

JUDGMENT

Regional Administrative Court for Tuscany section II - Florence, 14/11/2022, No. 1303

ITALIAN REPUBLIC
ON BEHALF OF THE ITALIAN PEOPLE
The Regional Administrative Court for Tuscany
(Second Chamber)

has pronounced this

JUDGMENT

on appeal No. 556 of 2021, supplemented by additional grounds, brought by "Associazione Italia Nostra-Onlus" in the person of its legal representative *pro tempore*, represented and defended by Matteo Ceruti and Tiziana Vigni, with digital address as in PEC from Registers of Justice;

"Comitato per la Tutela e la Difesa della Val D'Elsa" in the person of its legal representative *pro tempore*, Br. Ba., En. Ba., Fa. Be., Ba. Da., El. Al. Fe., Ch. Gi., Majnoni D'Intignano di Po. Ba. Pi., Le. Ra., Ce. Ta., Santa Maria a Poneta di Vi. Su. & C. S.a.s. in the person of the legal representative *pro tempore*, represented and defended by lawyers Matteo Ceruti, Daniele Granara and Tiziana Vigni, with digital domicile as per PEC by Registers of Justice;

against

- the Region of Tuscany in the person of the *pro tempore* Council President, represented and defended by lawyer Annamaria Delfino, with digital address as in PEC from the Registers of Justice;

- the Municipality of Barberino Tavarnelle in the person of the Mayor *pro tempore*, represented and defended by Fausto Falorni, lawyer, with digital domicile as per PEC from the Registers of Justice and domicile physical address for service at his office in Florence, via de' Pucci 4;

- the Regional Agency for Environmental Protection of Toscana-A.R.P.A.T. in the person of its legal representative *pro tempore*, not represented in the proceedings;

in respect of

Distilleria Deta S.r.l. in the person of its legal representative *pro tempore*, represented and defended by lawyers Leonardo De Vecchi and Valentina Brovedani, with digital address as in PEC by Registers of Justice;

for annulment

with the application:

- of the decree of the Head of the Environmental Authorisation Sector of the Environment and Energy Directorate of the Region of Tuscany No. 2582 of 19 February 2021, concerning the updating of the single environmental authorisation of the plant of the Distilleria DETA s.r.l. in the municipality of Barberino Tavarnelle (FI), as well as for the annulment of any other prior, connected inherent, consequent and derivative acts including, where necessary, the minutes of the meetings and opinions expressed by the conference of services, including the meetings of 15 July, 9 September and 6 October October 2020 as well as the opinions of ARPAT - Florence Department including the note prot. 2020/0078824 of 16/11/2020;
- the building permit No. 2021/012 of 23/03/2021 issued by the Municipality of Barberino Tavarnelle (FI) to the company Deta s.r.l. for works of "extraordinary maintenance of the smoke and odour treatment plant (E1 emissions) with integration and replacement of technological services", as well as SUAP single authorisation No. 21/017 of 23.03.2021 of the Manager of the Environment, SUAP and SVEC Area service of the Municipality of Barberino Tavarnelle (FI) and any other deed prerequisite, connected, inherent, consequent and derivative acts, including including, where appropriate, the opinions and minutes of the Municipal Building Commission No. 2021/03 and No. 2021/04;

with the appeal on additional grounds filed on 31 May 2021:

- of building permit No. 2021/012 of 23/03/2021 issued by the Municipality of Barberino Tavarnelle (FI) to Deta s.r.l. for work on of "extraordinary maintenance of the smoke and odour treatment plant (E1 emissions) with integration and replacement of services technological services", SUAP single authorisation No. 21/017 of 23.03.2021 of the Manager of the Environment, SUAP and SVEC Area service of the Municipality of Barberino Tavarnelle, the counter-deduction to the observation prot. 5165/2021, of the counter-deduction to observation prot. 5099/2021 of any other prior, connected, inherent, consequent and including, where appropriate, the opinions and minutes of the Municipal Building Commission No. 2021/03 and No. 2021/04.

Having regard to the application, the additional grounds and the annexes thereto;

Having regard to the affidavits of the Regione Toscana, of the Municipality of Barberino Tavarnelle and Distilleria Deta S.r.l.;

Having regard to all the acts in the case;

Relator at the public hearing on 19 October 2022, Dr. Alessandro Cacciari and heard for the parties the defenders as specified in the minutes;

Held and considered in fact and in law the following.

FACT

The company Distilleria Deta s.r.l., with registered office in loc. (omissis) of the Municipality of Barberino Tavarnelle, holds the Single Environmental Authorisation issued by the Region of Tuscany with Executive Decree No. 7707 of 12 August 2016, and subsequently updated with subsequent Executive Decrees No. 11900/2016, No. 11110/2017, No. 2715/2020 and No. 15693/2020 with which specific prescriptions were introduced for the odour parameter for emission E1. The authorisation concerns the activity of distillation and processing of wine, grape marc and wine lees for the production of alcoholic distillates, grappa, brandy, grape seeds for the extraction of seed oil and calcium tartrate. The company, with an application

submitted to the Sportello Unico per le Attività Produttive (hereinafter the "Sportello Unico") of Barberino Tavarnelle on 3 July 2020, requested an update of the authorisation with a substantial modification regarding atmospheric emissions, for an increase in the production of grape marc to be processed and the consequent increase in the emission rate at point E1 up to 75.000 Nmc/h, and an emission duration of 300 days/year, as well as the physical displacement of the latter emission point E1 with a change in height from 20 to 60 metres through the construction of a new chimney 60 metres high.

After a rejection notice and the submission of integrations and written observations by the company, the services conference held on 6 October 2020 ended, on the one hand, with the affirmation that "to reduce dust emissions and the spread of odours in the surrounding built-up area, there is no other solution but to install the new electrofilter and raise the chimney by 60 metres", and on the other, with the approval of the substantial modification proposed by the company with various prescriptions. This was followed by the issue by the Municipality of Barberino Tavarnelle of building permit No. 2021 of 23 March 2021 to construct the new 60-metre-high chimney and by the Single Desk of the single environmental authorisation No. 21 of 23 March 2021.

The measures were challenged with the present appeal, notified on 20 April 2021 and filed on 3 May 2021, claiming violation of the law and excess of power under various profiles.

The Municipality of Barberino Tavarnelle, Distilleria Deta and the Region of Tuscany entered an appearance, requesting that the appeal be dismissed.

With an appeal for additional grounds, notified on 20 May 2021 and filed on 31 May 2021, new objections were raised against the building permit and precautionary protection was requested.

By Order No. 351 of 22 June 2021, confirmed by Order No. 4932 of the Council of State of 13 September 2021, the precautionary application was rejected.

At the hearing on 19 October 2022 the case was retained for decision.

LAW

(omissis)

3. It is now necessary to address the exceptions with which the defences of the resistant parties contest the legitimacy to act of the applicants.

3.1 Beginning with the position of the “Comitato per la Tutela e la Difesa della Val D'Elsa”, the exception postulates the reconstruction and identification of the concept of "collective interest".

For a long time, legitimate interest was seen in an essentially individual key and linked to the protection of positions that the individual asserts against the public administration. Jurisprudence, through an evolutionary interpretation, has paved the way for the protection of positions belonging not to a single person but to a sum of subjects.

Legitimate interest relates to a position of personal and differentiated advantage and the problem faced was to identify which subject could be the subject to whom a diffuse interest in a given social sphere could be attributed. Theoretically and abstractly, even diffuse interests can be included in the broader genre of legitimate interest in the light, in particular, of Article 2 of the Constitution which recognises the inviolable rights of persons also in social formations; for procedural purposes, however, it was necessary to identify a mechanism through which this interest could materialise in the head of a specific subject who could be recognised as having the legitimacy to act (and resist) in court. This was done through the identification of qualified bodies acting statutorily for the protection of said interests. At that moment the diffuse interest belonging to each member of the group is individualised in the head of an organisation that acts to protect it and thus becomes the bearer of a differentiated position, which can legitimise it to challenge administrative measures and to oppose actions of the public power harmful to that position. Collective legitimate interest thus materialises as a position pertaining to a plurality of subjects constituting a homogeneous category or group and organized to achieve its ends. It is distinguished from diffuse interest because the latter, although also super-individual, does not belong to a determined plurality of individuals constituting an organization.

However, at this point the need arises to develop criteria to identify which collective bodies are legitimized to appeal against measures that damage the interests they represent. The problem obviously does not concern the exponential bodies provided for by law, such as municipalities, for example, which by legislative provision are deputed to protect the interests of their territorial community, and the same applies to professional orders and colleges in relation to members of their respective professional groups.

In the course of time, various criteria were identified for this purpose.

At first, reference was made to the possession of legal personality, but this criterion was soon abandoned because it led to discrimination between recognized and unrecognized entities, whereas mere de facto entities, such as committees or unrecognized associations, can also act as the guarantors of collective interests.

Reference was then made to the criterion of procedural participation, but this too was abandoned since participation, in certain cases, is envisaged not for the purpose of protecting a specific asset but in terms of a collaborative contribution in favor of the proceeding administration. That is, there is no automatic equation between procedural participation and legitimacy to act.

The criterion in force today is that of representativeness, which must be deduced from: a) statutory provisions of the body, b) stable organizational structure, c) stable connection with the interest that is allegedly injured.

To this is added the second criterion of legislative recognition. In several cases it is in fact the legislature that provides *ex lege* legitimacy in favor of certain organizations for the protection of collective interests, as is the case for non-governmental organizations promoting the protection of the environment that are recognized under Article 13 of Law No. 349 of 8 July 1986.

The procedural legitimacy of collective organizations is therefore based on two alternative criteria: legislative recognition or territorial connection together with stability and effective representativeness of the community to which the interest allegedly prejudiced belongs.

The most recent jurisprudence remains consistent with these coordinates, establishing that *"Diffuse interest is an autonomous legal situation that is in a fluid state, "diffused" among several subjects and, for this reason, "adscriptive", that is, lacking an effective holder, and can be brought to court by a collective entity on whose behalf legitimacy is recognized to act to assert a "proprietary interest." The process of differentiating diffuse interest by attributing its ownership to a collective entity can take place through an express legislative recognition or by means of an implicit legislative provision (so-called double track), which, however, requires that the entity still meets the following cumulative typified requirements established by jurisprudence: i) the purpose of protecting such an interest is established by the statute; ii) the entity has a certain degree of representativeness and an organization that is consistently aimed at protecting such an interest; iii) the diffuse interest has features of substantial "homogeneity" among the subjects composing the "community" (Council of State, section VI, January 26, 2022, No. 530; Regional Administrative Court for Apulia, Lecce, section I, September 29, 2011, No. 1665). Moreover, the concrete representativeness of environmental associations must be assessed with regard to the existence of three prerequisites: the organizations must pursue, non-occasionally and in accordance with their bylaws, environmental objectives; they must possess an adequate degree of representativeness and stability, and they must have an area of relevance related to the zone in which the collectively used good, which is assumed to be damaged is located (Regional Administrative Court for Friuli-Venezia Giulia, section I, July 5, 2021, No. 208).*

Applying these principles to the case at hand, it must be said that the “Comitato” was formed only on 18 January 2021 and, therefore, it does not have the requirement of a stable territorial connection necessary for it to assume legitimacy as being rooted in the territory. The legitimacy of a committee is rooted on three elements: adequate degree of representativeness; stable connection with the territory of reference and action with appreciable consistency, also taking into account the number and quality of the members. Moreover, it is necessary that the committee's activity be protracted over time and that, therefore, the committee is not created to challenge individual acts and measures (Council of State, section IV, 7 September 2022, No. 7799; Regional Administrative Court for Tuscany, section II, 23 March 2022, No. 372; Regional Administrative Court for Liguria, section II, 10 February 2017, No. 95). On the contrary, this is what happened in the case at hand, where the very recent establishment of the committee easily leads to the presumption, as correctly objected by the respondents, that it was set up precisely in relation to, and against, the issuance of the measures at issue without presenting the minimum period of time of operation that would qualify it as representative of the interests of the community it claims to represent. The Committee must therefore be dismissed from the proceedings for lack of standing.

3.2 As for the plaintiffs, according to the report they produced in the file, their properties are located at a distance from the distillery of between 700 and 2200 metres. In theory, therefore, they may be affected by odorous emissions from the other party's plant since, depending on the direction of the winds, it cannot be ruled out that they may cause them nuisance and undermine the enjoyment of their property. Their right to challenge the contested measures on grounds of environmental protection must therefore be affirmed. On the other hand, the same is not true of the appeal on additional grounds challenging the building permit issued for the raising of the chimney on specifically building-related grounds, since in that case the requirement of a stable connection, understood as spatial proximity, between their property and that of the other party to the proceedings, which is an indispensable precondition for entitlement to bring proceedings in building matters, is lacking. This prerequisite is the criterion that differentiates the position of the "neighbour" from that of the *quavis de populo* and is capable of qualifying it in terms of legitimate interest, differentiating it from the generic interest in respect of legality proper to each member of the community and which constitutes an interest of fact (Council of State, Plenary Session, 9 December 2021, No. 22). The physical spatial distance of the plaintiffs' land from that affected by the chimney's raising excludes their legitimacy to act under the town-planning and building profiles, since their position is not distinguished from that of the interest, neither differentiated nor qualified, in the respect of legality by the Public Administrations.

3.3 The purpose of the “Associazione Italia Nostra”, according to Article 1 of its statutes, is to contribute to the protection and enhancement of Italy's historical, artistic and natural heritage. Instead, disputes in which specifically construction-related issues, without environmental

implications and consequences, come to the fore are outside the scope of its social purposes. It, too, is therefore entitled only to the main appeal, which concerns objections under environmental profiles to the contested measures, and not to bring the appeal on additional grounds criticising the licence issued for the raising of the chimney under purely construction-related profiles.

It follows from these considerations that the appeal on additional grounds must be declared inadmissible on the ground of lack of standing of all the appellants, and the dispute must continue for consideration of the main appeal with regard only to the “Associazione Italia Nostra” and the appellants in their own right.

(omissis)

FOR THESE REASONS

the Regional Administrative Court for Tuscany (Second section), definitively ruling on the appeal and on the additional grounds, as proposed herein, dismisses the “Comitato per la Tutela e la Difesa della Val D'Elsa”; dismisses the main appeal and declares the appeal on additional grounds inadmissible.

Condemns the appellants, jointly and severally, to pay the costs of the proceedings in the amount of €4,000.00 (four thousand/00) plus accessories by law, if and to the extent due, in favour of each of the respondent parties; no costs for the Regional Agency for Environmental Protection of Tuscany.

Order that this judgment be enforced by the administrative authority.

Thus decided in Florence in the council chamber of 19 October 2022 with the intervention of the magistrates:

Carlo Testori, President

Riccardo Giani, Councillor

Alessandro Cacciari, Councillor, Extender

FILED IN THE SECRETARY'S OFFICE ON 14 NOV. 2022.