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The evaluation of “culturality” of assets:  
verification and declaration

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# The evaluation of “culturality” of assets: verification and declaration

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### **ABSTRACT**

This contribution starts from an overview of the complex regulatory framework on cultural heritage, with the aim of investigating the innovative impact of the new discipline, drafted with the goal to overcome the idea that, according to the category of the asset, its culturality is assumed by law. Today, in fact, there has been a tendency to evaluate the “item” without presumption, in an attempt to find a balance between the public need to guarantee the conservation, enhancement and use of the asset and the interest not to prevent nor complicate its circulation. Following these needs, in 2004 the legislator decided to put an end to the system of “lists” with the Code of cultural heritage, introducing a general obligation for the Ministry of cultural heritage to verify the cultural asset and, therefore, to declare the interest. The Code at Art. 10 proposes a list of assets that can be defined as “cultural”, of which the doctrine has proposed different classifications, among which is the one based on the relationship between asset and the process of verification or declaration regardless of their ownership. In order to identify the assets subject to verification, in addition to the subjective criterion – based on the ownership of the asset to the State, Regions, other local public bodies as well as any other public body and institute and non-profit legal entities – other indispensable requisites are the following: a) the asset must be a work of an artist who is no longer living b) the creation must date back over fifty years if movable and over seventy years if immovable.

### **KEY WORDS**

Cultural Assets – Conservation – Enhancement – Use – Circulation – Code of Cultural Heritage – Declaration of Cultural Interest

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## Table of contents:

1. Premise
2. The regulatory framework: from law n.1089/1939 to the Code of cultural heritage
3. Object of Protection: cultural heritage
4. The verifying procedure of the existence of artistic, historical, archaeological or ethno-anthropological interest
5. (Follows): Subjective profile
6. (Follows): Objective profile
7. (Follows): The procedure
8. The declaration of cultural interest
9. Proceedings: competence; the investigation; the notification of the declaration and the transcription
10. The administrative appeal opposed to the declaration

### 1. Premise

The current legislation concerning the assessment of the cultural nature assets is included in the Code of Cultural Heritage and Landscape, introduced by Legislative Decree dated 22nd January 2004, no. 42. For the purposes of analysing the current regulations, it is advisable to offer an overview of the complex regulatory framework characterized by a rather articulate and inhomogeneous process that goes back over time. Such a reconstruction seems necessary for the purposes of a more complete analysis of the innovative impact of the new discipline, aimed at overcoming legacies of the past which, according to the category of the asset, assumed its cultural nature *ope legis*.

The innovation lies precisely in the tendency to evaluate the “item” without presumption, in an attempt, *«on the one hand, to find the balance between the public interest in guaranteeing the conservation, enhancement and use of the cultural heritage, and the need, on the other, not to hinder the circulation of assets that are without interest or to allow it, even for assets that are of such interest, when the needs of protection are guaranteed and the disposal can, on the contrary, ensure their best value without prejudice to the public enjoyment»*<sup>1</sup>.

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<sup>1</sup> See the Resolution no. 16/2006/G of the Court of Auditors of October 24, 2006, in [http://www.corteconti.it/export/sites/portalecdc/\\_documenti/controllo/sez\\_centrale\\_controllo\\_amm\\_stato/2006/Delibera\\_n.\\_16\\_2006\\_G.pdf](http://www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_centrale_controllo_amm_stato/2006/Delibera_n._16_2006_G.pdf).

## 2. The regulatory framework: the Code of cultural heritage

For years, L. n. 1089/1939 has been the benchmark for the discipline of objects of artistic or historical interest.

Such law at art. 1 and 2, identified the “items” subject to protection.

The regulatory framework was characterized by an *ope legis* subordination mechanism to the protection regime.

With the entry into force of the Civil Code of 1942, the state property was specifically identified and, moreover, the inalienability of an absolute and no longer relative nature was arranged.

The relative character of inalienability emerges again in 1997, following the entry into force of l. n. 662/1996, although limited to real estate used by the military administration. Indeed, for the organizational and financial needs related to the restructuring of the Armed Forces, by decree of the President of the Council of Ministers, on proposal of the Minister of Defence, after hearing the Ministers of Treasury and Finance, properties are identified to be included in a specific program of disuse to be carried out according to the indicated procedures. In particular, it happens that, for the purpose of exchange and disposal of properties to fall into disuse, according to special programs, the Ministry of Defence communicates the list of such properties to the Ministry for Cultural and Environmental Heritage that decides no later than ninety days from the receipt of the communication regarding the possible existence of the historical-artistic interest, identifying, if so, the individual parts subject to the protection of the buildings themselves.

Specifically mentioned is the discipline included in l. n. 1089/1939 for assets recognized for this interest, to which the provisions of art. 24 and ff. of that law, and, therefore, acknowledging the possibility of authorization for sale by the Minister for cultural heritage.

These provisions were re-proposed with adjustments in the 1999 budget and subsequently in 2001.

The need to produce incomes from state property generates a strange legislative mechanism now tending to expand, now to limit, the transferability of “cultural heritage”.

A point of arrival in the normative chaos is the legislative decree of 29 October 1999, n. 490, approving the T.U. on cultural and environmental heritage, according to which (referring to art. 822 of the Civil Code) the inalienability of the assets belonging to state property, the Regions, the Provinces and the Municipalities is established.

A relative inalienability regime is also considered, subject to the authorization of the Ministry of Cultural Heritage and conditioned by the lack of interest in public collections and by the absence of damage to their conservation directly dependent on the alienation, in guarantee of non-impairment of the public enjoyment: a) of cultural assets belonging to the State, regions, provinces, municipalities that are not part of the historical and artistic state property; b) of cultural heritage, and, specifically, immovable and movable items that exhibit artistic, historical, archaeological, or demo-ethno-anthropological interest and

immovable things which, due to their reference to political, military, literature, and art history and of culture in general, have a particularly important interest, belonging to public bodies; c) of collections or series of objects that, by tradition, fame and particular environmental characteristics, have as a whole an exceptional artistic or historic interest and for which ministerial declaration of “items” of particularly important interest has intervened.

In reality, according to the provisions of the Enabling Act of 8 October 1997 n. 352, the Consolidation Act of 1999 has completely revised the discipline of cultural heritage, repealing the rules that existed until then, without, however, innovating the subject. In short, the existing legislation is brought together, introducing, when necessary, modifications to the rules for a more precise coordination and a simplification of the procedures.

Thus, a protection mechanism – already present with l. n. 1089/39 – is proposed, based on a rather vague discipline that required regions, provinces, municipalities, other public bodies and private non-profit legal entities to become an active part in identifying assets of presumable cultural interest through the preparation of appropriate descriptive lists to be submitted to the Ministry <sup>2</sup>.

One of the problems yet unresolved by the T.U. is the enhancement to be given to said lists. In the absence of indications on the matter, the jurisprudence constantly believed that the lists had a declaratory character for the purpose of reporting to the Ministry about the “probabilities” of the existence of a cultural interest. This orientation has also and above all been affirmed on the basis of a constant non-compliance by public administrations and by the subjects similar to them in the preparation and transmission of said lists.

After all, neither the non-compliant administrations have ever been sanctioned, nor has the Ministry ever made use of its power-duty to provide for a substitute, as foreseen by the existing rules. The prevailing jurisprudence<sup>3</sup> considered that the mere inclusion in the list did not guarantee the requirement of “culturality”, just as the lack of insertion did not preclude the application of the particular protection legislation. Therefore, the consequence of inclusion in the list was simply the provisional subjection to cultural protection, always having to, instead, follow an express provision of the administration concerning the recognition of the cultural interest of the assets.

With the enactment of the d.P.R. n. 283/2000, the regulation governing the sale of property belonging to the historical-artistic heritage, the obligation to compile the lists is extended to the state administrations involved in processes of disposal and enhancement of assets.

<sup>2</sup> G. Casu, *Testo Unico in materia di Beni Culturali e Ambientali*, Studio n. 2749, edited by the National Council of Notaries, approved by the Civil Studies Commission on March 1, 2000, which can be consulted online at [www.notariato.it](http://www.notariato.it).

<sup>3</sup> Cons. Stato, sex. VI, 9 February 2000, n. 678, in *Mass. C.d.S.*, 2000, I, 263; Cons. Stato, 27 February 1998, n. 1479, in *Mass. C.d.S.*, 1998, I, 1775. On the contrary, minority jurisprudence believed that the measure of recognition of cultural interest could also be implied on the basis of the intrinsic qualities and characteristics of the asset as well as the administrative acts and behaviour in the management of the asset. See Cass., 24 April 2003, n. 6522, in *Foro Amm. C.d.S.*, 2003, 1256. In doctrine, C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

Furthermore, within the range of the listed goods, the Ministry has the obligation to identify those having historical or artistic interest, as well as those requiring authorization for instruction (alienation, provision in concession or agreement).

A general prohibition on the disposal of assets that are not present in the list is established by the administrations (and similar bodies). This prohibition seems to have almost a punitive function for the continuing inactivity of the administrations or in any case can be understood as a stimulus to comply with the law.

There have been subsequent regulations aimed at controlling the enhancement, management and alienation of the State property assets also through the establishment of LTDs.

In particular, in 2002 the “Patrimonio dello Stato S.p.A.” was established and the legislator, with legislative decree April 15th 2002 n. 63, converted by l. n. 112/2002, considered the possibility to transfer to “Patrimonio dello Stato S.p.A.” full or partial rights on property belonging to the available and unavailable assets and to the state property with the task of enhancement, management and, possibly, alienation, prior, clearly, authorization from the Ministry of Cultural Heritage, also based on the provisions of Regulation no. 283/2000. “Patrimonio dello Stato S.p.A.” also has the possibility to transfer, for consideration, its assets to “Infrastrutture S.p.A.”. The latter was founded in 2002 following the l. n. 112/2002 with the task of financing, in partnership with banks and other intermediaries, infrastructures and large public works. Its activity consisted in collecting financial resources in order to use them for the financing of these activities related to infrastructures and large public works.

The implementation procedures consisted in the issue of stock and bonds as well as carrying out securitization transactions guaranteed by the public real estate assets (historic, artistic, state property, cultural and archaeological) owned by the “Patrimonio dello Stato S.p.A.”.

In 2004, however, the Code of cultural heritage entered into force and the legislator decided to put an end to the system of “lists” through it. Thus, in art. 184, repealing the Regulation n. 283/2000 and with art. 12 what generally happened in practice becomes a norm: the introduction of a general obligation of verification of cultural interest by the Ministry of cultural heritage and, therefore, a declaration of cultural interest.

### 3. Object of Protection: cultural heritage

The Code of cultural heritage is designed and drafted on the assumption, which is not new, that cultural interest cannot constitute an absolute presumption, but must be rather verified.

Art. 10 provides a list of assets that can be defined as cultural, regarding which the doctrine proposed different classifications.

One of these is based on the relationship between asset and the process of verification or declaration regardless of the relative ownership.

In particular, art. 10 paragraph 1 states that *«cultural assets are immovable and movable property of the State, regions, other local public bodies, as well as any other public institute and body and of private non-profit juridical persons, including civilly recognized eccle-*

*siastical bodies, which have artistic, historical, archaeological or ethno-anthropological interest.*».

According to art. 12, it is necessary that such assets are the work of an artist who is no longer living, the accomplishment of which dating back over fifty years, if movable, or over seventy years, if immovable. Said assets maintain such qualification until subjected to a special verification of the existence of cultural interest.

This category does not include specific typologies of goods identified in paragraph 2 of art. 10 of the Code.

This elencation identifies the universality of assets that *ope legis* are subject to protection as they are part of collections that can be representative of a specific case.

We talk about: a) collections of museums, art galleries and other exhibition areas of the State, regions, other local public bodies, as well as of any other public institution; b) archives and individual documents of the State, regions, of the other territorial public bodies as well as of any other public body and institution; c) book collections of the libraries of the State, regions, of the other local public bodies, as well as of any other public body and institute, with the exception of the collections which fulfil the functions of libraries.

Pursuant to art. 13, paragraph 2, such assets remain subject to protection even if the entities to which they belong mutate their legal nature in any way (so-called objective or inherent culture).

This provision responds to the twofold need to prevent the goods from being taken away from the special protection regime, as well as ensuring continuity of use by the community. In the third paragraph, art. 10 lists categories of goods for which, for the purposes of submitting to the particular protection regime, a prior declaration of existence of cultural or historical-artistic interest is required (so-called subjective or declared cultural status).

In order to have a declaration of “interest”, the interest must be considered “particularly important” or “exceptional”. In particular, exceptionality is required for book collections belonging to individuals, as well as collections or series of objects not falling within the universality of goods indicated in paragraph 2 of art. 10 and that, by tradition, fame and particular environmental characteristics, or for artistic, historical, archaeological, numismatic or ethno-anthropological relevance, are of exceptional interest.

The particular importance of the interest is also required (a) for movable and immovable assets of artistic, historical, archaeological or ethno-anthropological interest, not in public hands or those of non-profit juridical persons, (b) for archives and individual documents of historical interest, (d) for immovable and movable assets which have a link with political and military history, literature, art, science and technology, industry and culture in general or that are testimonies of the identity and history of public, collective or religious institutions.

The reference to numismatic collections is expressed since 2006, the year of entry into force of Legislative Decree no. 156/2006. The clarification had been solicited for several reasons in order not to confuse ancient coins with other protectable assets<sup>4</sup>.

In particular, anyone is given the possibility to possess private collections of coins, not all of which are subject to the particular protection for cultural heritage. Indeed, the protection of the collection or series of numismatic items follows the declaration provided for in art. 13 in the presence of an exceptional interest.

As for the coins, regardless of their inclusion in collections, it is necessary that they present an interest. The intensity of such interest changes according to whether the coins are in public or private hands. In the first case, an artistic, historical, archaeological or simple ethno-anthropological interest would seem sufficient, while in the second case it seems necessary for the interest to be of particular importance, in addition to being subordinated to the declaration of cultural interest.

The numismatic interest must be sought in the rarity and in the worth to be evaluated taking into account the age, the techniques and the materials of production as well as the context of reference. Such characteristics of rarity and merit are identified as alternatives unlike what is provided for other categories of goods, such as geographical maps, musical scores, manuscripts, photographs, for which the coexistence of both is required<sup>5</sup>. Such normative choice is not a misprint, an inattention or an oversight of the legislator, as a different prediction would have ended with the denial of cultural value to numismatic objects that, even if not rare, hold historical worth, especially when one comes across the so-called “hidden treasures”<sup>6</sup>.

In listing the cultural heritage, the legislator also mentioned villas, parks and gardens as well as public squares, roads, streets and other urban open spaces<sup>7</sup> that however present an artistic or historical interest. For mining sites and rural architectures, however, the existence of a historical and ethno-anthropological interest is necessary, to which we must add the artistic one when the object of protection are ships and floats.

Specifically concerning mining sites, it is observed that the mining activity was a protagonist in the economic and cultural evolution of our country, whose subsoil, since ancient times, was considered one of the richest in Europe, not in terms of quantity but for the variety of minerals useful to men.

<sup>4</sup> D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, Napoli, 2009, 86.

<sup>5</sup> T. Montorsi, *Le cose di interesse numismatico*, in *Aedon, rivista di arti e diritto on line*, n. 2/2006, *passim*.

<sup>6</sup> D. Antonucci, *op. cit.*, 86-87.

<sup>7</sup> Art. 10, par. 3, establishes the status of cultural assets for «immovables and movables, belonging to anyone, which are of particular interest because of their reference to the political, military, literary, artistic, scientific, technological, industrial history and culture in general, or as evidence of the identity and history of public, collective or religious institutions»; among such “items”, the subsequent par. 4, encompasses, at lett. g): «public squares, streets, roads and other urban open spaces of historical or artistic interest»; but this happens not *ipso jure*, for intrinsic qualities of the asset, but only when the declaration of cultural interest provided for by art. 13. intervenes. On this point, T.a.r. Friuli Venezia Giulia, Trieste, 19 December 2011, n. 547, in *www.amministrativisti.fvg.it*.

The expansionist boom of mining sites took place around the fifties, decreasing later on because of the drop of materials to be extracted, a result of intense exploitation, and for their obsolescence in light of industrial development.

The sites, therefore, even if fallen into disuse, represent the example of the old economy and have provided a starting point for the development of conservation and enhancement policies. In many cases, these mining sites have become eco-museums able to represent aspects of a historical period<sup>8</sup>, capable of favouring the economic development, with a cultural and tourist tone, of our country.

Rural buildings have value and must be protected as evidence of the traditional rural economy.

It happens, therefore, that often, while highlighting the deterioration of the structural elements of the building, the plasters, the fixtures, the floor, the architecture present valuable elements, for example with regard to the terrace, the battlements above the cornice, the entrance gates, perhaps finely built in blocks of stone in Piperno, such as to consider the building, for the particular architectural and constitutive type of materials, an example which is still original and not tampered with traditional agricultural structures, and therefore of considerable cultural interest pursuant Legislative Decree 42/2004<sup>9</sup>.

With regard to the age set for real estate to be considered of cultural interest, it is noted that it has been raised from fifty to seventy years by virtue of a recent change.

From the first attempts to discipline and protect cultural heritage, or from l. n. 364/1909 (so-called Rosadi law) to l. n. 1089/1939 (the so-called Bottai law), to the legislative decree n. 490/1999 (T.U. of cultural heritage), to the Code of cultural heritage, the limit of fifty years was considered appropriate for a binding and effective protection of what could have a cultural interest.

With the intervention of the Legislative Decree May 13, 2011, n. 70 (converted into July 12, 2011, No. 106), as of May 14, 2011 (the day following publication in the Official Gazette), paragraph 1 of art. 12 was modified and therefore to date are subject to protection c.d. de jure (i.e. operating *ope legis* until the intervention of the specific provision of assessment of the interest in the protection itself) the assets *«whose execution dates back over fifty years, if movable, or over seventy, if immovable»*<sup>10</sup>.

<sup>8</sup> L. Ficorilli, A. Patanè, *La valorizzazione dei siti minerari dismessi a fini culturali e turistici*, in [www.isprambiente.gov.it](http://www.isprambiente.gov.it).

<sup>9</sup> T.a.r. Campania, Napoli, sez. VII, 13 May 2013, n. 2471, in <http://lexambiente.it/>.

<sup>10</sup> T.a.r. Toscana, Firenze, sez. III, 15 May 2013, n. 805, in <http://www.studiolegalepn.it/>. Likewise, related articles have been modified for the purpose of a more precise regulatory coordination, such as art. 10, paragraph 5, which also specifies the mutual negative, establishing that the works *«are not subject to discipline»* restrictions *«whose execution does not go back over fifty years, if movable, or over seventy years, if immovable»*<sup>10</sup>, as well as art. 54, par 2 a) which establishes a general prohibition to alienate *«goods belonging to subjects indicated in art. 10, par 1, which are the work of an artist no longer living and whose execution dates back to over fifty years, if movable, or over seventy years, if immovable, until the conclusion of the verification procedure provided for in Article 12»*. Therefore, only if the procedure ends with a negative result, the assets are freely transferable.

The elevation of the time limit is justified by the legislator on the basis of the need to maximize state-owned federalism, as well as with the interest in simplifying the administrative procedures related to building interventions in those municipalities that adapt urban planning tools<sup>11</sup> to the requirements of regional landscape plans<sup>12</sup>.

#### 4. The procedure to verify the existence of an artistic, historical, archaeological or ethno-anthropological interest

The discipline of the process of verification of cultural interest was anticipated by the Legislative Decree n. 269/2003 (Article 27, par. 9), adopted on 30 September, or the day following the date of approval of the scheme of the Code of cultural assets approved by the Council of Ministers, converted with amendments in 1. November 24 2003 n. 326, which was followed by the Management Decree 6 February 2004, first provision for the implementation of the verification procedure.

With said Management Decree<sup>13</sup> it is noted that the State, Regions, Provinces, Metropolitan Cities, Municipalities and any other institution and public institute must identify the properties and describe the consistency, making use of a specific information model available on the Ministry's website.

Such forwarding is, however, subject to the signing of agreements by the Regional Superintendents<sup>14</sup> with the parties involved in the legislation, subject to ministerial approval, with which the transmission times and number of lists are defined.

It is established that, during the first application (and in any case within thirty days of the publication of the Decree in the Official Gazette) the competent branches of the State Property Office transmit to the regional Superintendence of the Ministry for Cultural Heritage and Activities a first list of land, property of the State, together with the related descriptive sheets containing the data related to the individual properties.

The procedure, as described in Legislative Decree n. 269/2003, is known as particularly articulated according to a structured process on the tacit consent mechanism.

In fact, the regional Superintendence, on the basis of the preliminary investigation carried out by the competent Superintendence and of the opinion expressed by them in the peremptory term<sup>15</sup> of thirty days from the request, concludes the verification procedure

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<sup>11</sup> With such notion we mean all the acts which have the purpose of protecting the territory and regulating its use and transformations.

<sup>12</sup> See comment by A. Ferretti, *Il decreto sviluppo e la tutela dei beni culturali*, in *www.leggioggi.it*.

<sup>13</sup> Act issued by a manager, an official of the Italian public administration.

<sup>14</sup> Peripheral organs of the Ministry of Cultural Heritage and Activities and Tourism (MiBACT) of the Italian Republic.

<sup>15</sup> This is the term that requires the fulfillment of an act within a given time, under penalty of loss.

regarding the existence of the cultural interest of the property with a motivated provision and it shall inform the requesting agency, within 60 days of receipt of the relevant descriptive card. The descriptive data sheets, integrated with the aforementioned provision, merge into an IT archive accessible to both administrations, for the purposes of monitoring the real estate assets and planning the interventions according to their respective institutional competences. The failure to communicate within the total term of one hundred and twenty days from receipt of the form is equivalent to the negative outcome of the verification.

Currently, the verification procedure is essentially the same as that considered in the previous system, even with corrections including the elimination of the tacit consent mechanism in contrast with art. 20, paragraph 4, of l. 241/1990, as amended by l. n. 80/2005 of conversion of the Legislative Decree n. 35/2005.

In fact, the legislator, specifying that in – the proceedings at the request of the party for the issuance of administrative measures – the silence of the competent administration is equivalent to granting the application, expressly excluded that such mechanism can be applied to proceedings concerning cultural and landscape heritage.

In order to protect the assets of probable cultural interest, their preventive and precautionary subjection to the particular protection regime is arranged up to the actual verification that can obviously end in a positive or negative sense.

However, there are different opinions according to which the setting of the Code of cultural heritage, in relation to the belonging of the asset, creates a “legal presumption of cultural interest”, excluding that art. 12, paragraph 1, has a purely precautionary purpose pending the verification of cultural interest<sup>16</sup>. But let us check and analyse the various aspects.

## 5. (Follows): Subjective profile

Considering the subjective aspect, the assets must belong to the State, to local public bodies, to other public bodies, as well as to non-profit private legal entities.

A first important novelty lies in the express mention of the State amongst the recipients of the norm. Such indication was designed and intended on the assumption that not all the assets of the State’s heritage are in the hands of the Ministry, as they may be in the availability of other administrations<sup>17</sup>.

The historical exclusion of the State from the particular regime for the protection of cultural heritage was based on the assumption that the Ministry could not exercise formal

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<sup>16</sup> On this matter see N. Aicardi, *L'individuazione dei beni di appartenenza pubblica e di enti privati non lucrativi*, in *I beni pubblici. Tutela, valorizzazione e gestione*, edited by Pollice, Milano, 2008, 314 ff.

<sup>17</sup> N. Aicardi, *L'individuazione dei beni di appartenenza pubblica e di enti privati non lucrativi*, cit., 314 ff.

administrative powers in respect of assets belonging to a subject whose Ministry is an organ<sup>18</sup>.

Such approach should not be accepted without criticism<sup>19</sup> since within the State the individual Ministries are figures endowed with considerable autonomy. Moreover, the recipient of the rules is not only the owner but also the individual holder.

Particular attention should be given to ecclesiastical bodies<sup>20</sup> falling within the broader category of non-profit private legal persons, and therefore, recipients of the Code of Cultural Heritage.

Immediately after the entry into force of the Code it was easy to feel the catastrophic effect the application of the general regime of protection to the immense patrimony of the Church could have, characterized by the presence of numerous assets without cultural interest.

The Church was completely denied the legitimate expectation of being able to dispose of its patrimony. This was opposed to a general interest of the State not to see the cultural heritage of the country depleted<sup>21</sup>.

This interaction is based on the Agreement of modification to the Lateran Concordat<sup>22</sup> (art. 12) of 18 February 1985, by virtue of which, in order to harmonize the application of Italian law with religious needs, it is expressly provided that the State and Church agree on the appropriate provisions for the protection, enhancement and enjoyment of cultural heritage of religious interest belonging to ecclesiastical authorities and institutions<sup>23</sup>.

Two agreements followed, one signed on September 13, 1996, specifically concerning the protection of cultural heritage of religious interest belonging to ecclesiastical authorities and institutions; the other, signed on April 18, 2000, on the conservation and consultation of archives of historical interest and libraries belonging to ecclesiastical authorities and institutions.

With the entry into force of the Cultural Heritage Code, the need was felt to adapt the 1996 agreements. Thus, the Agreement was signed on 26 January 2005, between the Ministry

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<sup>18</sup> T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali*, Milano, 2001, 373.

<sup>19</sup> N. Aicardi, *op. cit.*, 314 ff. Interventions of different normative value have followed one another in order to clarify the impact of the new discipline on ecclesiastical authorities in the context of an open dialogue with the Church.

<sup>20</sup> Organisms, having purposes of religion and in particular of worship, which arose within the structure of the Catholic Church and of creeds other than the Catholic one, which can, currently and through recognition, play an important role also in the state system.

<sup>21</sup> M. Rivella, *Procedura per la verifica dell'interesse culturale dei beni immobili di proprietà di enti ecclesiastici*, in *www.olir.it and in ex lege*, IV/2004.

<sup>22</sup> With the 1984 agreement, the relations between the State and the Catholic Church were adjusted, adapting them to the principles established by the Constitution that had taken over by introducing substantially new elements to be taken into account.

<sup>23</sup> A. Ferretti, *Manuale di diritto dei beni culturali e del paesaggio*, Napoli, 2013, 52 ff.

for Cultural Assets and Activities and the President of the Episcopal Conference of Italy (CEI)<sup>24</sup>.

It is established that (art. 2, paragraph 3) *«the inventorying and cataloguing of movable and immovable cultural assets belonging to ecclesiastical authorities and institutions constitute the cognitive basis for any subsequent intervention. To this end, the CEI collaborates in the cataloguing activity of such assets managed by the Ministry; in turn, the Ministry assures, where possible, the support to the inventoried activity promoted by the CEI and the parties guarantee the mutual access to the relative databases. For the implementation of forms of collaboration (...) the Ministry and the CEI can stipulate specific agreements»*.

On 8 March 2005 the Department for Cultural Heritage and Landscape of the Ministry and the National Office for Ecclesiastical Cultural Heritage of the CEI sign the Agreement (Framework Agreement) to which the Regional Directorates must comply in preparing the local agreements with the ecclesiastical bodies.

Said agreement responds to a need expressed by the Ministry for reasons of uniformity and operational simplification to stipulate a single agreement applicable to all the ecclesiastical bodies acting on the Italian territory, and to identify a single channel for the introduction of the requests<sup>25</sup>.

It is agreed that *«the Regional Directors of the Ministry for Cultural Heritage and Activities (...) sign with the Presidents of the Regional Episcopal Conferences – after their agreement with the diocesan Bishops of the Ecclesiastical Region, the Major Superiors of Institutes of Consecrated Life and men's and women's Institutes of Apostolic Life of Pontifical right of their own ecclesiastical Region or of their articulations located in the territory of the Region – agreements concerning the quantity, priority criteria and periodicity of sending requests for the verification of the cultural interest of the real estate of ecclesiastical institutions located in the territory of its competence»*.

With regard to the procedures for completing the request for verification of cultural interest by means of appropriate software especially prepared by the Italian Episcopal Conference, reference is made to the layout set out in Attachment A of the ministerial decree of 25 January 2005 which defines the modalities of the verification of cultural interest for properties owned by non-profit private legal entities.

It is specified that only with regard to the process of verification of the cultural interest of the buildings of worship, the photographic documentation is limited to two.

Instead, the framework agreement of 8 March 2005 outlines the method for transmitting requests, which must take place through a single channel.

In short, the diocesan curia, having printed the descriptions of the goods through the software of the CEI, sends the documentation in paper and electronic format, together

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<sup>24</sup> Permanent Assembly of the Italian Bishops.

<sup>25</sup> Mauro Rivella, *Procedura per la verifica dell'interesse culturale dei beni immobili di proprietà di enti ecclesiastici*, cit.

with the request for verification, to the representative for cultural heritage of the Regional Episcopal Conference. It will then be the regional appointee, within the first week of the month, to send to the Ministry – “Department for cultural and landscape assets”, the documentation in electronic format; as well as, at the same time, to send the paper documentation to the Regional Directorates and, simultaneously, for reference, to the competent Superintendence with methods that provide for the proof of delivery.

The Ministry provides each diocesan Curia<sup>26</sup> with a password for read-only access to the information system, in order to know the progress of the procedures for verifying the cultural interest of the pertaining assets and grants the Regional Episcopal Conferences the password to enter the information system for verification requests sent by the diocesan Curia of the respective territory.

In addition, the Ministry grants the CEI – “National Office for religious cultural heritage”, a password for read-only access to the information system in order to know the progress of the procedure for verifying the cultural interest of all Italian ecclesiastical bodies, and guarantees the Italian Conference of Major Superiors and the Union of Major Superiors of Italy read-only access to the information system through appropriate passwords concerning the ecclesiastical authorities of their responsibility.

The framework agreement also requires its application for one year only, from the date of signing, as well as the commitment of the parties to issue explanatory newsletters<sup>27</sup> for what is within its competence.

So, with Circular of March 14, 2005, on the assumption that it would be unthinkable to present complete lists of ecclesiastical estate assets, as well as very difficult for the Ministry to meet within the required time all requests for verification, the CEI specifies that the amount of requests should balance the operational capacity of the peripheral ministerial bodies with the consistency of the ecclesiastical property and the legitimate need of the authorities to be able to dispose of it. Priority, therefore, had to be given to those properties in respect of which deeds and interventions that could no longer be postponed were necessary.

The Ministry, however, with the circular of March 15, 2005 reiterates the inability to process verification requests not coming from official channels. At the same time, even if it does not exclude that this channel could be used by subjects who are not linked to the parameters dictated by the l. May 20, 1985 n. 222, such as private worship associations<sup>28</sup>

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<sup>26</sup> Also called Bishop’s Curia, in the Catholic Church, it is the assembly of all the organisms and persons who collaborate and help the Bishop in the pastoral guidance of the whole diocese. The curia is established and described by the Code of Canon Law in the canons 469-494.

<sup>27</sup> Written communication that in an organization, such as an enterprise or a public administration, is sent to a plurality of recipients to give orders, make arrangements or transmit information.

<sup>28</sup> Body characterized by the organization of different people in order to pursue a common non-profit purpose.

civily approved according to the civil code, regional foundations<sup>29</sup>, etc., it points out that said requests will be calculated in the number of procedures available to ecclesiastical bodies, thus reducing the number available to them<sup>30</sup>.

## 6. (Follows): Objective profile

For the purpose of identifying the goods subject to verification, after operating a skimming from the subjective point of view, based on the ownership of the asset of the State, the Regions, other local public bodies as well as any other public body and institution and non-profit-making legal entities, other indispensable requisites to take into consideration are the following: a) the asset must be the work of an artist who is no longer living; b) the creation must date back over fifty years if movable and over seventy years if immovable. As stated above, only recently the time limit for real estate, namely in 2011, was increased from fifty to seventy years.

This provision, in the silence that accompanied its introduction, leads, on the one hand, to the dissatisfaction of the Superintendence which in this way saw a crack in their power of control both on the maintenance and restoration interventions to be carried out on the assets of municipalities, provinces, regions, dioceses, parishes, foundations, etc., and on their circulation; on the other hand it brings the favour of the operators in the sector who sees the bureaucratic burden relieved concerning artefacts that most often show an absolute lack of cultural interest<sup>31</sup>.

The assets are identified in the items indicated in art. 10, paragraph 1, to be read in conjunction with paragraph 4, which makes a list of goods to be considered included among those listed in paragraph 1. Therefore, we consider goods that have artistic, historical, archaeological or ethno-anthropological interest: a) assets that concern palaeontology, pre-history and primitive civilizations; b) goods of numismatic interest that, in relation to the period, to the techniques and materials of production, as well as the context of reference, have a character of rarity or merit; c) manuscripts, autographs, correspondences, incunabula, as well as books, prints and engravings, with relative moulds, having character of rarity and of value; d) geographical maps and musical scores of rare and valuable nature; e) photographs, with relative negatives, cinematographic films and audio-visual media in general, having a rare and valuable nature; f) villas, parks and gardens that have an artistic or historical interest; g) public squares, streets, roads and other urban open spaces of artistic or historical interest; h) mining sites of historical or ethno-anthropological interest; i)

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<sup>29</sup> Body constituted by a patrimony preordained to the pursuit of a determined purpose.

<sup>30</sup> M. Rivella, *op. ult. cit.*, 30.

<sup>31</sup> See A. Ferretti, *Il decreto sviluppo e la tutela dei beni culturali*, in *www.leggioggi.it*, cit.

ships and floats with artistic, historical or ethno-anthropological interest; l) rural architectures with historical or ethno-anthropological interest as evidence of the traditional rural economy (paragraph 4).

Law<sup>32</sup> underlines that «Art. 12 (...) does not autonomously and exhaustively identify the requirements for the submission of the good to be verified, but quoting art. 10, paragraph 1, assumes that an, artistic, historical etc. interest subsists. Obviously the definitive assessment of the existence of the interest can only be achieved in the event of a positive outcome of the verification required by Art. 12 and, however, it appears necessary, from the beginning, to have a further objective connotation than the merely chronological one of the asset's origin and of the death of its creator. This conclusion is made clear by the wording of the rule of art. 12, Legislative Decree n. 42 /2004 which refers to art. 10, paragraph 1 of Legislative Decree n. 42 of 2004 and responds to practical needs of effectiveness of protection related to the impossibility for the peripheral organs of the Ministry of cultural and environmental heritage to verify, concretely, the existence of the interest in relation to all the things realized».

## 7. (Follows): the procedure

Pursuant to Art. 12, the procedure can be initiated by the competent bodies of the Ministry, ex officio or by request of the subjects whom the goods belong to and accompanied by the relative cognitive data<sup>33</sup>. The verification of the existence of artistic, historical, archaeological or ethno-anthropological interest is made on the basis of the general guidelines established by the Ministry itself in order to ensure uniformity of assessment.

For immovable property of the State, the request must be accompanied by a list of assets and their related descriptive sheets.

The identification of the criteria for the preparation of the lists, the procedures for drafting the descriptive sheets and the transmission of lists and sheets is delegated to Ministerial decrees, adopted in agreement with the State Property Agency and, for real estate used by administration of defence, also with the agreement of the competent general direction of the works and of the State Property Administration.

It is the Ministry, however, who establishes with its own decrees the criteria and procedures for the preparation and presentation of verification requests and related documentation.

<sup>32</sup> See T.a.r. Liguria, Genova, sez. I, 26 maggio 2010, n. 3297, Foro amm. TAR, 2010, 5, 1638.

<sup>33</sup> See Council of State, section. VI, 18 September 2013, n. 4649, Foro Amm. C.d.S., 2013, 9, 2587, according to which: «With introduction of an asset belonging to a public body, art. 12, paragraph 2, of the legislative decree n. 42 of 2004 provides that the procedure for the verification of cultural interest can be initiated, not only on the initiative of the subjects whom the goods belong to, but also ex-officio».

With regards to the lists and descriptive files, the concerned administrations referred to the management decree of 6 February 2004 and to the ministerial decree of 25 January 2005. In reality, the verification process could already be easily identified by reading only art. 12. Probably the Ministerial Decree of 2005 showed a practical function to solve operational problems that the computerized system had in the early applications as well as a function to separate the proceedings started on impulse from the ones started *ex-officio*. In fact, the 120-day deadline for the conclusion of the procedure is fixed in the hypothesis of request coming from the interested subjects. In case of silence the possibility of order to provide for is considered<sup>34</sup>, to the Ministry and, in the event of continued inaction, after thirty days, the possibility of appealing to the TAR<sup>35</sup>, which decides in council chamber<sup>36</sup>.

The doctrine soon highlighted several critical issues regarding the content of the ministerial decree, believing that it was created already “old”<sup>37</sup>. In particular, considering the process of evaluating the “culturality” of the asset, it conditions the proposition of a judicial appeal to the prior injunction to the Ministry, excluded from the subsequent legislation.

Indeed, a few days after its adoption (on February 11th), law. n. 15/2005 came into force on the administrative procedure<sup>38</sup> with which the legislator, in the event of inaction by the administration<sup>39</sup>, gave the possibility to act directly in court<sup>40</sup> without the need to send a prior notice of default<sup>41</sup>.

Another problem arose from consideration of a deadline for completion of the procedure, of one hundred and twenty days, different and higher than that provided for by art. 27 of the Legislative Decree n. 269/2003, at the time mentioned in art. 12 of the Code.

Said article 27 was introduced before the entry into force of the Code in order to guarantee to the system an instrument able to bring to the declassification<sup>42</sup> of assets of the State that were not of cultural interest, thus allowing the availability<sup>43</sup> of the assets with consequent inflow of money into the state coffers<sup>44</sup>.

<sup>34</sup> Written declaration by which the public administration is complied with the obligation to provide at its own expenses.

<sup>35</sup> Judicial body established in each region, competent to deal with administrative disputes at first instance.

<sup>36</sup> Location in which the judge withdraws for the case decision or particular modality with which the dispute is determined.

<sup>37</sup> A. Ferretti, *op. cit.*, 52 ff.

<sup>38</sup> Sequence of administrative acts that lead to the issue of a final act, the provision, and that therefore contribute to the achievement of a public interest.

<sup>39</sup> Inactive administration behaviour in response to a citizen's request.

<sup>40</sup> Make use of the court to enforce a right.

<sup>41</sup> Written declaration by which a party is bound to fulfil its obligation, indicating the legal consequences of the delay.

<sup>42</sup> Termination of the state character of an asset, resulting from a specific provision of the public administration.

<sup>43</sup> Right to dispose, i.e. to use the asset in a legal sense.

<sup>44</sup> C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit.; A.L. Tarasco, *Beni, patrimonio e attività culturali: attori privati e autonomie territoriali*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

This law decree identified the length of the proceedings in sixty days.

It was immediately evident that, regardless of the problems of coordination with the legislation in force, a Ministerial decree could not modify what was established in a State Law. The impasse was overcome by the Legislative Decree. n. 156/2006, which modified the last paragraph of Art. 12, expunging the reference to art. 27 of the Legislative Decree 269/2003 and ruling the duration of the procedure to be one hundred and twenty days from the request by the interested party.

Receipt of the request must be understood not as the date of submission of the application by electronic means, but rather the receipt of the paper application accompanied by the required information sheets, since, according to the Ministerial Decree of 2004, the sending of information albeit accompanied by digital signature<sup>45</sup> does not constitute the start of the verification process and requests cannot be considered if accompanied by lists that do not come from the printing of the web system<sup>46</sup>.

As for the movable property, only with the issue of the decree of the General Director of 27 September 2006, published in the official gazette of 10 November 2006 n. 262, criteria and methods for verification were established.

As to the verifications initiated automatically, with M.d. February 28, 2005, which introduced art. 4-bis to the M.d. 6 February 2004, a similar period of 120 days is established for the conclusion of the proceedings from the date of receipt of the communication to initiate the verification procedure by the subject possessor of the asset.

The verification may have positive or negative outcome.

A negative assessment entails the exit from the protection system outlined by the Code of cultural heritage to which an ad hoc provision of de-standardization will necessarily follow so that the asset can be alienated. Nothing prevents, for other reasons of public interest, the good from remaining state property even if it is not considered of artistic, historical, archaeological or ethno-anthropological interest. This is the case, for example, of the assets attributable to the road, waterway, port state property.

If the verification process ends, however, with a positive assessment, this constitutes a «declaration» pursuant to art. 13 of the Code. In the case of things subject to property or movable advertising<sup>47</sup>, the relative provision must be transcribed<sup>48</sup>, upon request of the superintendent, in the relative registers in order to make it enforceable<sup>49</sup> against any subsequent owner, proprietor or holder for any reason whatsoever.

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<sup>45</sup> The computer equivalent of a traditional original signature on paper.

<sup>46</sup> D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 105 ff. Procedure of evaluation of the asset culturality.

<sup>47</sup> Set of resources prepared by the law to make certain facts and legal documents of real estate or property easily knowable, giving the interested parties the opportunity to gain knowledge of them, so as to ensure the certainty of legal relationships.

<sup>48</sup> Transcription is a type of real estate advertising.

<sup>49</sup> The enforceability is the suitability of a legal act to express its effectiveness toward third parties.

Article. 12, with reference to state-owned assets, establishes that the positive provision, together with the descriptive sheets, should be included in an IT archive, kept at the Ministry and accessible to the Ministry and the State Property Agency for the purposes of asset monitoring and planning of interventions according to their respective institutional competences.

## 8. The declaration of cultural interest

The procedure for the declaration of cultural interest is governed by Articles 13 and following of the Code and concerns the verification of the existence of cultural interest as identified in Art. 10, paragraph 3, and, therefore, differently graduated according to the various types of goods indicated therein.

The need for such an explicit declaration was introduced only with l. 11 June 1922 n. 778, which, however, has without prejudice to the further effects of the notification made in accordance with previous provisions.

As confirmed by the law, the previous regulation only required the notification of interest. In particular, pursuant to r.d. 30 January 1913 n. 363, art. 53, paragraph 1, the imposition of the unavailability constraint on building of historical-artistic value, in relation to private property or in any case held by private individuals “for mere title of possession”, did not require, in the previous legislation, the formal declaration of considerable public interest in the preservation of the assets themselves, resulting the mere “notification of the restriction in the manner provided for by the regulatory provision” necessary (by registered letter, with acknowledgement of receipt or by formal notice or notification according to the rules of the code of civil procedure)<sup>50</sup>.

The declaration procedure follows the procedural model already provided for by Legislative Decree no. 490/1999 (Testo Unico dei beni culturali).

In the 2004 Code, an innovative text and not merely a draft, the time of declaration and notification are clearly distinguished, therefore the provision containing the declaration constitutes the act with which the restriction is imposed, while the notification complies with the time of knowledge of the act<sup>51</sup>.

In fact, the Code identifies assets by distinguishing them according to type and ownership, making a distinction between assets belonging to private individuals and assets belonging to anyone, requiring, as appropriate, a different assessment of interest, which must be exceptional, or particularly important.

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<sup>50</sup> See State Council section VI, 10 July 2001, n. 3805, in *Foro amm.*, 2001, 2054.

<sup>51</sup> See C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit.

In particular, paragraphs 3 and 4 of art. 10 list, albeit in a non-exhaustive manner, the various categories of goods subject to a particular binding regime upon declaration of cultural interest.

Therefore, pursuant to Art. 10 paragraph 3, with the declaration provided for by art. 13, cultural assets are: a) the immovable and movable goods that have particular artistic, historical, archaeological or ethno-anthropological interest belonging to subjects other than the State, the Regions, the other territorial Public Bodies and any other public institution and authority; b) archives and single documents belonging to private individuals, which have a particularly important historical interest; c) book collections, belonging to individuals, of exceptional cultural interest; d) immovable and movable assets, belonging to anyone, which are of particular interest because of their reference to the political, military history, literature, art, science, technology, industry and culture in general, or as evidence of the identity and history of public, collective or religious institutions; e) the collections or series of objects, belonging to anyone, that are not included among those indicated in paragraph 2 (see *infra*) and that, by tradition, fame and particular environmental characteristics, or for artistic, historical, archaeological, numismatic and ethno-anthropological relevance, are of exceptional interest.

To these categories we must add those that are specifically indicated in paragraph 4 when not belonging to the subjects indicated in paragraph 1 of article 10, that is the State, Regions, other local public bodies as well as any other public body and institute, private non-profit legal entities, including civilly recognized ecclesiastical bodies. These categories include: a) goods that concern palaeontology, prehistory and primitive civilizations; b) objects of numismatic interest that, in relation to the period, to the techniques and materials of production, as well as the context of reference, have a character of rarity or merit; c) manuscripts, autographs, correspondence, incunabula, books, prints and engravings, with relative moulds, having a rare and valuable nature; d) geographical maps and musical scores of rare and valuable character; e) photographs, with relative negatives, cinematographic films and audio-visual media in general, having a rare and valuable character; f) villas, parks and gardens which have an artistic and historical interest; g) public squares, streets, roads and other urban open spaces of artistic or historical interest; h) mining sites of historical or ethno-anthropological interest; i) ships and floats with artistic, historical or ethno-anthropological interest; l) rural architecture with historical or ethno-anthropological interest as evidence of the traditional rural economy .

The adoption of the declaration of cultural interest implies the need for a preliminary investigation in order to ascertain the existence of all the elements required by the relevant regulations.

Since there is no provision considering special rules to ensure that it is appropriate and adequate, it is considered peaceful that it should be based on objective elements, in order to arrive to a judgement on the asset and its characteristics.

Case law has consistently specified that the declarative provision is an expression of the exercise of a discretionary power and, as such, the administration is required to assess the

secondary interests involved, including private interests, whose sacrifice must be measured in relation to the intensity of protection of the cultural object present<sup>52</sup>.

In fact, more recent decisions regarding the ethno-anthropological assets, specified that *«The imposition of the historical and artistic restriction does not require a weighting of the private interests with the public interests connected with the introduction of the protection regime, not even for the purpose of demonstrating that the sacrifice imposed on the private has been kept to the minimum possible, both because a declaration of particular interest is not an expropriation restriction, constituting the assets of ethno-anthropological importance a category that is originally of public interest, and because in any case the constitutional discipline of the historical and artistic heritage of the Nation (Article 9 of the Constitution) establishes its safeguarding as the primary value of the current regulation»*<sup>53</sup>.

It is clear that, when the administration expresses opinions on the quality and value of an asset to be protected, it carries out assessments that relate to the merit of the administrative action even though it falls within the scope of the exercise of technical discretion. The latter, as is known, occurs when the examination of facts or situations relevant to the exercise of public power requires the use of technical or scientific knowledge of a specialized nature through an analysis of the facts and not of the interests. Hence the main difference between pure administrative discretion<sup>54</sup>, which consists in examining the various interests at stake in the search for the most appropriate solution, and technical discretionality<sup>55</sup>, the result of complex evaluations expressed through the use of questionable and non-certain criteria.

In the peculiar sector of cultural heritage, the assessment aimed at verifying the existence of the relative interest can only be accomplished by the Administration through the application of technical-specialist rules ontologically characterized by a physiological and indispensable questioning. It follows that these assessments can be censored in court only when it is clear that they are technically unreliable<sup>56</sup>.

In any case, it is undisputed that the declaration of quality of cultural interest of an asset is based on the exercise of technical discretion, with the application of specialist technical-scientific knowledge, for which the judge's decision concerns the logic, consistency and completeness of the evaluation, considered also for the profile of the correctness of the technical criterion and of the chosen application procedure, with the limit of the relativ-

<sup>52</sup> See State Council section VI, 2 September 1998, n. 1179, in *Foro Amm.*, 2000, 1796.

<sup>53</sup> See State Council section VI, 3 July 2014, n. 3360, in <http://www.iusexplorer.it/> which recalls CGARS, 10 June 2011, n. 418.

<sup>54</sup> Possibility of choice, or rather that "weighting" activity of all the interests at stake recognized to the public administration.

<sup>55</sup> Possibility of choice, recognized to the public administration, based on the verification of the existence of certain prerequisites of a technical nature required by law.

<sup>56</sup> Cons. Giust. Amm. Sicily, 10 June 2011, n. 418, Sez. Giur., with note by G. Tropea, *Il vincolo etnoantropologico tra discrezionalità tecnica e principio di proporzionalità: «relazione pericolosa» o «attrazione fatale»*, in *Dir. Proc. Amm.*, 2/2012, 718.

ity of the scientific evaluations remaining fixed. The administrative judge<sup>57</sup> can, therefore, censor the only evaluation that goes beyond the range of questionability, so that his judgement, while not remaining extrinsic, does not become a substitute for that of the Administration with the introduction of an equally debatable assessment<sup>58</sup>. This results in particular with regard to the judgement in historical-artistic matters for the ethno-anthropological profile, which, while anchored to technical criteria, has considerable margins of debatability due to the nature of the disciplines applied<sup>59</sup>.

Obviously the imposition of the restriction must be adequately motivated.

In terms of the imposition of historical and artistic constraints, motivation relates to the indication and specification of the type of interest that justifies the provision, that is to say the artistic value of the asset, so that the administration’s activity is that concerning the evaluation of particular relevance of the good from an artistic point of view, going beyond the evaluation of other profiles of public interest<sup>60</sup>.

Nothing excludes that said motivation is expressed by reference herein concerning acts of the administration or even third parties<sup>61</sup>, provided they respond to the need to externalize the reasons and the argumentative path at the basis of the provision, so as to allow a full and adequate reconstruction of the concrete reasons for the assessment and the consequent choice made and the correlative sacrifice imposed on the recipient of the provision. It therefore clearly appears as a necessity that motivation is adequate as the administration, albeit briefly, is required to establish the actual exercise of the assessment carried out in a logical process complying with the legislative requirements<sup>62</sup>.

With specific regards to the declaration of “culturality” of a property it has been specified that in expressing its motivation, the Administration can limit itself to mention, also by way of example, only some of the characteristic elements from which the particular historical-artistic value of the asset can be deduced, understood as a whole. The fact that the motivation of the imposing decree of the restriction makes specific and prevalent reference to some external characteristics of the building is not in itself sufficient to consider that the restriction is only limited to the external parts and does not extend, to the internal parts, and to external parts other than those specifically considered. Indeed, it cannot be assumed that the objec-

<sup>57</sup> The knowledge of disputes regarding legal situations in the public administration.

<sup>58</sup> See State Council section VI, 6 May 2014, n. 2295 and State Council, 14 luglio 2011, n. 4283, both can be consulted at the address <http://www.iusexplorer.it/>.

<sup>59</sup> See State Council section VI, 22 April 2014, n. 2019, in *De Jure*.

<sup>60</sup> See State Council section VI, 21 October 2005, n. 5939, in *Foro Amm. C.d.S.*, 2005, 10, p. 3030, and in *Riv. Giur. Ed.*, 2006, 2, I, 428.

<sup>61</sup> On this point, even recently, the jurisprudence affirmed the following: *It is in fact peacefully necessary, when imposing a restriction on assets of historical and artistic interest, to give a detailed motivation, albeit for reference, that demonstrates the exposure and the complete evaluation of the elements that constitute the conditions for the imposition itself*; State Council section VI, 31 May 2013, n. 2992, in *De Jure*.

<sup>62</sup> See C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit.

tive scope of extension of the restriction should be derived exclusively from its motivation. Otherwise, we would face the paradox of having to describe analytically, in the provision of restriction, the particular merit of every single portion of the property, with the practical effect of having to exclude from the regime of cultural asset those parts of lesser prestige and to make the bond itself as a whole that is contradictory and of difficult management<sup>63</sup>. Often, the need of historical-artistic protection clashes with other requirements equally relevant for our system. In such cases, it is necessary to weigh up the sacrifice of the different interests at stake.

Object of discussion was, for instance, the protection of cultural heritage on automatic suspendibility of the legislation protecting cultural heritage whenever there is the need to eliminate architectural barriers.

It has been specified by law that *«it cannot be deduced from the text and the ratio of l. January 9 1989, n. 13 (“Provisions to facilitate the overcoming and elimination of architectural barriers in private buildings”) the validity of a principle of overcoming and absolute and automatic derogation of the restrictions placed for the purposes of historical-cultural or landscape-environmental protection. These restrictions remain and must be respected (even where there are requirements for the protection of individuals with physical disabilities) if the realization of works preordained to overcome architectural barriers brings the “serious prejudice” to the cultural interest that is substantiated in safeguarding the restricted property, with the only limit of the obligation of adequate and reasonable justification of the possible refusal of authorization by the Superintendent. The “serious prejudice” to the protected property is not intended as physical damage to the property, but as a risk of damage to the value protected by the restriction, having the possibility, moreover, to relate only individual elements of the property, components of the overall historical-artistic connotation that underlies the qualification of cultural heritage»*<sup>64</sup>.

## 9. Proceedings: competence; the investigation; the notification of the declaration and the transcription

The procedure for the declaration of cultural interest was outlined for the first time by art. 7 of the Legislative Decree n. 490/1999, considering that the start-up phase could be activated directly by the Ministry for cultural heritage and activities, or after proposal of the superintendent in charge by subject and by territory, also after request of the Region, the Province and the Municipality.

<sup>63</sup> State Council section VI, 2 July 2013, n. 3545, in *Foro Amm. C.d.S.*, 2013, 7-8, 2135.

<sup>64</sup> State Council section VI, 12 February 2014, n. 682, in *Riv. Giur. Ed.*, 2014, 2, I, 390.

It was also considered that the initiation of the procedure should be communicated to the owner, the proprietor or the holder of the property.

From the very beginning it was problematic to identify the subject responsible for the start up of the territorial articulation of the Ministry that worked together with the sector and regional superintendence.

Since with d.P.R. n. 441/2000 the adoption of measures was delegated to the regional Superintendence pursuant to Articles. 6 and 7 of the Legislative Decree n. 490/99, on proposal of the sectorial supervision in charge, the legislative office of the Ministry, on 10 June 2002, expressed its counsel identifying the regional superintendent as the competent body for the start-up communication<sup>65</sup> and the sector supervisors as the subjects in charge of the proposal formulation<sup>66</sup>

If the asset concerned real estate complexes, the above mentioned communication had to be sent also to the municipality where the property was located.

The communication had to have as its object the identifying elements of the asset and its assessment resulting from the act of initiative or proposal, the indication of the effects provided for in paragraph 4 as well as the indication of the term, in any case not less than thirty days, to submit any comments.

The communication also implied the application, as a precautionary measure, of the provisions of Section I of Chapter II and Section I of Chapter III of Title I of Legislative Decree no. 490/1999, with consequent subjection to public controls and conservation obligations as well as limits to alienation and other transmission methods.

Today the declaration procedure is governed by Art. 14 of the Code of cultural heritage with a formulation that largely follows that already provided for by art. 7 of Legislative Decree 490/1999, adding some modifications and clarifications.

The procedural initiative is entrusted to the superintendent, even on the motivated request of the region and any other interested territorial entity.

Furthermore, respected doctrine considers that the *ex officio* procedure can also be solicited by the request of any interested subject, such as the owner of the asset to declare, without however having any obligation to address the Superintendence. Therefore, the application is compared to a mere report<sup>67</sup>.

The clarification that the request of the territorial authorities must necessarily be motivated has led the doctrine to believe that, in the absence of said motivation, the request can also be disregarded by the superintendent<sup>68</sup>.

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<sup>65</sup> Obligation to inform the initiation of the procedure to those who can a priori identify themselves as possible subjects involved.

<sup>66</sup> A. Ferretti, *Manuale di diritto dei beni culturali e del paesaggio*, cit., 127.

<sup>67</sup> T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali*, cit., 283.

<sup>68</sup> A. Pontrelli, *Commentario al codice dei beni culturali e del paesaggio*, edited by Angiuli e Caputi Jambrenghi, Torino, 2005, 80.

In any case, in compliance with the dictates of the provisions on the administrative procedure, should the proceeding be activated on the motivated request of the territorial entities, it is to the latter that any notice of rejection must be communicated<sup>69</sup>.

Pursuant to paragraph 1 of the art. 14, the superintendent must always communicate the initiation of the proceeding to the asset owner, the proprietor or the holder for any reason whatsoever.

The rationale of the legislator's choice to impose such communication must be sought, according to the jurisprudence, in the fact that, despite the assessment is based on a judgement of technical discretion, the final measure affects the recipient with direct or otherwise prejudicial effects. Allowing interested parties to be involved in the procedure, also through the presentation of observations, would respond to the need to allow the administration to assess all the interests and elements at stake, as a collaborative function, also in order to avoid erroneous decisions<sup>70</sup>.

The third paragraph of Art. 14 of the Code of cultural heritage, in resuming the old provisions, with reference to "real estate complexes" requires that the communication to initiate the procedure should also be transmitted to the municipality and the metropolitan city. In this regard, even today we discuss the concept of "real estate complex". In any case, if we wish to change the relative definition from the jurisprudence affirmed in various areas of law, we can assume that the reference is to a building that as a whole constitutes a homogeneous unicum<sup>71</sup>, or to

<sup>69</sup> The act by which, in proceedings at the request of the party, the person in charge of the proceeding or the competent authority, before adopting the negative provision, promptly informs the interested party of the reasons preventing the instance acceptance.

<sup>70</sup> See State Council section VI, 8 March 2000, n. 1171, in *Foro Amm.*, 2000, 927.

<sup>71</sup> On the concept of a real estate complex in the sense of a homogeneous unicum, see Cass., 16 May 2013, n. 11965, in *Guida al diritto*, 2013, 25, 51: «On the subject of leases of urban buildings for use other than residential, in the case of sale, with a single deed or with several related deeds, to the same subject of a plurality of real estate units, including that object of the lease, the tenant, who invokes the right of first refusal and the related right of redemption referred to in Articles 38 and 39 of Law 392/1978, is responsible for proving that the parties have considered the various properties sold as separate units, without any unifying element, that have intended to conclude a cumulative sale by making it appear simulated as a block sale for the sole purpose of affecting expectations, being however irrelevant that the future, unitary destination of the building complex is only possible as a result of building interventions or renovations, provided these are physically executable and are not prohibited by urban planning instruments»; Cass., 15 January 2001, n. 502, in *Giust. civ. Mass.*, 2001, 86: «Without prejudice to the fact that in the case of sale of the entire building of which properties leased for use other than housing belong, the tenants of these do not have the right of pre-emption (and redemption) provided for by art. 38 and 39 of the law n. 392 of 1978, neither on the real estate unit object of the respective rental relationship nor on the entire building, representing this a different asset from the single units that compose it; in the different case of sale not concerning the entire building, but a part of it including the property unit leased and other – that is, the sale of several building units belonging to the same building – to determine whether or not the right of pre-emption and redemption of the tenant of one or more real estate units included in the sale fails, it must be ascertained if in relation to the object of the sale considered as a whole it can be considered a "unicum" that is a complex that in the state in which it is located is equipped of its own objective, effective and not fictitious structural legal individuality»; Cass., 26 September 2005, n. 18784, in *Giust. civ.*, 2006, 10, I, 2071: «In the hypothesis of renting of urban buildings used for purposes other than residential, in the case of sale – or promise of sale – with a single deed and for a total price, not of the entire building, but of a part of it, including the real estate unit leased and other real estate units belonging to the same building, to determine if there is a right of pre-emption (and redemption) of the tenant of the real estate units included in the sale, the judge must ascertain whether in relation to goods sold – considered as a whole – a unicum is configurable, that is, a building complex which, in the state in which it is at

a group of buildings, also having different use destinations<sup>72</sup>, that is also to an non-built area susceptible to fractionation<sup>73</sup>. As for the specific indication of recipients such as the Municipality and the metropolitan city, it is justified for the purpose of informing the subjects responsible for planning powers, the issuing of qualifications in the building sector and the related powers of control.

The original formulation of the law made the choice to send the communication to the municipality or to the metropolitan city an alternative. Only with the legislative decree n. 156/2006, the conjunction “or” was replaced with “and”, with no margins of choice on the part of the body appointed for this purpose.

Although communication considered for the initiation of the procedure is not individual and personal, but given through appropriate forms of advertising, said form of communication is allowed thanks to the provisions of art. 8, paragraph 3, l. n. 241/90 whenever personal communication is not possible or is particularly onerous for the number of recipients.

Paragraph 2 of art. 14 specifies what the content of the communication should be. It must contain the elements of identification and evaluation of the asset resulting from the first investigations, the indication of the effects provided for in paragraph 4, as well as the indication of the term, in any case not below than thirty days, for the presentation of any observations.

For elements of identification and evaluation of the asset we mean those elements emerged in the pre-procedural phase that would induce the administration to initiate the procedure of declaration of cultural interest<sup>74</sup>.

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*the time of the “denuntiatio” or, in the absence of it, of the transfer, is endowed with its own objective and effective structural and functional individuality, such as not to be objectively fractionable into separate transfers of the individual portions of the building, and this regardless of the further and different evidence, at the expense of the tenant, of the fraudulent intent of the parties to evade the right of pre-emption by the surreptitious aggregation of other assets to the rented one».*

<sup>72</sup> Ministerial Decree n. 236/89 (art. 2), supplementing the minimum criteria already provided for by art. 1 of the l. January 9, 1989, n. 13, states that “building” must be considered *«a real estate unit with functional autonomy, or an autonomous set of property units that are functionally and/or physically connected to each other»*. Therefore, for the purposes that the law intends to pursue, even a single portion of a larger building complex with different uses must be considered “building”. For example, if there are premises for catering or recreational, cultural, entertainment activities etc., if these activities have independent access to residential units located on the upper floors and served by other access, the rules apply if works are performed on these premises; see F. Vescovo, *Progettare per tutti senza barriere architettoniche*, 1997, 17, in <http://www.progettarepertutti.org>.

<sup>73</sup> D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 123. See Cass. pen., sez. III, 04 April 2012, n. 526, in *De Jure*, 2012: *«Undoubtedly the offense of unlawful subdivision through the modification of the intended use of buildings subject to a development plan through the splitting of a real estate complex so that the individual units lose their original intended use to take over the residential one: modification that is in contrast with the urban planning instrument constituted by the subdivision plan»*.

<sup>74</sup> See State Council section VI, 22 June 2006, n. 3825, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), which excludes the need for communication of the opening of the procedure in the preliminary phase of acquisition of the elements concerning the historical-artistic character, aimed at determining whether the conditions for the imposition of the bond on a building exist, for its historical-artistic importance. This phase, in particular, does not rise to an independent procedural moment (due to the effects of Law 241/1990), as it constitutes an instrumental cognitive activity, which takes place before and out of the administrative procedure that can be formally initiated only when such activity ends positively, in the sense

These elements, as a rule contained in a report, are never to be considered definitive as they are the result of initial investigations to which the actual investigation must always follow in order to issue the final provision.

With a clear participatory purpose, the communication is accompanied by a safeguard purpose since, pursuant to paragraph 4, the communication involves, as a precautionary measure, the application of the provisions considered in Chapter II, Section I of Chapter III and from Section I of Chapter IV of Title I of the Code<sup>75</sup>.

In these regards, we recall articles 18 and 19 on supervisory and inspection powers, articles 20 to 28 relating to protection measures, consisting of bans on altering the asset or in the subordination to authorization of interventions on said asset, the articles from 53 to 59 on the limitations of the alienation and other modes of transmission of the asset<sup>76</sup>.

The precautionary effects cease at the end of the term of the declaration procedure, which the Ministry establishes in conformity with the current legal provisions on the administrative procedure. Concurrently the l. n. 241/1990 for the integration of the content of the initial communication must, in fact, also indicate the name of the person responsible for the procedure<sup>77</sup>. As for the form, the principle of freedom seems to be asserted, provided it is suitable for achieving the goal.

The other principles expressed in l. 241/1990 are applicable, following the changes introduced by l. n. 15/2005, for which failure to communicate the opening of the procedure no longer entails the automatic annulment of the contested deed if the administration proves that the content of the final provision could not have been different even if it had guaranteed the participation of the interested parties in the proceeding. The final provision is adopted exclusively by the Ministry to which the protection functions are exclusively assigned, not leaving any competence in this regard to the Regions<sup>78</sup>.

Written in its entirety, it must provide an account of the observations made by the parties in the proceedings in relation to the lack of cultural interest of the property. The lack of explanation, albeit consisting in a reference, of the reasons for overcoming the claims with memories or documents by the interested parties, is not substitutable, in court, with the

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of existence, in the opinion of the administrative authority, of sufficient indicators of the need for an initiative aiming – after dialectical confrontation with the subjects involved – at placing the restriction and to conform its limits.

<sup>75</sup> See T.a.r. Lazio, Roma, sez. II, 29 January 2014, n. 1155, in *www.giustizia-amministrativa.it*, according to which: «*The imposition of the restriction, may it be direct or indirect, must be preceded by the communication of the opening of the proceeding against the owners of rights on the property towards whom it will exert its effects, in consideration of the particular sacrifice or compression of the landlord sphere that the private undergoes as a consequence of the imposition of the bond*».

<sup>76</sup> See C. Volpe, *Commento agli articoli da 12 a 16 del Codice dei beni culturali e del paesaggio*, cit., *passim*.

<sup>77</sup> Figure that operates within the Italian public administration entrusted with the management of the administrative procedure.

<sup>78</sup> D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 121.

content of other acts of the procedure, from which it is not possible to deduce the existence of those reasons<sup>79</sup>.

Moreover, in order to justify the adoption of a provision for the imposition of the historic-artistic restriction, the mere and generic circumstance that a building represents a testimony of a type of construction of a particular historical period is not sufficient, given that any building is itself testimony of a type of construction of its period in the area in which it is located, as well as an appreciation based on mere documentary value is not sufficient to identify a cultural asset legally; nor can the simple indication of the characteristics of the constructive style of which the building represents testimony (which results in a mere tautological description) or the consideration that that constructive style is slowly disappearing. Therefore, the Administration is still required to indicate the reasons of particular cultural interest for which it notes that a particular type of construction style deserves the special protection that is resolved in the imposition of the restriction, as the particular characteristics of the single building that make it particularly expressive of that type of construction<sup>80</sup>.

lastly, pursuant to art. 3 of the l. 241/1990, the provision must indicate the deadline and the authority or body to address for the presentation of the judicial appeal<sup>81</sup> or the administrative appeal<sup>82</sup> in opposition.

Pursuant to art. 15, the provision is notified to the owner, proprietor or holder of the asset by messenger or by registered mail with return receipt.

Said notification is merely declaratory<sup>83</sup> of the restriction as the latter is constituted through the adoption of the provision.

More precisely, the provision for the imposition of the restriction does not have a nature of proof of knowledge<sup>84</sup>, since the notification in an administrative form to private owners, proprietors or holders of goods that have cultural interest is merely informative and does not play a constitutive function<sup>85</sup>, of the restriction itself, which is perfect independently of it, being exclusively intended to create in the its recipient the knowledge of the obligations incumbent on him. It follows that the notification to the subject who initially was its owner and who subsequently sold it does not constitute grounds for invalidity of the tax decree of the restriction<sup>86</sup>.

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<sup>79</sup> State Council section. VI, 09 January 2014, n. 23, in *Foro Amm. C.d.S.*, 2014, 1, 142.

<sup>80</sup> State Council section VI, 10 December 2012, n. 6293, in *Foro Amm. C.d.S.*, 2012, 12, 3274.

<sup>81</sup> An introductory act of the trial consists of the request made by a subject to a judge, to examine a certain situation in order to obtain a court order.

<sup>82</sup> The request addressed to a public administration in order to obtain a protection of their subjective legal situation.

<sup>83</sup> Non-constitutive or modifying effects of anything but solely for the assessment of legal situations and relations.

<sup>84</sup> Statement which produces legal effects only from the time of its receipt.

<sup>85</sup> Amending situations and legal relations.

<sup>86</sup> State Council section. VI, 13 March 2013, n. 1490, in *Foro Amm. C.d.S.*, 2013, 3, 785.

Obviously the possible omission of the notification makes the sanctions inapplicable towards those who, not knowing the provision of restriction declaration, have transgressed it<sup>87</sup>. The notification by messenger takes place according to the rules dictated by the code of civil procedure with application of Articles. 138, 139 and 140.

Possible flaws of the notification can be remedied with subsequent and regular notification without the need to adopt a new restraining order.

For the purposes of the efficacy with regard to third parties, where the subject of the restriction are objects subject to immovable or movable advertising, the provision of declaration is transcribed, at the request of the superintendent, in the related registers and is effective towards any subsequent owner, proprietor or holder for any reason.

We are faced with a hypothesis of declarative advertising<sup>88</sup> which constitutes an obligation for the administration with consequent liability for compensation in case of omission in all those cases which the violation of the obligation to transcribe has caused damage to those who purchased the restricted asset ignoring the existence of the restriction<sup>89</sup>. The transcription of the bond seems to be aimed only at facilitating its clarity for by third parties. It is true that the pre-emption on the restricted asset is exercised by the administration towards the owner, or the person to whom the payment order was notified or a subsequent successor. In the first case, since notification of the provision has occurred, problems of knowledge of the restriction do not arise; in the second case, the negotiation must be concluded in compliance with the pre-emption legislation<sup>90</sup>, that failing, the act will be void and therefore the buyer has no other possibility but to, exercising all the conditions, take action to obtain compensation for damages pursuant to Art. 1338 c.c.<sup>91</sup>.

Once the transcription has stepped in, the bond follows the asset as a property charge<sup>92</sup> thus making subsequent notifications redundant as with the transcription the restriction can be known by anyone<sup>93</sup>.

<sup>87</sup> T. Alibrandi, P.G. Ferri, *I beni culturali e ambientali*, cit., 262.

<sup>88</sup> Type of advertising aimed at making the facts for which it is expected to be enforceable against certain parties.

<sup>89</sup> A. Pontrelli, *Commentario al codice dei beni culturali e del paesaggio*, cit., 60.

<sup>90</sup> Right of preference, based on the law or on the will of the parties.

<sup>91</sup> G. Celeste, *Beni culturali: prelazione e circolazione*, in *Riv. not.*, 2000, 5, 1071.

<sup>92</sup> Periodical performance, which is payable by the subject as it remains in the enjoyment of a certain property.

<sup>93</sup> See State Council section VI, 27 August 2014, n. 4337, in *De Jure*, 2014, according to which: «A restriction legitimately imposed by the notification to the owner of the property can not be considered cancelled due to the transfer of the property related to it that is not accompanied by an information on the seller in relation to the existence of the same restriction, due to the actual nature and the irrelevance, for the purposes of its existence and operation, of private activities which, if omitted, could imply civil liability actions related to the obligation of exact information in the procedure relating to the formation of contracts (State Council IV, sent. 7 November 2002, No. 6067); the transcription of the historical-artistic bond, once carried out, and its notification to the owner subject, do not require further notifications to its successors or those having a cause (see State Council section VI, sent 8 July 2009, No. 4369); the cultural restriction is rooted erga omnes at the time of the transcription of the special decree, has a real nature and is opposable to all the subjects that become owners; once it has been transcribed, it undoubtedly expands its effects on the current owner and all his successors; the owner of a bound property and registered in the real estate records prior to its purchase, cannot avoid observing

## 10. The administrative appeal opposed to the declaration

Pursuant to art. 16 of the Code of cultural heritage, opposed to the declaration pursuant to art. 13 and, following the amendments to the Code as a result of Legislative Decree no. 156/2006, against the conclusive provision of the verification referred to in art. 12<sup>94</sup>, an appeal to the Ministry is allowed, for reasons of legitimacy and merit, within thirty days from notification of the declaration.

The decision to submit to the regulation the provision indicated in the verification and the declaration seems to be dictated by the need for balance of the system, avoiding an unjustified penalization of public property compared to the private one.

The Presidential Decree n. 233/2007 assigned to the general managers the tasks of verification and declaration of cultural interest, therefore the appeal as outlined by the regulation acquires the characteristics of the improper hierarchical appeal<sup>95</sup>.

Originally, the decision of the appeals was a responsibility of the ministerial department for cultural and landscape heritage and for the archive and library assets, without the possibility of delegation in favour of the general managers.

With the Presidential Decree n. 233/2007 the decision is responsibility of the general directorates for each sector of competence, namely the general direction for archaeological heritage, architectural, historical-artistic and anthropological assets, archives and library heritage, cultural institutes and copyright.

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*all the provisions that connote the binding discipline of the law relating to the property, not excluding the obligation of denuntiatio in case of its future alienation (State Council No. 4369/2009), for the purpose of exercising the right of pre-emption by the administrative authority». See V. Mastroiacovo, Imposta di registro. Acquisto di beni culturali, in Studio del Consiglio Nazionale del Notariato n. 11/2005/T, approved by the Commissione Studi Tributarî, in Studi e Materiali, II, Padova, 2005, from which emerges the existence of non-concordant doctrine on the declarative or constitutive nature of the transcription. In particular, it focuses on the position taken by Giovanni Casu, “Statuto e circolazione dei beni culturali dei privati, persone fisiche e giuridiche” (Proceedings of the Study Convention – The discipline of cultural heritage in the light of the new Code – Verona, 13 November 2004), who maintains that the transcription of the bond on the cultural asset cannot have the value of constitutive effect as supporting the contrary would mean affirming that the third party can validly purchase a cultural asset that is not transcribed, preventing the State from having an artistic pre-emption. Following this doctrinal front (see G. Celeste, Beni culturali: prelazione e circolazione, cit., 1071) the reality of the bond is such as to make it effective against anyone even regardless of the transcription of the title. This fulfilment, however necessary for the administration, would then have only the most limited function of making the constraint known.*

<sup>94</sup> See T.a.r. Lazio, Roma, section. II, 12 October 2010, n. 32765, in Riv. Giur. Ed., 2011, 1, 48, for which «Art. 16 legislative decree n. 42/2004, modified by art. 2, paragraph 1, lett. e), legislative decree n. 156/2006, provides for the admissibility to the Ministry for the assets and the cultural activities of the administrative appeal against the conclusive provision of the procedure of verification of the historical-artistic interest of the buildings, regardless of the positive or negative result that it has had and therefore of the content of the act of appeal, which may be constituted by the provision with which the presence or absence of the historical-artistic interest of the asset is found».

<sup>95</sup> Administrative appeal produced by those who want to protect their right or legitimate interest, against acts of the public administration, presented to a body of the public administration that has no hierarchical relationship with the body that produced the act.

The communication of the final provision must also contain the deadline within which it is possible to appeal, namely thirty days.

The failure to indicate said term configures a hypothesis of excusable error for the appellant who can be relieved from the time limit.

The imposition of a restriction affects the market value of the asset, therefore the owner-alienant has an obligation to communicate to the buyer the existence of the restriction, which determines an essential quality. Any reticence of the seller during the negotiations or during the sale - can give rise to the remedies provided by the Civil Code, but does not affect in any way neither on the powers attributed by the law to the Administration for the protection of the asset, nor on the legal regime of the property, resulting from the certainty<sup>96</sup> of the binding decree. The purchaser of the restricted movable property, precisely because it happens in the position of the assignor, is entitled to challenge the bond decree, but does not make use of a further term of appeal, the act becoming unquestionable with the expiry of the time limit resulting from the notification of the bond decree<sup>97</sup>.

The appeal must be presented to the competent Directorate-General. In any case, the possible submission of an appeal before a non-competent peripheral office does not make the application inadmissible. On the contrary, the unentitled body to which the appeal was filed is obliged to transmit the documentation to the competent body.

The appeal must be presented by filing or by sending a registered letter with return receipt. And in this last case the mailing date is considered as the date of presentation of the appeal for the purpose of assessing its promptness.

The administrative appeal has a wider object than the jurisdictional one, since the decision-making body has the possibility of examining not only the legitimacy<sup>98</sup> of the provision but also the merit<sup>99</sup>.

In fact, according to constant case-law, the evaluations expressed by the Ministry for Cultural Assets and Activities represent technical evaluations, which can be criticized in the judicial review of legitimacy, only when they show obvious unreasonableness, illogicality, or are the result of factual errors<sup>100</sup>.

<sup>96</sup> That cannot be contested.

<sup>97</sup> State Council section VI, 21 May 2013, n. 2707 in *Foro Amm. C.d.S.*, 2013, 5, 1403.

<sup>98</sup> The state of compliance of the administrative act with the requirements inherent to the agent, the object, the form, the function and the content required by law so that the act, as well as existing, is also valid.

<sup>99</sup> The set of all matters of substantive law brought to the knowledge of the judge as an actor, defendant and third parties, not related to the mere aspects of the rite.

<sup>100</sup> State Council section VI, 30 May 2014, n. 2814, in *De Jure*, 2014. In compliance with T.a.r. Liguria, Genova, section. I, 19 May 2014, n. 787, in *www.giustizia-amministrativa.it*, by which *«The declaration of the historical or artistic value of an asset presupposes a judgement of technical discretion that cannot be considered in the judgement of legitimacy, if not for defects of excess of power due to errors in the assumptions or for manifest illogicality: it follows that in the face of the exercise of such a power of merit, broadly discretionary in the contents – and exclusive prerogative of the administration – the judgement experienced in the jurisdiction is limited to the verification of the existence of profiles of incongruity and illogicality which, as such, are susceptible of bringing out the unreliability of the technical-discretionary evaluation performed»*.

The simple submission of the appeal involves the suspension of the contested provision, without prejudice to the precautionary measures<sup>101</sup> provided for in the declarative procedure of cultural interest and placed to protection of the conclusive provision<sup>102</sup>.

Since by express legislative provision, *ex* paragraph 5 of art. 16 of the Code, the administrative appeal must be applicable with the dispositions of the Presidential Decree November 24, 1971, n. 1199, it is not necessary to notify the appeal to any counter-parties<sup>103</sup>, as the deciding body has the obligation to disclose the existence of the appeal to other interested parties identifiable on the basis of the contested act in order to allow the latter to present any memories and documents.

The Ministry decides to appeal, after hearing the competent advisory body, within ninety days from the presentation of the document.

The useless expiry of this term configures a hypothesis of silence-rejection<sup>104</sup> which, at the procedural level, detects for the purpose of accrue of the right of the interested party to challenge the original act in court or with appeal to the Head of State.

In fact, nothing excludes that the administration provides beyond the expiring of the indicated term.

It is noted that the parties concerned are not obliged to exert the administrative appeal in advance. Indeed, the final provision must be considered immediately prejudicial and, therefore, it is possible to challenge the act also directly in court.

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<sup>101</sup> Provisional measures aimed at preventing irreparable damage related to process delay.

<sup>102</sup> D. Antonucci, *Codice commentato dei beni culturali e del paesaggio*, cit., 145.

<sup>103</sup> That holds an interest against the removal of the provision burdened by which could originate negative effects for its own legal sphere.

<sup>104</sup> The silence of the competent administration that is equivalent to a rejection of the application.