

## *22<sup>nd</sup> Colloquium*

### *Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union*

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Replies to the questionnaire

Italian Council of State

Rapporteur

*Giuseppe Barbagallo*

1) 2) Law No 443 of 21 December 2001, and subsequently Legislative Decree No 190 of 20 August 2002 implementing it, and Legislative Decree No 59 of 18 February transposing Directive 96/61/EC concerning integrated pollution prevention and control, introduced legislative provisions for implementing large-scale developments (infrastructure and strategic production facilities in the national interest) which partially derogate from the general rules governing public works and compulsory purchase/expropriation, which simplify and streamline the procedures, consistently with all the interests at stake.

In order for this legislation to be implemented, the government is required to include the project in the programme drawn up by the Minister of Infrastructure and Transport by joint agreement with the ministries having jurisdiction, the Regional governments involved, and the Central-Regional Governments Conference, after consultation with the Interdepartmental Committee for Economic Planning (CIPE). This programme is incorporated into the Economic/Financial Planning Document, in which the necessary funding is indicated. This is subsequently adopted by the CIPE, and is the first administrative act of external relevance for the implementation of major infrastructure schemes, such as motorways.

The successful contractors have six months from the date of the approval of the programme within which to submit the preliminary design for the infrastructure project concerned to the Ministry for Infrastructure. When it is necessary to put the work to competitive tender, this deadline is extended to nine months. The financial resources required to draw up the preliminary design and not already available are allocated by the Minister of Infrastructure and Transport, jointly with the Minister of the Economy and Finance, at the request of the successful bidder.

The preliminary design must also include appropriate maps that clearly identify the areas involved, any buffer areas and any protection measures, and also indicate the performance features, the functional specifications and the spending ceilings on the

infrastructure project for implementation, including the spending ceilings on any work or measures needed to offset the environmental or social impact, as well as the allied infrastructure and other civil engineering work needed for overall implementation.

Where current national and regional legislation require that the project must undergo an environmental impact assessment, the preliminary design must also include an environmental impact assessment report. The competent environmental authorities conduct an environmental impact assessment following the standard procedures used for assessing the environmental impact of large-scale projects provided by articles 17, 18, 19 and 21 of Legislative Decree No 190 of 2002. For the purposes of approving the preliminary design it is not necessary to serve notice on the parties affected by the expropriation measures. The adjudicator's submit the preliminary design to the Ministry of Production and, where relevant, the Ministry of the Environment and the Ministry of Cultural Heritage, and to the authorities of the Regions or Autonomous Provinces having jurisdiction. The same project has also submitted to the entities responsible for resolving any problems arising as a result of overlapping competences, using a procedure that is governed by specific rules. The authorities concerned to submit their judgments to the Ministry within 90 days of receiving the preliminary design. During the following sixty days, the Ministry acquires, where relevant, the opinion of the National Public Works Council (Consiglio Superiore dei Lavori Pubblici) or another advisory authority having competence, and submits its own proposal to the CIPE which rules on the project within thirty days thereafter.

The preliminary design is not submitted to the "services conference". Once it has been investigated, it is approved by the CIPE. The CIPE decides with a majority vote, and for the purposes of agreeing on the location of the project, it requires the assent of the presidents of the Regions and Autonomous Provinces concerned, which issue their determination after consulting the municipalities in whose territory it is to be implemented. The determination must be issued by the deadline indicated above, even if the municipalities involved have not expressed their opinion in time.

Where current legislation and regulations so require, approval also entails ascertaining the environmental compatibility of the project, and for all town planning and building regulation purposes, it formalises the agreement between the central and the regional authorities on the siting of the project, and automatically modifies the required town and country planning instruments already adopted; the local authorities are required to adopt all the necessary safeguard measures to protect the land to be used, and the buffer zones, if any. For environmental protection purposes, section 18(6) applies.

The municipalities therefore only play an indirect role (they must be consulted by the Regional governments) in producing the preliminary design. The consent of the Regional governments is necessary before the preliminary design can be approved. Without such consent, there is a procedure which may conclude with the approval of the project by the Council of Ministers, formalised in a Decree of the President of the Republic.

When the project is approved, all Master development plans of the municipalities affected by the motorway have to be modified, and the land required is used for the purpose of building the motorway.

The parties concerned do not need to be notified in this phase.

A tender is then called for the implementation of the project and the final planning of the project may be awarded to the general contractor.

It should, however, be noted that the preliminary design must be produced by the contractor who was awarded the project. The work may be entrusted under franchise or to a general contractor (for implementation using all necessary means).

Whereas the approval of the preliminary design automatically modifies the town and country development plans by setting aside the land to be used for the motorway, the approval of the final project by the CIPE entails the declaration that the project is a work of public utility, which is the condition for permitting the compulsory purpose/expropriation of the land.

The final design of the infrastructure project must also contain a report by the consulting engineer certifying that it is consistent with the preliminary design and any prescriptive conditions laid down when approved, with particular reference to environmental compatibility and the siting of the project. It must also set out any other works and measures to mitigate and offset the environmental, territorial and social impacts.

The adjudicator, or the franchisee or general contractor acting for the adjudicator, is required to notify the beginning of the procedure for the issue of the declaration of public utility on the private parties affected by the expropriation/compulsory purchase order pursuant to the relevant law (Law No. 241 of 7 August 1990); the notice is not served personally, which is the general rule for service of notices, but by publication in the local largest circulation daily newspaper and in one national daily newspaper of a notice publicising the project, its siting and a description of it. At the same time copies of the project are filed with the offices of the Regional government and made available for public inspection. A statutory deadline of sixty days from the date of service of notice of the commencement of proceedings is set for the private parties affected by the compulsory purchase/expropriation order to submit comments to the adjudicating body, which is required to evaluate them for any consequential determination to be made.

The adjudicating body, the franchisee or the general contractor submits the final project to each of the administrations affected by the project represented on the CIPE and to any other administrations and authorities required to issue permits and licences of any kind whatsoever, and to the managers of "interfering works". Within a maximum of ninety days from the date of service of their copy of the project, the competent public authorities and the managers of "interfering works" may submit reasoned proposals for adjustments, or requests for certain prescriptive requirements to be introduced into the final project or improvements to be made, without altering the siting and the essential features of the project, within the maximum spend ceilings and the performance features and functional specifications identified in the preliminary design. These proposals and requests are received by the Ministry at a special "Services Conference" which is convened thirty days or more following the date of receipt of the project by the parties concerned, and must be completed within ninety days thereafter, as indicated above.

The purpose of the "Services Conference" is purely to perform a preparatory a fact-finding exercise. During the ninety-day period following the Services Conference, the Ministry evaluates the compatibility of the proposals and the requests received before the deadline date from the competent public administrations and the managers of any works interfering with the binding specifications of the approved preliminary design, and submits its own proposal to the CIPE which, within the following 30 days, must adopt the final project, together with any supplementary provisions or modifications, also for the purposes of issuing the "statement of public utility".

The approval of the final project, which requires a majority vote in favour of the members of the CIPE, replaces any other permission, approval or opinion, by whatever name it may be called, authorising all the works, services and activities set out in the approved project. In the event that the authorities of the Regional government or the Autonomous Province dissents, the procedure adopted for the preliminary design is followed.

As we have seen, the public takes part in the process of establishing the final project.

Court protection is not, however, conditional upon this participation in the procedure.

3) Measures adopted for the implementation of public works may be challenged before the administrative courts (administrative courts of first instance, the Council of State on appeal).

There is also a special fast-track procedure. The court made issue an interlocutory suspension order against the measures, and set a date to examine the case on its merits at least 30 days later. These original hearing and the appeal take an average of 18 months.

4) All the parties indicated in the questionnaire have right of appeal. There is some doubt about whether the Environmental Association of a neighbouring country may appeal, because Law No 349 of 8 July 1986 (sections 13 and 18) gives the right of appeal to the administrative tribunals to national Environmental Associations and those present in at least five Regions (identified in a decree issued by the Minister of the Environment on the basis of the policy goals and the internal democratic system according to their bylaws or articles, and the continuity of their work and their external importance, after hearing the opinion of the National Council for the Environment).

However, there are also the provisions of article 8(6) of Legislative Decree no. 351 of 4 August 1999 (implementing the directive 96/62/EC on ambient air quality assessment and management):

"When the level of a pollutant exceeds, or is likely to exceed, the limit value plus the margin of tolerance or, as the case may be, the alert threshold following significant pollution originating in another Member State of the European Union, the Ministry of the Environment, after consulting the relevant Regions and local authorities shall consult with the authorities of the Member states of the European Union concerned, with a view to finding a solution."

On the basis of this provision a broad interpretation of sections 13 and 18 of Law No

349/1986 might conceivably authorise a non-Italian Environmental Association to appeal.

5) Any aggrieved parties claiming that their lawful interests have been harmed and having an interest in having the measure quashed may rely on any error in the act or acts being challenged.

6) The court may take cognisance of all errors of law claimed by the petitioners.

a) an inadequate environmental assessment, if complained of, constitutes an error of law entailing the voiding of the measure;

b) Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora was implemented in Italy under the regulations set out in Decree of the President of the Republic No 357 of 8/9/97.

The question that has been put relates to an area possessing features which would qualify it as a site of community relevance or as a special conservation zone, but in this respect it has not been declared as such.

Consequently, the environmental impact assessment could not take account of the compatibility of the project with the zone for the purposes of conservation as provided by the directive (Art. 5 Presidential Decree No 357). If the petitioners successfully claimed that the measure infringed this provision, the most immediate solution could be to reject their submission because the safeguard is connected with the formal classification of the zone as a conservation area, and there is also the need to protect to protect the project commissioned to the parties involved in the project.

A greater difficulty arises with regard to the solution of voiding the measure because of this infringement of the law; this would be possible in the event that it was considered that: 1) the non-classification of the site as a protected area was due to a technical assessment with no justification according to the provisions of the directive and its annexes, and unreliable on the basis of current knowledge regarding zoology and the natural sciences; 2) the identification of the project of zones was not a constituent, but a declaratory, act;

c) in this latter case, in which the classification of the zone, as a protected zone, has been transmitted to the Commission but the procedure has not yet been finalised, the solution mentioned above 7)(b)(2) under would appear viable, because the classification of the zone by the State requires safeguard measures be adopted;

d) the wildlife directive (79/409/EC of the Council) was transposed by Law No 157 of 11 February 1992.

The environmental impact assessment must also take account of the protection zones along the migration routes of wild birds.

The point here (and this also applies to the previous questions) is that the environmental impact assessment is an exercise of technical discretion, in other words, it is an evaluation performed according to the rules of science (in this case the natural sciences).

With regard to the judicial review court of technical discretion there is no unambiguous stance exists in case law.

I would say that in the case of judicial review of technical discretion by an administrative court, the review powers are total because, unlike the case of administrative discretion, the Authority is not faced with a choice between several lawful types of conduct but is required to accurately evaluate a fact according to the criteria of a given science or technology (in this case the natural sciences and the ecological sciences). The limit set on judicial control is linked by its very nature to the relative or contentious character of scientific assessments.

In addition, therefore, to the external examination of the procedures used, the logical criteria applied, the assessment procedure itself, the judge is required to see whether the judgment made by the administrative body is flawed; and in so doing, the court is faced, as already indicated, by the constraint regarding the relative character of scientific assessments, and hence the erroneousness is in the unreliability of the assessment according to the levels of knowledge of science on the basis of which the assessment was performed.

The administrative court is required to reject an assessment which falls outside the sphere of arguability or reliability (expert witnesses may also be called to facilitate the court's work) by voiding the act and referring it back to the relevant Administration, but it cannot take the place of the Administration or void - and certainly not substitute - its evaluation for that of the Administration whenever this sphere has not been superseded (CdS Div. IV, 13 October 2003, No 6202).

But in the instant case there are a number of purely discretionary aspects, because the administrative authority is required to reconcile several public interests, and the resultant decisions fall exclusively within the field of public administration.

e) Directive 1999/30/EC of 22 April 1999 was transposed by ministerial decree No 60 of 2 April 2002, and Directive 96/02/EC on ambient air quality assessment and management was transposed by Legislative Decree No 351 of 4 August 1999.

If the project entails exceeding the maximum values of particulate matter given in schedule III to ministerial decree No 60 of 2 April 2002, if the error of law is raised in the petition as the ground for voiding the act (that is, the error in the environmental impact assessment) the court must uphold the claim and consequently void the environmental impact assessment and the resolution approving the preliminary design. The problem is proving that these limits have been exceeded

8) An alleged error in law complained of, except if it is a formal flaw which the Administration is able to demonstrate had no influence on the conclusion of the proceeding, the act at issue is voided and all the consequential acts of the proceeding are voided with it.

The Administration may re-present the acts (beginning with the one deemed to be flawed) in accordance with the indications laid down in the court judgment of annulment.

The jurisdiction of the administrative court in this case is an annulling jurisdiction, and the judge may not stand in for the administration and may not modify or renew the administrative.

In the instant case, if the errors have been proven (violation of the environmental protection rules specified above) in the environmental impact assessment one can expect the assessment and the resultant adoption of the project to be annulled.

After the court annulment, the Administration is required to change the design in order to avoid the flaws and errors ascertained by the court and the violation of the aforementioned environmental protection rules.

Even in the course of the hearing of the case, the Administration or the public agency may renew some of the acts. In this case, the renewal halts the appeal proceedings because the act appealed is replaced by another.