The environment should be protected at reasonable costs: the US Supreme Court agrees with the latest jurisprudence of the Italian Constitutional Court.

On 29 June 2015 the US Supreme Court ruled on Michigan v EPA reversing, with a 5 to 4 majority, a judgement of the Court of Appeals for the D. C. circuit. The Supreme Court held that EPA (Environmental Protection Agency), unreasonably deemed costs irrelevant in deciding to regulate toxics from power plants. This ruling express the same position adopted by recent European legislation and Italian Jurisprudence. Both EU legislation and the Italian Constitutional Court in fact recognize that, when determining emission limit values, public authorities should find an equilibrium between environmental protection requirements and economic needs.

1. The Supreme Court position: Michigan v EPA

Starting with the analysis of Michigan v. EPA, it should be specified that the Clean Air Act entrust EPA with the power to regulate emissions of hazardous air pollutants from certain stationary sources. Section 112 (n) (1) then, concerns in particular power plants and affirms that the agency shall regulate power plants only on certain conditions: EPA is required to conduct a study on the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of

pollutants and to regulate electric utility steam, if it finds, considering the results of the study, that such regulation is appropriate and necessary[1].

EPA, after having concluded the mentioned study, found that it was appropriate and necessary to regulate: appropriate on the ground that power plants' emissions posed risks for human health and the environment while at the same time controls to reduce these emissions are available, and necessary because no other requirement of the Act eliminate these risks. Additionally EPA found that "costs should not be considered" in the decision to regulate. Nevertheless the agency conducted also a parallel Regulatory Impact Analysis which estimated that the regulation would force power plants to bear cost of 9.6$ billion per year, while benefits were estimated only between 4$ and 6$ million per year (plus eventually ancillary benefits worth 37$ to 90$ per year)[2].

States, industries, and labor groups challenged EPA's interpretation of the "appropriate and necessary" requirement. The Supreme Court, required to rule on the matter, before all, underlines that, while the agency is afforded a certain level of power to interpret the law (Chevron USA Inc v resources Defense Council Inc), "must operate in the bounds of reasonable interpretations"[3]. Therefore the main issue is whether EPA interpreted section 112 unreasonably when it deemed cost irrelevant to the decision to regulate.

In this regard the Court argues that, read naturally in the context, the phrase "appropriate and necessary", includes consideration of all relevant factors, among which costs are surely comprise: " one would not say that it is even rational, never mind appropriate, to impose billions of dollars in new economics costs for a few dollars in health or environmental benefits". Consideration of costs in fact "reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and disadvantages of agency decision"[4].

EPA presents diverse arguments supporting the reasonability of its decision, but none of them was considered convincing by the majority of the Court. Among others, the agency held, that it could ignore the cost when first deciding whether to regulate power plants because it can consider cost later, when deciding how much to regulate them.

Interestingly this same argument is one of the major points raised in the dissenting opinion. The dissent in fact agrees with the majority that cost is

[1] Clean Act sec 112 http://www.epw.senate.gov/envlaws/cleanair.pdf
[2] Michigan v EPA 576 U.S. (2015), Opinion of the Court p. 3-4
[3] Chevron USA Inc v resources Defense Council Inc. 476 US 837 (1984) quoted in Michigan v EPA 576 U.S. (2015), Opinion of the Court, p. 6
[4] Michigan v EPA 576 U.S. (2015), Opinion of the Court p. 6-9

almost always an important factor in regulation and it would have been unreasonable to exclude at all cost from consideration, but at the same time argues that it is not necessary for EPA to explicitly analyze costs at the first stage. Instead, is reasonable for EPA "to find it appropriate to trigger the regulatory process based on harms and technological feasibility only, given that costs will come into play later in multiple ways and at multiple stages, before any emissions limit goes into play"[5].

The majority disputes that the agency will take in due consideration cost at a later stage and considers that, "even if cost may become relevant at a subsequent stage of the regulatory process, that possibility does not establish its irrelevance at this stage". In fact, based on section 112, "when the Agency decides to regulate power plants, it must promulgate certain minimum (floor) standards, no matter the costs; the agency may consider cost only when imposing regulations beyond this minimum standards".[6]

Therefore the Court concludes that the agency must consider cost, including cost of compliance, before deciding whether regulation is appropriate or not.

2. Judgment n. 127/1990 of the Italian Constitutional Court

If, when and how cost must be taken into account while regulating emission limits and air pollution are topics discussed also in the judgment n. 127/1990 of the Italian Constitutional Court.

In this case the question concerns mainly article 2 d.pr. 203/1988 which establishes that, in determining minimum and maximum emission limit values, one of the criteria to be taken into account is the concept of "best available techniques". The article then defines best available technique, as "verified and tested technological instrument which allows the restraint or reduction of emissions to acceptable levels in order to protect health and environment, providing that the application of these measures does not imply excessive costs"[7].

In the reasoning of the judge addressing the Constitutional Court, this rule would imply that emission limit values, being fixed on the base of the technology available, are influenced by the cost of the technology itself and therefore that the protection of public health and environment would depend on the economic possibilities to adopt or not the available techniques. Such a law would violate art. 32 (right to health) and art. 41

[5] Michigan v EPA, 567 US 2015, Kagan J. dissenting, p. 8
[6] Michigan v EPA 576 U.S. (2015), Opinion of the Court p. 11
[7] Art. 2 (7) d.pr. 203/1998 *Migliore tecnologia disponibile: sistema tecnologico adeguatamente verificato e sperimentato che consente il contenimento e/o la riduzione delle emissioni a livelli accettabili per la protezione della salute e dell'ambiente, sempreché l'applicazione di tali misure non comporti costi eccessivi*.

(which states that freedom of economic activities is subordinated to social utility) of the Italian constitution.

The Italian Constitutional Court in this judgment adopts an approach different from the one adopted by the Supreme Court. In the opinion of the Italian Court, indeed, limit emission values should always be fixed in order to guarantee an acceptable level of environment and health protection, irrespectively of cost. The cost of the measures will be taken into account only if the legislator wants to establish stricter limit values, that go beyond this minimum acceptable level.

The Court agrees that it would be unreasonable if the legislator, on one side establishes limit emission values in order to protect public health and the environment, while on the other, allows industries not to adopt measures necessary to reduce emissions if they are too costly, but underlines that this is not the only possible interpretation of the challenged provisions. Indeed, the same rule establishes that also criteria other than the best available techniques must be taken into account when determining emission limit values[8]. Additionally, the EU directive of which the discussed article should be the transposition, primarily aim to the protection of health and environment, and mentions cost mainly in order to allow companies to graduate in time the adoption of BATs (Best Available Techinques) when their adoption would otherwise results in an excessive economic and competitive disadvantage[9].

Thereafter, following a logic and systematic interpretation, the Court concludes that it must be presumed that the emission limit values established by the public authorities are sufficient to guarantee an adequate protection of health and environment. It follows that this minimum standard will be fixed irrespectively of the costs, which instead must be taken into account only in case the public authority wants to impose a more stringent limit[10].

Thus, the Court:

- On one side affirms that emission limit values cannot exceed the minimum level necessary to guarantee health and environment protection

- On the other side, considers that public authorities cannot oblige industries to use new available technologies, able to further reduce the levels of pollution, if those technologies are too costly considering the sector in which the industry operates.

[8] Corte Costituzionale, decision n. 127/1990 p.4-6
[9] 84/360/CEE, art. 12-13
[10] Corte Costituzionale, decision n. 127/1990 p. 7-8

Accordingly, the concept of excessive cost is not referred to the single industry asked to adopt a new technology but is based on the average cost in the industry sector.

3. The new EU directive 75/2010 on industrial emissions

In 2010 the EU adopted a new directive which modifies provisions on industrial emissions, both on pollution prevention and control. Directive 75/2010, art. 3, says that "best available techniques means the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions…", but at the same time specifies that available techniques are only those "developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages…[11]".

Art. 15 of the same directive then requires the competent authorities to set emission limits based on BATs[12]: in other words the availability of technologies, also from an economic point of view, is among the factors to be taken into account when determining limit emission values. Moreover, provided that a high degree of protection of the environment as a whole is achieved, the directive admits also that "the competent authority may, in specific cases, set less strict emission limit values. Such a derogation may apply only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits[13]".

In conclusion, it can be said that the mentioned directive, expresses a point of view comparable to the one adopted by the Supreme Court in Michigan v EPA.

4. Judgment n. 85/2013 of the Italian Constitutional Court

Following these changes, also the jurisprudence of the Italian Constitutional Court evolved in the same direction. For instance, in the ruling n. 85/2013 the Court finds that the protection of the environment cannot be pursued at the expenses of other principles and interests relevant at the constitutional level. The ruling concerns a plant situated in Taranto which was operating without respecting environmental standards. More specifically, the discussion is about the opportunity to leave the plant

[11] 2010/75/UE, art. 3
[12] Best Available Techniques
[13] 2010/75/UE art. 15(4)

active in the meantime of the adaptation to environmental laws, in order to safeguard thousands of jobs. The Court, in this case, recognize that the right to health, from which follows the right to an healthy environment, must be balanced with the right to work, from which follows the constitutionally significant interest to maintain employment levels [14].

Such developments can be explained thinking of the enormous improvement in technologies which are occurred in recent years. These new technologies allow levels of pollution reduction which were not even imaginable in the early nineties, but, at the same time, are extremely costly and not every company can afford them, especially in times of economic crisis. Therefore, it would be unreasonable to oblige industries to respect too high standard, as this could harm their competitiveness on the market. On the contrary, a reasonable law, must find an equilibrium between environmental protection requirements and economic needs.

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[14] Corte Costituzionale, decision n. 85/2013, p. 36.