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EIA, SEA and IPPC[*]

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Environmental assessments - i.e. administrative procedures designed to achieve an early and integrated control of environmental effects of projects, plans, programs - is in Europe a recurring practice into public decision making proceedings, in order to make human activities compatible with a sustainable development.

Into the Italian legal system, the procedures of environmental assessments became quite common due to the transposition of dir. 85/337/EC (on the environmental impact assessment of certain public and private projects: EIA) formally achieved by the art. 6 of the l. 8 July 1986, n. 349, founding the environmental Ministry. However, the first significant implementation of the European rules about EIA has been achieved only through the d.p.r. 12 April 1996, enacted when the first directive on EIA was about to be strongly reformed by the dir. 97/11/EC (early followed by the dir. 2003/35/EC, on the participation of people in the arrangements of plans and programs in environmental matters). Anyway, the complete transposition of the directives on environmental impact

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assessment is due to the adoption of d. lgs. 3 April 2006, n. 152, otherwise known as the "environmental Code"[1].

By this act Italy has finally performed, with a significant delay, the dir. 2001/42/EC about the assessment of the environmental effects of certain plans and programs (strategic environmental assessment: SEA). The dir. 2001/42/EC defined just a minimum range of general principles on SEA, giving the States the task to plug - within 21 July 2004 - the specific European rules into the discipline concerning the national planning procedures or into other specific procedures: Italy has been condemned by the European Court of Justice for failing to promptly adopt the implementing legislation[2].

Recently, the d. lgs. 29 June 2010, n. 128 has included into the environmental Code the rules on IPPC (Integrated Pollution Prevention and Control)[3]. The d. lgs. 152/2006 (either in his original version or in the one reformed by the d. lgs 16 January 2008, n. 4) didn't include the legislative framework of this kind of act (which was already mentioned by the d. lgs. 18 February 2005, n. 59, implementing the dir. 96/61/EC)[4].

[1] See Court of Justice, 31 January 2008, *Commission v. Repubblica italiana*, C-69/07 which has condemned Italy for failing to promptly adopt the implementing legislation of dir. 2003/35/EC.

[2] See Court of Justice, 8 November 2007, *Commission v. Repubblica italiana*, C- 40/07. About the chronic Italian delay in implementing European directives in environmental matters see the report of 2006 entrusted by the European Parliament: DG INTERNAL POLICIES OF THE UNION, Status of Implementation of EU Environmental Laws in Italy (IP/ENVI/IC/2006-183), in http//www.europarl.europa.eu/comparl/envi/pdf/externalexpertise/implementation_of_eu_environmental_laws_in_italy.pdf.

[3] By this way, it has been enforced the advice of Consiglio di Stato (sez. consultiva per gli atti normativi) on the d. lgs. 4/2008, given in the Adunanza 5 November 2007, n. 3838 concerning the inclusion of the IPPC discipline into the text of the environmental Code.

[4] The dir. 96/61/EC has frequently been changed in a significant way, until the dir. 2008/1/EC have realized the "codification" of the text.

Into the part II of the d. lgs. 152/2006 there is, nowadays, a general legislative framework on environmental assessments which has been streamlined and simplified, through a better explanation of the dealings between EIA, SEA and IPPC[5].

The environmental assessments are distinguished because of their objects, their contents and their aims: the EIA is aimed at verifying the environmental sustainability of public and private projects having significant effects on the environment[6]; IPPC is aimed at preventing and controlling pollution arising from the industrial activities listed in Annex VIII of the Code: IPPC, such as EIA, concerns specific construction works or specific projects (and their substantial modifications) and provides «measures designed to prevent, where that is practicable, or to reduce emissions in the air, water and land, including measures concerning waste, in order to achieve a high level of protection of the environment»[7].

Through the abovementioned d.lgs, the legislator has confirmed the absorbing feature of EIA, stating that this act «substitutes and coordinates all the authorizations, arrangements, concessions, licensing, advices, clearances, and anyhow defined assents in

[5] The discipline on the impact assessment (known as "valutazione di incidenza") hasn't been included yet into the text of the d. lgs. 152/2006. The dir. 92/43/EC, concerning the protection of natural and semi natural habitat and wildlife (the art. 5 states the due to submit to the impact assessment any public or private initiative determining effects on the protected habitat and wildlife) in Italy has been enforced by the d.p.r. 8 September 1997, n. 357, reformed by the d.p.r. 12 March 2003, n. 120.

[6] See art. 4, par. 4 b), d. lgs. 152/2006.

[7] See art. 4, par. 4 c), d. lgs. 152/2006.

environmental field, required for the construction and the management of works or installations»[8].

According to the d. lgs. 128/2010, whereas a specific activity is subjected not on only to EIA, but also to IPPC, and whereas both are a matter for Regions and Districts, IPPC has to be included and absorbed into EIA, in order to prevent any duplication of investigating and evaluating activities[9].

The SEA is aimed at "throwing back" the step of the environmental assessment, so that the assessment is already done when global decisions - able to draw the setting of the subsequent and specific choices in the matter of territorial administration - are taken. The SEA then consists in a reasoned advice concerning the sustainability of plans and programs[10].

The d. lgs. 128/2010 has also considered that advice binding, stating that the competent authority has to review plans and programs, taking into account the contents of the advice[11].

[8] See art. 26, par. 4, d. lgs. 152/2006. The d. lgs. 128/2010 has institutionalized the use of the interlocutory conference ("conferenza di servizi istruttoria") as a way through which singulars and offices whose functions are substituted or coordinated by the EIA can take part to the administrative procedure.

[9] See art. 10, d. lgs. 152/2006.

[10] The sub- procedural feature of the SEA proceeding is the result of the changes provided by the d. lgs. 4/2008, to avoid a condemnation by the Court of Justice (*ex* art. 228 TEU, nowadays 260 TFEU) because of the non-conformity of the national discipline to the dir. 2001/42/EC. The original version of d. lgs. 152/2006 drew the SEA as an autonomous (although linked) procedure respect to the main planning procedure, stating that the SEA procedure should end with the enacting of a decision having the nature of an administrative act.

[11] See art. 15, par. 2, d. lgs. 152/2006.

In order to clarify the leadings between EIA and SEA, the abovementioned d. lgs. has denied the enforcement of SEA to the authorization proceedings concerning construction works which are able to automatically modify urban plans[12]. By this way the lawmaker intended to stop the practice - which had forged the SEA's purposes - of granting just into general planning proceedings a high level of environmental protection and a strong integration of the environmental assessments.

The reform also introduced a quality assessment during the "verification of subjection" of a certain plan or program to SEA. In case of plans and programs covering small local areas and in case of unimportant changes of environmental and territorial plans and programs, the SEA is necessary just if the competent authority considers the planned activities to have a *significant* impact on the environment, taking into account the different levels of ecological sensitivity of the areas interested by the activities[13].

Besides, the criteria for the verification of subjection to EIA have also changed. According with the reform of 2010, the competent authority is expected to control not only whether the project had a bad impact on the environment, but also whether this impact can be considered "significant"[14].

The d. lgs. 128/2010 has also modified many other important rules of the environmental Code, in order to achieve a strong simplification of the proceedings. It has been pointed out that the general discipline on administrative procedure (l. 7 August 1990,

[12] See art. 6 par. 12 d. lgs. 152/2006, stating that «the SEA concerning the localization of specific construction works is not necessary for the modifications of the territorial planning or the destination of land as resulting after the zoning variances, understanding the enforcement of the discipline about EIA»

[13] See art. 6 par. 3, and 3 *bis*, d. lgs. 152/2006.

[14] See art. 20, par. 4, d. lgs. 152/2006.

n. 241) has to be enforced – if compatible[15] - to all the verification and authorization proceedings ruled by the environmental Code.

According to the d. lgs. 128/2010: the singular can complain with the inactivity of the administration in the EIA proceedings[16]; it is also necessary to grant computer facilities in the EIA and SEA proceedings. In€ order to speed up these proceedings, the lawmaker also set stricter procedural terms, assuring – however - to the interested people the concrete chance to participate.

Beside, the reform of 2010 has cleared up the functions of the State and the other local governments, giving the Regions the power to regulate other eventual ways to select plans, programs and projects which have to be subjected to SEA, EIA and IPPC[17].

At the end, we need to remark the introduction of interlocutory conferences into EIA proceedings and the power of the competent authority to enact a decision, even in case of inactivity or dissent of one or more participating administrations[18]. It also has to be underlined that the abovementioned d.lgs. reduced the research, the prospection and the growing of liquid and gaseous hydrocarbons into the sea[19] and gave the Minister of environment the task of updating the technical rules concerning SEA, EIA, IPPC[20].

[15] See art. 9, par. 1, d. lgs. 152/2006.

[16] See art. 26, par. 2 *bis*, d. lgs. 152/2006.

[17] See art. 7, par. 7, d. lgs. 152/2006.

[18] See art. 25, par. 3 *bis*, d. lgs. 152/2006.

[19] See art. 6, par. 17, d. lgs. 152/2006.

[20] See art. 34, d. lgs. 152/2006.

An updated analysis of the contents of the d.lgs. 128/2010 concerning EIA, SEA, IPPC can be found in: R. URSI, *La terza riforma della Parte II del testo unico ambientale*, *Urbanistica e Appalti*, n. 1/2011, 13; particularly on the SEA procedure: M.L.MARINIELLO, *La dimensione procedurale della valutazione ambientale strategica: un'analisi comparata*, Napoli, 2011.