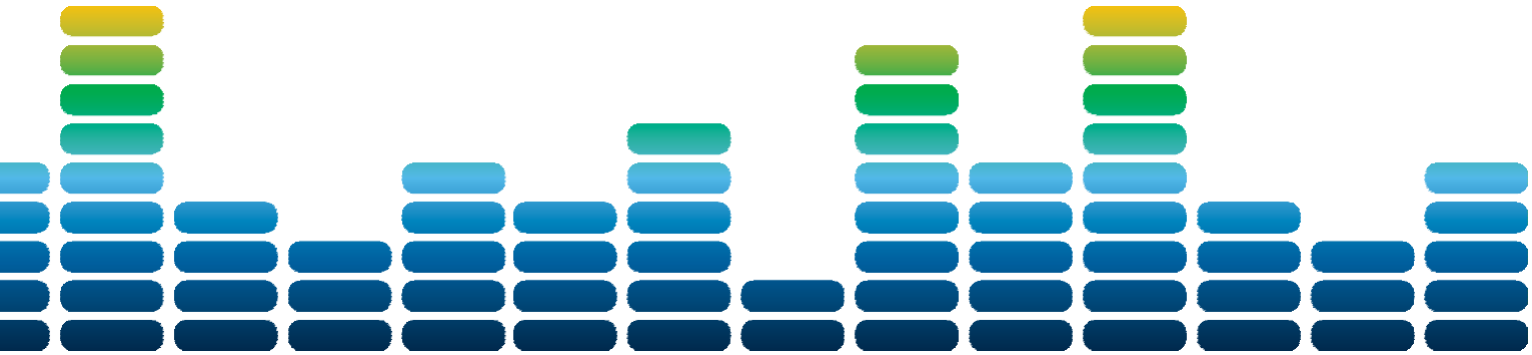
Guidelines for the application of Articles 28 and 29 of Legislative Decree 152/2006: the monitoring and sanctioning system - Reasoned reading



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SUMMARY

Preface

This document, produced in the framework of the activities of the LQS1 Line of Intervention of the CReIAMO PA Project dedicated to Environmental Assessments of which the Ministry of the Environment and Energy Security is a beneficiary, is aimed at contributing, through a reasoned reading of the single provisions, to the interpretation of the regulations set forth in Articles 28 and 29, Legislative Decree 152/2006.

The document was prepared by the Technical Specialised Unit of the LQS1 Line of Intervention on the basis of the analysis of legal and technical documentation at national and regional level and by virtue of the contribution provided by regions and autonomous provinces, as well as the state administration.

The availability of support tools for the activities of EIA authorities and proponents represents an important opportunity to ensure a homogeneous application of EIA regulations on the national territory: this objective is pursued by the CReIAMO PA Project through the publication of this guideline document that, although not binding, can represent a valid orientation tool.

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Acronyms and Definitions

Competent authority	The public administration is responsible for adopting the measure of verification of subjectivity, for drawing up the reasoned opinion, in the case of assessment of plans and programmes, and for adopting the final EIA measures, in the case of projects.
EIA Directive	Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
DVA	General Directorate for Environmental Assessments - Ministry of Energy Security
LQS1 Line	Line of action Environmental Assessments - Actions for improvement the effectiveness of SEA and EIA processes for programmes, plans and projects
MASE	Ministry of the Environment and Energy Security
CReIAMO PA Project	Skills and Networks for Environmental Integration and Improved PA Organisations - NOP Government and Institutional Capacity 2014-2020
UTS	Specialised Technical Unit of the CReIAMO PA Project - Line of Intervention LQS1
VIA	Environmental Impact Assessment

1. INTRODUCTION

1.1. Purpose and structure of the document

The purpose of this paper is to examine the problematic profiles that have emerged both on a theoretical level and in practical application in relation to Articles 28 and 29 of Legislative Decree 152/2006, five years after the amendments made by Legislative Decree 104/2017.

The document aims to offer a systemic perspective of the experiences formed among the regional administrations that, not without difficulty, have tried their hand at implementing the legislation in question. Even in the face of the heterogeneity of the individual regional experiences, however, common critical profiles have emerged, which are, in fact, the object of privileged analysis in this work.

It should be pointed out, however, that some profiles need deeper reflection, even *de iure condendo,* therefore, the aim of this paper is not, and could not be, to solve these recurring problems, but rather to identify them, to 'line them up' so as to stimulate future and shared reflection.

1.2. Methodology, tools and structure of the document

The methodology adopted is an examination of the legal and procedural nature of the individual provisions. The purpose of the analysis, as already anticipated is to offer a contribution to the interpretative activity of the legislation and, hopefully, to the consolidation of the *best practices* formed to date.

The examination, therefore, will be conducted by means of a punctual analysis of the individual regulatory provisions, contained in Articles 28 and 29, Legislative Decree 152/2006, and will be punctuated by the individual paragraphs, aspiring to the highest degree of completeness.

The document is the result of numerous activities under the LQS1 line of the CREiAMO PA Project allowed a direct confrontation with the regional administrations.

The observations of the Regions and Autonomous Provinces were acquired and discussed at the EIA Technical Tables dedicated to Articles 28 and 29 of Legislative Decree 152/2006 held within the activities of Line LQS1 - Environmental Assessments of the CReIAMO PA Project on 19 and 26 May 2021.

This paper has also drawn on these observations in order to attempt to offer a coherent reading of the legislation, and to crystallise proposals for interpretative improvements to the regulatory fabric.

In addition, the document also took into account the practices and experiences gained in the context of proceedings under state jurisdiction and was shared with the competent Division V - EIA and SEA Assessment Procedures of the General Directorate for Environmental Assessments of the MASE.

2. COMPLIANCE CHECKS AND MONITORING: ART. 28, LEGISLATIVE DECREE N.152/2006

2.1. Article 28, paragraph 1

The proponent is obliged to comply with the environmental conditions contained in the EIA screening or EIA decision.

2.1.1 General overview

The reform of Article 28 brought about by Legislative Decree 104/2017 (which came into force on 21 July 2017), was very significant and introduced a punctual regulation for a previously undefined and therefore ineffective topical phase of environmental assessments (EIA and EIA submissibility check).

The legislature therefore wished to pay the necessary attention to the phase following the issuance of

the measure, which is necessary to verify the conditions under which the competent authority has deemed the proposed project environmentally compatible, in the absence of which, that decision could be fundamentally flawed.

It is therefore not a mere fulfilment but a substantial phase of the procedure that does not end with the issuance of the measure, but continues with the *ex post* verification of the requirements, deemed necessary to support the absence of potential significant negative impacts, often assessed on a forecast and probabilistic basis and therefore inherently affected by possible margins of uncertainty, or for the necessary control of the effectiveness of any measures envisaged to reduce and/or compensate them.

The effects of the EIA measure and of the measure of verification of subjectivity to EIA, where environmental conditions are envisaged, are not limited to the mere phase of issuing the permit, but extend throughout the entire life cycle of the project and of the resulting work. The EIA measure, in fact, has a strongly conforming content, exercised through the affixing of environmental conditions - a fundamental element of the decision - which concern both any further project phases and those of construction (the so-called site phase) and operation, up to the phase of decommissioning of the work.

Compliance with the environmental conditions is the subject of a detailed control procedure, called "verification of compliance", to be activated in the manner defined in Art. 28 on the basis of the timetables indicated in the prescriptive frameworks of the same environmental conditions.

The provisions of Article 28 of Legislative Decree 152/2006, as replaced by Article 17 of Legislative Decree 104/2017, have retroactive effect pursuant to Article 23, paragraph 3, of Legislative Decree 104/2017, which extends the application of the amended Article 28 to monitoring activities and EIA and EIA submissibility verification measures adopted under the previous legislation.

2.2. Article 28, paragraph 2

The competent authority, in cooperation with the Ministry of Cultural Heritage and Activities and Tourism for the profiles of competence, shall verify compliance with the environmental conditions referred to in paragraph 1 in order to promptly identify unforeseen significant and negative environmental impacts and to take appropriate corrective measures. For such activities, the competent authority may avail itself, through appropriate memoranda of understanding, of the National Networked System for Environmental Protection referred to in Law no. 132 of 28 June 2016, of the Istituto Superiore di Sanità for profiles concerning public health, or of other public entities, which shall promptly inform the same competent authority of the results of the verification. For the support of the same activities, in the case of projects of state competence that are particularly relevant due to the nature, complexity, location and size of the works or interventions, the competent authority may establish, having heard the proponent and with charges borne by the latter, special environmental observatories aimed at ensuring the transparency and dissemination of information concerning the compliance checks, which operate according to the modalities defined by one or more decrees of the Minister for the Environment and the Protection of Land and Sea adopted on the basis of the following criteria:

- *a) designation of the Observatory members by each of the Administrations and Bodies identified in the Environmental Impact Assessment decree;*
- *b) Appointment of 50 per cent of the representatives of the Ministry of Ecological Transition from among persons outside the administration of the Ministry with significant competence and professionalism to perform the functions;*
- *c) provision of grounds for ineligibility, incompatibility and conflict of interest;*
- *d) temporary nature of the appointment, not exceeding four years, non-renewable and not combinable with appointments to other observatories;*
- *e) identification of the charges to be borne by the proposer, setting an upper limit for the remuneration of the members of the Observatory.*
- *f) Upon successful completion of the verification, the competent authority certifies compliance by publishing the relevant documentation on its website within 15 days of receipt of the verification result.*

2.2.1 Regions that submitted comments

Campania, Lazio, Liguria, Marche, Piedmont, Apulia, Tuscany, Umbria, Veneto, Autonomous Province of Trento

2.2.2 General overview

The first sentence identifies the main purpose of the verification of compliance with environmental conditions in terms of the timely identification of unforeseen significant and adverse environmental impacts that require the implementation of appropriate corrective measures.

The legislator has thus paid express attention to 'unforeseen' situations that might occur if the proponent does not fulfil the obligation enshrined in subsection 1 of Art. 28 to comply with the environmental conditions contained in the EIA or EIA screening measure.

Recalling the purpose of the environmental conditions (art. 5, paragraph 1, letters o-ter, o-quater, Legislative Decree 152/2006) to ensure the effective prevention, reduction or compensation of potential significant negative impacts, already identified and assessed during the preliminary investigation carried out by the competent authority, the non-implementation of the conditions by the proponent is a "pathological" condition that may generate significant impacts "unforeseen". These are therefore not to be understood as not having been previously identified and assessed, but rather as resulting from the proposer's non-compliance on which the competent authority must monitor and, if necessary, remedy with measures aimed at remedying any negative repercussions on the environment resulting from the non-compliance.

The first measures to be implemented by the competent authority in the event of a negative outcome of the verification of compliance, are those governed by paragraph 5 of Art. 28.

The term "unforeseen impacts" is also referred to in Paragraph 6 of Article 28, where, however, as reported in Chapter 2.5, it is explicitly emphasised that such events constitute non-ordinary events that are "additional or different" and are therefore not attributable to the proponent's failure to comply with the environmental conditions.

The second sentence defines the possibility that the competent authority, as defined by Article 5, paragraph 1, letter p) of Legislative Decree 152/2006[1], may avail itself of other subjects for the verification of compliance with environmental conditions, while retaining exclusive ownership of the procedure. The period appears to be formulated in a manner oriented towards the sphere of state competence, identifying different forms of collaboration/assistance between the latter and public subjects at a central level (Ministry of Cultural Heritage and Activities and Tourism, now Ministry of Culture, National Network System for Environmental Protection, Istituto Superiore di Sanità), although not limiting it to these subjects but referring in general to other public subjects.

Since the rank of the competent authority, whether state or regional, is therefore not clearly specified, it is necessary to refer to the definition of the latter pursuant to the aforementioned Article 5(1)(p) and thus to refer the provisions to both the competences of the state and of the Regions and Autonomous Provinces or to the public administrations that may have been delegated by them in their functions.

Although reliance by the competent authority on other entities is optional, this possibility seems to be envisaged as effectively feasible only following the conclusion of specific acts (memoranda of understanding) between the parties involved, in the absence of which it does not appear practically feasible.

This aspect is dealt with specifically in Chapter 2.2.5 as part of the critical issues that emerged and

[1] the public administration responsible for the adoption of the measure of verification of subjectivity to EIA, the preparation of the reasoned opinion, in the case of assessment of plans and programmes, and the adoption of EIA measures, in the case of projects or the issuance of the integrated environmental authorisation or the measure

working hypothesis.

National Networked System for the Protection of the Environment (SNPA), which in Article 3 paragraph 1 letter l) identifies that the SNPA's institutional functions include the monitoring activities of the effects on the environment deriving from however named, authorising the operation Reference is also made to Law 132/2016 establishing the the realisation of infrastructural works of national and local interest, also through collaboration with the Environmental Observatories that may have been established.

Concerning the term 'reliance', more extensively dealt with below, it is noted that in order to avoid possible doubts on the allocation of responsibilities and competences for compliance verification activities, it is appropriate to clearly establish in the EIA measure, or in the associated prescriptive framework, the subjects involved and their respective roles.

The Ministerial Decree MATTM no. 308 of 24/12/2015 "Methodological guidelines for the preparation of prescriptive frameworks in EIA measures of state competence", often used as a "model" also for the prescriptive frameworks of regional measures, has operated in this sense a formal and substantial rationalisation of the contents of the prescriptive frameworks and of the individual "prescriptions" for their correct implementation by the proponent and effective verification by the competent authority.

The aforementioned ministerial decree, issued prior to the substantial reform of Article 28 brought about by Legislative Decree 104/2017, identifies a single "supervisory body", responsible for the verification of compliance, and possible different "involved bodies" which are attributed a specific role and functions for the implementation of the condition by the proponent and not a role of collaboration with the competent authority for the purposes of the verification of compliance.

According to the current wording of subsection 2, the 'supervising body' is equivalent to the competent authority, whereas for the 'involved bodies' the current regulation does not provide for specific indications, but instead identifies the entities that the competent authority is entitled to use for compliance verification activities.

In the case of environmental conditions dictated in regional opinions within the framework of the state EIA and transposed by the EIA decree, the competent authority is the MASE and the Region represents the body used by the MASE, which, pursuant to DM 308/2015, would correspond to the involved body.

Any persons identified for compliance verification activities are required to communicate the results of the verification to the competent authority in a timely manner. This provision is to be interpreted in conjunction with the maximum time limits for the conclusion of the proceedings set forth in paragraph 3.

The third sentence of the paragraph is entirely devoted to the institution of environmental observatories, more extensively discussed below.

The last sentence of the paragraph, in order to guarantee the public's rights to information on the decisions taken at all stages of the environmental assessment procedures, provides that following the positive outcome of the verification of compliance attesting to the full fulfilment by the proponent of the environmental condition, the documentation relating to the procedure must be made available to the public through the dedicated websites, within fifteen days of its conclusion.

The legislator limited this fulfilment to the positive outcome of the verification, however, the state administration, by established practice, publishes the documentation received from the start of the procedure, in compliance with the principle of transparency of administrative action and information to the public.

Although not expressly provided for, the term "relevant documentation" is to be understood as all the documentation pertaining to the procedure, similarly to the other procedures governed by Title III of Part Two of Legislative Decree 152/2006, i.e. the documentation submitted by the proponent at the start of the application for verification of compliance together with the certification of the positive outcome of the verification by the competent authority. The formal nature of the certificate is not made

explicit in the general rule and is therefore left to the discretion of the competent authority (communication or other administrative act).

It is also specified that, even in the event that the positive outcome is the result of an activity carried out by a party other than the competent authority, the latter is still responsible for fulfilling its obligations to inform the public.

2.2.3 The principle of reliance in verifying compliance with environmental conditions

The legislator of the reform of Article 28 operated by Legislative Decree. 104/2017 "*has sanctioned in unequivocal terms the exclusive entitlement of the power to verify the compliance of environmental conditions in the head of the competent authority with a twofold effect (compared to what was previously the case, on the basis of the assumption according to which of the verifications of compliance were considered responsible, from time to time, the entities or bodies that had requested the introduction of a given environmental condition in the final measure) on the one hand, that of making the relative procedure more efficient, expeditious and transparent, enabling - inter alia - the proponent to deal with a single public interlocutor responsible for the verification; on the other, that of preventing the "politicisation" of the verification activity that often arose when the Region or the local authorities concerned were considered responsible for it* "[2].

The relationship of 'reliance' referred to in paragraph 2 in administrative law means the manner in which a public entity benefits from the technical and/or managerial capacities of another public entity without, however, transferring its ownership in the exercise of the function assigned to it.

This, therefore, does not affect the competent authority's retention of sole ownership of the entire environmental assessment procedure, including the monitoring regulated by Article 28.

The participation in the procedure of the subjects identified by the competent authority for their specific technical competences, is therefore configured as a form of collaboration between public administrations, a n d not as a delegation, and therefore does not relieve the competent authority of the responsibilities and functions attributed to it by Article 28.

The legislator intended to identify a form of 'agreement' between the competent authority and the public entity of which it intends to avail itself, identifying for this purpose that appropriate memoranda of understanding be concluded.

This instrument, in general, describes a bilateral or plurilateral agreement and is not configured as a true contractual bond but rather as an act that regulates support activities and institutional collaboration linked to the achievement of objectives of common interest such as those related to the protection of the environment and health, directly connected to the primary purposes of the environmental assessment procedure.

Unlike the institution of the agreement between public administrations, governed by Article 15 of Law 241/1990, the memorandum of understanding is not governed by any regulatory source and differs from the agreement and other forms of a contractual nature, such as the convention, in that it is mainly of a programmatic and policy-oriented nature, being preparatory to the subsequent conclusion of more binding instruments such as agreements and conventions.

2.2.4 Environmental observatories

The third sentence of the paragraph regulating the purposes and organisational modalities of the environmental observatories is also formulated in a manner oriented to the sphere of state competence in that the scope of application refers to *projects of state competence,* the Minister for Ecological Transition is identified to adopt acts regulating the operation of the observatories, the *Environmental Impact Assessment decree is* mentioned, as well as *representatives from outside the Ministry*.

In implementation of the provisions of Paragraph 2 of Art. 28, a decree of the Minister of Ecological

[2] Marcello Cecchetti “La riforma dei procedimenti di valutazione d’impatto ambientale tra D.Lgs. n. 104 del 2017 e Corte costituzionale n. 198 del 2018”; Federalismi.it, 9 January 2019

Transition of 25 June 2021 (OJ General Series No. 165 of 12.7.2021)[3] established the modalities for the operation of environmental observatories, replacing the previous decree of the Minister of the Environment and Protection of Land and Sea No. 175 of 13 August 2020, which is simultaneously repealed.

In Article 3 of the aforementioned decree, the environmental observatory is defined as a *collegial body that performs support tasks for the competent authority in carrying out the activities provided for in Article 28.2 of Legislative Decree 152/2006* and that guarantees *the transparency and dissemination of information concerning compliance checks, in order to ensure their full and immediate disclosure.*

The article identifies, like Article 28.2, a role for the observatory aimed at transparency and the widest possible sharing with the public of information on compliance audits, which is also one of the tasks defined in Article 3.

Due to the environmental and territorial relevance of the works for which it is established, the functions of the environmental observatory therefore go beyond technical support to the competent authority for the verification of compliance with environmental conditions, configuring a primary role of permanent supervision that guarantees the community (*public bodies, associations, committees, individual citizens*) not only the *proper implementation of the prescriptions and/or environmental conditions laid down by the EIA measure,* but also the transparency and information of the verification and control action through telematic methods (Internet sites) and the active participation and constant comparison with *stakeholders.*

In this regard, reference is once again made to Article 3, paragraph 1, letter l) of Law No. 132/2016 establishing the SNPA, which identifies among the SNPA's institutional functions the monitoring activities of the environmental effects connected to the *realisation of infrastructural works of national and local interest, also through collaboration with the Environmental Observatories that may have been established.*

2.2.5 Main critical issues that emerged and working hypotheses

- As reported by many Regions and ARPAs, as of the date of drafting of this document, there is a lack of Memoranda of Understanding stipulated between the competent authority and the SNPA, or with the other competent public bodies mentioned in paragraph 2. This condition represents a critical issue insofar as the role and modalities of involvement of the Regional Environmental Protection Agencies in compliance verification procedures, both of state and regional competence, are not clearly defined.

  In this regard, in the conclusions of the document "Proposal of guidelines for the activities of the agency system in relation to the prescriptions of the EIA decrees and to the environmental monitoring plans"[4] approved by Resolution of the SNPA Council 27/2018 of 22.2.2018, it is reported that "Due to the specific regional regulatory sources from which the respective agency structures derive, both the articulation of the structures in charge of the subject matter, when involvement in the state and/or regional procedure is envisaged, and the competences vary greatly. Moreover, this involvement sometimes appears to be on a conventional basis and is, in very different ways, sometimes governed by internal regulations or circulars. [...] In conclusion, these results highlight the urgent need to standardise and harmonise EIA activities and the methods of involvement of regional and local territorial structures, with particular reference to those belonging to the agency system.

  With a view to streamlining and simplifying administrative action, it would appear desirable to draw up a 'framework' agreement protocol between the MASE and other public bodies at a

[3] https://www.gazzettaufficiale.it/eli/id/2021/07/12/21A04112/SG

[4] https://www.snpambiente.it/wp-content/uploads/2018/10/Delibera27conallegati.pdf

central level (SNPA, Ministry of Culture, Istituto Superiore Sanità) that clearly and unambiguously defines the possible ways in which state and regional structures may be involved, first of all in the procedures of state competence, also defining appropriate forms of connection for the activities of verification of compliance in the regional sphere so that the regions can regulate, in a manner consistent with the internal administrative structure, the most appropriate methods of coordination with the other subjects involved in the activities governed by art. 28. This possibility is also provided for by the provisions of Article 7-bis, paragraph 8 of Legislative Decree 152/2006, provided that compliance with European and national legislation is ensured.

In the absence of such a condition, the conclusion of memoranda of understanding would therefore take the form of a 'bureaucratic step' conditioning the different possibilities of using the various public entities referred to by the rule for compliance verification activities

- In light of the relevant novelties introduced to the institute of the verification of compliance by Legislative Decree 104/2017, it appears necessary to provide for the updating of the Decree of the Ministry of the Environment and Protection of the Sea No. 308 of 24/12/2015 "Methodological guidelines for the preparation of prescriptive frameworks in EIA measures of state competence" which, although relating to the sphere of state competence, as is known, has also been taken as a reference by many regional authorities, allowing to standardise the wording and contents of the prescriptive frameworks. Such an update would allow, first of all, to adapt the terminologies and functions attributed to the various subjects involved in the procedure (e.g. supervising bodies, involved bodies), the scope of application, as well as to make any changes to the contents of the aforementioned decree, also in relation to the operational experience gained in the matter.
- According to the current provisions, the outcome of the compliance check may be either exclusively 'positive' or 'negative' and, consequently, there are various specific fulfilments by the competent authority. In state practice, there is also the 'partially complied' condition. This occurs in cases where the outcome of the compliance check is not completely positive, but the deadline for compliance (e.g. commissioning of the plant) has not yet expired. In such a case, according to the above-mentioned practice, the proponent has the opportunity to complete compliance, provided that this occurs within the time limit indicated in the order. Only if the latter is exceeded does the competent authority proceed to issue the warning pursuant to Art. 28.5.

2.3. Article 28, paragraphs 3 and 4

3. *For the verification of compliance with environmental conditions, the proposer shall, in accordance with the timeframe and specific implementation modalities set out in the subject to an EIA or in the EIA decision, it transmits in electronic form to the competent authority, or to the party that may have been identified for verification, the documentation containing the elements necessary for the verification of compliance. The verification activity is concluded within 30 days of receipt of the documentation submitted by the proposer.*
4. *In the event that the entities identified for the verification of compliance pursuant to subsection 2 fail to do so within the time limit set forth in subsection 3, the verification activities shall be carried out directly by the competent authority.*

2.3.1 Regions that submitted comments

Calabria, Campania, Lazio, Liguria, Marche, Piedmont, Apulia, Tuscany, Umbria, Veneto, Autonomous Province of Trento

2.3.2 General overview

Paragraphs 3 and 4 regulate the fulfilments of all the parties involved, the proposer, the competent authority and any parties it uses, and also establish the timeframe for the conclusion of the procedure.

In the summary wording of the rules in question, the procedure is divided into the two stages set out in the first and second sentences of paragraph 3:

- transmission by the proposer "*to the competent authority or to the entity that may be identified for verification*" of the documentation containing the elements necessary to verify compliance;
- verification of compliance by the above-mentioned parties '*within thirty days of receipt of the documentation submitted by the proposer*'.

With respect to the first step, the rule first requires the proposer to submit the documentation

"*in compliance with the timeframe and the specific implementation modalities set out in the measure",* whether it is an EIA or an EIA verification. Moreover, except for the electronic format, the regulation does not specify the contents of the documentation except in general terms of completeness and adequacy with respect to the environmental condition.

To this end, clarity and the necessary detail in the formulation of the environmental condition is of paramount importance, also in terms of the timeframe within which it must be fulfilled, in order to allow for its proper implementation by the proponent, who is left with full discretion as to the content of the documentation, which may therefore include different types of documents.

Deadlines for the implementation of the environmental condition and for the subsequent activation of the compliance verification procedure by the competent authority are binding on the proposer.

The rule further provides that such documentation may be forwarded to the competent authority or to the entity the latter intends to use for the verification by indicating a dual option, i.e. alternatively and not exclusively (to a single entity) or cumulatively (to both entities).

This appears to be a harbinger of uncertainty and possible difficulties or differences in interpretation and application of the standard.

Should the proponent opt for transmission to the competent authority, this could entail additional obligations for the latter with respect to the party that may be in charge of the verification, and consequent procedural burdens that could affect, in particular, compliance with the already very limited timeframe for concluding the procedure.

In the event that the proponent opts instead for transmission to the entity that the authority intends to use for verification, a potential contradiction arises with the provisions of Paragraph 2 concerning the exclusive ownership of the procedure by the competent authority, which, not being informed of the commencement of the procedure, would lose the role of coordinating the same necessary to ensure compliance with the responsibilities provided for by both Paragraphs 2 and 4 of Article 28.

Therefore, in order to avoid the possible discrepancies highlighted above, it is considered appropriate that the application and the relevant documentation be submitted at the same time to both parties, i.e. to the competent authority and to the party to be used.

The second phase requires that the investigative activity by the verifier be concluded within 30 days.

Such stringent timeframes, even if not explicitly indicated as peremptory, in contrast to the other procedures governed by Articles 19, 25, 27 and 27-bis of Legislative Decree 152/2006, if on the one hand they ensure certain and rapid timeframes for the proponent, on the other hand they may be excessively limited for the performance of activities that may prove to be complex in relation to the specific nature of the environmental condition.

It should also be noted that the rule does not provide for additional steps that characterise other procedures, such as the request for clarifications/additions to the documentation submitted by the proponent, the suspension of procedural deadlines, and consultation with other parties.

However, in the absence of provisions to the contrary, it would seem that the general rules on administrative proceedings, and therefore also the institution of procedural suspension under Article 2.7 of Law 241/1990, can be applied. This is provided that the prerequisites indicated therein are met, i.e. that the suspension is justified and the time limit identified is proportionate and congruous with respect to the needs represented. The same reflection seems to be possible with regard to a possible warning under the subsequent paragraph 5 of Art. 28.

It is also recalled that Article 28.2 provides for the *timely* communication of the results of the verification to the competent authority by the persons identified for such activities. The term 'timely' should therefore be taken to refer to a deadline for compliance with the 30-day time limit for the conclusion of the procedure established by Paragraph 3, which is therefore likely to be shorter.

Paragraph 4 regulates the hypothesis of inertia on the part of the entities identified for compliance verification, dealt a more with extensively below.

2.3.3 The hypothesis of inertia of the entities identified for compliance verification

As already indicated in relation to Paragraph 2, the full and exclusive responsibility for the compliance verification procedure placed on the competent authority is confirmed by Paragraph 3, which regulates the case of non-compliance by the party whose services the competent authority uses within the 30-day time limit.

In such a case, the competent authority is expected to provide, in substitute route, for compliance verification activities.

Article 2.2 of Law No. 241/1990 provides that public administrations must conclude the administrative proceedings falling within their competence with an express measure, which must be adopted within thirty days from the date of commencement of the proceedings or within a different term established by law or by regulation adopted by decree of the President of the Council of Ministers. By 'express measure' is meant that which results from the preliminary investigation activity, regardless of the outcome, whether positive or negative.

Hence the obligation to conclude proceedings within the time limits set out in paragraph 4 of Art. 28 even to 30 days, with no exceptions unless provided for *by law*.

Article 2 of Law 241/1990, paragraphs 9-bis, 9-ter, 9-quater regulate, in case of inaction of the administration, the activation of substitutive powers.

These rules, according to the principle that the passage of time is a protectable good, stipulate that the public administration must act within administrative time limits as this is considered a declination of the principle of legality, but also of the efficiency and effectiveness of administrative action.

Paragraph 9-bis of Article 2 of Law 241/1990 provides for the power of substitution in the event of delay or inertia in concluding proceedings. This is a power conferred *ex lege* on the top management of the administration itself and can be exercised within the same confines, thus excluding a possible substitutive function at the head of the political bodies. Failure to comply with procedural deadlines therefore produces a remedial effect in favour of the subject left unanswered, since inertia can be neutralised, before recourse to administrative justice, by the power of substitution. The governing body may identify only one subject to whom substitutive powers may be attributed, which, pursuant to Article 28.4, is unequivocally defined as the competent authority. The underlying *rationale of* the rule confirms its full responsibility in all cases in which the prescribed timeframe for concluding individual proceedings is not respected.

Paragraph 4 of Art. 28 does not define the time limits within which the competent authority, in lieu of non-compliance by the party entrusted with the verification of compliance, must conclude the verification activities.

Article 2(9-ter) of Law 241/1990 provides that, once the time limit for the conclusion of the procedure has expired to no avail, the person in charge or the organisational unit referred to in Article 2. 9-bis, ex

officio or at the request of the interested party, shall exercise the power of substitution within a time limit equal to half of the original time limit, concluding the procedure through the competent structures or by appointing a commissioner. According to the general rule on administrative procedure, there would therefore appear to be a 15-day time limit for the competent authority to conclude the procedure for verifying compliance with the environmental condition in the event of inertia on the part of the party responsible for such verification.

From a formal point of view, the provisions of Paragraph 4 of Article 28 are clear and explicit, as they do not give rise to any possible uncertainties, since they merely refer to the power of substitution in the event of inertia on the part of the party in charge of verification, nor do they provide for any prodromal activities on the part of the competent authority with respect to the avocation of verification functions, as those instead expressly provided for by Paragraph 5, albeit for a different case.

From a substantive point of view, there are several critical issues in the implementation of the provisions, which are discussed in the next section.

2.3.4 Main critical issues that emerged and working hypotheses

- The most critical aspect of the provisions relates to the stringent timeframe for the conclusion of the procedure, considered by the competent authorities, both state and regional, to be inadequate and insufficient for the technical investigation and evaluation of the documentation by the verifying party, be it the competent authority or the subject.

  In the case of outsourcing, the overall time frame must also include time for the necessary coordination between the two parties.

  From a de *iure condendo* perspective, it appears desirable to provide for the possibility, on the part of the competent authority, of requesting clarifications and/or additions to the documentation submitted by the proponent, and, consequently, to provide for possible exceptions to the procedural timeframes indicated by the rule.

  A further action that contributes to ensuring that the monitoring activity does not represent an excessive burden for both the competent authorities and the proponents lies in the advisability of streamlining the prescriptive framework associated with the final measure, limiting the environmental conditions to those that actually reflect the purposes indicated in Article 5, paragraph 1, letters o-ter) and o-quater), i.e. to those measures necessary to avoid, prevent, reduce and, where appropriate, compensate for significant and negative environmental impacts, and those of monitoring.
- Although the respect of the deadlines for the implementation of the environmental condition and the consequent activation of the compliance verification procedure is binding for the proponent, it may happen that the latter does not submit the documentation within the deadlines indicated in the environmental condition. On this point, we reiterate the need for the environmental condition to indicate the deadline for the start of the verification of compliance, referring to the specific phase and macro-phase, as defined in Ministerial Decree 308/2015.

  If, without prejudice to the foregoing, the Proponent fails to fulfil its obligations under the environmental condition, the Competent Authority has the burden of verifying compliance, pursuant to Art. 29, para. 2, by means of an investigation of the non-compliance or breach of the environmental condition.
- The rule provides that the documentation for the verification of compliance by the proponent may be transmitted, alternatively, to the competent authority or to the subject of which the latter intends to avail itself. In the event that the competent authority avails itself of another subject, in order to avoid possible uncertainties or problems in coordination, it seems appropriate to proceed with the simultaneous transmission to the competent authority and to the subject identified for the verification of compliance.

2.4. Article 28, paragraph 5

In the event that the verification of compliance is unsuccessful, the competent authority shall warn the proposer to comply within an appropriate time limit, after which the sanctions provided for in Article 29 shall apply.

2.4.1 Regions that submitted comments

Liguria, Marche, Piedmont, Tuscany, Autonomous Province of Trento.

2.4.2 General overview and comparison with Art. 29.2

Paragraph 5 regulates the hypothesis in which the outcome of the verification of compliance is negative. In such a case, the competent authority shall assign a time limit to the proponent to comply and properly observe the environmental condition. It is only in the event that the deadline has expired unsuccessfully that the competent authority will have to initiate the *procedure* under Article 29, both in terms of procedural remedies and sanctioning instruments. This creates interpretative difficulties especially with reference to the relationship between the paragraph in question and Article 29, paragraph 2.

On this point, reference is made to what is discussed in greater detail in Chapter 3.2.2 and in particular in the *box entitled* "*Focus* on Art. 28.5 and Art. 29.2".

6. *If at the outcome of the results of the verification activities referred to in paragraphs 1 to 5, or after the authorisation of the project, the execution of the construction works or the operation of the work, it is ascertained that there are negative, unforeseen, additional or different environmental impacts, or impacts significantly higher than those assessed within the EIA procedure, in any case not attributable to the failure of the proponent to comply with environmental conditions, the competent authority, having obtained further information from the proponent or other competent environmental subjects, may order the suspension of the works or authorised activities and order the adoption of appropriate corrective measures.*

7. *In cases where, upon the occurrence of the cases referred to in subsection 6, the need arises to amend the EIA measure or to establish additional environmental conditions with respect to those of the original measure, the competent authority, for the purposes of the re-examination of the EIA procedure, shall order the updating of the environmental impact study and its new publication, assigning to the proponent a deadline not exceeding 90 days.*

2.5. Article 28, paragraphs 6 and 7

2.5.1 Regions that submitted comments

Campania, Marche, Piedmont, Autonomous Province of Trento, Tuscany, Umbria, Veneto.

2.5.2 General overview

Paragraphs 6 and 7 regulate special cases that may occur in the following phases a:

- verification of compliance with environmental conditions (paragraphs 1 to 5);
- the authorisation of the project;
- the execution of the construction works of the work;
- the operation of the work.

It should be noted that these are specific situations for which the experience of application, both at

state and regional level, is rather limited and that the legislator has regulated them in a general way, but that they must necessarily be dealt with on a case-by-case basis, albeit within the framework of the rule.

The provisions refer to a phase subsequent to all the fulfilments regulated by Title III of Part Two of Legislative Decree 152/2006 and also subsequent to the authorisation fulfilments (if any). These conditions circumscribe, exclusively from a temporal point of view, the scope of application of paragraphs 6 and 7.

From a substantive point of view, the conditions for the application of the discipline indicated in Paragraph 6 are fairly well delineated, albeit with margins of vagueness with respect to some aspects discussed below. In fact, the existence of environmental impacts (negative, unforeseen, additional or different, or significantly greater than those assessed in the EIA procedure) that are not attributable to the proponent's failure to comply with environmental conditions must be 'ascertained'.

The last part of the period reiterates what has already been explained in the above-mentioned time conditions and assumes that the verification of compliance has been positively concluded and that the environmental conditions have been fully implemented by the proponent. These conditions therefore relieve the proponent from any responsibility for the occurrence of the environmental impacts described below.

Environmental impacts must first and foremost be negative. The word 'significant' is omitted from the wording, which would suggest that the magnitude or intensity of the impacts need not be significant.

Subsequent indications of negative impacts are listed partly in sequence (*unforeseen, additional or different*) and partly in alternative form (*i.e. significantly larger than those assessed in the EIA procedure*).

The interpretation thus leads to the delineation of two types of negative impacts:

1. both 'unforeseen' and 'additional', i.e. additional and new to what resulted from the evaluation process;
2. of a similar nature/typology to the impacts already analysed and assessed as part of the assessment but of significantly higher magnitude and therefore intensity.

The phrase "unforeseen impacts" is also referred to in Article 28.2. As already indicated in Chap. 2.2 here, the expression is used precisely to express the primary purpose of verifying compliance with environmental conditions: to monitor *ex post* so that any "unforeseen" situation can be promptly identified and corrective action can be taken to restore ordinary conditions.

The unforeseeability of the impact does not, therefore, arise from the failure of the proponent to fulfil environmental conditions, but from non-ordinary causes or events that could not have been foreseen in advance in the EIA procedure.

The term 'additional or new' characterises a different nature or type of impacts than those already identified and assessed within the EIA procedure, to be read in conjunction with the term 'unforeseen'.

The first case of negative impacts (unforeseen, additional or new) is therefore completely unrelated and new with respect to the *ante operam* and *post operam* scenario at the basis of the analyses and assessments carried out within the EIA procedure, each within its own competence and responsibility (proponent, competent authority, other actors involved).

The second case, on the other hand, is completely different and prefigures a different magnitude or greater significance of impacts that have already been analysed and assessed as part of the assessment procedure. The rule does not seem to imply an inadequate assessment (underestimation) on the part of the competent authority or the proponent, but rather the possibility that causes/events may occur that modify the environmental boundary conditions and may give rise to both "new impacts" (first case) and "more significant impacts" (second case).

The occurrence of such conditions, which are therefore of a 'non-routine' nature, does not exempt the competent authority from the obligation to carry out all the necessary research and in-depth

investigations, availing itself of the cooperation of the proposer and the parties involved.

Subsequently, it may take preventive action, where justifiably deemed necessary, ordering the suspension of works (in the case of negative impacts verified during the construction phase) or the suspension of operations and the adoption of appropriate measures to mitigate the impacts or to prevent the conditions that generated them from occurring again.

The term "corrective measures" here takes on the same meaning as in para. 2 as effective actions to restore the situation prior to the occurrence of the event giving rise to the adverse impact. In para. 2, however, as already pointed out, the cause is different and is attributed to non-compliance with environmental conditions.

Paragraph 7 must be read in conjunction with paragraph 6. The former, in fact, defines the specific cases and identifies the prerequisites for proceeding, possibly and not necessarily, to the actions defined by the latter.

With Paragraph 7, the legislature wanted to regulate a further hypothesis that may arise from Paragraph 6 in the event that the investigations, the inhibition of activities or the adoption of corrective measures by the competent authority have not proved sufficient to guarantee the effective "removal" of the causes and consequent effects (negative impacts), and therefore a systematic action is necessary in order to affect the original EIA measure.

The causes/events that generated the adverse impacts, irrespective of the two different cases identified in subsection 6, may in fact require a revision of the assessment carried out by the competent authority to take into account new elements and scenarios that led to the onset of new or more significant environmental impacts.

The rule delineates to all intents and purposes a new procedure ("reissue") that is not, however, as in the ordinary procedure, initiated at the request of a party, but is ordered by the competent authority against the proponent, who is required to update the environmental impact study and who, within ninety days, must submit a new application that will continue the ordinary procedure.

The new measure resulting from the assessment carried out by the competent authority based on the updated environmental impact study may be modified both in content and in the prescriptive framework, which may contain different and/or additional environmental conditions.

In view of the particular facts at the origin of the new procedure, from a substantive point of view the re-run of the same will focus on the new cognitive elements provided by the proponent with the aim of identifying suitable measures, also of a preventive and monitoring nature, that can effectively counteract the negative impacts that have arisen.

This purpose should therefore not invalidate the analyses and assessments already carried out by the competent authority concerning those aspects that are not directly, indirectly or cumulatively related to the occurrence of the new or more significant adverse impacts ascertained.

A first noteworthy element lies in the fact that the provision refers exclusively to *the* '*EIA procedure*', confirmed by the fact that the proponent is required to update the environmental impact study.

As indicated in Chapter 2.5.3 below, however, it is also possible to envisage a broader application of the provision, with reference to project types that fall within the scope of the EIA and would therefore be excluded from this provision, even though the same cases governed by subsection 7 may occur.

Finally, it must be clarified that the application of paragraph 6 and/or paragraph 7 does not contemplate in any case the application of measures and/or sanctions pursuant to Article 29 of Legislative Decree 152/2006, since there is no breach by the proponent for non-compliance with environmental conditions.

2.5.3 Main critical issues that emerged and working hypotheses

- Paragraph 6 refers exclusively to the "EIA procedure", whereas in paragraphs 1 through 5, which are also referred to by the same paragraph 6, all the monitoring activities governed by Article 28 refer both to the procedures/measures of verification of subjectivitỳ to EIA and to EIA. It follows that the provision may be interpreted in a broad sense and that, therefore, paragraphs 6 and 7 are also applicable with reference to the hypotheses of verification of subjectivity to EIA.

2.6. Article 28, paragraph 7-bis

The proponent, within the validity terms established by the measure of verification of subjectivity to EIA or EIA, transmits to the competent authority the documentation regarding the acceptance of the works or the certification of regular execution of the same, including specific indications regarding the conformity of the works with the deposited project and the prescribed environmental conditions. The documentation is promptly published on the website of the competent authority.

2.6.1 Regions that submitted comments

None as the paragraph was introduced after the holding of the Technical Tables with the Regions and Autonomous Provinces dedicated to Articles 28 and 29 of Legislative Decree 152/2006.

2.6.2 General overview

Paragraph 7-bis was introduced by Decree-Law 76/2020 converted with amendments by Law 120 of 11 September 2020.

The subsection strengthens the ex post control of the works realised, placing new obligations on the proponent to be fulfilled within the validity period stipulated by the EIA or EIA submissibility decision.

The new provision is of fundamental importance in that it provides concrete certainty to the competent authority with respect to the actual implementation of the project assessed in relation to the results of specific verification and control activities governed by sector regulations.

The testing of public works is a compulsory institution governed by Article 102 of the Public Contracts Code (Legislative Decree 50/2016) under the heading "Testing and verification of conformity", which has the purpose of verifying the conformity of the work carried out with the projects and contracts, certifying its full technical, economic and functional regularity.

Testing is foreseen for works, whereas verification of conformity relates to services and supplies and therefore does not fall within the scope of paragraph 7-bis.

The acceptance test is a technical-administrative activity involving various subjects (Single Project Manager, works director, execution director, inspector) which must be concluded, on a provisional basis, no later than six months after the completion of the works, unless otherwise regulated, for which the deadline is one year, and becomes final two years after the issue of the provisional acceptance certificate (also by resorting to the legal mechanism of silent consent).

The acceptance certificate is the document that gives certainty of the conformity described above and constitutes the final act of acceptance.

The certificate of regular execution of the works may replace the acceptance certificate in the case of works whose works contracts are less than €1,000,000, if the contracting station decides to avail itself of this option, or for amounts exceeding €1,000,000 in specific cases governed by paragraph 2 of Article 102 of Legislative Decree 50/2016. The certificate shall be issued by the works manager within three months from the date of completion of the works.

The last part of the first sentence of the paragraph imposes on the proponent an obligation to submit

further documentation to certify '*the conformity of the works with the deposited project and the prescribed environmental conditions*'.

With reference to this conformity, it is presumable that the 'project' mentioned corresponds to the one filed for the purposes of environmental assessment, therefore having a level that is not necessarily equivalent to the one that is the subject of the authorisation. This profile, presents potential criticalities in the case of an EIA verification procedure for which the regulations in force do not foresee the obligation to deposit the project.

Having said this, it appears evident that in both cases (EIA and EIA submissibility verification) the documentation filed in compliance with the provisions of the paragraph in question, must be suitable to highlight differences/changes that may have arisen in the subsequent project development or authorisation phases.

With regard to the compliance of the works with the prescribed environmental conditions, the documentation must report the details of the measure/communication of attestation of compliance by the competent authority for the environmental conditions that have time scenarios (macro-phases and phases according to DM 308/2015) that fall within the validity terms provided by the measure of verification of subjectivity to EIA or EIA. For time scenarios after the above-mentioned deadlines, it may be appropriate to recall the environmental conditions for which the compliance verification procedure will subsequently be initiated.

The fulfilments provided for by Paragraph 7-bis are aimed at enabling the competent authority to carry out the necessary verifications with regard to the absence of design modifications of a substantial nature with respect to those already assessed as well as to the fulfilment of the environmental conditions, which would otherwise determine the application of the remedies under Article 29, Paragraphs 2 and 5.

The last sentence of the paragraph refers to the fulfilment of the obligation to provide information to the public, already provided for in paragraphs 2 and 8 of Art. 28.

2.6.3 Main critical issues that emerged and working hypotheses

- The correct application of paragraph 7-bis by the proponent of private works, in the absence of a specific unitary discipline such as that issued for public works (Article 102, Legislative Decree 50/2016) appears more complex and deserving of a specific regulation that clearly defines the documentation to be submitted (e.g. through specific forms or guidelines).
- The above-mentioned criticality recurs in even more evident terms with reference to the EIA verification measures, where, since there is no obligation to file the project, it is not entirely easy to identify the criteria for demonstrating the conformity required by the regulation.
- Where the validity term of the measure is not indicated in the measure of verification of subjectivity to EIA, which is not explicitly provided for by the current legislation, the term within which the proponent is required to submit the documentation is not defined. In the hope that, even de iure condendo, the obligation to establish a time limit for the validity of the measure will become explicitly mandatory also for that of the verification of subjectivity to an EIA, it is possible to envisage that the documentation will be transmitted following the acceptance of the works or the certification of regular execution or equivalent documentation.

2.7. Article 28, paragraph 8

Appropriate information on how the monitoring activities are carried out, the results of verifications, controls and any corrective measures taken by the competent authority, as well as the data resulting from the implementation of environmental monitoring by the proposer, shall be made available on the website of the competent authority.

2.7.1 Regions that submitted comments

Liguria, Marche, Piedmont, Tuscany, Autonomous Province of Trento

2.7.2 General overview

The new wording of the paragraph operated by Legislative Decree 104/2017, which, at the date of drafting this document, has not been further amended, preserves the general purpose of ensuring information to the public with respect to all monitoring activities carried out by the competent authority subsequent to the adoption of the negative measure of verification of subjectivity to EIA or the EIA measure (verifications, controls, corrective measures) by also including data resulting from the implementation of environmental monitoring by the proponent, if prescribed as part of the environmental conditions.

The regulation integrates what is already provided for regarding transparency and information to the public by paragraph 2 (results of the verification of compliance with environmental conditions) and by paragraph 7-bis (documentation certifying the conformity of the works realised to the approved project and to the environmental conditions prescribed in the measure of verification of subjection to EIA or EIA) in the most important and significant phase of the environmental assessment procedure that resides precisely in the complex of activities of "ex post evaluation of the project" aimed at guaranteeing that the work is realised and exercised in full compliance with the conditions imposed by the competent authority that has the obligation to oversee the decisions taken, which may also be the result of public participation in the procedure.

This aspect is therefore crucial to ensure the necessary feedback from all stakeholders involved in the decision-making process as well as credibility and trust in the institutions' work on the part of citizens.

2.7.3 Monitoring outcomes and public information

The results of the monitoring, understood in the broadest sense as the set of verification activities following the issuance of the measure, and the related information, both administrative and technical (documentation prepared by the proposer and the competent authority), together represent what is referred to in the subsection as the 'manner in which the monitoring activities are carried out'.

The "results of the verifications" are to be understood as the results of the compliance verification procedure, which, as already indicated for para. 2, may be either positive (Art. 28.2) or negative (Art. 28.5), entailing in the latter case specific actions to be taken by the competent authority.

Pursuing the entire subsection to ensure complete transparency of administrative action and information to the public, it is desirable that it be interpreted broadly to include information to the public, *via the website of the competent authority,* even in cases of negative verification results.

In addition to verifications, the regulation also includes the results of 'controls', a broad term that can include various activities that can also be carried out by means of field inspections, placed under the responsibility of either the competent authority or the entities it may use as they are in any case aimed at verifying the correct implementation of the environmental condition.

The subsection also refers to "any corrective measures taken by the competent authority", an aspect already identified in subsection 2, in relation to the purpose of the compliance verification activities, and in subsection 6 for various cases not attributable to the proponent's failure to comply with environmental conditions.

It is not made clear whether the information to the public concerns not only any corrective measures taken pursuant to paragraph 2, but also those taken pursuant to paragraph 6. The latter case, however, does not appear to be the subject of this requirement, since it may take place only after the compliance verification activities have been positively concluded, i.e. after the authorisation of the project, thus configuring a situation of an extraordinary nature that goes beyond the ordinary monitoring activities governed by paragraphs 1 to 5 of Article 28.

The innovative part of the rule compared to the wording prior to Legislative Decree 104/2017 concerns the public disclosure of data resulting from the implementation of environmental monitoring by the proponent.

This is therefore a specific area of environmental conditions contained in the EIA measure, defined in Art. 25.4(c) as:

the measures for monitoring significant and negative environmental impacts, also taking into account the contents of the environmental monitoring project prepared by the proponent pursuant to Article 22, paragraph 3, letter e). The type of parameters to be monitored and the duration of monitoring are proportionate to the nature, location, size of the project and the significance of its effects on the environment. In order to avoid duplication of monitoring, existing monitoring mechanisms resulting from the implementation of other relevant European, national or regional legislation may be used where appropriate.

The purpose of the provision is very ambitious and, as indicated in the following paragraph, presents considerable critical issues with regard to the concrete possibility of implementation by the competent authorities as it presupposes the availability of criteria and methodologies as well as human and instrumental resources for this information to be made accessible to the public.

The European Commission's guidelines for the preparation of an Environmental Impact Assesment[5] devote ample space to environmental monitoring measures, albeit with a predominantly technical approach, which is therefore beyond the scope of this document.

Only the recommendations on making monitoring results available to the public and the development of suitable databases are highlighted here, in order not only to provide information to the public, but also to increase the wealth of environmental knowledge that is also useful for reducing the burden of building environmental scenarios in the same environmental contexts.

This last aspect assumes fundamental importance in order to offer the opportunity for professionals who prepare environmental studies to reuse the cognitive heritage constituted by the environmental monitoring required within the framework of EIA procedures with a view to a 'circular economy' aimed at valorising the available information resources.

There are also many guidelines prepared at both state and regional level for environmental monitoring in EIA procedures to support both proponents and competent authorities, developed with different approaches oriented both to the project type and to the specific environmental component.

2.7.4 Main critical issues that emerged and working hypotheses

- The provision of information to the public on environmental monitoring data is an obligation that has so far been disregarded by most of the competent authorities, mainly due to a shortage of human and instrumental resources: in the state context, information is provided for major works through the websites set up as part of the environmental observatories.

  At the regional level, several initiatives and experiences have been launched, however, as yet not fully structured and therefore available to the public via the websites of the competent authorities.

[5] https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/b7451988-d869-4fee-80de-0935695f67f2/details?download=true

In order to allow the sharing of environmental monitoring data, it is necessary to have methodological standards to structure suitable databases and, first and foremost, to allow the proponent to provide the data according to formats suitable for implementing the databases. To this end, the "Guidelines for the preparation of the Environmental Monitoring Project (PMA) of works subject to EIA procedures"[6] prepared by the former Ministry of the Environment and Protection of Land and collaboration with the former Ministry of Culture and Tourism and ISPRA provide methodological standards, which, however, based on operational experience, are not frequently used by proponents.

3. ARTICLE 29, LEGISLATIVE DECREE N. 152/2006: NON-COMPLIANCE WITH ENVIRONMENTAL ASSESSMENT MEASURES, SANCTIONS AND PROCEDURAL CONSEQUENCES

3.1. Article 29, paragraph 1

Measures authorising a project adopted without an EIA or without an EIA, where required, are voidable for breach of law.

3.1.1 Regions that submitted comments

Campania, Apulia

3.1.2 Overview and consequences of the regulatory provision

The subsection in question provides that the adoption of an authorisation for the realisation or operation of a project without a prior environmental assessment, where provided for, entails the illegitimacy of the authorisation itself and its annulment for 'violation of the law'.

This provision already existed, precisely in paragraph 1 of Article 29, Legislative Decree 152/2006, before the reform operated by Legislative Decree 104/2017, albeit in a partially different wording.

Unlike the subsequent (and wholly innovative) provisions of Article 29, the provision in question not only does not take place in a properly sanctioning context (as we shall see, only subsection 4 and subsection 5 provide for administrative sanctions), but does not even envisage specific remedies for the competent authority (as is the case instead with the provisions of subsections 2 and 3).

It is, in fact, a provision that is addressed to administrations other than the competent EIA authority, and specifically to all the administrations competent to issue authorisations for projects that have as a prerequisite the prior carrying out of an assessment of subjectivity to an EIA or an EIA. The regulation, in fact, invalidates the authorisations issued in the absence of a prior environmental assessment, censuring the conduct of administrations that, despite the lack of a prerequisite provided for *by law* (the prior environmental assessment), nevertheless adopt the authorisation measure within their competence.

The consequence of the illegitimacy, however, is not the ineffectiveness of the authorisations in question, but rather their susceptibility to appeal within the legal time limits (60 days with an appeal to the competent Regional Administrative Court, 120 days with an extraordinary appeal to the Head of State), and - with a somewhat longer time frame - to be subject to a second-level measure (so-called self-protection): ex officio cancellation pursuant to Article *21-nonies,* L. 241/1990, within 18 months or, less properly, revocation pursuant to Art. 21, *quinquies*, L. 241/1990.

[6] https://va.minambiente.it/File/DocumentoCondivisione/1da3d616-c0a3-4e65-8e48-f67bc355957a

It is, therefore, a measure of relative scope, since it does not deprive *ex lege the* invalid authorising measure of its effects (as would have been the case if a hypothesis of nullity of such measures had been envisaged) and, on the contrary, it subordinates its removal to the ordinary remedies of the law. This means that, once the time limits for appeal have expired, the effectiveness of the measure will be intangible, if not by the authority competent to issue it, in the forms and within the limits of Articles *21-nonies* and *21-quinquies*, L. 241/1990.

The potential tenuousness of this provision, however, can be justified by virtue of the consequences that are in any event generated for the proponent who has carried out a project without prior environmental impact assessment. The existence of an invalid but effective measure (therefore not challenged and annulled, neither removed in self protection), of authorisation of the project carried out without prior environmental assessment, in fact, does not prevent the application of the procedural remedy of the so-called "pathological" posthumous EIA, governed by paragraph 3 of Article 29, nor the imposition of the penalty provided for in paragraph 4 of the same Article 29.

In other words, the provision of the paragraph in question establishes the annulment of the authorising measures adopted without prior environmental assessment, where required, but does not identify any application prerequisite of the subsequent paragraphs of Article 29, which, on the contrary, are directly applicable regardless of the annulment of the authorising measure issued without environmental assessment.

3.2. Article 29, paragraph 2

> "Where *breaches or violations of the environmental conditions referred to in Article 28 are ascertained, or in the case of design changes that make the project different from the one subject to the procedure of verification of subjection to an EIA, to the EIA procedure, or to the single procedure referred to in Article 27 or in Article 27-bis, the competent authority shall proceed according to the gravity of the breaches:*
>
> *a) the warning, assigning a time limit within which the non-compliance must be remedied;*
>
> *b) a warning with simultaneous suspension of the activity for a fixed period of time, where there is a risk of significant and negative environmental impacts;*
>
> *c) the revocation of the measure of verification of subjection to an EIA, of the EIA measure, in the event of failure to comply with the requirements imposed by the warning and in the event of repeated violations leading to situations of danger or damage to the environment*'.

3.2.1 Regions that submitted comments

Campania, Piedmont, Apulia, Tuscany, Umbria, Veneto

3.2.2 Overview and consequences of the regulatory provision

The innovative scope of the amendments made to Article 29 by Legislative Decree 104/2017 can be perceived by reading the paragraphs following the first, and in particular paragraphs 2, 3, 4 and 5.

The provisions contained therein, in fact, disregard the authorisation acts obtained by the proponent, and concern, instead, the latter's conduct. These provisions regulate the hypotheses in which the proponent has committed one or more offences in violation of the EIA regulation, and prefigure remedial instruments in the hands of the competent authority.

Among the above-mentioned remedies, however, a clear distinction must be made. A first type of remedies to the offence committed by the proponent, which can be defined as 'procedural remedies', is regulated in paragraphs 2 and 3 of Article 29. A second type of remedies, independent of the 'procedural remedies' even though they have the same genetic circumstance, is that identified in subparagraphs 4 and 5, which provide for the imposition on the proponent of administrative sanctions,

and which may therefore be defined as 'sanctioning remedies'.

The individual differences will be examined in the course of the discussion, however, it is important here highlight the different functions that these remedies play in the legal system.

The 'procedural remedies', regulated in paragraphs 2 and 3, have the purpose of 'correcting' the conduct of the proponent, with the aim of pursuing the public interest of environmental protection, and in order to ensure the full application of the EIA regulations, preventing the occurrence of detrimental effects on the environment. They are therefore measures that do not have a properly 'punitive' content, but rather a prescriptive and conformative one. They are, therefore, administrative procedures aimed at assessing the situation emerging from the offence, and to identify the necessary prescriptions so that its effects are, where possible, removed from the relevant environmental context.

The 'sanctioning remedies', on the other hand, taking the form of an administrative sanction, have the primary purpose of punishing the unlawful conduct of the proponent, and find their application regardless of the effectiveness of the procedural remedies and of any conduct therein on the part of the proponent. They are, in fact, penalties that are based on the mere commission of the offence by the proposer: the execution of a project or part of a project without prior environmental assessment (Article 29.4) or the failure to comply with environmental conditions (Article 29.5).

The two types of remedies, therefore, share the same genetic circumstance, but have no interdependent relationship, since they must both be commenced - at the same time and in parallel - at the time of the establishment of the tort.

This has created some application criticalities on the part of some administrations, which - in particular with reference to hypotheses of good faith on the part of the proponents, perhaps endorsed by the presence of titles, including environmental ones, for the operation of the project - would consider it fairer to impose the penalty only in the event of a negative outcome of the remedial procedures (ex paragraphs 2 and 3).

This interpretative option does not seem compatible with the current legal wording, and could rather be considered as a working hypothesis in *de jure condendo* terms.

The first category of procedural remedies, governed by paragraph 2, applies in the presence of "established non-compliance or violation of the environmental conditions referred to in Article 28, or in the case of design changes that render the project non-compliant".

The application prerequisites of these instruments, therefore, consist first and foremost in the ascertainment of the factual circumstance that allows the procedural process to begin.

The provision does not prescribe any particular form to be given to the ascertainment. However, given that the competent EIA authority does not generally carry out supervisory activities, the hypotheses of knowledge of the unlawful act of the proponent are typically three.

The first is the reporting by supervisory authorities. In particular, the Arpa and the law enforcement agencies in charge of environmental protection who, in the course of their inspection and control activities, ascertain the existence of such violations.

The second hypothesis, on the other hand, consists in the (generally non-voluntary) self-reporting by the proponent to the competent authority, on the occasion of a request for re-assessment, or the initiation of a compliance check with reference to environmental conditions other than those not fulfilled or violated.

The third hypothesis, on the other hand, is that resulting from the negative outcome of a compliance check initiated pursuant to Article 28, which has persisted even after the "warning" to comply issued by the competent authority, pursuant to Article 28.5.

***Focus* on Art. 28(5) and Art. 29(2)**

The issue of the relationship between Art. 28(5) and Art. 29(2) is of particular relevance.

These are, in fact, two different hypotheses, which nevertheless share terminological profiles capable of raising doubts as to the character of each.

Art. 28.5: "In the event that the verification of compliance gives a negative result, the competent authority shall warn the proposer to comply within an appropriate time limit, after which the sanctions provided for in Article 29 shall apply".

Art. 29.2: "Where non-compliance or violations of the environmental conditions referred to in Article 28 are established [...] the competent authority shall proceed according to the gravity of the infringements:

a) a warning, assigning a time limit within which the non-compliance must be remedied;

b) a warning with simultaneous suspension of the activity for a fixed period of time, where there is a risk of significant and negative environmental impacts;

c) revocation of the measure of verification of subjection to EIA, of the EIA measure, in case of failure to comply with the requirements imposed by the warning and in case of repeated violations leading to situations of danger or damage to the environment".

Both cases concern the non-compliance with environmental conditions, however, they originate from quite different circumstances.

The hypothesis governed by Art. 29.2, in fact, regulates a 'pathological' case of wrongdoing committed by the proponent - the 'violation' of an environmental condition - and disclosed to the competent authority at the outcome of an inspection or control.

The hypothesis governed by Article 28, paragraph 5, on the other hand, regulates a different context, which is part of an administrative proceeding, initiated spontaneously by the proponent in order to demonstrate compliance with a certain environmental condition, which however turns out to have been 'not complied with' (and therefore not 'violated').

The substantial difference lies in the absence of unlawful conduct in the hypothesis governed by Article 28.5, the assessment being, on the contrary, the outcome of a procedure initiated promptly by the proponent precisely in order to comply with the prescribed environmental conditions. Even in this hypothesis it is possible that unlawful conduct may be committed, but only where the proponent fails to comply with the environmental conditions within the time limits set by the competent authority. In the case of non-compliance, in fact, a specular hypothesis is configured to that envisaged by paragraph 2 of Article 29, in that one finds oneself before an environmental condition that has not been fulfilled, and therefore the prerequisite for the application of procedural and sanctioning remedies exists.

This is, moreover, provided for in express terms by Article 28.5 itself, which, in fact, specifies that, once the time limit set for compliance with the environmental condition has elapsed to no avail, "the penalties set forth in Article 29 shall apply".

The use of the term "sanctions" might suggest that the legislature wished to refer only to the application of Article 29.5, since only in that provision "sanctions" are properly envisaged, thus excluding the applicability also of the procedural remedies set out in paragraph 2.

However, such an interpretation appears to be contrary - in addition to the textual datum of Article 29.2, which is applied in "ascertained" cases of non-compliance with environmental conditions, as in this case - to the legal principles, including those of European derivation, regarding environmental assessments, which impose the pursuit of the useful effect of the discipline and which, therefore, require administrations to adopt all useful instruments to ensure full compliance with the EIA discipline.

It seems, therefore, possible to conclude that, in the event of non-compliance with the deadline prescribed by the competent authority on the part of the proponent, the rules of Article 29 apply in full, both with reference to "procedural" remedies (Article 29, paragraph 2) and with reference to "sanctions" remedies (Article 29, paragraph 5).

On the other hand, some perplexity remains as to whether the deadline has been met, e.g. by the timely transmission of the necessary documents, where, however, the outcome of the compliance check is again negative.

With reference to this hypothesis, it could be argued - in terms more favourable to the proponent - that since Article 28.5 subordinates the application of Article 29, and thus entry into the "pathological" phase, to the circumstance that the time limit set by the competent authority has "elapsed to no avail", the "attempt" to comply within that time limit is capable of preventing access to the "pathological" phase. In support of this thesis, mention may be made, by way of analogy, of the provisions of Article 29.3, which expressly associates the same negative effects with the hypothesis of the futile expiry of the time limit for submitting an application for a new environmental assessment, and the negative outcome of the latter.

It is, however, also possible to interpret the rule in terms less favourable to the proponent, i.e. to hold that the futile expiry of the time limit concerns the actual fulfilment of the environmental condition, not the mere attempt, and that therefore the possible negative outcome of the verification of compliance is equivalent to the futile expiry of the time limit itself. On the other hand, the rule in its wording requires the proponent to "comply within a reasonable time", and thus seems to bind to the time limit not the transmission of the required documentation, but rather the actual compliance with the environmental condition.

The ascertainment, therefore, must concern '*non-compliance or violations of the environmental conditions set forth in Article 28, or in the case of design changes that make the project deviate from the one subject to the* [environmental assessment] *procedure*'.

The first hypothesis, therefore, relates to environmental conditions, already extensively addressed *above* with reference to Art. 28.

The prerequisites for the application of Article 29 lie in the occurrence of '*failures*' or '*breaches*' of these environmental conditions.

The term 'non-compliance', as is also apparent from the analysis of Article 28.5, may be understood to refer to cases in which the proponent, despite having attempted to comply with the environmental condition, has not succeeded. This would suggest that such non-compliance derives from an assessment conducted by the competent authority itself in the course of the verification of compliance.

As already pointed out above, this condition is not independently capable of constituting the applicative prerequisite of Article 29, since, pursuant to Article 28.5, the reiteration of the negative outcome of the assessment at the end of the notice to comply served on the proponent is first necessary (see *above*).

It is open to question whether there is a case of 'non-compliance' of environmental conditions that does not result from a compliance test, and thus does not presuppose a prior procedure under Art. 28(5).

One hypothesis to be considered could be that of non-compliance with the time limit set by the competent authority for the commencement of the compliance verification procedure pursuant to Article 28. In such a case, however - without prejudice to the need to assess on a case-by-case basis whether the environmental condition has actually been complied with - it would seem to be more a case of 'breach' of the environmental conditions, since the time for compliance with the environmental condition is also part of the condition itself.

By 'violations' of the environmental conditions, in fact, it seems possible to intend the hypotheses in which the proponent has completely disregarded compliance with the environmental condition, not even making an attempt to fulfil it. It is evident that the two hypotheses are not always distinguishable and referable to unitary categories, since there may well be cases that bear the elements of both. It is for this reason that the legislature has not differentiated the consequences deriving from the two hypotheses, leaving the procedural solution to be adopted to the assessment - to be carried out on a case- by-case basis - of the administration.

Equivalent to these hypotheses, then, is the second scenario described by the rule, i.e. the one that takes the form of "in *case of design changes that make the project different from the one subject to the* [environmental assessment] *procedure*".

This scenario is not without critical interpretation issues, especially with reference to the hypothesis of summary environmental assessments such as the EIA screening.

In fact, the main critical issue lies in identifying the correct perimeter to be attributed to the term '*dissimilar*'. In the hypothesis of an EIA, but also in the EIA itself (at least under state jurisdiction), the level of project elaboration required of the proponent corresponds to a still 'preliminary' degree of thoroughness, often the feasibility study alone being sufficient. Well, in the development of the design drawings, through the drafting of the final and then executive project, design divergences are physiological, at least in terms of the depth of the aspects covered by the preliminary drafting.

It is clear that such 'in-depth studies' do not appear to be reasonably capable of integrating hypotheses of *non-conformity of* the project with respect to the one submitted to the environmental assessment procedure, under penalty of sanctioning any project authorised and then developed during implementation.

If such a conclusion seems reasonable, it is also appropriate to try to identify where the dividing line lies, since it is clear that not all elaborations resulting from project development can be considered permissible.

Well then, without prejudice to the need to assess each individual case by case, it seems reasonable to consider that the non-conformities must concern aspects directly subject to the environmental assessment, the substance of which has led to a positive conviction on the part of the competent authority, as well as all the elements that, on the contrary, would have led to a different decision on the part of the authority itself. In other words, the project must certainly comply with the contents of the preliminary environmental study (in the case of an environmental impact assessment) and of the environmental impact study (in the case of an environmental impact assessment), thus qualifying as non-conforming that project that in the implementation phase does not correspond to what is described therein, or adds elements that should have been represented therein, since they have potential significant and negative impacts.

3.2.3 The procedural remedy under Art. 29(2): the procedure following the ascertainment of the prerequisites

At the outcome of the ascertainment of the conditions described above, the competent authority is required to initiate an administrative procedure aimed at restoring compliance with the rules on environmental assessments, directly intervening on the conduct of the proponent.

Pursuant to the paragraph in question, in fact, the competent authority must proceed "according to the gravity of the infringements: (a) a warning, assigning a deadline within which the non-compliance must be eliminated; (b) a warning with simultaneous suspension of the activity for a fixed period of time, where the risk of significant and negative environmental impacts is manifested; (c) the revocation of the measure of verification of subjection to EIA, of the EIA measure, in the event of failure to comply with the prescriptions imposed with the warning and in the event of repeated violations that result in situations of danger or damage to the environment".

The competent authority, therefore, is given a wide discretionary power, as it is required in the first

instance to make an assessment of the 'seriousness' of the infringement committed by the applicant. Depending on the seriousness, the competent authority may - on the basis of the letter of the rule - resort to three different remedies.

The first two instruments seem clearly alternative and the result of a different outcome of seriousness of the proposer's infringement.

Both, in fact, provide for a warning by the proponent and the assignment of a time limit within which to eliminate non-compliance. In hypothesis *sub* b, indeed, the indication of the time limit is not explicit, but it is possible to consider, logically rather than analogically, that this provision is also applicable to that hypothesis.

The difference between the hypothesis *sub* a) and the hypothesis *sub b)* lies in the possibility for the competent authority, in the hypothesis *sub* b), to order the simultaneous suspension of the activity for a specified time. This may occur, in fact, if the competent authority detects the presence of a 'risk of significant and negative environmental impacts'.

It follows that the competent authority will be required to carry out a preliminary investigation aimed at making an assessment of the existence of potential environmental and significant impacts. This preliminary investigation, however, must be carried out with the aim of identifying not the certainty of the existence of such impacts, but also the mere 'risk'. It is therefore an assessment based on the precautionary principle, and even more precautionary nature of the ordinary environmental assessment, since even the mere existence of risk entails the consequent suspension of activity.

The measure suspending the activity, therefore, must be expressly motivated by indicating the risks of environmental impacts detected, in the presence of which, however, the suspension becomes a due act.

Pulling the threads together, at the outcome of the ascertainment of the prerequisites set forth in paragraph 2, first part, the competent authority will have to initiate a preliminary investigation aimed, firstly, at assessing the gravity of the infringement and, secondly, at assessing the existence of a "risk of significant and negative environmental impacts". In the event of a positive outcome of this second assessment, the competent authority will have to take action pursuant to subsection 2(b), and in the event of a negative outcome to the mere warning pursuant to subsection 2(a).

To these scenarios, then, must be added that governed by subsection 2(c). In fact, the rule provides that the competent authority must provide for 'the revocation of the measure of verification of subjection to an EIA, of the EIA measure, in the case of failure to comply with the prescriptions imposed with the warning and in the case of repeated violations that lead to situations of danger or damage to the environment'.

This rule seems to describe two different scenarios.

The first scenario, corresponding to the first part of the provision ("in the event of failure to comply with the requirements imposed by the warning notice") does not appear to be at a level of gradualness - in terms of gravity of the infringement - with respect to the scenarios *under* a) and b). On the contrary, it is precisely the implementation of the measures contained in scenarios *sub* a) and b), and in particular the measure of the warning (with or without the simultaneous suspension of the activity), and the proposer's corresponding failure to comply with the relevant requirements, which is preparatory to the application of the remedies under sub c), consisting in the "revocation" of the environmental assessment measure.

A second scenario, on the other hand, is the one described by the last part of sub-paragraph c), and corresponds to the hypothesis in which the competent authority detects: 'repeated violations leading to situations of danger or damage to the environment'.

This is a hypothesis that, unlike the preceding hypothesis, may well be placed on a more gradual level, in terms of the gravity of the infringement, than hypotheses *(*a) and *(*b).

In fact, the hypothesis described here concerns the case in which the violations ascertained by the competent authority are even repeated, and therefore: corresponding to a single environmental condition that has been violated several times, corresponding to several environmental conditions, or corresponding cumulatively to both a violation of environmental conditions and the presence of a design non-conformity. These circumstances, however, are not in themselves suitable for the application of the rule in its full consequences, since it is also necessary for the competent authority to carry out a preliminary investigation to ascertain the existence of a 'danger or damage to the environment'. Repeated violations, therefore, must entail not only a 'risk', as seen with reference to hypothesis *sub* b), but a concrete and certain danger to the environment, or even must have already entailed the occurrence of 'damage' to the environment.

This is, therefore, an extremely serious hypothesis, in which the precautionary principle is no longer applied, with the mere risk of significant and negative impacts and the temporary suspension of the activity, but rather the principle of prevention, with the certainty of the danger to the environment or the concretisation of that danger in damage to the environment, and the subsequent - more serious - consequence of the definitive revocation of the assessment measure.

This assessment appears particularly problematic, as it seems to imply a *quid pluris* with respect to the specific competences of the competent EIA authority, concerning aspects linked to the discipline of "environmental damage" art. 300 et seq. Legislative Decree 152/2006, which provides for a separate assessment procedure.

3.2.4 Main critical issues that emerged and working hypotheses

- It seems useful to specify, in relation to Art. 28(5), whether a new negative result of the compliance check is equivalent to the expiration of the time limit and therefore gives rise to the application of Art. 29, or whether, on the contrary, in the event of compliance with the time limit, albeit with a new negative result of the compliance check, Art. 28(5) is again applicable.
- It appears useful to specify the procedure to be followed in order to arrive at the assessments envisaged by the paragraph in question. In particular, the assessment procedures that govern the decision to suspend or not to suspend the measure, with reference to the existence of a "risk" of significant and negative impacts, and even more, that provided for in subparagraph c), where the revocation is connected to the existence of a "danger or damage to the environment", a broad assessment that may not fully correspond to the competences of the competent EIA authority.

3.3. Article 29, paragraph 3

In the case of projects to which the dispositions of the present decree are applied, which have been carried out without the previous subjection to the procedure of verification of subjection to EIA, to the procedure of EIA or to the single procedure of article 27 or of article 27-bis, in violation of the dispositions of the present Title III, or in the case of annulment by the courts or in self-defence of the measures of verification of subjectivity to EIA or EIA measures relating to a project already carried out or in progress, the competent authority shall assign a time limit to the interested party within which to start a new procedure and may allow the continuation of the works or activities provided that such continuation takes place in terms of safety with regard to any health, environmental or cultural heritage risks.

Once the time limit assigned to the interested party has expired to no avail, or if the new EIA measure, adopted pursuant to articles 25, 27 or 27-bis, has a negative content, the competent authority orders the demolition of the works carried out and the restoration of the state of the places and of the environmental situation at the expense of the person responsible, defining the terms and modalities. In the event of non-compliance, the competent authority shall take action ex officio at the expense of the defaulting party.

The recovery of such expenses shall be carried out in the manner and with the effects provided for by the consolidated text of the legal provisions relating to the collection of State property revenues approved by Royal Decree No 639 of 14 April 1910.

3.3.1 Regions that submitted comments

Campania, Piedmont, Apulia, Tuscany, Umbria, Veneto.

3.3.2 General overview

Paragraph 3 of art. 29 regulates the most serious hypothesis of non-compliance with the EIA discipline: the realisation of the work without having carried out the environmental assessment procedure. This hypothesis is flanked and equated with the hypothesis of the subsequent cancellation of the EIA measure, through a judicial ruling or intervention in self-defence.

These are, therefore, cases in which a project has been carried out, even partially, in the absence of a prior (and valid) environmental assessment, in all cases in which this was instead prescribed by law.

In such hypotheses, the question was raised as to whether an *ex-post* assessment could be carried out, given the ontological preventive nature that characterises environmental assessments.

In addition to what is described below, please note MiTE Environmental Interpretation No. 43387 of 04.04.2022[7].

3.3.3 The different posthumous EIA hypotheses: the 'pathological' posthumous route and the 'physiological' posthumous route

The subject of the posthumous EIA, however, is not limited to the hypothesis described *above.* Given the numerous criticalities that characterise the subject, manifested by all the Regions and Autonomous Provinces that have taken part in the debate on the matter, in this contribution it is considered opportune to attempt a systematic reconstruction of this case in order to identify the correct discipline applicable in its various declinations.

There are, in fact, at least two main hypotheses in which a project implementation has not been preceded by an environmental assessment.

a) The carrying out of a project without a prior environmental assessment even though provisions requiring such an assessment were in force (Art. 29.3).

b) A project was carried out without a prior environmental assessment because it was carried out before the entry into force of the relevant provisions, and thus, before the entry into force of the first EIA Directive, Directive 85/335/EEC, corresponding to 3 July 1988, and its subsequent transposition into national law.

These are two radically different cases from each other, since in case (a) the plant was built in direct violation of the provisions in force that required an environmental assessment procedure to be carried out, and therefore the construction of the plant is clearly unlawful.

In case b), on the other hand, the project was carried out under a regulatory framework that did not require environmental assessments to be carried out, and was therefore carried out in full and complete legality.

With reference to both, the question arises - to this day - as to how the discipline of environmental assessments can be applied.

7 https://www.mite.gov.it/sites/default/files/archivio/allegati/interpello_ambientale/VA/2022_04_13_risposta_Interpello_43387_04-04-2022.pdf

3.3.4 The 'pathological' posthumous route

The case *sub* a), i.e. the execution of a project without prior environmental assessment despite the fact that this is prescribed by the applicable law *ratione temporis*, is the hypothesis with the quickest solution, since it is expressly regulated by Art. 29(3) (in comment), and has been the subject of numerous rulings by the EU Court of Justice.

This hypothesis, in fact, takes place in a 'pathological' context, in which the proponent has carried out the project (or part of it) unlawfully, and thus in violation of the rules in force. We are therefore faced with an unlawful act of the proposer himself.

At any time when the competent authority becomes aware of the unlawful implementation of a project (or part of it), it must, pursuant to Art. 29(3):

- assign a time limit to the person concerned within which to initiate a new environmental assessment procedure;
- Evaluate the possibility of allowing work or activities to continue, but only on condition that such continuation is safe with regard to possible health, environmental or cultural heritage risks.

The environmental assessment procedure that will result from the impetus given by the competent authority, however, will be a very peculiar procedure, since it will concern a project that has already been realised, thus losing the preventive function that constitutes the founding prerequisite of the EIA discipline.

This will be a posthumous EIA procedure.

However, as clarified by the numerous rulings of the Court of Justice of the European Union (CJEU) on this point, such a posthumous EIA cannot perform a function of "amnesty" of the offence perpetrated by the proponent. On the contrary, in order to preserve the full effectiveness of the discipline of environmental assessments and to recover its preventive nature, the assessment must not be carried out with reference only to future environmental impacts, but must take into account those produced since the realisation of the work, i.e. it must consist of a "now for then" judgement. On all of them see CJEU C-196/16 "*an assessment carried out after the construction and commissioning of an installation cannot be limited to its future impact on the environment, but must also take into account the environmental impact since its construction*".

The assessment, therefore, must be completely indifferent to the fact that the project has *already been carried out,* even considering a possible negative outcome: "The *fact that the project has already been carried out must not have a decisive influence on the new assessment, in order to avoid inducing a project to be carried out abusively in the first instance, without prior assessment*" (CJEU C-196/16 - Advocate General's Opinion).

It is the legislature itself, in Article 29(3), that specifies that if the proponent fails to comply with the time limit set for the commencement of the procedure, or if the new EIA measure has a negative content, the competent authority will be obliged to order the demolition of the works carried out and the restoration of the state of the site and the environmental situation at the expense of the person responsible.

It is, therefore, an environmental assessment procedure that has very incisive contents and can have overwhelming consequences for the proponent, since it intervenes in a context of illegitimate realisation of the work, and therefore in a pathological context.

For this reason - also in order to distinguish the institution from the case *under* b) - it is possible to name the posthumous EIA procedure in question as: 'pathological posthumous EIA'.

3.3.5 The 'physiological' posthumous route

The hypothesis described *under* b) is, on the other hand, profoundly different.

In this scenario, in fact, the project was carried out at a time in history when there was no provision

requiring the carrying out of a prior environmental assessment. The realisation of the project is, therefore, fully legitimate, as it pre-existed the reference environmental legislation (first EIA directive, which came into force on 3 July 1988). There is, therefore, no 'pathological' trait as there is no regulatory violation.

It follows that it is immediately possible to exclude the applicability of the institute of the "pathological" posthumous EIA (whose application prerequisite lies precisely in the violation of the EIA regulations), as governed by Article 29, paragraph 3, of Legislative Decree 152/2006.

As a matter of principle, then, it is possible to state that there does not seem to be any provision, either national or European, that would allow the discipline of environmental assessments to be applied where such a project, realised before the entry into force of the discipline, subsequently remains unchanged in both physical and authorisation terms.

This is because the principle of non-retroactivity of legal norms applies in our legal system (Art. 11, Prel. dispositions of the Civil Code).

On the other hand, the issue of the applicability of the discipline of environmental assessments arises with reference to the hypothesis of modification of the work and/or renewal of the relative authorisation title.

These two hypotheses are not always superimposable, but for both the question is the same: whether it is possible to subject to (posthumous) EIA, and if so how, the part of the pre-existing work that remains unchanged.

Even in such cases, the general application of the EIA rules is conditional on the existence of the prerequisites already mentioned *above*.

Firstly, the alteration or renovation must integrate the notion of 'project', and secondly place it must be a project that falls within the categories subject to EIA regulations.

With reference to the first point, recalling that the definition of a project in the EIA Directive is as follows: '*the execution of construction works or other installations or works and other interventions in the natural environment or landscape, including those intended for the exploitation of soil resources*', the following comments should be made.

In general terms, it seems to be necessary to exclude the applicability of the EIA regulation to cases in which the activity performed does not in any way fall under this broad definition.

Emblematic on this point is the CJEU's ruling that in the case of a mere renewal of an authorisation, without any modification activity of the work, it declared the inapplicability of the EIA discipline.

In particular, the Court stated that: "[...] *the term 'construction'* [...] *is unambiguous and must be understood in its usual sense, that is to say, as intended to refer to the construction of works which did not previously exist or to the alteration, in a physical sense, of pre-existing works* [...] *the renewal of an existing authorisation to operate an airport cannot, in the absence of works or interventions which alter the physical reality of the site, be classified respectively as a 'project' or as a 'construction' within the meaning of those provisions*".

It is, however, necessary to carry out such an analysis on a case-by-case basis, as well as to distinguish between project types, since the content of the notion of project must be understood in an extensive sense (CJEU, judgment of 28 February 2008, case C 2/07, paragraph 32). In this regard, consider what the CJEU itself ruled, with reference to a renewal of an authorisation for the exploitation of a quarry, which, since it concerned the modalities for the exploitation of soil resources, was in any case considered compatible with the notion of "project": "*In the light of that, it must be noted that decisions such as that laying down new conditions and that approving the points covered by the new conditions for the exploitation of the quarry* [...] *constitute, taken as a whole, a new authorisation* [...].

Decisions adopted by the competent authorities, the effect of which is to permit the resumption of an extraction activity, constitute, taken as a whole, an authorisation [...] *for which the competent authorities are under an obligation to carry out, where appropriate, an assessment of the environmental impact of such an activity*'

(CJEU C-201/02, judgment of 7 January 2004).

Specular arguments can also be found in the pronouncements of the Constitutional Court, which with reference to thermal and mineral concessions declares the: "*necessity, at the time of renewal of the concession, to carry out an assessment of both environmental impact (EIA) and incidence*" (Corte cost. sent. 14.01.2010, no. 1).

From this reconnaissance of case law, it seems possible to state that:

- the mere renewal of an authorisation without any change, neither in terms of variation of the pre-existing physical reality, nor in terms of intervention in the natural environment and landscape, or in terms of land use, does not seem to entrench the applicability of the EIA rules.
- In all cases where, on the contrary, the renewal entails a modification of the activity, even if only in quantitative terms, the applicability of the EIA rules is fully entrenched.

In view of this initial clarification, it is appropriate to ask in what terms these rules apply.

Well, this will be fully applied, in terms of 'prior' environmental assessment, with reference to all the changes made. These, in fact, are still to be implemented and are therefore subject to thefull application of the discipline: the environmental assessment may intervene as a preventive measure.

However, what happens to the parts of the work that are not affected by the changes? Here too, case law offers an answer.

The Campania Regional Administrative Court, in fact, recalls how, as a rule: "*the environmental compatibility judgement will concern the project of modification or expansion of the plant (and will not therefore extend to the entire work), provided that the prerequisite positively contemplated by the discipline is met, i.e. the possibility of "significant negative repercussions on the environment*"" (Campania Regional Administrative Court, no. 3086/2020).

That said, however, the same TAR (regional administrative Court) specifies that: "*Nonetheless, it is natural that, in order to judge the environmental impact of the modification made, it will not be possible not to take into account also the pre- existing plant, where this is necessary, because, e.g., the effects of what is planned can be appreciated only by taking into account the entire structure and the entire production process*" (T.A.R. Campania, no. 3086/2020 and T.A.R. Campania, Salerno, sec. II, 24/12/2019, no. 2254).

It therefore seems possible - with a view to allowing a full assessment of the effects, including cumulative effects, of the work - also take into account the unmodified part.

The CJEU also comes to the same conclusions with regard to the modifications made to airport structures considered likely to increase their activity and air traffic, the assessment must also take account of the increase in activity: "*The competent authorities must take account of the intended increase in the activity of an airport when examining the effect on the environment of the modifications made to its infrastructures in order to permit that increase in activity*" (CJEU 28 February 2008, C-02/07).

The assessment to be carried out on the parts of the plant that have not been modified, however, certainly cannot be qualified as "preventive", since it concerns works that have already been realised. It is, therefore, also in this case a "posthumous" EIA, which, however, assumes very different characteristics from the "pathological" one, since it concerns instead a work that has been carried out in full legitimacy. It can, therefore, be qualified as a "physiological" posthumous EIA and typical of installations that were legitimately realised before the adoption of the EIA regulations when they were subsequently modified.

That being clarified, there is one final question: the actual extent of the 'physiological' posthumous EIA.

It has already been said several times that the extension of this assessment cannot in any way take on the features of the 'pathological' posthumous EIA, governed by Article 29, paragraph 3, of Legislative Decree 152/2006, which would even allow the demolition of the work.

In the case of the 'physiological' posthumous EIA, the possibility of demolishing the work should

certainly be excluded, as should the need to carry out a 'now for then' assessment to make up for the non- application of the EIA rules.

This is, moreover, recognised by the same jurisprudence, which has specified how: "*A reasonable balancing of the interests at stake - environmental protection and private economic initiative - both constitutionally protected, justifies the intention not to overwhelm and wipe out works or activitiesì long since* ***legitimately located****, without, however, allowing that acquired status to be transmitted to subsequent alterations, to be subject to EIA*" (Constitutional Court sentence 209/2011).

In even more exhaustive terms: "*The premise of this requirement must be sought in the need, emerging from Community case law, to 'ensure' that the useful effect of Directive 85/337/EEC is in any case achieved, without however calling into question, in their entirety, the location of all existing works and activities* ab antiquo. *That would be contrary to the reasonable balance that must exist between the interest in environmental protection and the preservation of the historical location of installations and activities, the annihilation of which - with significant economic and social consequences - would be the possible effect of a retroactive application of the assessment standards that have become mandatory for all projects subsequent to 3 July 1988, the date on which the period for implementation of that directive expired*".

And again: "*Since the plant in question pre-existed the legislation requiring it to be subjected to an environmental impact assessment, the court cannot fail to observe that, in the case of plants pre-existing at the time of the introduction of the environmental regulations, the regional administration would not have been able to implement the relocation solution, since the theory of acquired rights and, in essence, the principle of the protection of legitimate expectations (a principle of European Union law) precluded it, so that the point of balance between the protection of the conflicting situations (continuation of the business activity - environmental protection) would necessarily have to be found in the identification of the best "solutions" available for the mitigation of the environmental impact by the proceeding administration, which should have been duly adopted by the company in order to continue its productive activity*" (Tar - regional administrative Court of Campania, n. 3086/2020).

The assessment activity, therefore, must balance the elements already acquired and not modifiable (such as, for example, the location of the plant), and balance the interest in the application of the EIA discipline with the legitimate expectations of the proponent, considering only the *pro-future* effects of the project.

In this sense, it is possible to cite the legislation of the Region of Tuscany, validated by sentence no. 209/2011 of the Constitutional Court, which - precisely with reference to projects carried out before the entry into force of the EIA regulations and subject to modification - states: '*For the parts of works or activities not affected by modifications, the procedure is aimed at identifying any measures suitable to obtain the best possible mitigation of impacts, also taking into account the economic-financial sustainability of the same in relation to the existing activity*'.

3.3.6 Main critical issues that emerged and working hypotheses

- The possibility of permitting the continuation of works or activities on condition that such continuation is safe with regard to any health, environmental or cultural heritage risks, is an extremely delicate aspect, also with regard to the time required for the acquisition of completed information by the competent bodies and the consequent decisions.
- With reference to the last part of paragraph 3, it should be noted that the hypothesis of the demolition of the works by the competent EIA Authority in lieu of the inertia of the "offender" proves, in practice, for the budgets of most local authorities, to be very difficult to implement, especially if the construction of the works is at an advanced stage and therefore the advance payment of the expenses for the restoration of the state of the places is particularly onerous.

3.4. Article 29, paragraphs 4, 5, 6.

4. *Unless the act constitutes a criminal offence, any person who implements a project or part of a project without a prior EIA or without an EIA screening, where prescribed, shall be punished with an administrative sanction of 35,000 euro to 100,000 euro.*

5. *Unless the offence constitutes a criminal offence, a fine ranging from 20,000 euro to EUR 80,000 against a person who fails to comply with the environmental impact assessment or environmental impact assessment.*

3.4.1 Regions that submitted comments

Campania, Tuscany, Umbria, Veneto.

3.4.2 General overview

Finally, paragraphs 4 and 5 regulate the remedies already defined above as "sanctions". These are in fact provvedimental instruments that originate from factual circumstances that coincide with those already examined with reference to the 'procedural' remedies, but differ from the latter in teleological terms: they do not restore environmental protection *standards*, but rather 'punish' the unlawful conduct of the proponent. The two paragraphs, in fact, provide for the imposition of an administrative fine by the competent EIA authority, to the person responsible for the unlawful conduct.

The two rules differ in terms of the objective element of the offence (the fact that generates the penalty) and in terms of the *quantum of* the penalty.

Paragraph 6 confers the competence to impose the sanction on the competent authority.

The competent authority is identified at *state level in* Art. *7-bis,* para. 4: '*The competent authority is the Ministry of the Environment and Protection of Land and Sea, which exercises its competences in cooperation with the Ministry of Cultural Heritage and Activities and Tourism for the preliminary activities related to the EIA procedure*'.

At the regional level, on the other hand, it is regulated by Article *7-bis,* paragraph 5: '*At the regional level, the competent authority is the public administration with tasks of environmental protection, preservation and enhancement identified according to the provisions of regional laws or autonomous provinces*'.

The competent authority for the imposition of sanctions, therefore, is the EIA authority.

The concrete exercise of the sanctioning activity is governed by Law 689/1981, and therefore, pursuant to Article 14 of the aforementioned law, "the *details of the violation must be notified to the interested parties residing in the territory of the Republic within ninety days and to those residing abroad within three hundred and sixty days from the ascertainment*".

Once the infringement has been notified, it must be imposed by the competent authority within the limitation period of the same, which, pursuant to Article 18, Law 689/1981, corresponds to five years from the infringement: '*The right to collect the sums due for the infringements indicated by this law is prescribed within five years from the day on which the infringement was committed*'.

3.4.3 The prerequisites for the application of sanction remedies: the implementation of a project or part of a project without prior EIA or EIA screening

Paragraph 4 provides for the imposition of an administrative fine of 35,000 to 100,000 on those who have carried out a project or part of a project without a prior EIA or EIA screening.

The sanction, therefore, finds its application presupposition in a factual circumstance that appears superimposable to the one examined with reference to the application of paragraph 3, which gives rise to the application of the discipline concerning the 'pathological' posthumous EIA.

In fact, it seems clear that in no case can the imposition of the penalty be applied with reference to

'physiological' posthumous EIA hypotheses, since - as extensively clarified *above* - in such cases there is no wrongdoing.

The imposition of the sanction, in fact, even more so than the application of the procedural remedies set forth in paragraphs 2 and 3, finds its basis and legitimacy in the existence of unlawful conduct on the part of the proponent, since the *rationale* underlying the sanction is precisely the 'punitive' intent of the unlawful conduct.

Therefore, in all cases where a breach of EIA provisions is not established, as is the case, for example, with regard to the 'physiological' posthumous EIA, there can be no legitimate imposition of administrative sanctions.

This being clarified, the provision does not appear to be perfectly superimposable on 'pathological' posthumous EIA hypotheses, since it only describes the hypotheses in which the project has been realised *without* the prior EIA or verification of subjection to an EIA, not, therefore, the hypotheses in which it has been realised by virtue of a prior EIA or verification of subjection to an EIA subsequently annulled by a court or in self-defence.

In such cases, therefore, the applicability of the sanctioning provision in paragraph 4 seems to have to be excluded. This interpretative solution, on the other hand, in addition to the need to interpret the penalty provisions in restrictive terms, seems to be based on the principle of reasonableness, by virtue of the absence of unlawful conduct on the part of the proponent, who legitimately carried out the project by virtue of a measure issued by the competent authority, even if it subsequently proved to be unlawful.

As is well known, however, the issue of legitimate expectations with reference to measures subsequently declared unlawful is the subject of conflicting interpretations in doctrine and case law. Moreover, in terms that are even more penalising for the proponent, reference must be made to the hypotheses - which are common in criminal case law - in which the removal of the unlawful measure is deemed capable of constituting a criminal offence on the part of the proponent, with the imputation of the corresponding offence. Therefore, a more afflictive interpretation by the courts than the one proposed and desired here cannot be excluded.

Focus: the relationship between paragraph 3 and paragraph 4 of Art. 29

The coincidence of the genetic event, in the terms outlined above, which gives rise to the application of the rules in subsection 3 (posthumous 'pathological' EIA) and subsection 4 (administrative sanction), raises questions of interpretation concerning the relationship between the two provisions.

In particular, the question has been raised as to whether the 'pathological' posthumous EIA procedure and its outcome can play a role, even a prerequisite, with respect to the imposition of the sanction referred to in paragraph 4.

Some interpreters, in fact, have theorised a consequentiality between the two hypotheses, considering the penalty applicable only in the event of a negative outcome of the posthumous 'pathological' EIA procedure. In other words, this thesis considers that the prerequisite for the imposition of the sanction referred to in Paragraph 4 is not the realisation of a project or part of it without prior environmental assessment, but rather the negative outcome of the 'pathological' posthumous EIA procedure.

In the opinion of these interpreters, this would also be useful in order to determine the intensity of the offence and thus to identify the correct *quantum of* the penalty within the sentence framework.

Such an interpretation, although suggestive, on the basis of the legislation currently in force, does not seem supportable.

Indeed, a plain reading of subsection 4 does not reveal any conditioning of the imposition of the sanction to the prior conduct of the procedure referred to in paragraph 3 (posthumous 'pathological' EIA).

On the contrary, the text of the provision appears unequivocal in identifying as a prerequisite for the imposition of the sanction precisely the implementation of '*a project or part of a project without a prior EIA or without the verification of subjection to an EIA, where prescribed*'.

On closer inspection, in fact, this factual circumstance constitutes an offence in itself, since the project was carried out in violation of the rules on environmental assessments, regardless of any subsequent 'pathological' posthumous EIA procedure and its outcome.

Therefore, the establishment of the offence appears sufficient for the imposition of the sanction, irrespective of by the outcome of the remedial posthumous EIA procedure.

On the other hand, the two provisions, as already mentioned, meet two different public needs. On the one hand, subsection 4 is aimed at punishing unlawful conduct ("*whoever carries out* [...] *shall be punished with an administrative sanction*"), on the other hand, subsection 3 is aimed at recovering the application of the EIA discipline, requiring the initiation of the relevant procedure even if *ex post*.

In terms of the quantification of the penalty, on the other hand, the competent authority must follow the provisions of Article 11, Law 689/1981 and therefore: '*In determining the administrative pecuniary sanction fixed by law between a minimum and a maximum limit and in the application of the optional accessory sanctions, regard shall be had to the seriousness of the breach, to the work performed by the agent for the elimination or mitigation of the consequences of the breach, and to the personality of the same and to his economic conditions'.*

Therefore, the sudden commencement of the posthumous pathological EIA procedure may well be an element of assessment with regard to the *quantum of* the penalty, without, however, this being the sole prerequisite for its imposition.

3.4.4 The prerequisites for the application of sanction remedies: non-compliance with environmental conditions

Paragraph 5, on the other hand, is based on the hypothesis that the proponent, although in possession of an EIA or EIA submissibility decision, does not comply with its environmental conditions.

In this case, the factual presupposition governing the applicability of the rule seems to correspond - although there are obvious differences in terminology - to the same presupposition described in paragraph 2, where reference is made to "non-compliance or violations of the environmental conditions referred to in Article 28".

Therefore, in the event that these factual prerequisites are ascertained, the competent authority will be required to impose a sanction ranging from EUR 20,000 to EUR 80,000. With reference to the correct classification of this case, please refer to what has already been examined *above* in Chapter 3.2.

On the other hand, the further case governed by paragraph 2, consisting in the realisation of a project that differs from the one subject to environmental assessment, does not seem to fall within the scope of this provision.

In fact, the correct framing in terms of sanctions of this particular case, which, however, does not seem to be attributable strictly to the observance of an environmental condition, raises numerous perplexities. Such a conclusion, in fact, seems to necessarily presuppose a case-by-case analysis, since there may well be a failure to comply with an environmental condition that translates into a design change that makes the project deviate from the authorised one.

On the other hand, on the other hand, the project modification, where it consists in the realisation of a part that has never been subject to assessment, could even configure a penalty hypothesis corresponding to that governed by paragraph 4, where reference is made to the realisation of a project 'or part of it'.

It seems possible, therefore, to exclude that the case expressly contemplated by the procedural remedies, and consisting in the execution of a project that differs from the one subject to assessment, is not subject to a penalty remedy. That being said, however, the correct penalty to be imposed must

be defined on a case-by-case basis, in order to correctly identify the correspondence of the case to that described by paragraph 4 (realisation of part of a project without prior environmental assessment) or paragraph 5 (realisation of part of a project without compliance with environmental conditions). Nor does the outcome of such a case-by-case analysis necessarily appear to be unequivocal, since there may well be hypotheses of competition between the two cases, and therefore of competition between the administrative penalties.

3.4.5 Sanctioning remedies: common criticalities.

As a preliminary point, it should be specified that the modalities for exercising the sanctioning power, given the absence of any express derogation, are to be found in the general law on administrative sanctions, Law 689/1981.

However, there are numerous questions of interpretation with regard to these subparagraphs.

Some of the critical profiles of the individual provisions have already been examined in the previous chapters. The critical profiles that are shared by both sanctions will be examined below.

The first critical profile that arises for both rules is represented by the presence of the so-called 'salvation clause', which limits their applicability only to cases in which the fact, which constitutes the objective element of the conduct, does not constitute an offence. This has created numerous questions of interpretation, due to the divergence in terms of both timeframes and, above all, jurisdiction that characterises the two types of assessment.

In particular, the question arises as to how the competent authority can recognise whether or not the act constitutes an offence.

Given, in fact, that the competence to ascertain a criminal offence certainly does not reside in administration, but only in the hands of the judicial authority, and that the timeframe for establishing the existence of the offence might not be compatible with that for imposing the penalty.

Moreover, once the unlawful conduct has been ascertained, many interpreters have expressed their perplexity with reference to the determination of the actual *quantum of* the sanction within the edictal framework defined by the regulation, given also the lack of experience in terms of sanctioning powers of many of the competent EIA administrations.

On this point, as noted above (Chapter 3.4.3), the competent authority must comply with the provisions of Article 11, Law 689/1981 and therefore: "*In determining the administrative pecuniary sanction fixed by law between a minimum and a maximum limit and in the application of the optional accessory sanctions, regard shall be had to the seriousness of the breach, the work performed by the agent for the elimination or mitigation of the consequences of the breach, as well as to the personality of the same and to his economic conditions*".

Finally, but not in terms of importance, numerous interpretative doubts have arisen as to the applicability of the sanctions over time, and in particular as to whether the conduct of those who carried out projects without an environmental assessment before the entry into force of Legislative Decree 104/2017, which instituted the sanctions in question, can be sanctioned.

Article 23 of Legislative Decree 104/2017, although it concerns the transitional discipline, contains nothing with reference to the newly created sanctions. Therefore, it could be assumed that, since the general discipline is in force, the sanction is only applicable to offences committed *after* the entry into force, by virtue of Article 1, L. 689/1981 "*no one may be subject to administrative sanctions except by virtue of a law that came into force before the commission of the violation*".

However, the crux of the matter lies in defining the moment when the offence is committed. With reference to offences relating to town and country planning, building, landscape and environmental matters, consisting in the execution of works without the prescribed concessions or authorisations, in fact, it is considered by constant case law that this lasts over time and only ceases with the cessation of the unlawful situation, that is, with the imposition of the pecuniary sanction or with the obtaining of the authorisation. This is the so-called permanent offence. In this type of offence, the consummation

continues for a period of time by the conscious will of the agent with the consequence that, in the case of a succession of stricter laws, if the permanence continues under the force of the new law, it is this alone that must be applied.

On this basis, it appears legitimate to consider that the sanctioning case referred to in Article 29(4) and (5) falls precisely within the scope of the definition of permanent offence and that, therefore, precisely by virtue of the application of the *tempus regit actum* principle, conduct that began with the implementation of the project, prior to the entry into force of Legislative Decree 104/2017 (21 July 2017), but continued until dates subsequent to its entry into force, would also be punishable.

Therefore, the deadline of 21 July 2017 does not appear to be decisive for the imposition of the sanction, which appears to be applicable also to projects implemented before that date, provided, of course, that they are still in existence at the time of the entry into force of the sanction provision.

3.4.6 Main critical issues that emerged and working hypotheses

- It seems useful to provide for a terminological alignment between the cases subject to sanctions (paragraphs 4 and 5) and those subject to procedural remedies (paragraphs 2 and 3).
- The possible competition between administrative sanctions and penalties.
- The existence of the escape clause seems to represent a limitation of the time frame in the imposition of the sanction.

3.5. Article 29, paragraphs 7 and 8

7. *The administrative pecuniary sanctions provided for in this Article shall not be subject to the reduced payment provided for in Article 16 of Law No. 689 of 24 November 1981.*
8. *The proceeds deriving from the application of the administrative pecuniary sanctions falling within the competence of the State for the violations provided for by the present article, are paid to the State budget and are subsequently reallocated to the relevant expense chapters of the Ministry for the Environment and the Protection of the Territory and the Sea to be destined to the improvement of the surveillance activities, prevention and environmental monitoring, to the activities referred to in Article 28 of the present decree for the verification of the compliance with the environmental conditions contained in the measure of verification of subjection to EIA or in the EIA measure, as well as for the provision of measures for the health protection of the population in case of accidents or natural disasters.*

3.5.1 Regions that submitted comments

None.

3.5.2 General overview

Paragraph 7 of Article 29 also relates to the penalty system and provides for the exclusion of reduced payment even when the conditions set out in Article 16, Law 689/1981 are met.

This is an exception to the general rules, often provided for with reference to penalties in environmental matters because of the particular social disvalue that the legislator attributes to the relevant unlawful conduct. For this reason, even if the sanctioned party were to pay within the term of sixty days from the notification of the details of the violation (or of the, more unlikely, immediate notification), he would still be required to pay the full amount, as he would not be able to benefit from any relief.

Finally, paragraph 8 also relates to the penalty system and is aimed at regulating the use of funds found following the imposition of the administrative fines referred to in paragraphs 4 and 5.

More specifically, paragraph 8 defines the possible uses of such funds, with exclusive reference, however, to those deriving from sanctions under State jurisdiction. In such cases, in fact, the funds will have to be allocated 'to the *improvement of environmental supervision, prevention, and monitoring activities, to the activities referred to in Article 28* [...] *for the verification of compliance with the environmental conditions contained in the measure of verification of subjection to EIA or in the EIA measure, as well as to the provision of measures for the health protection of the population in case of accidents or natural disasters*'.

There is no provision in Paragraph 8 with reference to the proceeds of administrative fines under regional competence. The use of the latter, in fact, is referred pursuant to Article *7-bis*, paragraph 8 of Legislative Decree 152/2006 to specific laws or regulations to be adopted by the Regions and Autonomous Provinces. However, the autonomy of the regional legislator is in any case limited to defining '*the allocation to the purposes set forth in Article 29, paragraph 8, of the proceeds deriving from the application of administrative pecuniary sanctions*'.

Therefore, if on the one hand it is the Regions and Autonomous Provinces that determine the modalities of distribution and disbursement of these proceeds, it does not seem admissible that these may deviate from the purposes already identified in Article 29.8.

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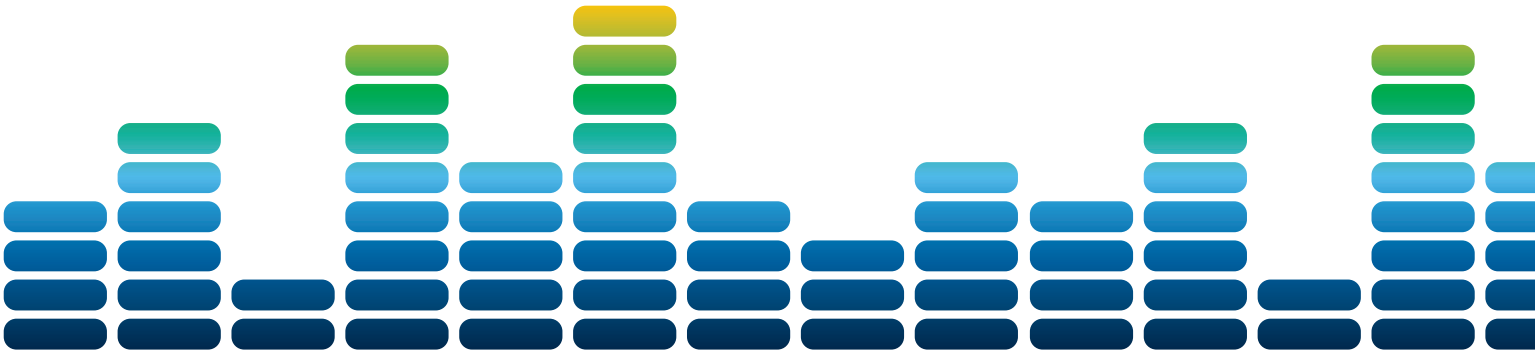

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