Still Searching for a Reliable Script: Access to Scientific Knowledge in Environmental Litigation in Italy

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1. INTRODUCTION

The rules on evidence and the approach to access to scientific knowledge by administrative courts have changed greatly in Italy during the past 20 years. The changes impact environmental litigation, but their scope is wider and quite general. The UE general principle of effective judicial protection contributed to the evolution of Italian law towards a somewhat closer look to the factual findings on which administrative decisions are based.[1] The practice of judicial review, including in environmental matters, however, is often rather deferent to the findings of the public decision makers. The aim of this paper is to critically analyse the Italian rules and judicial practice concerning access to scientific knowledge in environmental litigation.

In line with the approach taken in this special issue, this contribution will focus exclusively on access to scientific knowledge in the 'general' administrative courts.[2] This covers both first instance (*Tribunali amministrativi regionali – TAR*, one in each of the 20 Regions in the country) and appeal (*Consiglio di Stato*) courts.[3] Different rules, which will not be analysed here, apply in front of the 'ordinary courts' having jurisdictions over 'environmental damage' claims,[4] and before the Court

[1] For the division of roles between EU and national courts based on a number of principles, including effective judicial protection, and for further references see M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' in this same issue, p. 1 f.

[2] See generally M. Protto, 'Giurisdizione in generale' R. Caranta (dir.), *Il nuovo processo amministrativo* (Zanichelli, 2011) pp. 113-172.

[3] Full text of all the judgments is available at www.giustizia-amministrativa.it (in Italian); the search engine is not very good and a number of pay-for-access websites where judgments are indexed are normally used. It is to be noted that in Italy cases are not referred to by the names of the parties; more bureaucratically, the sequence 'court, date, number' is used; references in this contribution will conform to the national pattern.

[4] Further, if not fully updated, information may be found in the Italian report on the experience gained in the application of Directive 2004/35/EC Ares(2013)2770018 - 29.07.2013, available at:

of auditors which is competent to entertain actions aimed at recovering costs for the State budget flowing from environmental breaches (for instance, due to remedial action taken following pollution).[5]

Changes in the doctrines concerning both the bounds of judicial review by administrative courts and access to scientific knowledge in cases brought before the administrative courts competent to review administrative decisions or inaction, as well as changes in the legislation, will be presented first (2). The actual practice of the administrative courts will then be analysed with reference to a number of cases thought to be emblematic regarding the judicial review of decisions taken by the administration in environmental matters (3). Conclusions assessing the practice of the administrative courts against EU law and EU case law, including those implementing the Aarhus Convention, will conclude the paper (4). It is stressed from the outset that this author fully share the conclusion that "the requirements imposed by EU law only provide a vague guidance and minimum denominators" and that it is questionable if this is sufficient to meet the requirement of 'substantive review' as imposed under Article 9 of the Aarhus Convention.[6]

2. FACTS AND THE ADMINISTRATIVE COURTS

In the first half of the XIX century the *Consiglio di Stato* was fashioned following the French *Conseil d'Etat* model. The *Consiglio di Stato* was to advise the King on appeals brought against decisions that had been confirmed all through the administrative hierarchy.[7]

http://ec.europa.eu/environment/legal/liability/pdf/eld_ms_reports/IT.pdf , p. 45 ff; see also the EFFACE report on Fighting Environmental Crime in Italy: A Country Report available at http://efface.eu/sites/default/files/EFFACE_Fighting%20Environmental%20Crime%20in%20Italy.pdf .

[5] Cass. civ., Sez. Unite, 21 May 2014, n° 11229, *Foro ital.*, 2015, I, 2481.

[6] See the detailed analysis by M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn 1.

[7] For further analysis please refer to R. Caranta, 'Administrative Appeals in Italy', in J-B. Auby and T. Perroud (eds.), *Droit comparé de la procédure administrative. Comparative Law of Administrative Procedure* (Bruylant, 2016) pp. 806 ff.

In this framework, the advice was based on the file established by the public administration that had taken the decision challenged. This was to a large extent a paper-based inquisitorial rather than adversarial procedure. Those challenging an administrative decision were seen as mere instruments to allow the State to amend its own mistakes in the higher interest of the rule of law (so-called *contentieux objectif*).[8] Facts were not much of an issue, and in any case they were material only insofar as they had been ascertained by the decision maker and as such established in some of the documents in the file.[9]

With a number of legislative instruments adopted between 1889 and 1905, the *Consiglio di Stato* was granted a judicial capacity in addition to its traditional advisory capacity. As a rule, however, judicial review was confined to legality. Only very exceptionally were the administrative courts given the power to look into the merits of the decision.

The distinction between legality and merits is of course fraught with difficulties, in Italy as elsewhere. Basically, Italian courts embraced a wide notion of discretion that extended to cover both policy decisions about conflicting public and private interests and complex factual assessments.[10] Moreover, Italian courts are most ready to read complex decisions as involving both policy choices and complex factual assessments. These decisions and assessments were reviewable only in so far as they were close to irrational. Judicial review focused on matter of procedures and on the reasons given by the decision maker. Otherwise administrative courts tended to defer to the choices made by the administration.[11] Full review has instead always been performed concerning simple facts, such as measuring noise emissions.[12]

[8] This was again consistent with the French model: M. Fromont, *Droit administrative des Etats européens* (PUF, 2006)
[9] See, also for references to the Italian legal literature M. Eliantonio, *Europeanisation of Administrative Justice?* (Europa Law Publishing, 2008) p. 184.
[10] R. Caranta, 'On Discretion' in S. Prechal – B. van Roermund (eds), *The Coherence of EU Law* (Cambridge University Press, 2008) pp. 191 ff.
[11] M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 9, at p. 185; see also A. Comino 'The Application of the Aarhus Convention in Italy' in R. Caranta, A. Gerbrandy, B. Müller (eds), *The Making of a New Legal Culture: the Aarhus Convention* (Europa Law Publishing, 2018) p. 176 f.
[12] *E.g.* T.A.R. Sicilia, Palermo Sec. I, 12 December 2011, n° 2333.

Procedural rules laid down in R.D. 17 August 1907 n° 642 indicated the evidence allowed, and they were fully in line with the paper-based procedure which was briefly described above. Basically, the administrative courts had full access to the facts of the case, including through recourse to outside expertise, only in those exceptional situations in which their jurisdiction extended to the merits of the decision. When their jurisdiction was limited to legality review, the administrative courts had to rely on the documents in the administrative file. At most they could ask the decision maker for clarifications (*schiarimenti*) or additional factual investigations (*verificazioni*).[13] Recourse to expert witnesses was not an option. As Mariolina Eliantonio has remarked, 'since the choices of the administration involving technical aspects could not be reviewed by the courts, there was no point in giving the courts themselves the power to entrust an independent expert with the task of analysing and reporting on these choices'.[14]

In the past twenty years or so, the traditional deference to the decision maker has been reconsidered and the procedural rules have been changed.[15]

2.1. A Harder Look?

Late in the last century and early in this millennium, under pressure from scholars and taking stock from the evolving case law on effective judicial protection as then developed by the European courts (both the CJEU and the ECHR), the administrative courts reconsidered their approach to judicial review specifically concerning complex factual assessments.[16] As Eliantonio has made clear, this was based on the understanding administrative courts had of the European general principle of effective judicial protection rather than on specific precedents by either the CJEU or the ECHR.[17]

[13] See also M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 9, pp. 183 f.
[14] Ibid, p. 186.
[15] Ibid, pp. 181 ff.
[16] This influence is analysed by M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 9, pp. 190 ff.
[17] Ibid., p 190.

The leading case concerned a work disability claim brought by a public servant and as such falling under the full jurisdiction of the administrative courts.[18] This was soon followed by an important competition case belonging to the general legality review jurisdiction of the same courts.[19]

In both cases, the *Consiglio di Stato* expressly disavowed marginal or peripheral or extrinsic (*estrinseco*) judicial review to embrace a direct appraisal of the decision-making process (so called *controllo intrinseco*).[20] Courts still considered themselves forbidden from taking the decision in the place of the administration (substitutive review), but were ready to fully and directly review whether the right factual investigation process had been chosen and whether the relevant scientific and technical rules had been respected.[21]

The *Consiglio di Stato* tries to strike the uneasy balance between the effectiveness of judicial protection on the one hand, and what it perceives as the impossibility of a court to decide on the merits of an administrative case on the other hand. In a case concerning sanctions for abuse of a dominant position, the highest administrative court held that judicial review covers both the rationality and proportionality of the decision taken and the reasons given for it. It also extends to checking whether accepted scientific procedures were adhered to. However, given what is assumed to be the relativity of scientific knowledge (*relatività delle valutazioni scientitiche*), judicial review must stop short of second-guessing the substance of the administrative decision.[22]

Reference to the 'relativity of scientific knowledge' is found frequently in the case law[23] and as such is repeated in scholarly writings, including textbooks.[24] It is to be kept in mind, and it is

[18] Cons. Stato, Sec. VI, 9 April 1999, n° 601
[19] The leading case is Cons. Stato, Sec. VI, 23 April 2002, n° 2199, *Foro amm. CdS*, 2002, 1007, note N. Rangone 'Intese nel mercato assicurativo e sindacabilità dei provvedimenti antitrust', and *Giur. comm.* 2003, II, 170, note R. Caranta 'I limiti del sindacato del giudice amministrativo sui provvedimenti dell'Autorità garante della concorrenza e del mercato'.
[20] M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 9, pp. 190 f.
[21] For further discussion see M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 9, pp. 190 ff.; R. Caranta and B. Marchetti, 'Judicial Review of Regulatory Decisions in Italy; Changing the Formula and Keeping the Substance?' in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.) *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, 2009), 145-171, at 150 ff.
[22] Cons. Stato, Sec. VI, 13 September 2012, n° 4873; Cons. Stato, Sez. VI, 7 November 2005, n° 6152.
[23] E.g. Cons. Stato, Sec. VI, 24 November 2015, n° 5327; Cons. Stato, Sec. VI, 14 October 2015, n° 4747; Cons. Stato, Sec. V, 13 September 2012, n. 4873; Cons. Stato, Sec. VI, 12 October 2011, n. 5519.
[24] V. Cerulli Irelli, *Lineamenti di diritto amministrativo* 5th (Giappichelli, 2016) 298 f.

perhaps regrettable, that the change in the doctrines concerning the proper bounds of judicial scrutiny originated from competition law cases. Economics is the 'scientific' knowledge relevant in these cases. Economics, however, is hardly a science under the understanding of science as based on the validation/falsification of hypotheses through experiment, developed during the Enlightenment with reference to the natural sciences. Economic assessments, and especially prospective economic assessments, are often 'arguable' or 'debatable' rather than true/false.[25]

Uncertainty in the evaluation is of course not limited to economics. Another area where the administrative courts have shown much restraint is in reviewing the classification of heritage buildings which is decided base on vague standards such historical relevance, cultural significance and aesthetic merit.[26]

This approach, and the limits to judicial review coming with it, might be justified with references to the circumstances of some categories of cases. It is however worth noticing that in the well-known *Tetra Laval* case the uncertainty inherent in prospective economic analysis has led the Court of Justice to both acknowledge "the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations to require"[27] and – somewhat contradictorily – to allow the EU courts to probe deeply the reasoning in the challenged decision, and this even more so "in the case of a prospective analysis required when examining a planned merger with conglomerate effect".[28] While the exact reading of the *Tetra Laval* judgment is not without

[25] Economics was brilliantly analysed with reference to philosophy of science by D.M. Hausmann, *The inexact and separate science of economics* (Cambridge, 1992) spec. 152 ff.
[26] E.g. Cons. Stato, Sec. VI, 14 October 2015, n° 4747.
[27] Case C-12/03, *Commission* v. *Tetra Laval* ECLI:EU:C:2005:87, paragraph 38.
[28] Paragraph 39.

challenges, scholars agree in that the case marked a step towards a closer look into administrative decisions even when they involve complex analysis,[29] which extends beyond the economic field.[30]

Given to the rather casual approach of Italian courts to precedents which will be discussed later, reference to the relativity of scientific knowledge has instead become the standard in judicial review and has been extended to every complex factual assessment, including those performed with the methodologies of the natural sciences that are relevant in environmental cases. These cases do not necessarily always imply 'uncertain science' even if complex environmental impact assessments might well involve uncertain prospective evaluations.[31]

Reviewing the procedure and the reasons given is still a process-oriented rather than substance-oriented review.[32] While no longer marginal, judicial review in Italy is still somewhat weak and does not amount to strong or full – or to use US administrative law terminology – *de novo* review.[33]

Whether the change in the doctrines – the law in the books – has really impacted how judicial review is actually performed – the law in action – is open to debate.

Food for thought was provided by a series of judgments concerning challenges to a decision by the anti-trust authority to fine a number of companies providing jet fuel to Italian airports for price fixing. As is often the case with competition cases, the decision involved complex economic analysis, such as the proper delimitation of the relevant market and the quantification of the effects of the agreement that restrained competition in the said market. Since each of them was engaged in an

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[29] See for instance J. Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' [2016] 53 Common Market Law Review, 427 ff; A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' [2010] 47 Common Market Law Review, 380; M.F. Bay and J. Ruiz Calzado, 'Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions' [2005] 28 World Competition 437 ff; for a well articulated analysis of the different evaluation/assessment steps involved in a merger decision see A. Gerbrandy, Prospective Analysis and Establishing Substantive truth in Review of Merger Decisions in Court' [2014] Netherlands Administrative Law Library 8 ff and 13 (also available at http://www.nall.nl/tijdschrift/nall/2014/02/NALL-D-14-00001).

[30] See the analysis by M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn 10 f.

[31] A. Gerbrandy, Prospective Analysis and Establishing Substantive truth in Review of Merger Decisions in Court' above fn, p. 3.

[32] See also A. Lamorgese, *La giurisdizione contesa. Cittadini e pubblica amministrazione* (Giappichelli, 2014) 18.

[33] See also A. Sandulli, 'The Use of Comparative Law before the Italian Public Law Courts', in M. Andenas – D. Fairgrieve (eds.), *Courts and Comparative law* (Oxford University Press, 2015) 266-278, at 274 f.

egregious blame-shifting game, the companies involved sought judicial review individually. One and the same factual situation thus gave rise to different judgments. They then separately appealed the first instance judgment, leaving the fines to stand. The *Consiglio di Stato* itself disposed of the appeals with separate judgments penned by different judges. The striking feature is that the different judgments expounded very different theories as to the proper bounds of judicial review. Some came very close to marginal review and were content with finding the overall reasons given by the antitrust authority globally persuasive. Other judgments, while still finding no ground to strike out the challenged decision in the end, almost embarked on *de novo* reviews by closely scrutinising each step in the authority's reasoning and looking into the facts relied upon by the authority, including proven information exchanges among the companies involved.[34]

The jet fuel litigation easily supports different readings. Stressing that all judgments came to the same conclusion and left the antitrust authority's decision standing, one could be excused for thinking that doctrines on judicial review do not matter. At the least, the judgments show that Italian administrative judges are divided as to their proper role. This however might entail that different panels might approach – and review – similar cases differently. It is also worth stressing that the administrative court did not think it necessary to have recourse to expert witnesses, rather preferring to look directly into the facts of the case.

Generally speaking, it is difficult to make a solid link between the doctrines expounded in a judgment and the type of review actually performed. Hard(er) look doctrines are often expounded with reference to the review of decisions that would most probably not have anyway withstood judicial scrutiny even under a hands-off approach. This was the case with a decision ordering immediate remedial action to avoid groundwater contamination. The court found that the public administration had not considered at all whether the measures imposed were actually needed and whether alternatives less detrimental not just for the addressee of the decision but for the environment

[34] See R. Caranta and B. Marchetti, 'Judicial Review of Regulatory Decisions in Italy; Changing the Formula and Keeping the Substance?' in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.) *National Courts and the Standard of Review in Competition Law and Economic Regulation* above fn 18, 145-171, spec. at 159 ff, where the cases are analysed.

itself existed. Whatever the power of factual evaluation given to the decision maker, its actual use was labelled "arbitrary". Of course, it did not help the respondent authority that it had failed to provide any evidence that the addressee of the decision was responsible for the contamination. Also damning was the fact that, on the same day it issued the order, challenged and later annulled by the court, the public administration wrote to all the industries located in the area proposing an agreement to plan an overall clean-up.[35]

In other easy cases, reference to a doctrine expounding marginal review may instead hide the fact that the judges had peered into the file and were satisfied with the substantive outcome achieved by the decision maker. This is believed to have been the case when a first instance court upheld the decision not to forgo the breaches of rules for the protection of the cultural heritage by a landowner who had built some shacks using disparate materials on an area along the shores of the Garda Lake characterised by olive grooves. After having recalled the precedents calling for restraint in reviewing discretion, the courts basically concluded that the pictures in the file showed that the local authority was justified in coming to the conclusion that the huts were eyesores that could only be remedied by levelling them.[36]

Further analysing environmental cases will shed some light on this grey area of the law. Before, the evolution of the legislation has to be briefly described.

2.2. Changes to the Means of Proof.

Whatever its limits, the shift to 'intrinsic review' brought with it the need for expert advice to help judges to assess whether the right technical or scientific procedures were duly followed or not.[37] Evolution in the case law was later consolidated into legislation which also answered the need for

[35] T.A.R. Toscana, Sec. II, 19 May 2010, n° 1524.
[36] T.A.R. Lombardia, Brescia Sec. II, 18 March 2011, n° 440; see also T.A.R. Lombardia, Brescia Sec. II, 2 February 2011, n° 224, where the court held that the municipality was justified in considering unacceptable from an aesthetic point of view a plastic fence in a wooded area; pictures are however not referred to in this latter case.
[37] M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 9, p. 191

expert advice. A series of changes in the law culminated in the 2010 Code of judicial administrative procedure widening the means of proof available in legality review proceedings.[38]

The starting point is to be found in Articles 63 and 64 of the Code, which has reaffirmed the traditional approach to the burden of proof. Because the public administration conducted the investigation, Italian administrative law adheres to a (weak) inquisitorial system.[39] The parties are asked to provide what evidence they have. The court, however, has wide powers as to how to find evidence, including by asking of its own volition the administration, the parties or third parties for documents and information.[40]

Concerning the means of proofs specifically, the Code juxtaposes old and new but also significantly changes the rules of the game. The powers of administrative courts to order factual investigations (*verificazioni*) have been strengthened and widened under Article 66. Today the court can entrust factual investigations to any expert, including those from outside the public sector. Under Article 63(4), administrative courts have also been given the power to have recourse to expert witnesses if this is strictly necessary. It is to be noted that in writing about 'expert witnesses' we are using a term that is widely understood in the English-speaking world. In Italy, experts are asked to produce a written report, which is circulated to the parties who may have been named *ex parte* experts, in turn reacting with written report(s). There is in principle no cross-examination of the expert witness named by the court in what is still an eminently paper-based procedure.

This does not however bring Italian law in conflict with either the Aarhus convention or EU law. The requirement of (some measure of) 'substantive control in no way needs to be translated into a US style adversarial procedure. The problem rather lies – as will be clarified in the next sections – in the little use Italian administrative courts make of the new means of proof available to them.

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[38] Legislation later consolidated in the Code now in force is analysed by M. Eliantonio, *Europeanisation of Administrative Justice?* above fn 7, pp. 194 f; see also See the analysis by M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn 1, p. 20 ff.
[39] Ibid, pp. 186.
[40] See generally P. Chirulli, 'Istruttoria' in R. Caranta (dir.), *Il nuovo processo amministrativo* above fn 1, 521-572.

The difference between *verificazioni* and expert witnesses no longer depends, as was the case in the past, on the fact that the former are committed to the same office that made the decision or to another public administration (or official working with an administration). Also, it is not unusual to entrust the role of expert witness to some official working with a different administration. The difference between *verificazioni* and expert witnesses has been clarified in some judgments in the sense that the former provide additional factual information as compared to what is already clear from the administrative file. On the other hand, expert witnesses provide a factual evaluation based on some specific technical knowledge supplementing what judges, who in Italy are all trained in law, may know.[41] In practice, the distinction may not be that clear-cut. However, the two means of proof are differently regulated in terms of the role that the parties – or experts named by them – have to play. Specific due-process rules are expressly provided for, with reference to the activities committed to expert witnesses only.[42]

Whatever the difference, because of the restraint they often display when reviewing discretionary administrative decisions, Italian administrative courts seem more confident in having recourse to outside help in order to collect information on facts that are not too complex, and are definitely not interlinked with policy considerations. One good instance of this is provided by a recent decision by the first instance court in Piedmont. Some farmers were refused an *ex post* authorisation to build a small shelter near their blueberry orchard because the Cuneo municipality considered it to be too close to a canal. Applicable rules on no-building areas along canals specified different minimum distances from canals with or without concrete shoulders. The documents in the administrative file mentioned two canal names, and it was unsure whether this was two discrete canals or just one, and also whether the relevant one had concrete shoulders or not. Probably distrusting very much the services of the municipality, the court commissioned an expert to investigate what were

[41] Cons. Stato, Sec. V, 7 June 2016, n° 2433; Cons. Stato Sez. VI, 12 November 2014, n° 5552.
[42] See e.g. Cons. Stato, Sec. VI, 17 January 2017, n° 175; breach of those safeguards will lead to the judgment being quashed in appeal: Cons. Stato, Sec. V, 26 November 2013, n° 5610.

clear facts (one or two canals? with or without concrete shoulders?) whose verification left no margin to uncertainty.[43]

3. ON THE LAW IN ACTION

In principle, the analysis of the Italian case law in this area might be structured in different ways. One possibility would be to classify judgments based on the doctrines on judicial review they adhere to. Only, as shown above, one might well doubt that the review actually performed truly and plainly follows from the accepted theoretical framework. Another possibility would be trying to establish some kind of continuum based on how intense the review was in each case. This would, however, obliterate the very different breadth of the discretion or margin of choices left to the decision maker by the legislation applicable in different areas.

The preferred course of action is therefore to classify the case law according to the relevant environmental measure and the degree of discretion or power of factual or scientific assessment given to the decision maker. The analysis will start with those instances in which factual assessments and policy decision are inextricably interwoven, such as in the case of EIA procedures. Because of the broad margins of discretion enjoyed by the decision maker in such cases, a more peripheral approach to review is to be expected. This should not be the case in those situations in which the public authority is given more or even very limited powers of factual assessment.[44]

Before going into the case analysis, a few cautionary remarks need to be made. Italian courts, including administrative courts, are very casual concerning precedents. Often, the facts of the case are only sketched in the judgment. As is well known, precedents are instead taken very seriously in common law jurisdictions. 'The peculiar feature of the English doctrine of precedent is its strongly

[43] T.A.R. Piemonte, Sec. II, 17 April 2017, n° 611; see also, concerning the measurement of noise levels, T.A.R. Sicilia, Palermo Sec. I, 12 December 2011, n° 2333.

[44] The difference between types of discretion is highlighted in M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn 1, p. 3 f: see also above, § 2.

coercive nature'.[45] However, only *rationes decidendi* are binding.[46] The '*ratio* of a case relates the proposition of law discussed in the judgment or judgments to the facts of the case and to the claims of the parties'.[47] This means that 'the facts of the case form very much more than just a context: they play a crucial role in determining its future force'.[48] Propositions that are not part of the *ratio* are simply *obiter*. They retain (some) persuasive authority, but do not bind following judgments.[49] Precedents are seen as establishing very specific rules attuned to the special factual situation of the case at hand rather than declaring broad principles. Different rules may be devised and applied in certain following cases if the facts or specific circumstances are different. In sum, 'students of the common law study discrete cases and the facts, reasons, and distinctions courts rely on to resolve them'.[50]

Apparently less concerned about the facts, Italian courts tend to discuss at some length the legal principles and rules applicable and their interpretation. The jet fuel cases discussed above are a good instance for this. The discussion of the relevant doctrines is often concluded with a short phrase summing up the law as it is understood by the court (the so called *massima*). When deciding a case, the *Corte di Cassazione* must and the plenary section of the *Consiglio di Stato* may lay down one or more *massime* to bind the lower or the referring court if the case is sent back to them.[51] Moreover, under Article 74 of d.lgs. 2 July 2010, n° 104 (the Code of judicial administrative procedure), administrative courts may declare an action clearly inadmissible or unfounded by simply referring to

[45] R. Cross and J.W. Harris, '*Precedent in English Law* (4th edn., Clarendon Pres, 1991) p. 3.
[46] Ibid, p. 6; the authors discuss at length the distinction in Ch. 2.
[47] Simon Whittaker, 'Precedent in English Law: A View from the Citadel' [2006] Eur. Rev. Priv. Law 705, p. 718.
[48] Ibid.; see also R. Cross and J.W. Harris, '*Precedent in English Law* above fn, p. 43 f.
[49] Simon Whittaker, 'Precedent in English Law: A View from the Citadel' above fn 39, p. 720.
[50] Michael L. Wells, 'A Common Lawyer's Perspective on the European Perspective on Punitive Damages' [2010] 70 Louisiana Law Rev. 557, 560; see also Simon Whittaker, ' Precedent in English Law: A View from the Citadel' [2006] Eur. Rev. Priv. Law 705, 711 f; for a more qualified approach see however Rupert Cross and J.W. Harris, *Precedent in English Law* (4th edn., Clarendon Pres, 1991) p. 14 f.
[51] Concerning the *Consiglio di Stato* see Art. 99 of d.lgs. of 2 July 2010, n° 104 (the Code of judicial administrative procedure); see G. Corso, 'L'Adunanza plenaria e la funzione nomofilattica' (2014) *Rassegna forense*, 633-640.

a previous judgment expressly called *precedente*.[52] In practice this often means referring to the *massima* of a previous judicial decision, possibly cutting and pasting it into the new judgment.[53]

The law in Italy cannot be explained by referring to one or few leading cases or even by going deeper into a discussion about the facts and *rationes decidendi* of different cases in search of meaningful distinctions. What can be provided is an impressionist picture of what are believed to be the different trends discernible in the case law. More often than not, some judgments could be find being at odds with the picture.

3.1. EIA Procedures

In Italy the Environmental Impact Assessment – EIA is treated as semi-binding on the final decision. The decision maker responsible for taking the final decision might well come to a different conclusion, but he or she will not just have to give reasons for departing from the EIA conclusion but should collect additional data or evidence.[54] Unsurprisingly decision makers tend to stick to the outcome of EIA and to give reasons by referring to it. Those wanting to challenge the final decision will mainly focus their pleas on the procedure followed for the EIA and its substantive outcomes. In the case law EIA is treated as a topical instance of a procedure and a decision in which factual assessments and policy decisions are inextricably interwoven.[55]

In what is often referred to as the leading case in this specific area, one company had asked the Region for authorisation to open a landfill to be used to collect non-hazardous waste.[56] Following what the *Consiglio di Stato* characterised as a thorough investigation, the EIA on the requested authorisation was negative for a number of reasons. These included the fact that the municipality in

52 See M. Sinisi, *Il giusto processo amministrativo tra esigenze di celerità e garanzie di effettività della tutela* (Giappichelli, 2017) spec. pp. 288 ff.
53 Which of course should not be the case: M. Ramajoli, 'La tipologia delle sentenze del giudice amministrativo' in R. Caranta (dir.), *Il nuovo processo amministrativo*, above fn 1, 595-629, at p. 627.
54 Cons. Stato Sec. V, 17 October 2012, n° 5294.
55 Eg Cons. Stato Sec. VI, 22 February 2007, n° 933; see A. Comino 'The Application of the Aarhus Convention in Italy' above fn, 177.
56 Cons. Stato, Sec. V, 2 October 2014, n° 4928.

whose territory the landfill was to be opened had in the meantime decided to rebrand itself as a tourist destination by developing bio- and traditional agriculture; that the Region had adopted policy guidelines favouring the development of existing landfills rather than the opening of new ones; that the need for new landfills had been inflated by the applicant, who had not taken into due account the principle of proximity;[57] that the proposed installation was closer to an urban area than allowed in the applicable zoning regulation; and that the opening of the proposed landfill would have adversely affected traffic in the area. In the end, a number of policy reasons militated against the landfill, and these were not overweighed by any need in the public interest.[58]

The first instance administrative court had dismissed an application for judicial review and this was appealed by the developer. Referring to earlier cases, the *Consiglio di Stato* illustrated its doctrinal approach by stressing that EIA decisions are not just based on technical assessments, rather presupposing policy choices about conflicting public and private interests, including those calling for the so-called zero-option. This translates into a reinforced duty to give reasons for a positive decision once public interests militating against the proposed project have been invoked during the procedure, including by stakeholders.[59]Somewhat contradictorily, the court acknowledged a wide discretion to the decision maker, thus implying limited judicial review on the decision taken, while at the same time placing a high burden on the decision maker in terms of reasons to be given.[60]

Most of the pleas of the company were rejected on appeal. The higher administrative court held that, far from giving preponderant weight to the opinion of the local municipalities, the Regional authority had considered all the relevant elements, including that the proposed landfill was not necessary to meet the needs of the population.[61] Moreover, the decision had been taken after the applicant had been given ample opportunity to reply to the objections raised against the project. In

[57] Which is codified in Art. 16 of Directive 2008/98/EC on waste and repealing certain Directives (the so-called Waste Framework Directive).
[58] See sect. 1 of the judgment.
[59] Ibid, sect. 7.1.
[60] Ibid.; see also sect. 7.2.3.
[61] Ibid, sect. 7.2.1.1.

line with the generally accepted view in Italian case law, the court also held that it was not necessary for the decision maker to rebut individually and analytically each and every argument raised by the applicant to defeat the counter-objections.[62] Finally, the court dismissed the detailed factual arguments developed by the applicant to criticize as either obsolete or wrong the data concerning the amount of waste generated in the region and the capacity of the landfills already in use that were relied upon by the decisions maker. According to the court, these arguments amounted to a dissenting opinion that could not put into question the legality of the decision taken; possible different understandings of the factual situation do not allow the courts to override a well motivated decision adopted following a thorough investigation.[63]

This judgment deserved a somewhat lengthy description because it is thought to represent well the attitude of Italian administrative courts when faced with challenges to complex factual assessments and policy choices made by the decision maker. The courts tend to be satisfied when told a plausible story that gives consistent reasons as to the procedure followed and the decision taken. Provided that the right to be heard has been sufficiently safeguarded during the administrative procedure, the courts will not be drawn into adversarial arguments about the relevant facts. Even an articulate alternative presentation of those facts by the applicant for judicial review will not be enough for the courts to consider asking expert advice. Such attitude seems inconsistent with even a very modest reading of the requirement for 'substantive legality' review spelt out in Article 9(2) of the Convention.[64] It is also doubtful whether it does meet – or not – 'minimum standard' to be applied 'to the examination of the facts' required in the *Commission Notice on Access to Justice in Environmental Matters*.[65]

[62] Ibid, sect. 7.2.2.
[63] Sect. 7.2.3.
[64] See, also for a comparison of the standards laid down in Art. 9(29 and 9(3) of the Aarhus Convention, M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn 10 ff,
[65] C(2017) 2016 final, paragraph 139.

This somewhat hands-off approach applies beyond environmental cases to include factual evaluation concerning measures to safeguard the landscape and cultural heritage, whose protection predates environmental concerns in Italy.[66]

4.2. Wildlife Management and Hunting Plans

Measures concerning wildlife management also normally entail policy decisions based on complex factual situations requiring scientific assessments. This is specifically true concerning hunting plans. Regions and sub-regional (provincial) entities are competent to draw hunting plans, set the dates for the hunting season, decide the species that can be hunted and delimit the areas set aside for reproduction and protection. Hunter lobbies are politically very strong in a number of Italian regions, leading decisions makers to stretch, and often to breach, EU and national rules.[67]

One of the most interesting cases concerning access to scientific knowledge on environmental matters involved a series of provincial hunting plans of the Bergamo province in the Lombardy Region. The judgment is significant for highlighting both the possibilities open under the current legislation, including having recourse to expert witnesses, and for the limits that administrative courts place on their review.[68]

In 2006 WWF Italy challenged the provincial hunting plan. The latter was amended in 2008 to remedy the fact that the EIA had followed instead of preceding the adoption of the plan and that the EIA document was largely cut and pasted from the one drafted by another province. The WWF challenged the new plan in the course of the initial first instance judicial proceeding, which was still ongoing and ended up lasting four years. All in all, the claimant raised 32 pleas, making the judgment fairly long by recent Italian administrative court standards.

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[66] See again T.A.R. Lombardia, Brescia Sec. II, 18 March 2011, n° 440, which was briefly discussed above.
[67] E.g. Case C-164/09, *Commission* v. *Italy*, ECLI:EU:C:2010:672.
[68] TA.R. Lombardia, Brescia Sec. II, 9 April 2010, n° 1532.

The analysis by the first instance court started by recalling the bounds on its review power. The court held that the case fell under legality review, meaning that it could not go into the merits of the case, substituting its own decision to the one taken by the administration.[69] In this framework, the report established by the expert witness might only be used to assess whether the choices made by the decision maker were logically coherent, taking as the standard the scientific knowledge relevant to those choices.[70]

Two of the main pleas raised by the WWF were held to be well founded. The first concerned the proper delimitation of the 'alpine region'. This is relevant because the national legislation provides a different rate of set aside for sanctuary and reproduction for the alpine region compared with the rest of the province. The expert witness named by the court clarified that two conflicting theories may be used to delimit the alpine region. The first is 'natural' in that it only relies on the presence of specific fauna found exclusively in mountain areas. The second is 'cultural' and also takes into consideration the traditions of the local populations and how they interact with the environment. All the experts, including those named by the parties, agreed that both approaches are acceptable, meaning that there is no consensus in the science. This is indeed a good instance of 'uncertainty' affecting the natural sciences. However, the Bergamo province did not adhere to either of the two theories. According to the expert witness named by the court, the province simply copied the cartography already used twenty years before (if not earlier). This made the plan adopted by the province illegal for both breach of the duty to give reasons and irrationality. The plan did not explain the methodology chosen and in any case, given the changes in the environment which may be expected after twenty years, the 1997 cartography could not but be considered obsolete.[71]

The first instance court also held as illegal the methodology applied to define set aside areas. The province, acting on a literal interpretation of the regional legislation, included all areas in which hunting is forbidden to make up the tally of areas set aside for sanctuary. Therefore, areas along roads

[69] Ibid, sect. 3.
[70] Ibid, sect. 4.
[71] TA.R. Lombardia, Brescia Sec. II, 9 Apr 2010, n° 1532, sect 12 f.

or railways and close to houses were so considered. Interpreting the legislation in the light of the aim to allow enough areas for the fauna to find shelter and reproduce, the court found that such areas are unfit for purpose. Therefore, they should have not been factored among the areas set aside for conservation. Here the court was mainly concerned with law rather than with facts. The expert witness was however relied upon to find that indeed a sizeable part of the areas ostensibly set aside as sanctuary could not answer the needs of the fauna.[72] Similarly, the expert's opinion was relied upon when finding that sanctuary areas around alpine passes were not correctly designed, since the cartography showed overlaps between what ostensibly were sanctuaries and badly defined areas where hunting lodges were situated. This was all the worse since the province could have easily plotted the exact site of the hunting lodges based on documentation it held in its archives.[73]

Other pleas raised by the WWF were rejected. For instance, relying on the expert's opinion, the first instance court upheld the provisions in the plan concerning the areas and times in which hunting dogs could be trained because they were considered to be in line with the criteria used in 'animal management sciences' (*scienze faunistiche*).[74] Also the court stuck to the traditional approach to participation and the duty to give reasons, holding that the claimant could not expect the decision maker to discuss analytically each and every point raised by those taking part in the administrative procedure.[75]

This judgment shows that (some) administrative courts are at least ready to have recourse to expert witnesses to check the accuracy of some benignly complex facts forming the base for policy decisions. When it is so, a court goes further in the judicial review than in the EIA case discussed in the previous section. This shows the law in the books can indeed be interpreted and applied fully in

[72] Ibid, sect. 14 ff, and specifically sect. 20 concerning the information derived from the report established by the expert witness. It is to be noted that the experts named by the province had not challenged the findings by the expert named by the court on this point.
[73] Ibid, sect. 22 ff.
[74] T.A.R. Lombardia, Brescia Sec. II, 9 Apr 2010, n° 1532, sect. 26.
[75] Ibid, sect. 5 and 6.

line with the requirements in Article 9 of the Aarhus Convention and in the EU implementing legislation.

This judgement also provides some interesting information about the practice concerning the role and treatment of expert witnesses, albeit predating the 2010 Code of judicial administrative procedure. Firstly, the expert chosen was a public servant working for the wild animal management department of another region. Secondly, but possibly not unrelated to the first aspect, the costs for the expert were limited, amounting to something more than EUR 7000 for two reports, one each for the 2006 and 2008 plans, the latter exceeding 2000 pages. Finally, since not all the pleas were considered well-founded, the court ordered each party to bear its own costs, and to share the costs for the expert witness. The latter judgement seems somewhat unfair, since the WWF was successful on most of the issues it raised. Still, given the limited costs involved, it is doubted this infringes the requirement of 'non prohibitively expensive' set out in Article 9(4) of the Aarhus Convention.[76]

3.3. Remedial Measures

In Italy, public authorities often issue orders against those responsible for water pollution and/or ground contamination. These orders normally require the polluter to remedy the harm done to the environment through decontamination work and/or the building of catchment walls and basins to prevent further environmental damage. There is (almost) no policy involved here, and all the questions revolve around the most technically appropriate way(s) and means to remedy the situation.[77] These measures, which entail a relevant when not heavy financial burden on the polluter, are generally challenged in court.

[76] A.D. Nagy 'The Aarhus-Acquis in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure' in R. Caranta, A. Gerbrandy, B. Müller (eds), *The Making of a New Legal Culture: the Aarhus Convention* above fn, p. 47 ff,

[77] T.A.R. Toscana, Sec. II, 6 July 2010, n° 2316.

Administrative courts do not hesitate to strike down insufficiently reasoned orders as it was already shown by the judgement annulling the decision ordering immediate remedial action to avoid groundwater contamination because of lack of reasons.[78] They have also proven to be ready to challenge decisions based on fact-finding activities performed in breach of due process legal requirements and/or for which insufficient reasons were given, including concerning the absence of less burdensome measures for the addressee of the administrative order.[79]

In other cases, the courts have trodden more carefully. One such case involved a remedial and prevention order against a company responsible for polluting ground water, including affecting a natural protection area. The company was required to build containment works. The first instance court started by quoting a long section of a judgement of the *Consiglio di Stato* rendered in an abuse of dominant position case and which was already recalled, excluding direct review of the substance of the decision because of 'scientific relativism'.[80] On this basis, the court was very quick to point out that the containment works were fully adequate to prevent further harm to the environment and also fully proportional ("*del tutto proporzionata*") to the specific factual situation.[81]

This is an instance of an administrative court referring to a *massima* from a judgment concerning a completely different factual situation to dispose quickly of the case at hand. Some elements of proportionality analysis are present in the judgment, but they seem to have been used just to provide a touch of modernity or to make shallow reasons appear fashionable. Of course the applicant was probably not very deserving, since it neither denied responsibility, nor seemed to have advanced any alternative remedy to what was a non-contested case of pollution. Still, one might wonder why it took the first instance court of Apulia seven years to pass judgment on a very simple case.

[78] T.A.R. Toscana, Sec. II, 19 May 2010, n° 1524.
[79] T.A.R. Toscana, Sec. II, 6 July 2010, n° 2316; here (again) the order included remedial measures for pollution which was not attributable to its addressee.
[80] T.A.R. Puglia, Lecce Sec. I, 5 September 2014, n° 2304, sect. 3.1; see also, between the same parties, T.A.R. Puglia, Lecce Sec. I, 5 September 2014, n° 2305.
[81] T.A.R. Puglia, Lecce Sec. I, 5 September 2014, n° 2304, sect. 3.2.

What is remarkable is that none of the above judgments was based on the court performing – or committing to an expert – a detailed factual investigation. Clearly insufficient reasons were at time sufficient to lead to the annulment of the administrative decision challenged. When it was not so, like in the last case referred to, the administrative court seemed to back off from any additional fact finding initiative. Again this might seem inconsistent with even a minimal reading of the requirement of 'substantive review' as laid down in Article 9 of the Aarhus Convention, but it is also true that the applicant for judicial review did nothing in this case to prod the court to take a more inquisitive approach.

Finally, in one case, a first instance administrative court annulled an urgent order to remedy pollution from household wastewater in the Circeo natural reserve. From the expertise acquired in a parallel case opposing the addressee of the order and his neighbours before the civil courts, it was clear that the problem originated from a series of breaches of building rules committed in the past when the original small houses were significantly enlarged. According to the court, an urgent order was not the kind of decision provided by the law to answer such past breaches.[82]

This solution might be considered somewhat formalistic, but the judgment is still significant because it shows some readiness to act on expertise acquired in front of other courts.

3.4. Other Authorisations/ Concessions not Requiring EIA

Granting authorisations or concessions for works or infrastructure not requiring EIA normally presupposes very limited factual assessment powers. The impact is more limited and the technical challenges faced by the decision maker are limited. Still, the administrative courts generally claim that they may only review the procedure and the reasons given.[83]

[82] T.AR. Lazio, Sec. III *Quater*, 26 January 2016, n° 7528.
[83] Cons. Stato, Sec. VI, 4 November 2013, n° 5293, sect. 2.

Notwithstanding this doctrinal stance, at times the courts can be seen reviewing – and upholding – the substance of the decision taken by the public authority. This is so especially when the decision corresponds to common sense, as in the case with the shacks and huts built close to the shores of the Garda Lake.[84] This was also the case with a request to allow non-permanent leisure beach facilities throughout the year on some sandy dunes on the coasts of Apulia. The *Consiglio di Stato* upheld the negative decision based on advice from the authority competent for cultural heritage and the environment that had required the facilities to be fully removed at the end of each summer season. The court reasoned that the facilities had a negative visual impact on the surrounding environment and the provision to remove them was expressly considered to be 'intrinsically congruous'. The decision challenged was also held to strike a justified balance between environmental considerations and the financial interests of the beneficiary of the authorisation (who of course wanted to avoid the extra costs ensuing from periodical removal and reinstallation).[85]

When confronted with cases characterised by limited assessment powers, Italian administrative courts seems ready to look into the substance of the administrative decision challenge, and this whatever the doctrinal approach they decide to adhere to. Generally speaking therefore, the case law analysed in this sections are in line with requirement of 'substantive review' as laid down in Article 9 of the Aarhus Convention.[86]

3.5. Sanctions

Widespread illegality does not (always) mean impunity. Sanctions happen and are often challenged. One case concerned illegal quarrying activity in Campania, with an ensuing fine of EUR 3.479,36

[84] T.A.R. Lombardia, Brescia Sec. II, 18 March 2011, n° 440; see also T.A.R. Lombardia, Brescia Sec. II, 2 February 2011, n° 224, where the court held that the municipality was justified in considering unacceptable from an aesthetic point of view a plastic fence in a wooded area; pictures are however not referred to in this latter case.
[85] Cons. Stato, Sec. VI, 4 November 2013, n° 5293, sect. 2.
[86] See A.D. Nagy 'The Aarhus-Acquis in the EU. Developments in the Dynamics of Implementing the Three Pillars Structure' above fn, p. 47 ff.

and an order to stop the activity and restore the area to what it was before. The owner of the land denied all responsibility, claiming that the alteration of the area had either happened before he bought the land or was the result of naturally occurring erosion. He asked for an expert to report on the factual situation. Based on the expert's report, which had contrasted a number of past and present images of the area taken from the air, the court found that quarrying had indeed recently taken place and upheld the decision taken by the public administration. Beside the fine, the claimant had to pay EUR 4.000,00 for the legal costs of the opponent Region and EUR 2.542,23 for the expert.[87]

Here again, as in the cases analysed in the previous section, the margin of discretion is not an issue, and courts are ready to look into the facts, including by referring to expert witnesses.

4. Conclusions

Changes in the legislation in the past twenty years have given the Italian administrative courts the tools they need to conduct factual investigations and to have access to scientific knowledge through both *verificazioni* and expert witnesses. The administrative courts themselves have reconsidered the doctrine concerning judicial review, allowing themselves somewhat wider margins of scrutiny on the decisions taken by the public authority. This, however, stops short of going into the substance of the decision and even shorter of substituting a judicial decision to the one taken by the competent administrative authority. The administrative courts are very ready to concede wide discretion, including room for policy decision, to the public administration. Also they tend to approach science with a heavy dose of scepticism and label scientific knowledge as characterised by much uncertainty. When in doubt, the courts bow to the choices made by the decision maker.

As already remarked, the fact that changes in the doctrines of judicial review first took place with reference to competition cases did not help much. The Italian administrative courts have simply

[87] T.A.R. Campania, Sec. IV, 7 December 2016, n° 5708, sect. 8.5.

and plainly extended the doctrines on the bounds of judicial review to the analysis of environmental cases.[88] At times this is even done by recalling *massime* that were drafted with reference to cases miles away from environmental law, such as for instance – and again – competition law.[89]

It might also be the case that the administrative courts were and are most probably not ready to go much further in judicial review anyway. Scholars too are deeply divided in Italy, with a number of them expounding the virtues of limited review and justifying it on different arguments ranging from separation of power to the lack of specialised knowledge of administrative courts.[90]

In practice, judicial review in environmental cases is therefore still very much focused on the reasons given, looking at their logical consistency more than at their soundness, and even less so at the soundness of the decision taken (unless of course the decision plainly conforms to or instead flies in the face of common sense). Italian administrative courts seldom avail themselves of expert witnesses, and this in turn keep their review to the surface of the administrative decision. Individual judges cannot indeed be expected to be endowed with specialised scientific knowledge.

The situation is at times different when the facts are clear or the factual investigation required is reasonably straightforward. If so, as shown by the case concerning the Bergamo hunting plans, at least some administrative courts are ready to have recourse to experts to obtain a fuller knowledge of the factual situation on which policy decision have been made and to rely on experts' findings.[91]

It is difficult to say in general whether the Italian practice of judicial review is in line with the EU general principle of effective judicial protection. The case law of the Court of Justice has shown signs of restraint in the past few years. Moreover, this case law is less than straightforward on the specific topic standard of review and means of proof. Finally, and in any case, it certainly stops short of requiring a full review of factual assessments, including complex ones.[92]

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[88] This seems to be a quite general pattern in Europe: see D.C. Dragos and B. Neamtu 'Access to justice under the Aarhus Convention: the Comparative View' in R. Caranta, A. Gerbrandy, B. Müller (eds), *The Making of a New Legal Culture: the Aarhus Convention* above fn, p. 390.
[89] Eg T.A.R. Puglia, Lecce Sez. I, 5 September 2014, n° 2304, discussed above.
[90] See, also for further references, B. Marchetti, 'Il giudice amministrativo tra tutela soggettiva e oggettiva: riflessioni di diritto comparato' in *Diritto processuale amministrativo* 2014, 2014, p. 74
[91] TA.R. Lombardia, Brescia Sez. II, 9 April 2010, n° 1532.
[92] E.g. Case C-71/14, *East Sussex County Council*, ECLI:EU:C:2015:656; Case C-120/97, *Upjohn*, EU:C:1999:14

Also it is difficult to say generally whether Italian case law is in line with the obligations flowing from the Aarhus Convention and from the EU measures implementing it. The *Commission Notice on Access to Justice in Environmental Matters* is not very specific on this topic. It refers to a 'minimum standard' to be applied 'to the examination of the facts'[93] without further elaborating on what these 'minimum standards are.[94] This notwithstanding, the more hands-off judgments are indeed hard to reconcile with the requirement of 'substantive legality' review predicated in Article 9 of the Aarhus Convention.[95]

[93] C(2017) 2016 final, paragraph 139.
[94] See the analysis by M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn, 18 f.
[95] See, also for a comparison between the standards laid down respectively in Art. 9(2) and 9(3) of the Aarhus Convention, M. Eliantonio and T. Palonnitty 'The EU requirements for the standards of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' above fn, 10 ff,