COUNTRY REPORT: ITALY

Italian Environmental Law Development in 2013

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The Difficult Balance Between Economy and Environment: The Role of the Courts

The 2012 Italy country report[1] underlined the important role of the Courts in controlling and interpreting Italian environmental law in a context of economic crisis. This assertion is now confirmed by a recent judgment of the Constitutional Court No. 85 of 9 May 2013. The judgment refers to a conflict of competence between the Government and the Criminal Court. The judgment of the Constitutional Court arose in the context of the Taranto Criminal Court ordering the closure of a major Italian plant, the steelworks firm ILVA Ltd. of Taranto. In this regard, the Government has been accused of adopting laws in conflict with precautionary measures adopted by the Criminal Court to ensure environmental and health protection against industrial air pollution. The Criminal Court of Taranto adopted precautionary measures to stop ILVA's production on the basis that the plant's emissions were exceeding air pollution emission limits. At the same time, precautionary measures were adopted to stop the sale of ILVA's products.

ILVA of Taranto, at first a state-owned company but since 1995 a company in the private sector, is the most important European steelworks firm. The plant was built in the Sixities; initially under public control, and then bought by private parties in 1995. Today, it is an important source of employment for South Italy, especially for the Region Puglia. The court order for the closure of the plant carried with it significant risks for employees as the owners threatened the final closure of the plant.

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[1] C. Petteruti, Italian Environmental Law Developments in 2012, IUCN eJournal 4, 2013.

For this reason, the Italian Government adopted a "Decree-Law" (a regulation by the Government having the force of a law), commonly referred to as "Save-ILVA Decree",[2] providing the appointment of a Supervisor to manage the plant. The Decree provides that the Supervisor must control the adoption of measures for stopping pollution. It introduced the notion of "plant of national strategic interest" identified by a Decree of the President of the Council of the Ministers. In this regard, the Decree provides that the Minister of Environment, when reassessing the integrated environmental authorisation, can authorise to stay production for a period not exceeding 36 months. This authorisation is dependent on the condition that the requirements contained in the reassessment provision of the "integrated environment authorization" (IEA) are fulfilled.[3] In any case, the Decree provides that it must be ensured the most adequate environmental and health protection, according to the best available technology is implemented.

Referring to the Decree-Law, the Criminal Court raised the conflict of competence, requesting a judicial review by the Constitutional Court on the basis that the Decree-Law would expropriate judicial function, inhibiting the effectiveness of precautionary measures. According to the Criminal Court, the Government would have modified a judicial measure through a legal measure which is formally a law but substantially an administrative act regulating a specific case.

Italian Government Action to Support Plants of National Strategic Interest in Crisis

During 2012 and 2013 the Italian Government policy has been characterised by the adoption of an "extraordinary legislation" implemented to address the environmental and employment crisis of the ILVA's plant. At the same time, the Government introduced legislative measures aimed at promoting the recovery of the enterprises in crisis, especially for plants of national strategic interest. *The Decree-Law No. 207/2012* (then transformed into *Law No. 231 of 24 December 2012*), *the Decree-Law No. 61/2013* (then transformed into *Law No. 89 of 3 August 2013*) and *the Decree-Law No. 101/2013* (then transformed into *Law No. 125 of 30 October 2013*) can be located in this sphere of operation.

The first Decree-Law has introduced a review procedure of the IEA. Indeed, the IEA is an administrative authorisation required by law for certain kinds of plant which could have an

[2] Decree-Law No. 207 of 3 December 2012 then transformed into law No. 231 of 24 December 2012.
[3] The Decree-Law No. 207/2012 introduces an administrative act of second degree which is a reassessment of a previous IEA. The reassessed IEA authorizes an industrial plant to carry on the industrial production for a time limit.

environmental impact.[4] The new IEA reassessment procedure is applicable to the plants which are in crisis and have been identified as being of "national strategic interest" by a Decree of the President of the Council of the Ministers. *The Decree Law No. 207/2012* does not provide a definition of the term "crisis" and does not identify the characteristics which would qualify a plant as being of "national strategic interest". It merely provides that the IEA review procedure may be utilised in situations where there is a need to protect jobs. This applies for plants which have provided employment to at least 200 workers during the preceding year. During the IEA reassessment procedure, the Ministry of the Environment is empowered to authorise the continuation of production for 36 months. In this case, the reassessment provisions establish the measures for environmental and health protection according to the best available techniques. These provisions can be applied even in cases of judicial order of attachment. Any violation of the measures contained in the reassessment provision attract the application of a new administrative fine, equal to 10% of the turnover of the last financial statements, in addition to any other administrative sanctions provided by law.

The Decree-Law No. 61/2013[5] was also introduced to address ILVA's emergency, providing for the supervised administration in cases of an environmental emergency caused by the activities of a plant of national strategic interest (as identified by *the Decree Law No. 207/2012*). Indeed, the Decree provides that a plant of national strategic interest can be placed under the administration of an external commissioner should it fail to adopt the IEA measures.[6] It is necessary for this purpose that the plant has no less than 1000 workers,[7] and there must be repeated contraventions of the IEA provisions. The commissioner is appointed by a Decree of the President of the Council of the Ministers. They replace the council board of the enterprise for 12 months (the term of office may be extended for up to 36 months) and are endowed with the power to apply the measures provided by IEA. The same Decree provides for the appointment of three experts[8] who have the task of drafting an environmental and health protection plan and a strategic business plan. The purpose of the

[4] The plants subjected to the IEA are identified by the Law No. 152 of 3 April 2006. The law is flanked by regional laws that identify the authority who has competence to release the authorization for the plans operation.

[5] The Decree-Law has been adopted by the Government as a result of ILVA's violations about the IEA reassessed provisions. These violations have been detected by the National Institute for Environmental Protection and Research and the Regional Agency for Environment which has reported to the Guarantor.

[6] The violations are detected by the National Institute for Environmental Protection and Research and the Regional Agencies for Environment jointly with the involved enterprise.

[7] The Decree-Law No. 61/2013 introduces a dimensional parameter (1000 workers) higher than the Decree law No. 207/2012 (200 workers).

[8] The three experts are appointed by the Minister of the Environment, after consultation of the Minister of Health, among environmental and plant engineering experts.

former plan is to ensure that the IEA measures are implemented, while the latter plan provides for the measures necessary to ensure the continuation of production in respect of health and environmental protection. This last plan is an instrument to ensure the industrial production, whose income is aimed towards financing the actions needed to address the environmental emergency.

The most interesting part of this Decree-Law is article 2. It provides expressly that all ILVA's plants are subjected to the supervised administration in case of environmental emergency.[9] Thus, article 2 provides that the assessment procedure of IEA violations does not apply to ILVA due to evidence of extraordinary need and urgency in this instance.

It is therefore clear that *the Decree-Law No. 207/2012* and *the Decree-Law No. 61/2013*, although they introduce general provisions, contain provisions specifically addressed to the environmental emergency caused by ILVA. Moreover, it is clear that the Decrees-Law provide a combined effect between an administrative act and the law referring to ILVA's plants.[10]

Finally, *the Decree-Law No. 101/2013* (article 12) provides the authorisation of building and managing a landfill waste site inside ILVA's plant. The Decree considers the authorisation useful for the fulfilment of the environmental and health protection plan provided by article 1 of *the Decree Law No. 61/2013*.[11]

[9] The Decree-Law modified the article 3 of the Decree-Law No. 207/2012 (which defines just the ILVA's plant of Taranto as a plant of national strategic interest) extending to all ILVA's plants the qualification of "plants of national strategic interest".

[10] In this regard, E. Frediani, Autorizzazione integrata ambientale e tutela "sistemica" nella vicenda dell'Ilva di Taranto, conference proceedings on "Il caso Ilva: nel dilemma tra protezione dell'ambiente, tutela della salute e salvaguardia del lavoro, il diritto ci offre soluzioni?", 15 March 2013, www.federalismi.it

[11] The authorised landfill waste are provided for the waste disposal produced by ILVA's plant The Decree-Law provides that the construction and management technique of landfill waste are defined by a Decree of the Minister of the Environment to ensure an adequate standard of environment protection.

The Government's Action Reviewed by the Constitutional Court

The judgment of the Constitutional Court No. 85 of 9 May 2013 regarding *the Decree-Law No. 207/2012* confirms the constitutional compatibility of the emergency Government action with respect to:

- the conflict of competence between legislative and judiciary power;
- the juridical nature of the ILVA's integrated authorisation; and
- the balance between constitutional values.

The conflict between legislative and judicial power, from the point of view of the Criminal Court, arose from the introduction of a legal measure which, in the same regulatory framework, would have modified precautionary measures in conflict with the order granted by the Criminal Court. At the same time, *the Decree-Law No. 207/2012* represents a violation of the principle of natural justice, providing only an administrative sanction against IEA violations, which limits the right to judicial protection of health. Simply put, the Decree-Law does not realise an adequate balance between the right to health and environment, on the one hand, and the right of private economic initiative on the other. The last objection is supported by the argument that there is a hierarchy of rights in the Italian Constitution. In terms of this hierarchy the right to health including the right to a healthy environment supersedes that right to private economic initiative. This approach did not find the Constitutional Court's approval. Instead, the Court underlined the fact that in the Italian Constitution there is an integrated relationship between the different fundamental rights. For this reason, it is not possible to identify a hierarchical relationship between constitutional rights. According to the Constitutional Court, it is possible to balance the rights involved. The qualification of health and environmental protection does not imply their supremacy over the other constitutional rights and principles. It means that health and environment protection cannot be sacrificed in the face of others' constitutional rights. Thus, there is a dynamic point of equilibrium between the constitutional rights and principles that must be defined according to the principles of proportionality and reasonableness.[12]

With this "dynamic perspective" of fundamental rights, the Constitutional Court affirmed the dynamic nature of the IEA *as per* the censured *Decree-Law No. 207/12*. IEA contemplates

[12] The Constitutional Court judgment No. 264 of 28 November 2012 states that law protection must always be systemic and unfractionated into a series of uncoordinated rules. In fact, the lack of coordinated rules involves the unlimited expansion of just one right to the detriment of others.

an emission reduction program which requests a periodical review according to latest technologies.[13] Thus, the Court identified the reassessed IEA as the administrative act through which it is possible to balance acceptability and risk management, on the one hand, and human health and environmental protection on the other. Thus, the Court confirmed that when there are critical issues in the first IEA, an administrative procedure of secondary degree is triggered (the reassessed IEA procedure). This situation enables a reassessment procedure aimed at examining the inefficiencies of the first IEA and introducing new measures to ensure pollution reduction.

Therefore, according to the Constitutional Court judgment, *the Decree-Law No. 207/2012* establishes a combination between an administrative act (the reassessed IEA) and a legal provision "which takes as its starting point the new balance between production and environment outlined in the reassessed IEA". For this reason, the Court did not accept the argument that the IEA provided by the Decree-Law would be an act having the force of law.[14] In the same way, the Court confirmed the constitutional compatibility of the Decree-Law. This compatibility must be assessed with reference to the content of the law in order to avoid any unequal treatment.[15] Thus, the criteria for the legislative choices and the implementation modalities to apply must be indicated by the law itself. In this regard, the Constitutional Court considered the Decree Law compatible because it refers to ILVA's plant as being of national strategic interest by virtue of the environmental emergency and employment crisis.

Conclusion

The Constitutional Court acknowledged that *Decree-Law No. 207/2012* and the intervention of the Government were for reasons of employment emergency. The economic crisis prompted the Executive Power to adopt measures to protect the livelihoods of a large number of people. The support of the constitutional judge in the case of ILVA is confirmed by the same judgment of the Constitutional Court which referred to the existence of a dynamic

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[13] The article 29-*octies* of the "Legislative Decree" No 152/2006 (in transposition of the Directive 2008/1/EC concerning integrated pollution prevention and control) provides that IEA must be reassessed: i) for emergency pollution; ii) for significant changes about best available technologies (BAT); iii) for requirements related to security plant; and iv) for new national or community law. In this contest, the Minister of the Environment can authorize the operation of the plants which are of the national strategic interest for a time of 36 months.

[14] Among the different arguments proposed by the criminal Court about the unconstitutionality of the Decree-Law No. 207/2012, they refers to the nature of Decree as act having force of a law to underline the violation of the article 113 of the Italian Constitution. Indeed, the article 113 refers to the right of challenging administrative acts in front of the administrative courts.

[15] Constitutional Court No. 20 of 9 February 2012.

relationship amongst the different rights and principles of the Italian Constitution. This would seem to be in accordance with the Government of the Court's acknowledgment that an administrative procedure (the reassessed IEA) which ensures the prosecution of an enterprise causing detriment to health and environment protection is lawful. At the same time, the judgment of the Constitutional Court acknowledged the capacity of an administrative act (the reassessed IEA) to stop the Criminal Courts in suppressing environmental crimes. These elements reveal an unequal approach of the Constitutional Judge to the different fundamental rights involved in the ILVA episode.

In the current historical setting, more so than in the past, economic issues (employment, economy and development) are in a privileged position among fundamental rights. To paraphrase the famous quote, we can say that all fundamental rights are equal but some fundamental rights are more equal than others.