

Italian Report

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BALANCING WITH NON ENVIRONMENTAL CRITERIA

Non-environmental criteria in the comparative balancing between competing interests.

In a number of cases, the decision as to whether carrying out a certain project requires an accurate balancing between the public, “collective” interest to the protection of the environment on the one hand, and the specific interests to the realisation of the project on the other. When such a situation goes to court, - in Italy normally these cases involve the regional administrative courts - the judicial body is often called to revise the competent authority’s decision concerning the denial or the authorisation of a certain project.

In particular the Environmental Impact Assessment procedure aims at introducing a certain transparency in the final decision, by enabling to acquire (and make known to the public) certain elements which are necessary to strike an appropriate balance among the different interests at stake and among the costs and benefits of a certain project. On the basis of those elements, the judicial body can undertake an assessment of whether the public authority has correctly balanced the primary concerns to the protection of the environment and public health, which are at the heart of the EIA, with other public concerns.

However when a decision concerning the authorisation or denial of a certain project involves a certain amount of discretionary power by the competent public authority (in Italy: Governmental decision for larger projects or *Conferenza dei Servizi* - a sort of consultation forum where all other interested public authorities are involved and the general public is informed and consulted), such a decision can be subject only to a limited judicial review by the administrative courts (See Consiglio di Stato, 1/2004 and 129/2006).

An overview of some of the most recent decisions of Italian administrative courts highlights the main environmental and non-environmental criteria which guide such a comparative evaluation process.

For instance, in a case concerning the construction of a wind mills plant in Tuscany, near Lucca, the Regional Administrative Tribunal of Tuscany upheld the Tuscany Region’s decision not to authorise the project on the basis of the negative opinion of the ‘*Conferenza dei Servizi*’ on the environmental compatibility of the project. The project was to be located in an area of significant interest from the point of view of the protection of environment, biodiversity conservation and landscape.

The Court affirmed that EU, national or regional legislation do not expressly recognise the supremacy of energy interests over the protection of the environment. In particular, the Court, while acknowledging the benefit deriving from the realisation of the project (increase in the energy production), affirmed that the EIA procedure primarily aims at safeguarding the fundamental interests to the protection of the environment, public health, natural resources conservation, improvement in the quality of life, and that those overarching interests must be taken into account during the procedure and when ultimately deciding on the project. Finally, the Court based its decision to uphold the negative decision of the competent public authority

on the significant negative impact of the project on the environmental resources and on the landscape. In fact, an impact could not be otherwise mitigated by the identification of an alternative location for the project or by the provision of specific measures. (TAR Toscana, Sez. I, 1536/2009) (see also TAR Sardegna, Sez. II, 2083/2006).

A different conclusion was reached by the Regional Administrative Court of Lombardia in another case concerning the construction of a thermo-electric plant near Lodi, in the Lombardia region. Again this case involved the need to strike a balance between the environmental interests and the interests to the increase in the energy supply. In such a case, the Court upheld the Ministerial decree authorising the construction of the plant. A number of non-environmental criteria were considered in the balancing exercise. In particular, the Court considered that the project was in line with the overall objective of the Regional Energetic Programme (Programma Energetico Regionale – PER), which is to guarantee energy supply with the highest rate of efficiency; it further considered that the project responded to the PER both with respect to the location, as the PER identified the Lodi area as a priority location for the installation of new energy plants, and from the point of view of other ‘sub-criteria’, such as the degree of technological innovation with specific respect to energy efficiency and the level of emissions, as well as the utilisation of the best available technologies.

In motivating its decision, the Tribunal also positively considered the fact that both the Ministerial decree authorising the construction of the project and the EIA study presented by the project proponent addressed possible interferences with the landscape and the surrounding environment by introducing provisions aimed at reducing and minimising the impact of the project with those components and at preventing contrasts with the surrounding landscape.

The notion of ‘public interests’ and the ‘private benefits’ involved in the realisation of a project

The comparative analysis of the case-law of the Italian administrative courts also reveals a wide concept of ‘public interest’ against which to assess the benefit of a certain project. This concept includes on the one hand the public interests which are safeguarded by the EIA procedure – namely environmental protection, natural resources conservation, landscape, human health – and on the other hand the different non-environmental public interests which are generally encompassed by the general interest to the socio-economic development of the territory or of a certain area. This general interest may consist in various types of more specific interests, such as: increase in the energy supply of a certain area/population (see TAR Toscana n. 1536/2009; TAR Lombardia 5773/2007, TAR Lazio 5481/2005), improvements in the transportation and communication system (See TAR Veneto 2234/2005 as re-examined by Cons. Stato 129/2006), facilitation of new economic and production activities (see TAR Lombardia 5773/2007), etc.

ASSESSMENT OF RISKS AND BENEFITS OF THE PROJECT

Identification of risks and benefits: role of public perception and considerations

The analysis of the relevant case-law reveals that the assessment of the environmental risks of a certain project must be supported by an appropriate documentation. For instance, in the case concerning the construction of a wind plant in Tuscany, the appellant company complained about the lack of scientific support for the negative deliberation by the Region concerning the construction of the plant. The claim however was rejected by the Tribunal which considered

that both the ecological relevance of the area and the risk for the ecosystem deriving from the proposed project were adequately proved (see TAR Toscana, 1536/2009).

Assessment of environmental risks and benefits of a certain project: qualitative vs monetary assessment

In the comparative evaluation of the different interests at stake, both environmental risks and socio-economic benefits of the project are assessed on a qualitative basis, rather than in monetary terms.

Assessment of the environmental risks

Environmental risks are considered in terms of the significant negative impacts on the natural resources (fauna and flora species) of a particular area or on the landscape (“alteration of the visual perception of the landscape”) [TAR Toscana, 1536/2009].

In the assessment of the degree of the impact caused on the environment, a special relevance is attributed to the ecological significance or the landscape value of a certain area. When the project affects areas that have a special ecological value – as they are the habitats of particular endangered species – or areas that are considered as of Special Community Interest (SIC), the valuation is normally stricter.

In a case concerning the operation of a landfill, the Regional Administrative Tribunal of Tuscany (TAR Toscana, case 17/2010) examined the decision of the regional administrative authority to exclude such a project from the EIA. The Tribunal stated that in order for a project to be excluded from the EIA it is necessary to ascertain, through an accurate analysis aimed at obtaining all the necessary cognitive elements, the absence of significant environmental impacts. This analysis must be conducted in light of specific evaluation criteria as defined by the law. In the specific case, the ‘screening’ phase must take into account the ecological sensitivity of the geographical area affected by the project, the regeneration capacity of the natural resources, and the destination of the area (eg. whether it is classified as a protected area). On this basis, the Tribunal annulled the administrative authority’s decision which had excluded the project from the EIA; the Tribunal based its decision on the fact that the special status of protected area should have been properly taken into account in the assessment of the environmental risks and impacts of the project on the area.

Assessment of the Socio-Economic benefits

Similarly, the economic, social and other benefits accruing from the realisation of a certain project are normally expressed in terms of contribution of the project to the achievement of certain objectives, as identified by the law or by documents and strategies concerning territorial and urban planning.

For instance, in a case concerning the construction of a termo-electric plant in Lombardia (Lodi area) (TAR Lombardia 5773/2007), the Regional authority based its positive decision on the project elements that are in line with the objectives of the regional energy programme (energy supply, use of the best technologies, utilisation of a site already existing for similar purposes etc.), therefore contributing to their achievement.

Need for a thorough and rigorous assessment of the benefit of a certain project vs the political discretionary power: the case concerning the construction of the A-31 highway

It appears from the analysis of the relevant case-law that the Courts are not always able to conduct an appropriate scrutiny of the public authority's assertion as to the benefits of a certain project in terms of its contribution to the achievement of a specific public interest. A major limit to the judicial review of the competent authority's decision may be sometimes represented by the political nature of such decision. Especially for bigger project consisting in the construction of large infrastructure, the decision of the competent administrative authority may be influenced by political considerations, falling within the broad discretionary power of the competent public authority, with evident limits for a comprehensive judicial review. This aspect was quite evident in the case concerning the completion of the **A-31 highway** in northern Italy linking Trento-Vicenza and Rovigo.

In such a case, a number of NGOs challenged the Presidential Decree (decreto Presidente Consiglio dei Ministri) authorising the project before the Regional Administrative Court of Veneto (TAR Veneto, 2234/2005). The case typically involved the competing interests to the protection of the environment and the territory on the one hand, and to the economic development (in terms of improvement of communication and transport in the region, and more generally its contribution to the economic development of the region).

Faced with these opposite concerns, the Court acknowledged the lack of appropriate arguments and factual elements supporting the need for such a project as well as the lack of appropriate reasoning justifying the prominence of economic values over the protection of the landscape and environment. On this basis, the Court annulled the decision, considering it as a mere assertion which did not properly take into account to the need of carefully evaluating and balancing the competing interests on the basis of supporting objective elements (see also, for a similar conclusion the decision of TAR Puglia, 894/2008, annulling the decision to authorise the construction of barriers on the maritime littoral area).

Against this decision, the proponent lodged an appeal before the Supreme Administrative Court of Italy (*Consiglio di Stato*), which reversed the decision of the lower administrative tribunal (TAR Veneto). One of the arguments of the defendant company, which was accepted by the *Consiglio di Stato*, was that the decision at stake was substantially **a political act**, expression of the broad discretionary power of the Government, which, as such, could be subject only to a limited judicial review. (*Consiglio di Stato*, 129/2006).

ROLE OF MITIGATION AND COMPENSATION MEASURES

The analysis of the case-law shows that the prescription of appropriate compensation and mitigation measures to be taken in the realisation of a specific project is positively considered as reducing the environmental risks.

In a case concerning the authorisation to the operation of a landfill, the Regional Administrative Tribunal affirmed the acceptability, within certain limits, of certain types of environmental impacts, provided that they can be limited and contained by the adoption of appropriate mitigation measures (TAR Toscana n. 17, 2010).

Therefore, the identification of the possible environmental impacts of a project and the provision of appropriate containment and mitigation measures operates *ex ante*, and plays a relevant role in assessing the acceptability of the project, in the light of a comparative evaluation and balancing of its possible environmental risks and the socio-economic benefits deriving from its realisation.

Similarly, in a case concerning the construction of an electric line passing through an area classified as a SIC (TAR Piemonte, 234/2004, the Regional Administrative Tribunal

positively evaluated the introduction of specific compensation measures. Therefore, it rejected the recurring part's allegation whereby the project had not adequately taken into account the need to protect the local natural resources.

STANDING

Under Italian law, and according to a consistent case-law, both private parties and NGOs have legal standing in administrative proceedings to challenge decisions concerning the authorisation of projects likely to have adverse environmental impacts. Such a right to standing may be based both on the protection of a private interest likely to be affected by the decision (in the case of private parties: see TAR Toscana, 17/2010, concerning the right of a private resident near the area where a landfill was supposed to operate to bring an action against the administrative authorisation), as well as on the defence of collective interests for the protection of the environment.

In general terms, as regards NGOs in particular, the Italian case-law is consistent in admitting the possibility to challenge an administrative decision having adverse environmental impact only for those NGOs and private and public associations which have the protection of the environment as a "statutory" objective.

In any case, environmental NGOs and associations may act to defend "diffuse interests" to the protection of the environment only when the challenged decision is likely to affect the environmental resource specifically and positively protected by the law and not in order to generically defend the environment. Within these limits, however, there are no limitations as to the types of arguments and criteria on which they base their claims, which can well include non-environmental criteria (TAR Toscana, 1651/2008).

ALTERNATIVES

The analysis of alternatives under Italian law will be limited to the EIA legislation and some of the relevant related case-law.

The relevant Italian legal framework on alternatives (EIA legislation)

Part II of the Legislative Decree 152/2006, implementing the EU legislation on Environmental Impact Assessment, include the obligation for the operator and the competent authority to consider the alternatives to the project proposal.

In particular, art. 22 of the Legislative Decree specifies the contents of the study on EIA of a proposed project. The study, which is presented by the project proponent, shall include "a summary description of the main alternatives taken in consideration by the project proponent, including the so-called 'zero option', and shall indicate the reasons for the choice from the point of view of its environmental compatibility". Moreover, Art. 21 of the Legislative Decree also places on the competent authority to consider the alternatives, including the zero alternative, during the consultation with the operator concerning the approval of the project.

The relevant case-law (on EIA)

The referred relevant case-law on EIA further illustrates the scope of the alternatives and their role in the balancing process and in the procedure leading to the approval/denial of a certain project proposal.

Normally, the alternative options are proposed by the operator, in line with the requirements of the law. It is the responsibility of the competent public authority, through the *Conferenza di Servizi*, where all other interested public authorities are involved and the general public is informed and consulted, to evaluate the available alternatives.

Normally, the specific available and practically feasible alternatives within the same project are considered. Not the possibility of a different project. The zero-option must be also taken into account in the evaluation process.

In general terms, the comparative evaluation of the alternatives should be used in order to select the alternative which has the lowest impact on the environment and the territory (see TAR Puglia, 894/2008 and TAR Lazio 6076/2002).

However, the competent authority has a broad discretionary power in analysing the alternatives and may also take into account general land planning instruments and economic or energy plans. For instance, in the case concerning the construction of a thermo-electric plant near Lodi (TAR Lombardia, 5773/2007), it appears that the decision of the Regional authority to authorise a specific project, as well as to the exclusion of the alternative options – and the alternative locations – identified by the project proponents was made on the basis of the criteria contained in the Regional Energy Plan. The plan, indeed, indicated the Lodi area as one with a high priority for the development of such a project. Similarly, the exclusion of the ‘zero alternative’ was justified with the prevalent need to increase the energy supply of the Lombardia Region, which was deemed to be insufficient by the Regional authority.