AVOSETTA MEETING Vienna – May 2018

Flexibilities with regard to meeting EU regulatory objectives and requirements

Italian Report

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Regulation has often been criticised as being too rigid, particularly with regard to the needs of businesses. As a way out, well designed exemptions have been considered a proper tool for making regulation more flexible. However, it appears that over the years, flexibility mechanisms have become ever stronger, possibly to an extent that they undermine regulatory objectives; the concept of regulation thus needs to be more thoroughly reconsidered. This is proposed as the subject of our next meeting. We will start with more general policies of prioritising economy and ecology, and then discuss various more specific instruments of regulatory flexibilities, looking at different sectors where they appear to provide illustrative examples.

Accordingly, the following questionnaire is divided into two parts: Part I includes an introductory question on policies of prioritising economy and ecology in your country. Within Part II, you are asked to answer the questions on exemplary flexibility mechanisms in the field of climate change, industrial emissions and water management. For those who feel they are in a position to spend time on top of that on the questionnaire, a set of questions on flexibility mechanisms in biodiversity management (Natura 2000) is marked as 'optional' at the end of Part II.

I. Policies of prioritising economy and ecology

In recent years, EU environmental policies have more and more been framed around an emphasis on boosting competiveness, and preventing obstacles for the single market as such and small and medium sized businesses in particular. Examples for this tendency can be found in almost every area of EU environmental policy, be it the emphasis on the creation of jobs in the circular economy package or concessions for heavy industries in the emission trading system. Looking at the inherent conflicts between the objective of protecting and preserving the environment, and economic activities, it appears that EU policy- and decision-makers believe in a need to prioritise the latter.

This, however, is not a tendency confined to the EU level. In fact, at MS level we observe similar tendencies in policy-making relating to the environment. Austria can provide some examples in that regard:

In 2017, the federal legislator adopted a law on the 'General Principles of Deregulation' aiming to ensure ia that financial impacts of legislation on businesses are assessed and must be adequate; in transposing EU law, implementing more stringent measures ('gold-plating') shall only be possible in exceptional cases. After an administrative court had annulled an EIA permit for a third airport runway based on climate change considerations and in view of the Austrian state objective of comprehensive environmental protection, a legislative initiative was passed to introduce a state objective of

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acknowledging the importance of economic growth, employment and representing a competitive business hub. For the same reason, the Austrian Economic Chambers have argued that – 'just as much as' for environmental interests – there is a need for a representative of business interests in permitting procedures in order to ensure the competitiveness of Austria as a business hub. A so-called 'Business Hub Ombudsman' (*Standortanwalt*) should thus be party to such proceedings.

Are you aware of similar initiatives, current or planned, in policy- and/or decision-making in your country which result in prioritising economic activities over environmental interests? If so, please provide examples.

I.1 Introduction

In Italian law, there are so far no specific pieces of legislation explicitly prioritising economic activities over environmental interests within an explicit deregulatory agenda. However, several economic initiatives related to the construction of major infrastructure for road, rail and energy transport (i.e. TAV – high speed railway network between Turin and Lyon; TAP – Trans-Adriatic Pipeline connecting Turkey, Greece and Albania to Italy for gas transport; Ponte sullo Stretto – the planned bridge over the Messina Strait which should connect mainland Italy and Sicily; MOSE project – a system of mobile gates aimed at protecting Venice from flooding), have been criticised and opposed by some citizens and NGOs, having been perceived as influenced by a deregulatory approach, aimed at giving priority to economic interests at the expenses of environmental interests.

I.2 The prohibition of gold plating

The practice of gold plating when transposing EU directives into Italian law has been rarely used by the Italian legislator. Since 2010, by means of an amendment introduced by art. 14 (§ 2) of Law 183/ 2010 into art. 14 (§ 24 bis) of Law 246/2005 (*Law on legislative simplification*), a general prohibition of gold plating has been officially introduced into the Italian legal system. The relevant provision reads as follows: "The acts of transposition of EU Directives cannot foresee the introduction or the maintenance of levels of regulation which are higher than the minimum ones required under the said Directives".

The higher levels of regulation are defined by art. 14 (§ 24 ter) of Law 246/2005 and include: "The introduction of all requirements, standards and obligations which are not strictly necessary for the implementation of a Directive; any extension of the scope of application of the Directive, if by so doing higher administrative burdens are imposed on the addressees of the norms; any sanction, procedure or mechanism which are more burdensome than those strictly necessary for the implementation of a Directive".

Only in exceptional circumstances, as stated by art. 14 (§ 24 quarter) of Law 246/2005, the general prohibition of gold plating can be derogated. Any proposed derogation must be duly justified on the basis of a "regulatory impact assessment" (*valutazione di impatto regolatorio* - AIR), which is disciplined by art. 6 the above mentioned Law 246/2005; only if a derogation can be justified under the criteria set by the law, the competent public administration may propose the introduction of regulatory standards which are higher than the minimum ones provided by a given EU Directive.

More recently, the general prohibition of gold plating and the related provision on the limits and modalities of the exceptions thereto, has been restated by art. 32 of Law 234/2012, the new framework law which regulates the implementation of EU law into the Italian legal system.

Despite the general prohibition of gold plating, however, a recent example of derogation to such a rule can be found in the new Italian regulatory framework on EIA, which is provided by Legislative Decree 152/2006, as recently amended by Legislative Decree 104/2017. The latter Decree has been adopted in order to update Italian legislation on EIA and bring it in conformity with the provisions of Directive 2011/92/UE, as amended by Directive 2014/52/UE. In such a context, in particular, art. 19 of Legislative Decree 152/2006, as amended by art. 8 Legislative Decree no. 104/2017, maintains the possibility for the public to participate to the "screening" procedure, which is conducted in order to determine whether projects listed in Annex II to Directive 2011/92/EU, including their changes or extensions, are to be subject to an EIA procedure. Such a duty to consult the public is not foreseen by the relevant provisions of the EU EIA Directive; therefore, it can be considered as an example of derogation to the general prohibition of gold plating.

I.3 The promotion of green economy

As mentioned above, in Italy the term deregulation is normally not used in environmental policy and law; however, there is a widespread reference to the term "green economy", which sometimes implies some deregulatory objectives. "Green economy" has emerged as a priority in policy debate in recent years and the Italian green economy strategy covers several sectors, namely: energy; greenhouse gas (GHG) emissions and ozone-depleting substances; air quality and air pollution; transport sector emissions of GHG and air pollutants; waste; water; sustainable consumption and production (SCP); chemicals; biodiversity and land use.

In December 2015 Italy adopted Law 221/2015, which aims at promoting a green economy approach; such a Law contains *inter alia* several provisions on green public procurement, which aim to encourage the use of green products and services by the public administration, while at the same time introducing, in a deregulatory perspectives, a reduction of administrative burdens and costs for the companies which satisfy certain minimum environmental criteria, are certified under EMAS or have obtained the Ecolabel certification for their products. The same approach towards the promotion of green public procurement was then restated a few months later, with the adoption of the new general code on public procurement, by means of Law 50/2016.

For instance, art. 93 of Law 50/2016 (formerly art. 16 (§ 1 a) of law 221/2015) provides that companies which are certified under the EMAS scheme (or under the scheme UNI EN ISO14001) enjoy a reduction in the amount of the bank guarantees they must provide in order to participate to public procurement bids, carry out new public procurement contracts or qualify for the renewal of existing ones. A similar benefit is given to companies which have obtained the EU Ecolabel for their relevant products and to companies which have developed a greenhouse gases inventory, under the scheme UNI EN ISO 14064-1, or which have calculated the carbon footprint of their products, under the scheme UNI ISO/TS 14067.

II. Techniques aiming at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

a) EU-ETS

In the current EU emission trading system (EU-ETS) framework, MS are allowed to use credits from outside the EU-ETS within this trading system. Those international credits result either from emission reduction projects in developing countries (Clean Development Mechanism; Art 11a EU-ETS

Directive) or from greenhouse gas reduction projects among developed countries (Joint Implementation, Art 11a EU-ETS Directive). These credits are tradable within the EU-ETS and can thus be used to comply with requirements under the EU-ETS. As of 30 April 2016 the total number of international credits (CER and ERU) used or exchanged accounts for over 90 % of the allowed maximum.

1. (How) was the possibility of using international credits transposed into national legislation?

Italy has not transposed into national legislation the possibility to use international credits as foreseen by Art. 11a of the Directive 2009/29/EC.

2. Has your country used the possibility of using international credits to comply with EU-ETS requirements? If so, to what extent? Are you aware of the reasons for relying on this possibility?

To the best of my knowledge, Italy has not used the possibility of using international credits to comply with EU-ETS requirements.

After 2020, the emissions reduction target will be a domestic one, thus the use of international credits in the next trading period of the EU ETS is not foreseen.

3. How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?

No change is foreseen for the period after 2020 in the Italian domestic policy mentioned above. I am not aware of any official discussion going on in Italy to this respect.

b) Effort Sharing (Non-ETS)

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In the current framework for non-ETS sectors, targeted by the Effort Sharing Decision (ESD), MS are provided with a range of flexibilities in order to meet their (respective) reduction targets. MS are allowed to bank and borrow their (surplus) annual emission allocations (Art 3.3 ESD) as well as to transfer annual emission allocations to another MS (Art 3.4 ESD). In addition, MS can also use international project credits from emission reduction projects in developing countries (Clean Development Mechanism) or from greenhouse gas reduction projects among developed countries (Joint Implementation) to meet their commitments under the ESD (Art 5 ESD).

In a 2016 report, the Commission finds that so far, no MS has used any of the flexibility instruments provided in the ESD, yet a change is expected in the years to come (SWD(2016) 251 final).

1. (How) were the flexibility mechanisms of the ESD transposed into national law?

Italian legislation does not regulate the flexibility mechanisms provided in the ESD.

2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

To the best of my knowledge, in Italy, none of the said flexibility mechanisms has been used so far.

Support for flexibility mechanisms is still high. In fact, in the current post 2020 reform of the ESD, further flexibility mechanisms are discussed. Those flexibility mechanisms include the use of cancelled ETS certificates and the use of LULUCF credits to meet ESD targets (forestry offsets).

3. How is this proposal on further flexibility mechanisms received in your country? If the proposal becomes law, would you expect your country to rely on those flexibility mechanisms in the future?

On the basis of the information obtained from the Italian Ministry for the Environment, Land and Sea on this issue, Italian authorities are considering the possibility to promote in the future the use of LULUCF credits for compliance. However, it should be highlighted that, according to Annex III of the Proposal for EU Regulation on Member States GHG emission reductions from 2021 to 2030, the proposed maximum net amount of removals from forestry and related activities which will be allowed to be used for compliance under the new planned flexibility mechanism is limited for Italy to 11.5 million tonnes of CO_2 equivalent (that corresponds to a maximum annual flexibility of 0.3% compared to the planned 2030 target for Italy). Therefore, it seems that the use of this new planned flexibility mechanism and its relevance for compliance purposes will remain in any case very limited.

2. Exemptions from regulatory directives

a) Water Framework Directive: Establishing less stringent environmental objectives[1]

The Water Framework Directive (WFD) establishes the overall objective of achieving "good status" for all waters, in view of which, ia, environmental objectives are set for different types of waters.

Art 4.5 of the Directive provides for the possibility of deviating from these environmental objectives set by the Directive with regards to specific bodies of water which are affected by human activity or when their natural condition is such that it may be unfeasible or unreasonably expensive to achieve good status. Such less stringent environmental objectives may only be set after evaluating other options and measures are taken to ensure the highest quality status/the least deterioration possible, and all practicable steps are taken to prevent any further deterioration of the status of waters.

MS are required to include the establishment of such less stringent environmental objectives and the reasons for it in the river basin management plan for the respective river basin district (Art 13 WFD). The less stringent environmental objectives are to be reviewed every six years.

1. (How) was the possibility of establishing less stringent environmental objectives transposed into national law? Is the transposing legislation stricter than Art 4.5 by, e.g., adding further requirements for deviating from the environmental objectives?

Art. 4.5 of Directive 2000/60/EC has been implemented in Italian law by art. 77 (§ 7) of Legislative Decree 152/2006, namely the Italian framework legislation on environmental protection (so-called *Environmental Protection Code)*. Such a provision empowers the Regions to introduce less stringent conditions as compared to the general environmental objectives foreseen by the WFD. The less stringent conditions can be inserted in the river management plans and must be reviewed every 6 years.

[1] Water Framework Directive has been transposed in Italian law by Legislative Decree no. 152/2006, Part III, (*Environmental Protection Code*).

2. Have national authorities relied on the option of establishing less stringent environmental objectives in their river management plans? If so, to what extent and for what reasons? If not, why?
3. If national authorities have established less stringent environmental objectives in their river management plans, are these objectives regularly reviewed? Have such less stringent environmental objectives been adapted or even lifted?

In the practice of developing river management plans, some less stringent conditions and exemptions have been sometimes introduced. In an initial phase, the introduction of such conditions has shown a poor correlation between the specific reasons for the exception and the less stringent objective introduced. In a subsequent phase, recent practice shows a more appropriate analysis and correlation between the needs and reasons on the one side, and the choice of the less stringent objective on the other side. The competence to draft and periodically review the river management plans is decentralised and lies within the water district authorities

4. Are there possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans? If so, please describe those possibilities briefly.

Article 66 § 7 of Legislative Decree 152/2006 determines the general rules and procedures concerning the involvement of the public in the drafting, review and update of river management plans. According to those prescriptions, the competent water district authority promotes an active involvement of all the interested stakeholders and ensures that the following documents are made available to the public:

- the timetable and the agenda for the drafting of the river management plan;

- an overall provisional evaluation of the main issues and problems in the management of the specific basin;

- copies of the river management plan project.

To the best of my knowledge, no specific possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans are foreseen in Italian legislation. Therefore, the only way the public can make its voice heard is to follow the general public participation rules and procedures described above.

b) Industrial Emissions Directive: Setting less strict emission limit values[2]

The Industrial Emissions Directive (IED) requires MS authorities, in permitting industrial installations covered by the Directive, to set emission limit values which ensure that emissions do not exceed the emission levels associated with the best available techniques (BATs; Art 15.3 IED). However, if due to the geographical location/the local environmental conditions or the technical characteristics of the installation concerned achieving those emissions limits would lead to disproportionately higher costs compared to the environmental benefits, MS authorities may set less strict emission limit values as part of the permit. As part of the permit conditions, the less strict emission limit values must be reviewed in accordance with Art 21 IED.

[2] IED Directive has been transposed in Italian law by means of *Legislative Decree no. 152/2006 (Part II, Annex VIII, (Environmental Protection Code)*.

1. (How) was the option of setting less strict emission limit values as permit conditions transposed into national law? Is the transposing legislation stricter than Art 15.4 by, e.g., adding further requirements for deviating from the emission limit values?

The IED Directive has been transposed in Italy by means of Law 46/2014, which made some amendments to Legislative Decree 152/2006, the already mentioned so-called *Environmental Protection Code*. Article 29-sexies, § 9-bis of Legislative Decree 152/06 reproduces with no changes or additions the relevant provisions of the IED Directive. According to such provisions, emission limit values for specific installations are set in the permits, by taking into account the relevant guidelines issued and periodically reviewed by the Italian Ministry for the Environment, Land and Sea, pursuant to Annex XII-bis to Legislative Decree 152/2006.

2. Have national authorities relied on the option of setting less strict emission limit values in permitting industrial installations? If so, to what extent, for what reasons and for which types of industrial installations? If not, why?

According to the information received from the Italian Ministry for the Environment, Land and Sea, the exemptions granted in the permits can be estimated at less than 1% of the total industrial installation permits issued. In particular, less strict emission limit values have been accorded just in 7 cases in the glass industry sector.

3. If national authorities have set less strict emission limit values in permitting industrial installations, is there a requirement to review these permit conditions regularly?

Article 29-sexies § 9 bis of Legislative Decree 152/2006 states, in general terms, that the application of less strict emission limit values shall in any case be checked and confirmed every time the permit undergoes a review. Moreover, article 29-octies of Legislative Decree 152/2006 requires the regular renewal and review of every authorization every 10 years. This period may be extended up to a maximum of 12 years if the installation, at the time of receiving the permit, was certified under the scheme UNI EN ISO 14001 and up to a maximum of 16 years if the installation, when receiving the permit, had obtained an EMAS certificate (Regulation (EC) No. 1221/2009).

4. Are there possibilities for the public to challenge the setting of less strict emission limit values as part of permit conditions, the lack of review of such less strict emission limit values respectively? If so, please describe those possibilities briefly.

According to article 29-quater § 4 of Legislative Decree 152/2006, within 30 days from the publication of the permit request by the competent authority, people concerned can present to the competent authority their written remarks on the permit request. No specific prescriptions are given for setting less strict emission limit values or for the lack of review of such less strict emission limit values. However, the public may use the ordinary review procedures foreseen by generally applicable administrative law.

OPTIONAL:

Should you find the time, please feel free to answer the following optional questions on flexibility mechanisms in Natura 2000 management. Any answers will certainly enhance our discussions.

Exemptions and offsetting combined: the case of NATURA 2000

The overall objective of the Habitats Directive is to ensure biodiversity through the conservation of natural habitats and of wild fauna and flora; the establishment of a coherent network of protection areas – Natura 2000 sites – is the main instrument in that regard. Once a plan or project is significantly affecting such a Natura 2000 site, yet no alternative solution exists and the plan or project is in the overriding public interest, MS are required to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (Art 6(4) Habitats Directive). Essentially, an offsetting of negative environmental impacts is thus only permitted in cases where the requirements of the appropriate assessment are fulfilled.

1. How was the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment transposed into national law? Do the national rules go beyond the requirements of the Directive by, e.g. adding further requirements for compensatory measures?

   1. Answer: the obligation to take compensatory measures in view of the coherence of the network was transposed into national law according to Art 6(4) Habitats Directive).

Further avenues of offsetting are discussed within the framework of the Habitats Directive.

So-called 'mitigating measures' are designed to reduce the significant negative effect of a plan or project on the Natura 2000 site after they occur to a level where they no longer affect the integrity of the site; as a consequence, such a plan or project could be permitted based on Art 6(3) instead of Art 6(4) Habitats Directive. The Court found such measures non-compliant with the Habitats Directive as they constitute 'compensatory measures' which can only be taken as part of a permit based on Art 6(4) Habitats Directive (CJEU, C-521/12; C-387/15 and C-388/15).

In contrast, so-called 'protective measures' form part of a plan or project and are aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site in the first place. In such a case, a plan or project can be permitted based on Art 6(3) Habitats Directive. However, questions arise whether such 'protective measures' can also be taken into account in the appropriate assessment when they have not yet been implemented and their positive effect has not yet been achieved (Case C-294/17)

2. Does your national law allow for 'mitigating measures' or 'protective measures' to be considered under the rules transposing the appropriate assessment of the Habitats Directive? If so, to what effect? Can such 'mitigating measures' or 'protective measures' allow a developer not to undergo the test set out in Art 6(4) Habitats Directive?
3. Are you aware of any other options, in law or in court practice, that allow for the offsetting of negative environmental impacts within the context of the Natura 2000 framework? If so, please describe these options. If not, are you aware of discussions on this subject pushing for a change of the law?
4. Does ecological economics provide an answer? Is there any debate in your country suggesting that we should better factor in the socio-economic services of natural resources? (to be elaborated)