Published on 06/30/2021 N. 04952/2021 REG.PROV.COLL. N. 08038/2013 REG.RIC.

REPUBLIC OF ITALY

IN THE NAME OF THE ITALIAN PEOPLE

The Council of State

in a judicial session (Second Section)

has pronounced the following

JUDGMENT

on the appeal number 8038 of 2013, proposed by the Comitato Comitato per la tutela dell'ambiente e della salute dei cittadini (*Committee for the protection of the environment and the health of citizens*) (formerly No-maxistalla), represented by its legal representative, represented and defended by lawyer Antonio Quarta, at whose office it is domiciled in Rome, at Via Bissolati, n. 54

against

- Municipality of Perugia, represented by the Mayor pro tempore, represented and defended by lawyer Luca Zetti, domiciled in Rome, at Via Maria Cristina, n. 8, at the office of lawyer Goffredo Gobbi;

- Regional Agency for Environmental Protection - A.R.P.A. Umbria, represented by its legal representative, represented and defended by lawyer Giovanni Tarantini, domiciled in Rome, at Via G. B. Morgagni, n. 2/A, at the office of lawyer Umberto Segarelli;

against

- Opere Pie Riunite di Perugia, represented by its legal representative, represented and defended by lawyers Matteo Frenguelli and Mario Fantacchiotti, domiciled in Rome, at Via Filippo Nicolai, n. 22

for the reform

of the judgment of the Regional Administrative Tribunal for Umbria, n. 303 of May 23, 2013, delivered between the parties.

Having seen the appeal and its attachments;

Having seen the pleadings of the City of Perugia, A.R.P.A. Umbria and Opere Pie Riunite di Perugia;

Having seen all the acts of the case;

Rapporteur in the public hearing of May 4, 2021 (held under the provisions of art. 84 of Decree Law 17 March 2020, n. 18, converted with Law 24 April 2020, n. 27, referred to by art. 25 of Decree Law 28 October 2020, n. 137, converted with Law 18 December 2020, n. 176) Cons. Roberto Politi;

No one present for the parties;

Considered and considered in fact and law as follows

FACTS

The appellant states that on October 12, 2011, Opere Pie Riunite di Perugia submitted an application for a Simplified Authorization Procedure (P.A.S.) for the construction of a biogas plant in the locality of Santa Maria Rossa in the Municipality of Perugia. The Conferences of Services, which was convened by the Municipality of Perugia, was concluded positively; and with the management determination no. 31 of November 23, 2011, the above-mentioned P.A.S. was completed.

With appeal N.R.G. 87 of 2012, the Committee for the Environment and the Health of Citizens asked for the annulment of the aforementioned decision. The court rejected the appeal and ordered the parties to bear their own costs.

Against this ruling, the present appeal, by which the criticisms articulated in the first instance are reproposed, was filed, notified on October 17, 2013 and deposited on the following November 8.

The appellant presents the reasons for the appeal by making general considerations regarding its legitimacy to act, refuting the arguments presented by the opposing parties in the first instance; in particular, arguing that its purposes would lie in the protection of the environment in the areas of San Martino in Campo and Santa Maria Rossa (and not just in the opposition to the construction of the aforementioned biogas plant).

The reasons for the appeal can be summarized as follows:

(*omissis*)

4. On December 4, 2013, the municipal administration of Perugia appeared in court, countering the arguments presented in the introductory act, and also filing an incidental appeal against the aforementioned ruling of the T.A.R. Umbria, in the part in which it did not declare the appeal inadmissible due to lack of legitimacy of the Comitato (allegedly established for purely occasional and contingent purposes).

5. Furthermore, on January 8, 2014, Opere Pie Riunite di Perugia also appeared in court. By its memorandum, it analytically refuted the reasons cited in the appeal under examination.

6. A.R.P.A. Umbria, which appeared on April 10, 2014, adhered to the incidental appeal, as above deployed by the City of Perugia; on the merits, it asked for the confirmation of the first-degree judgment, in light of the contested soundness of the arguments presented by the appellant Comitato.

7. In view of the examination of the appeal on the merits, both the City of Perugia and the Opere Pie Riunite di Perugia presented written defenses, by submissions filed, respectively, on March 26, 2021 and March 31, 2021.

By these submissions, the arguments already previously presented were reiterated, and both parties ultimately insisted on the rejection of the appeal.

8. The appeal is retained for decision at the public remote hearing of May 4, 2021.

LAW

1. The appeal filed by the Municipality of Perugia, in which it argues that the Comitato per l'Ambiente e la Salute dei Cittadini (formerly No-maxistalla) lacks standing to challenge the construction of a biogas plant in the Santa Maria Rossa area of Perugia, must be examined first.

2. The question of the standing of the association in question to challenge administrative decisions in court must be considered within the general framework concerning the issue of standing to bring legal action in administrative proceedings by associations that protect generally understood collective interests, regardless of the scope of the measures challenged.

The Court notes that, according to the principles established by the consistent case law of this Council and recently reiterated by the Plenary Assembly (judgment of February 20, 2020, no. 6), "associative entities that are included in the special list of representative associations ... or that meet the requirements established by case law, are authorized to take legal action to protect the legitimate collective interests of certain communities or categories."

This is because the representative entity - in addition to being the holder of its own legal positions as a legal person, like individual subjects of the legal order, natural and legal persons - is also the holder of:

- legal positions that also belong to each member of the community represented by the entity, which can therefore be protected both by the entity and by each individual member (in this sense, the collective interest assumes the connotation of "superindividual" interest),

- as well as legal positions that the entity holds exclusively, that is collective interests strictly speaking, whose ownership is only of the entity, precisely because they result from a process of subjectivization of interest, otherwise diffuse and undetermined (Council of State, section IV, July 24, 2019, no. 5229).

This jurisprudential elaboration comes from the experience of the legislative recognition of collective interests in environmental matters and the consequent legitimation recognized to these associations by art. 18, point 5, of Law 8 July 1986, no. 349 ("Establishment of the Ministry of the Environment and provisions on environmental damage"; provision survived to the repeal ordered by art. 318 of Legislative Decree 3 April 2006, no. 152), from which it can be inferred that the registration in the list provided for in art. 13 of the aforementioned law does not determine a rigid automatism, and the judge, as a result of a verification of concrete representativeness, can also admit to the exercise of the action associations that are not registered, according to the criterion of the so-called "double track" that distinguishes the ex lege legitimation of the recognized associations of environmental protection (which does not require verification) from the legitimation of the other associations (among many others, Council of State, Section VI, September 13, 2010, no. 6554; Section IV, October 2, 2006, no. 5760).

3. In light of these considerations, it is therefore possible to state, with reference to associations, that:

The right to take legal action is not limited to the one provided for by the law (ex articles 13 and 18 of law 8 July 1986, n. 349; articles 309 and 310 of D.Lgs. 3 April 2006, n. 152), but can be recognized on a case-by-case basis even beyond the specific hypotheses provided for by the law, although such openness should not lead to the uncontrolled proliferation of popular actions, which are not allowed by the legal system except in very exceptional cases (Cons. Stato, Sez. IV, 22 March 2018, n. 1838; id., 19 June 2014, n. 3111);

Therefore, spontaneous committees or associations of citizens can be considered legitimized to challenge measures deemed harmful to common interests if they can demonstrate possession of the substantial

requirements developed by the jurisprudence (see, among others, Cons. Stato, sez. IV, 22 March 2018, n. 1838; sez. V, 2 October 2014, n. 4928; sez. V, 15 July 2013, n. 3808; sez. VI, 23 May 2011, n. 3107; sez. IV, 19 February 2010, n. 1001).

These requirements can be summarized as follows (see Cons. Stato, Sez. IV, 2 April 2020, n. 2236):

- The existence of a statutory provision that qualifies the objective of protection as an institutional task of the organism (statutory purpose of the entity);

- Demonstration of organizational consistency, adequate representation and stable connection with the territory where the collective subject carries out the activity of protecting these interests (so-called proximity of the entity with respect to the substantial interest that is assumed to be harmed by the administrative action and in protection of which the representative entity intends to act in court);

- Prolongation of the activity over time, with the consequence that the recognition of legitimization in favor of subjects established to challenge individual acts and measures is precluded (stability of the organizational structure of the entity).

4. The application of these hermeneutic coordinates to the present case implies that the active legitimacy of the appellant (and first-degree litigant) association "Committee for the Environment and Health of Citizens (formerly No-maxistalla)," must be excluded, as it:

- does not possess the ministerial recognition prescribed by the combined provisions of Articles 13 and 18, paragraph 5, of Law No. 349 of 1986;

- was established (January 28, 2012) less than a month before the filing of the first-degree judicial appeal (February 20, 2012);

thereby not demonstrating possession of all the substantive requirements, as previously elaborated by jurisprudence.

The close temporal proximity that characterized the establishment of the present appellant Committee compared to the legal initiative taken before the T.A.R. Umbria clearly and conclusively demonstrates the direct preordination of the creation of the collective subject in question (solely) for the purpose of opposing the project for the construction of the biogas plant: therefore, such an initiative characterizes as a clearly occasional and/or contingent intervention of a plural subject with alleged aims of environmental protection, which are in reality limited exclusively to the aforementioned intervention.

5. It cannot, on the other hand, be argued that the Committee for the Environment and Citizens' Health (formerly No-maxistalla) integrates an evolutionary configuration compared to the previous "No maxistalla" Committee.

As stated by the appellant (page 11 of the introductory act), "if it is known that the committee was created to oppose the maxistalla project (so much so that it was reported by the press), it is equally obvious that the same committee then dealt with the biogas plant and the Ikea settlement with a broad aim of protection and defense of the environment of the area"; and if "the committee was only interested in these projects, this is for the simple and fortunate reason that, before then, the area had retained the characteristics of the flat Umbrian countryside and there was no need for the citizens of the area to organize a committee to protect the environment of that territory", only following the "presentation of the maxistalla and biogas plant projects, citizens were forced to question the impact of such projects and that of Ikea and have joined together and organized a committee to protect their territory".

Although the collective subject in question initially constituted itself to oppose the realization of the "maxistalla" and, subsequently, has "evolved" with the purpose to oppose to the biogas plant, the party claims that "the purpose of the committee is the protection of the environment in the area of San Martino in Campo and Santa Maria Rossa and not just the biogas plant project which is the subject of this lawsuit. In addition, the substantial activity of the Committee ... makes it clear the representativeness with respect to the interest in protecting the environment and the health of citizens".

The last statement does not raise, indeed, from the rank of an unproven assertion: rather, the statutory purposes (in addition to the conduct of the activity of the collective subject in question, as illustrated by the documentation filed in the records), are merely and unequivocally limited to opposing the contested intervention and do not extend to the more general purpose of protecting the interest of the health and environment of the communities settled in the area above.

6. As for the requirement of adequate representation, the appellant tries to establish its existence, highlighting that it has promoted "several public assemblies" and collected around 450 signatures with a petition, in addition to having presented a formal notice and having been referred to the local press.

These activities, in light of the above interpretive guidelines, are fully irrelevant in order to illustrate the essential identifying coordinates necessary for the recognition of legal standing for the purpose of soliciting judicial protection.

The appellant Committee has, in fact, failed to show sufficient representativeness, organizational consistency, and stable connection with the territory where the protection of interests takes place; as a result, it must be excluded that the Committee itself has active legitimation for the purpose of contesting, in court, the realization of a biogas plant in the locality of Santa Maria Rossa of the municipality of Perugia.

7. Further, it is worth expanding the reference framework by referring - although only for reasons of completeness - to the systematization of the matter of the enforceability of collective interests that has been carried out, in the most general terms, by the Italian Council of State, Section VI, in judgment no. 3303 of July 21, 2016.

This decision has clearly explained how and why, in progressively more stringent ways, it is correct to impose specific limits on the legal standing of private associations and committees for protecting the so-called collective interests, rightly underlined the need "*to delimit the scope of the legal standing that can nowadays be recognized to the representative entity established to protect collective interest. It is a topic that must be addressed keeping in mind the evolution that has characterized the legal system over the years, and especially in the last decade.*"

In that judgment, the appellant "*invokes ... the traditional theory according to which collective interest transforms into collective interest (and therefore into a legitimate actionable interest) "personifying" in the representative entity established to protect common interests of the group.*

The thesis, in other words, would be that diffuse interest ... would lose its "adespotic" character as a result of the constitution of an organized, stable, effectively representative entity, having as statutory purpose precisely that of protecting the interests of the reference category.

This thesis, in the opinion of the Section, cannot be accepted.

"*There is no doubt, in fact, that the theory of collective interest has had the meritorious result of allowing access to judicial protection to a wide range of meta-individual interests, often corresponding to primary constitutional values, which would otherwise have been left without adequate protection.*

The rapid evolution of the economic and productive system, which has taken place especially since the early seventies, has in fact determined the emergence of new protection needs compared to those previously known, bringing to the fore the problem of protecting a category of interests, linked to the enjoyment of collective and indivisible goods, which, as a result of that evolution, were suddenly exposed to dangers previously unknown (the theme related to the protection of the environment, which was one of the first territories of emergence of the figure of the collective interest, represents an emblematic demonstration).

In a first phase, in the face of a legal system not yet adequate to the emerging protection needs of meta-individual interests, the role of representative entities has been, as we said, decisive and meritorious, because it has allowed these interests to take on a legal dimension and to have a subjective center of reference.

Subsequently, however, over time the need to compensate for the lack of an institutional protection system has gradually diminished, because the legislator has gradually taken into account the ongoing changes and has begun to provide - introducing them by law - specific forms and methods of protection.

In this way, there has been a progressive institutionalization of that protection that was previously entrusted or left to the initiative of private groups and associations. On the one hand, many meta-individual interests have been entrusted, based on specific sectoral disciplines, to the care of public subjects specifically established, and active legitimization to act in court has been expressly attributed to these subjects (sometimes even before the administrative judge with the action of annulment) to obtain protection."

"On the other hand, the legislator, while sometimes preserving (but following its provision by law) the legitimization of private entities that express the interests of the group, has shown, however, a marked tendency to circumscribe such legitimization both on the subjective and, above all, on the objective level."

"The limitation under the subjective profile has been translated into the express recognition of the ownership of the action to associations registered in particular lists (...). In this respect, the case-law according to which the registration in the list does not determine a rigid automatism, as the judge, at the outcome of a verification of concrete representativeness, can admit to the exercise of the action also associations not registered, is well known. Nevertheless, the aforementioned regulations, by restricting the subjective legitimacy to registered associations, are the expression of a significant normative trend that cannot (and increasingly will not) be ignored in the context of a broader reflection on the role of exponential entities."

"The limitation under the objective profile has been, in turn, translated into the specific provision of the type of action that can be exercised by exponential entities."

"Therefore, more and more often, the legal standing of exponential entities finds express recognition in a precise normative discipline, which also takes care to establish who can act and, above all, the type of action that can be exercised."

The College believes that the aforementioned legislation is an expression of a general principle of the legal system aimed at recognizing the exceptional nature of the legitimation recognized to representative entities.

In other words, it seems clear that the legal system - once aware of the need to protect the types of interests that have recently emerged - is now in the process of overcoming the case-law forms of attribution of legal standing for their protection, having definitely embarked on a new, more efficient and more balanced typification of the actions that can be taken and the subjects authorized to take them: there is, in substance, the affirmation of a new and more mature "binding nature" of the actions that can be taken (both on a subjective and objective level) in the aforementioned areas.

The general principle to which reference must be made is the very general principle of the prohibition of procedural substitution, established by Article 81 of the Code of Civil Procedure: according to which "outside of the cases expressly provided for by law, no one can assert in the proceedings in his own name the rights of another person."

The prohibition of procedural substitution implies that, even for representative entities, the possibility of asserting in their own name the diffuse interests of the individual members of the category must find, each time, a specific normative foundation.

It is true that one of the results achieved through the aforementioned theory of collective interest has been to transform the diffuse interest of individuals into a collective interest of the representative entity; it is also true, however, that this transformation has been the result of a fictio iuris, which does not alter the substantial connotation of the underlying relationship and is unable, therefore, to overcome the ontological data represented by the objective alterity existing between the effective ownership of the interest (the individual) and the subject that asserts it (the entity).

This fictio iuris, therefore, cannot be translated into a not allowed form of extraordinary and generalized procedural legitimation, without a legislative basis (in contrast to the rule established by art. 81 c.p.c.); since any assertion of the right to act must be founded, in each individual case, on a positive normative basis.

These conclusions are even more valid in cases, such as the one subject of the present judgment, in which the legislator dedicates a specific normative discipline to the legitimation of representative associations (obviously of primary rank, given the existing legal reserve in the procedural field) which expressly identifies the type of action that can be exercised.

In these cases, allowing legitimation even with respect to actions not contemplated (or to subjects not indicated), would mean violating not only the general principle that prohibits substitution outside of the cases provided for by law; but also the specific sectoral discipline that typifies the type of collective protection entrusted to the representative entity."

7. Upon accepting, within the terms outlined above, the incidental appeal filed by the City of Perugia, the following are granted:

The declaration of inadmissibility of the main appeal, due to the lack of active legal standing of the Committee for the Environment and Citizens' Health (formerly No-maxistalla);

The subsequent reform - as a result of the inadmissibility of the first-degree appeal - of the decision of the T.A.R. Umbria, no. 303 of May 23, 2013.

Costs of litigation follow the defeat and are settled as per the ruling; in this regard, it is specified that the related amount is reduced, solely for the position of the Regional Agency for Environmental Protection - A.R.P.A. Umbria, due to the limited defensive activity displayed by the latter in this degree.

FOR THESE REASONS

The Council of State in a judicial capacity (Second Section), definitively pronouncing on the appeal as proposed above, hereby decides:

- to accept the incidental appeal proposed by the City of Perugia; and as a result, in reform of the appealed judgment of the T.A.R. Umbria, declares the first degree appeal before the latter inadmissible;

- declares the main appeal, proposed by the Committee for the protection of the environment and the health of citizens (formerly No-maxistalla), inadmissible.

Condemns the appellant Committee for the protection of the environment and the health of citizens (formerly No-maxistalla), in person of the legal representative, to pay the expenses of the double degree of judgment:

- in favor of the City of Perugia and the Opere Pie Riunite of Perugia, in the amount of € 5,000.00 (five thousand euros) for each of the aforementioned parties;

- in favor of the Regional Agency for Environmental Protection - A.R.P.A. Umbria, in the amount of € 3,000.00 (three thousand euros);

in addition to general and accessory expenses as per law.

Orders that this judgment is executed by the administrative authority.

So decided by the Second Section of the Council of State, with headquarters in Rome, in the Council Chamber of May 4, 2021, convened with remote mode and with the simultaneous and continuous presence of the magistrates:

Ermanno de Francisco, President

Giancarlo Luttazi, Councilor

Giovanni Sabbato, Councilor

Carla Ciuffetti, Councilor

Roberto Politi, Councilor, Writer

THE RAPPORTEUR THE PRESIDENT

Roberto Politi Ermanno de Francisco

THE SECRETARY