



Le juge administratif et le droit communautaire de l'environnement

National administrative courts And Community Environmental law

Italie - Italy

Réponse au questionnaire Answer to The questionnaire

COUNCIL OF STATE - ITALY

SEMINAR FOR COUNCILS OF STATE AND SUPREME

ADMINISTRATIVE JURISDICTION.

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QUESTIONNAIRE

1. Information and public participation in environmental issues.

Main texts in force: Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

Council directive 85/337/EEC of 27 June 1985.

Aarhus Convention of 25 June 1998.

Art. 8 of the European Convention for the protection of human rights and fundamental freedoms.

Directive 2003/35/EC (with modified Directive 85/337/EEC)

Directive 2006/12/EC of the European Parliament and the Council of 5 April 2006 on waste.

Directive 96/61/EC of the Council of 24 September 1996 concerning integrated pollution prevention and control.

A. Application of regulations.

Directive 2003/4/CE on the access of the public to the environmental information, that has repealed previous directive 85/337/EEC, has been introduced in Italy with the D.Lgs. n. 195 of 19 August 2005. The art. 7 of the decree (Protection of the access right) provides that against the determination of the public authority

concerning the right of access and in the case of lacked answer within the terms of which the to art.3.2 the petitioner can appeal according the procedure of which to the art. 25, comma 5, 5 bis and 6 of the L. 7 August 1990 n. 241, or he can ask the re-examination for the aforesaid determination, according the procedure established from the art.25, comma 4, of the same law n. 241 of 1990, to the competent civic defender for territory, in the case of actions of the communal, provincial and regional administrations, or to the Commission for the access of which to the art. 27 of the cited law n. 241 of 1990, in the case of actions of the peripheral administrations of the State. Directive 96/61/CE relative to the prevention and integral reduction of the pollution has been put into effect integrally from the D.Lgs. n. 59 of 18 February 2005.

Directive 2006/12/CE relative to the refusals is going to be introduced. Directive 2003/35/CE modifying directive 96/61/CE has been introduced with the D.Lgs. n. 152 of 2006.

The Convention of Aarhus has been ratified from Italy with L. n. 108 of 16 March 2001.

The application of the indicated texts and in particular of the communitarian directives to the inside of the Italian national context has given to interesting litigations, above all on the constitutional plan, in consideration of share of competences existing between State and Regions in Italy.

1. As far as the application of directive 2003/4/EC on the access of the public to the environmental information, introduced in Italy with the D.Lgs. n.

195/2005, must be mentioned the decisions n. 398 and 399 of 1 December 2006 of the constitutional Court. With the first(n. 398)the Court has asserted that the access to the environmental information does not re-enter in the within of the matter "protection of the environment", being a matter itself of the most general specific aspect of thematic of the right of access of the public to the data and documents in possession of Public Administration. The art. 22. comma 2, of the L. 7 August 1990 n. 241(New rules in matter of administrative procedure and right of access to administrative documents), modified from the L. 11 February 2005 n. 15, after to have established that the access to documents constitutes general principle of the administrative activity and concerns to the essential levels of the concerning performances the civil and social rights that must be guaranteed on all the national territory according art. 117, comma 2, lett.m) Cost., specifies that persists the power of the regions and local institutions, in the within of the respective competences, to guarantee ulterior levels of protection. The art. 29. comma 2, of the same law add that regions and the local institutions, in the within of the respective competences, regulate the matters disciplined from the present law in the respect of the constitutional system and the guarantees of the citizen in the cares of the administrative action, therefore as defined from the principles established from the present law. Consequently, the constitutional Court has thought groundless the issue of constitutional legitimacy raised from the Prime Minister's Office with reference to the art. 117 Cost. of Chapter II of the Law Region Friuli

Venezia Giulia n. 11/2005 that does not concern to the limits traced from the state legislation in matter of right of access to the information, previewing specific norms on the environmental information, not turned to the protection of the environment, but to a better acquaintance, from the citizens, of the environmental problems. With the second one (n. 399/05) the constitutional Court has reaffirmed that the discipline of the environmental information does not belong to the matter "protection of the environment" of exclusive State competence according to art. 117, lett.s), Cost., but becomes part of the protection of the right of access of the public to administrative documents. That is not worth however to exclude the legislative competence of the State in matter, because the access to administrative documents concerns the essential levels of the concerning performances the civil and social rights of which to the art. 117, lett.m) Cost.

From the constitutional norm and the L. n. 241 of 1990 that regulated on the inner plan the access right emerges a composite system of protection of the right to the access that is articulated in the necessary state discipline of the essential levels and in the eventual local regional discipline of ulterior levels. On these assumptions the Court has excluded that it was not up to the State to give to performance to communitarian Directive 2003/4/CE in environmental information, just because to the State is incumbent the duty to fix the essential levels of protection, valid for the entire national territory also in this field.

As far as, then, the definition of "environmental information " of which to D.Lgs.n. 195 of the 2005 must be mentioned the sentence n. 294 of 2007 of Regional Administrative Tribunal of Veneto, that has in particular decided that the environmental information, to the contrary of what happens in the general system of access previewed in the national legislation, can be demanded from whichever physical person or institution without that these must declare just the interest to every Public authority that of it has the possession. It must be mentioned, still, the sentence of the Regional Administrative Tribunal of the Lombardy, Sez. I, n. 1759 of 12 October 2007 that has established that the right of access to the environmental information, for how much extending and generalizing, cannot change in a shape of indiscriminate access to all practical the inherent ones to a determined field of administrative activity, not being able the access right to change in an instrument of systematic and generalized control on the management of all the procedures in itinere and, generally, on the entire acts of a public institution. It must be mentioned, finally, the sentence of the Regional Administrative Tribunal of the Campania, Naples, Sez.I, n. 6057 of the 12 june 2007 that, in case of situations of emergency in matter of refusals, asserts the subsistence of the obligation of the extraordinary Commissioner for the emergency refusals in Campania to supply to the adoption with own decree of the measures to assure the information and the participation of the citizens in compliance with the Paper of 27 Aalborg of May 1994.

2. For how much it concerns the application of directive 2003/35/CE, introduced in Italy with the D.Lgs. n. 152 of 2006, it must be mentioned the decision n. 5283 of 9 October 2007 of the Council of State, VI Section, with which it has been asserted that the expiration of a long period of time is not of itself in a position to exempting from the eventual responsibility for polluting facts and therefore from the obligation to supply to carry out the indispensable restoration: that is endorsed is not the pollution produced in previous age, but the lack of elimination of the remaining effects although passing time.

3. For how much it concerns, then, directive 2006/12/CE it must be mentioned the sentence n. 14557 of the penal Court of Cassation, Sez. III, that has specified the new notion of refusal according to the new communitarian discipline of directive 2006/12/CE, in force from 17/05/2006 and therefore subsequently the D.Lgs. n. 152 of 2005, which is the whichever substance refusal or object of which the holder is unaware or had intention to be unaware.

4. The principle of consultation of the interested parties, like provided in Directive 85/337, has given place to litigation under the profile of the lack of observance of this principle in the course of procedures that provided the consultation. This lack, where verified, integrates, according to the Italian jurisprudence, a defect of the procedure that can give place to the cancellation of the acts of the procedure.

5. As far as the contained specifications in this matter in directive 2003/35/CE, the expression "having an interest in" could be not sufficiently clarifying of the connected limits.

B. Judge Control Techniques.

Traditionally, the Italian judiciary administrative system is based on what is known as "double jurisdiction": the Ordinary Civil Judiciary Authority (Courts, Courts of appeal etc.) traditionally has jurisdiction over violation of subjective rights - straight subjective and is empowered to declare an administrative act as unlawful. The Administrative Judiciary Authorities deal mainly with violation of legitimate interests - *interessi legittimi*, can annul unlawful acts, and, in specific peremptory cases, replace or partly amend them (substituting to the Public administration). This division of jurisdiction has recently undergone legislative change partly owing to the difficulty of distinguishing between legitimate interests and relevant subjective rights. The administrative judicial system is composed of the Regional Administrative Courts (TAR, at first instance level) and the Council of State (at the appeal level). They monitor in particular the legitimacy of administrative acts and may annul them. Only in peremptory cases is the administrative judge entitled to assess the merit of the act: it can not only annul it but also partially or entirely replace it with his own. The Constitutional Court is not part of the court system even though its functions are mainly judiciary: passing judgments on the constitutional legitimacy of laws and legal acts. Not specific national legislation regarding the

application of the Aarhus Convention, ratified by Law n. 108 of 16 March 2001, exists to day in Italy. Violation of environmental law can be challenged through regular criminal, civil or administrative judicial procedures and through administrative appeals. In general, the existing framework for access to justice against administrative acts applies for environmental matters. Therefore, acts or omissions by public authorities that breach environmental laws to are challenged either before the administration, following contentious proceeding(administrative appeal- not resorted administrative) or before the administrative judge at the judicial level. Administrative appeal is not an obligatory administrative procedures prior to going before the court and it is not the most frequently used procedures for challenging administrative/environmental acts. To decision following the administrative appeal can be appealed before an administrative authority through another administrative appeal, or before the administrative court, within the administrative Time limits applicable for judicial procedures. The administrative appeal usually has not suspensive effects, except in peremptory cases (art. 3 DPR n. 1199/719 for serious reasons. The judicial administrative appeal is the procedures most often used by citizens and environmental associations to challenge an act or omission of the Public Administration. Law n. 349/1986 provides officially recognised environmental associations autonomous legal standing before the administrative judge, at certain conditions established by the law. TAR judgements can be appealed the

Council of State. The appeal must be submitted within 60 days of the notification of judgement but its submission does not automatically suspend the execution of the administrative act that is subject to complaint. However, the claimant may request its suspension when its execution might causes serious and irreparable damage. The administrative judge has general competence of legitimacy over the administrative acts(the merits to are assessed only in specific cases expressly foreseen by the law): an application filed in an administrative court normally aims at obtaining the judicial annulment of an administrative decision for lack of jurisdiction, breach of law or abuse f power. There is also the administrative judge' s exclusive jurisdiction, in certain matters, when the administrative judge has jurisdiction also over subjective rights. The control of the correctness of the use of the discretionary power from Public Administration constitutes the object of the verification of legitimacy from the administrative judge, according the ordinary outlines of the administrative judgment. In case of lacked adaptation the Administrations to the decisions of the administrative judge, the Italian system knows a special jurisdictional procedure in order to obtain the complete adaptation from the administrations (so said ottemperanza judgment).

OPEN QUESTIONS.

Decisions on waste law or polluting installations.

2. Pollution law.

Directive 2006/12/EC on waste(it is going t be introduced).

Directive 96/61/EC regarding integrated pollution prevention and control(IPPC), integrally introduced with D.Lgs. 18/2/2005, n. 59.

A. Application of regulations.

Distribution of the responsibilities in order to the restoration of the polluted sites.

The D.Lgs. 18 February 2005 n. 59 with which in Italy has been given to integral performance to directive 96/61/CE relative to the prevention and reduction integrated of pollution(IPPC)provides for the measures to avoid, or, in case are not possible, to reduce the emissions coming from industrial activities in the air, the water and the ground, including the measures relative to the refusals and in order to achieve a high level of protection of the environment in its complex. The decree disciplines, also, the release, the renew and the re-examination of the integrated environmental authorization of the industrial systems. The competent authority to release the integrated authorization is the Ministry of the environment for the existing and new systems of state competence (es. refineries, power stations), for the other systems, the characterized authority. There are previewed rules(agreements between central State and Regions) to guarantee the harmonization between the development of the national productive system, the policy of the territory and business strategies. In synthesis, a system of coordination between the several involved authorities is previewed. The competent authority in matter of release of the authorization has the power to renew it (periodically every 5 or 6 or 8

years), on the base of previously acquired information. It has, also, the power to re-examine the granted authorization, where necessary. In case of not observed prescriptions or exercise without authorization the competent authority can invite to eliminate the irregularity, can suspend the authorized activity and revoke the authorization in case of lacked adaptation to the prescription. Regarding restoration of polluted sites the D.Lgs. n. 152 of 2006, art. 242, discipline in the detail the relative procedures, as temporary interventions, the putting in safety, the operating one and of emergency. Such norm disciplines, also, the competence in order to the measures necessary to eliminate the pollution, attributing it to the Region that operates through a Conference of services. But when the area is included into the sites ones of national interest to submit to restoration, competence belongs to a state institution(Ministry of environment))(art. 252/4 D.lgs. N. 152/2006).

(TAR Sardinia, Sez.II, n. 1809 of 8 October 2007; TAR Sicily, Catania, Sez.I, n. 1254 of the 20 July 2007).

The participation of the private owners of polluted sites to the administrative procedure for the adoption of the restoring measures is necessary to the aim of the assessment of the responsibility and for the determination of the modalities and the cost of the restoration(Cons. Stato, VI sez., n. 4525 of 2005).

After coming in force of the D.Lgs. n. 152 of 2006 has been formally introduced the principle that “ who pollutes pays” of which to directive 2004/35/CE, that finds application in all the administrative procedures;

therefore, the charges of restoration of a polluted site must be preceded from the assessment, with participated procedure, of the responsibilities for the pollution. The model of previewed responsibility is that one of the subjective responsibility (aquiliana) and not that objective one. The owner, where is not responsible of the pollution, does not have the obligation to directly supply to the restoration but only the burden to make it if he wants to avoid the consequences of law. (TAR Lombardy Milan, Sez.II, n. 5355/07).

Judge control techniques.

In Italy it is well established that the protection of the environment is a constitutional value and italian Constitution does not pose particular problem to the protection of legal positions connected stating, in article 24, that all persons are entitled to take judicial action to protect their individual rights and legitimate interests. Problems may arise about the defining of the powers and limits of the action of the social formations that hold interests. (Cons. Stato, IV Sez., n. 5760 of 2 october 2006).

In legitimacy proceedings the evidence is limited to the request of document, clarifications, verification (through wich the judge verifies whether to certain situation corresponds to what is expressed in the appealed act) and technical advice. In merit proceedings, witness, inspections and expert evidence are admitted. Both during the first and the second degree of litigation the claimant can ask for an interim measure. The appeal to the judiciary administrative authority does not have suspensive effects of the appealed act: however the

claimant has the right to request the act' s suspension, if a serious and irreparable damage exists. Other interim measures are also applicable to the administrative proceedings, as seizure(sequestro), an interim order for the seizure of assets the ownership or possession of wich is at issue; measures to safeguard possession(azione possessoria); quia time injunction (azioni di nunciazione) preservants the status quo. In addition there is a specific procedures named Summary procedure(Tutela sommaria): law 205/00 gives the President of the Court the power to issue interim measures when urgent situations arise. Like precautionary measures, interim measures are taken before rendering judgment on the merits.

Although the Italian system does not provide a specific mechanism for access to justice in environmental matters, the system itself has evolved in a positive manner and legislation (art. 18,5 of before Law n. 349/86)recognises environmental associations autonomous legal standing the administrative judge if the association is officially recognised by ministerial decree and provided that they fulfil specific requirements established by law.

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