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Managing complexity: the efficiency of administrative performance and the re-emergence of economic planning for the reconciliation of strategic interests of territories

Abstract

The convergence of multidimensional crises has contributed to change the framework of strategic choices that impact the present and the expected future. The boundaries of climate and environmental action define the new margins of manoeuvre for political and administrative institutions, shaping an institutional system increasingly influenced by the need to provide rapid regulatory responses to emergencies (from pandemics to energy) as well as to the challenges posed by the demographic crisis and economic recession. This scenario requires an administrative decision-making process adapted to the management of a complex reality, in which the role of scientific knowledge and technical skills (particularly the digital technologies) – for its ability to reengineer the administrative machine – are assuming a crucial importance. Hence efficient administrations capable of knowledge and foresight, rather than simply reducing procedural steps, are needed. The efficiency of administrative performance, meant as the suitability of the organisation to best serve its purpose, is therefore fundamental not only to ensure that the administration is able to respond to the needs of the citizen, in the mediation of different interests, but also to legitimise public intervention, in observance of Article 97 of the Italian Constitution. Starting from this assumption, the paper intends to investigate how the fulfilment of the public interest of administrative action – namely the efficiency of public administration – can be declined in the territories, in the form of

the principles of adequacy and rationality, i.e. in the construction of the most adequate and effective responses to the needs expressed in the various contexts. Strategic decisions in the energy field (as in the case of the procedures for the installation of regasifiers and floating gas storage terminals) represent in this sense a specific prism of analysis, being the point of fall of simplification logics aimed at the achievement of objectives of national interest as well as of deep conflicts at local level that call into question the issues of ecological democracy and the ability to make the choices made by the administration adequately comprehensible, between security and environmental concerns. In this sense, planning activity is becoming increasingly central, in its triple dimension, now also approved by the European institutions, of economic, environmental and spatial planning at the same time. The protection of the environment, the fight against climate change and the objective of biodiversity, beyond the traditional model of sustainability, seem in fact to provide the foundations, in a perspective of positive territoriality, to realise experiences already attempted in the past of a development-oriented administration, i.e. capable of stimulating the production of value (social, cultural, environmental, economic) from the specific potential resources of a territory.

KEYWORDS: efficiency; administrative performance; strategic decisions; economic, environmental, and spatial planning; land use management.

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1. Complexity, the role of digital technologies and the efficiency of administrative performance

Complexity is a concept that implies the possibility of describing the unity (of a system, of an environment, of the world, etc.) using the distinction between the elements and relationships of which it is composed. Social com-

plexity[1], more specifically, is linked to the notion of legal postmodernity, a conceptual and methodological category that, assuming detachment from faith in rational thought as the founding vehicle of human existence and juridicity, preludes the affirmation of a more relational and relative conception of life and life and law[2].

The transition from modernity to post-modernity appears marked by a gradual erosion of formal rationality[3] in favour of a more pragmatic and substantive vision of administrative action, as well as of an increasingly active role of the Courts. The scenario thus delineated is that of a plurality of institutional actors variously involved in the decision-making process.

In recent years, this has become even more evident due to the convergence of multidimensional crises[4], which has contributed to change the framework of strategic choices impacting the present and the expected future. The boundaries of climate and environmental action define the new margins of manoeuvre for political and administrative institutions, shaping an institutional system increasingly influenced by the need to provide rapid regulatory responses to emergencies (from pandemics to energy) as well as to the challenges

1 On social complexity, see N. Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie*, Frankfurt a. M., Suhrkamp, 1984; G. Pasquino (ed.), *Le società complesse*, Bologna, il Mulino, 1983; AA.VV., *Complessità sociale e identità. Problemi di teoria e di ricerca empirica*, Milano, Franco Angeli, 1985; D. Zolo, *Complessità e democrazia*, Torino, Giappichelli, 1987.

2 See S. Favaro, *La teoria della complessità sociale e il postmoderno nel diritto. Un esempio paradigmatico: la teoria della rappresentanza di Salvatore Pugliatti*, in *Tigor: rivista di scienze della comunicazione*, III, 2, 2011, pp. 4-23. C. Salvi, *Diritto postmoderno o regressione premoderna?*, in *Eur. dir. priv.*, 3, 2018, p. 872.

3 According to Weber, the distinctive element of modern (i.e. rational) law consists in its "calculability", the possibility, contemplated in it, to predict with certainty the rule applicable to the concrete case. See M. Weber, *Economia e società*, vol. II, Torino, Einaudi, 1999; N. Irti, *Calcolabilità weberiana e crisi della fattispecie*, in *Riv. dir. civ.*, 5, 2014, p. 987 ss.; A. Carleo (ed.), *Calcolabilità giuridica*, Bologna, il Mulino, 2018. The relationship between legislative power and political decision-making is based on certain cornerstones such as the rule of law and the principle of legality, rational law having a function of guaranteeing the formal and egalitarian application of the law. In the modern State, therefore, relations with the bureaucratic apparatus are conducted according to predictable rules and, above all, without regard to the individual. See F. Denozza, *In viaggio verso un mondo re-incantato? Il crepuscolo della razionalità formale nel diritto neoliberale*, in *Osservatorio del diritto civile e commerciale*, 2, 2016, p. 420.

4 The period 2020-2022 has been marked by dramatic events of global significance: from the Covid-19 to the Russian invasion of Ukraine, to the welding together of the economic crisis with the urgent of the energy crisis.

posed by the demographic crisis and economic recession. In this context, it becomes necessary an administrative decision-making process adapted to the management of a complex reality in which the role of scientific knowledge and technical skills – particularly the digital technologies, for their ability to reengineer the administrative machine[5] – are assuming a crucial importance.

Sustainability of ecosystems, as the goal of the European climate neutrality strategy[6], seems moreover to entail a broadening of legal thinking, changing the very idea of environmental protection, no longer understood as merely necessary to correct a negative market externality but as an objective in itself[7].

In this sense, a gradual evolution can be envisaged from an anthropocentric interpretation, based on the need to safeguard health and the natural environment, leaving intact the sectorialisation of areas of intervention and risk management competencies for the mere legitimisation of economic production, to a biocentric or "ecocentric" approach.[8]. Tha latter, aims at the conservation of ecosystems and thus works towards a primacy of ecology[9] over economics, considering the interconnection between multiple objects of observation and for a longer time span than the present[10]. This change also appears consistent with the recent reform of Articles 9 and 41 of the Italian Constitution[11].

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5 See B. BOSCHETTI, *La transizione della pubblica amministrazione verso il modello Government as a platform*, in A. LALLI (ed.), *L'amministrazione pubblica nell'era digitale*, Torino, Giappichelli, 2022, pp. 1-44.

6 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 (European Climate Law).

7 See E. CHITI, *Oltre la disciplina dei mercati: la sostenibilità degli ecosistemi e la sua rilevanza nel Green Deal europeo*, in *Rivista della Regolazione dei Mercati*, 2, 2022, p. 468 ss.

8 See B. CELATI, *L'intervento pubblico per la riconversione ecologica dell'economia. Modelli, strumenti e prospettive giuridiche*, Padova, Cedam, 2021.

9 See E. CHITI, *op. cit.*, *passim*.

10 See S. MESSINA, *Il costituzionalismo "globale" alla prova del cambiamento climatico e della crisi ecologica planetaria. Per una possibile metamorfosi del diritto ambientale internazionale*, in A. ANDRONICO, M. MELI (ed.), *Diritto e antropocene. Mutamenti climatici e trasformazioni giuridiche*, Sesto San Giovanni, Mimesis, 2020, p. 154 ss.

Such an orientation far from legitimising a paralysis of the administrative decision, implies its adaptation to the need to consider the complex retroactions and indeterminacies reflecting a multiplicity of points of observation, relating the "context" with a "systemic" dimension. This brings out a further component of complexity, particularly evident in times of crisis, that of "contradiction", which finds in the territories, as a synthesis of the plurality of interests that gravitate there, a privileged place of expression, often resulting in conflicts[12].

The ability to foresee and manage the various interests at stake therefore assumes the role, together with speed of response, of key element in managing complexity. Two themes come to the fore in this respect: digitisation and administrative efficiency.

Regarding the former, the digital transition is identified as one of the cornerstones of European and national recovery and resilience strategies, promoting a process of integral rethinking of the administration, embracing both the organisational/managerial and the functional/processual dimensions, ultimately involving the entire system of economic and social relations, according to a logic that has been defined "ecosystemical"[13].

As far as administrative efficiency in performances is concerned, in the territorial management it takes on a specific declination, which is that of adequacy, deriving from the principle of responsibility and responding to proportionality, i.e. the ability to know the problem to be addressed and to be able to decide accordingly[14], meeting the needs of the community.

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11 Constitutional Law no. 1 of 11 February 2022, Amendments to Articles 9 and 41 of the Constitution on environmental protection

12 One only has to think of the difficulties involved in bringing together a merely local and an abstractly global dimension, the particularisms of the community with the universalism of climate and environmental issues.

13 See B. Boschetti, *Transizione digitale e amministrazione (eco)sistemica,* in *Studi Parlamentari e di Politica Costituzionale*, 209, 2021, pp. 53-80.

14 See P. Forte, *Aggregazioni pubbliche locali. Forme associative nel governo e nell'amministrazione tra autonomia politica, territorialità e governance*, Milano, FrancoAngeli, 2012, p. 19.

2. Good performance and legitimacy of administrative decisions in the "emergency society"

In a broader sense, efficiency is linked to the concept of the capacity for administrative action, and in particular to the principle of good performance (art. 97 of the Italian Constitution), which thanks to the National Recovery and Resilience Plan (NRRP) – an instrument which contributes to post-pandemic reconstruction by setting up a legal and institutional architecture capable of allowing both adequate reactions to emergencies, in the immediate term, and coherent responses to accompany structural changes, in the medium and long term[15] – acquires new relevance.

The principle of good performance indeed has been interpreted as a typical expression of "public efficiency", with reference to its organisational meaning[16], as well as in functional terms, being designed to improve the performance of the public apparatus. In line with NRRP, considered in this perspective, it requires the administration to have recourse to the most appropriate instruments and means in order to achieve the administrative result[17], i.e. the synthesis between the need to realise the public interest and the utmost attention to the uniqueness of the concrete event[18]. Digitalisation, promoted by NRRP, seems then to provide an opportunity in that respect, allowing the rediscovery of the principle of good performance, in its procedural sense[19], in

15 On the nature of NRRP, see M. Clarich, *Il PNRR tra diritto europeo e nazionale: un tentativo di inquadramento giuridico*, in *www.astrid-on-line.it,* July 2021.

16 See M.R. Spasiano, *L'organizzazione comunale – Paradigmi di efficienza pubblica e buona amministrazione*, Napoli, Edizioni Scientifiche Italiane, 1995, p. 223 ss.; Id., *Il principio di buon andamento: dal metagiuridico alla logica del risultato in senso giuridico*, in *Ius publicum*, 2011, p. 33.

17 The result, from time to time, has been configured in economic terms, either as material satisfaction of the citizen's claim, or as a satisfaction of legally founded claims, or as taking into account all the interests at stake. The result has been also conceived as being outside the perimeter of legality.

18 See S. Dettori, *Doveri amministrativi di risultato e doveri amministrativi di comportamento (a proposito di un recente saggio di Massimo Monteduro)*, in *P.A. Persona e Amministrazione*, 1, 2021, p. 467.

19 See G. Berti, *La pubblica amministrazione come organizzazione*, Padova, Cedam, 1968; D.U. Galetta, *Transizione digitale e diritto ad una buona amministrazione: fra prospettive aperte per le Pubbliche Amministrazioni dal PNRR e problemi ancora da affrontare*, in *Federalismi.it*, 2022, pp. 103-125.

the light of the close relationship between the procedure under Law 241 of 1990 and the administrative decision.

The NRRP indeed transforms public administration in a «key resource to propel the country into the post-pandemic future»[20], with the provision of contextual and enabling reforms, planned, and managed as investments, emphasising the need for an efficient and "result-oriented" government.

From a dimension in which the principle of cost-effectiveness prevail and condition to certain degree the capacity of the entire government – with the exaltation of savings as an absolute value[21] – we are thus moving towards a new idea of administration as an organization which must be able to spend resources well and promptly[22].

What is needed, above all, is the capacity for knowledge and forecasting[23], using technical skills as a tool to strengthen the administrative discretion of decisions[24] in sectors that increasingly condense a plurality of interests.

An emblematic case in this regard is the energy field, in which issues of emergency, health, climate and land governance intersect.

Several measures in the NRRP concern energy and are mainly allocated in the in mission two, entitled «Green Revolution and Ecological Transition», which provides for investments in the «circular economy and sustainable agriculture», «land and water protection», «energy efficiency», «renewable energy, hydrogen, networks and sustainable mobility».

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20 See B. Boschetti, B. Celati, *La Buona amministrazione*, Istituto Toniolo, October 2022.

21 As affirmed by the Constitutional Court in Judgment no. 247 of 2018, in the teleological articulation of the constitutional precept as amended, «good performance also presupposes that the positive financial result is matched by a correct and optimal provision of social services and benefits rendered to the community».

22 See F. Cintioli, *Risultato amministrativo, discrezionalità e PNRR: una proposta per il Giudice*, in *Giustiziamministrativa.it*, 2021.

23 See D. Donati, *La strada da fare. Appunti* per *l'amministrazione dopo la pandemia*, in *Rivista di Diritto Pubblico*, 1, 2021, pp. 127-153.

24 On administrative discretion see L.R. Perfetti, *Discrezionalità amministrativa e sovranità popolare*, in S. Perongini (ed.), *Al di là del nesso autorità/libertà: tra legge e amministrazione*, *Atti del convegno Salerno, 14-15 novembre 2014*, Torino, Giappichelli, 2017, p. 119 ss.

The Plan, to facilitate the start-up of economic activities and the installation and upgrading of facilities, provides for a set of administrative simplification mechanisms concerning proceedings deemed strategic in environmental matters.

The strategy followed seems to be that of attempting to rationalise the complexity of administrative decision-making, either by sterilising the potential conflict of interests of constitutional relevance or by drawing the decision to a centralised level[25].

One may wonder, however, whether simplification is really the only strategy for shaping administrative decisions with a view to "public efficiency", i.e. to foster the emergence of administrations capable of performing their tasks effectively.

Simplification is in fact interpreted as synonymous with acceleration, as it is believed that the dysfunctions of our administrations are due to the interminable protraction of decision-making processes, the fragmentation of competences, with the associated conflicts, and the overload of prescriptions accumulated[26].

However, the paralysis of authoritative processes is caused by the difficulty of balancing interests and values, rather than the time needed for closing procedures.

As stated by the doctrine, in fact, a correct discourse on administrative simplification should consider the physiological complexity of government, which stems from factors such as the interaction of public interests, the importance of private interests and institutional pluralism. The result is a normal complexity of rules, which must contemplate the different interests at stake – e.g. the construction of facilities, environmental protection and landscape pro-

25 See S. Spuntarelli, *Le rinnovabili per la transizione energetica: discrezionalità e gerarchia degli interessi a fronte della semplificazione dei procedimenti autorizzatori nel* PNRR, in *Diritto Amministrativo*, 1, 2023, pp. 59-95.

26 See S. Amorosino, *La "dialettica" tra tutela del paesaggio e produzione di energia da fonti rinnovabili a tutela dell'ambiente atmosferico*, in *Rivista giuridica dell'edilizia*, 4, 2022, p. 261 ss.

tection – and define the relationships between the different public and private actors, otherwise they fuel litigation[27].

The litigation arises from uncertainties, not least because the legislator often does not unravel the knot of which primary interest (development of renewables, environmental protection, landscape protection) the authorities should pursue in the concrete case, taking other interests into account. Uncertainties, more generally, are the consequence of the difficult relationship between science and law, especially when law is called upon to endow with certainty what is uncertain for science[28].

At the same time, a conditioning role is played by the practice of "Nimby" (not in my back yard) or by the absolute prevalence of landscape protection. This is what happens in the case of the dispute between State and Regions, which is particularly heated in relation to the location of plants powered by renewable sources[29].

Regarding more specifically the first aspect, the defence of the territory from works and activities of public interest also seems to derive from the lack of planning in the location of renewable energy plants. The programming activity is in fact crucial to shift the balancing of conflicting interests upstream by the identification of suitable and unsuitable areas for plant installation.

As emphasised in a recent recommendation of the European Commission[30], indeed, «The lack of public acceptance of renewable energy projects is another significant barrier to their implementation in many Member States. To address this, the needs and perspectives of citizens and societal stakeholders should be taken into account at all stages of renewable projects development – from policy development to spatial planning and project development – and

27 See B.G. Mattarella, *La semplificazione amministrativa come strumento di sviluppo economico*, in *Astrid-on-line.it*, November 2019.

28 See M.A. Cabiddu, *La nozione giuridica di territorio*, in *Territorio*, 47, 2008, pp. 195-199.

29 See S. Spuntarelli, *op. cit.*, p. 66.

30 Commission Recommendation (EU) 2022/822 of 18 May 2022 on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements.

good practices for ensuring just distribution of the various impacts of installations among the local population should be encouraged».

It is also a question of framing this type of decision - linked to the management of complex problems in what can be defined as a true "emergency society" - within a broader and more coordinated vision of the territory as a place of collective interests that must be taken into account by the system, but also of conflicting resistances and reactions, making the participation of the inhabitants, individually and collectively, in the choices on the destination and use of the territory indispensable.

In the light of these observations, the hypothesis that this paper intends to test is that an efficient and "result-oriented" administration – where the result becomes a parameter of legitimacy – requires a new planning activity specifically of a strategic nature, which pivots on the territory as a connecting element between law and economy.

3. Strategic energy decisions between calls for simplification and conflict management in the territories

Strategic energy decisions raise social and political challenges. Indeed, the location of energy technologies entails environmental impacts that often provoke growing local opposition, requiring that national interest and environmental compatibility be held together in harmony with the local community and all stakeholders.

Moreover, the direction indicated by the European institutions is precisely that of compatibility and convergence between development and environmental protection[31], creating a sustainable energy system that guarantees sufficient energy resources for economic growth and is able to mitigate the impact on the environment.

This approach assumes that the environment should be considered as a complex organised system of interacting elements.

31 See G. Rossi (ed.), *L'ambiente per lo sviluppo. Profili giuridici ed economici per il concetto di ambiente per lo sviluppo*, Torino, Giappichelli, 2020.

Included in the concept of system are those of complexity – which requires the adoption of management mechanisms rather than simplification – and of relationship, the latter well expressed by the legal principle of integration31F[32].

Strategic energy decisions also call into question the issues of institutional relations between public authorities and of the "negotiability" of public interventions.

In this sense, they represent a specific prism of analysis, being the drop point of simplification logics aimed at the achievement of objectives of national interest as well as of deep conflicts at the local level that imply the ability to make the choices made by the administration adequately understandable, between security and environmental concerns.

The government acts implementing the NRRP are perfectly framed within such a scenario, establishing the simplification of authorising procedures and of environmental impact assessments (EIA) in order to facilitate the ecological transition.

With the former, the administration defines the rules of the concrete case according to a regulatory logic, which can be interpreted as conditional, presupposing the conformation of the conduct of a given private operator through specific prescriptions whose purpose can be traced back to the need for adequate and effective protection of one or more interests32F[33]. The prescriptive-conditional clause can be considered an instrument for managing conflict within the decision-making dynamic favouring the attainment of a balance realised in the perspective of a protection that has been defined, also in the light of the constitutional jurisprudence, as "systemic"[34].

32 For a complete analysis of these issues, see V. DI CAPUA, *L'autorizzazione integrata ambientale. Verso una tutela sistemica dell'ambiente*, Napoli, Editoriale Scientifica, 2020; M. CAFAGNO, D. D'ORSOGNA, F. FRACCHIA, *Nozione giuridica di ambiente e visione sistemica*, in *Diritto e processo amministrativo*, 3, 2018, p. 713 ss.

33 See F. FRACCHIA, *I procedimenti amministrativi in materia ambientale*, in AA.VV, *Diritto dell'ambiente*, Bari, 2008, p. 395 ss.

34 See, for this reflection, E. FREDIANI, *Decisione condizionale e tutela integrata di interessi sensibili*, in *Diritto Amministrativo*, 3, 2017, p. 447 ss.; ID., *La clausola condizionale nei provvedimenti am-*

An example of an authorisation with a conforming function is the integrated environmental authorisation (IEA)[35], the purpose of which is mainly emission control; the object is therefore represented by the operation of the plant, not by its location and construction, which are instead covered by the EIA, concerning projects that may have significant and negative impacts on the environment and cultural heritage[36].

The environmental impact assessment is for is part of critical importance in the authorisation process for renewable energy installations, being a substantial prerequisite for the single authorisation[37] and, as such, capable of halting the procedure if it ends in a negative outcome[38]. It is the site of a real political confrontation and therefore the epicentre of potential conflicts. Thus, the legislator has provided for various mechanisms, procedural, or organisational, suitable to "defuse" conflicts that arise during environmental impact assessments[39].

In order to promote the development of renewable energies, the construction and operation of plants are in particular regulated according to special simplified and accelerated procedures.

In this regard, among the implementation measures of the NRRP, those introduced as a matter of urgency by Decree-Law no. 77 of 31 May 2021, con-

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bientali, Bologna, il Mulino, 2019.

35 See V. Di Capua, *op. cit.*; G. De Giorgi, *Le procedure integrate*, in R. Ferrara, M.A. Sandulli (a cura di), *Trattato di diritto dell'ambiente*, Milano, Giuffrè, 2014.

36 See R. Ferrara (ed.), *La valutazione di impatto ambientale*, Padova, Cedam, 2000; Id., La *valutazione di impatto ambientale fra discrezionalità dell'amministrazione e sindacato del giudice amministrativo*, in *Foro amministrativo TAR*, 2010, p. 3179 ss.

37 Introduced by Article 12, legislative decree no. 387/2003, it is aimed at the issue of the single authorisation measure by the Regions or Autonomous Provinces or the Ministry of Economic Development. It is only in this procedure that «the synchronic assessment of the public interests involved and deserving of protection can and must take place, in comparison both with the interest of the private economic operator and also (and not least) with further interests of which individual citizens and communities are holders, and which find their provision and protection in the constitutional principles» (Constitutional Court, Judgment no. 221 of 27 October 2022).

38 See S. Spuntarelli, *op. cit.*, p. 72.

39 See M. D'Angelosante, *Il PNRR e le semplificazioni in materia di valutazioni e autorizzazioni ambientali, fra sviluppo economico sostenibile e protezione ambientale sostenibile*, in *Rivista quadrimestrale di Diritto dell'Ambiente*, 1, 2022, p. 252 ss.

verted by Law no. 108 of 29 July 2021, as well as by Decree-Law no. 17 of 1 March 2022, converted by Law n. 34 of 27 April 2022, and by Decree-Law no. 36 of 30 April 2022, converted by Law no. 79 of 29 June 2022, assume particular relevance.

More specifically, articles 12 and 18 of Law Decree no. 17/2022, entitled respectively *Simplification for renewable plants in suitable areas* and *Identification of additional suitable areas for the installation of plants powered by renewable sources*, have updated the regulations set out in Legislative Decree 199/2021 for the identification and installation of plants powered by renewable sources in suitable areas to be identified by decree.

To make the European principle of maximum dissemination of renewable sources[40] effective, it is also provided that plants may be located in any part of the territory, except if grounds for incompatibility are identified. However, the list of areas considered by the law to be suitable for the installation of systems is extended, as the installation of photovoltaic and thermal solar systems covering an area no greater than sixty per cent of the industrial area of relevance is also permitted in areas for industrial use, as an exception to municipal urban planning instruments[41].

The implementing legislation of the NRRP has also affected the organisational profile establishing a Technical Commission composed by experts called upon to operate full-time, for environmental assessment procedures in relation only to the projects included in the National Recovery and Resilience Plan and those implementing the integrated national energy and climate plan.

Moreover, also in relation to favouring renewable energies, if an EIA falls within the competence of the State, it is provided that it may be replaced by a resolution of the Council of Ministers and, furthermore, that any sub-

40 See Constitutional Court (Judgment no. 224 of 11 October 2012).

41 Art. 10-*bis*, inserted by Art. 1, par. 1, Law no. 34/2022 converting Decree-Law no. 17/2022.

sequent silence on the part of the competent administration is equated with the granting of authorisation[42].

Besides renewables (wind, sun wave motion, surface emissions of gaseous vapours, biomass, waste, and hydrogen), the energy sources considered compatible with the transition objectives by the EU are nuclear and gas (albeit temporarily). The latter's role in the decarbonisation of global energy use is considered unequivocal, which is why, in addition to access to existing gas infrastructure, the construction of onshore facilities to receive LNG and regasify becomes necessary.

In this respect, Decree-Law n. 50/2022 lays down several provisions for the construction of new regasification plant, establishing an even more special and accelerated procedure. Art. 5, in particular, defines the works aimed at increasing national regasification capacity by means of floating storage and regasification units to be connected to the network existing at the date of issue of the decree, including the related infrastructures, «strategic interventions of public utility, not deferrable and urgent».

For their construction, provision is made for the appointment by decree of the President of the Council of Ministers of one or more extraordinary government commissioners. The commissioner issues the authorisation required by law[43] following a single procedure. For environmental assessments of works and related infrastructures, after notification to the European Commission, the exemption referred to in Article 6(11) of Legislative Decree n. 152 of 3 April 2006 applies.

The authorisation has the effect of a variant of existing urban planning instruments, as well as of approval of the variant to the port master plan, where necessary.

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42 Art. 7, paragraphs 1-3, Decree-Law no. 50/2022.

43 The authorisation provided for in Article 46 of Decree-Law no. 159 of 1 October 2007, converted, with amendments, by Law no. 222 of 29 November 2007.

Decree-Law n. 57 of 29 May 2023 containing *Urgent measures for territorial entities, as well as to ensure the timely implementation of the National Recovery and Resilience Plan and for the energy sector* also intervened on the subject.

Art. 3, entitled *Supplements to the rules on the realisation of new regasification capacities*, in particular, states that: «within 60 days of the date of entry into force of the decree, interested parties may submit new applications pursuant to Article 5, paragraph 5, of Decree-Law n. 50 of 17 May 2022 to the extraordinary governmental commissioners already appointed pursuant to paragraph 1 of the same article». The authorisation for the construction or operation of the infrastructures is issued by the competent extraordinary commissioner of the Government following a single procedure, including the environmental assessments referred to in Title III of Part Two of the decree Legislative Decree n. 152 of 3 April 2006, with a maximum duration of two hundred days from the date of receipt of the request, carried out pursuant to Article 5 of the same Decree-Law n. 50 of 2022.

The strong promotion of regasifiers, by creating a separate track from ordinary procedures, stems from the known difficulties of Russian gas supply[44], at the same time the installation of this type of plant is at the origin of a series of conflict dynamics in the different areas involved.

A significant case is that of the Municipality of Piombino, in Tuscany, which presented a precautionary request to the Lazio Regional Administrative Court against the installation a new regasification facility (floating storage and regasification unit - FSRU facility), which takes liquefied gas (LNG) transported by carriers, returns it to a gaseous state and then feeds it into the gas network. The judges rejected the request stating[45] that: «even in the same way as

44 In its REPowerEU proposal of March 2022, the Commission explained that the EU imports 90 per cent of its gas consumption (about 45 per cent of which comes from Russia) and set as a priority goal the termination of Russian fossil fuel supplies "well before 2030". REPowerEU Plan asked member countries to make an additional effort beyond the Ready for 55 percent package, that is to increase the percentage of energy from renewable sources from 40 percent to 45 percent and energy savings from 9 percent to 13 percent compared to the 2020 scenario.

45 Regional Administrative Court of Lazio, Order no. 7917 of 22 December 2022.

the reconciliation of the opposing interests involved» there would not be «the conditions for the granting of the precautionary measure».

More specifically, the Municipality of Piombino has challenged Commissioner Order n. 140 of 25 October 2022, concerning «Art. 5 of Decree Law no. 50/2022: issue of single authorisation pursuant to Article 5(2) for the construction of the work, and related infrastructure, called "FSRU Piombino" and connection to the national gas pipeline network - proposer: SNAM FSRU ITALIA».

As underlined by the judges, the procedural modalities for the authorisation of the initiative in question are governed by a regulation (Articles 5 and 14 bis of Decree-Law n. 50/2022) that is characterised by being eminently emergency and by relating to interventions that, already in the declaratory statement, appear to be marked by a high degree of specificity, thus falling within the scope of application of Article 2(4) of EU Directive 2011/92 (exemption from the EIA) and of Guideline Act C/2019/8014, OJ C 386 of 14.11.2019.

The hearing on the merits, scheduled for 8 March 2023 before the Regional Administrative Court of Lazio, was postponed to 5 July, but in the meantime, transhipment operations of the LNG cargo at Snam's new regasification terminal in Piombino have begun, and the first quantity of gas from the new regasifier has subsequently been injected into the Italian network.

The choice of the single authorisation as a simplification mechanism with an accelerating function, in the light of the need to implement strategic interventions of public utility, which cannot be postponed, does not, however, appear to completely eliminate uncertainties with a view to the administrative result, since, as seen in the case of Piombino, the outcome of the procedure is always exposed to possible judicial review, even by local administrations or committees.

The complexity of the decision, in short, does not seem to be solvable by speeding up proceedings alone.

Furthermore, there is a clear risk that in situations such as this, the necessary participation of citizens can only find space through the possibility of legal recourse, i.e. in an oppositional and precisely conflictual phase. On the contrary, the participatory moment should be considered as a space not so much for compromise as for achieving consensus45F[46], which is indispensable to give legitimacy to administrative choices.

These processes in fact, due to their complex nature, must be framed in the broader reflection on the transition from the concept of "environment-protection" to that of "environment-production". As recalled by the doctrine[47], it is a distinction that evokes Giannini's well-known opposition between "protection-agriculture" and "production-agriculture"[48].

This parallelism is opportune precisely because even for the ecological transition there seems to be a legislative "sector" characterised by the legislator's favouring of certain productive activities, namely the operation of renewable energy production facilities (as is the case with agriculture, considering both the Italian Constitution and European legislation).

The idea of "environmental-production", i.e. the construction of energy infrastructures as a function of the ecological transition, requires inevitable coordination between production needs and the protection of other territorial interests.

This coordination presupposes the conformation of the activities carried out in the territories with a view to achieving general systemic objectives but also in order to ensure adequate protection of relevant sensitive interests.

In addition to authorisations with a conforming function, the planning instrument, increasingly configured according to ecological purposes, is also relevant in this respect.

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46 See J. BLACK, *Proceduralizing regulation*, in *Oxford journal of legal studies*, 2000, p. 597 ss.
47 See S. AMOROSINO, *op. cit.*, p. 261 ss.
48 See M.S. GIANNINI, *Diritto pubblico dell'economia*, Bologna, il Mulino, 1995, p. 232.

After all, when Giannini coined his famous image of "agriculture-production", he laid the foundations, through his lucid intuition, for an intertwining of economic planning in agriculture and territorial planning, i.e. for the reversal of the principle according to which territorial planning should direct economic activity by conditioning its outcomes on the planned territory, thus implementing a logic of functionalising the transformation of agricultural land to the needs of agricultural production[49].

Similarly, it can be argued that the interests of ecological transition should be organised together with spatial planning choices.

4. Sustainability and resilience in the perspective of the legal definition of the concept of territoriality

This idea of the functionalisation of spatial arrangements in the name of ecological transition[50] entails a new reading of the concept of territoriality, in antithesis to what has been called «the spatiality of the economy and technology», extolled by the European Treaties, which aim to form: «not a wider and more extensive territory (which would always be a new territory), but a space, i.e. a seat of exchanges, which transcends[51] the territories of individual States»[52].

Physical space once again becomes relevant for the economy as some territories are, in terms of development planning, more optimal than others. The territory, in this sense, acquires a specific legal value as a strategic resource for development, for its material assets but also for its capacity to produce so-

49 See P. Urbani, A *proposito della riduzione del consumo di suolo*, in *Rivista giuridica dell'edilizia*, 3, 2016, p. 227 ss.

50 See Constitutional Court no. 267 of 2016 on the regulation of wind power plants, which considers a regional regulation illegitimate as in conflict with, among others, Article 41 of the Constitution, in that, by imposing terms and time limits, it places an obstacle in the way of free private initiative as 'functionalised' to environmental interests by the specific State legislation.

51 See S. Amorosino, *op. cit.*, p. 261 ss.

52 See N. Irti, E. Severino, *Le domande del giurista e le risposte del filosofo (un dialogo su diritto e tecnica)*, in *Contratto e impresa*, 2, 2000, p. 668.

cial, cultural, environmental, and economic value through the synergic integration of local actors among themselves and with supra-local actors[53].

The "environment-production" formula developed to highlight the promotion of a perspective based on supporting renewables as energies drawn from the environment "for environmental protection" and ecological transition appears congruent with this idea of territoriality, which is also enriched by the contribution of the legal definition of the concept of resilience[54].

The latter indeed is increasingly associated with the need for a law called upon to ensure proactive adaptation to climate and environmental change, capable of beating its negative effects in time[55]. Science plays a key role in this regard, validating and supporting both innovation processes and public regulations[56]. This implies going beyond the mere objective of sustainable development, already complemented by the idea of enhanced protection in the form of "sustainable protection"[57], to outline a model based on protecting the integrity of ecosystems as such[58].

The precautionary and preventive approach in this dimension must be read as the basis for the production of positive externalities through economic activities, in a proactive and not merely conservative manner, also thanks to the new European principles of "do no significant harm"58F[59] and "energy efficiency first".

Therefore, the objective must no longer be an economic exploitation of the ecosystem compatible with the need for protection, but, in an inverted per-

53 See G. Dematteis, F. Governa, *paper per il seminario Territorialità e delocalizzazione nel governo locale. Traccia per una discussione*, Imola, 2002.

54 Art. 2 of EU Reg. 241/2021.

55 See B. Boschetti, *Oltre l'art. 9 della Costituzione: un diritto (resiliente) per la transizione (ecologica)*, in *DPCE online*, 2, 2022, p. 1153 ss.

56 See E. Chiti, *op. cit.*, p. 468 ss.

57 See E. Frediani, *Decisione condizionale e tutela integrata di interessi sensibili*, cit., p. 447 ss.

58 E. Chiti, *op. cit.*, p. 468 ss.

59 The "do no significant harm" principle is based on what is specified in the "Taxonomy for Sustainable Finance" (EU Regulation 2020/852) adopted to promote private sector investment in green and sustainable projects and to help realise the objectives of the Green Deal.

spective[60], the creation of economic value through a land use that is increasingly suitable for not altering environmental values, balancing as antagonistic instances the consumption of natural resources and the benefits for the community[61].

The new wording of Article 41(3) of the Italian Constitution[62] also seems consistent with this reading, imposing a positive constraint on economic activity, i.e. directing production and consumption patterns towards environmental protection ("produce to improve the environment")[63].

Indeed, as the Italian Constitutional Court ruled, even before the constitutional amendment was made, «it is a choice of planning policy that the general interest objective of building alternative energy plants, instead of being entrusted exclusively to public hands, is deemed pursuable through private economic initiative, when other interests of a general nature do not preclude it»[64]. According to the Court, the relevance of an economic initiative involving the allocation of private capital in a production process aimed at the creation of material resources of strategic public interest would not be affected by the fact that the private purpose is profit oriented. More precisely, the judges define free private initiative as "functionalised" for the care of environmental interests by specific State legislation.

The territory becomes, in this scenario, an expression of the fundamental need for balance between the protection of resources and their exploitation, with a view to the well-being and economic and civil progress of the community settled on it.

In this sense, planning activity is becoming increasingly central, in its triple dimension, now also approved by the European institutions, of economic,

60 See Council of State, Sec. VI, 16 November 2004, no. 7472.

61 See Council of State, Sec. VI, 22 February 2007, no. 933.

62 *The law determines the appropriate programmes and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes*.

63 See F. De Leonardis, *La transizione ecologica come modello di sviluppo di sistema: spunti sul ruolo delle amministrazioni*, in *Diritto Amministrativo*, 4, 2022, p. 779 ss.

64 Constitutional Court no. 267 of 2016.

environmental, and spatial planning at the same time. The protection of the environment, the fight against climate change and the objective of biodiversity, beyond the traditional model of sustainability, seem in fact to provide the foundations, in a perspective of positive territoriality, to realise experiences already attempted in the past of a development-oriented administration, i.e. capable of stimulating the production of value from the specific potential resources of a territory.

Moreover, the doctrine also recognises a "planning" function to certain measures of the authorisation type, which can be traced back to a preventive logic, identifying with the concept of prescriptive conditionality, as already emphasised, their capacity to affect the development modalities of authorised activities[65].

The dialogue between public and private interests is, however, the key component of planning-type dynamics, according to regulatory mechanisms typical of conformation activity, in this case ecological.

5. Planning as a public intervention technique for managing complexity

Planifcatory methods allows to avoid a potential conflict embedding the opposing interest in fertile dialogue that is part of the procedure: in this way complex administrative decisions, economic activity and spatial transformation find a place for mediation.

Planning can also be seen as the principle by virtue of which interventions aimed at creating a link between the need for conservation (of certain resources) and the need to promote activities carried out in the name of the general interest can be regulated in the territories[66].

One can say that in the transformative scenario described, the joint consideration and connections between the economic and territorial spheres are now fundamental activities.

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65 See E. FREDIANI, *op. cit.*, p. 447 ss.

66 On this topic, See N. RANGONE, *Le programmazioni economiche. L'intervento pubblico in economia tra piani e regole*, Bologna, il Mulino, 2007.

It may also be recalled that illustrious doctrine has already emphasised that «urban planning (and land government) could be placed in a context of economic assumptions considered by the Constitution as that on which the regulation of the economy must operate; and urban planning is normatively associated with the latter, as an instrument for the implementation and imposition of social aims on property, and, in particular, of the aims of transforming existing and inadequate socio-economic assets to be modified and arranged in a more rational manner and more in keeping with the needs of social justice, wellbeing, dignity and freedom of the individual, improving the relationship between man and the environment»[67].

However, recovering the legacy of what happened in the past, some insights seem to be emerging.

Worthy of attention are the experiences of the so-called "Quadroter[68] project" of 1992[69], a research programme of the CNR, defined as "strategic" by its very authors, aimed at the construction of a "territorial framework reference for environmental planning"[70] and of the "Project '80", the most organic but unimplemented government initiative to make administrative action consistent with the real shape of the territory, through both economic and spatial planning, attentive to the environmental factor[71].

In both cases, spatial planning was of fundamental importance. One of the reasons for the latter's lack of implementation, however, would have been the separation of the economic and urban planning aspects, in the sense that «often purely morphological spatial models with no time paths have been for-

67 See A. Predieri, *Pianificazione e costituzione*, Milano, Edizioni di Comunità, 1963.

68 Quadreter was a "Framework for spatial policy".

69 See F. Archibugi (ed.), *Eco-sistemi urbani in Italia. Una proposta di riorganizzazione urbana e di riequilibrio territoriale e ambientale a livello regionale-nazionale*, CNR Progetto strategico Quadroter, Roma, Gangemi editore, 1999.

70 See F. Dini, A. D'Orazio, C*ittà metropolitane e questione dell'ente intermedio in Italia*: *tassonomie di soluzioni possibili*, in *Federalismi.it*, 20, 2022, p. 315 ss.

71 See *Il riordino territoriale dello Stato*, Scenari Italiani 2014. Rapporto annuale della Società Geografica Italiana Onlus, 2014.

mulated – in regulatory terms –alongside econometric models with no spatial content»[72].

Another relevant aspect of Project '80 was the search for a connection between the different levels of territorial government, with 30 metropolitan systems proposed as a basis for the orientation of regional planning. For the first time, indeed, in relation to the essential method of programming, reference is made to the need for a development-oriented administration, not referred to specific areas or individual cities, but to "multi-municipal" complexes, structured so as to ensure a strong relationship between municipalities[73].

With regard to planning as a tool for the ecological shaping of economic development, this need for connection between the various levels of territorial government is highly topical. In particular, it appears necessary to involve local and regional authorities in the ecological transition process, balancing, through planning, the different interests at stake.

The usefulness of a tool for territorial policy, suitable for regulating the close link between green economic growth and (consequent) transformations of the territory, emerges in particular with regard to the issue of energy installations. Indeed, this is the field in which the greatest conflicts arise, both between the different territorial authorities and with the communities concerned.

Suffice it to think of the regulation of the authorisation regime for energy plants from renewable sources, which falls not only within the State subject matter "environmental protection" but also within the concurrent regional legislative competence, insofar as it relates to "production, transport and national distribution of energy" pursuant to Article 117, third paragraph, of the Italian Constitution, the fundamental principles of which are contained in the provisions of Legislative Decree n. 387 of 2003, in the "Guidelines" pursuant to

72 See F. Fiorelli, *Assetto territoriale e Mezzogiorno nel "Progetto '80"*, in F. Forte (ed.), *Il progetto '80, Atti degli incontri di studio promossi dal seminario di Urbanistica della Facoltà di Architettura di Napoli diretto da Giulio De Luca*, *Napoli 14-15 dicembre 1969*, Napoli, Guida Editori, 1970.

73 See D. Donati, *Città strategiche. L'amministrazione dell'area metropolitana*, Milano, Franco Angeli, 2023.

Ministerial Decree of 10 September 2010 and in Legislative Decree n. 28/2011.

Regional competence has also recently been reaffirmed by administrative jurisprudence, which stated that municipalities – including those of regions with a special statute – cannot preclude the installation of photovoltaic plants in agricultural green areas due to the mere use of the site and cannot do so, in any case, by resorting to ordinary local regulatory powers. The relative power is in fact attributed to the regions, which, in compliance with the limits imposed by Ministerial Decree 10/09/2010 (Guidelines for the authorisation of plants powered by renewable sources) and Legislative Decree n. 199/2021, indicate the areas "not suitable" for the installation of plants. It is therefore up to the regional act – and not the local rule – to identify the incompatibilities of certain areas, in relation to the type and size and, therefore, also the power of the plants[74].

The denial, in this sphere, of the decision-making autonomy of local authorities and the high degree of complexity in the regulation of legal relations called into question by the authorisation procedures – just think once again of the case of the regasifier in Piombino, which pitted region and municipality against each other –, impose the search for a suitable instrument to reflect the close interdependence between territorial planning, economic development and territorial transformations, which these procedures invoke.

5.1. Strategic planning: new horizons to reconcile economic development and land use?

Integration and coordination between economic and physical planning are linked to the idea of efficiency as the rational use of land, especially in light of the need, with constitutional and European coverage, to address the current energy crisis through the production of energy from renewable sources, while preserving the environment and landscape.

74 Regional Administrative Court of Sicily, Palermo no. 299 of 2 February 2023.

The planning of "functionalised" public policies – such as those involved in the design of the ecological transition of territories – requires the adoption of ad hoc tools capable of governing their economic, social, and environmental outcomes.

In particular, the importance of a specific type of planning, so-called "strategic planning", emerges.

Strategic planning can be interpreted as an ordering element of the spatial effects of the incipient long-term ecological transition, capable of enhancing the synergies that reside in the cooperation rather than in the competition between the various entities, inserting itself in the dynamics of connection between municipal and regional authorities.

In this sense, it physiologically refers to the concept of the "vast area" as a territorial sphere of reference in which close collaboration between the various local identities can be established.

Moreover, the horizon of strategic planning is not exhausted in the realisation of a work, or an activity, but proposes a representation of territorial development to be realised by successive phases and progressive objectives, over a long period of time, having a structural rather than operational nature[75].

The planning of energy plants, as already pointed out, is well suited to this specific framework, since it must be considered as an integral part of a territorial economic development project, based on the ability to enhance the local interests of the area, thus bringing any conflicts back into the decision-making process, with a view to better administration of results.

Indeed, the fight against climate emergencies increasingly orients administrative action in an ecological sense, determining the need to efficiently manage (i.e. with a view to results) the balancing of the different interests that the affirmation of certain principles, such as that of the maximum diffusion of alternative energies, entails.

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75 See D. Donati, *Città strategiche. L'amministrazione dell'area metropolitana*, cit., 134.

In this sense, the strategic planning model appears to take on the function of a reference paradigm, as an adaptive and dynamic tool, based on the continued close connection between planning and decision-making, but also of constant correction in relation to a specific set of sensitive interests in mutual tension, allowing a systemic balance point to be identified.

At the same time, it must be emphasised that planning of this kind, being linked to a broad time projection, poses certain difficulties with regard to measuring the outcomes of the administrative action.

Indeed, and this is perhaps the aspect that most needs to be problematised, it is increasingly essential in a scenario of complex decisions, involving also the so-called "future generations", to prefigure an administration that is able to measure its action over time against its development objectives, becoming the monitoring of results, also in line with the new course initiated (with difficulty) by the NRRP, a crucial factor to assess the good performance of government.