

JUDGMENT

Council of State, Section IV - 28/11/2022, No. 10441

ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

The Council of State

sitting in judicial capacity (Fourth Chamber)

has pronounced this

JUDGMENT

on appeal No. 3736 of 2022, brought by the "Associazione articolo 32-97", "Associazione italiana per i diritti del malato e del cittadino", in the person of its legal representative *pro tempore*, represented and defended by the lawyers Carlo Rienzi and Gino Giuliano, with digital domicile as per Pec by Registers of Justice, with an address for service in Rome, viale delle Milizie n. 9;

against

Roma Capitale, in the person of the Mayor pro tempore, represented and defended by lawyer Antonio Ciavarella, with digital address as by Pec by Registers of Justice;

against

the Environmental Protection Department of Roma Capitale, in the person of its legal representative *pro tempore*, not constituting a party to the proceedings;

for the reform

of the judgment of the Regional Administrative Court for Latium, Second Section, No 2308 of 28 February 2022, rendered between the parties.

Having regard to the appeal and the annexes thereto;

Having regard to the notice of appearance of Roma Capitale;

Having regard to Article 117 of the Code of Administrative Procedure;

Having regard to the defence briefs;

Having seen all the acts of the case;

The following was convened in the Council Chamber on 22 September 2022 by the Counsellor Claudio Tucciarelli and heard for the parties the lawyers Gino Giuliano and Antonio Ciavarella.

## FACT AND LAW

**(omissis)**

6. The appeal is unfounded and must be dismissed and the judgment under appeal upheld.

7. The appeal at first instance was brought by the association AIDMA which, in its appeal, challenges the inadmissibility of the appeal decided by the judgment of the Regional Administrative Court and, to this end

- considers that, also on the basis of previous jurisprudential precedents, the lack of registration in the register of consumer associations is not decisive, since the association would in any case meet the requirements of non-occasionality, stable connection with the territory, consolidated over time, and representativeness of the local reference community. Instead, the principle of horizontal subsidiarity should be enhanced;

- highlights the importance of the principle of subsidiarity;

- emphasises that its statutes expressly refer to the healthy environment and public services, which would include the municipal public green care service; in particular, AIDMA maintains that it has made explicit the basis of its legal standing to bring proceedings and emphasises that, from a reading of Article 2 of the statute, it is apparent not only that it operates on a non-profit-making basis, but that its 'exclusive purpose' is 'to protect by all legitimate means, including recourse to the legal instrument, the rights and interests of consumers and users, paying particular attention to consumers and users of public and private health care services, in whatever capacity, and of the pharmaceutical service'. In addition, Art. 2(a) of the articles of association makes it clear that one of the association's main purposes is to protect the right to health, to be understood in its broadest sense as the right to a healthy environment, while letters (c) and (d) of the articles of association state that AIDMA pursues 'the correctness of the provision of public services and how it promotes and ensures 'the sustainable use of the territorial, natural and cultural heritage as a prerequisite for a social and environmental habitat, aimed at promoting the physical and mental health of citizens through civil, criminal and administrative actions. There would therefore be no clear initial limitation of the association's object to the protection of the rights and interests of consumers and users of the public and private health care and pharmaceutical services, as the contested judgment of the Regional Administrative Court holds. Among the many purposes to which the Association is dedicated there is also the right to the protection of the environment, which is why the contested decision

was wrong when it ruled out that the statutes did not contemplate as an institutional purpose of the Association the protection of the interest of citizens in general terms in the diligent maintenance and custody of public property and, among them, of the municipal green areas by the municipal authorities: the maintenance of public green areas is therefore also included among the public services - which can guarantee better standards of quality of life in relation to the conditions of the city - and the new wording of Article 9 of the Constitution confirms this;

- contests that the criterion of proximity was not met by the association, which had indicated in its application the various areas of Rome requiring intervention;

- censures the arguments of the contested judgment concerning the absence of representativeness, having indicated in the appeal its own activities.

8. The College considers that what is represented by the appellant is not capable of positively overcoming the scrutiny regarding the existence of AIDMA's legitimacy to act.

In particular, the Council of State (see, in particular, Council of State, Plenary Session No. 6 of 2020 and, most recently, section IV, No. 7799 of 2022) has highlighted the guiding principles in this matter, from which the Board sees no reason to deviate. In fact, as regards the recognition of the existence of a general legitimacy of exponential entities with regard to the protection of collective interests before the administrative court, the protection of "diffuse" (*i.e. ad hoc*) interests has been ensured since the 1970s through the recognition of the existence of a legitimate interest of a collective nature attributable to an entity that by virtue of possessing certain requisites identified by case law (effective representativeness, statutory purpose, stability and non-occasionality, in some cases a connection with the territory) becomes capable of assuming ownership (Council of State, section V, No. 253 of 1973; Supreme Court of Cassation, United Sections, 8.5.1978, No. 2207; Council of State, Plenary Session, 19.11.1979, No. 24).

In particular, the Plenary Session (in line with its own previous Judgement No. 7/2012, focused on the legitimacy to act in the exercise of the right of access) stated the following: "the circumstance that the care of the general public interest is entrusted to the administration does not detract, however, from the fact that it is subjectively referable, albeit indiscriminately, to social formations, and that the latter, in their associated dimension, represent the actual and final users of the common good whose care is at issue. The situations are in fact different and heterogeneous: the administration has a duty to look after the public interest and therefore enjoys a legal situation capable of affecting communities and categories (power); the associations representing collectivities or categories, on the other hand, embody the substantial interest, they are its beneficiaries, and therefore the legal situation of which they are holders is that of legitimate interest, *i.e.* that pertaining to the subjective sphere of the association, correlated to a public power, which, on the procedural side, arises in an instrumental sense to

obtain protection with regard to the goods of life, affected by the power granted to the administration" (Council of State, Plenary Session No. 6/2020, cit.).

There must be no doubt as to the legitimacy of associations, when all the salient features of the collective interest are present in the legal situation being challenged: "legitimacy, in order to exist, must refer to an interest that was originally diffuse, and therefore ad hoc, which, concerning goods for collective use, is "personalised" in the head of an exponential body, endowed with data characteristics, thus becoming the body's own legitimate interest" (Council of State, Plenary Session, no. 6/2020).

The Plenary Session, with decision no. 9/2015, clarified that "It is, moreover, indispensable that the interest protected by the intervention is common to all the members, that the subjective positions of only a part of the members are not protected and that, ultimately, no internal conflicts within the association can be configured (even with the interests of only one of the members), which would automatically imply the lack of the general and representative nature of the position being sued (see also, *ex multis*, Council of State, section III, 27 April 2015, No. 2150)".

Once the possibility of the legal protection of widespread (*i.e.* shared and not exclusive) substantial interests through an exponential body that assumes statutory and not occasional representation thereof has been recognised, it is however necessary to ascertain whether such connotations exist in the concrete case.

It is worth reiterating that, for the purposes of legal standing, the associative purpose is not sufficient in itself to differentiate a diffuse or adhesive interest, belonging to a more or less extensive part of the population, but it is necessary to prove an adequate degree of representativeness, a stable connection with the reference territory and an action with appreciable consistency, also taking into account the number and quality of the associates (see, for example, Council of State, section IV, No. 1001/2010; section I, No. 1254 of 2020).

With regard to the legitimacy to act, and in particular to the appeals brought by associations representing citizens and users, case law is firm in considering that, in administrative proceedings, the aforementioned requirement of *legitimitas ad causam* cannot be considered satisfied where one of such associations takes legal action in order to pursue, in a general way, the proper exercise of administrative power or for mere purposes of justice, it is instead necessary to identify, in such cases, an injury to the legitimate interests of the association itself or a direct and current injury to the diffuse interests of the persons protected by the same, without prejudice to the need to verify the existence of an interest in the appeal consisting in the identification of an advantage, or at least the expectation of an advantage, current and direct, that may derive from the annulment of the contested measure (Council of State, section III, Judgment No. 2892, para. III, Judgment No. 2892 of 9 June 2014).

With regard to the legitimacy of committees, a distinction must be made between subjective requirements, relating to the characteristics of the appellant committee, and objective requirements, relating to the type of admissible action. According to the well-established case law of this Council of State, in order for a committee to be able to validly bring an appeal to challenge acts deemed to be damaging, it is necessary that it pursues, in its bylaws, in a non-occasional and generic manner, the objectives of protecting the interests brought before the court; it has an adequate degree of representativeness and stability; it has an area of relevance that can be linked to the area in which the asset for collective use that is allegedly harmed is located (Council of State, section IV, Judgment No. 1838 of 15 March 2018)" (Council of State , section I, No. 805/2019 and, similarly, section I, No. 1693/2018 and No. 2202/2017).

The Panel cannot but confirm this approach (with respect to which the qualification of the subject as a committee or association is indifferent): the legitimacy to challenge administrative acts of an association (circle) of citizens that lacks the character of exponential body on a stable and continuous basis and is not endowed with adequate representativeness is to be excluded.

Again, case law (most recently the aforementioned Plenary Session No. 6 of 2020 and No. 8 of 21 May 2019), then requires, in order to configure an actionable collective interest, that it be homogeneous and, in the case instead of collective subjects created by private autonomy, which group together only those who concretely gave rise to the initiative, considers it necessary to examine it concretely (on the specific point, Plenary Session, No. 6 of 2020 § 10.3.; subsequently, section IV, No. 1535 of 2021; section IV, No. 4174 of 2021).

9. In the case at hand, it should be noted that the reference in the judgment under appeal to the fact that the appellant association is not registered in the special list of associations representing users or consumers referred to in Article 137 of Legislative Decree No. 206/2005 (Consumer Code) is of an incidental nature and is not decisive for the purposes of the decision by the Regional Administrative Court.

Moreover, the association has not demonstrated in any way, with respect to the interest asserted in the action, its legitimacy to bring before the administrative court actions for the protection of the collective legitimate interests of the specific community (the citizens of Rome). The requirements identified by the case-law for that purpose cannot be regarded as satisfied.

The contents of the association's articles of association provide clear confirmation in this regard. Article 2, which defines the object of the activity, provides that the association has as its exclusive purpose that of protecting by any legitimate means, including recourse to legal means, the rights and interests of consumers and users, paying particular attention to consumers and users of public and private health care services, in whatever capacity, and of the pharmaceutical service; the association also has as its pre-eminent purpose the fight against discrimination and the promotion of equal treatment therefore. This is the background

to the provision in the articles of association whereby the association promotes legal actions or intervenes in civil and criminal proceedings, including by forming a civil party to claim compensation for damages arising from the injury of subjective rights and/or legitimate interests, individual and/or collective, concerning the purposes pursued by the association, including damage to health in general, damage arising from poor health care, and damage to the environment in which one lives. It is therefore clear that the association carries out its activities with the main purpose of guaranteeing and providing the best possible protection of the 'right to health'.

The subsequent enumeration in the same Article 2 of the bylaws indicates the objectives pursued, in which the protection of the right to health as the right to a healthy environment refers to the sustainable use of the territorial, natural and cultural heritage, as a prerequisite for a social and environmental habitat, aimed at fostering the physical and mental health of citizens, through civil, criminal and administrative legal actions (lett. a) and the pursuit of fairness in the provision of public services - including the health service - both in terms of their quality and the adequacy of the relevant tariffs, with particular regard to the good performance and impartiality of the administration, as a condition for improving the quality of life and conditions of the cities (lett. c).

The initial delimitation of the proper object of the association with reference to the protection of the rights and interests of consumers and users of the public and private health care service and of the pharmaceutical service is therefore followed by isolated and generic references to the territorial heritage and conditions of the city which are not capable of extending the applicant's representativeness to that specific community (the citizens of Rome) for the protection of which the organisation expressly acts. Such interests are ultimately referred to health care and to the condition of the patient (or 'sick person', to use the lexicon of the judgment under appeal) even in its more limited meaning of consumer and user of the city's territory.

On the contrary, the objects set out in the statutes do not include the protection of the interest of citizens in the proper or adequate maintenance of public property and, in particular, of the municipal green spaces. It follows that the initiative of the association from which today's dispute arose does not relate to the purposes pursued by the statutes. The applicant's initiative is in fact aimed at calling for more accurate and systematic ordinary and extraordinary maintenance of the green areas owned by Roma Capitale.

That conclusion is further corroborated by a separate element: the absence of any allegation on the part of the association as to the suitability of its organisation and structure for the attainment of the statutory objectives, functional to the pursuit of the association's activities. On the contrary, there is another argument put forward by the respondent administration already during the proceedings at first instance and not effectively countered by the appellant: the very

refusal to register the appellant association was also due to the small number of members (four) and the failure to carry out continuous activity in the previous three years.

It must be added, with respect to the appellant's further criticisms, that the enhancement of the principle of horizontal subsidiarity cannot constitute a derogation or weakening of the procedural principles governing the legitimacy or interest in bringing proceedings.

Moreover, the indication in the application produced by the association of the various areas of Rome for which intervention was sought is not capable, by itself, of satisfying the criterion of the association's proximity and, in any event, of remedying the deficiencies already set out of the legitimacy to bring proceedings.

10. In conclusion, the appeal must be dismissed as there is no basis for recognising the association's capacity to act.

Taking into account the association's admission to legal aid, there are justified reasons to award the costs of the present appeal between the parties.

#### FOR THESE REASONS

The Council of State sitting in judicial capacity (Fourth Chamber), definitively ruling on appeal No. 3736/2022, as in the epigraph, dismisses it.

Costs compensated.

Order that this judgment be enforced by the administrative authority.

Thus decided in Rome in the council chamber of 22 September 2022 with the intervention of the magistrates:

Vincenzo Lopilato, President FF

Nicola D'Angelo, Councillor

Silvia Martino, Councillor

Michele Conforti, Councillor

Claudio Tucciarelli, Councillor, Extender

LODGED IN THE SECRETARIAT ON 28 NOV. 2022.

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