

Courts establish environmental and safety obligations under precautionary principle

August 01 2016 | Contributed by **B&P Avvocati**

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Introduction

During the past two decades, the precautionary principle has played a major role in shaping Italian environmental and safety policies, which influence industry requirements. The precautionary principle requires that some action be taken to handle serious and identified environmental risks, whatever the level of scientific certainty around such risks and their causes. The simple message given by the precautionary principle ("Better safe than sorry") has been the main basis for the continuous adaptation of environmental legislation. However, in practice, precaution has sometimes been used by courts to impose a level of protection higher than that which is required by law. This is despite the fact that, under the Italian constitutional system, only the legislature can decide the level of protection required.

Recent Constitutional Court and High Administrative Court decisions have addressed the problem of how to establish the level of environmental protection required under the precautionary principle.

Court decisions

The Constitutional Court has established that, in the environmental and safety arena, the most important principle to follow is that of balance between conflicting interests,⁽¹⁾ so much so that some scholars argue that balance is the only right that can actually be claimed. More specifically, the court held that the right to health – from which follows the right to a healthy environment – must be balanced with the right to work – from which follows the constitutionally significant interest in maintaining employment levels.

In addition, the High Administrative Court has thoroughly investigated the legal consequences of the continuous improvements in environmental science and technology. Such improvements could, in theory, allow the industry to dramatically enhance any environmental performance. However, in several cases the cost of the measures that would need to be taken in order to achieve such a goal would be particularly high. Under EU Directive 75/2010/EC, member states can and should force the industry to adopt exclusive techniques that are economically and technically feasible, taking into consideration their costs and advantages (so-called 'best available techniques'). In accordance with this, the High Administrative Court has recently established and repeatedly confirmed that, when choosing the techniques to be imposed on an industrial plant, public authorities must:

- compare the available alternatives in order to select the least expensive option that fits the scope; and
- adopt a gradual and sensible approach.⁽²⁾

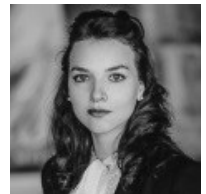
In this regard, recent decisions of the European Court of Justice and several foreign national courts (eg, in the United States, the United Kingdom and the Netherlands) have insisted on finding an appropriate balance between environmental protection and economic development.

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Comment

Recent court decisions suggest that the proportionality principle should be the key tool for identifying the level of precautionary measures to be adopted for possible environmental risks. In particular, the proportionality principle requires the best available balance be chosen in order to make environmental protection compatible with different constitutional interests and achieve the desired results through the least costly measure possible. These decisions are in accordance with similar judgments by the European Court of Justice and other foreign national courts.

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Endnotes

(1) Decision 85/2013.

(2) For example, High Administrative Court decisions 83/2016 and 2452/2014.

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