerning the opinions which laws sometimes require for an administrative measure to be adopted (e.g. the opinion of the State Council for the approval of a Government regulation, the opinion of the Territory Adjustment Council for permission to build), Article 15 states a time limit for issue (45 days) after which the competent administrative body can proceed "regardless of whether the opinion has been obtained". When the decision is instead subject to a technical opinion by a specialist, i.e. when the opinion regards technical matters (engineering, health, the environment etc.), provision is made for a longer time limit (90 days). If after this time no opinion has been received, the administrative authority may turn to another office with similar technical competence or to a university (Article 17). In this way, a remedy has been sought to the delays caused by the inertia of the offices called upon to express a technical opinion or carry out an assessment, authorising the administration to decide regardless of the opinion or to look elsewhere for a technical assessment.

Second, to solve the rather more complex problems caused by the legal possibility of there being several administrative authorities involved in a single procedure, or more than one procedure required for the execution of a private activity, law No 241 lays down some general provisions regulating the "services conferences" (Article 14 ff.). This legislative instrument aims at preventing the offices involved in the procedure or set of procedures from acting unilaterally with findings that, if negative, block the proceeding itself or in any case have a negative effect on the outcome. Instead of acting unilaterally, such offices must meet in a conference. In this way the decision is taken collegially by the majority. What would be a power of veto outside the conference, thus become points to be put to the vote, thus, broadly speaking, the procedure or set of procedures become a collective act.

There is, however, the risk that the public interest is endangered if the opinion of offices which are in the minority within the conference is completely ignored at the time of the final order. In order to eliminate or at least attenuate this risk, the

legislator has placed a number of limitations on the application of the majority principle.

First of all, dissent by one or more representatives of the administrations involved must not only be justified, but must contain the specific indications of the changes to be made to the project in order for approval to be granted (Article 14-4). In other words, the dissenting office cannot merely say no, but has to make an alternative proposal so that, if accepted, it would give its approval. The underlying idea is not only to prevent decisions being remitted to the mere fact of a majority vote, but also that an attempt must be made to encourage dialogue between participants leading to a positive result.

Secondly, when the dissenting administrative body is responsible for safeguarding the landscape, the environment, health, or the historical and artistic heritage, a majority vote is not sufficient. The decision in these cases is the province of the political organs (the cabinet, the regional council, the city council: Article 14-4). These are deemed to be the most qualified to solve the conflict between offices if the holders of the public interest considered most important (the environment, landscape, health etc.) are in the minority at the conference.

IV. The advantages and disadvantages of simplification.

At the roots of the rules – just mentioned – aiming at simplifying administrative action there is an important assumption, that is to say that administrative pluralism has costs that are shifted on end users.

If the decision has to follow on from an opinion or a technical assessment carried out by public offices other than the one which will reach a decision, and if the protection of specific public interests is entrusted to a different public authority for each of these interests, administrative procedures will go on for a period of time that is simply not foreseeable. The one who suffers from all these drawbacks is the citizen who is counting on the decisions and who can undertake a specific activity or build something only on the basis of the final measure of the administrative procedure.

The law on administrative procedures is the result of a parliamentary decision. It is more important that citizens be

satisfied in their expectation of an expeditious administration with its effects on his/her freedom (especially economic freedom) rather than to satisfy the need for total satisfaction of all the public interests which that freedom will have to come up against. To satisfy such an expectation it is by no means impossible to forego an opinion or ignore the dissent of the office opposing the measure because - it may usefully be underlined - dissent is not expressed by an office favourable to the measure in opposition to a majority against but, in the great majority of cases, comes from an office which is against a proposal favourable to the private individual.

The rules on simplification suggest a further reflection. Are we absolutely sure that the proliferation of public interests, each entrusted to one specific administration, and the consequent need for a variety of administrations to remove the barriers to the activity of a private individual, is compatible with our constitutional order which, enriched by principles of the European economic constitution, gives pride of place to economic freedom and institutions of property and enterprise?

The rule of the so-called maximisation of specific public interest, set out in public law doctrines, which shows the close connection between the proliferation of the public interest and the multiplication of the administrative offices, often leads an administration to obtuse and prejudicial stands hostile to the private individual. The "conference of services" was an attempt to dilute these positions in the midst of the collegiate dynamic, stripping them of power when they become a minority voice within the conference. Seen in this light, the simplification of administrative procedures produces effects convergent with the liberalisation of private activity. The fewer the administrative fetters, the greater the freedom the private individual enjoys.

V. From simplification to liberalization of economic activities.

The connection just mentioned between the simplification of administrative procedures and the liberalization of economic activities becomes still more evident when considering two further instruments provided for in Law No 241, the notification of

commencement of work and tacit approval (*silenzio-assenso*), that are regulated by Articles 19 and 20, respectively.

When the authorisation or act of consent, whatever terminology is used, envisaged by the law, are bound in so far as they depend exclusively on compliance with the requirements and prerequisites of law, they can be substituted by a declaration of the interest supported by a personal declaration also in lieu of the certificates and attestations required by law. Thirty days after the declaration has been made to the authority, the work subject to it can begin.

The public authority may prevent the activity from being carried out within thirty days of receiving the declaration, or it can interrupt it even afterwards as long as it keeps to the prerequisites of official annulment or withdrawal (such as a factor emerging subsequently, or a specific public interest).

A public authority may only block private works if the activity that the private party declared it was able to carry out requires discretionary authorisation (not being subjected, thus, to the norms disciplining the notification of commencement of work) or if the activity actually carried out is different from what is declared – i.e. it is an activity that has to be authorised through a discretionary measure. Thanks to the substitution of the authorisation by the notification of commencement of activities, the private individual has greater freedom. This happens every time the public authorities' previous power to intervene becomes subsequent (and possible) power.

Even if it has been included in the chapter of Law No 241 dealing with administrative simplification, the notification of commencement of work is, at least ideally, a form of liberalisation.

It is true that administrative procedures are simplified because public authorities are freed of the necessity to examine applications for authorisation and take the corresponding measures. But what is more important from the legal and political point of view is that an individual may exercise economic freedoms without having to wait for the measures that public authorities have the power to take. As a result, it becomes the individual's responsibility to assess the prerequisites and the requirements established by law for carrying out the activity.

The other legal instrument for which a connection between simplification and liberalization emerges is the tacit approval

(*silenzio-assenso*), which is provided by Article 20 of Law No 241/90, after the amendment introduced in 2005 (Law No 80/2005). When authorisation (or in any case the act of consent) by a public authority is still required, its silence after the time limit previously established for the conclusion of the procedure "is tantamount to acceptance of the application".

This rule might appear revolutionary if its scope of application were not drastically reduced by the exceptions envisaged by paragraph 4 of Article 20. Indeed, tacit approval cannot be applied to proceedings concerning the cultural heritage and landscape, the environment, national defence, public security and immigration, public health and safety, or cases where the law states that the administration's silence is tantamount to the rejection of an application, or other procedures which the government might identify. Therefore, there can be no tacit authorisation by the national heritage and environment bodies, nor a tacit assessment of environmental impact, nor a tacit issue of a passport, nor the tacit issue of a residence permit to an immigrant.

So the principle of affirmation remains. While in the past the inertia maintained by the administration regarding private applications was equated to a rejection, today, if the application has been formalised as described in section 1, this inertia is in principle tantamount to an approval of the application. It shows, arguably, a friendlier approach to the private individual coming into contact with public authorities.

VI. The liberalization of private activities between the Italian economic constitution and that of the European Union.

In its original form, Article 20 of Law No 241/90 attributed to the government the recognition of the laws that subjected private activity to administrative authorisation. This resulted in the monstrous figure of around 10,000 authorisations. What was at issue, then, was not only if and how the administrative regime (using notification of commencement of works in place of bound authorisation and subjection of discretionary authorisation to the regime of tacit approval) could be mitigated, but also whether, in actual fact, the authorising regime was to be maintained or private activities could be freely carried out.

A clear indication in favour of freedom has come from European Union law. The European Union is founded on the "principle of an open market economy based on the "principle of an open market economy with free competition" (Art. 4 par. 1 Treaties of Rome). Among the member States there is "a common market characterised by the elimination of obstacles to the free circulation of merchandise, people, services and capital" (Art. 3 letter c), Arts. 23-31, Arts. 39-60); public companies are subject to the rules of competition (Art. 86 par. 1); the same holds for firms appointed to manage services of general economic interest, whether public or private (Art. 86 par. 2). Access to the market by new firms is guaranteed by the prohibition of understandings or practices limiting competition (Art. 81) or abuse of the dominant position (Art. 82).

It is in the light of these constitutional provisions governing the economy that authorising instruments (such as authorisations, licences. clearance, qualifications, enrolment in registers or lists) must be considered. All such instruments often create barriers to the entry of new firms or new subjects in specific markets, especially when there are constraints or overall contingents. They imply, consequently, an attenuation of competition, if not its elimination. It must be observed also that the anti-competitive effects are multiplied when the act of consent by public authorities is requested by foreign firms intending to trade their products on a market other than the native one and have already requested and obtained authorisation and a license in their own State. In this case, the incompatibility of much national legislation with the principles of European Union law becomes still more evident.

First, the Court of Justice of the European Communities, followed by the Commission, have approached the second of the two problems using the criterion of mutual recognition. It implies that, in principle, any goods that have been legally produced and marketed in its country of origin (Home State) may be marketized within another Member State (Host State), without being subject to the authorisation regime in force there.

Second, the problem of reconciling economic freedom and public control has been taken up by the European Commission and the Council with a series of directives imposing the liberalisation of a series of activities – from road transport, transport by sea and air to the production of electrical energy and

electronic means of communication: activities which in the past, and the recent past at that, were subject to authorisations, concessions, licences etc. and which are now free. In all such cases, EU law does not deny the need or at any rate the admissibility of public control. Indeed, the Treaty lays down an explicit provision allowing each Member State to limit the free movement of goods, together with the prohibition of such measures that amount to quantitative restrictions on import or export (measures which are usually administrative) (Art. 30 Treaties of Rome). However, the underlying reasons for this limitation – i.e. the public interest which justifies it - are peremptory: public morals, public order, health reasons, the protection of the cultural heritage, the protection of industrial or commercial property (Art. 30 cit.). And the Court of Justice has always denied that the reasons for limiting the free movement of goods (and the rule is valid also for other freedoms of circulation: people, services, capital) can also be of an economic nature. Thus, a Member State cannot introduce limitations (and thus authorising regimes) which in themselves are based on economic grounds or economic policy, because this type of assessment is the exclusive province of the market.

From this point of view, the economic constitution of the European Union differs from the Italian one, which is made up of the provisions of the Constitution which concern the economy. Article 41 of the Italian Constution recognises free enterprise (paragraph 1). However, it states (paragraph 3) that laws shall institute the appropriate programmes and control of public and private economic activity so that it can be directed and coordinated for social purposes. This effectively makes it possible to functionalise commercial activities for social purposes (by law, i.e., coercively and irrespective of the will of the entrepreneur). It may be argued, therefore, that this form of public intervention is completely irreconcilable with the "principle of an open market economy and free competition".

The conflict between the two visions of the relationship between the State and the market first came to the fore with the establishment by the European Court of Justice, of the supremacy of EU law over the domestic law of the Member States, which was eventually accepted by the Italian Constitutional Court in 1984. The conflict become still more evident after the constitutional reform of 2001. Among other things, Article 117 of the

Constitution was modified. It now establishes that the legislative power is exerted (by the State and Regions) not only "in accordance with the Constitution", but also through the observance "of the limitations deriving from the Community legal system and international obligations". Seen in this light, Law No 241, with its admittedly timid indications regarding the liberalisation of private commercial activity (notification of commencement of work and tacit approval), follows the EU line.

VII. Twenty years later: successes and failures.

If we seek to understand if and the extent to which the law governing administrative procedures has determined a shift in the framework of relationships between the citizens and public administrations, we cannot limit ourselves to a comparison of the normative situation before Law No 241 and what came out of the 1990 law and the numerous changes that took place over the successive twenty years. Indeed, it must also be said that the public administrations have put up strong resistance, and in some cases a strenuous one, to the innovations introduced by Law 241. Some examples may illustrate this.

The norms concerning the limit for the conclusion of the proceedings and the obligation to define this with a specific measure have been systematically disregarded. The recent changes to law No 241, which envisage compensation for damage arising from the delay, is itself an attempt to counteract this behaviour, providing sanctions for the failure to meet the obligation that has been systematically violated.

Along with delay in issuing the measure, there still remains the practice of failing to conclude procedures, a silence which, despite the recent extension of the conditions for the application of the tacit approval model, still remains a meaningless silence which only through the action of the interested party (now exonerated from compulsory presentation of notice to an inert administration) becomes tacit rejection.

On this point, the legislator has intervened outside the law on administrative procedures by introducing a special fast track for cases heard by administrative judges (Article 2, Law No. 205/2000 which corresponds to Article 21-bis of Law No 1034/1971 on the institution of regional administrative courts).

Rather than the long wait of the old cases appealing against tacit rejection and having to wait for a judgment which simply reiterated the obligation of the administration to arrive at a decision, the claimant now has the right for his action against the inert behaviour of the administration to obtain a ruling within thirty days of making the claim with the Administrative Court. With his "succinctly motivated" ruling, the judge gives the administration a short time limit within which a decision must be reached (no more than thirty days), and with the same ruling, or a subsequent one, sought by the claimant, an officer is appointed to act in place of the defaulting administration.

Another provision of Law No 241 that is systematically ignored requires the previous administration to obtain the documents in its possession or held by another public administration (Art. 18). The legislative intent in transferring from the citizen to the administration the burden of procuring the necessary paperwork, or that which in any case is required for the decision, has been to a large degree frustrated.

Nor has simplification always been successful. Most of the time, the administrative body which is supposed to reach a decision, and which could do so without the prescribed opinion, once the time limit has expired (as established by Article 16), prefers to wait to make sure that the opinion is issued even if with great delay, making use of the protestative formulation of the specific provision" ("[…] the administration may proceed with or without having obtained the opinion", Article 16, paragraph 2).

Even more frequent is recourse to the faculty of bypassing an office which has not expressed a technical opinion within the legally required 90 days, sending the request to another office with equivalent jurisdiction or a university (Art. 17).

Turning now to the conference of services, it is effectively a way of significantly accelerating the work of the administration if the work takes place within the ninety days established by the law (Article 14 ter, par. 3). However, it sometimes takes an extraordinary number of meetings, many of which come to nothing because of the non-participation of offices whose representatives do not show or because they abstain from taking a position pending consultation either with colleagues or with their superiors. Another obstacle emerges when the representatives of the same office, who change each time, express different opinions.

Often the minutes are so confused that it is not possible to understand what the official position is supposed to be.

All the above is couched in the most general terms, and the assessment of the situation is a little impressionistic, given the lack of sufficiently reliable data on how the institution operates. However, with regard to both the conference of services and the other institutions of Law 241, it should however be pointed out that performance varies from administration to administration and, above all, from region to region. The poor performance of the administrations of the south of Italy, due to the unsatisfactory quality of the personnel (many of whom are employed outside the canons of meritocratic selection procedures), and the predominant political-administrative culture in these areas which turns the citizen-user into a subject and the bureaucrat into an arbitrary master, explains how some of the innovations, while meritorious, brought about by Law 241, have not taken hold.

VIII. The role of *la doctrine.*

The remarks just made with regard to the cultural environment ought to be completed by considering another important element, that is to say the thoughts about public law. Among the forces opposing the full enforcement of Law No 241/90 and, more generally speaking, the liberal spirit which inspires it, a particular mention needs to be made of part of administrative doctrines (and the case law).

The notification of the commencement of works and tacit approval have been looked upon with suspicion, as if the two institutions were likely to bring about anarchy, devastation of the territory, and destruction of the environment.

It is significant that the majority of doctrinal contributions on the notification of the commencement of works regard the protection of third parties. The underlying idea is that third parties could be harmed by private individuals carrying out unauthorised works, taking advantage of the notification of the commencement of works. This is a way to neutralise the innovative range of the institution, which offers above all a means of liberalising the actions of private individuals.

Equally significant from the cultural point of view is the debate which has blown up over the nature of the notification of

the commencement of works. A part of the case law followed by a part of *la doctrine* argues that the notification of the commencement of works is an administrative measure (and not a declaration by the private individual) since its efficacy in terms of authorising a private individual to act does not depend on the notification (and thus the answerability of the private individual), but on the fact that the administration has not intervened within the time limit assigned to it to prevent the private individual from going ahead. The implicit assumption is, however, at least questionable, in that freedom is in any case the result of a decision, albeit negative (of a concession), of the administrative authorities.

There is therefore a long way to go before the Italian administrative system brings itself into line with the principles of freedom enshrined in the EU legal order (and in part by the Italian Constitution itself). Law No 241/90 has, however, contributed to covering a significant part of the way. It is for this reason that it should be considered a milestone in the Italian administrative system.

Bibliographical references

Given the nature of this short essay, only some bibliographical references will be provided.

1. My interpretation of law No 241 as a powerful element of (potential) change has been advanced in several pieces, including G. Corso & F. Teresi, *Procedimento amministrativo e diritto di accesso ai documenti amministrativi* (1992, 2nd ed.), and G. Corso, *Manuale di diritto amministrativo* (2009).

2. There are not many analyses of law No 241/1990 in English. Among these, see D. Sorace, *Administrative Law*, in Ugo Mattei & Jeffrey Lena (eds.), *Introduction to Italian Law* (2003), 125**;** M.P. Chiti (ed.), *General principles of administrative action (*2006); G. Pastori, *Recent Trends in Italian Public Administrations*, 1 *Italian Journal of Public Law* 18 (2009).