THE SCOPE OF JUDICIAL REVIEW OVER THE PRELIMINARY EXAMINATION IN ADMINISTRATIVE DECISION-MAKING PROCEDURE

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1. Introduction.

The judgement of the Italian Council of State, V Section, No. 5299 of 17 October 2012, concerns the environmental impact assessment (hereinafter referred to as the "E.I.A.") of a project for technological modernization and environmental upgrade of a biomass incineration plant, and the consequent permit to operate, named under Italian law "integrated environmental authorization" (hereinafter referred to as the "I.E.A.").

The E.I.A. is a decision-making procedure to check the environmental compatibility of projects for construction works, installations various, schemes or other forms of intervention in natural surroundings and the landscape, which are likely to have significant effects on the environment or cultural heritage.

Such procedures at a national level are governed by Legislative Decree No. 156 of 3 April 2006, Articles 4-10 and 19-36, implementing Directive 2011/92/EU and, where they concern projects which fall within the jurisdiction of regional authorities, they are governed by regional laws[1].

[1] Article 7(4) of Legislative Decree No. 152 of 2006 establishes that projects listed in Annexes III and IV to the same legislative Decree are subject to E.I.A. under regional law; Article 7(7) establishes that regional laws discipline the procedure for regional E.I.A. and I.E.A. in accordance with general limits referred to in Legislative Decree No. 152 of 2006, in accordance with the general principles concerning E.I.A. and I.E.A. referred to in that same Legislative Decree, and in accordance with the rules concerning administrative decision-making procedure that are compulsory for regional and local authorities, as laid down in Art. 29 of Law No. 241 of 7 August 1990.

Legislative Decree No. 152 of 2006 enjoins that the proposer submit an environmental impact study to the authority. This study shall contain a description of the project, the information essential for an assessment, a description of the main alternatives and of the "zero alternative", and details of monitoring measures (Art. 22 of Legislative Decree No. 152 of 2006).

The presentation of the environmental impact study is followed by a public consultation, during which anybody can access documents and submit comments, and during which public administrations can express their opinion.

This procedure ends with an environmental compatibility declaration, which states the conditions for execution of the project, and the monitoring and control measures.

The I.E.A., by contrast, is granted after a decision-making procedure to check the environmental compatibility of an activity. At a national level this procedure is governed by Articles 4-10, 29 bis-29 quattordecies, 33-36 of Legislative Decree No. 152 of 2006, implementing Directive 2010/75/UE; with regard to certain activities indicated in the same Legislative Decree, the I.E.A. is governed by regional laws[2].

If the project is subjected to E.I.A, the I.E.A. follows on the E.I.A. and, in specific circumstances, the E.I.A. may substitute for the I.E.A.

The authorization application contains, *inter alia*, a description of the installation and its activities, and the main alternatives to the proposed technology, techniques and measures as studied by the applicant.

At a later stage, there is a public consultation during which anybody can access documents and submit observations, and a consultation of public administrations involved in an "interdepartmental meeting". The authorization establishes the operating conditions and, in particularly, sets emission limit values for pollutant substances.

In E.I.A. and I.E.A. decision-making procedures[3] the public administration exercises two kinds of discretion: technical discretion and administrative discretion.

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[2] Article 7(4-ter) of Legislative Decree No. 152 of 2006 establishes that the I.E.A. for projects listed in Annex VIII that are not indicated in Annex XII is governed by regional laws; see footnote No. 1 for the limits of these laws.

[3] In the Italian legal system, administrative decisions were originally unilateral decisions, and not subject to judicial review.
Administrative acts preceding adoption of a final administrative decision (the act that has legal impact upon third parties) were internal to the administration, because of the authoritarian concept of relations between State and citizen, in which safeguarding of the citizen in terms of knowing about and participating in administrative decision-making procedure was not held to be important and there was no judicial control over the final decision.

Technical discretion consists in the possibility of the public administration choosing controvertible and not certain technical and scientific criteria, via which to examine the factual situation.

After these technical assessments, the public administration with the final decision makes a choice - that is, it exercises administrative discretion - in which it balances interests, the primary public interest (i.e. the interest identified in the law conferring the power, precisely designed to pursue this interest) and the public and private secondary interests. According to case-law, «an E.I.A. is not to be interpreted as confined to checking the abstract environmental compatibility of an installation, but as a comparative analysis weighing the environmental sacrifice against the economic and social benefit, considering feasible alternatives and the zero alternative»[4].

In carrying out this balancing feat, the public administration has to choose in accordance with the factors presented by the concrete situation.

If such balancing is lacking, the final decision is considered illegal, because it constitutes a "misuse of power", and hence it can be annulled by administrative courts.

Ever since the 1930s, in case-law and in legal theory there has arisen the idea of an administrative decision-making procedure, based on the view that, to be valid, an administrative decision must pursue the general interest, entailing objectives defined in law. Hence, administrative acts preceding the adoption of a final administrative decision have become of legal significance, verifiable and subject to jurisdiction; in point of fact, the grounds of the administrative decision are formed in the course of those acts. The administrative decision-making procedure consists in a sequence of preparatory acts right up until the final decision, and an illegal act renders the final decision illegal.
The rules on administrative decision-making procedure have two main rationales. The first is to safeguard those who are the object of decision and persons involved in the procedure. For this reason they are allowed to participate in administrative decision-making procedures through representation of their interests (during the preliminary examination they may present observations and documents that the administration is bound to consider); and for this reason decisions are subject to judicial review, to verify whether the sequence of procedural acts was in conformity with the law.
The second rationale is based on the principle of good administration. This allows for consideration and a better evaluation of all facts and interests involved, as well as coordination between public administrations, which can present opinions, conclude agreements and consult together.
In 1990 the General Law on Administrative Procedure (Law No. 241 of 7 August 1990) was passed, governing the sequence of administrative procedural acts, and confirming the principles outlined by case-law. The content of this law complements other laws regulating individual procedures, such as environmental procedures.

[4] *Consiglio di Stato*, sec. IV, 5 July 2010, No. 4246, in *Foro amministrativo Consiglio di Stato,* 2010, 7-8, 1419; in this judgment it is claimed that the public administration can arrive at "a negative solution if the intervention proposed causes an environmental sacrifice that is greater than is necessary to fulfil the scope of the project; for this reason a public administration may refuse to authorize projects that will cause an environmental sacrifice, and these can be substituted by more environmentally friendly solutions, in accordance with the principle of sustainable development, which rules the weighing of interests".

There is a misuse of power when the public administration's decision has an aim other than that for which it was granted by law.

When checking for the presence of any such defect in the decision, the administrative court has to verify whether the public administration has weighed all the facts and interests involved, and if it has reasonably balanced them, following the administrative decision-making procedure.

That is the reason why the preliminary examination is central to the whole procedure: at this stage, the factual and legal particulars of the situation on which the administrative decision will bear, along with the interests involved, are identified and evaluated for final decision.

A defect in the preliminary examination of discretional decisions makes the final decision illegal and annullable[5]. Case-law has identified symptoms of misuse of power, and states that these exist when facts are misinterpreted or the preliminary examination is incomplete.

All of the above refers to administrative discretion; case-law on the judicial review of technical discretion has evolved in its turn.

In actual fact, technical discretion was initially considered not subject to review by an administrative court, given that it was deemed to fall under "administrative opportuneness", which is the field in which public administration can choose the most opportune solution among several lawful solutions, and such choice is not subject to judicial review on the principle of separation of powers, according to which administrative power is to be exercised exclusively by public administration[6].

In due course, technical discretion was lumped with administrative discretion, and became subject to extrinsic judicial review, from the standpoint of logicality and reasonableness; therefore, the court might only perceive the symptoms of misuse of power.

In this way the court restricted its power to examining documents, administrative acts preceding adoption of the final administrative decision, the final decision, and the reasoning behind adoption of the final decision, in order to note if there was any contradictory statement of reasons, manifest unreasonableness, or incorrect factual conditions: the technical evaluation by the public administration was

[5] Law No. 241 of 1990, Art. 21 octies, establishes that a decision constituting a misuse of power can be annulled.

[6] That is not the case for some subjects, listed in Art. 134 of Legislative Decree No. 104 of 2 July 2010 (Code of Administrative Procedure), on which the administrative court can review administrative opportuneness: these subjects concern the implementation of an enforceable judgment, the electoral process, financial penalties, disputes over field boundaries, refusal of cinematographic authorization.

considered to be based on expedience, which the court was not empowered to review.

The absence of any comprehensive review was also due to the inability of the court to order a technical expert's report[7].

Subsequently, Legislative Decree No. 80 of 31 March 1998 as regards subjective rights, and Law No. 205 of 21 July 2000 as regards all disputes assigned to the administrative court, introduced the feature of the technical expert's report (now foreseen by Art. 67 of Legislative Decree No. 104 of 2010).

At this point, part of case-law[8] argued it should be possible to assess the extent of any technical error in the public administration's evaluation, checking its reliability, the correctness of the technical criteria and of the procedure by which they have to be applied. It was asserted that the court has to know the facts on which a decision is based, in order to assess its lawfulness.

However, the majority view was that it is inadmissible for a court to override the technical assessment of a public administration: the court may only criticize the technical reliability of the public administration's evaluation[9].

Furthermore, an intrinsic judicial review concerning discretion, via a technical expert's report, is only made if the extrinsic review on the reasoning is not sufficient to establish whether the decision is lawful.

Nevertheless, when it comes to environmental decision-making procedures, the administrative court limits its review[10], affirming that «the environmental impact

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[7] In administrative procedure prior to 2000, the means of proof admissible were a request to public administration for clarification, a request for production of documents, and a request for verification from public administration of some aspects of the final decision.

[8] *Consiglio di Stato*, sec. IV, No. 601 of 9 April 1999, in *Consiglio di Stato*, 1999, I, 584.
A relevant text here reads «the judicial review is not restricted to an extrinsic examination of the discretional evaluation (using the criteria of logicality, adequacy and completeness of the preliminary examination of administrative decision-making procedure) but has to verify the correct assessment of facts, according to the parameters regulating the issue. From this point of view, and in application of the principle of effective legal protection, recognised by European law (as established by Art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms), on the one hand the court cannot replace the public administration, on the other hand the court has to evaluate if the public administration's evaluation is wrong» (*Consiglio di Stato*, sec. VI, No. 2461 of 27 April 2011, in *Foro Amministrativo Consiglio di Stato*, 2011, 4, 1333).

[9] The text reads: «case-law concerning judicial review on points of technical discretion is in favour of the court knowing the full facts, in order to verify the logicality, reasonableness, proportionality and adequacy of the decision and its motivation, the regularity of the decision-making procedure and the completeness of the preliminary examination, although the court cannot express an autonomous decision, in that it lacks the power» (*Tribunale Amministrativo Regionale* [hereinafter referred to as *T.A.R.*] Roma, sec. I, No. 32354 of 20 September 2010, in *Foro Amministrativo - T.A.R.*, 2010, 9, 2810; likewise *T.A.R.* Catania, sec. II, No. 232 of 2 February 2011, in *Foro Amministrativo - T.A.R.,* 2011, 2, 655).

assessment […] entails a high degree of administrative discretion that does not permit any judicial review, unless the decision is clearly illogical and incongruous». Hence the decision is only subject to judicial review «in case of evident illogicality or erroneous statement of facts, in which it is clear that the public administration exceeded the bounds of its discretion»[11], such as when «the preliminary examination is lacking or is inadequate»[12]; it has been stated that «a decision substantially cannot be subject to judicial review when it regards the prime importance of the landscape and the environment as recognized by the Constitution; thus in weighing private interest against public interest linked to protection of the landscape and environment, there is no obligation even to demonstrate that the sacrifice imposed on a private party is restricted to the minimum possible»[13].

Case-law has affirmed that technical discretion may be subject to judicial review «within the bounds of incorrect use of power from the standpoint of inadequacy in the statement of reasons, marked illogicality or erroneous statement of facts and contradiction in the evaluation, but the illegality has to be macroscopic and manifest»[14]. In relation to such acts, «the administrative judicial review shall concern the regularity and completeness of the preliminary examination, the non-existence of erroneous statement of facts and the consistency of the final decision with preceding acts»[15].

2. Council of State, Section V, No. 5299 of 17 October 2012: the case.

Some environmental organizations and private citizens brought an action for the annulment of the E.I.A. on a project for technological modernization and environmental upgrade, and of the I.E.A. issued by the Province of Grosseto for an biomass incineration plant. The applicants alleged *inter alia* that the preliminary examination in the decision-making procedure was inadequate with regard to identification and evaluation of the project's effects on environmental factors – as

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[10] Cf. R. FERRARA*, La valutazione di impatto ambientale fra discrezionalità dell'amministrazione e sindacato del giudice amministrativo*, in *Foro amministrativo- T.A.R.* 2010, 10, 3179.
[11] *T.A.R.* Toscana, sec. II, No. 986 of 20 April 2010, in *Riv. giur. edilizia*, 2010, 4, I, 1234; likewise *T.A.R.* Lecce, sec. I, No. 135 of 26 January 2011, in *Foro Amministrativo - T.A.R.,* 2011, 1, 256.
[12] *T.A.R.* Bari, sec. I, No. 1205 of 3 August 2011, in *Foro Amministrativo - T.A.R.,* 2011, 7-8, 2512.
[13] *Consiglio di Stato*, sec. IV, No. 4246 of 5 July 2010, in *Rivista Giuridica dell'Ambiente* 2011, 1, 111; *T.A.R.* Cagliari, sec. I, No. 883 of 9 August 2011, in *Foro Amministrativo - T.A.R.*, 2011, 7-8, 2612.
[14] *T.A.R.* Trieste, sec. I, No. 560 of 15 December 2011, in *Foro Amministrativo - T.A.R.*, 2011, 12, 3882.
[15] *T.A.R.* Torino, sec. II, No. 611 of 24 March 2001, in *Ragiusan,* 2001, 211-2, 174.

demonstrated by a number of requirements contained in the E.I.A. – and likewise the statement of reasons for the administrative decision.

The Province thereupon initiated a review procedure including a public enquiry. During this procedure analysis of the E.I.A. showed some deficiencies: specifically, deficiencies concerning: the right definition of the subject of the E.I.A., characterization of the climate and the current quality of the air, characterization of the current state of lands, characterization of the current quality of the water, the health impact assessment, impact assessment concerning the ecosystems and protected areas, impact assessment concerning local economic activities, and the agricultural productions impact assessment.

Furthermore, there proved to be some contradictions between the E.I.A. and the environmental impact study.

The outcome of this review procedure was a self-protective withdrawal of the environmental compatibility declaration, and a supplement to the preliminary examination of the E.I.A. decision-making procedure.

After approval of the preliminary examination supplement, the E.I.A. procedure ended with a declaration of environmental compatibility.

The applicants again impugned these acts, alleging that the preliminary examination was inadequate.

The regional administrative Court of Tuscany, considering that the grounds of appeal relating to inadequacy of the preliminary examination and insufficiency of motivation were well founded, upheld the appeal and annulled the E.I.A. decision and the I.E.A.

The company owner of the plant appealed to the Council of State.

The grounds of this last appeal were: an *error in iudicando* due to the lack of a proper preliminary investigation, erroneous statement of the facts and inconsistency in the statement of reasons.

In particular, the applicant argued that the judgment held the preliminary examination of the decision-making procedure to be insufficient, whereas it was complete, as shown by the documentation; furthermore, the appraisal by the judge was inadmissible: it was an appraisal which fell outside the scope of the Court's review; moreover the monitoring prescribed by the public authority would have been an appropriate cautionary measure ensuring a much-needed control over the functioning of the plant.

3. The judgment.

The Council of State dismissed that appeal.

The most interesting point in the judgment concerns the scope of a judicial review by the administrative court over the preliminary examination of an administrative decision-making procedure.

The Council of State declared that the judge of first instance, in considering inadequate the preliminary examination of the decision-making procedure, was not substituting his own evaluation for that of the public administration, but only pointing out an erroneous exercise of administrative power, since it was not sufficiently supported by a proper preliminary examination as required by law: in that way, the judge of first instance had correctly exercised his power of review.

In actual fact – the Council of State ruled – the lack of an exhaustive, full and reliable preliminary examination emerged from the reading of the supplement to the preliminary examination, and was not an independent evaluation by the judge.

The act of integration to the preliminary investigation did not diminish those deficiencies.

In particular, the supplement took account of the observations presented by the University of Florence, which noted that the kind of analysis utilized was unreliable, and the observations presented by the Regional Agency for the Protection of the Environment of Tuscany, in which certain omissions and imprecisions were revealed. The supplement observed that the complexity of the problem required more advanced tools, such as an integrated eco-toxicological procedure, different from those being used.

As regards the characterization of the current quality of the water and the health impact assessment, the supplement also highlighted the relevance of these points, and indicated ways to safeguard and contain them. Regarding the ecosystems and protected areas impact assessment, the supplement affirmed that, for a correct assessment, it would be necessary to acquire the results of monitoring before starting official operation of the plant; and it would be necessary, after the consideration of such results, to lay down a regular plan of further monitoring.

Hence, the insufficiency of the preliminary examination emerges from the supplement, which highlighted its inadequacies, and from the lack of any clear

indication of the situation (zero point) on which the project presented would have a bearing.

Furthermore, these inadequacies, rather than requiring an additional investigation, resulted in the decision to tighten up monitoring; this demonstrates the weaknesses of the preliminary examination.

In fact, even though monitoring is usually an adequate precautionary tool for stable control over the effects of plant functioning on the local environment, the increased number of prescriptions required during plant operation in order to remedy the shortcomings of the preliminary examination was tantamount, in the opinion of the judge, to contradicting the whole requirement that there be an adequate assessment of the environment via the E.I.A. procedure.

4. Conclusions.

This judgment follows the approach suggested by recent Italian case-law, which is that the court cannot substitute its evaluation for one by public administration, but may perceive, if it observes the symptoms, that a preliminary examination is not adequate, and that consequently there has been a misuse of power, causing the decision to be illegal.

In this particular case, the deficiency of the preliminary examination, according to the Council of State, emerged from a reading of the acts of the decision-making procedure, and, in particular, from the supplement to the preliminary examination, whereby the public administration noted that the type of analysis used was inadequate, but failed to arrange an additional investigation; secondly, from the provision of tightened monitoring, aimed at remedying the deficiencies of the preliminary examination.

Where there are such symptoms, the inadequacy of the preliminary examination does not emerge from an independent evaluation by the court, but from the acts of the decision-making procedure.

In this way it is confirmed that judicial review by the administrative court on discretional decisions regarding environmental matters mainly consists in ascertaining the completeness of the preliminary examination.

In the words of a recent judgment[16], judicial review by the administrative court, although originally focusing on final decisions, has extended its scope to the

[16] *Consiglio di Stato*, sec. III, No. 26 of 8 January 2013, in *Foro Amministrativo Consiglio di Stato*, 2013, 1, 96.

whole administrative decision-making procedure, through the evaluation of misuse of power, interpreted as a shortcoming of that power and not of the single act, and in particular through the evaluation of symptoms of misuse of power, as the erroneous assessment of the situation in question and the lack of a proper preliminary investigation. Case-law has evolved here based on Arts. 24, 103 and 113 of the Italian Constitution, and has led to the view that, in order to verify whether there has been a misuse of power, the administrative court may examine, not the evaluation of interests, but the existence of these interests, the completeness of the preliminary investigation and the logical consistency of the evaluation.

The need of an intrinsic judicial review was later perceived, and this has become possible through new powers of inquiry permitting more penetrating verification of the facts and the reliability of technical operations.

The outcome of this evolution can be observed in the Code of Administrative Procedure, which establishes that «administrative courts shall ensure the full and effective protection of rights in accordance with the principles of the [Italian] Constitution and European law» (Art. 1).

In conclusion, evaluation of the reliability of technical choices of the public administration lies within the bounds of a modern judicial review by the administrative court.