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TIPS ON COMPLEX ADMINISTRATIVE DECISIONS: MULTIPLICITY OF INTERESTS AND ELIMINATION OF DISSENT

SPUNTI SULLE DECISIONI AMMINISTRATIVE COMPLESSE: MOLTEPLICITÀ DEGLI INTERESSI ED ELIMINAZIONE DEL DISSENSO

SINTESI

L'emergere di obiettivi che interessano l'intero Paese spinge spesso il legislatore a utilizzare la clausola «interesse nazionale» nelle disposizioni che procedimentalizzano l'agire pubblico. L'intenzione normativa è, così, quella di accelerare le decisioni e giungere più velocemente al risultato voluto: questo, a maggior ragione, quando esso conduce all'ottenimento di finanziamenti europei.
È questa anche l'intenzione del legislatore nel d.l. n. 77/2021, il quale, agli artt. 12 e 13, prevede l'attivazione di poteri sostitutivi e meccanismi di superamento del dissenso i quali, di fatto, rischiano di tradursi nella eliminazione di interessi pubblici, contrastanti con quello «nazionale», che ne ostacolano – o anche solo ne rallentano – la realizzazione. I meccanismi così congegnati, però, presentano almeno due aspetti critici. Anzitutto, non garantiscono il rispetto del «principio del risultato», laddove inteso quale corollario del «buon andamento»: attribuire un valore trainante a un solo interesse «nazionale» silenziando gli altri interessi pubblici con esso eventualmente contrastanti non significa giungere a una buona decisione amministrativa, la quale è invece – per sua natura – complessa. In secondo luogo, essi spostano il centro decisionale dalle autorità amministrative a quelle politiche: sacrificando il potere amministrativo sull'altare dell'«interesse

nazionale». Ne deriva una inevitabile esautorazione dell'Amministrazione dall'esercizio dei suoi poteri, sulla scia di un *trend* in ascesa.

ABSTRACT

The emergence of objectives that affect the entire country often prompts the legislator to use the 'national interest' clause in the provisions that proceduralize public action. The legislative intention is thus to speed up decisions and get more quickly to the desired result: this, all the more so when that result leads to obtaining European funding. This is also the intention of the legislator in law decree no. 77/2021, which, in Articles 12 and 13, provides for the establishment of substitutive powers and mechanisms for overcoming dissent that, in fact, seriously risk translating into the elimination of public interests – conflicting with the 'national' one – that hinder (or even only slow down) its implementation. The extreme mechanisms thus devised, however, have two critical aspects. First of all, they do not guarantee respect for the 'principle of result', when understood as a corollary of the so-called 'good administration': attributing a driving value to a single 'national' interest while silencing other public interests that may conflict with it does not mean achieving a good administrative decision, which is – by its very nature – complex. Secondly, they shift the centre of decision-making from administrative to political authorities: sacrificing administrative power on the altar of the 'national interest'. The result is an inevitable disempowerment of the Administration from exercising its powers, in the wake of a rising trend.

PAROLE CHIAVE: Complessità; dissenso; PNRR; poteri sostitutivi; conferenze di servizi.
KEYWORDS: Complexity; dissent; NRRP; substitute powers; conferences of services.

1. Complex administrative decision and multiplicity of interests involved. The research hypothesis: the inadequacy of the simplification approach through elimination of interests

The theme that we intend to address concerns the conflicts – and the current methods of resolving them – between interests that have different importance and which – even if not necessarily – can refer to different territorial levels of government, where the administrative decision[1] has enough complex-

1 The syntagma «administrative decision» – which undoubtedly has a certain vagueness, sharing the observations of A. Police, *La predeterminazione delle decisioni amministrative. Gradualità e trasparenza nell'esercizio del potere discrezionale*, Naples, 1997, *passim*, esp. p. 87 – is understood here in a broad sense, *i.e.* as a discretionary choice of the public administration which reconciles the interests involved in the specific cases in the light of the investigation carried out: in other words, the lemma is used as a synonym for an administrative act – not necessarily the final provision of the proceeding – in which the administrative activities of looking after interests fade. The thesis is attributable, in doctrine, to E. Cannada Bartoli, entry *Decisione amministrativa*, in *Nuovissimo Dig. it.*, vol. V, Turin, 1960, p. 269, for whom the administrative decision coincides with the administrative measure. See also F.G. Scoca, *La teoria del provvedimento dalla sua formulazione alla legge sul procedimento*, in *Dir. amm.*, n. 1/1995, pp. 1 ff., esp. p. 38. Of the same opinion P. Virga, *Il provvedimento amministrativo*, Milan, 1968, p. 105, according to whom administrative decisions, despite having a legal nature, are in any case administrative measures, the result of will and judgement. In this sense, M. Bombardelli, *Decisioni e pubblica amministrazione. La determinazione procedimentale dell'interesse pubblico*, Turin, 1996, p. 3, by «administrative decision» means the combination of judgment and will that creates a conflict of interest «by selecting a particular arrangement among other possible ones». Lastly, A. De Siano, *Precedente giudiziario e decisioni della p.A.*, Naples, 2018, which in any case manages to give it an even more nuanced definition in terms of outlines, de-formalizing the «administrative decision» and placing it in the broader context of the possible choices made by the public entity: «con la locuzione "decisione amministrativa" […] potrebbe anche semplicemente intendersi la determinazione sul da farsi, che viene assunta da un soggetto di regola pubblico alla luce di un certo percorso istruttorio conformandosi al paradigma normativo di riferimento»; l'A., consapevole della «valenza meramente descrittiva» della definizione, tale per cui essa «potrebbe rientrare più nella scienza dell'amministrazione che in quella propriamente giuridica», ne specifica quantomeno i contorni circa la provenienza della decisione da un'Amministrazione pubblica, così sostituendo l'aggettivo qualificativo «amministrativa» col complemento di specificazione «della p.A.» (pp. 23-24).

We must acknowledge a different meaning of the syntagma – in the so-called narrow sense – which, at least originally, was opposed to the lemma «provision», leaving to the «administrative decision» (not the function of active administration, but only) the function of judicial act. For M. Nigro, *Le decisioni amministrative*, Naples, 1953, pp. 33 ff. (but also Id., entry *Decisione amministrativa*, in *Enc. dir.*, Milan, 1962, pp. 810 ff.), the administrative decision is a contentious species of the administrative act of assessment (of the applicability) of a certain rule with respect to a concrete case, except for some isolated cases in which that act has a constitutive (eliminatory) character. In this sense also the entry of F. Merusi, G. Toscano, *Decisioni amministrative*, in *Enc. giur.*, vol. X, Rome, 1988, p. 3. A.M. Sandulli, *Manuale di diritto amministrativo*, Naples, 1984, p. 610, adheres to this orientation, which includes them among «i provvedimenti che operano su precedenti atti amministrativi», so they can be subject of controversy. Similar content, in the same years, has the notion provided by E. Capaccioli, *Manuale di diritto*

ity to cross them all. This is because (the intention of the analysis is declared since this opening) it is above all of these times – certainly the last twenty years – the tendency of the legislator to affirm the primacy of driving public interests (actually, not infrequently attributable to the meta-juridical value[2]) which have strategic and national importance, being their realization capable (*in mente legislatoris*) of reviving the destiny of the country, now from a political-institutional point of view, now from an economic-social point of view.

However, this tendency encounters a necessary obstacle in the legal and social framework of the country in constant crisis, in which the difficulty of resolution is immediately felt due to the enormous congestion of interests – public and private – whose balancing is becoming increasingly difficult[3].

As will be seen shortly, the increase in social complexity is associated with an equal trend in the context of standardization, which is often the sub-

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amministrativo, Padua, 1983, p. 351: the decision is an 'act of justice', not an 'act of management of public interests', which can be adopted only upon appeal by the interested party, the decision-making content of which must be limited to the application, it is a dutiful act and does not present any profile of discretion. In short, it is in part comparable to a sentence, albeit in the form and legal regime of administrative acts. Again in this sense, see the voice of A. Travi, *Decisione amministrativa*, in *Dig. disc. pubbl.*, vol. IV, 1989, p.p. 524 ff., for which decisions are measures that settle disputes subject to an administrative appeal: they are «esclusivamente preordinate a risolvere conflitti con gli altri soggetti e che pertanto non si risolve mai nell'amministrazione attiva» but they are, indeed, «espressione di una funzione tipicamente giustiziale» (p. 527).

2 On the relationship between norms and values, and on the intrinsic danger of a law that goes beyond the former to relate individuals to the latter without the mediation of a positivised filter, see P.L. Portaluri, Bannkreise *giurisdizionali. Qualche appunto di metodo*, in *Ordines*, n. 2/2022, pp. 210 ff.

3 So much so that the 'administrative decision' that balances them also assumes the qualification of 'complex' in doctrine: according to F. Cortese, *Coordinare per decidere: il procedimento quale sede di sintesi per gli interessi pubblici*, in Aa.Vv., *Annuario AIPDA 2017*, Atti del Convegno AIPDA su Decisioni amministrative e processi deliberativi, Naples, 2018, pp. 101 ff., it is such in cases in which at least one of the following circumstances occurs, i.e. if it involves several subjects who aspire to be represented; whether the interests to be taken into consideration are many and varied, as well as – perhaps, even partially – divergent; whether the norms to be considered are of different origins and ranks; if there are more outcomes available; whether the decision and the way in which it is taken present actual projections on rights and freedoms; whether «the question is perceived as effectively in need of a 'final' determination, but the concrete risk is distinctly perceived that it cannot necessarily be closed with a single decision or, better, that it does not end with its mere adoption and with its concrete realization, reverberating on the adoption of other decisions [...] or giving rise to further administrative issues [...] or confirming and radicalising the participatory instance» (p. 104; our translation).

ject of filings, second thoughts, rearrangements, amendments, reforms. All tricks that – paradoxically – aim to reduce complexity by simplifying it.

However, since this objective is often missed, the legislator opts for a more radical simplification, normatively imposing public interests as a priority consideration, the realization of which becomes an imperative for the Administrations, whose typical decision-making role is often reduced as it is prey to a regulatory caging which – where administrative decisions lead (or risk leading) to the failed realization of the national strategic interest considered from time to time – shifts the decision-making focus to the political sphere.

The tendency therefore leads to inevitable reflections on the capacity of the regulatory system thus elaborated to truly "simplify" and to achieve strategic objectives while respecting the balance of public and private interests, inevitably deprived of the subject institutionally called to carry it out, especially when the cases submitted to its judgment are complex.

2. Complexity as a τόπος of administrative law *versus* simplification approach

In general, it must be premised that this of complexity is a τόπος of law[4]– administrative in particular[5]. Indeed, we owe an incessant reconstructive

4 See the voice by A. FALZEA, *Complessità giuridica*, in *Enc. dir.*, Annals, vol. I, Milan, 2007, p. 201 ff., in which the close link between society and law is appreciated, where a growing social complexity is counterbalanced by an equally complex law which has the duty to be non-chaotic, orderly and linear: «[I]l diritto positivo è uno strumento ordinatore della complessità sociale e perciò costituisce a sua volta una realtà complessa, una realtà nella quale il predicato della complessità si atteggia però nei modi dell'ordine e della razionalità» (p. 213).

In other words, Falzea's essay brings the law back to its primary task, the ordering one of a social feeling that changes and evolves over time, leading to the growth of juridically relevant interests. For the A., there are two categories « che nella loro congiunzione assolvono un ruolo fondante dell'esperienza sociologica e giuridica: *le situazioni di interesse socialmente e giuridicamente rilevanti*» (p. 202, original italics); where, while the relevance of the former is assessed by resorting to cultural rules, «[L]a rilevanza giuridica delle situazioni di interesse discende anch'essa da una valutazione etico-sociale, ma è dotata di un apposito e distinto criterio di giudizio, costituito dal sistema culturale del diritto, riservato a quelle situazioni di interesse che presentano, all'interno dei valori ai quali si informa la cultura della società, quel più intenso significato etico-sociale che si traduce nella garanzia di realizzazione – la quale costituisce oggetto, a sua volta, di regole particolari, di organizzazione e di azione, che quella garanzia stabiliscono e disciplinano» (always p. 202).

5 Lastly, in this regard, read the reflections of P. FORTE, *Complessità e situazioni giuridiche. Notazioni teoriche*, in AA.VV., *Scritti per Franco Gaetano Scoca*, Vol. III, Naples, 2020, pp. 2141 ff.

and critical work of procedural disciplines to doctrine and jurisprudence which – cyclically moved by public interests of occasional relevance[6] – have (perhaps correspondingly) tackled the problem of inevitable structuring (which will be referred to here with the lemma «system»[7]) of administrative relations and activities with an analytical approach, typical of complicated systems and oriented towards simplification, rather than with the more appropriate synthetic

6 An example of this is the imperative need for «maximum incentives for economic development» – M. Mordenti, P. Monea, *Ora l'impresa risparmia sui tempi e il Comune riorganizza gli uffici*, in *Guida agli Enti locali*, n. 3/1999, pp. 37 ff., esp. p. 40 – who had already at the end of the '90s of the last century called for the issuing of the regulation on the one-stop shop, in which the so-called conference model emerged for the first time: see P.L. Portaluri, *Il procedimento «semplificato» (mediante conferenza di servizi) per la realizzazione di impianti produttivi nel regolamento sullo sportello unico*, in E. Sticchi Damiani, G. De Giorgi Cezzi, P.L. Portaluri, F.F. Tuccari (eds)., *Localizzazione di insediamenti produttivi e semplificazione amministrativa. Lo sportello unico per le imprese*, Milan, 1999, pp. 39 ff.. Already then the A. expressed perplexity about the effective unifying – and therefore simplifying – capacity of the conference model. The same uncertainties still exist today, in the time of the PNRR, where the economic-productive interest, read through the lens of sustainability, rules, but the procedural modules remain uncompositional: P.L. Portaluri, *L'«incanto che non so dire»: unicità e unicismi procedimentali nel governo del territorio*, in *Federalismi.it*, n. 29/2021.

7 The theory of complex systems, which also finds application in the legal field, intersects the most varied thematic fields, from mathematics to engineering to biology. See, in this regard, the reconstruction already made by A. Falzea, *Complessità*, cit., esp. pp. 207-208.

Here, in order to stipulately agree with the reader on the meaning attributed to the term «system», the definition provided by the American biologist J.C. Miller can be used. See Id., *Living systems. Basic concepts*, McGraw-Hill, 1978 (1st ed.), italian version edited by A. Beretta, *La teoria generale dei sistemi viventi*, Milan, 1986, p. 48: «I significati del termine "sistema" vengono spesso confusi. Il più generale, tuttavia, è il seguente: un sistema è un insieme di unità interagenti che sono in relazione tra loro. La parola "insieme" implica che le unità che lo compongono hanno proprietà comuni, il che è essenziale ai fini della relazione e interazione tra esse. Lo stato di ciascuna unità è vincolato, coordinato, o dipendente dallo stato delle altre unità. Inoltre vi è almeno un'operazione che si può applicare alla somma di queste unità che dà un valore maggiore del valore che si ottiene applicando quell'operazione alla somma di quelle unità prese singolarmente».

The 'system' can typically be: simple, complicated, complex, chaotic. Depending on the number and variety of its elements, as well as the relationships between them. In the simple system, the elements are few, known, homogeneous, and the relationships between them are linear; in the complicated system, the elements increase quantitatively, with unchanged relations; in the complex system, as the quantity and quality of the elements increase, non-linear relationships are associated; finally, in the chaotic system, the elements are quantitatively and qualitatively unknown, just as the relationships between them are unknown.

The definition of 'complexity' is due to the biologist J. De Rosnay, *Il macroscopio. Verso una visione globale*, Bari, 1978 (English version, *The Macroscope: a New World Scientific System*, New York, Harper & Row, 1979), pp. 117-118, for which a complex system is composed of a large variety of components or elements that possess specialized functions; these elements are organized by internal hierarchical levels; they are linked by a high density of reticular and non-linear

method, which instead serves to understand a complex system as a whole[8]. This, especially in the context of rationalizing the sources of law with respect to public action, has led to incautious regulatory simplification interventions with a counterproductive effect: a "complicating simplification"[9].

The ineffectiveness of these interventions[10] rests on a fundamental misunderstanding: namely that complexity is in itself an ungovernable phenomenon and, therefore, to be eliminated. Thus, the simplification approach aims to

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interconnections.

In short, a complex system is that system made up of «elements» (many and different from each other) and «connections» (many and non-linear): so that – understood in its entirety – it is different from the mere summation of its elements (characteristic, instead , this, typical of complicated systems).

The theory of complex systems has also achieved a fruitful application in the philosophical and social fields: see N. Luhmann, R. De Giorgi, *Teoria della società*, Milan, 2013 (2nd ed.). See also the entry of N. Luhmann, *Complessità sociale*, in the *Enciclopedia delle Scienze sociali*, Rome, 1992.

8 H. Atlan, *L'organization biologique et la théorie de l'information*, Paris, Hermann, 1972, then 1992; then Seuil, 2006, distinguishes: «A complicated system is a system whose structure and operating principles we understand: in principle, nothing prevents us from having full knowledge of it with time and money. On the contrary, the complex system would be that of which we have a global perception, in terms of which we can identify and qualify it, even though we know we do not understand it in its details».

Therefore, adopting an analytical approach to a complex system always leads to losing something. Thus G. Zanarini, *Complessità e causa complessa*, in Aa.Vv., *Caos e complessità*, edited by SISSA, Naples, 1996, p. 8: «What is complicated, once explained, can be made simple; what is complex, on the other hand, cannot be traced back to the simple elements that constitute it without irreparably losing something essential. The word complex in fact refers to the plot, to the fabric. And the fabric, despite being made up of parts (the threads, the weft, the warp), has characteristics that the individual parts do not have, and which can only be 'explained' to a limited extent by undoing the weave» (our translation).

9 The expression is borrowed from the essay by M. Ainis, *La semplificazione complicante*, in *Federalismi.it*, n. 18/2014, which identifies in the excess of regulation one of the negative features of the legal system, which politics deludes itself of being able to solve with simplification: «Negli ultimi anni si è affermata una sorta di dittatura culturale della semplificazione, non c'è governo che non vi attinga a piene mani; e ogni volta l'ultima raffica di semplificazioni viene presentata come la più risolutiva, anzi definitiva» (pp. 2-3). Given, however, the continuous failures of the simplification approach, for Ainis «*è necessario passare dalla semplificazione alla semplicità* delle leggi e dei procedimenti. La prima è un'attività *ex post*, ed è sempre problematica, come raddrizzare le gambe a un bambino nato storpio. La seconda attiene al concepimento delle regole, ed è ancora più difficile, perché chiama in causa lo stesso abito mentale dei giuristi» (p. 8, original italic). Jurists too – especially constitutionalists and administrativeists – are guilty of cultivating pivotal and nuanced classifications and distinctions that complicate the understanding of law.

The methodical approach to legal complexity is well explained by M. Bombardelli, *Semplificazione normativa e complessità del diritto amministrativo*, in *Dir. pubbl.*, n. 3/2015, pp. 985 ff., spec. pp. 1018-1019, who also recalls the vivid formulation of Ainis, where he observes that the regulatory interventions adopted for the purpose of simplifying actually end up further complicat-

truncate, elide, subtract: norms, procedures, effects, interests. Especially – as far as is relevant here – interests.

Yet it is quite evident that the subtraction of a "piece" of the system does not simplify the latter, since the relationships between the elements of the system are not linear, so that eliminating one of the gears from the machine does not achieve the goal of reducing them by creating a more brief[11], precisely because a chain (understood as a linear union of elements) does not exist: perhaps the system could re-adapt itself in a less complex way, where its framework resisted subtraction; but it is only one of the hypotheses, we would say the most remote.

Conversely, the complexity of the legal system – in general but, as far as we are concerned here, of the administrative law system – must be understood as the *existential presupposition* of its very life[12]: since it is not a characteristic to

ing the regulatory framework in Italy: «The problem derives from the fact that precisely identified the objective of simplification, sought by intervening on the complication of the system of sources, without instead paying due attention to the well-distinguished phenomenon of its complexity. In fact, it is not enough to attack the complication of the system of sources, that is, the excessive number of 'folds' of a phenomenon which is *cum-plicatum* and can be simplified through interventions of 'explanation' and reduction of the discrete elements that compose it. Instead, it is necessary to pay due attention to the complexity of the regulatory system, i.e. to the fact that it is a *cum-plexus* phenomenon, i.e. full of interweaving that bring together its components in a plot where the single sources lose importance in their singular character and discreet and instead acquire it at the level of the fabric they are going to compose, in which, however, their specific individuality becomes more nuanced and often difficult to perceive» (our translation).

10 Among the failures of simplification in administrative procedural law are the provisions regarding the conference of services, which will be discussed below: see M. Ainis, *Semplificazione*, cit., *passim*, for a concise and effective excursus.

11 The analogy is taken from M. Bombardelli, *Semplificazione normativa*, cit., p. 1059: «That is, it is necessary to be able to develop and take root in the awareness that when a new source is introduced, modified or eliminated from the legal system, one does not limit oneself to adding or subtracting a cog in a mechanism, but the conditions and perspectives evolution of a system» (our translation).

12 Also M. Bombardelli, *Semplificazione normativa*, cit., p. 1031: «It is therefore the complexity of the system - its being more than the sum of its parts, its impossibility of being reduced to the sum of its individual components - that becomes the element to be considered as a priority when planning simplification interventions. These should not be conceived according to a 'semi-simplifying thinking' for which complexity is a problem to be solved, but instead starting from the awareness that it is a characteristic and ineliminable aspect of the system, which must be taken into account. In other words, one must take into account that, unlike complication, complexity is '[...] something our society cannot do without', because it expresses, on the one hand, the plurality and intertwining of interests present in society and the

be eliminated, but to be kept as a starting point for the observer, the simplifying interventions must not be limited to the mere arithmetical reduction of the system components, but must extend to understanding the relationships between them and, therefore, to the overall consideration of the functioning of the system itself.

The change of approach is functional to follow the corresponding metamorphoses of society, which – constantly requiring to be ordered[13] – can only be the recipient of rules that – at least – try to adapt to its changing characteristics over time: above all as regards the enrichment of interests that are affected by life events.

Giannini's words on the necessary coexistence between primary and secondary interests return, motionless in time[14]: one of the factors increasing the

relationships between them, and on the other hand, the multiplicity and great differentiation of the institutions that organise it» (our translation).

13 Law is notoriously a social phenomenon, reported by A. Falzea, *Complessità*, cit., p. 204-207, for which the characteristics of the law are to be identified in humanity and in sociality. This implies above all that law operates on the social level, since it is there that individuals aggregate and act, sharing the fundamental aspects of human reality (common existence, common experience, common culture); the relationships of coexistence and coexistence then generate nuclei of interest, which in turn give rise to the preparation of rules for their realization and conservation in situations of conflict as well as solidarity; these interests, to which differences of degree belong and some of which assume the rank of common values, are ordered according to social and cultural rules, of organization and relationship; human wholes are subject to the cultural system of law, and this subjection requires that the situations of interest – when they emerge from individuality and rise to values of the whole – acquire cultural and juridical relevance. In short, there is an undeniable functional link between law and life: it is, for the A., 'unacceptable' that this link is terminated through «the denial that [this relationship] can take place through rules of action, because this thesis, which frontally contrasts with the reality of life, it would leave society at the mercy of disorder in "a decomposed experience without beginning and without end" (Giuseppe Capograssi)» (p. 207). Expressed, here, is the criticism of anti-normativism, «which translates into the denial of legal rules as factors in combating social disorder» (also p. 207) (our translation).

14 M.S. Giannini, *Il potere discrezionale della pubblica amministrazione. Concetti e problemi*, Milan, 1939, (as well as Id., *Diritto amministrativo*, II, Milan, 1993, p. 49), qualifies the discretionary power as «il potere di apprezzare in un margine determinato l'opportunità di soluzioni possibili rispetto alla norma amministrativa da attuare»; but the Administration moves herself «in un ambito circoscritto da norme: quando l'amministrazione agisce, deve curare l'interesse pubblico proprio della sua attribuzione o della sua competenza; la sua scelta è perciò finalizzata: dev'essere la più opportuna in ordine ad un pubblico interesse nel caso concreto». In short, it is excluded that the public authority has the sole task of maximising the public interest entrusted to its care, because of the consideration that a public interest never exists in isolation but is together with other interests, both public, collective and private: discretionary, then, is the choice that consists of a comparative weighing of several secondary interests against a primary inter-

complexity of the legal system lies precisely in the changes in public and private interests that crowd the cases to be regulated (and on which the Administrations must decide). If, in fact, on the one hand, public interests increase at a convulsive pace[15], generating differentiated statutes for their regulation and protection, on the other hand private interest escapes the classic dynamic of its opposition to the State; it is enriched and multiplied, often assuming a synergistic role with the public if not even a driving force[16] the same.

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15 The general law on administrative procedure bears a trace – one of all – of the increase in public interests. Think of the art. 20, Law no. 241/1990, in the matter of silent consent. In the original version of the provision, that simplifying instrument was applied only in the cases determined by the regulation pursuant to art. 17, paragraph 2, law no. 400/1988. In the version following the intervention of Law No. 80/2005, now converted into a general rule, silent assent did not apply «to acts and procedures concerning the cultural and landscape heritage, the environment, national defence, public safety and the immigration, health and public safety»; law n. 69/2009 then proceeded to add «immigration, asylum and citizenship»; a few years later, law 221/2015 identified a new sensitive public interest, that is, «protection from hydrogeological risk», to be subtracted from tacit consent. The evolution of the literal content of the provision highlights the growth of interest over the years, so that the legislator has gradually had to adapt the provision.

16 The impact of private interest on administrative decisions is typically located in the context of agreements with the Administration, whose genus is governed by art. 11, law no. 241/1990: among the many contributions, see P.L. Portaluri, *Sugli accordi di diritto amministrativo*, in *Riv. giur. ed.*, n. 4/2015, pp. 147 ff., which signals its progressive abandonment since «Sono [cioè] mancate due precondizioni, entrambe necessarie: anzitutto la stratificazione storica e applicativa (il c.d. formante pratico), che comporta la formazione di *ius receptum* addirittura in assenza – come fu paradossalmente nei nostri, ricordati due casi delle convenzioni lottizzative e delle concessioni contratto – di una base di diritto positivo; in secondo luogo, la preregolazione di ambiti precisi dove la selezione degli interessi meritevoli di essere amministrati mediante accordi è compiuta già dal diritto legislativo, che ne fissa – ne parametra, meglio – le modalità gestorie».

On the other hand, it has been effectively pointed out that private interest manages to be the driving force even in administrative proceedings that end with unilateral measures: co-decision becomes fundamental where the private sector has a force – economic or technical competence – which forces the Administration to model its imperium on the demands it asserted. In this regard, see always P.L. Portaluri, *Potere amministrativo e procedimenti consensuali: studi sui rapporti a collaborazione necessaria*, Milan, 1998.

Consider, most recently, the experiences of project financing and public-private partnerships, in which the private sector assumes a role of initiative and promotion of projects to be financed (again on the increase, see A. Moliterni, *Le prospettive del partenariato pubblico-privato nella stagione del PNRR*, in *Dir. Amm.*, no. 2/2022, pp. 441 ff., for whom «the process of transition of the administrative, economic and social system towards the strategic objectives of the PNRR unveils new spaces for the use of public-private partnership instruments and operations. However, the logic of the partnership can only really ensure the strengthening and stabilisation of the development choices made by public authorities if it is adequately supported by courageous administrative reforms, by a strengthening of the technical capacity of administrations, but also by the overturning of that 'sfiduciary paradigm' on which not only the tradi-

And in an "increased complexity" society[17], in which the analytical skills, the decision-making tools of the individuals, the knowledge, the so-called *expertises*, the so-called *capabilities*, can only increase the relationships between subjective juridical situations, which constantly fade between the category of rights and that of interests[18], and are increasingly reticular.

Logically speaking, this framework should, in situations in which one or more public interests are a question, decree the importance of the role of the Administration in its decision-making process: the wider the scope – in the sense of their caliber, but also of their numerousness – of interests, the component of administrative power becomes more essential, in this case discretionary, qualified as a necessary intermediary between the generality and abstractness of the law, on the one hand, and the factual situation full of unforeseen (and perhaps unpredictable) variables) on the other[19].

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tional legal (and cultural) approach to public contracts (and the public-private relationship) has long been based, but, more generally, our very conception of social living» - our translation); or, again, to the experiences of 'shared' administration as an expression of horizontal subsidiarity ex art. 118, para. 4, Const.: see G. Arena, *L'amministrazione condivisa ed i suoi sviluppi nel rapporto con cittadini ed enti del Terzo Settore*, in *Giur. Cost.*, no. 3/2020, pp. 1449 ff., who, in commenting on one of the most recent and well known pronouncements of the Constitutional Court on the relationship between the Administration and Third Sector entities on the subject of co-planning, emphasises the sharing of the public function by these entities, as sanctioned by the Constitutional Court itself, 26 June 2020, no. 131.

17 The expression is borrowed from P. Forte, *Complessità*, cit., esp. p. 2150: «L'accelerazione della complessificazione, insomma, ha tra altro moltiplicato quelle che potremmo definire *pretese legittime*, non dovute necessariamente a riconoscimenti legali formalizzati esplicitamente, ma più o meno giustificate sul piano sostanziale, più nelle qualità e meno negli statuti, nel senso che sono riconducibili in vario modo a prescrizioni normative; aspirazioni al riconoscimento della appropriatezza all'assunzione di responsabilità importanti, e (*ex facto oritur jus*) a meccanismi protettivi e vantaggiosi, che riguardano non più *élites* circoscritte, e nemmeno solo classi sociali, ma moltissimi tra i viventi, intesi come persone individue o gruppi circoscritti e poco omogenei; un percorso favorito da disposizioni costituzionali interne e convenzionali internazionali – con il loro carico di organi decisionali e giurisdizionali –, e corroborate da principi e clausole generali, centralizzate sulla persona e sulle sue emanazioni, che induce altra complessità in termini quasi entropici, in cui ogni precario equilibrio tende ad allargarsi verso nuovi legittimati, che hanno forze e argomenti sufficienti a romperlo e, squilibrando, a indurre nuovi movimenti».

18 Again P. Forte, *Complessità*, cit., esp. pp. 2168 ff.

19 The affirmation should not be understood in a two-way sense, i.e. in the sense in which, as the bundle of interests dwindles, the breadth of the administrative decision necessarily narrows, understood from the point of view of its discretionality. It is true that there are hypotheses of *Reduzierung auf Null* of discretion – for example in the context of the so-called dutiful withdrawal of act – but this does not imply that, in these hypotheses of "zeroing", the exis-

And instead, as stated in the exergue, the approach chosen by the legislator tends to proceed in the opposite direction: to the complexity of the system – and therefore to the irreducible multiplicity of interests – he responds, that is, with a constant elision *sub* species of procedural simplification, overcoming dissent and of the opposition deeds of the Administrations in the conference and confrontation, all in accordance with a "logic of the result"[20] which does

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tence of a decision is completely obliterated administrative. In other words, even where the rule – yes, general and abstract – manages to predetermine exactly the conditions for activating a certain administrative power and its typical effects (attributes, in other words, a restricted power to the Administration), the public administration holds however a decision-making area: since it decides in any case on the an of the activation of the bound power, or rather on the effective existence of the factual presuppositions of the power and the appropriateness of its exercise, and on the quid, or rather on the effects of the same. In this regard, see the contribution of F. Follieri, *Decisione e potere amministrativo nell'atto vincolato*, in *P.A. Persona e Amministrazione*, no. 1/2017, pp. 111 ff., which speaks of «skepticism about the constraints» based on acceptable arguments of the semantic analysis of the rules: the administrative activity would therefore be bound where there is no margin of appreciation - in the rule attributing power - nor in the qualification of the assumptions of the exercise of the power (so-called cognitive moment), nor in the choice of the content of the measure (so-called disposition moment). And yet, precisely the semantic analysis demonstrates that there is no possibility of univocally defining the cognitive moment («While the constraint in the disposition moment is semantically possible, the constraint in the cognitive moment is semantically impossible», p. 127); and, moreover, even if the disposition moment is unequivocally definable from the point of view of regulation, nevertheless the Administration also has a decision-making margin here («the administration retains the possibility, even if not the permission, to act differently, i.e. not to respect the hypothetical-constitutive norm. In other words, the administration decides in each case whether to dispose of a certain effect in a given situation and which effect to dispose of», p. 138, thus demonstrating that even a bound act can exist and also be illegitimate) (always our translation).

20 The emergence of the result as a general principle of administrative activity and organization constitutes the juridicalisation of the union between legality and good performance in the perspective of administrative efficiency. Among the most accredited doctrinal contributions on the subject, see M.R. Spasiano, *Il principio di buon andamento*, in M. Renna, F. Saitta (eds.), *Studi sui principi di diritto amministrativo*, Milan, 2012: pp. 117 ff., p. 134 and 135: «The logic of the result, expressive of good performance, therefore has nothing to do with the result at all costs, or with the necessary material satisfaction of the citizen's claim»; «The importance assigned by the system to the administrative result and its subsumption within legality, determines the extension of the norm-act comparison, to the norm-act-result relationship, the latter evidently understood in legal rather than economic terms». By the same author, see, even earlier, *Funzione amministrativa e legalità di risultato*, Turin, 2003, as well as, most recently, *Nuove riflessioni in tema di amministrazione di risultato*, in Aa.Vv. *Scritti per Franco Gaetano Scoca*, Naples, 2020, pp. 4845 ff.; see also M. Immordino, A. Police (eds.), *Principio di legalità e amministrazione di risultato*, Turin, 2004; A. Romano Tassone, *Sulla formalità di legalità e amministrazione di risultato*, Turin, 2004; A. Romano Tassone, *Sulla formula "amministrazione per risultati"*, in Aa.Vv., *Scritti in onore di Elio Casetta*, Naples, 2001, pp. 813 ff.; Id., *Analisi economica del diritto e "amministrazione di risultato"*, in Aa.Vv., *Analisi economica e diritto amministrativo, Annuario AIPDA 2006*, Milan,

not see it as the most balanced synthesis of interests[21] but to their sacrifice in favor of a single hegemonic interest[22]: the rapid and punctual realization of a work, a project or an intervention.

Here, then, we aim to understand whether the emerging regulatory approach actually leads to a tendential withdrawal of some interests with respect to others, and what are the ways in which this happens; where this process is actually detectable, a reference to the broad principle of result could, perhaps, lead to a better rebalancing of the decisions.

3. «Simplification» and «acceleration»: the choice of the legislator to impose interests of primary importance that can be managed by the political Authority

Now, in this context we perceive the inadequacy of a juridical approach that attempts to simplify administrative decisions, the reconciliation between public interests, and between these and private interests, "amputating" entire procedural "pieces": eliding provisions, shortening assigned terms to the Administrations, generalizing the hypotheses of tacit provision, and so on. An ap-

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2007, pp. 233 ff. See finally a last study on the principle of effectiveness, understood as teleologically result-oriented: G. Corso, M. De Benedetto, N. Rangone, *Diritto amministrativo effettivo. Una introduzione*, Bologna, 2022.

21 D. D'Orsogna, *Contributo allo studio dell'operazione amministrativa*, Naples, 2005, attempts to bring the logic of the result into the theory of the administrative measure, so as to be able to assess the validity of the latter in relation to the result achieved. To do so, it is essential, according to the author, that the result - from being the purpose of the measure - becomes a predetermined element in the rule that regulates administrative action: «the predetermination of the result, by placing itself at the level of the rules of administrative action, constitutes an important moment of enrichment of the legal paradigm of reference for the assessment of the administrative measure in terms of validity» (p. 175, our translation).

22 P.L. Portaluri, *L'«incanto che non so dire»: unicità e unicismi procedimentali nel governo del territorio*, in *Federalismi.it*, no. 29/2021, p. 46, expresses himself on this point in a doubtful way, where he states that the PNRR standardization has an advantage of clarity, in its style, compared to previous regulatory experiences: «Possiamo infatti riconoscere – restando in una logica puramente operazionale, di processo – che ora le sequenze sono scandite meglio; come più definiti sono ruoli e poteri delle singole figure soggettive, pubbliche e private, che vi compaiono. Ma son tutte immagini senza volto. Se nell'analisi ci fermassimo qui, trascureremmo un aspetto, forse il più importante: quali siano gli interessi *concreti* – di nuovo, pubblici e privati – che prevalgono o che invece recedono (sia pure in linea di tendenza) nel modello generale unicizzante tracciato dall'ecosistema normativo PNRR; quali cioè si rafforzano, quali s'indeboliscono. L'*unicità* – procedimentale e decisoria – porta infatti con sé almeno il rischio dell'*unicismo*: di un interesse-Moloch cui gli altri sono offerti in sacrificio» (original italics).

proach which, however, continues to be established and which, in truth, has taken on a hegemonic role in the post-pandemic order, where the urgency of making markets and investments recover on the national territory has imbued government decisions and legislation, condensed into the Italian National Recovery and Resilience Plan (NRRP; from now on, called in its Italian acronym: PNRR) and its implementing decrees[23], two of which in particular have been entitled to simplification (or, better, in the plural, to simplifications)[24].

In this "regulatory ecosystem"[25] a tendency towards the amputation of the procedural *ganglia* pertaining to the protection of public interests of territorial importance can be highlighted, when the object of the decision is the implementation of projects and works of strategic importance for the country. What comes to the fore here – and it is on this that our investigation will focus – is art. 13, Legislative Decree 77/2021, "Overcoming dissent", which *provided* that "in the event of dissent, opposition or other equivalent act", "suitable to preclude, in whole or in part, the implementation of an intervention falling within the PNRR", the Technical Secretariat at the Council of Ministers for the implementation of the PNRR "proposes to the President of the Council of Ministers, within the following five days, to submit the question to the examination of the Council of Ministers for the consequent determinations"; if then the same act of dissent comes from the regional level, the same Technical Secretariat or the Minister for Regional Affairs will convene the Unified Conference, which must express its opinion within fifteen days. And it must, evidently, express itself positively, since, "in the absence of shared solutions that allow

23 Just by way of statistics, on the website *www.osservatoriorecovery.it*, it is sufficient to select the item «PNRR» to check the relative decrees and 202 decrees have emerged since 2019, divided between ministerial acts and notes, decree-laws and legislative decrees.

24 The obvious reference is to the legislative decree July 16, 2020, n. 76, «Urgent measures for simplification and digital innovation» (so-called Simplification Decree), conv. with the law 11 September 2020, no. 120; and then to the legislative decree July 28, 2021, n. 77, «Governance of the national recovery and resilience plan and first measures to strengthen the administrative structures and to speed up and streamline procedures», commonly known as the Simplifications Decree-bis, conv. with the law 29 July 2021, no. 108.

25 Expression by P.L. Portaluri, *L'«incanto che non so dire»*, cit., p. 46.

for the speedy implementation of the intervention", the substitutive powers at the state level and within governmental competence will be activated. Able to override any opposition at the regional level.

It will be noted that we said «provided», as the subsequent legislative decree 13/2023[26], dislocated the subjective sphere of the obligation to elevate the decision-making focus to the Council of Ministers, making it payable – no longer to the Technical Secretariat, but – to the "Delegated Political Authority on the matter of PNRR or the competent Minister, also on the initiative of the PNRR mission structure set up at the Presidency of the Council of Ministers or the General Inspectorate for the PNRR": from a technical body to a political body, therefore.

The provision has a certain similarity, in the spirit that imbues it, with the just launched new Code of public contracts, Legislative Decree no. 36 of 31 March 2023[27], which, in art. 38, paragraph 11[28], provides for a conference mechanism which essentially prevents dissenting Administrations from vetoing the execution of the work or project, forcing them to provide a "plan B", com-

26 Legislative Decree 24 February 2023, n. 13, «Urgent provisions for the implementation of the National Recovery and Resilience Plan (PNRR) and the National Investment Plan complementary to the PNRR (PNRR), as well as for the implementation of cohesion policies and the common agricultural policy».

27 In O.J. no. 77 of 31 March 2023, suppl. ord. no. 12. The new Public Procurement Code enters into force on 1 April 2023, but its provisions have deferred effect until 1 July 2023. For notices or tenders published before that date, the previous provisions continue to apply. A transitional period is then set, until 31 December 2021, due to the validity of some provisions of the previous Code, Legislative Decree no. 50/2016, of the Simplification Decree n. 76/2020 and, especially for the PNRR and PNC contracts, of the Simplifications-bis decree, no. 77/2021.

28 The text is reproduced, extrapolated from the definitive outline of the Code in implementation of article 1 of the law of 21 June 2022, n. 78, containing «Delegation to the Government in matters of public contracts». Article 38, paragraph 11: «Nella procedura di cui al presente articolo, le determinazioni delle amministrazioni diverse dalla stazione appaltante o dall'ente concedente e comunque coinvolte ai sensi dell'articolo 14-*bis*, comma 3, della legge n. 241 del 1990, in qualsiasi caso di dissenso o non completo assenso, non possono limitarsi a esprimere contrarietà alla realizzazione delle opere o degli impianti, ma devono, in ogni caso, a pena di decadenza, indicare le prescrizioni e le misure mitigatrici che rendano compatibile l'opera e possibile l'assenso. Tali prescrizioni sono determinate conformemente ai principi di proporzionalità, efficacia e sostenibilità finanziaria dell'intervento risultante dal progetto originariamente presentato. Le disposizioni di cui ai periodi precedenti si applicano, senza deroghe, a tutte le amministrazioni comunque partecipanti alla conferenza, incluse quelle titolari delle competenze in materia urbanistica, paesaggistica, archeologica e del patrimonio culturale».

patible with the principle of financial sustainability of the work itself: the execution of which, therefore, it must not be prevented[29]. Here, there is no exercise of the substitutive power by political or central bodies, nor is there a mechanism for overcoming dissent aimed at making the decision in the name of the President of the Council of Ministers[30]: however, the direction of the provision is clear, since the failure to locate public works, whether of state or local interest, is not contemplated.

We are therefore witnessing an explicit elimination of dissent: which in general, in these complex administrative procedures, is expressed by local administrations or by administrations responsible for the protection of sensitive interests (note the expression referred to in art. 38, paragraph 11, quoted: Administrations «holders of competences in urban planning, landscape, archaeological and cultural heritage matters»). "Elimination" because, rather than overcoming dissent through "composition" of dissent, the rules opt either for a relocation of the decision to the central-governmental level (see *Simplifications-bis* decree) or for an unspecified "decadence" from the expression of that disagreement (see art. 38, paragraph 11, Code of public contracts).

Thus, the commitments to "simplify" and "accelerate" the approval procedures for projects and works of strategic interest are fulfilled: the hypothesis

29 Here, the observations by P.L. Portaluri, *Considerazioni sul procedimento di localizzazione e approvazione delle opere pubbliche (*ex *art. 38, comma 11, dello schema di codice),* in *Astrid Rassegna*, 2023, are essential. For the Author, in fact, the provision removes the power of veto from Administrations with sensitive interests, at the same time realizing the principle of procedural unity through the *equalization* and *de-politicizing* administration of all public interests: including sensitive ones (p. 1, original italics). Where – by way of interpretation or amendment, proposed by the A. during the hearing and explained in the contribution – the subtraction of the veto power is not compensated by correct mitigating measures, the provision would face a possible constitutional illegitimacy due to violation of art. 9 of the Constitution (p. 7).

30 Although, for example, P.L. Portaluri, *Considerazioni*, cit., p. 8, recovers that "escalation" mechanism in an interpretative way, since the art. 38 cited, in paragraph 1, makes a reference to l. 241/1990 («The approval of the projects by the administrations is carried out in accordance with the law of 7 August 1990, n. 241») and therefore also with its art. 14-*quinquies*, whose paragraph 1 allows the devolution of the decision to the Prime Minister by the Administrations responsible for the protection of sensitive interests, even where their dissent is merely motivated, not necessarily constructive as required by art. 38, Control Code of 2023.

that is examined in this work is, then, that these objectives cannot be pursued well, simply "cutting" subjects, procedures and skills.

The trend was already evident in the legislation concerning the localization of production sites at the end of the '90s of the last century[31] – characterized by a strict anti-regionalist spirit[32] – in which the simplification procedural tool was summarized in the conference of services between the Administrations concerned, a more or less extensive conference depending on the number

31 On which see, most recently, C. CELONE, *La speciale disciplina urbanistica ed edilizia delle opere pubbliche*, in G. CORSO, M. IMMORDINO (eds.), *Studi in onore di Filippo Salvia*, Naples, 2022, pp. 199 ff., for which the conference mechanism envisaged therein displaces decision-making power too suddenly in the hands of the Government without setting preliminary compositional moments with possibly dissenting Administrations. In particular, the trend clearly emerges in the legislation concerning the location of public works of state interest (art. 3, dPR no. 383/1994; art. 81, dPR no. 616/1977; art. 55, legislative decree no. 112/ 1998; art. 7, letter b), dPR no. 380/2001), removed from the building permit regime and instead subjected only to the assessment of compliance «with the planning and building regulations»: the jurisprudence, however, specifies that the art. 3, Presidential Decree no. 383/1994 has expressly provided that, in the event of convening a Service Conference pursuant to art. 2 paragraph 14, law December 24, 1993 no. 537 – in which the Region, the Municipality concerned as well as the other State administrations and the entities in any case required to adopt acts of understanding, or to issue opinions, authorizations, approvals, clearances, provided for by state and regional laws participate – the Conference evaluates the projects definitive relating to works of state interest, in compliance with the provisions relating to archaeological, historical, artistic and environmental constraints. The approval of the projects, in cases in which the decision is adopted unanimously by the Conference of services, replaces to all effects the acts of understanding, the opinions, the concessions, including buildings, authorizations, approvals, clearances required by state and regional laws. This means that, in the present case, the unanimous approval of the project also replaces the landscape authorization (*ex multis*, see Tar Campania, III, 1 March 2011, n. 1248). The trend was finally slowed down by the Constitutional Court, which – in a similar case, Constitutional Court, 11 July 2019, n. 179 – sanctioned the principle according to which the existence of a unitary requirement that legitimises the intervention of the state legislature also with regard to the regulation of complex proceedings outside the sphere of exclusive state competence entrusted to the services conference, with a view to the objective of accelerating and simplifying administrative action, does not imply that the entire regulation of the services conference and therefore also the rules governing the overcoming of dissent within it, can be attributed to a matter of exclusive State competence, in view of the variety of sectors involved, many of which undeniably also relate to regional competences, it being necessary to have regard, for the purpose of identifying the matters The provision of unilateral intervention by the State, as a mere automatic consequence of the failure to reach an agreement, constitutes a violation of the principle of loyal cooperation with the consequent sacrifice of the sphere of regional competence, all the more so because the provision of such a short deadline makes it extremely complex and difficult to conduct any kind of negotiation, automatically attributing to the Government the power to decide, without the necessary appropriate procedures being in place to allow repeated negotiations aimed at overcoming divergences.

32 A rich and punctual critical review is offered by P.L. PORTALURI, *L'«incanto che non so dire»*, cit., which points out that anti-regionalism has experienced a parable that has led it to its

of territorial levels crossed by the implementation interventions and the areas of public interest affected by them. In those procedural models, the (sensitive or territorial) public interest protected by the dissenting Administration undergoes a metamorphosis because the decision can only be brought to the central level, of the Presidency of the Council of Ministers, thus escaping the typically administrative and technical-discretionary reconciliation, and becoming the subject of a political decision[33]. This leads to a certain hesitation of the dissenting Administrations, which would seem more inclined to compromise in the conference, knowing that – if the decision is brought to the political level, further from the territory and therefore from the urgency of the impact on the local geographical fabric – they could lose their guardianship altogether[34].

From these very first ideas, therefore, a clear direction seems to emerge: the one whereby "simplification" and "acceleration" are achieved by eliminating "pieces" of the system. Specifically, eliminating interests that may get in the way of achieving the result.

In order to reflect on the effectiveness of this regulatory approach, the general relationship between politics and administration – in PNRR decisions,

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decline.

33 In this regard, see the notes by P. Forte, *Pubblica amministrazione ad eminenza scientifica e tecnologica. Riflessioni teoriche*, in *Ist. fed.*, no. 4/2021, pp. 965 ff., esp. p. 975: «Reconciliation and a certain hierarchy between multiple public interests is well possible and indeed necessary in contemporary societies, but on condition that these have already been identified as such by a deliberation that is inevitably political (in our system, based on the law - art. 97, para. 2, Const.), and that the political preference is not made by an administrative decision-maker, who can impose it by himself, that is, unilaterally and definitively; relating to complex phenomena, such an operation may well know proper administrative formulas of coordination, as for example happens today - as well as in the proceedings - especially in the services conference, in which, as is well known, if an appropriate arrangement cannot be defined administratively, a solution must be found and entrusted to the decision-making level of government, with an inevitably political responsibility» (our translation).

34 S. Battini, *La trasformazione della conferenza di servizi e il sogno di Chuang-Tzu*, in Id. (ed.), *La nuova disciplina della conferenza di servizi*, Turin, 2016, p. 25, for which the position of the proceeding administration is strengthened: the more the potential "dissenters" know that any decision adopted without their consent can only be overturned with the successful experiment of the opposition remedy, the more they will be induced to accept the compromise to reach a unanimous decision in the conference of services.

very intense – must be seen, since it is on the political table that interests are evidently at stake. We will start from here now.

4. Politics and administration in strategic decisions for the country

To borrow the words of authoritative doctrine, the administration "places itself between political activities and final productive activities as a necessary moment of articulation and translation of political choices into concrete final results"[35]. In other words, it is up to the administration to carry out a function of making concrete a purpose constraint set by the political guidelines.

On the other hand, this is the so-called functionalization of the administrative activity, or rather its subjection to a discipline «and, therefore, to a legal significance of the purpose of the activity»[36]. There is no doubt that the application of such a purpose – identified with the result, with the end, or with the public interest – is not the primary task of the Administration, but finds its first conception in the context of the politic address. This is because the public interest notoriously escapes perfect legality: not surprisingly, it has also been presented as an "extra-juridical notion, proper to other social sciences"[37]; it depends "increasingly, both in its actual conformation and in its implementation, also on the non-public interests that are connected to it, at least in the sense that the PA must act "by striving to prevent the primary interest of which it is an exponent from obscuring and make the other collimators overlooked and

35 G. Pastori, *Statuto dell'amministrazione e disciplina legislativa*, in *Annuario AIPDA 2004*, Milan, 2005, pp. 11 ff., esp. 16.

36 P. Forte, *Il principio di distinzione tra politica e amministrazione*, Turin, 2005, p. 21, who continues: «The function needs all the more a discipline that governs it and limits its execution, the more it qualifies to be endowed with the possibility of making decisions that are independent of the consent of whoever is, in any way, recipient»; the A. then identifies the problematic foundation of the administrative function, i.e. the identification of the public interest that justifies and directs it, which «has a controversial epistemological foundation, a difficult conceptual delimitation, an uncertain juridical nature» (again p. 21).

37 A. Travi, *Nuovi fermenti nel diritto amministrativo verso la fine degli anni '90*, now in Id., *Scritti scelti*, Naples, 2022, p. 21 ff., esp. p. 22 (already in *Il Foro it.*, 1997, V, p. 169). The Author points out that the presentation of the public interest as an extra-legal notion is not satisfactory and therefore requires 'completion' with its definition in legal terms.

be successful only for its position and more or less regardless of the other aspects involved"»[38]. It therefore identifies itself with a method of *administratio*, which involves "the interpenetration, the evaluation of the multiple public interests that the legal system brings out"[39]. In other words, the public interest may not even "exist in nature", but result in being the result of an assessment or appreciation by the Administration which, in the act of reconciliation, designates an interest as prevailing over the others: "thus the attention shifts from the notion of public interest to the principle of impartiality in the treatment of the interests at stake"[40].

This interest, therefore, is "given", it is a presupposition of the Administration: the establishment of its formal identity is extraneous to the public administrative task and is left to a political seat. It is alien.

And yet, such a clear *caesura* between the identification of a purpose, of a public interest, by a political power, extraneous to and prior to the administrative one, appears at least anachronistic, if indeed it is not colored with nuances which, for today, they imply the awareness that the Administration – more and

38 P. Forte, *Il principio*, cit., pp. 21-22 (our translation).

39 It is thus that the concept of public interest will also include meanings linked to the good performance and correct exercise of the function: always P. Forte, *Il principio*, cit., *passim*.

40 Quotation and quotation marks from A. Travi, *Nuovi fermenti*, cit., p. 22. The bibliography on the principle of impartiality is endless, given its relevance from an administrative, but also constitutional, national and Euro-unitary level. Let us refer here to L. Antonini, *Il principio di imparzialità*, in M.A. Sandulli (ed.), *Principi e regole dell'azione amministrativa*, 2nd ed., Milan, 2017, pp. 65 ff. For the purposes of this contribution, the conception to which reference is made is that of M. Nigro, *Studi sulla funzione organizzatrice della pubblica amministrazione*, Milan, 1966, for whom the cited principle consists in identifying and evaluating all the interests involved, so that the choice is the result of an exact and complete representation and weighing of these interests. Impartiality, for M. Trimarchi, *L'inesauribilità del potere amministrativo. Profili critici*, Naples, 2018, has a «minimal meaning as a prohibition to make preferences or as a rule pertaining only to the organisational moment», in addition to its broader conception as «a principle according to which the administration, in pursuing its institutional ends, must at the same time take care of the satisfaction of the ends of others (impartial party). In this meaning, impartiality implies that the administration must take into account the interest of the addressee of the measure in becoming aware of all the elements that justify the exercise of power. Nor does it appear lawful to leave it to the free choice of the public administration to decide whether to explain only some or all of the justifying reasons, since this would create an unjustified unequal treatment between the addressees of a measure having the same operative content but different reasoning. It is therefore consistent with the conception of the administration as an impartial party that it must give an account in the measure of all the facts constituting the allegedly existing power» (pp. 222-223 – our translation).

more often – ends up determining itself the public interest concretely pursued in its decision.

There is always, in other words, a «political share of the administrative decision»[41], nestled in the selection and comparison between interests, which have their own theoretical and descriptive dimension, when they are still indicated to the Administration by the external political power, and then their concrete and defined dimension, when the Administration is concretely to decide its fate[42].

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41 P. Forte, *Pubblica amministrazione*, cit., p. 966.

42 F.G. Scoca, *Il coordinamento e la comparazione degli interessi nel procedimento amministrativo*, in Aa.Vv., *Convivenza nella libertà. Scritti in onore di G. Abbamonte*, II, Naples, 1999, pp. 1274 ff., albeit with reference to the public interest «in concreto», states that the administration's task is to represent it (actually).

In this sense, case law also agrees in separating an abstract public interest from its concrete counterpart: the concretisation is capable of overturning the Administration's determinations, refraining from acting to protect that interest, when its effective protection could derive – on the contrary – from the omission of exercising power. For example, on the subject of the imposition of a restriction on a property of historical-artistic interest, «While it is true that the appreciation of the importance of the cultural interest of a property and the consequent need to subject it to the regime of protection proper to property of artistic, historical, archaeological or ethno-anthropological interest that is particularly important within the meaning of Article 10, paragraph 3, letter a) of Legislative Decree no. 42 of 2004, the Administration's decision is not to act in the same way as it would have done in the case of a property of historical interest. Legislative Decree no. 42 of 2004 and that are, therefore, declared cultural assets, belongs to the assessment of the Administration in charge thereof, it is also true that the assessment cannot disregard, on pain of a dangerous abstraction for the very survival in concrete terms of the thing that constitutes the cultural asset, the consideration of the concrete coordinates of space and time in which it is set. The Administration's assessment must necessarily take into account a complex and integrated system pertaining to the concrete public interest, in which the concrete survival of the cultural testimony must inevitably be linked to the need to preserve, with the cultural value, the very material existence and vitality of the context of which the asset itself is an integral part» (Cons. Stato, VI, 2 March 2015, no. 1003: the Superintendence had placed a structural restriction on the property – a historic theatre –, which in fact resulted in a restriction on its use; however, the decision had been taken without considering the impossibility of preserving the value of that structure, which in reality could no longer be used because it had deteriorated irreparably: «it does not appear that the Administration conducted its own investigation in this case with sufficient regard to the practical effects of overcoming such an intrinsic limitation of the constraint as a cultural asset; nor therefore to the concrete factual situation in which the property is set, nor to the current sustainability of the preservation of the specific structures pertaining to the use of cinema-theatre, nor to the effect of compatibility with other destinations, nor to the comparison of the interest expressed by the constraint with the requirements of guaranteeing in the economic reality the very survival of the property, in its characteristics worthy of preservation and protection») (always our translation).

Political share that emerges, for example, in certain categories of administrative measures that have a significant impact on the territory: think of the SEA (Strategic Environmental Assessment, aka, in Italy, VAS – Valutazione Ambientale Strategica) in[43] urban and territorial plans or to the EIA (Environmental Impact Assessment, aka, in Italy, VIA – Valutazione d'Impatto Ambientale) on projects[44]. It will be said that the environmental assessment of plans, programs and projects – in the form, respectively, of the SEA and the EIA – has a purely technical-discretionary content, since it must fulfill the function, predetermined by the European legislator, of "evaluating", in fact, the impact on the environmental indices of a specific planning or design choice. The re-

43 The choice of the preposition "in" is due to a linguistic device which means the pervasiveness of the evaluation within the territorial plans. In other words, when local Administrations have to consider the environmental variable in their planning and programming acts, this cannot happen with a sort of "certification of environmental compatibility of the plan", but must follow the path of integrated assessment within interior of the plan, which arises with it. In this sense, see E. Boscolo, *La VAS nel piano e la VAS del piano: modelli alternativi di fronte al giudice amministrativo*, in *Urb. app.*, no. 9/2010, pp. 1104 ff.: «La VAS è stata invece concepita per riconformare in chiave ambientale ogni passaggio dell'*iter* decisionale pianificatorio (il cd. *policy cycle*): dalla decisione di soddisfare determinati bisogni mediante particolari soluzioni insediative ed infrastrutturali, sino alla localizzazione ottimale dei fattori di trasformazione (se del caso passando per mitigazioni e compensazioni). In questo procedimento, i parametri di sostenibilità ambientale, ed in particolare la capacità di carico dei territori eligibili, vengono quindi a costituire – differentemente che nella VIA – fattore intrinseco e conformante della decisione pianificatoria e non mero termine rigido di confronto».

44 Tar Lombardia, Brescia, I, 18 May 2022, no. 492: «Il giudizio di compatibilità ambientale è reso sulla base di oggettivi criteri di misurazione ed è attraversato da profili particolarmente intensi di discrezionalità amministrativa sul piano dell'apprezzamento degli interessi pubblici in rilievo e della loro ponderazione rispetto all'interesse dell'esecuzione dell'opera. Questo apprezzamento è sindacabile dal G.A. solo in ipotesi di manifesta illogicità o travisamento dei fatti, nel senso in cui l'istruttoria sia mancata o sia stata svolta in modo inadeguato e risulti perciò evidente lo sconfinamento del potere discrezionale riconosciuto all'Amministrazione, anche perché la valutazione di impatto ambientale non è un mero atto tecnico di gestione ovvero di amministrazione in senso stretto, trattandosi piuttosto di un provvedimento con cui viene esercitata una vera e propria funzione di indirizzo politico-amministrativo con particolare riferimento al corretto uso del territorio, in senso ampio, attraverso la cura e il bilanciamento della molteplicità dei contrapposti interessi pubblici (urbanistici, naturalistici, paesistici, nonché di sviluppo economico-sociale) e privati. Considerazioni, queste, pacificamente estendibili anche alla procedura di V.A.S., il cui scopo è proprio quello di garantire un elevato livello di protezione dell'ambiente e contribuire all'integrazione di considerazioni ambientali all'atto dell'elaborazione, dell'adozione e approvazione di piani e programmi, assicurando che siano coerenti e contribuiscano alle condizioni per uno sviluppo sostenibile. Assicura, inoltre, che l'attività antropica sia compatibile con le condizioni per uno sviluppo sostenibile, nel rispetto della capacità rigenerativa degli ecosistemi e delle risorse, della salvaguardia della biodiversità e di un'equa distribuzione dei vantaggi connessi all'attività economica».

sult is a determination that has to do with soil consumption, with limits on polluting emissions, with the balance between green spaces and built spaces, and so on.

And yet, there is not only arid measurement or strictly juridical comparison of interests[45], in all of this: choosing whether or not to carry out a project, where to locate it; choosing, upstream, to plan and program a series of interventions over time, which will change the environment, is above all a political choice. Territorial planning, in general, is the result of evaluations of a political nature[46]: which also justifies the broad administrative discretion[47] of the body called to approve it.

Before that, planning itself is a set of activities preordained to the formation of a plan, or a tool capable of rationalizing resources and interventions in space and time in order to achieve certain objectives[48].

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45 The juridicalisation of the choices of the Administration is considered a fruitful advance in the juridical field, compared to the primordial consideration of the selection of interests as an eminently political operation, by P. Forte, *Public administration*, cit., p. 968.

46 See for example Tar Lazio, II, 9 August 2022, n. 11119: «Gli enti locali, mediante l'approvazione degli strumenti urbanistici generali, operano delle scelte ampiamente discrezionali, in quanto espressione di valutazioni politiche circa il futuro assetto del territorio comunale, avuto riguardo agli obiettivi di sviluppo economico-sociale da perseguire, che si traducono nell'assegnazione al territorio comunale di destinazioni di uso (c.d. zonizzazione) che ben possono non coincidere con quelle in atto esistenti, ma che corrispondono agli obiettivi di sviluppo economico-sociale da perseguire in prospettiva futura».

47 It is notoriously well-established principle that urban planning choices are characterized by broad discretion and constitute appreciation of merit removed from the legitimacy review, unless they are affected by errors of fact or abnormal illogicality, with the consequence that they must not be adequately motivated (*ex multis*, Cons. Stato, IV, 13 October 2022, n. 8731).

48 Don't think only of urban and territorial planning, since planning and programming are typical activities of the economic, health, public works sectors: P.L. Portaluri, *Il principio di pianificazione*, in M. Renna, F. Saitta (eds.), *Studi*, cit., pp. 453 ff. exposes the history and underlines its *vis expansiva* even beyond the areas in which the legislator prescribes to the Administrations the obligation to prepare a plan.

R. Dipace, *L'attività di programmazione come presupposto di decisioni amministrative*, in Aa.Vv. *Annuario AIPDA 2017*, cit., pp. 129 ff., according to which the programming and/or planning activity characterizes large sectors of public action, both when it has purely internal relevance and when it has the strength to connote, in various ways, private activities (think of the first and fundamental planning activity which is that of the budget law; to the strategic planning of the ministries; to that of the need for public personnel; to planning regarding purchases by the public administrations; to those to satisfy the essential levels of health services; to those concerning the territory, the environment and soil protection). Not only, but it is the programmatic logic that constitutes the red thread that links the Community policies to the national ones: the stability law must take into account the Community indications; the programming of

Objectives that often lose materiality – construction of urban grids, building order, placement of production plants in places that can accommodate them, protection of hydrogeological safety, etc. – and take on an immaterial color, thus adjectivering the plans with the term «strategic».

Not infrequently, when planning – as well as programming – becomes strategic, it moves away from the lowest territorial level, to move – by virtue of the principle of subsidiarity – to the highest levels: thus its unitary implementation is ensured. This presumably also because its function is not that of pure balanced urbanization of the territory, but of its governance understood in an overall sense, in which socio-economic development variables must be taken into account[49] which with urbanization can connect[50], but they are certainly not identified with it[51]. Think, for example, of the Strategic Development Plans,

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the EU structural funds is closely linked to national public policies in various sectors [...](see p. 131, our translation).

49 A. Simonati, *Il piano strategico in Italia: meccanismo di valorizzazione della pianificazione urbanistico-territoriale o impulso alla de-pianificazione?*, in *Riv. giur. ed.*, no. 2/2013, pp. 99 ff., according to which strategic planning in Italy is essentially a mechanism for the enhancement of the socio-economic development of the territory, and the redevelopment and recovery of degraded areas (see p. 101, our translation). Reference is necessarily made to the extensive bibliography cited by the author, in footnote 13.

50 On this topic see F. Cangelli, *Piani strategici e piani urbanistici. Metodi di governo del territorio a confronto*, Turin, 2012, which relates the possible synergy between strategic and territorial planning.

51 A. Simonati, *Il piano strategico*, cit., raises the question on the relationship between strategic planning and urban planning: that is, whether the former constitutes a push towards de-planning or instead manages to confirm the essential role of urban planning. The Author reviews various strategic initiatives characterized by a certain singularity, in which local authorities have conducted, with articulated procedures for consulting citizens and the so-called stakeholders, targeted strategic initiatives unrelated to the surrounding contexts. According to her, a constant of Italian experimentation lies in the fragmentation and in individualism. The initiative always starts from the lead municipality, which only subsequently involves other subjects, public and/or private; normally, then, coordination takes place, somewhat paradoxically, with entities that operate within the institutional sphere of the lead entity, while the links established with other entities of the same level are sporadic and juridically little formalized (see p. 118, our translation). However, a common thread of synergy can be glimpsed between strategic and urban-territorial planning, because the inputs from the experiences gained up to now in Italy lead us to favor the thesis according to which, almost paradoxically, strategic planning can be used as a tool for redevelopment of the planning efficiency of the urban plan. Therefore, strategic planning could prove to be very useful as a rationalization mechanism – and reduction to its role as "*ultima ratio*" – of urban-territorial planning by variants. Enhancing the use of strategic plans, then, could produce the establishment of fruitful synergetic relations at the supra-municipal level (see p. 117, our translation).

envisaged and governed by art. 6, d.p.c.m. 25 January 2018, Regulation establishing the Special Economic Zones (so-called ZES, in Italy)[52]: these plans have precisely a «strategic» objective – already declared in the title – namely that of supporting and reviving the economy of the less competitive territorial areas. In these cases, which mostly have a regional significance, the Council of State has established that "the need to introduce in the Strategic Development Plan adequate forms of coordination with the relevant and legislatively regulated port strategic planning, as is known, also appears nationwide»[53]. It is no coincidence that the PNRR also intercepts the ZES, where it provides for "special interventions for territorial cohesion"[54], envisaging a targeted reform which "aims to simplify the governance system of the ZES and to favor mechanisms able to guarantee the construction of interventions quickly, as well as to favor the establishment of new companies"[55], entrusting the competence of the single authorization procedure to the Commissioner.

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52 The regulation had been provided for with Legislative Decree 20 June 2017, n. 91, *Urgent provisions for economic growth in the South*, converted with amendments by law 3 August 2017 no. 123, as part of a series of interventions in support of the South. In the ZES, companies already operating or newly established can benefit from tax breaks and administrative simplifications. Therefore, these are areas that must be regulated with a purely economic strategic planning. With as many institutive d.p.c.m., eight ZES were established (Abruzzo, Calabria, Campania, Ionian Interregional Puglia-Basilicata, Adriatic Interregional Puglia-Molise, Eastern Sicily, Western Sicily, Sardinia). Here the source: *https://www.agenziacoesione.gov.it/zes-zone-economiche-speciali/*.

53 Cons. Stato, 10 January 2018, n. 2325 (meeting of 21 December 2017, favorable opinion with observations on Legislative Decree 91/2017). On the topic, see M. Menicucci, *Le zone economiche speciali (ZES) fra normativa nazionale e piani di sviluppo strategici regionali*, in *Riv. Dir. Nav.*, no. 1/2018, pp. 273 ff.; Id., *Le zone economiche speciali (ZES) ... due anni dopo*, in *Riv. Dir. Nav.*, no. 1/2020, pp. 353 ff.; see also S. Tranquilli, *Le "zone economiche speciali" e la coesione territoriale: indagine comparata nell'Unione Europea e analisi del tentativo italiano*, in *Dir. econ.*, no. 2/2020, pt. 2, pp. 427 ff., for which the Italian ZES experience, compared to their counterparts set up in other European countries, is still rather slow to produce really positive effects: «In Italy, despite the efforts made by the various levels of government to prepare and improve economic policies for the Mezzogiorno, the measures put in place to attempt to bridge the gap with other territorial, national, European and international realities continue to prove ineffective» (p. 458, our translation). On the broad topic of port planning, however, see the contribution of M. D'Arienzo, S. Pugliese, *Pianificazione portuale in Italia alla luce dei riflessi della politica europea dei porti*, in *Dir. econ.*, n. 2/2020, pt. 1, pp. 305 ff.

54 PNRR, Mission 5 Component 3: Special interventions for territorial cohesion, pp. 129 ff. The Mission reserves a Reform and a specific Financial Investment for the ZESs.

55 The affirmation that it must be achieved through a quick construction of the areas is already explanatory of the dimension of development; italics of the writer.

The "strategy", therefore, not only can intersect and be functionalized to very different objectives, but constitutes an element of elevation of the competent level of government, up to the national level. Consider, again, the well-known story of «strategic plants of national interest»: here the two terms – strategic and national – recur together, not without difficulty of interpretation in relation to the perimeter of the scope of application of the provisions that concern them. The ILVA case is undoubtedly among the best known: without retracing its events and jurisprudential stages here[56], suffice it here to recall the most significant legislative intervention – which lit the fuse of the jurisdictional conflict which then continued in the years to come – was consolidated in Legislative Decree 3 December 2012, n. 207, converted with modifications in l. 24 December 2012, no. 231, which prescribed the continuation of activities - despite the judicial seizure of the plants - for the establishments whose "national

56 In this regard, see the reconstruction by R. FERRARA, *L'incertezza delle regole tra indirizzo politico e "funzione definitoria" della giurisprudenza*, in *Dir. amm.*, no. 4/2014, p. 651 ff., esp. pp. 680 ff., who underlines that the use of indeterminate legal concepts by the legislator reveals the hermeneutics of the other institutional actors – the Judge, *in primis* – as a source of «unexpected and enduring heuristic ability». There is no doubt that the jurisprudential arrest with the most significant systemic impact was that of the Constitutional Court, n. 85/2013, on which, among others and by no means exhaustive, see R. BIN, *Giurisdizione o amministrazione, chi deve prevenire i reati ambientali? Nota alla sentenza "Ilva"*, in *Giur. cost.*, no. 3/2013, pp. 1505 ff.; L. GENINATTI SATÈ, *"Caso Ilva": la tutela dell'ambiente attraverso la rivalutazione del carattere formale del diritto*, in *Forum Quad. Cost.*, *https://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2013/0008_nota_85_2013_geninatti_sat.pdf*, 2013; M. MASSA, *Il commissariamento dell'ILVA e il diritto delle crisi industriali*, in *Forum Quad. Cost.*, *https://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2013/0010_nota_85_2013_massa.pdf*, 2013; V. ONIDA, *Un conflitto fra poteri sotto la veste di questione di costituzionalità: amministrazione e giurisdizione per la tutela dell'ambiente. Nota a Corte costituzionale, sentenza n. 85 del 2013*, in *Rivista AIC*, no. 3/2013, *https://www.rivistaaic.it/images/rivista/pdf/3_2013_Onida_3.pdf*; M. BONI, *Le politiche pubbliche dell'emergenza tra bilanciamento e "ragionevole" compressione dei diritti: brevi riflessioni a margine della sentenza della Corte costituzionale sul caso Ilva (n. 85/2013)*, in *Federalismi.it*, no. 3/2014. The Ilva case then had aftermath, giving rise to two other significant jurisprudential interventions: Constitutional Court, 23 March 2018, n. 58, on which see D. PULITANÒ, *Una nuova "sentenza ILVA". Continuità o svolta?*, in *Forum cost.*, n. 2/2018, pp. 604 ss.; e Corte EDU, 24 gennaio 2019, Cordella e a. c. Italia, about which see A. GIURICKOVIC DATO, *Il bilanciamento tra principi costituzionali e la nuova dialettica tra interessi alla luce della riforma Madia. Riflessioni in margine al 'caso Ilva'*, in *Federalismi.it*, n. 12/2019. The sentence of the ECtHR of 2019 – still substantially unexecuted by the Italian State – saw the succession of other rulings of similar tenor: ECtHR, 5 May 2022, ref. nos. 4642/17 (Ardimento and ac Italy); 45242/17 (Perelli and ac Italy); 48820/19 (brigands and ac Italy); 14385/18 (EA and CA Italy); 37277/16 (AA and ac Italy), all published in official Italian translation in *https://www.giustizia.it/giustizia/it/mg_1_20.page?facetNode_1=1_2%282022%29&selectedNode=1_2%28202205%29*.

strategic interest" was recognized[57] (not surprisingly, that provision went down in history as "Salva-Ilva")[58]. The legislator did not define the conditions that led to the recognition of that qualification, leaving wide discretion to the Presidency of the Council of Ministers, whose decree was therefore entrusted with the task of labeling the establishments as "of strategic national interest"[59]. A legislative choice that ILVA, established in the constitutional proceedings, defended as pertaining to acts of "high administration"[60]. Acts of high administration which – despite the strong resistance of the Apulian territorial bodies, whose territory and whose inhabitants were (and, sadly, still are) marred by the polluting effects of the iron and steel plant[61] – dominate the lower levels of

57 According to the same Constitutional Court, in the aforementioned sentence n. 58/2013, «La qualificazione di cui sopra [impianto d'interesse strategico nazionale, n.d.r.] implica: a) che nello stabilimento sia occupato, da almeno un anno, un numero di lavoratori subordinati non inferiore a duecento, compresi quelli ammessi al trattamento di integrazione dei guadagni; b) che vi sia assoluta necessità di salvaguardia dell'occupazione e della produzione; c) che segua un provvedimento autorizzatorio del Ministro dell'ambiente, che pone la condizione dell'adempimento delle prescrizioni dell'AIA riesaminata, con il rispetto delle procedure e dei termini ivi indicati; d) che l'intervento sia esplicitamente finalizzato ad «assicurare la più adeguata tutela dell'ambiente e della salute secondo le migliori tecniche disponibili» (point 7.3 in law).

58 The "saga" of the so-called decrees Salva-Ilva still continues today, with the approval of the fifteenth decree: decree law 5 January 2023, n. 5, converted with modifications by l. 3 March 2023, no. 17. The provisions of this vein also have a significant impact on the criminal law of those accused of environmental crimes in the management of the iron and steel plant: on the latest decree, see F. Basile, *Un nuovo decreto c.d. salva-ILVA: prime osservazioni su "nuovo" e "vecchio" scudo penale*, in *Sistema penale*, no. 2/2023, pp. 5 ff.

59 The art. 1, Legislative Decree 207/2012 (converted text), opens as follows: «In the event of an establishment of national strategic interest, identified by decree of the President of the Council of Ministers [...]». The legislator does not spend a word on the identification criteria.

60 Constitutional Court, no. 85/2013, cit., point 3.2.1. in fact: «Sarebbe infondata, in queste condizioni, la censura mossa all'art. 1 del decreto, per l'asserito contrasto con l'art. 3 Cost. Non sarebbe carente, in primo luogo, la fissazione dei presupposti per l'individuazione dell'interesse strategico nazionale, che attiene tipicamente alla sfera dell'alta amministrazione (è richiamata, a confronto, l'analoga disciplina dettata per l'esercizio di poteri straordinari nel settore della difesa ed in altri settori strategici: decreto-legge 15 marzo 2012, n. 21, recante "Norme in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni", convertito, con modificazioni, dall'art. 1 della legge 11 maggio 2012, n. 56)». On this point, the Constitutional Court will leave an eloquent *non liquet* in law.

61 See Tar Puglia, Lecce, I, 13 February 2021, n. 249, on the contingent and urgent ordinance of the mayor of Taranto which ordered the closure of some blast furnaces unless they were adapted to specific requirements: the Salento judge declared its legitimacy, rejecting the appeals of Ilva and Arcelor Mittal. However, the sentence was overturned by the Judge of Appeal, Cons. State, IV, 23 June 2021, n. 4802 because the order to stop the Ilva factories, issued by the Mayor of Taranto, was illegitimate, as there was no imminent danger.

government by virtue of the management of an interest that rises to the national level and to the strategic type. Interest thus covered, first of all, at the political level, of which the high administration acts implement[62] and on whose very implementation, as will be seen below, they have a decisive impact to the detriment of local levels.

Think of another case: the location of telecommunications systems (antennas, radio stations, *etc.*). The regulatory framework is provided by the law 22

62 The relationship between acts of high administration and political acts is slippery and still full of gray areas, the former finding themselves in the condition of being subject to review only for some profiles, compared to the unquestionability of the latter, of which, however, there is no definition in our legal system. This gap is filled by jurisprudence, according to which two requisites contribute to the notion of political act, one subjective and the other objective: on the one hand, it must be an act or provision issued by the Government, i.e. by the Administrative authority which is responsible for the function of political guidance and management at the highest level of public affairs, on the other hand, whether it is an act or provision issued in the exercise of political power, rather than in the exercise of merely administrative activity (Cons State, IV, 07 June 2022, n. 4636). From the extensive reconstruction by V. Giomi, *L'atto politico nella prospettiva del giudice amministrativo: riflessioni su vecchi limiti e auspici di nuove aperture al sindacato sul pubblico potere*, in *Dir. proc. amm.*, n. 1/2022, pp. 21 ff., it emerges that the enucleation of the act of high administration served to broaden the protection against a power which, given the evanescent limits of the political act, risked being excessively uncontrollable, whose immunity must therefore be limited to acts, a strict expression of the governmental approach: «Following the idea of "unhooking" the political act from the administrative function and from the functionalized administrative power, one begins to bring the political act back to the government function, trying to juridically identify the concept of political orientation function of which one would like the political act to constitute one of the natural expressions, as and if it comes from the Government, or more precisely, from the exercise of that peculiar power attributable and connoted to it from an inseparable bond to the political dimension which is manifested precisely in the political direction to implement the Constitution» (our translation). As also pointed out by G. Tropea, *Genealogia, comparazione e decostruzione di un problema ancora aperto: l'atto politico*, in *Dir. amm.*, no. 3/2012, pp. 329 ss., which offers a comparative picture with other systems, «the extension of the category of acts of high administration corresponds to a decrease in the political act. And today, even on the dogmatic level, this category seems to be broadening beyond what was intuited in the seminal work on the subject. No longer simply administrative deeds ascribable to the political-administrative direction (directives, general deeds, planning deeds, etc.), in which the participation, often informally, of the social subjects with the interests involved is envisaged, but also punctual deeds, attributable to the political direction of the administration, in relation to the management of official relationships (assignments, appointments, removals, etc.), or in which the political direction is expressed directly, without the previous mediation represented by the address documents. These are acts identified on the basis of two criteria: being acts of administrative political orientation, and being characterized by a cause or reason of a political nature which expands their discretion and makes them questionable in terms of strict legitimacy (incompetence, violation of the law, illogicality)» (our translation). The cases are wide, especially in the context of appointments and revocations of positions in entities governed by the public power: for example, the appointment of Chairman within the Board of Directors of RAI S.p.A. is an act of high administration («it is the act in which manifests the choice, based on the verified possession of

February 2001, no. 36, «Framework law on protection from exposure to electric, magnetic and electromagnetic fields», therefore a legislative provision aimed at minimizing exposure to electromagnetic pollution; therefore, again, oriented towards the protection of health. Not exactly an accelerating standard of interventions and new installations.

The fact is, however, that the art. 8 – which regulates the division of responsibilities between Regions, Provinces and Municipalities – was first modified by Legislative Decree 76/2020 (art. 38, paragraph 6) and then by Legislative Decree 13/2023 (art. 18, paragraph 8). Paragraph 6 of the aforementioned art. 8, in the original version, attributed to the Municipalities a regulatory power «to ensure the correct urban and territorial settlement of the plants and minimize the exposure of the population to electromagnetic fields». The result was a generalized localization power entirely the prerogative of the local bodies, which could plan the installation of the systems even excluding entire "sensitive" areas and sites, in which it was necessary to avoid exposure to electromagnetic waves (for example in the vicinity of schools)[63].

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the legal requirements, of the person deemed most suitable to hold that office in view of compliance with the programmatic objectives set by the primary source legislation and, therefore, this determination is not the expression of a free activity in the ends, but of an activity of high administration, and therefore, is subject to the general discipline of administrative acts»), as well as the opinion of the Parliamentary Supervisory Commission, prescribed within the procedure by art. 49, co. 5, legislative decree n. 177/2005 («it is not the expression of a political discretionary activity (as such absolutely unquestionable), but rather, the manifestation of a judgment concerning, on the one hand, the professional competence of the chosen subject; on the other, the his suitability to be able to play, on the basis of the value of his previous professional career and, more broadly, biographically, a role of guarantee for the protection of pluralism and the objectivity of information, as indispensable safeguards of an authentically democratic system»), see Tar Lazio, III, 4 January 2020, n. 54.

63 The jurisprudence confirmed this. See for example Tar Lazio, II, 1 June 2018, n. 6136: «The municipal regulation established by art. 8 paragraph 6, law no. 36 of 2001, in regulating the correct installation in the territory of the plants, may contain rules for the protection of sensitive areas from exposure to electromagnetic fields, also placing generalized prohibitions on the location of plants in the vicinity of sensitive sites such as schools and hospitals or parks or areas for games and sports, provided they do not impede network coverage of the national territory»; «In particular, this power may translate into the introduction both of rules to protect areas and assets of particular landscape, or environmental, or historical and artistic value, and in the identification of sites that, due to their intended use and the quality of the users, may be considered 'sensitive' to radioelectric immissions, and therefore unsuitable for the installation of plants to minimise the exposure of the population to electromagnetic fields».

The intervention of Legislative Decree 76/2020 – not surprisingly, called "Simplifications Decree" – was decisive for a change of course, marking a very heavy reduction in the municipal localization power, attributed «with the exclusion of the possibility of introducing limitations to localization in generalized areas of the territory of radio base stations for electronic communications networks of any type and, in any case, to affect, even indirectly or through contingent and urgent measures, the limits of exposure to electric, magnetic and electromagnetic fields, the attention values and quality objectives, reserved to the State [...]». So, today[64], the Municipality can only adopt location criteria and cannot – on the contrary – introduce any limits to the location itself, regardless of the identification of any sensitive sites[65]: this also because the local authority cannot act as an obstacle to the national interest in guaranteeing telephone and telecommunication coverage («the power attributed to the municipal administration to identify the areas where to place the systems is conditioned by the fact that the exercise of this faculty must be aimed at the creation of a complete network of telecommunications infrastructures, such as not to prejudice the national interest in the coverage of the territory and the efficient distribution of the service»)[66].

Undoubtedly, therefore, the centralizing impulse of the interest of the State, when it comes to strategic choices for the country: a qualification, this, which appears to have a pivotal capacity and which legitimizes the amputation of local territorial interests – which moreover they can also relate to the health

64 The latest interpolation by art. 18, co. 6, Legislative Decree 13/2023 (section «Measures regarding digital infrastructures and the purchase of IT goods and services instrumental to the implementation of the PNRR, as well as the digitization of procedures», expressly oriented according to the explanatory report to «simplify the purchases of goods and IT services instrumental to the creation of the PNRR») introduces a reference to articles 43, 44, 45, 46, 47 and 48 of the legislative decree 1 August 2003, n. 259, which lay down provisions on access to the ground and related to networks and systems.

65 *Ex multis*, Tar Lombardia, II, 19 May 2022, n. 1153: «the identification of a single area or restricted portions of the territory where to place the plants based on the pursuit of exclusively local urban planning interests is not permitted, constituting a limit to the location (not permitted) and not a criterion location (allowed)».

66 Tar Lombardia, II, no. 1153/2022, cit.

of the community, as well as to the protection of landscape views, therefore to interests that are detached from the purely local dimension because they coincide with adespotic values – and of the Administrations set up for their protection.

This happens with even more accentuated force in the current juncture of time, in which the political-administrative direction of the country marks a clear relevance for national interests – just think of the PNRR, in which, moreover, the term "strategic" in its variants occurs over 50 times – for the implementation of which measures expressly aimed at construction sites, centralizing the decision-making power in the state political authority and through mechanisms for overcoming the dissent of the territorial administrations through measures of high administration are launched.

5. The mechanisms for overcoming dissent with respect to strategic choices: the law decree no. 77/2021

Now, there is no doubt that the centralization of responsibilities and powers is linked to a national interest: which takes on specific features, since – as expressed by the provision contained in the governance discipline of the PNRR[67] – «the national interest in prompt and punctual implementation of the interventions assumes pre-eminent value»[68].

«Prompt and punctual», says the law. Time assumes a fundamental role in the implementation of choices of national strategic interest: especially in the mechanisms of the PNRR, whose diachrony is measured, in accordance with its Union founding source[69], in milestones and targets every six months. The

67 Legislative Decree 31 May 2021, n. 77, «Governance of the national recovery and resilience plan and first measures to strengthen the administrative structures and to speed up and streamline procedures».

68 It is the dictate of the art. 1, co. 2, Legislative Decree 77/2021.

69 Article 2(4) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Facility for Recovery and Resilience identifies 'milestones and targets' as measures of progress towards the realisation of a reform or investment, with 'milestones' being qualitative results and 'targets' being quantitative results. On the basis of this provision, in the definitions contained in Circular No. 21/2021 of the Accountant General of the State providing technical instructions for the selection of PNRR projects (in *https://www.rgs.mef.gov.it/_Documenti/VERSIONE-I/CIRCOLARI/2021/21/Circolare-del-14-otto-*

disbursement of the various installments of grants and loans recognized in favor of our country depends on the achievement of the results connected to the milestones and objectives (targets) expiring in each semester[70].

Since the timing of decisions assumes central importance – perhaps even more than their quality – it is with it that the result to be achieved coincides: in short, we return to the «logic of the result»[71]. This facilitates the centralization of skills[72].

As part of the desire to achieve the goal, a governance of the PNRR is therefore established – as is now known – which defines in advance the issues relating to the implementation of the plan and the advance definition of any issue that could lead to delays in the execution, especially in the dialogue with the local administrations. It is the task assumed precisely by Legislative Decree 77/2021, which «dictates, in its first part, provisions on the governance of the National Recovery and Resilience Plan, describing a system articulated on dif-

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bre-2021-n-21.pdf), milestone should be understood as the 'qualitative goal to be achieved through a given PNRR measure (reform and/or investment), which represents a commitment agreed with the European Union or at national level (e.g. legislation adopted, IT systems fully operational, etc.)', while 'target' means the 'quantitative goal to be reached through a certain measure of the NRP (reform and/or investment), which represents a commitment agreed with the European Union or at national level, measured by a well-specified indicator (e.g. number of kilometres of rail built, number of square metres of building renovated, etc.)'.

70 A. Tabacchi, *Le procedure per l'esercizio dei poteri sostitutivi e il superamento dei dissensi nell'attuazione del PNRR*, in *Federalismi.it*, no. 9/2023, clarifies that «Unlike what happens for other spending programs financed by the European Union, therefore, the disbursement of resources is not directly connected to the physical progress of investments or interventions to be implemented, but essentially depends on the achievement of the results foreseen in the annex to the implementing decision of the Council of the European Union which approved the PNRR» (p. 2, our translation).

71 Although this is then brought back to the more general principle of good performance. In this regard, M. Midiri, *Il tempo delle funzioni pubbliche (a proposito del Piano nazionale di ripresa e resilienza)*, in *Federalismi.it*, n. 18/2022, p. 151: «Il rilievo del tempo, in questa programmazione per obiettivi, trova la sua chiave costituzionale nel principio di buon andamento: il migliore uso dei mezzi disponibili (efficienza) deve servire al maggior grado di soddisfazione della domanda della società (efficacia). È questa la lettura da dare alla c.d. "logica di risultato". Non mera questione di organizzazione degli uffici, ma risposta al bisogno di prestazioni essenziali (art. 117, 2° comma, lettera m), Cost.) in una fase socio-economica in cui assume primaria importanza l'azione propulsiva dei poteri pubblici».

72 Also M. Midiri, *Il tempo*, cit., p. 150, states that «Nel sistema delle Amministrazioni centrali si è individuato il fulcro del sistema: scelta organizzativa ritenuta necessaria considerati i tempi stretti, e con il recupero delle autonomie nella fase di gestione».

ferent levels. The different strategic roles played by the central and peripheral state administrations are defined, as well as the modalities of dialogue with the European authorities. The second part of the decree provides for a series of simplification measures affecting the most sensitive sectors affected by the axes of the PNRR and aimed at facilitating their full implementation»[73].

Therefore, alongside the centralization, there are procedural mechanisms for overcoming dissents, denials, oppositions and other equivalent acts, coming from territorial administrations. Two, in particular: the activation of substitute powers (art. 12) and the specific overcoming of dissent (art. 13).

5.1. Art. 12: the substitute power. Few tips

Substitute powers are activated "in the event of failure by the Regions, Metropolitan Cities, Provinces or Municipalities to comply with the obligations and commitments aimed at implementing the PNNR and assumed as implementing bodies"[74]. In the broader framework of the «ordinary» and «extraordinary» substitution[75], the exercise of these powers is subject to the occurrence

73 It is the explanatory report to Legislative Decree 77/2021, in *http://www.assimpredilance.it/doc_portale/cont/Relazione_illustrativa_DL_77_2021.pdf*. It should be noted that since the opening, quoted in the text in italics, the adjective "strategic" has been used.

74 Explanatory report to Legislative Decree 77/2021, cit., art. 12, p. 5.

75 On the exercise of substitutive power from State level – both of a normative and administrative nature – one can only refer to the numerous contributions that have dealt with it especially following the constitutional reform of 2001, when the hoped-for extension of powers of the territorial Autonomies had to counterbalance an extraordinary power of government intervention where required by the national interest, pursuant to art. 120 of the Constitution: «In via generale, nei modelli istituzionali in cui sono riconosciute agli enti territoriali funzioni normative ed amministrative di particolare ampiezza, in caso di inerzia o insufficiente attività delle autonomie locali, è necessario predisporre degli strumenti idonei a garantire efficacemente la tutela di interessi nazionali, al fine di preservare un certo grado di uniformità giuridica, economica e sociale nell'ordinamento: la sostituzione è istituto presente sia negli ordinamenti caratterizzati da un "federalismo duale", sia in quelli espressione di un "federalismo cooperativo". Nella fase antecedente alla l. cost. n. 3 del 2001, il nostro ordinamento conosceva già, sia pure nella sola legislazione ordinaria, il potere sostitutivo del Governo nei confronti degli enti territoriali: anzi […], tale istituto risultava essere necessariamente correlato al processo istituzionale di decentramento amministrativo, avviato dagli anni settanta, e sviluppatosi ulteriormente negli anni novanta a seguito dell'approvazione delle leggi "Bassanini" […]. Malgrado non sia stato espressamente abrogato né dal nuovo art. 120 Cost. né dalla legislazione successiva attuativa (segnatamente l. n. 131 del 2003) purtuttavia è da ritenere che l'art. 5 d.lgs. n. 112 del 1998 sia stato implicitamente superato: la disciplina generale della sostituzione del Governo nei confronti delle Regioni e degli enti locali è infatti oggi organicamente prevista dall'art. 8 l. n. 131 del 2003, in essa sono stabiliti i presupposti e le modalità di svolgimento del potere sostitu-

of two essential assumptions, alternative to each other: failure to comply with obligations and commitments aimed at implementing the PNRR assumed as implementing bodies[76]; putting at risk the achievement of intermediate and final objectives of the PNRR[77].

Incidentally, it should be remembered that our legal system has already known a similar experience (when in 2014 the interest in attracting loans to our

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tivo statale». This is how the system that was just born in 2001, for R. Cameli, *Poteri sostitutivi del governo ed autonomia costituzionale degli enti territoriali (in margine all'art. 120 Cost.)*, in *Giur. cost.*, n. 5/2004, pp. 3390 ff., which points out that the substitutive power of art. 120, paragraph 2, Constitution (specific to the state government) constitutes, in this context, one of the main instruments guaranteeing the principle of unity and indivisibility of the Republic sanctioned by art. 5 of the Constitution, exercisable in case of system "pathologies".

Among the constitutionalists who have dealt with the topic, F. Bassanini, *Attuazione regionale di direttive comunitarie e intervento sostitutivo del Governo*, in *Le Regioni*, 1977, pp. 148 ff.; P. Caretti, *Potere sostitutivo dello Stato e competenze regionali in attuazione di obblighi comunitari*, in Giur. cost., 1976, pp. 2223 ff.; E. Gianfrancesco, *Il potere sostitutivo*, in T. Groppi, M. Olivetti (eds.), *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo titolo V*, Turin, 2001, pp. 183-184, G. Veronesi, *Il regime dei poteri sostitutivi alla luce del nuovo art. 120, comma 2, Cost.*, in *Ist. fed.*, 2002, pp. 733 ff.; G.M. Salerno, *La disciplina dei poteri sostitutivi tra semplificazione e complessità ordinamentale*, in *Federalismi.it*, 2002, pp. 355 ff.

In particular, on the side of administrative law, see F.G. Scoca, *Potere sostitutivo e attività amministrativa di controllo*, in Aa.Vv., *Aspetti e problemi dell'esercizio del potere di sostituzione nei confronti dell'amministrazione locale. Atti del convegno di studi amministrativi (Cagliari 19-20 dicembre 1980)*, Milan, 1983; A. Police, *Sussidiarietà e poteri sostitutivi: la funzione amministrativa nello Stato plurale*, in L. Chieffi, G. Clemente di San Luca (eds.), *Regioni ed enti locali dopo la riforma del Titolo V della Costituzione fra attuazione ed ipotesi di ulteriore revisione*, Turin, 2004; G. Avanzini, *Il commissario straordinario*, Turin, 2013; M.R. Spasiano, *Emergenza e poteri sostitutivi tra storia, attualità e prospettive*, in *Dir. soc.*, 2017, pp. 361 ff.; V. Cerulli Irelli, *Art. 8*, in Aa.Vv., *Legge "La Loggia". Commento alla L. 5 giugno 2003, n. 131, di attuazione del Titolo V della Costituzione*, Rimini, 2003, pp. 173 ff.; M. Bombardelli, *La sostituzione amministrativa*, Padua, 2004.

76 Assumptions thus identified by A. Tabacchi, *Le procedure*, cit., p. 137, who also believes that the non-compliance with obligations or commitments by the implementing subjects may also result in defaults or delays of the executing subjects, involved in the implementation of the interventions, since in fact their conduct reflects on that of the subjects actuators.

77 According to A. Tabacchi, *Le procedure*, cit., p. 140, the formula «intermediate and final objectives» can include both the milestones and targets, as well as the further elements of the time schedule for the implementation of the measures, which are not relevant for the purposes of the payment of the instalments, but have the function of monitoring the implementation of the Plan and are reported in the computerised management and reporting system of the Plan, ReGiS (procedural steps, further steps and Italian milestones). This extension could apparently constitute an extension of the formula contained in Decree-Law No. 77 of 2021, but it seems possible to affirm that delays or non-fulfilment with respect to steps of the timetable relevant only for internal purposes may, in any case, take on significance as indicators of risk of failure to achieve European objectives and milestones, which take on significance for the purposes of the payment of instalments of European financing.

country became a priority, so much so as to adopt "salvation" decrees for Italy[78]), an experience in which the exercise of substitutive power proved to be problematic[79] in commissioner form[80] and in which the intervention of the Constitutional Court became necessary to rebalance the relationship between the center and the periphery of the government levels[81]. In fact, in 2014, the substitutive powers became fully operational in the procedures aimed at ensuring the effective implementation of interventions financed with European

78 The obvious reference is to the legislative decree 12 September 2014, n. 133, conv. with modifications from law 11 November 2014, no. 164, the so-called Sblocca Italia decree: the regulatory intervention had significant repercussions on the simplification of urban planning and construction, not without the difficulty of offering a compatible interpretation with the general provisions on the administrative procedure referred to in Law 241/'90. For all, see the monographic dossier AA.VV., *Gli effetti del decreto legge Sblocca-Italia convertito nella legge 164/2014 sulla legge 241/1990 e sul testo unico dell'edilizia*, in *Riv. giur. ed.*, supplement to no. 6/2014, edited by M.A. Sandulli, which collects the proceedings of the Conference between AIPDA and AIDU.

79 Provided by art. 12, Legislative Decree no. 133/2014, according to which in the event of ascertained non-compliance, inertia or delay in the implementation of interventions co-financed by the European Union or drawing on national funds for cohesion policies, the President of the Council of Ministers or, on his delegation, the Minister for the South and Territorial Cohesion may exercise the substitutive powers referred to in article 9, paragraph 2, of decree-law no. 69 of 2013.

80 M.R. SPASIANO, *Osservazioni sull'istituto del commissariamento nel decreto Sblocca-Italia*, in *Riv. giur. ed.*, suppl. to no. 6/2014, pp. 61 ff., esp. p. 62, for which in many cases the commissioner demonstrates the failure of the policy of incentives for local autonomies. Solutions of a substantially centralist nature are put in place without formally changing (for the moment) the distribution of responsibilities between the different levels of government (which would require a radical intervention of constitutional reform), nor is defined a new management model; the Author continues: "the national interest of an initiative must not constitute a mere *éscamotage* for the recall to the State of the competences of others [...], but rather represent the fruit of a demonstrated and motivated need at an ultralocal level. In the same way, the principles of solidarity and adequacy cannot simplistically be apodictically invoked to legitimise forms of subtraction of competences, distancing the citizen from his interest in the res communis, which at that point does not belong to him, and - not affecting it in any way - he "bears"» (see p. 65, our translation).

81 Constitutional Court, 21 January 2016, n. 7, for which, in the issue of «government of the territory», as far as it is relevant here, The State can resort to the subsidiarity call "in order to allocate and regulate an administrative function (judgment n. 303 of 2003) even when the matter, according to a criterion of prevalence, belongs to the concurrent, or residual, regional jurisdiction" (judgment no. 278 of 2010). The Court stated in this regard that – because in the matters referred to in art. 117, third and fourth paragraph, of the Constitution, a state law can legitimately attribute administrative functions at a central level and at the same time regulate their exercise, it is first of all necessary that it respects the principles of subsidiarity, differentiation and adequacy in the allocation of administrative functions, responding to the needs of unitary exercise of these functions. Furthermore, it is necessary for this law to dictate a logically pertinent discipline, therefore suitable for the regulation of the aforementioned functions, and which is limited to what is strictly indispensable for this purpose. Lastly, it must be adop-

Union resources[82]: it was up to the Government – also through the appointment of extraordinary commissioners – to ensure «the competitiveness, cohesion and economic unity of the country».

However, the centralization of responsibilities was opposed by the Apulia Region, which appealed to the Constitutional Court complaining that the regulatory intervention that allowed it had conversely marginalized the regional role: even more because the administrative functions had, yes, been centralised; but in matters of concurrent legislative competence[83]. The Judge unequivocally

ted as a result of procedures which ensure the participation of the levels of government involved through instruments of sincere collaboration or, in any case, must provide for adequate cooperation mechanisms for the concrete exercise of the administrative functions assigned to the central bodies. Therefore, with reference to the latter profile, in the persistent absence of a transformation of the parliamentary institutions and, more generally, of the legislative procedures – even only within the limits of the provisions of art. 11 of the constitutional law of 18 October 2001, n. 3 (Amendments to title V of the second part of the Constitution) – State legislation of this type "can aspire to pass the scrutiny of constitutional legitimacy only in the presence of a discipline that prefigures a process in which the concerted activities and horizontal coordination, i.e. the agreements, which must be conducted on the basis of the principle of loyalty" (judgment no. 303 of 2003).

82 Precisely provided for by the aforementioned art. 9, co. 2, Legislative Decree June 21, 2013, n. 69, converted, with modifications, by l. 9 August 2013, no. 98: «Al fine di non incorrere nelle sanzioni previste dall'ordinamento dell'Unione europea per i casi di mancata attuazione dei programmi e dei progetti cofinanziati con fondi strutturali europei e di sottoutilizzazione dei relativi finanziamenti, relativamente alla programmazione 2007-2013, in caso di inerzia o inadempimento delle amministrazioni pubbliche responsabili degli interventi, il Governo, allo scopo di assicurare la competitività, la coesione e l'unità economica del Paese, esercita il potere sostitutivo ai sensi dell'articolo 120, secondo comma, della Costituzione secondo le modalità procedurali individuate dall'articolo 8 della legge 5 giugno 2003, n. 131, dagli articoli 5 e 11 della legge 23 agosto 1988, n. 400, e successive modificazioni, e dalle disposizioni vigenti in materia di interventi sostitutivi finalizzati all'esecuzione di opere e di investimenti nel caso di inadempienza di amministrazioni statali ovvero di quanto previsto dai contratti istituzionali di sviluppo e dalle concessioni nel caso di inadempienza dei concessionari di servizi pubblici, anche attraverso la nomina di un commissario straordinario, senza nuovi o maggiori oneri per la finanza pubblica, il quale cura tutte le attività di competenza delle amministrazioni pubbliche necessarie per l'autorizzazione e per l'effettiva realizzazione degli interventi programmati, nel limite delle risorse allo scopo finalizzate. A tal fine, le amministrazioni interessate possono avvalersi di quanto previsto dall'articolo 55-*bis* del decreto-legge 24 gennaio 2012, n. 1, convertito, con modificazioni, dalla legge 24 marzo 2012, n. 27, e successive modificazioni».

83 As denoted by G. Pizzoleo, *Il decreto "Sblocca Italia" al vaglio della Corte costituzionale: esercizio unitario delle funzioni amministrative e mancato coinvolgimento della Regione interessata (nota alla sent. n. 7 del 2016)*, in *Osservatorio AIC*, n. 2/2016, p. 9 (our translation), «often, the already thin line that separates the call to subsidiarity from the indiscriminate centralization of such tasks and functions can blur until it resolves itself into a legislation (*rectius*: standardization) that is constitutionally illegitimate or, at least, studded with questionable aspects in point sincere collaboration between entities. This is because, by virtue of the principle of legality that informs the dynamic mechanism set up by art. 118 of the Constitution, if the State takes over an administra-

established that, in the matter of "government of the territory", the State could not take over administrative functions exclusively – including the appointment of an extraordinary Commissioner who approved projects and oversaw their entire execution – without proceeding to "strong agreements"[84] with the Regions involved in the interventions. The need for unity and effectiveness in the achievement of interests of national strategic importance, however worthy, could not be satisfied by eliminating sub-state governmental and territorial levels and their interests. With an effective formulation, the Constitutional Judge has thus expressed a cardinal principle: the sub-state levels of government must not only be involved with concertation procedures, but their dissent must also be protected in those concerts. Dissent which, moreover, is not relevant only when it concerns sensible interests, but must be considered globally in relation to all the sub-state interests affected by the intervention[85]. This is because «the complexity of the social phenomena on which legislators intervene is expressed, as a rule, in a dense network of relationships, in which it will hardly be possible to isolate a single interest: it is, rather, the opposite rule that

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tive function for itself, out of subsidiarity, the same must be – necessarily – regulated by state law (so-called legislative subsidiarity); and this also where the object concerned exceeds the limit of exclusivity established by art. 117, paragraph 2, of the Constitution, touching on competing matters (art. 117, paragraph 3, of the Constitution) and even matters falling within the residual competence referred to in art. 117, paragraph 4, of the Constitution. In this perspective, therefore, it is evident that the interweaving of administrative powers and functions determines the weakening of the material division envisaged by art. 117 of the Constitution and poses the problem of coordination between the various levels of government involved (therefore, mainly between the State and the Regions».

84 That is «not surmountable with a unilateral determination of the State except in the "extreme hypothesis, which occurs when the experimentation of further bilateral procedures has proved to be ineffective"» (pt. 2 in law).

85 The Court affirms that the space taken away from the Region in the context of the approval of the strategic projects covered by the contested regulations is not recovered even «in the context of the conference of services, which the Commissioner convenes within 15 days of the approval of the projects, because the reasoned dissent of the Region activates the concertation procedures provided for by art. 14-quater, paragraph 3, of the law of 7 August 1990, n. 241 (New rules on administrative procedure and right of access to administrative documents) only for profiles relating to "environmental, landscape-territorial protection or historical-artistic heritage, or the protection of health and public safety". On the other hand, *it is clear that, in order to achieve the 'co-determination' of the act (judgment no. 378 of 2005), the Region must be placed on an equal footing with the State, with regard to the entire bundle of regional interests on which the administrative function impacts*» (our italics).

one has the to find in the concrete regulatory dynamics, or the confluence in the laws or in their individual provisions of distinct interests, which can well be distributed differently along the axis of the regulatory competences of the State and the Regions. In such cases, this Court cannot exempt itself from assessing, first of all, whether one matter prevails over the others (judgments no. 50 of 2005 and no. 370 of 2003), bearing in mind that, by means of such an expression, the proprium of the judgment is synthetically summarized, or the identification of the competence of which the provision is a manifestation. When it is not possible to conclude in the sense just indicated, there is a hypothesis of "competition of competences" (judgment n. 50 of 2005), which requires the adoption of the "canon of loyal collaboration, which requires state law to prepare adequate tools for involving the Regions, to safeguard their competences" (judgments no. 88 of 2009 and no. 219 of 2005)" 88 of 2009 and no. 219 of 2005)» 88 of 2009 and no. 219 of 2005)»[86].

Well, the current regulatory confusion – held by the red thread of the crushing of the role of the territorial Autonomies[87] – reproposes the activation

86 Constitutional Court, 22 July 2010, n. 278, on which see L. VESPIGNANI, *Supplenza della corte o* justice à la carte*? (a margine della sentenza 22 luglio 2010, n. 278)*, in *Federalismi.it*, no. 19/2010; and M. CECCHETTI, *La Corte "in cattedra"! Una emblematica "sentenza-trattato" che si proietta ben oltre le contingenti vicende storiche della disciplina legislativa presa in esame*, in *Le Regioni*, no. 5/2011, pp. 1064 ff.

87 A. LERRO, *Governance del PNRR e rapporti fra centro e autonomie territoriali. Art. 12, d.l. 77/2021 in materia di poteri sostitutivi, quale impatto sul regionalismo italiano?*, in *IPOF*, n. 2/2022, pp. 143 ss., believes that the regulatory device, following the art. 8, ln 131/2003 (the so-called La Loggia law), authorizes the exercise of substitutive powers of the Government *vis-à-vis* the territorial Autonomies in a very extended form, relegating – even in the Conferences – the local Authorities to a purely consultative role: «Pare, infatti, che il ruolo degli enti territoriali sia quasi unicamente consultivo, sicché la decisione sarebbe appannaggio pressoché esclusivo del Governo, *rectius* della Presidenza del Consiglio. Ciò è evidenziato dalla disciplina della Cabina di regia e del Tavolo permanente per il partenariato economico, sociale e territoriale; si aggiunga l'idoneità delle materie di competenza esclusiva statale *ex* artt. 117, co. 2 lett. a, Cost. 67 e 117, co. 2 lett. m, Cost. ad intervenire su materie riconducibili alle sfere di attribuzioni regionali. Tuttavia, la disposizione che più di altre potrebbe definire i futuri rapporti fra centro e periferia è l'art. 12 del decreto, grazie al quale il Governo dispone, potenzialmente, di un ampio margine di discrezionalità nell'esercizio del potere sostitutivo. Se il Governo dovesse attivare diffusamente l'esercizio dei poteri sostitutivi, alle Regioni residuerebbe un ruolo evidentemente marginale nell'attuazione del PNRR» (p. 156). See also C.B. CEFFA, *Il limitato ruolo delle autonomie territoriali nel PNRR: scelta contingente o riflesso di un regionalismo in trasformazione?*, in *Federalismi.it*, no. 24/2022, esp. p. 60: «l'impronta centralistica della *governance* si ravvisa nel ruolo marginale riservato al sistema delle autonomie territoriali, i cui esponenti, nonostante molti degli obiettivi del

scheme of that power[88] and introduces more firm mechanisms for overcoming the disagreements expressed in the conference venues by the local authorities.

5.2. Art. 13: the overcome of the dissent. Substantial profiles

It will not be surprising, given these premises, that Legislative Decree 77/2021, in art. 13, has – probably on purpose, systematically after art. 12 dedicated to the substitute power – legitimized the Government to unilaterally overcome the disagreements of the territorial Administrations where, in fact, there are strategic PNRR projects of national interest[89], to realize.

Piano ricadano in materie di competenza regionale, siedono solo a titolo eventuale e senza alcuna particolare autorità decisionale nei suoi principali organi ed il cui apporto a livello di indirizzo politico nell'attuazione delle strategie intraprese si rivela essere quasi del tutto assente, data la mancata previsione di meccanismi di partecipazione ai lavori preparatori che rischiano di relegare tale presenza ad una pura formalità istituzionale». The Author identifies among the critical points of the art. 12, Legislative Decree 77/2021, the structural limits of the substitutive instrument, conceived to intervene 'downstream' of a decision-making process that, instead, 'already upstream' of institutional action should have clear priority policy logics on which to intervene, especially if insisting on matters of shared competence, through the identification of those necessary points of balance between potentially conflicting legal interests (see p. 68).

88 In force of the principles dictated by the constitutional jurisprudence on art. 120, co. 2 of the Constitution, also re-proposed in the explanatory report to the decree: the substitutive powers: a) must be provided for and governed by the law, which must define the substantive and procedural prerequisites, in compliance with the principle of legality; b) must be activated only in the event of ascertained inaction by the Region or by the replaced local body; c) must concern only acts or activities without discretion in the year, the obligatory nature of which is the reflection of the unitary interests which the replacement intervention provides for safeguarding; d) they must be entrusted to government bodies; e) they must respect the principle of sincere collaboration within a proceeding in which the replaced entity can assert its reasons; f) must comply with the principle of subsidiarity (judgment no. 171 of 2015, which recalls judgments no. 227, no. 173, no. 172 and no. 43 of 2004). See the text at *http://documenti.camera.it/leg18/dossier/pdf/D21077c_vol.1.pdf?_1648575978210*, p. 77 of the report.

89 Lastly, see P.L. PORTALURI, *Autonomia differenziata e interesse nazionale nel rapporto fra Stato e Regioni: per un modello procedimental-consensuale*, in *www.giustizia-amministrativa.it*, 2023, who believes that the suppression of the express "national interest" clause in the constitutional provision pursuant to art. 120, co. 2 of the Constitution – far from overcoming its use in limiting the regional legislative power – still constitutes a problematic aspect of the effective implementation of the principle of "unity and indivisibility" of the Republic referred to in art. 5 of the Constitution, today no longer entrusted to the "domain of the preliminary ruling", but rather "to procedural and (at least tendentially) consensual relations, without prejudice to the role of the State as the ultimate decision maker".

On the too "casual" use of this clause by the state level of government, as a limit to the regional legislative power, it is appropriate to refer to a reflection formulated close to the reform of Title V by B. CARAVITA DI TORITTO, *In tema di "interesse nazionale" e riforme istituzionali*, in *Federalismi.it*, no. 6/2003, an editorial in which a long passage from a sentence of the Constitutional Court prior to the reform itself is quoted - and therefore to the introduction of art. 120

Only to provide the essential, substantial lines of the provision under consideration.

First of all, the conditions in order to activate the procedure for overcoming dissent: differently from art. 12, relating to substitutive powers, a concrete jeopardization of the objectives of the PNRR time schedule is not required (indeed, the provision makes no reference to the non-compliance with obligations and commitments aimed at implementing the PNRR undertaken as implementing bodies; nor to the jeopardizing the achievement of intermediate and final objectives of the PNRR). If, in other words, for the exercise of substitutive powers it is generally required that an intermediate or final objective of the Plan be put at risk, to activate the procedure for overcoming disagreements it is instead sufficient that the act of dissent is liable to preclude in whole or in part the implementation of an intervention: government intervention is legitimized – in anticipation – by the mere endangerment of the objective considered from time to time. The provision does not look at the overall objectives of the Plan, nor at its milestones, but at specific «interventions falling within the PNRR» (as stated by the provision)[90].

What can be understood, then, by «dissent, denial, opposition or other equivalent act», it is a hermeneutical question that leads to affirming that it could be any opposition act - of any of the Administrations involved in the decision-making process[91] – which, beyond the *nomen juris*[92], is essentially an im-

of the Constitution as we know it today – or Constitutional Court, n. 177/1988. In that contribution, the A. predicted that the La Loggia law, n. 131/2003, would shortly thereafter highlight «the dramatic difficulty of rationally managing the division of legislative power between the State and the Regions, the distribution of administrative functions between the different levels of government and the consequent construction of a system of fiscal federalism» (our translation).

90 For this reason, the art. 13 is very close to the exercise of substitutive powers envisaged by the so-called residual clause pursuant to art. 12, co. 4, Legislative Decree 77/2021, or in all cases in which situations or events impeding the implementation of projects included in the PNRR cannot otherwise be overcome quickly.

91 The art. 13 also applies to dissent expressed by state administrations, therefore not necessarily territorial.

92 As known, the principle of typicality of administrative acts – which correlates to the principle of legality on which see the reference to G. Corso, *Il principio di legalità*, in M.A. Sandulli (ed.), *Principi e regole dell'azione amministrativa*, Milan, 2015, pp. 31 ff., esp. p. 34 – is

pediment to the approval of the intervention or, more broadly, to its implementation. In short, more than the type of opposition act, its "blocking suitability" counts. This implies, on the one hand, the breadth of the objective scope of application of the provision, a scope that goes beyond the "labels" of acts of dissent; on the other hand, the inapplicability of the rule itself where there are – properly – acts of dissent (negative opinions, conditioned opinions, oppositions of various kinds), but without that "blocking suitability", since they are susceptible to being overcome through the mechanisms already identified – at least – by law no. 241/1990[93].

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not resolved in a mere formalism, but looks at the concrete tenor and purpose of the act itself for the purpose of its classification: The exact classification of a measure must be carried out taking into account its actual content and its real cause, even regardless of the *nomen juris* formally attributed by the Administration, with the consequence that the appearance deriving from terminology that may be imprecise or improper, used in the textual formulation of the deed itself, is not binding nor can it prevail over the substance and neither does it determine per se a defect of legitimacy of the deed provided, of course, that the formal and substantive prerequisites corresponding to the power actually exercised exist (*ex multis*, Tar Trentino Alto-Adige, I, 5 January 2023, no. 1).

93 The obvious reference is to the provisions on dissent expressed in the conference of decision-making services, which – albeit with the changes that have taken place over the years – govern the overcoming of the dissent itself by referring the deal to the Council of Ministers to protect sensitive interests. In fact, it is known that the conference of services decides according to the so-called criterion of prevalence («on the basis of the prevailing positions», pursuant to art. 14-ter, co. 7, law no. 241/1990), which is «rule from the content flexible which, compared to the rigidity of the majority method, makes it possible to concretely evaluate, based on the nature of the interests involved, the importance of the contribution of the single authority and the type of their possible dissent»: thus, Cons. Stato, VI, 21 October 2013 n. 5084. This can happen where the Administrations that express themselves negatively during the conference protect qualified interests: for example, think of the Superintendency and the Park Authority which formulate a reasoned and insurmountable dissent (when the argumentative content of the disagreements in question is «such as to correlate an insurmountable negative value to the typology and nature of the intervention, regardless of any expedient during the implementation», Tar Molise, I, 7 October 2019, n. 316) and the proceeding Administration provides with motivated determination of negative conclusion of the conference of services instead of referring the matter to the Council of Ministers. In this case, as stated by Tar Molise, I, n. 316/2019, cit., in the hypothesis in which an Administration responsible for the protection of qualified interests expresses its dissent in line with a prevailing orientation of the same tenor (that is, as in the present case, negative), the conference concludes with the adoption by the proceeding authority of the reasoned determination of conclusion of the proceeding as envisaged by the aforementioned article 14-ter, paragraph 6-bis, without activating the referral to the Council of Ministers. The rationale of the special rule established by art. 14-quater, paragraph 3 is, in other words, to refer the question to the Council of Ministers in order to prevent the conference of services, in the presence of particularly significant interests, from being concluded on the basis of the criterion of prevalence with possible prejudice of values such as the environment, the landscape, the historical-artistic heritage, health and public safety. A hypothe-

Therefore, the relationship between the 13, legislative decree no. 77/2021 and the homologous provision – art. 14-*quinquies* – of law no. 241/1990 is such that the first one finds application in all those cases in which the procedure for overcoming the dissent envisaged by the general provision cannot be applied: this is by virtue of a literal and systematic interpretation of the framework regulatory framework, both by reason of the express legislative provision which qualifies the procedure envisaged therein as residual and by the qualified nature of the dissent considered by article 14-*quinquies* of law no. 241/1990, which, as expressed by administrations holding sensitive interests, justifies the application of an *ad hoc* procedure, placed as a particular guarantee of the interests represented by those Administrations[94].

However, there's a possible overlap between the areas of application of art. 13 and of the art. 14-*quinquies*, where, for the purposes of implementing interventions falling within the PNRR, it is necessary to hold a conference of services which envisages the participation of Administrations holding qualified interests. Think, once again, of the Special Economic Zones (already identified with the acronym ZES[95]), established with the regulation pursuant to Legisla-

sis that goes beyond the trend of the decision-making conference that is the subject of the dispute (where, in fact, the Administrations holding qualified interests had expressed an insurmountable dissent and therefore the danger of prejudice did not exist).

94 See A. Tabacchi, *Le procedure*, cit., p. 154.

95 It should be remembered that the ZES can be established in regions with a per capita GDP of less than 75% of the European average: in Italy these are the regions of Sicily, Calabria, Basilicata, Puglia and Campania, while they are regions in transition (with a per capita GDP between 75 % and 90% of the European average) the regions of Sardinia, Abruzzo and Molise. The Special Economic Zone is defined as a geographically delimited and clearly identified area, located within the borders of the State, also made up of non-territorially adjacent areas, provided they have a functional economic nexus, and which includes at least one port area forming part of the network overview of the trans-European transport networks, defined by regulation (EU) no. 1315 of 11 December 2013. The purpose of the Special Economic Zones is to create favorable conditions in economic terms, financial and administrative, which allow the development of existing businesses and the establishment of new businesses. These companies are required to comply with national and European legislation, as well as with the provisions adopted for the functioning of the ZES itself and benefit from special conditions. In particular, companies that start a program of entrepreneurial economic activities or make incremental investments within the ZES can take advantage of the reduction in the terms of the proceedings and the simplification of the obligations with respect to the legislation in force (see the explanatory documentation of the Chamber at the link *https://www.camera.it/temiap/documentazione/temi/pdf/1104404.pdf?_1686803468712*). These companies are required to com-

tive Decree 91/2017: art. 5-*bis* of this decree governs the release of the Single Authorization for the implementation of «projects relating to economic activities or the setting up of industrial, production and logistics activities within the ZES, not subject to certified reporting of the start of activity. The single authorization, where necessary, constitutes a variant of the urban planning and territorial planning instruments, with the exception of the regional landscape plan», therefore it imposes itself on the municipal instruments; the Authorization is issued by the Extraordinary Commissioner for the ZES – appointed by the government but, from 2021, «in agreement with the President of the Region concerned»[96] – following a special conference of services to which «all the competent administrations are summoned, also for the protection of the envi-

ply with national and European legislation, as well as with the provisions adopted for the functioning of the ZES itself and benefit from special conditions. In particular, companies that start a program of entrepreneurial economic activities or make incremental investments within the ZES can take advantage of the reduction in the terms of the proceedings and the simplification of the obligations with respect to the legislation in force (see the explanatory documentation of the Chamber at the link *https://www.camera.it/temiap/documentazione/temi/pdf/1104404.pdf?_1686803468712*).

96 Specifically, the art. 4, co. 6, first part, Legislative Decree 91/2017, establishes that «The Commissioner is appointed by decree of the President of the Council of Ministers, adopted on the proposal of the Minister for the South and Territorial Cohesion, in agreement with the President of the Region concerned. In the event of failure to finalize the agreement within sixty days of the formulation of the proposal, the Minister for the South and Territorial Cohesion submits the question to the Council of Ministers, which proceeds with a reasoned resolution». The regulatory change regarding the procedure for appointing the ZES Commissioner was imposed by art. 57, co. 1, lit. a), no. 2), decree law 77/2021: this is because the governance of the special economic zones was changed with the budget law for 2020 (art. 1, paragraph 316 of law no. 160 of 2019), establishing that the subject for the administration of the ZES area, i.e. the Steering Committee, is also composed of an extraordinary Government Commissioner, who presides over it. Previously, the Steering Committee was instead chaired by the President of the Port System Authority.

However, the Sicily Region contested the governance system referred to in the 2020 budget law before the Constitutional Court, as the presidency of the Steering Committee – passed precisely from the President of the Port System Authority to the exclusively government-appointed Extraordinary Commissioner –, according to the deductions of the regional body, the principle of loyal collaboration. The constitutional judge, who ruled after the enactment of legislative decree 77/2021, finally took note of the regulatory change («The Sicilian Region complains, in fact, that the principle of loyal cooperation would be infringed by the decision to have the SEZ Steering Committee chaired by a person appointed 'without any agreement' with the Region concerned. The above provisions, on the other hand, introduce a new appointment procedure, in the context of which an agreement with the President of the Region concerned is indeed provided for, which circumvents the alleged breach of the principle of loyal cooperation and satisfies the applicant's claim»), thus rejecting the question of constitutionality (Corte Cost., 24 Sept. 2021, no. 187).

ronment, landscape-territorial, cultural heritage, state property, fire prevention, citizen health and in charge of customs regulations» (art. 5-*bis*, paragraph 4, legislative decree 77/2021). If these administrations or the regional administrations oppose the reasoned decision to conclude the conference, it is up to the delegated political authority for the south and territorial cohesion to convene a meeting to seek a shared solution, the – negative – outcome of which the question is finally remitted to the Council of Ministers in application of art. 14-*quinquies*, co. 6, law no. 241/1990 for overcoming dissent.

For the purposes of a more precise identification of the rather narrow scope of application of art. 13, law decree no. 77/2021, a provision for closing the system was also reported, with which this provision would appear to be compatible: art. 5, co. 2, lit. c-*bis*), law no. 400/1988[97]. In fact, since it is generally attributed to the President of the Council to refer to the Council itself the decision on matters in which conflicts have arisen between the Administrations, the intervention of this provision would seem in any case to allow an intervention of even broadly political nature in the ambit of proceedings governed by specific regulatory provisions relating, in particular, to the construction of infrastructures and strategic works[98].

97 A. Tabacchi, *Le procedure*, cit., p. 155: «Anche al fine di mantenere un qualche margine di applicabilità della disciplina di cui all'articolo 13 del decreto-legge n. 77 del 2021, si potrebbe invece ritenere che la disciplina prevista da tale disposizione sia compatibile con quella disciplinata dall'articolo 5, comma 2, lettera c-bis), della legge n. 400 del 1988, che consente al Presidente del Consiglio dei ministri di deferire al Consiglio dei ministri, ai fini di una complessiva valutazione ed armonizzazione degli interessi pubblici coinvolti, la decisione di questioni sulle quali siano emerse valutazioni contrastanti tra amministrazioni a diverso titolo competenti in ordine alla definizione di atti e provvedimenti. Sembrerebbe, infatti, che quest'ultima disposizione per il suo carattere generale non possa considerarsi uno specifico meccanismo di superamento del dissenso, ma funga anch'essa da norma di chiusura del sistema».

On this point, see also G. Mari, *'Primarietà' degli interessi sensibili e relativa garanzia nel silenzio assenso tra pp.aa. e nella conferenza di servizi*, in *Riv. giur. ed.*, no. 5/2017, pp. 305 ff., in relation to the intrinsic political evaluation of the resolution of the Council of Ministers following the opposition to the final determination of the conference of services carried out by the dissenting Administrations: the provision of law no 400/1988 would therefore be indicative of this matrix evaluation profile essentially politics.

98 In this case it is up to the Department for Administrative Coordination to carry out the preliminary activity for overcoming the disagreement that has emerged between the Administrations. To this end, clarifications are acquired on the positions expressed by the participating administrations and the examination of the documentation received on the subject through the

5.2.2. Procedural profiles

Let's get to the procedural aspect.

Almost like a return to the past[99], the art. 13 distinguishes between two different procedures depending on whether the dissent comes from a territorial or a state administration.

The procedure envisaged in the event of disagreements, denials or oppositions from bodies of Regions, Autonomous Provinces and local bodies, provides that both the political Authority[100] delegated in matters of PNRR or the competent Minister – *ex officio* or on the initiative of the PNRR mission structure established at the Presidency of the Council of Ministers or of the General Inspectorate for PNRR set up within the Ministry of Economy and Fi-

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holding of in-depth meetings. During the meeting, the possibility of overcoming dissent through an agreement between the administrations is verified. From this stage onwards, the investigation differs according to what is prescribed by the specific legislation: in some cases the decision regarding the resolution of the dissent is taken by the Council of Ministers on the basis of a comparative assessment of the interests, in other cases through a decree of the President of the Republic or of the President of the Council of Ministers. For more information see the form at *https://www.governo.it/it/dipartimenti/dica-att-supdissensosp/9261*. The Department, regulated by decree of the Secretary General of 13 May 2022 (in *https://www.governo.it/sites/governo.it/files/documenti/documenti/Presidenza/DICA/Normativa/Dica_organisation/DSG_20220513-txt.pdf*), is a general structure of the Presidency of the Council (established by the d.p.c.m. 1 October 2012, art. 2, co. 3, lett. b), in *https://presidenza.governo.it/normativa/allegati/dpcm20121001.pdf*) for the exercise of coordination functions and, among other attributions, "ensures the functions of the sole representative of the state administrations" in the conference of services (art. 2, paragraph 2, DSG 13 May 2022).

99 This is underlined by A. TABACCHI, *Le procedure*, cit., p. 156, for which the art. 13 takes up the version of the general discipline of the conference of services dating back to the text of the law 241/1990 reformed by the law 15/2005, where the art. 14-quater then in force diversified the proceedings according to whether the qualified dissent came from a state administration (and at the time the decision was left to the Council of Ministers), or from a regional administration (thus involving the Permanent Conference for relations between the State, the regions and the autonomous provinces of Trento and Bolzano), or by a local Administration (referring the decision to the Unified Conference referred to in Article 8 of Legislative Decree No. 281 of 28 August 1997).

100 The original formulation of the law envisaged that it was the Technical Secretariat of the PNRR, also at the instigation of the Central Service for the PNRR, to formulate the proposal to the Prime Minister. The power was then expressly politicized by Legislative Decree 13 of 24 February 2023, today envisaging an initiative by the Minister holding the delegation for the implementation of the PNRR or by the competent Minister, limiting the activities within the competence of the mission structure set up at the Presidency of the I recommend impulse functions only. The impetus role of the Inspectorate General for the PNRR has also ceased, now competent exclusively for the operational coordination on the implementation, financial management and monitoring of the Plan.

nance[101] – to propose to the President of the Council of Ministers, within the following five days, to submit the question to the examination of the Council of Ministers for the consequent determinations.

The provision does not clarify – as can be understood – the dies a quo of the five-day term: it is therefore not clear whether it starts from the expression of dissent, from its communication or notification to the central structures, or from the knowledge by the Minister, the Political Authority or the Mission Structure or by the General Inspectorate.

There is no doubt that the question has a practical relevance, since the general discipline pursuant to art. 14-*quinquies*, law no. 241/1990, which provides that the deadline for proposing the question to the President of the Council of Ministers starts from the communication of the "reasoned decision for the conclusion of the conference of services", therefore at the outcome of the moment of institutional connection: the remedy provided by the general law is, in other words, posthumous.

In the art. 13, on the other hand, given the urgency of guaranteeing timeliness and speed in the implementation of the PNRR objectives, the remedy has an anticipatory nature, therefore the procedure for overcoming the dissent must logically be carried out before any negative conclusion of the proceduralized conciliation moment. Therefore, it becomes essential to understand when dissent becomes knowable to the governance structures vested with the power to invest the Prime Minister with the related issue. This is to ignore the - perhaps remote, but not impossible – circumstance for which the mere news

101 According to the art. 6, Legislative Decree 77/2021, the Inspectorate has «operational coordination tasks on the implementation, financial management and monitoring of the PNRR, as well as control and reporting to the European Union pursuant to articles 22 and 24 of the regulation (EU) 2021/241, complying with the related information, communication and advertising obligations. The Inspectorate is also responsible for managing the Next Generation EU-Italy revolving fund and related financial flows, as well as managing the monitoring system on the implementation of the reforms and investments of the PNRR, ensuring the necessary technical support to the central administrations holders of interventions envisaged in the PNRR referred to in Article 8, as well as to the territorial administrations responsible for implementing the actions of the NRP referred to in Article 9» (our translation).

of the dissent expressed by the State Administration may not be sufficient, since it is not certain that it has the "blocking suitability" of the PNRR intervention, which could also emerge at a later time. In view of the short time limit (five days), it would not be out of place to specify its starting date[102].

As already noted, «at present, in fact, this term could abstractly start from the expression of dissent, which, however, does not appear to be a fact that is easily known by the central governance structures of the Plan, especially in the presence of measures that envisage a particularly high number of interventions. In the absence of a regulatory intervention, since an obligation to report disagreements cannot be found in the current legislation, it would seem necessary to have to consider as dies a quo that of the effective knowledge of the disagreements themselves by the Presidency of the Council of Ministers»[103].

Instead, we come to the procedural aspects of the dissent expressed by administrations other than state ones. According to the art. 13, co. 2, where the dissent, refusal, opposition or other equivalent act comes from a body of the Region, or of the Autonomous Province of Trento or Bolzano or of a local body, it is the Technical Secretariat, also at the instigation of the Central Ser-

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102 Moreover, there is a system of monitoring, reporting and control of the PNRR measures and projects by the Administrations pertaining to the territorial levels of the State, governed by Circular of the State General Accountant n. 27 of 21 June 2022 (in *https://www.rgs.mef.gov.it/VERSIONE-I/circolari/2022/circolare_n_27_2022/*). The circular could be integrated or a modification of the same art could be arranged. 13, Legislative Decree 77/2021 which clarifies the mechanisms for reporting dissent to the central authorities. A. TABACCHI, *Le procedure*, cit., pp. 156-157, proposes that it might be advisable to amend the regulations in order to provide, as a general rule, for a duty to report disagreements in the first instance on the part of the implementing subjects, who should promptly inform the central Administrations in charge of the interventions, which, in turn, having assessed the impossibility of using further mechanisms to overcome disagreements already provided for by the legislation in force, should report the criticality to the PNRR Mission Structure of the Presidency of the Council of Ministers and to the General Inspectorate for the PNRR of the State General Accounting Department. It would seem, however, advisable for the report to be as circumstantial as possible and for the mere notice of disagreement to be accompanied by an indication as to whether it is likely to preclude, in whole or in part, the implementation of an intervention of the Plan. Only in the presence of such an indication could the five-day time limit for the formulation of the proposal to activate the procedure for overcoming dissent be effectively applied.

103 A. TABACCHI, *Le procedure*, cit., p. 157.

vice for the PNRR, to propose to the Prime Minister or to the Minister for Regional Affairs and Autonomies, always within the following five days, to submit the question - not to the Prime Minister, but - to the Permanent Conference for relations between the State, the regions and the autonomous provinces of Trento and Bolzano to agree on the initiatives to be taken, which must be defined within fifteen days of the date of convening the Conference. After this deadline, in the absence of mutually agreed solutions enabling the prompt implementation of the intervention, the President of the Council of Ministers, or the Minister for Regional Affairs and the Autonomous Communities in the relevant cases, shall propose to the Council of Ministers the appropriate initiatives for the exercise of substitutive powers[104].

The differences with respect to the procedure activated for the dissent of the State Administrations are quite marginal: it is evident that, in this case, the activation of the procedure for overcoming the dissent has remained the prerogative of the Technical Secretariat, therefore not of the political body; which, moreover, takes the initiative only if the consensual-conferential procedure in the Permanent Conference has a negative outcome.

Nonetheless, despite the fact that dissent from local authorities is foreseen, the referral of the question to the Unified Conference is not contemplated, the only formal place in which those bodies can institutionally express and discuss about the group of interests that concern them and which is invested by the PNRR intervention[105].

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104 A. Tabacchi, *Le procedure*, cit., p. 157: «The provision therefore refers to the substitutive powers envisaged by the Constitutional Charter and not to the "special" ones envisaged for the implementation of the PNRR, probably in consideration of the circumstance, already indicated, that the conditions for the exercise of the powers in article 12 of the decree-law n. 77 of 2021 as they refer to putting the objectives of the Plan at risk, may prove to be more restrictive in some respects than those governed in general by article 8 of law no. 131 of 2003».

105 M. Cecchetti, *L'incidenza del PNRR sui livelli territoriali di governo e le conseguenze nei sistemi amministrativi*, in *Rivista AIC*, no. 3/2022, notes that the absence of a permanent conference venue involving all levels of government is evidence that the participation of the Regions and local authorities in the planning of the PNRR as well as in the implementation of the related interventions is only "graciously granted" or "requested" by the Government optionally.

As noted, "a preliminary phase of dialogue between the administrations concerned aimed at identifying a shared solution is not expressly regulated, which, where compatible with the implementation times of the PNRR, could favor a conciliatory settlement of the expressed oppositions, thus reinforcing the protection of the principles of loyal collaboration and subsidiarity"[106].

The decisions of the Council of Ministers, taken in the cases of art. 13[107], act as a moment of closure of the proceeding, sanctioning the definitive overcoming of the dissent through a provision which - not unlike its counterpart provided for by the general discipline - seems to still have, despite the regulatory interventions on the law 241/1990 which removed the express reference nature of an act of high administration[108].

106 A. Tabacchi, *Le procedure*, cit., p. 158.

107 A. Tabacchi, *Le procedure*, cit., pp. 158 ss., gives account of a special provision contained in Legislative Decree 77/2021, art. 44, having as its object the activation of substitutive powers and the overcoming of disagreements regarding public works of significant complexity: the mechanism, similar to that referred to in articles 12 and 13, has some peculiarities with respect to the one just examined, since the decisions of the Council of Ministers are immediately effective, are not subject to the preventive legitimacy control of the Court of Auditors and are published, in extract, within five days from the date of adoption , in the Official Gazette of the Italian Republic.

The Author evokes the possibility of extensively applying these rules also to the decisions of the Council of Ministers concluding these proceedings, even though this solution could prove problematic in consideration of the different wording of the provisions.

108 As already anticipated above, the qualification of the determination as an act of high administration - and not, conversely, a political act - decrees its jurisdictional reviewability (albeit limited to the extrinsic control of the vice of excess of power in the particular figures symptomatic of the inadequacy of the procedure preliminary investigation, illogicality, contradictory nature, manifest injustice, arbitrariness, unreasonableness of the choice adopted or lack of motivation, and not extended to direct examination and independent evaluation of the material tending to demonstrate the existence of the relative conditions). On this point, see Court of Cassation, SS.UU., 12 July 2019, n. 18829: «in order to recognize the political character of an act, in order to remove it from the judicial review, it must be impossible to identify a legal parameter (whether legal provisions, and principles of the system) on the basis of which to carry out the judicial review: when the legislator predetermines canons of legality, politics must, in fact, abide by them, in accordance with the fundamental principles of the rule of law. Specifically, when the scope of extension of discretionary power, whatever it may be, is circumscribed by constraints set by legal rules that mark its boundaries or direct its exercise, compliance with these constraints constitutes a requirement of legitimacy and validity of the deed, which can be reviewed, in fact, in the appropriate ways and fora. In the light of these principles, it is quite evident that the resolution of the Council of Ministers, issued as a result of the specific procedure indicated by law n. 241 of 1990, art. 14-quater does not have the requisites to be considered a political act, being, on the contrary, the same expressly qualified as an act of high administration within paragraph 3 of the said provision, as amended by Legislative Decree 133 of 2014, art. 25 converted with amendments by Law No. 164 of 2014. The Resolu-

The provision has not yet had concrete application, or - at least - there is not yet a jurisprudential interpretation deriving from any dispute, above all of a constitutional nature: this is because it would seem that the Regions have for now renounced to claim their prerogatives before the Judge of the laws, "revealing the decisive and unanimous preference of the regional system, first of all on the political level, for maintaining a dialogue and interlocution with government institutions of a fundamentally collaborative and non-oppositional nature"[109].

On the other hand, the procedural tools of the concerted type - first of all the Conferences and permanent Tables - see a (more than anything else) passive participation of the sub-state bodies, which are given the "only" role of implementers of what has already been decided at headquarters, thus also neutralizing their contribution in the "ascending" phase of the PNRR[110].

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tion, which constitutes an expression of the expressed administrative power of the Council of Ministers during the conference of services, therefore remains subject to judicial review».

109 M. Cecchetti, *L'incidenza*, cit., p. 302, who notes that at the time of the publication of his contribution, only two appeals are pending in the Constitutional Court – nos. 3 and 4/2022 – respectively proposed by the Tuscany Region and the Friuli-Venezia Giulia Region, moreover in port matters (l.n. 121/2021), therefore only broadly attributable to the PNRR.

For A. Tabacchi, *Le procedure*, cit., p. 155, «at the moment there is no application experience of the provisions of the decree-law n. 77 of 2021 which allows unequivocal considerations to be drawn on the effectiveness of the envisaged procedure. If it were deemed useful to overcome the narrow existing margins for the application of this procedure, a regulatory intervention could be considered which envisages its possible extension, directly, to the implementation of the interventions of the PNRR, overcoming the residual nature that currently characterizes it , also in order to ensure greater control of the various procedures by the structures of the Presidency of the Council of Ministers competent for the implementation of the Plan» (our translation).

110 This is confirmed by M. Cecchetti, *L'incidenza*, cit., p. 295: that is, it is necessary to take note of «two elements of which to assume the necessary awareness in relation to the administrative activities aimed at the planning and implementation of the interventions, elements that seem to restore a decidedly marginal role of the autonomies:

- the territorial autonomies and, in particular, the Regions are almost totally excluded from the tasks attributable to the "ownership" or "responsibility" of the interventions;
- the same bodies are involved exclusively as "implementing subjects", but they are only partially involved here, together with a large plurality of other national and territorial subjects, and for an overall minority share of resources, although certainly significant if measured on the stock of resources made available for the implementation of the Plan at the territorial level (not so much for the Regions, but above all for the local bodies)».

The Author continues by pointing out the opacity of the PNRR discipline in identifying the distinctive features of the implementing subjects, who, at least in theory, have a role that is anything but marginal since they are the beneficiaries of the loans, as well as those responsible

6. Brief concluding remarks: the centralization and politicization of decisions, the deprivation of the powers of the public administrations

The framework just traced expresses a fairly precise idea of our legislator: namely that, in the urgency of speeding up the implementation times of specific projects in order to obtain the promised European funding, any dissent expressed by the Administrations concerned – none excluded – is a forbidden obstacle[111] to overcome.

While being aware that not infrequently administrative power has been exercised by the assignee bodies in the sense of constituting an undue blocking filter on the activities of private individuals, including entrepreneurial[112], how-

for the management and implementation of the individual projects: «it is certainly not irrelevant whether or not a body politically representative of (and responsible to) the community of a given territory plays such a role (starting from the choices concerning the preparation and presentation of projects, to the guarantee that the intervention is carried out in compliance with the regulations in force and the specific rules established for the PNRR, to the accounting management of the resources received, to the fulfilment of the obligations of monitoring, reporting and control for the purposes of achieving the goals and objectives associated with the project)» (p. 296, our translation)

111 The idea that the Administration – its action and its organization – translates into an obstacle between the *intentio legislatoris* and the result to be achieved is by no means new, having led to multiple reform initiatives which now intended to liberalize the private activities – thus subtracting them from administrative control – now simplifying procedures and complexes activities and organization – and therefore reducing and thinning out. The results, however – perhaps also due to the cyclical nature of these allegedly simplifying interventions, which become the priority of every executive who takes office, and therefore do not allow consolidating the certainty of the rules – have not always been successful.

In this regard, F. Fracchia, *L'amministrazione come ostacolo*, in *Dir. econ.*, no. 2/2013, pp. 357 ff., warns that simplification does not allow to remove all the obstacles linked to the presence of the administration and which are linked to a great variety of juridical institutes (p. 360) and, therefore, reformist attempts often fall on deaf ears because it is difficult to study the Administration as an "obstacle", or rather as a complex of public bodies which "does not favor or impede the achievement of relevant objectives, or hinders some activities attributable to subjects other than the administration itself" (p. 361).

112 F. Fracchia, *L'amministrazione*, cit., himself acknowledges this, where he recalls that the Municipalities have often made use of their planning power «to put a stop to the diffusion of initiatives feared by local communities, such as radio broadcasting systems. In this case, many municipalities have sometimes acted as an obstacle, or, better still, have hindered the achievement of a specific objective (the opening up of the mobile telephone services market, strongly desired by the general legal system), supporting a logic (basically it is a different goal) inspired by the principle *Not In My Back Yard*» (p. 364).

This problem is addressed by the aforementioned regulatory change which left local authorities with the sole power to formulate criteria for the location of radio and telecommunications systems, without being able to introduce any location bans, not even in sensitive sites.

Nonetheless, with the ministerial decree of 10 May 2018, n. 76, the regulation on the public debate was issued, in order to elaborate the criteria to obtain a broad participation of citizens

ever the 2021 legislator's choice to "simplify" the authorization procedures by "skipping" the dissent of the Administrations does not seem to be shared from a systematic point of view.

Often the goal of simplifying procedures has been subservient to the speed of the decisions to be taken, with the side effect of being able to guarantee "the result", but not a qualitatively complete, accurate, impartial decision[113]. The paradox is that, in this way, the result is not achieved in any case, when understood as a "good" result: «The objective pursued can only be a good decision: quick and timely, but, at the same time, also well-formed (fair and reasoned), to the outcome of a production process congruent with the substantial data of the administrative problem"[114].

It was said at the beginning of this contribution that the simplifying approach just described shows all its weaknesses when the "administrative problem" is "complex": because – to be honest – a complex problem cannot be tackled except through a procedure decision-making and pondering that reflects precisely that complexity. It cannot be avoided.

On the other hand, this is the most correct reading of the institution of the conference of services pursuant to articles 14 ff. of the general law on administrative procedure: born as a tool for spontaneous comparison and coordination between Administrations, it is then institutionalized and continuously reformed by the legislator in search of delicate – and, by their nature, precarious – balances between interests. Yes, it resolves itself into a procedural instru-

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with respect to the choices of location of public works and thus avoid the occurrence of blocking phenomena. On this point, see G. Manfredi, *Il regolamento sul dibattito pubblico: democrazia deliberativa e sindrome* nimby, in *Urb. app.*, no. 5/2018, pp. 604 ff.

113 Among others, D. D'Orsogna, *Semplificazione e conferenza di servizi*, in Aa.Vv., *Annuario AIPDA 2016, Antidoti alla cattiva amministrazione: una sfida per le riforme*, Naples, 2017, pp. 225 ff., esp. p. 227, acknowledges this, where, in relation to the conference of services, the A. notes that enhancing the simplification profile alone leads to evaluating the legal discipline with respect to the sole objective of speeding up the decision, and not also that of ensuring its quality. THERE. thus, he invites us to evaluate the services conference as an institution of simplification but also of coordination: its two functions cannot be separated, under penalty of violation of the principle of good performance.

114 Also D. D'Orsogna, *Semplificazione*, cit., p. 227.

ment of simplification, but it is intimately complex[115], although the reforms (most recently, the one carried out with Legislative Decree no. 127/2016) have continually made that same instrument an "object of simplification"[116].

The current regulatory structure of the services conference envisaged by the general law on the procedure is known: it is still the natural forum for discussions between Administrations, although – for efficiency purposes – both simplifying automatisms on the one hand (silence-assent, for example) and, on the other hand, mechanisms for overcoming dissent capable of shifting the decision-making competence to political bodies for the purpose of settling the conflict between the PP.AA. same[117], have been introduced.

The art. 14-*quinquies*, in particular, provides – as already mentioned – that the Administrations responsible for the protection of qualified interests (environmental, landscape-territorial protection, cultural heritage, protection of citizens' health and public safety), as well as the Administrations of the Regions and of the autonomous provinces of Trento and Bolzano, may – if they have expressed their reasoned dissent in the conference and the conference has equally decided in favor – propose a judgment of opposition to the President of the Council of Ministers.

The opposition opens a new phase of confrontation with the Presidency of the Council and can conclude either with an agreement or with a resolution

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115 Outlines the framework D. D'Orsogna, *Semplificazione*, cit., p. 229, for which the basic idea that imbued the institution of the service conference before the 2016 reform «is the acknowledgment of the (physiological) datum of the substantial (social and institutional) complexity of the administrative problem; which requires, to be managed efficiently, a systemic response: an adjustment of the overall functionality of the administration. In this perspective, the service conference is seen as a tool for simplifying the administrative activity which operates, in a technical sense, thanks to an increase in the "complexity" of the decision-making activity, in the sense that it is integrated and coordinated into the system. Thus marking a transition from "procedural rationality (linear and disaggregated) to complex rationality» (our translation).

116 D. D'Orsogna, *Semplificazione*, cit., *passim*.

117 Critical on these aspects is E. Scotti, *La conferenza di servizi tra pluralismo e unilateralismo costituzionalmente orientato (a proposito di Corte cost. n. 9/2019)*, in *Federalismi.it*, no. 17/2019; a reference should also be made to Id., *La nuova disciplina della conferenza di servizi tra semplificazione e pluralismo*, also in *Federalismi.it*, no. 10/2016, in which she already detected critical profiles then confirmed by the Constitutional Court in the 2019 sentence.

of the Council of Ministers, which can – alternatively – reject the opposition (and the determination of the conference of services definitively acquires effectiveness) or accept it partially (the determination is thus modified and partially outdated)[118].

Now, from the general model it can be deduced that the real decision-making seat of the complex administrative problem is still the conference one, in the confrontation between the Administrations, which was also sought and reiterated up to leaving the role of ultimate decision-maker to the Council of Ministers. There is no doubt that – especially with the reform intervention of 2016 – the legislator intended to speed up the work of the conference (the deadlines for reaching an agreement following the opposition are very limited, they do not go beyond thirty days overall understood after the decision of the conference) and orient them, on the merits, in a positive sense[119]: remember that the opposition proceedings can only be brought by the Administrations

118 Where the opposition is fully accepted, the provision is not expressed. For D. D'Orsogna, *Semplificazione*, cit., p. 247, the silence of the rule can be interpreted in two ways: a) as an expression of a *favor* for the positive decision (the zero option does not seem to be contemplated); or b) in the sense that it was decided to leave discretion to the proceeding Administration on the evaluation of the repercussions of the resolution of the Council of Ministers.

119 The opinion of Cons. Stato, I, 30 September 2019, n. 2534, par. 5-6-7, clearly states it: «nel regime anteriore alla riforma del 2016 […] il "ricorso" a questo rimedio [l'opposizione, n.d.r.] era infatti riservato, in termini speculari rispetto al regime attuale, non già all'amministrazione contraria alla conclusione positiva della conferenza, bensì all'amministrazione procedente che intendesse superare il parere negativo di un'amministrazione preposta alla tutela ambientale, paesaggistico-territoriale, dei beni culturali o alla tutela della salute e della pubblica incolumità dei cittadini, parere negativo che determinava un effetto ostativo alla conclusione positiva della conferenza e impeditivo dell'approvazione del progetto, dinanzi al quale l'amministrazione procedente, interessata invece alla conclusione positiva della conferenza, non aveva altro rimedio se non la rimessione dell'affare alla sede "politica" del Consiglio dei Ministri. […] La *ratio* della riforma di cui al d.lgs. n. 127 del 2016 – che ha ribaltato quel sistema, *privilegiando l'esito positivo della conferenza di servizi* e onerando della rimessione dell'affare al Consiglio dei Ministri non più l'amministrazione procedente, ma quella preposta alla tutela di interessi sensibili il cui parere negativo sia stato giudicato superabile nel meccanismo di prevalenza quali-quantitativa che caratterizza il modulo decisionale della conferenza di servizi – risiede nello snellimento e nell'accelerazione dei procedimenti, con deflazione del carico gravante sul Consiglio dei Ministri, anche in considerazione del fatto che la rimessione dell'affare amministrativo alla suddetta sede "politica" (di alta amministrazione connotata da discrezionalità amministrativa e non più tecnica) dovrebbe costituire l'eccezione e non la regola, trattandosi pur sempre di una deroga alla regola generale di riserva del provvedimento di gestione agli organi amministrativi ordinari e non al vertice dell'indirizzo politico-amministrativo» (our italic).

"in charge" of the protection of sensitive interests, i.e. those that are technically competent to express opinions and technical assessments in the context of proceedings involving sensitive interests[120].

The legislative choice in the PNRR ecosystem, on the other hand, is much more radical, reserving only a small corner for the confrontation between the Administrations and shifting the competence to the political authority right from the expression of dissent to centralize the decision to the Council of Ministers.

The art. 13, Legislative Decree no. 77/2021, in particular, sounds like the result of a centralizing choice of competences which only apparently leaves the Administrations with the power to decide on the PNRR interventions to be implemented and implemented: on closer inspection, in the arena of comparison between the Administrative authorities concerned minimal space is left. In the hypothesis in which the dissent is expressed by state administrations, it is even completely elided: because it is sufficient that the deed of opposition is suitable to block the realization of the project so that the competence to take «the consequent determinations» is transferred directly to the Council of Ministers by the "political authority" delegated to the PNRR. When, then, the dissent is expressed by a non-state Administration, the convened conference venue – which, moreover, it does not involve the Municipalities, limiting itself to the state and regional levels (or of the autonomous provinces) – it has a limited (not to say unreal) deadline to decide, i.e. fifteen days, before the substitutive powers of the Council of Ministers are activated. This is to say nothing of the

120 This has led the Council of State to exclude, in principle, that the Municipalities that have expressed their dissent in the conference of services have legitimacy to propose the opposition proceedings, lacking an attribution of technical skills in the matter of sensitive interests and being – on the contrary – entities with general purposes representative of the community installed in the area. The exclusion of legitimacy, however, is prudent, not absolute or *a priori*: «la vastità e l'eterogeneità delle fonti di possibili attribuzioni di competenze comunali non consentono di enunciare in termini assoluti in questa sede una regola di necessaria esclusione della legittimazione comunale a proporre opposizione; una tale conclusione […] vale sicuramente in linea di massima, ma non esime dalla necessità di effettuare un approfondimento analitico caso per caso alla luce anche della specifica legislazione regionale applicabile» (cfr. para. 7).

absolute normative undifferentiation of the interests that can, in reality, stand in the way of the realization of a project, some of which – at least in the general law on administrative procedure – receive a differentiated status even in the consensual-conferential setting as "sensitive".

The overall impression that emerges is that the clause of the "national interest in the prompt and punctual implementation of the interventions" is yet another attempt by the legislator to deprive the public administration of its natural role: that of subject responsible for the protection of public that need to be constantly balanced between them in the place assigned to this, i.e. the administrative procedure.

This practice is, in truth, quite old: the increasingly massive use of the laws-measures[121] addressed to government regulation[122] of specific cases[123], has

121 On which, among others, see the monographic study of S. Spuntarelli, *L'amministrazione per legge*, Milan, 2007, for which the progressive increase of the provisional laws determines the «crisis of the law» and, at the same time, encourages the diffusion of the specular phenomenon «the law of the crisis», pointing out that the flattening of the distinction between legislative and executive with regard to the exercise of the legislative function embodies the prevalence of the effectiveness and immediacy of decisions over the weighting of their content (p. 127).

In classical literature, see also F. Cammeo, *Della manifestazione di volontà dello Stato nel campo del diritto amministrativo*, in V.E. Orlando, *Primo Trattato di Diritto Amministrativo*, Milan, 1907, III, p. 94; C. Mortati, *Le leggi provvedimento*, Milan, 1969; A. Franco, *Leggi provvedimento, principi generali dell'ordinamento, principio del giusto procedimento*, in *Giur. Cost.*, 1989, II, 1056.

The profound link between law-provision and state of crisis or emergency – and its subversive capacity of the system of sources – is outlined by L. Perfetti, *Legge-provvedimento, emergenza e giurisdizione*, in *Dir. proc. amm.*, no. 3/2019, pp. 1021 ff.: «Gli interventi recenti su segmenti del sistema bancario, quelli relativi ad infrastrutture strategiche, all'esercizio di poteri speciali del Governo rispetto ad acquisizioni di imprese anch'esse strategiche (*golden power*), a bonifiche di siti inquinati sono frequentemente accompagnati ad affermazioni di emergenze che conducono a leggi-provvedimento o – comunque – a consistenti alterazioni del sistema delle fonti e delle garanzie».

122 According to L. Perfetti, *Legge-provvedimento*, cit., «Con la legge-provvedimento, il gruppo di potere che esprime la maggioranza parlamentare sottrae alle garanzie della giurisdizione una decisione per sua natura amministrativa. Da un punto di vista materiale, si tratta di un provvedimento amministrativo, che dovrebbe avere l'efficacia giuridica propria di questa categoria di atti e poter essere sottoposto al sindacato del giudice – e, se illegittimo, annullato. Da un punto di vista formale, però, la sua approvazione con forza-di-legge lo sottrae a quelle garanzie. È difficile negare che – da un punto di vista istituzionale – la legge-provvedimento non si mostra, nella normalità dei casi, come l'esercizio di una pura volontà parlamentare; piuttosto, è espressione della volontà della maggioranza politica – in cooperazione tra Parlamento e Governo – di rafforzare una sua decisione puntuale in modo da imporla con maggiore vigore»

123 The law-provision is institutionally the one that deals with a single well-identified case and is not susceptible to further application (for example the so-called "Salva Ilva" law); how-

led to frequent raids by the Constitutional Court in order to ensure its compatibility with our constitutional system[124].

Here there is no escaping that paradigm: the (government) legislator wanted to "simplify and accelerate" the implementation of the PNRR projects, predetermining by law the result to be achieved – precisely, the implementation of the interventions: the provisions do not contemplate the zero option – and entrusting the task to the Administrations which, in essence, become exclusively implementing subjects (read, mere executors), which are, in the end, deprived of their power to balance interests and decide.

It is true that public administration is, not infrequently, an obstacle; but it is equally true that administrative problems exist and are complex, especially when they fall on the territory, and cannot be solved simply by depriving the Administrations of their powers, in the name of a "logic of results" which, in this case, sounds at least distorted , as it is no longer an expression of the constitutional principle of good performance of the Administration. Simply because, here, an Administration seems to be gone.

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ever, there are also laws that have the same effects as provision-laws but are addressed to "classes of cases": for example, the legislation on the extension of state-owned maritime concessions, on which see the critical observations of A. De Siano, *Stravaganze giurisprudenziali a proposito dell'atto amministrativo (a margine di Adunanza plenaria, 9 novembre 2021, nn. 17 e 18)*, in *Dir. proc. amm.*, no. 4/2022, pp. 823 ff., according to which the reconstruction on the subject carried out by the administrative judge has emptied of content the administrative deeds of extension, defined by the Plenary as «merely recognizing» the effects of the law-measure.

124 See for example the Constitutional Court, 27 July 2020, n. 168 on the so-called "Genoa decree" following the collapse of the Morandi bridge. On the issue of checking the constitutionality of provision-laws see, in general, G.U. Rescigno, *Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, in *Astrid Online*, 2007.