

# The ‘Weakening’ of the Duty to Give Reasons in Italy: An Isolated Case or a European Trend?

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*Despite the importance formally attached to the principle, the Italian legal system is witnessing a progressive ‘weakening’ of the duty to give reasons. This weakening process seems problematic from the perspective of the respect of the rule of law and effective judicial protection of individuals vis-à-vis the administrative action. This phenomenon though is not specific of the only Italian legal system. The analysis of European Law and of the provisions in selected Member States have shown the weakening of the duty to give reasons can be considered a widespread issue.*

**Keywords:** duty to give reasons, administrative measure, participation, administrative procedure

## 1 INTRODUCTION

The duty to give reasons is a generally recognized principle of administrative law both at national and European level. As such, this principle performs multiple functions. It helps to interpret administrative measures, it ensures the transparency of administrative action and in turn its judicial control. These three different functions of the duty to give reasons pertain to the three possible recipients of the duty itself: the addressee of an administrative measure, society as a whole and the administrative courts.<sup>1</sup>

The obligation upon administrative authorities to state the factual and legal reasons for their actions is a powerful tool in controlling the activities of the public administration, as it goes to the core of the evaluations made by the administration. From this perspective, the duty to provide reasons is not only useful for the purpose of judicial review, but it also allows individuals to ‘accept’ the point of view of the administration and at the same time to legitimize administrative action.<sup>2</sup>

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<sup>1</sup> A. Romano Tassone, *La motivazione dei provvedimenti amministrativi e sindacato di legittimità* (Milano 1987).

<sup>2</sup> A. Cassatella, *Il dovere di motivazione nell'attività amministrativa* (Padova 2013).

The Italian legal system provides for the duty to give reasons in Law. no. 241 of 1990 (the Italian Administrative Procedure Act). Despite the importance formally attached to this principle, however, the Italian legal system is witnessing a progressive ‘weakening’ of the duty to give reasons. This weakening process seems problematic from the perspective of the respect of the rule of law and effective judicial protection of individuals vis-à-vis administrative action. At the same time, this trend may be understood in the context of a broader tendency, which is felt Europe-wide, to speed up administrative decision-making. The question, which this contribution aims to answer, is whether similar weakening tendencies can be observed beyond Italy and constitute thus a trend shared by other Member States of the European Union. Judicial decisions and administrative practices show that legality is in crisis even when the law states a precise duty. Despite the specific provisions of administrative law requiring the statement of reasons in administrative measures, public authorities consider the duty as not binding.<sup>3</sup> The paper will show that this loose attitude of the administrative authorities is reinforced by the jurisprudence, that legitimizes conduct in clear violation of the duty clearly enshrined in the law.

For these purposes, after illustrating the state of art in Italy, the paper will provide an overview of the existing regulatory frameworks of the duty to give reasons at EU level and in some Member States in order to assess if the weakening of the duty to provide reasons is a unique Italian phenomenon or a general trend. The conclusion will offer some recommendations as to how to reinforce and revive the duty to give reasons.

## 2 THE DUTY TO GIVE REASONS IN THE ITALIAN LEGAL SYSTEM

### 2.1 INTRODUCTION

The Constitutional Court recently stated that the duty to give reasons represents ‘the prerequisite, the foundation, the centre of gravity and the very essence of the legitimate exercise of administrative power’ and for this ‘an irreplaceable safeguard of substantive legality’.<sup>4</sup>

In the 1930s, two distinct components of the duty to give reasons in administrative acts had been identified: on the one hand, ‘the presentation of the facts to which the act refers and the statement of the legal cause of the

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<sup>3</sup> For general considerations on this issue, see S. Cassese, *New Paths for Administrative Law. A Manifesto*, 3 *Int’l J. Const. L.* 605 (2012).

<sup>4</sup> Corte cost., ord. 26 May 2015, n. 92, the Constitutional Court recalls in its decision Cons. Stato, s. III, 7 Apr. 2014, n. 1629; Cons. Stato, s. VI, 22 Sept. 2014, n. 4770; Cons. Stato, s. III, 30 Apr. 2014, n. 2247; Cons. Stato, s. V, 27 Mar. 2013, n. 1808.

institution to which it applies'; on the other, 'the mere exposition of subjective considerations'.<sup>5</sup>

Nowadays, the latter component of the duty to give reasons is no longer significant because the will or psychological motivations, relevant in private law, are excluded in the consideration of administrative measures. In today's Italian administrative law, only the objective elements of a decision have importance, the psychological aspects are deemed irrelevant.<sup>6</sup>

In other words, what does matter is not the subjective motivation of the authority (voluntary motivation), but rather the externalization of the reasons. This clearly emerges from the regulatory provisions.

Article 3 of Law no. 241/1990 (the Italian Administrative Procedure Act) establishes a general duty to give reasons and specifies that the statement of reasons must contain the 'factual presuppositions' and the 'legal reasons' behind the decision, as they emerged from the preliminary investigative phase of the administrative decision-making procedure.<sup>7</sup>

The link between the duty to give reasons and the preliminary phase of the administrative procedure is very close: the statement must indicate in its entirety the logical process followed, the reasons for the decision taken in connection with the factual assumptions that emerged during the administrative procedure.

The Italian Law on administrative procedure has marked a turning point, by requiring that public authorities follow a formal procedure to reach their decisions, ensuring preliminary activities and necessary investigation are fulfilled in a complete and proper way and giving citizens appropriate guarantees to participate and have a say in the decision process concerning measures affecting them.<sup>8</sup> Specifically, the Law establishes that in every administrative procedure the public authority shall, for the purposes of the preliminary fact-finding activities, assess the conditions for the authority to act and adopt a decision, the legitimating requirements and the circumstances that are to be relevant for the issue of a measure; and, furthermore, ascertain the facts *ex officio*, providing for the completion of the

<sup>5</sup> C.M. Jaccarino, *Studi sulla motivazione con speciale riguardo agli atti amministrativi*, Roma, 1933, 42 ss; ID., *voce Motivazione degli atti amministrativi*, in *Noviss. Dig. it.*, vol. X, 1968, 958 ss; this interpretation has been followed by the doctrine at the time: *see* G. Zanobini, *Corso di diritto amministrativo*, cit., 398; A. Amorth, *Il merito dell'atto amministrativo*, cit., 58 ss; G. Roehrsen, *Note sulla motivazione degli atti amministrativi*, in *Riv. dir. pubbl.*, 1941, 121 ss.

<sup>6</sup> R. Villata & M. Ramajoli, *Il provvedimento amministrativo* 270–271 ff. (2d ed., Torino: Giappichelli 2017).

<sup>7</sup> 'The statement of reasons must set out the factual premises and the points of law that determined the authority's decision, as these emerge from the preliminary fact-finding activities'. Specifically the Italian provision states: 'La motivazione deve indicare i presupposti di fatto e le ragioni giuridiche che hanno determinato la decisione dell'amministrazione, in relazione alle risultanze dell'istruttoria' (Art. 3(1) of Law no. 241/1990).

<sup>8</sup> For further information D. Sorace & S. Torricelli, *Administrative Law*, in *Fundamentals of Italian Law* 233, specifically 239 ff. (A. De Luca A. Simoni & Milan eds, 2014).

necessary instruments if need be, and take every action required for the appropriate and prompt conduct of the preliminary fact-finding activities. In particular, the assigned public officer shall have the power to request the making of statements and the rectification of erroneous or incomplete statements or applications, to carry out technical assessments and inspections and to order the exhibition of documents.

Article 6 of the same Law also concerns the duty to give reasons, and it reinforces the link between the findings of the preliminary investigative phase, on the one hand, and the final decision, on the other. This provision establishes that the public officer who is required to issue a measure, if he or she is different from the person in charge of the administrative investigative proceedings, must state the reasons why the final decision has departed from the findings of the preliminary investigative phase.<sup>9</sup>

The statement of reasons is enriched by the generalized recognition of a right of participation in the administrative procedure. Well before the legislator created such a right, the jurisprudence had affirmed that the statement of reasons, in case of a decision contrary to what was suggested by the private individuals during the proceedings by means of written submissions and documentary evidence, should specifically consider what was proposed and explicitly clarify the reasons for the different decision.<sup>10</sup> In this way, individuals do find a specific correspondence of their participation in the proceedings in the final decision adopted by the authority.

Furthermore, Article 10-*bis* of Law no. 241/1990 provides that, in proceedings begun at the request of a private party, the public administration is required to inform the private party, before the formal adoption of an act of refusal, of the grounds for the refusal. The private party has then the right to submit his or her comments in writing and the statement of reasons of the final decision should take any failure to accept said observations into consideration.<sup>11</sup> This provision thus

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<sup>9</sup> 'Where other than the officer responsible for the procedure, the organ with competence for adoption of the final measure shall not have the power to depart from the results of the preliminary fact-finding activities conducted by the officer responsible for the procedure without indicating the reasons for such action in the final measure.' (Art. 6(1)(e) of Law no. 241/1990).

<sup>10</sup> Tar Calabria, Catanzaro, s. I, 22 Apr. 2002, n. 842; Tar Puglia, s. I, 25 July 2001, n. 3126.

<sup>11</sup> Section 10-*bis* (Communication of Reasons preventing the Allowing of an Application) '1. In procedures requested by interested parties, the officer responsible for the procedure or the competent authority shall, before the formal adoption of a measure refusing an application, promptly communicate to the applicants the reasons preventing the allowing of the application. Within ten days of receipt of the communication, the applicants shall have the right to present their observations in writing, accompanied by documentation where appropriate. The communication referred to in the first sentence shall interrupt the timeframes for concluding the procedure and these shall start to run again from the date on which the observations are presented or, in their absence, from expiry of the timeframe referred to in the second sentence. The reason for any failure to accept such observations shall be given in the statement of reasons contained in the final measure. The provisions of the present section shall not apply to competitive procedures or to procedures relating to social security or welfare

provides further content to the duty to state reasons and enhances the adversarial aspects of the administrative proceedings between private parties and the public administration.

The need to externalize, together with the reasons for the decision, also the reasons behind the possible failure to accept the further arguments proposed by the private individual shows how the statement fulfills the function of ‘making the recipient of the act understand’ the process leading to the decision.<sup>12</sup>

Even more recently, the legislator intervened to modify Article 2, co. 1, of the law no. 241/90, configuring a hypothesis of shortened and simplified statement of reasons for the occurrence of specific assumptions (Article 1, co. 38, of the law 6 November 2012, n. 190). The new wording of the Article provides that the public authorities, ‘if they recognize the manifest unreceivability, inadmissibility, unacceptability or groundlessness of the application’, conclude the procedure with a provision ‘drawn up in a simplified form’, ‘the statement of reasons of which may consist of a synthetic reference to the point of fact or law deemed decisive’. In this way it is specified that the duty to provide reasons exists for the public authority even when the application is manifestly unacceptable.<sup>13</sup>

As regards the scope of the duty to give reasons, Article 3 of Law no. 241/1990 provides that all administrative acts must contain a statement of reasons, with an exception only for administrative acts of general nature.<sup>14</sup>

However, there are two situations where reasons might be required for administrative acts of a general nature: on the one hand, the jurisprudence requires the statement of reasons also for those general administrative acts that are suitable to undermine the subjective legal situation of the private individual (for example, the variant of a master plan that is limited to a certain territory<sup>15</sup>); on the other hand, specific sectorial laws can impose an obligation to state reasons also for regulatory and general acts (for example, Article 23 of law no. 262 of 28 December 2005, establishes that the acts of the Bank of Italy and Consob which have a regulatory nature or general content must contain the motivation).

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arising as a result of an application by an interested party and managed by the social-security bodies.’ (Art. 10-*bis* of Law no. 241/1990).

<sup>12</sup> See Cons. Stato, s. VI, 10 Feb. 2020, n. 1001; in the same sense Cons. Stato, s. VI, 15 Oct. 2013, n. 5008; Tar Lombardia, Milano, 8 Apr. 2011, n. 933.

<sup>13</sup> Tar Campania, Napoli, s. VII, 13 Sept. 2018, n. 5486.

<sup>14</sup> Unlike in European Union law, where also general acts have to be motivated (*see* Art. 296 (2) TFEU and Art. 41 of the Charter of Fundamental Rights of the European Union). *See* para. 3.

<sup>15</sup> Recently, in this sense, Tar Friuli-Venezia Giulia, Trieste, s. I, 3 Feb. 2020, n. 64; previously in the same sense the Supreme Session of Cons. Stato, Ad. Pl., 22 Dec. 1999, n. 24.

## 2.2. THE PROCESS OF 'WEAKENING' OF THE DUTY TO GIVE REASONS

There has been a golden age for the duty to give reasons in administrative measures, in which it has served to expand the spaces for protecting the private individuals from the public administration. Making clear the reasons for the administrative decision allowed the judge to control the logical process followed by the public administration. However, as mentioned in the introduction, despite its firm anchoring in legislation, the duty to give reasons for administrative acts has been subject to a process of 'weakening' in the Italian legal system. This process regards both non-discretionary and discretionary administrative acts and it stems both from the activities of the administration and from the case law.

The process of weakening of the duty to give reasons has been taking different forms, which will be examined in turn.

A first way in which the duty to give reasons has been weakened is through an extensive interpretation, by the case law, of the so-called '*per relationem*' statement of reasons. Such situations occur when the reasons for the decision result from another act (for example, an opinion) referred to in the final decision. Article 3 of Law no. 241/1990 permits as such a *per relationem* statement of reasons, because it provides that the act from which the reasons for the decision stem, and which is referred to in the final decision, does not have to be communicated to the private party; it is sufficient that this act be simply indicated in the final decision and made available.

The Italian case law has interpreted the possibility of *per relationem* statement of reasons in an extensive way. While the law in principle only allows the authority to omit the *communication* to the party of an act underlying the final decision, according to the administrative courts, also the *reasons* for the decision contained in another act need not be referred to in the final decision. It is sufficient that the reasons for the decision may be grasped from the reading of other acts, even if the final decision does not make explicit reference to them.<sup>16</sup>

A second weakening mechanism of the duty to provide reasons has been through the acceptance of a 'numerical' statement of reasons. It is a problem dating back over time, with respect to which jurisprudence does not show enough attention to the reasons applicable to individual claimants or participants. According to the administrative courts,<sup>17</sup> in the case of public competition or a qualifying examination, such as the bar exam, or in the case of tendering for the award of a contract, the duty to give reasons is sufficiently fulfilled by the

<sup>16</sup> See e.g., Regional Administrative Court (hereinafter: TAR) Sicily, Catania, s. III, 24 Feb. 2016, no. 561.

<sup>17</sup> See e.g., Council of State (hereinafter: Cons. Stato), s. V, 31 Oct. 2016, no. 4561; Tar Lazio, Roma, s. I, 7 Feb. 2014, n. 1506.

attribution of a numerical score. The grade would summarize the judgment in a numerical form and would in itself contain a sufficient statement of reasons. This weakening of the content of the duty to give reasons through a mere numerical score also obtained the endorsement of the Constitutional Court. Seized of a question concerning the constitutionality of the possibility to provide only a numerical score, the Court held that this mechanism fulfils the duty to give reasons, since the principles of impartiality, publicity and transparency, which form the basis of the duty itself, must be balanced against the principles of proper functioning, good administration, efficiency, cost-effectiveness and efficacy.<sup>18</sup> This arises in the sense that a more detailed presentation of reasons that may have led to a judgment of unsuitability, as opposed to a score should not be imposed on the public administration in the light of the principle of good performance, having regard both to the short time within which the competitive procedure must be concluded and the number of participants involved.

This case law has been criticized, as the duty to give reasons does not seem, by its very nature, to adhere to a fixed standard. The degree of detail and adequacy of the statement of reasons should vary according to the type of act at stake but may hardly be summarized in a number. Furthermore, one may legitimately wonder how a synthetic statement of reasons, different from a mere number, would impose on the public administration a burden contrary to the principle of efficiency.<sup>19</sup>

A third weakening mechanism concerns the acceptance by Italian administrative courts of a complete lack of a statement of reasons in some circumstances. In order to explain this trend, it should be recalled that, even prior to Law no. 241/1990, the case law had acknowledged the duty to give reasons in two instances: in the case where the law expressly provided for it, and in the case of discretionary administrative acts.<sup>20</sup> The duty to give reasons was excluded for non-discretionary acts, acts of general nature, and acts granting a request made by a private party. After the entry into force of Law no. 241/1990, and despite the general obligation to provide reasons contained therein, the administrative courts continued to tie the duty to give reasons to the discretionary nature of the administrative act, as had been the case in the past. At first, case law adopted this particular interpretation without providing a motivation for its position.<sup>21</sup> At present, the position is

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<sup>18</sup> Constitutional Court, 8 June 2011, no. 175. The principle of proper functioning, provided in Art. 97 of Italian Constitution, can be examined from a double point of view: that of public interest and that of individual guarantees. From the first, public authorities must make a proper use of the resources at their disposal, so that their activity can be effective and able to reach its objectives. From the second point of view, this principle has a meaning similar to the principle of good administration in EU Law. For more details see Sorace & Torricelli, *supra* n. 9, at 237 ff.

<sup>19</sup> F. G. Scoca, *Punteggio numerico e principio di buon andamento*, Giur.cost. 2279 ff. (2011).

<sup>20</sup> See on this point Villata & Ramajoli, *supra* n. 6, 279 ff.

<sup>21</sup> Recently, Cons. Stato, s. II, 12 Mar. 2020, n. 1765.

maintained on basis of Article 21-*octies* of Law no. 241/1990.<sup>22</sup> This provision establishes that non-discretionary administrative acts tainted with formal errors that are not able to affect the substance of the decision may not be annulled by the administrative courts.<sup>23</sup> As the lack of the statement of reasons has been interpreted as a formal error, claims against non-discretionary administrative acts devoid of statement of reasons have not led to the annulment of these acts. In such instances, for example, in the case of a demolition order for a building following the ascertainment of illegal building activity the current case law goes so far as to speak of a 'statement of reasons *in re ipsa*' of the acts.<sup>24</sup>

The weakening of the duty to give reasons has also affected discretionary administrative acts. Article 21-*nonies* of Law no. 241/1990,<sup>25</sup> which concern discretionary administrative acts, establishes that an administrative authority may itself annul an administrative act 'when reasons of public interest are present ... and taking the interests of all parties concerned into account'. However, the case law considers that administrative annulment does not require a specific and timely statement of reasons whenever the public interest which forms the basis for the annulment measure is to avoid an unjustified outlay of public money.<sup>26</sup>

The continuity between case law dating from before the legislative introduction of the duty to give reasons and the subsequent case law shows how the legal provisions have struggled to impose themselves over the principles of the living case law.

The fourth weakening mechanism of the duty to give reasons can be traced back to the possibility, introduced twenty years ago, for the public authority to complement the statement of reasons during judicial proceedings.<sup>27</sup>

Logical and legal consistency ask for the statement of reasons to be contextual and not subsequent to the dispositive part of the administrative measure. However, part of the jurisprudence allows the integration of the statement during judicial proceedings, both in the case of tied administrative measures and in the case of discretionary administrative acts.

<sup>22</sup> See on this point Villata & Ramajoli, *supra* n. 6, at 281 ff.

<sup>23</sup> 'A measure that is adopted in breach of rules governing procedure ... shall not be voidable if, by virtue of the fettered nature of the measure, it is evident that the provisions it contains could not have been other than those actually adopted.' (Art. 21-*octies* (2) of Law no. 241/1990).

<sup>24</sup> Cons. Stato, s. V, 9 Sept. 2013, no. 4470.

<sup>25</sup> 'When there exist grounds in the public interest for so doing, an administrative measure i.e., unlawful in accordance with s. 21-*octies* may be annulled *ex officio* by the organ that issued it or by other organs so empowered by the law, within a reasonable timeframe, anyway not exceeding eighteen months since the adoption of license or authorizations and taking account of the interests of the addressees and parties with conflicting interests.' (Art. 21-*nonies* (1) of Law no. 241/1990).

<sup>26</sup> Cons. Stato, s. III, 22 Dec. 2014, no. 6310.

<sup>27</sup> Cons. Giust. Amm. Reg. Sic., 20 Apr. 1993, no. 149.



As mentioned above, pursuant to Article 21 *octies*, if a formal error is not capable of affecting the content of an obligatory decision, the decision may not be annulled. The case law has given a particular interpretation of this provision, according to which the lack of statement of reasons is deemed to be a formal error. On the basis of this interpretation of Article 21-*octies*, authorities have been permitted to provide reasons during the judicial proceedings, so as to be able to prove that the lack of reasons in the original decision did not affect its content.<sup>28</sup> However, as mentioned above, Article 21 *octies* applies only to non-discretionary acts.<sup>29</sup>

The Italian Constitutional Court was asked to rule on the constitutionality of Article 21-*octies* insofar as it permits the authority to complement the statement of reasons of an administrative act during judicial proceedings. The Constitutional Court, however, did not provide an answer and considered the question as manifestly inadmissible, because, in its view, the question submitted did not have the purpose of resolving a question of constitutionality, but that of surreptitiously receiving from the Court an endorsement of a particular interpretation of Article 21-*octies*, which is in principle the task of the court ruling on merits.<sup>30</sup> In this ruling, the Constitutional Court seems to have hidden behind the consideration that the case law according to which the lack of statement of reasons in an administrative act is to be considered as a formal error, is not yet 'living law', insofar as there is also a contradictory trend within the administrative case law. It is here submitted that a greater courage and a clear position on the part of the Constitutional Court would have helped clarify the role and weight of the duty to give reasons. Consequently, the case law continues to be divided internally on the legitimacy of the subsequent statement of reasons, thus requiring individuals to seek judicial remedies in order to have knowledge of the specific reasons underlying the administrative measure.<sup>31</sup>

### 3 THE DUTY TO GIVE REASONS IN EUROPEAN LAW

In European Union law the duty to give reasons was originally found in Article 190 European Economic Community (EEC) and is now found in Article 296 Treaty on the Functioning of the European Union (TFUE), which states: 'legal

<sup>28</sup> Cons. Stato, s. IV, 4 Mar. 2014, no. 1018.

<sup>29</sup> Cons. Stato, s. IV, 4 Mar. 2014, no. 1018.

<sup>30</sup> Corte cost., Ord. 26 May 2015, no. 92 states that the question appears directed not at resolving a doubt of constitutional legitimacy, but at receiving from the Court an improper endorsement of a specific interpretation of the contested provision (referred to the judge of merit), an operation which is all the more inadmissible in the presence of case law not of the all settled.

<sup>31</sup> For a recent case allowing the subsequent statement of reasons *see* Tar Campania, Napoli, s. VII, 11 Mar. 2020, n. 1112; contrary Tar Lazio, Roma, 6 Feb. 2020, n. 1572.

acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties'. The scope of Article 296 TFEU is broad and applies to all legal acts, legislative, delegated and implementing. As pointed out,<sup>32</sup> this is noteworthy. The duty to give reasons varies in national law, but – as previously noted for Italy – in most Member States it is narrower than Article 296, which imposes a duty to give reasons not only for administrative decisions, but also for legislative acts. Many national legal systems do not impose an obligation to furnish reasons for legislation, or do so only in limited circumstances.

The EU Charter of Fundamental Rights provides that good administration as a fundamental right by declaring, in Article 41, the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This right includes, among others, 'the obligation of the administration to give reasons for its decisions'.

According to those provisions, the Court of Justice has consistently held that the statement of grounds required by Article 296 TFEU must disclose in a clear and unequivocal way the reasoning followed by the Community authority which adopted the measure in question. The statement must make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its supervisory jurisdiction.

The Court stressed the proximate connection between the duty to examine carefully and impartially all aspects of the case, and the obligation to give reasons, since the latter is prerequisite to ensure that the former has been properly complied with.<sup>33</sup>

Despite all the assertions of principle in support of the general duty to give reasons, the Court in its case law has identified several exceptions, in which it is not necessary for the reasons to detail all relevant factual and legal aspects for the decision.

Specifically, the Court while stressing the importance of the provision in Article 296 TFEU has frequently emphasized limits of the duty to give reasons.

The Court has consistently held that the question whether the statement of the grounds for a decision meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.<sup>34</sup> In this way Commission is not

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<sup>32</sup> P. Craig, *EU Administrative Law* 340 (2d ed., OUP 2012).

<sup>33</sup> In that sense Craig, *supra* n. 32, at 334, citing cases T-241/00 and 394/94 *British Airways plc and British Midland Airways Ltd v. Commission* (1998) ECR II-2405, (95), EU:T:2002:57.

<sup>34</sup> See in particular, Case C-350/88 *Delacre and Others v. Commission* [1990] ECR I-395, paras 15 and 16, EU:C:1990:71, and Case C-466/93 *Atlanta Fruchthandels-gesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799, para. 16, EU:C:1995:370.

required to refer to all of the arguments of the parties, it is required only to set out the facts and legal considerations having decisive importance for the decision.<sup>35</sup>

Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities such as the time and technical facilities available for making the decision.<sup>36</sup>

As in the Italian system, the European Court accepts a numerical statement of reasons.<sup>37</sup> Specifically, the Court<sup>38</sup> stated that:

The comparative assessments made by the selection board are reflected in the marks it allocates to the candidates. The marks are the expression of the value judgments made concerning each of them. ... communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the board's decisions are based. Such a statement of reasons is not prejudicial to the candidates' rights. It enables them to know the value set on their performance and to ascertain, if such is the case, that they have not in fact obtained the number of marks required by the notice of competition in order to be admitted to certain tests or to all the tests.

Furthermore, the requirement to give a statement of reasons must be evaluated having regard to the different levels and types of competition and, more particularly, to the number of candidates competing in each of them. In the case of competitions where the candidates are more numerous, the statement of the reasons for the rejection of applications must not be so voluminous as to place an intolerable burden on the proceedings of the selection boards and the work of the personnel administration.<sup>39</sup>

Moreover, the statement of reasons for a measure is not required to specify the matters of fact or of law dealt with, provided that the measure falls within the general scheme of the body of measures of which it forms part.<sup>40</sup>

In some other cases, the Court of Justice acknowledges that the statement of reasons can be avoided by the Community authority whenever reasons can be explained referring to other administrative acts. This is called, as in the Italian legal System, the statement of reasons *per relationem*. Specifically, the European judge<sup>41</sup> pointed out that the statement of reasons for an administrative act may refer to other acts, and, in particular, take note of the content of an earlier act, especially if it is connected. In the case at stage, the Commission referred to another decision as a

<sup>35</sup> In that sense Craig, *supra* n. 32, at 336, T-459/93 Siemens v Commission, EU:T:1995:100.

<sup>36</sup> See the judgment of 1 Dec. 1965 in Case 16/65 Firma C. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1965] ECR 87, EU:C:1965:117.

<sup>37</sup> See C- 560/08 Commission v. Kingdom of Spain and European Union Civil Service, EU:C:2011:835.

<sup>38</sup> Case C- 254/95P European Parliament v. Angelo Innamorati, EU:C:1996:276, para. 30–32.

<sup>39</sup> Case C-56/93 Kingdom of Belgium v. Commission (1996), EU:C:1996:64.

<sup>40</sup> Case C-244/95 Moskof [1997] ECR I-6441, para. 57, EU:C:1997:238.

<sup>41</sup> Case C-119/97, P, Union Française de l'Express (Ufex), DHL International, Service CRIE v. Commission (1999), EU:C:1999:116.

basis for the contested decision. The Court establishes that the statement of reasons for an administrative act may refer to other acts and, in particular, take note of the content of an earlier act, even if it refers to another case concerning different parties.

#### 4 THE DUTY TO GIVE REASONS IN A COMPARATIVE PERSPECTIVE

This section will examine the relevant provisions and case law of selected Member States, and it will show that it is possible to observe a general trend of ‘weakening’ the duty to give reasons. Despite the fact that the duty to give reasons is generally considered an essential requirement for administrative measures in all the legal systems examined, legislative provisions or judicial interpretations allow public authorities to bypass this duty. In this way, the obligation to provide a statement of reasons has become more nuanced and thereby, it may be argued, can no longer be considered to be a duty.

##### 4.1. GERMANY

In Germany,<sup>42</sup> the Code of Administrative Procedure (*Verwaltungsverfahrensgesetz*, VwVfG) sets forth a general duty to give reasons for those decisions requiring either the written or the electronic form (§39(1) VwVfG). According to this provision, the statement of reasons must include reference to the findings of fact and the legal basis for the decision. Specifically, discretionary acts must refer, in the statement of reasons, to the points of view (*Gesichtspunkte*) leading to the public administration’s final choice. The rule excludes from the aforesaid duty some specific administrative acts listed under sub-paragraph 2. For example, the duty to give reasons does not apply to favourable decisions (provided that they do not affect the position of third parties), automatic sanctions and administrative acts of general scope.

In the German legal system, the duty to give reasons is considered as enshrining the high value attached to the protection of the individual affected by an administrative decision.<sup>43</sup> From this perspective, the statement of reasons is considered as the instrument through which it is possible to check and, if necessary, challenge the legal and factual grounds of an administrative decision.

At the same time, it should be stressed that, in the German legal system, procedural norms are considered to have a mere ‘auxiliary function’ (*dienende Funktion*) for the content of an administrative decision.<sup>44</sup> Thus, as a starting

<sup>42</sup> Cassatella, *supra* n. 2, at 179 ff.

<sup>43</sup> *Ibid.*

<sup>44</sup> H. Pünder, *Administrative Procedure – Mere Facilitator of Material Law versus Cooperative Realization of Common Welfare*, in *Debates in German Public Law* 240, 243 ff. (H. Pünder & C. Waldhoff eds, Oxford: Hart Publishing 2013); H. Pünder, *German Administrative Procedure in a Comparative*

point, administrative decisions which were adopted through an erroneous administrative procedure are considered lawful, unless the procedural error exceptionally qualifies as a serious error according to §44(1) or (2) VwVfG, which renders the administrative decision void. As the duty to provide reasons is considered as a procedural rule, administrative acts lacking a (sufficient) statement of reasons are considered lawful, albeit voidable. Furthermore, German law (§45 VwVfG) provides that certain procedural errors, including the violation of the duty to give reasons, may be rectified during the objection procedure and, in any event, up to the last judicial instance ruling on facts (*letzte Tatsacheninstanz*).<sup>45</sup> Upon this basis, and as foreseen in §42 VwVfG, it is possible for administrative authorities to complement an insufficient statement of reasons during the judicial proceedings. Furthermore, even if a procedural error cannot or has not been rectified by subsequent action on the basis of §45 VwVfG, §46 VwVfG provides that administrative courts may not annul an administrative decision because of procedural error ‘where it is evident that the infringement has not influenced the decision on the matter’. This provision applies to non-discretionary decisions, as well as in situations where, due to the circumstances of the case, only one decision appears to be lawful (‘discretion reduced to zero’ – *Ermessensreduzierung auf Null*).<sup>46</sup>

From this overview, it appears clear that, under German law, the possibility of complementing the statement of reasons of the administrative decision once the judicial proceedings have already commenced, as well as the cases of non-voidability for procedural errors established under §46 VwVfG, work in favour of the stability of administrative acts.

As regards discretionary acts, §114 Verwaltungsgerichtsordnung (VwGO) provides that ‘the administrative authority may also supplement its discretionary considerations as to the administrative act in the proceedings before the administrative courts’. This provision has allowed the authority to complete or give a missing statement of reasons in court. Through this provision, therefore, the administration’s discretionary power may be exercised beyond within the deadline fixed for the adoption of the decision, and in fact until the end of the judicial proceedings.

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*Perspective – Observations on the Path to a Transnational ius commune proceduralis in Administrative Law*, 11 Int’l J. Const. L. 940, 942 ff. (2013); H. Pünder & A. Klafki, *Chapter 6 Grounds of Review and Standard of Review*, in *Casebook Judicial Review of Administrative Action* (Ch. Backes & M. Eliantonio eds, Oxford: Hart Publishing 2019).

<sup>45</sup> For a clear description of the German framework see F. Grashof, *Neighbours ‘Reinventing the Wheel’ or Learning from Each Other? - The Belgian Administrative Loop and Its Constitutionality: A Comparison to the German Debate* (31 Mar. 2017), Maastricht Faculty of Law Working Paper No. 2017–4. Available at SSRN: <https://ssrn.com/abstract=2943939> or, <http://dx.doi.org/10.2139/ssrn.2943939>.

<sup>46</sup> See R. Grote, ‘Procedural Deficiencies in Administrative Law: A Comparative Analysis’ (2002) 18 *South African Journal on Human Rights* 475, 488.

The case law of the Federal Administrative Court (*Bundesverwaltungsgericht*) has accepted that the reasons for an administrative decision may be added during the judicial proceedings only if specific conditions are met.<sup>47</sup> First of all, the reasons put forward after the adoption of a decision must exist at the moment when the administrative act is issued; secondly, the reasons provided may not amend the act in its substance and content and, finally, the party concerned must be given the possibility to defend himself/herself and to react to the statement of reasons added by the public authorities.

Furthermore, the Court has held that in the event the authorities supplement a missing or inadequate statement of reasons during the judicial proceedings, there is no breach of the constitutional principle safeguarding the impartiality of the judge,<sup>48</sup> since this process respects the requirement of adversarial procedure set out in §104(1) VwGO, pursuant to which the president must discuss the dispute with the parties in fact and in law.

Both the joint application of §45 VwVfG for non-discretionary acts and §113 VwGO for discretionary acts, providing the possibility for authority to supplement a missing or incomplete statement of reasons, and §46 accepting the possibility to bypass an incomplete statement of reasons in a non-discretionary decision show a picture in which the basic principle is that of '*Reparatur geht vor Kassation*', that is the principle under which it is better to 'save' an administrative act rather than annulling it.

#### 4.2. FRANCE

In France<sup>49</sup> the duty to give reasons was introduced for the first time with Law no. 79–587 of 11 July 1979.<sup>50</sup> This provision required the statement of reasons only for specific acts, which impose a limitation upon or prejudice for the addressee, such as

<sup>47</sup> Recently on this point BVerwG 9 A 16.16 (25 Apr. 2018).

<sup>48</sup> For the past debate in terms of constitutionality of the German provisions, see M. Niedobitek, *Rechtsbindung der Verwaltung und Effizienz des Verwaltungsverfahrens*, DÖV 761 ff. (2000); C. D. Bracher, *Nachholung der Anhörung bis zum Abschluß des verwaltungsgerichtlichen Verfahrens?*, DVBl 534, 538 (1997); W. Erbguth, *Zum Gehalt und zur verfassungs- wie europarechtlichen Vereinbarkeit der verwaltungsprozessual ausgerichteten Beschleunigungsgesetzgebung*, UPR 81, 89 (2000). See also F. Grashof, *Neighbours 'Reinventing the Wheel' or Learning from Each Other? - The Belgian Administrative Loop and Its Constitutionality: A Comparison to the German Debate*, 11. Specifically Art. 97 of the Basic law for the Federal Republic of Germany contains the requirement of judicial independence.

<sup>49</sup> Cassatella, *supra* n. 2, at 166 ff. and *Il dovere di motivazione nello jus commune europeo*, in *I procedimenti amministrativi di adjudication dell'unione europea: principi generali e discipline settoriali* (G. della Cananea & M. Conticelli eds, Torino 2017) with many cross-references to French law scholars. For a review prior to the introduction of the code, cross-reference is hereby made to Jean-Louis Autin, *La motivation des actes administratifs unilatéraux, entre tradition nationale et évolution des droits européens*, 1 *Revue française d'administration publique* 85 (2011), which highlights the expediency of the legislator's involvement, also in light of the development of European law, to the extent of widening the duty to give reasons in administrative acts.

<sup>50</sup> *Relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administrations et le public.*

burdensome administrative acts. Prior to this,<sup>51</sup> the French Council of State (*Conseil d'Etat*) had required the public administration to prove the coherence and justification in relation with the contents of the records of the proceedings, even if it did not explicitly request that the statement of reasons be a necessary element of administrative decisions.<sup>52</sup>

The subsequent decree of 28 November 1983 extended the obligation to state the reasons for all those acts adopted after a participated administrative proceeding, whether by individuals or by their associations.<sup>53</sup>

A further step towards a general duty to give reasons was made with the adoption of the Code of Relations between the Public and the Administration (*Code de relations entre le public et l'administration*),<sup>54</sup> which dedicates Title I of Book II to the duty to give reasons (*La motivation et la signature des actes administratifs*).<sup>55</sup> In particular, Article L211-2 stresses the general obligation previously in force for unfavourable administrative acts (*décisions administratives individuelles défavorables*), specifying thereafter the categories of administrative acts which fall within the scope of the provision.<sup>56</sup> The following articles furthermore require the statement of reasons for all those decisions which derogate from the general rules set forth by laws or regulations (Article L211-3). Finally, it is made clear that subsequent decrees of the Council of State may specify, if necessary, the categories of decisions in respect of which a statement of reasons must be given (Article L211-5).

In so far as the content and form of the administrative acts are concerned, Article L211-5 of the Code specifies that the statement of reasons must be in

<sup>51</sup> CE, 29 Jan. 1950, Billard.

<sup>52</sup> M. Auby & R. Drago, *Traité de contentieux administratif*, III, 1160 (Paris 1976), R. Chapus, *Droit Administratif General*, I, 1129 (15th ed., Domat Montchretien 2001), A. Mast, *La motivation come instrument de controle par le Conseil d'Etat de l'exercice du pouvoir discrétionnaire de l'administration*, in *La motivation des décisions de justice* 369 (C. Perelman & P. Foriers eds, Bruylant: Bruxelles 1978).

<sup>53</sup> Cassatella, *supra* n. 2, at 175.

<sup>54</sup> For comments see D. Custos, *The 2015 French Code of Administrative Procedure: An Assessment*, in *Comparative Administrative Law*, 284 (S. Rose Ackerman & P. L. Lindseth eds, Northampton, Elgar 2017); G. Napolitano, *Il codice francese e le nuove frontiere della disciplina del procedimento in Europa*, *Giorn. dir. amm.* 5 (2016).

<sup>55</sup> A specific short comment to the provision is offered by the Code des relations entre le public et l'administration 2018, annoté et commenté, *Dalloz* 2017, 50–51 and I. Papadamaki, *L'obligation de motivation en droit administratif français sous l'influence du droit de l'union européenne*, *Revue d'histoire public* 1245 (2017). Recent decisions of the Conseil d'Etat have applied this provision: see e.g., Conseil d'Etat, 5<sup>ème</sup> chambre, 26 July 2018, no. 419058 and no. 419061.

<sup>56</sup> 'For this purpose, decisions must be motivated which: 1 ° Restrict the exercise of public freedoms or, in general, constitute a police measure; 2 ° inflict a sanction; 3 ° Make the granting of an authorization subject to restrictive conditions or impose restrictions; 4 ° Withdraw or repeal a decision creating rights; 5 ° oppose a prescription, a foreclosure or a forfeiture; 6 ° Refuse an advantage the attribution of which constitutes a right for the persons who fulfill the legal conditions to obtain it; 7 ° Refuse an authorization, except when the communication of the reasons could be likely to attack one of the secrets or interests protected by the provisions of a to f of 2 ° of the article; 8 ° Reject an administrative appeal, the presentation of which is compulsory prior to any contentious appeal in application of a legislative or regulatory provision'.

writing and must include reference to the reasons in fact and in law underpinning the decision.<sup>57</sup> This provision thus not only ensures the identification of the reasons for a decision, but also an understanding of the evidence that has led to the issue of the decision. Therefore, a stereotyped statement of reasons, which ignores the specific factual elements of the concrete situation in the ongoing proceedings or which merely reproduces legal provisions, will not be sufficient.

Furthermore, the Code contains specific provisions for urgency (Article L211-6). Where a situation of absolute urgency prevents a decision from having a statement of reasons, the lack of a statement of reasons does not render a decision unlawful. Nonetheless, if so requested by the party concerned and within the time limit for judicial review, the authority that made the decision will have a month to mention the underlying reasons.

Should the public administration implicitly take an unfavourable decision (most often as a result silence kept for a certain period of time), by definition, this decision will not include reasons in writing. Nonetheless, whenever there has to be, as a rule, a statement of reasons for an explicit decision, the issue of the lawfulness of the implicit decision lacking any statement of reasons will arise. In such cases, upon the request of the party concerned, submitted within the time limit for a claim for judicial review (*recours pour excès de pouvoir*),<sup>58</sup> the reasons for the implied rejection must be communicated within one month of the relevant request. Should that be the case, the time limit for challenging the said decision will be extended to two months from the date on which the statements of reasons were communicated.<sup>59</sup> The request to disclose the statement of reasons aims thus not only to check the reasons of the administrative decision, but also to gain time to bring a claim for judicial review, as the period for bringing such a claim will be extended. At the end of the one-month period, failure of the public administration to reply or to communicate the statement of reasons will cause the administrative decision to be unlawful due to an insufficient statement of reasons.

An implicit or explicit decision failing to sufficiently state the reasons will be vitiated by a formal error (which is part of the so-called ‘external illegality’ – *illégalité*

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<sup>57</sup> ‘La motivation exigée par le présent chapitre doit être écrite et comporter l’énoncé des considérations de droit et de fait qui constituent le fondement de la décision’ which means that the statement of reasons must be written and include the legal and factual considerations which form the basis of the decision.

<sup>58</sup> For example, two months of the notification or publication of the contested decision (*see* Article R421-1 of the Code of Administrative Justice).

<sup>59</sup> ‘An implicit decision made in cases where the explicit decision should have been reasoned is not illegal simply because it is not accompanied by such reasons. However, at the request of the interested party, formulated within the time limits of the contentious appeal, the reasons for any implied decision of rejection must be communicated to him within one month of this request. In this case, the period for contentious appeal against the said decision is extended until the expiration of two months following the day on which the reasons have been communicated’.



*externe* – of the administrative act) and, thus, may be annulled by the administrative courts.<sup>60</sup>

The public authority may also act in the course of the judicial proceedings and rescind a decision which displays an insufficient statement of reasons prior to the ruling of the court. This can take place through withdrawal (*retrait*) and abrogation (*abrogation*). Through withdrawal (*retrait*) the effects of a decision are removed both for the future and for the past (*ex tunc*). Abrogation only removes the effects of an administrative decision for the future (*ex nunc*).<sup>61</sup> Article L242-1 of *Code des relations entre le public et l'administration* provides that authorities may rescind an administrative decision provided that it is unlawful and that this takes place within four months of its adoption.

Finally, in France, unlike Germany, there are no specific provisions for 'rectifying' procedural mistakes akin to §45 VwVfG. However, as in Germany, the court will not annul an administrative decision whenever is no discretion on the part of the competent authority (*théorie des moyens inopérants en cas de compétence liée*). As the duty to give reasons has only recently been inserted in this legal system, there is not yet any case law about the application of this rule to the lack of the statement of reasons.

Furthermore, in the French legal system, there used to be a distinction between essential formalities (*formalités substantielles*) and non-essential formalities (*formalités accessoires*). The obligation of the administration to give reasons for its decisions was considered to be such an essential procedural formality. The breach of such essential formalities always led to annulment unless – as mentioned above – no other administrative decision was deemed possible. However, the distinction between essential and non-essential formalities has been questioned by the *Danthonny* case.<sup>62</sup> In this case, the French Council of State held that an infringement of a procedural rule only leads to the annulment of the decision if this infringement has consequences on the content of the decision or has deprived individuals of procedural safeguards. Hence, it can be argued that, on the basis of this case law, an insufficient statement of reasons will not lead to the annulment of the decision if the authority can prove that it would have anyway taken the same decision.

<sup>60</sup> Further on the grounds of review in the French legal order, H. Pünder & A. Klafki, *Chapter 6 Grounds of Review and Standard of Review*, in *Casebook Judicial Review of Administrative Action* (Ch. Backes & M. Eliantonio eds, Oxford: Hart Publishing 2019).

<sup>61</sup> 'Au sens du présent titre, on entend par: 1° Abrogation d'un acte: sa disparition juridique pour l'avenir; 2° Retrait d'un acte: sa disparition juridique pour l'avenir comme pour le passé.' establishing that for the purposes of this title, the following definitions apply: 1 ° Repeal of an act: its legal disappearance for the future; 2 ° Withdrawal of an act: its legal disappearance for the future as for the past (Article L240-1 of the Code of Relations between the Public and the Administration).

<sup>62</sup> See *Custos*, *supra* n. 54, 297 ff.

#### 4.4 BELGIUM

The Belgian Act of 29 July 1991, the Law on the Formal Statement of Reasons of Administrative Acts, generalizes the obligation to formally state reasons for unilateral administrative acts of individual scope. The reasons ‘must specify in the instrument the legal and factual considerations underlying the decision’.<sup>63</sup> The duty to give reasons strengthens judicial control of administrative decisions and the observance of the principle of equality of arms in administrative litigation.

Some recent developments of the legislator in Belgium have put new attention to this issue.

By decree of 6 July 2012, the Flemish legislator added two new instruments to the Council for Permit Disputes’ toolbox: mediation and the so-called ‘administrative loop’ or ‘*boucle administrative*’. This administrative loop is defined as ‘offering the authority granting the permits at every stage of the procedure by interlocutory judgment the possibility to remedy, or arrange to have remedied, a defect in the contested decision within the time period that the Council determines’.<sup>64</sup>

The Federal legislator (with the Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State) introduced in the Administrative Litigation Section of the Council of State<sup>65</sup> its own version of the administrative loop, clearly inspired by the Flemish model.

Following the appeals of several individuals and non-profit associations, the Constitutional Court was brought to decide on the constitutionality of the Flemish administrative loop in decision No. 74/2014 and of the Federal administrative loop in decision No. 103/2015.<sup>66</sup>

By allowing the authority to rectify an individual administrative decision that is not formally reasoned, by supplying reasons following the application of the administrative loop, the contested provisions impair the right to receive immediate notice of the reasons justifying the decision.

The Court is of the opinion that the duty to give reasons, which is meant to enable the individual to assess whether there are grounds for seeking

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<sup>63</sup> Article 3 of the Act of 29 July 1991.

<sup>64</sup> See Bortels, *infra* n. 65, at 6.

<sup>65</sup> *Ibid.*, at 18.

<sup>66</sup> Specifically, With decisions No. 74/2014 of 8 May 2014 and No. 152/2015 of 29 Oct. 2015, the Belgian Constitutional Court annulled the provisions of the Flemish and Federal legislation introducing the ‘administrative loop’. This new tool of the Belgian administrative courts grants the power to annul a decision, thereby facilitating the final settlement of a dispute. The first judgment relates to the administrative loop contained in the Flemish Town and Country Planning Code, the second judgment relates to the almost identical loop contained in the decree on the Flemish administrative courts. For a comment to the decisions H. Bortels, *The Belgian Constitutional Court and the Administrative Loop: A Difficult Understanding*, *Jus publicum* 2 (2016). Further on this also H. Bortels, in Furthermore M. Delsignore, *The Italian Legal System and the Possible Implications of the Belgian Constitutional Court's Rulings on the Administrative Loop*, in Maastricht Faculty of Law Working Paper 2017.

judicial review, would be ineffective if the individuals only learn of the reasons on which the decision is based after instituting court proceedings.<sup>67</sup>

Furthermore, the Court<sup>68</sup> affirms that Article 6(9) of the Aarhus Convention requires that the text of the administrative decision in environmental matters be made accessible to the public ‘along with the reasons and considerations on which the decision is based’.

The administrative authority, according to the Constitutional Court’s ruling, has the duty to clearly state the reasons for an administrative act and that means, whenever those reasons are missing, the act has the potential to be declared void. The administrative loop mechanism, instead, puts pressure on the separation of powers and in a discriminatory way violates the principle of impartiality and independence of the judiciary. According to the Court, the administrative judge intervenes in the determination of the content of a discretionary administrative act, which is a task of the administrative authorities.

On 1 December 2016, however, the Constitutional Court dismissed the appeal against the Decree of 3 July 2015, which granted the above-mentioned two Flemish administrative courts a redesigned administrative loop for formal and substantive illegalities. The judge can now offer the defending party the possibility to rectify the unlawfulness by adopting a new rectified administrative act of which the content can be altered. In contrast to the previous loops, the judge only holds whether the unlawfulness could be rectified and no longer needs to rule on the content of the administrative act. The Constitutional Court rejected all arguments of the applicant and held that the contested provision is constitutional. The Court ruled that there is no longer a violation of the independence and impartiality of the judge.<sup>69</sup>

## 5 CONCLUSION: SOME GROUNDS FOR ‘REVIVING’ THE DUTY TO GIVE REASONS

The analysis carried out above concerning the duty to give reasons shows that a process of ‘deconstruction’ taking place and it applies both at the level of substantive administrative law as well as that of judicial administrative proceedings law. From the perspective of substantive law, as we have tried to emphasize, if the legislator initially adopted specific provisions with the aim of enhancing the duty to give reasons as a fundamental in the administrative procedure, over time the provisions have been modified in favour of a speedy administration activity to the detriment of

<sup>67</sup> No. 103/2015, B.13.4.

<sup>68</sup> No. 103/2015, B 13.4 and No. 74/2014, B.9.5.

<sup>69</sup> As can be read on the annual report of Developments in Belgian Constitutional Law, link, <http://www.icconnectblog.com/2017/10/developments-in-belgian-constitutional-law-the-year-2016-in-review/>.

participation, cooperation and subsequent protection of the citizen. In the perspective of jurisprudence, administrative judges have interpreted the legislative provisions by diminishing the weight and the strictness of the duty. On the one hand, the duty to give reasons is rendered largely useless; on the other, judicial proceedings becomes a sort of administrative proceedings conducted in a sham of judicial proceedings. The citizen is forced to initiate judicial proceedings for the sole purpose of knowing the reasons behind the act adopted by the administration.

It is surely true that ‘what counts is what someone has done, not what someone declares they would have wanted to do’.<sup>70</sup> These are the words used forty years ago by Giannini in describing the phenomenon of the ‘dequotazione’, devaluation of the statement of reasons underlying the administrative act. But the devaluation and the weakening of the duty to give reasons are not synonymous.

In the 1970s, ‘dequoting’ the duty to give reasons was a guarantee for the citizen – that is, focusing on what the administration did and not what the administration said it wanted to do through statement of reasons. In this way, the search for the substantive reasons underlying the measure was emphasized in a context where attention was almost exclusively devoted to the final act rather than to the administrative procedure.<sup>71</sup>

As shown above, the Italian context is different today: there have been numerous successful attempts to dilute the power of the administration, and the court has access to more refined techniques for controlling the correct use of administrative power.<sup>72</sup> In this different general context, the reduction of importance (the ‘weakening’) of the duty to give reasons eliminates an important guarantee for citizens. However, the statement of reasons for administrative action is not an empty formula, possibly supplemented by a subsequent statement of reasons put forward by the administration during the judicial proceedings. In fact, the administration must always be responsible for the power exercised and the first means of ensuring this sense of responsibility is to provide an explicit statement of reasons for its choices.<sup>73</sup>

This phenomenon is not specific to the Italian legal system. The analysis of European Law and of the provisions in selected Member States have demonstrated that the weakening of the duty to give reasons can be considered to be a widespread issue. The obligation to provide a statement of reasons turns out to be more nuanced and less effective because of a peculiar interpretation of the provisions concerning formal errors in administrative proceedings. This interpretation is very much open to criticism as the statement of the factual and legal reasons is a powerful tool in controlling the activities of the public authorities.

<sup>70</sup> M. S. Giannini, under *Motivazione dell'atto amministrativo*, in *Enc.dir.*, vol. XXVII, 268 ff. (Milan 1977).

<sup>71</sup> Again Giannini, *supra* n. 70.

<sup>72</sup> R. Villata & M. Ramajoli, *supra* n. 6.

<sup>73</sup> G. Corso, under *Motivazione dell'atto amministrativo*, in *Enc.dir.*, *Aggiornamento V*, 774 ff. (Milan 2001).