GIURETA
Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente
Vol. XVIII
2020

THE IMPLEMENTATION OF THE «HABITAT» IN RESPECT OF NATURA 2000 MARINE SITES IN ITALY AND IN FRANCE [*]

Fabrizio Corona [**]

SUMMARY: 1. Introduction. – 2. The approach chosen by France. – 3. The approach chosen by Italy. – 4. The lawfulness of Italian approach. – 5. The efficiency of each approach

1. – A short introduction is necessary. The so-called «Habitat» directive [1] requires the implementation of a network, known as «Natura 2000 network» [2],

[*] This work has been co-financed by the IMC – International Marine Centre, Oristano, with funds from the Interreg V A Italy France Maritime 2014-2020 Co-operation Program, project «Gestione Integrata delle Reti ecologiche attraverso i Parchi e le Aree Marine – GIREPAM» (Asse 2 – Lotto 3 – PI 6C – OS 1).

[**] Dottorando di ricerca in Diritto della navigazione nell'Università degli Studi di Sassari presso IMC, International Marine Centre, Oristano (Italy)

[1] We are dealing with the Council directive 92/43/EEC of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora. Even today, it constitutes the pillar of european policy for the conservation of nature, together with the directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009, on the conservation of wild birds, that replaces entirely the Council directive 79/409/EEC of 2 April 1979. As declared in the third recital, the main aim of the «Habitat» directive is «to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements». With this directive, the european legislator proved to be aware of the main environmental questions that are at the root of the Rio declaration on environment and development of 1992, with special regard to the sustainable development principle. In fact, for instance, the above-mentioned third recital declares that the «Habitat» directive «makes a contribution to the general objective of sustainable development».

[2] The essential network's legal framework is to be found in article 3 of directive. The first paragraph defines the object of protection measures provided into Natura 2000 sites, namely «the natural habitat types listed in Annex I and habitats of the species listed in Annex II». By means of following provisions, it is going to maintain or, where appropriate, restore these habitats and species «at a favourable conservation status in their natural range». This goal can be achieved only if member States comply with the requirement provided into the second paragraph. This one forces States to «contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1», by designating sites as special areas of conservation.

composed of protection zones integrated with each other [3], within which habitats and species considered of Community interest [4] have to be protected. Well, the implementation of that network inside marine environment has proved to be problematic everywhere. There are several factors that held up its development. Just to name a few: the doubts (that died hard) concerning the application area into the Community marine environment of the directive [5], the shortage of marine habitats listed in annex I of the directive; the difficulties found in tracking the species to be protected pursuant to annex II, especially those ones that live in the open sea; the need for coordination of the «Habitat» directive's legal framework with other Community and international regulations concerning the protection of the marine environment [6].

[3] That is to say, the sites of Community importance (SCIs), the special areas of conservation (SACs), as which the former shall be designated «as soon as possible and within six years at most», and the special protection areas (SPAs) pursuant to directive 79/409/EEC.

[4] Article 1 (*c*) (*g*) defines respectively «natural habitat types of Community interest» and «species of Community interest». Some similarities can be noticed. In fact, these definitions refer to a generic situation of danger of the habitats or species to be protected.

[5] Only by its judgment dated 20 October 2005, given at the end of an infringement proceeding against UK and Northern Ireland (case C-6/04), the CE Court of Justice definitively clarified that the «Habitat» directive shall also applies to areas beyond the Member States' territorial waters. Therefore, also to their exclusive economic zones and to their continental shelves.

[6] These and other factors have been considered by many Community documents and studies carried out by European Union or member States' institutions. For instance: the report of the Commission, Brussels, 5 January 2004 COM(2003) 845 final, on the implementation of the directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora; the communication from the Commission to the Council and the European Parliament, Brussels, 24 October 2005 COM(2005) 504 final, «Thematic Strategy on the Protection and Conservation of the Marine Environment»; the communication from the Commission, Brussels, 22 May 2006 COM(2006) 216 final, «Halting the loss of biodiversity by 2010 – and beyond, Sustaining ecosystem services for human well-being»; the «Study on evaluating and improving the article 6.3 permit procedure for Natura 2000 sites» issued by the Ecosystem LTD and financed by EU Commission in 2013 (available at http://www.ceeweb.org); the report from the Commission to the Council and the European Parliament, Brussels, 20 May 2015 COM(2015) 219 final, «The State of Nature in the European Union – Report on the status of conservation and trends for habitat types and species covered by the Birds and Habitats Directives for the 2007-2012 period as required under Article 17 of the Habitats Directive and Article 12 of the Birds Directive»; the «Proposal for an assessment method of the ecological coherence of networks of marine protected areas in Europe» issued in 2015 by the Marine Expert Group set up by the EU Commission (available at https://circabc.europa.eu); the report from the Commission to the European Parliament and the Council, Brussels, 1 October 2015, on the progress in establishing marine protected areas (as required by Article 21 of the Marine Strategy Framework Directive

The European Union is quite aware of these issues. Some years ago, indeed, the EU Commission has published the guidelines relating just to the establishment of Natura 2000 network inside the marine environment [7].

Said that, attention should be paid to the way Italy and France have dealt with these questions.

2. – Beginning with the latter, it is necessary to focus on the chosen approach on the whole. It must be noted that the way France has transposed the

2008/56/EC); the document «Implementation of the "Habitat" Directive and conservation status of habitats and species in Italy» issued by the Italian Ministry of environment, Nature Conservation Directorate, in 2008 (available at www.minambiente.it); the document «State of implementation of the "Habitat" directive and future perspectives» issued by the Italian Environmental Protection and Research Institute in 2008 (*Istituto superiore per la protezione e la ricerca ambientale* – ISPRA; available at www.isprambiente.gov.it); the document «National strategy for biodiversity» issued by the Italian Ministry of Environment in 2010 (available at www.minambiente.it); the methodological guide on the «Assessment of the conservation status of natural marine habitats on a Natura 2000 site scale» issued by the natural heritage Service of the French National Museum of Natural History in 2011 (available at https://inpn.mnhn.fr). About this subject, see, among all: D. ADDIS, *Attuazione in Italia delle direttive n. 92/43/Cee "Habitat" e n. 79/409/Cee "Uccelli" in relazione alle aree protette marine*, in *Dir. comunit. scambi intern.*, 2002, 629–641; D. AMIRANTE (a cura di), *La conservazione della natura in Europa. La Direttiva Habitat ed il processo di costruzione della rete "Natura 2000"*, Milano, 2003, 1 ss.; D. AMIRANTE, N. M. GUSMEROTTI, *Le aree protette e l'Europa. La rete Natura 2000 per la conservazione della biodiversità*, in G. DI PLINIO, P. FIMIANI, *Aree naturali protette: diritto ed economia*, Milano, 2008, 21-52; C. BARTHOD (a cura di), *Analyse du dispositif Natura 2000 en France*, Rapport CGEDD n. 009538-01, Ministère de l'écologie, du développement durable et de l'énergie, 2015, 1 ss.; M. BENOZZO, F. BRUNO, *La valutazione di incidenza. La tutela della biodiversità tra diritto comunitario, nazionale e regionale*, Milano, 2009, 157 ss.; C.-H. BORN, F. HAUMONT (a cura di), *Natura 2000 et le juge. Situation en Belgique et dans l'Union européenne*, Bruxelles, 2014, 1 ss.; M. DUHALDE, *Analyse des instruments des politiques de la biodiversité: le cas de Natura 2000 en milieu littoral et marin*, Université de Bretagne occidentale – Brest, 2016, 1 ss.; V. FRANK, *The european Community and marine environmental protection in the international law of the sea. Implementing global obligations at the regional level*, Leiden, 2007, 380 ss.; A. GALDINI, *Rete Natura 2000 e pianificazione territoriale nella Pubblica Amministrazione*, Doctoral thesis, XXVIth Cycle, University of Bergamo, 2010-2011, 1 ss.; S. MABILE, *La mise en œuvre du réseau Natura 2000 dans les zones de juridiction nationale*, in *ADM*, 2005, 123-141; J. MAKOWIAK, *La mise en place du réseau Natura 2000: les transpositions nationales: actes du colloque organisé à Caserta, Piedimonte Matese I, les 30-31 mai 2003*, Limoges, 2005, 1 ss.; S. MALJEAN-DUBOIS, J. DUBOIS, *Vers une gestion concertée de l'environnement. La Directive "habitats" entre l'ambition et les possibles*, in *Rev. jur. env.*, 1999, 531-555; A. MARQUETTE, *La gestion française des sites classés "Natura 2000"*, Université Lumière Lyon II – Année universitaire 2006-2007, Lyon, 2007, 1 ss.; P. MOSSONE, *La tutela degli ecosistemi marini in relazione all'applicazione dei differenti regimi normativi vigenti*, Doctoral thesis, XXVIIIth Cycle, University of Sassari, 2015-2016, 1 ss.; ID., *Over-*

«Habitat» directive into national law obviously has been influenced by her form of government. As a result, the central government maintain a key role [8] [9], with special regard to the prefects, who have a role of representation. These latter steer the implementation of Natura 2000 network from the starting phases and take on a key role in the management of the network [10]. This trait of the directive transposition's legal framework increases with respect to Natura 2000 marine sites. That's because France assumes that conservation of marine environment should be a requirement of national significance. It can be deduced from

lapping different regulatory regimes for the protection of marine areas: the case of the institution of Nature 2000 marine sites in Sardinia, in *Giureta*, 2017, 211-227; G. RELINI, *Il progetto «Implementazione dei S.I.C. marini italiani»*, in *Biologia Marina Mediterranea*, 2009, 61-64; A. TROUWBORST, H. DOTINGA, *Comparing european instruments for marine nature conservation: the OSPAR convention, the Bern convention, the Birds and Habitats directives, and the added value of the marine strategy framework directive*, in *EELR*, 2011, 129-149; L. TUNESI *et al.*, *I siti di interesse comunitario in Italia per la creazione di una rete europea di aree marine protette*, in *Biologia Marina Mediterranea*, 2009, 48-54; C. ZOPPI, *Integrazione delle misure di conservazione dei siti della rete Natura 2000 nei regolamenti delle aree marine protette: uno studio relativo alla Sardegna*, 222-233, in F. BENINCASA (a cura di), *Seventh international symposium: monitoring of mediterranean coastal areas: problems and measurement techniques: Livorno (Italy) June 19-20-21 2018*, Firenze, 2018. In relation to the issue of coordination with other regulations, some of these must be mentioned: the directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy; the directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements; the directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (marine strategy framework directive); the EC Council regulation n. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy; the EU regulation n. 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy; the EU Commission decision 2017/848 of 17 May 2017, laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment, and repealing decision 2010/477/EU; the international convention for the prevention of pollution from ships (MARPOL convention) adopted by the International Maritime Organization (IMO) in 1973; the United Nations convention on the law of the sea (UNCLOS) signed in Montego Bay in 1982; the convention on biological diversity signed in Rio de Janeiro in 1992 in connection with the United Nations conference on environment and development; the Barcelona convention for the protection of the Mediterranean of 1976, amended in 1995, and especially its additional protocol concerning specially protected areas and biological diversity in the Mediterranean; the agreement on the conservation of cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area signed in Monaco in 1996. About this subject, see, among all: G. ANDREONE, G. CATALDI, *Regards sur les évolutions du droit de la mer en Méditerranée*, in *Ann. fr. dr. intern.*, 2010, 1-39; M.M. ANGELONI, A. SENESE, *La tutela*

the centralization of competences to central government that differentiates marine sites from terrestrial ones, even though France hasn't given up promoting decentralization for the benefit of regional and local authorities and consultation with local agents [11]. Don't forget, then, the increasing role of the French Bureau for the Biodiversity (*Agence française pour la biodiversité*) [12], called upon to encourage the setting up of the network of the French marine protected areas [13] and to help with their management [14].

Said that, it must be added that the French approach turns out to be or-

dell'ambiente marino nella Convenzione di Montego Bay, available at http://www.seaspin.com; J.-P. BEURIER, *La protection juridique de la biodiversité marine*, 2004, available at http://www.cdmo.univ-nantes.fr; G. CATALDI, *Problèmes généraux de la navigation en Europe*, in R. CASADO RAIGÒN (a cura di), *Europe et la Mer, II Colloquium of the International Association for the Law of the Sea*, Bruxelles, 2005, 127-149; V. FRANK, *The european Community and marine environmental protection in the international law of the sea. Implementing global obligations at the regional level*, cit., 331 ss.; K. MONOD, *Les Aires Spécialement Protégées d'Importance Méditerranéenne, un accouchement réussi*, in *Revue Européenne de Droit de l'Environnement*, 2003, 171-186; G. PRUNEDDU, *L'attuazione della politica comunitaria nell'ambiente marino mediterraneo*, in *Riv. dir. nav.*, 2010, 659-664; T. SCOVAZZI, *Evolution of International Law of the Sea*, in *Recueil des cours. Collected courses of The Hague Academy of International Law*, L'Aia, 2000, 1 ss.; ID (a cura di), *Marine specially protected areas the general aspects and the Mediterranean regional system*, L'Aia, 1999; T. TREVES, *Il diritto del mare e l'Italia*, Milano, 1995, 1 ss.

[7] These guidelines (available at http://ec.europa.eu) are the result of work of a group of experts established by the EU Commission under the guidance of the Habitat Committee in 2003. They concern both marine coastal environments and those in the open sea, trying to help Members' States follow up the ambitious goals fixed by the Commission communication on «Halting the Loss of Biodiversity By 2010 – And Beyond» COM(2006) 216 final relating to Natura 2000 network, in particular: the completion of marine network of special protection areas (SPAs) by 2008; the adoption of lists of sites of Community importance (SCIs) by 2008 for marine environment; the designation of special areas of conservation (SACs) and the establishment of management priorities and necessary conservation measures for SACs by 2012 for marine environment; and the establishment of similar management and conservation measures for SPAs by 2012 for marine environment.

[8] The French environment policy is mainly determined by central government (the Ministry of ecological and fair transition – *Ministère de la Transition écologique et solidaire*), supported by his decentralized services, like the Regional Directions for Environment (DREAL). However, he shares this responsibility with regional and local authorities, like regions, departments and municipalities, even though they have a smaller role. About this subject, see S. MABILE, *La mise en œuvre du réseau Natura 2000 dans les zones de juridiction nationale*, cit.; J. MAKOWIAK, *La mise en place du réseau Natura 2000: les transpositions nationales: actes du colloque organisé à Caserta, Piedimonte Matese I, les 30-31 mai 2003*, cit., 104-106; J. MAKOWIAK, P. STEICHEN, *Natura 2000 et le juge. La situation en France*, 247-284, in C.-H. BORN, F. HAUMONT (a cura di), *Natura 2000 et le juge. Situation en Belgique et dans l'Union européenne*, cit.; A. MARQUETTE, *La gestion française des sites classés "Natura 2000"*, cit., 22-29.

ganic. It means that the transposition national law attaches a unique importance to Natura 2000 marine sites by drawing up a well-defined set of provisions [15]. Furthermore, there are many circulars concerning identification and management of these sites, addressed by the French Ministry of Environment to prefects and other decentralized services linked to the same Ministry [16]. They give, more than transposition national law contained within the environmental code, the idea of a complex system: a system by which France has thought opportune to differentiate the protection of Natura 2000 marine

[9] That's why it can be seen a plenty of disputes before the administrative courts (*tribunaux administratifs*, *cours administratives d'appel* and the *Conseil d'État*), rather than those of constitutional nature. See J. MAKOWIAK, P. STEICHEN, *Natura 2000 et le juge. La situation en France*, cit., 251 s.

[10] For instance, in accordance with the article L414-2 of the French environmental code, as modified by the law n. 2005-157 of 23 February 2005, the prefect (the administrative authority) sets up a steering committee (COPIL – *Comité de Pilotage*), which is charged with drawing up of the management plan, known as «Objectives document» (DOCOB – *Document d'objectifs*). It is worth recalling that France has decided to make the Natura 2000 sites' management plans obligatory, even though the article 6 of the «Habitat» directive qualifies it as a voluntary instrument («[...] Member States shall establish the necessary conservation measures involving, *if need be*, appropriate management plans [...]»). Furthermore, in accordance with the article L414-4 of the same code, as modified by the laws n. 2008-757 of 1 August 2008 and n. 2010-788 of 12 July 2010, the prefect fixes the local list of the planning documents, the plans and the projects which don't need any assessment of implications pursuant to article 6 of the «Habitat» directive, and adopts a motivated decision on whether or not a planning document, plan or project not included in the lists referred to in paragraph III and IV of article L414-4 should be submitted to an assessment of implications. With good reason, J. MAKOWIAK, *La mise en place du réseau Natura 2000: les transpositions nationales: actes du colloque organisé à Caserta, Piedimonte Matese I, les 30-31 mai 2003*, cit., 102, says that the prefect is charged with monitoring the respect of law by the regional and local authorities. It is worth recalling that the main national laws transposing the «Habitat» directive are contained within the environmental code, promulgated for the first time by the ordinance n. 2000-914 of 18 September 2000.

[11] In accordance with the article R414-9-2, added to code by the decree n. 2008-457 of 15 May 2008, the prefect/s convene and chair the steering committee of Natura 2000 sites mostly located into marine habitats. Instead, in accordance with the article R414-8-1, as modified by the decree n. 2008-457 of 15 May 2008, they confine themselves to convening the steering committee, which subsequently nominates his chairman, that couldn't be necessarily the prefect/s, when the Natura 2000 site is mostly located into terrestrial habitats. With regard to marine sites whose territory is mainly located within a natural marine park (the main protected marine area regulated by the environmental code pursuant to articles L334-1 and L334-3), in accordance with the articles L414-2, as modified by the law n. 2006-1772 of 30 December 2006, and R414-10-1, added to code by the decree n. 2008-457 of 15 May 2008, the management board of the natural marine park is charged with drawing up the objectives document, under the conditions fixed for the park's management plan, and monitoring its implementation. Even the circular of 19 October 2010 from the French Ministry of environment

sites from terrestrial ones [17].

3. – Italy has chosen a completely different approach. Certainly, this fact is partly due also to her different form of government [18]. Anyway, in Italy regional and Autonomous Provinces' of Trento and Bolzano authorities have a leading role in carrying out the «Habitat» directive. Indeed, the transposition national law [19] confers to them the competence on Natura 2000 sites management [20], limiting herself to providing a minimal protection framework. Therefore, free-

(available at https://www.legifrance.gouv.fr) clarifies that in the latter case the prefect/s have a quite more limited role, also because there's no steering committee. Given that most of Natura 2000 marine sites are located partly or totally within a natural marine park, the result is that the prefect/s' role in the Natura 2000 sites' management has a quite minor importance than in the past. However, that importance hasn't totally disappeared. Indeed, for instance, according to the above-mentioned circular, prefect/s continue to be responsible for assessing compatibility of Natura 2000 marine sites' objectives with those of natural marine parks during the preliminary phase known as «study mission» (*mission d'étude*), in the course of which the park's perimeter is still not fixed. If the prefect/s considers that they're not compatible, the Natura 2000 sites' steering committee can be established.

[12] Which absorbed the French Marine protected areas Bureau (*Agence des aires marines protégées*) with the adoption of the law n. 2016-1087 of 8 August 2016. See M. G. MIQUEL, *L'Agence des aires marines protégées: quelle ambition pour la politique de protection du milieu marin?,* Rapport d'information fait au nom de la Commission des finances, n. 654, 2014, 1 ss.

[13] Among which the French environmental code of course includes, pursuant to article L334-1, the Natura 2000 sites partly or totally located on the sea.

[14] In fact, article R334-1 of the French environmental code states that «*L'Agence française pour la biodiversité anime le réseau des aires marines protégées françaises et contribue à la participation de la France à la constitution et à la gestion des aires marines protégées décidées au niveau international. A cette fin, elle peut se voir confier la gestion directe d'aires marines protégées. Elle apporte son appui technique, administratif et scientifique aux autres gestionnaires d'aires marines protégées et suscite des projets d'aires marines protégées afin de constituer un réseau cohérent*». Article R131-28 concerns the composition of the administrative board of the Bureau: it shows how participation of national institutions can be highly influential in determining the national policy about marine protected areas. See, among all, S. MABILE, *La mise en œuvre du réseau Natura 2000 dans les zones de juridiction nationale*, cit., 139-141; M. G. MIQUEL, *L'Agence des aires marines protégées: quelle ambition pour la politique de protection du milieu marin?*, cit., 1 ss.

[15] The French environmental code includes in itself a very large amount of provisions dedicated to Natura 2000 network, divided into legislative – section I, chapter IV, title I, book IV of legislative part, from article L414-1 to article L414-7, which include the fundamental regulations – and regulatory ones – section I, chapter IV, title I, book IV of regulatory part, from article R414-1 to article R414-26, which include detailed provisions. A few words about marine sites are spent into the fundamental regulations, but it's within the regulatory part that a paragraph dedicated just to these sites can be found (paragraph II, from article R414-9 to article R414-9-7).

dom has been given to Regions and Autonomous Provinces to choose whether to adopt a detailed legislative discipline or to carry out merely administrative competences, strictly connected to «Habitat» directive transposition [21]. That's why in each Regions different approaches could be observed [22].

With regards to Natura 2000 marine sites, the coherence and «differentiation» compared to terrestrial sites characteristic of French legislation can't be noted into Italian one [23], also because of uncertainty about the real extent of the regional competences on the institution and management of Natura 2000

[16] Just to name the main ones: circular n. 2007 of 20 November 2007 concerning the additions that have to be brought to Natura 2000 marine network – Instructions for sites' identification; circular of 19 October 2010 concerning the establishment of the steering committees and the drawing up and monitoring of objectives documents of Natura 2000 mostly marine sites; circular of 4 January 2012 concerning environmental assessment and the assessment of implications relating to Natura 2000 of the «bills of structures» (*schémas des structures*) of the marine cultures' exploitations; circular of 14 May 2012 concerning the implementation of Natura 2000 network into marine environment the coordination between the «Habitat» and «Birds» directives and the Marine Strategy Framework directive; circular of 30 April 2013 concerning the taking into account of maritime fishing activities in the outline of the drawing up, or the revision if need be, of objectives documents of Natura 2000 sites' where these activities are practised; Government instruction of 15 July 2016 concerning the process of identification of complementary Natura 2000 sites beyond the territorial sea (this one isn't properly a circular by the way) (these documents are available at https://www.legifrance.gouv.fr and at https://aida.ineris.fr/).

[17] It's interesting how France, although she pursues a Natura 2000 network's implementation policy more «statist» than Italian one (as will be seen below), also developed, unlike Italy, a complex system of private legal instruments for the management of Natura 2000 sites. Namely, the so-called «Natura 2000 contract» (*contrat Natura 2000*) and the so-called «Natura 2000 paper» (*charte Natura 2000*), regulated by articles R414-13 to R414-17 and by articles R414-12 and R414-12-1 of the environmental code respectively. Nevertheless, the use of these instruments for the management of marine sites turned out (and turns out) to be problematic. On this subject, see M. DUHALDE, *Analyse des instruments des politiques de la biodiversité: le cas de Natura 2000 en milieu littoral et marin*, cit., 301 ss.

[18] To understand the jurisdictions distribution' system relating to the environmental matter defined by the Italian legislation, it is necessary to separate legislative jurisdiction from administrative one. With regard to the former, it's not easy to understand which authority (State, regional and local) competences belong to. The system defined by the article 117 of Italian constitution and the other laws beneath her is quite complicated. Indeed, the competence on protection of environment, ecosystem and cultural heritage belongs only to State, while the competence on land management and enhancement of cultural and environmental heritage is shared between State and Regions. Anyway, as a result, State turns out to have a key role. Indeed, the important Constitutional Court's (*Corte costituzionale*) ruling n. 378 of 14 November 2007 seems to confirm such a framework. Instead, the administrative jurisdiction, according to article 118 of Italian Constitution, proves that roles are reversed. In fact, the subsidiarity principle implies that competences belong first to local, provincial and metropolitan cities'

marine sites [24].

Therefore, the transposition national law refers to Regions and Autonomous Provinces, as a last resort, the choice of the approach to be followed.

Sardinia and Tuscany, for instance, have chosen a mildly differentiate approach. There are many provisions and policy papers showing a special attention to marine environment [25], even though they don't reach French «peaks». Liguria shows an even more marked differentiation. Just think to strictly standards provided by her in the conduct of the assessment of im-

authorities. Only if these competences can't be exercised in a unitary manner, their exercise switches to regional and, in the end, State authorities. Situation gets quite difficult talking about marine environment. Indeed, the legislative decree n. 112 of 31 March 1998, article 69, first indent (*d*), provides that protection, safety and quality status' monitoring of marine environment is a responsibility of national significance. Furthermore, the same article, second indent (*d*), provides that protection of coastal environment is a responsibility of State, and of Regions as well. Therefore, this decree, which provides a new administrative competences' conferring, seems to be in conflict with the article 118 of Italian constitution, what implies a difficult coordination of rules. The issues brought about by all of this are one of the reasons, as will be evident, why Italy has had so many problems on implementing Natura 2000 network inside marine environment. About this subject, is recommended to read, among all: D. AMIRANTE, N. M. GUSMEROTTI, *Le aree protette e l'Europa. La rete Natura 2000 per la conservazione della biodiversità*, cit., 21-52; J. MAKOWIAK, *La mise en place du réseau Natura 2000: les transpositions nationales: actes du colloque organisé à Caserta, Piedimonte Matese I, les 30-31 mai 2003*, cit., 235-238; L. TUNESI *et al.*, *I siti di interesse comunitario in Italia per la creazione di una rete europea di aree marine protette*, cit., 48-54.

[19] After an initial situation of laxity of the Italian legislator, the Government adopted the first transposition national law, that is the decree n. 357 of 8 September 1997, followed by the ministerial decree of 20 January 1999 and, above all, by the decree n. 120 of 12 March 2003, which modified it in order to ensure increased compliance with the «Habitat» directive and to avoid an infringement proceeding. Furthermore, it is necessary to remind: the ministerial decree of 3 September 2002, which provides the guidelines of Natura 2000 network' sites management; naturally, the ministerial decrees of 25 March 2004, 25 March 2005 and 5 July 2007, which first provides the sites of Community importance's list for the Alpine, Continental and Mediterranean biogeographic regions respectively; the ministerial decree of 17 October 2007, which provides the uniform minimum standards in order to define the conservation measures relating to special areas of conservation and special protection areas. About this subject, see D. ADDIS, *Attuazione in Italia delle direttive n. 92/43/Cee "Habitat" e n. 79/409/Cee "Uccelli" in relazione alle aree protette marine*, cit.; D. AMIRANTE, *Natura 2000 et le juge en Italie*, 323-340, in C.-H. BORN, F. HAUMONT (a cura di), *Natura 2000 et le juge. Situation en Belgique et dans l'Union européenne*, cit.; L. CIANFONI, *Direttiva habitat: efficacia delle misure di salvaguardia di cui all'articolo 6 in attesa dell'adozione delle liste dei siti di importanza comunitaria*, in *Riv. giur. ambiente*, 2004, 601-606; J. MAKOWIAK, *La mise en place du réseau Natura 2000: les transpositions nationales: actes du colloque organisé à Caserta, Piedimonte Matese I, les 30-31 mai 2003*, cit., 235-261; P. MOSSONE, *La tutela degli ecosistemi marini in relazione all'applicazione dei differenti regimi normativi vigenti*, cit., 58-64.

plications, when plans and projects to be assessed affects the Posidonia bed's habitat [26].

Generally, there is a trend towards giving marine habitats and species a special significance, which justifies the conception of legal instruments different from those provided for terrestrial sites.

4. – There's now the need to understand whether the approach chosen by Italy is lawful, even in view of EU Commission guidelines concerning the establishment of Natura 2000 network inside the marine environment, or it must get closer to French one. In our opinion, EU doesn't take over a specific paradigm. She doesn't require any difference in the identification and management of marine and terrestrial sites. She's only interested in ensuring a favourable conservation status of habitats and species which should justify

[20] For instance, the article 3 of the decree n. 357 of 8 September 1997 provides that the Regions and the Autonomous Provinces of Trento and Bolzano shall identify the sites to be proposed by the Italian Ministry of Environment to EU Commission which will be part of the Natura 2000 network. The article 4 of the same decree provides that the above-mentioned authorities shall take appropriate steps to avoid, in the proposed sites of Community importance (pSCIs), the deterioration of natural habitats and the habitats of species, and establish, for special areas of conservation, the necessary conservation measures within six months after their designation. The article 5 of the same decree provides that those same authorities could define many basic aspects linked to the assessment of implications, like the arrangements for the submission of studies that the proposers of regional, urban and land use plans, actions and projects must carry out for the purpose of a positive assessment.

[21] The above-mentioned article 5, by allowing Regions and Autonomous Provinces to redefine many fundamental aspects linked to the assessment of implications, proves to be not «legally binding», in so far as they haven't the duty to adopt such a provision. About this subject, see D. AMIRANTE, N. M. GUSMEROTTI, *Le aree protette e l'Europa. La rete Natura 2000 per la conservazione della biodiversità*, cit., 40-49; the document «State of implementation of the "Habitat" directive and future perspectives» issued by the Italian Environmental Protection and Research Institute in 2008 (ISPRA)

[22] And that's why disputes before the Constitutional Court, rather than those of administrative nature, have had such an importance. See D. Amirante, Natura 2000 et le juge en Italie, 325 ss., cit.

[23] The transposition national law doesn't give special attention to marine sites. A few exceptions can be found, for instance, in the ministerial decree of 17 October 2007, article 2 (*g*) (*h*), concerning prohibitions relating to fishing in force in special areas of conservation. A few more provisions relating to marine sites, in the following articles, are in force in special protection areas pursuant to directive 79/409/EEC.

[24] While the legislation on Italian marine protected areas minimises the role of Regions, the already mentioned decree n. 357/1997 doesn't provide any specifications on the role of Regions in instituting and managing marine sites. See D. AMIRANTE, *Natura 2000 et le juge en Italie*, cit., 323-340; A. GALDINI, *Rete Natura 2000 e pianificazione territoriale nella Pubblica Amministrazione*, cit., 133 ss.

the designation of a site [27]. This is proved by what the above-mentioned guidelines declare [28]. Moreover, there's no sign of complaint concerning the approach chosen by Italy for Natura 2000 marine sites in the infringement proceedings initiated by EU against Italy concerning the «Habitat» directive transposition in national law and ended with a judgment of condemnation [29].

In conclusion, it could be argued, with no doubt, that the approach followed by Italy is definitely lawful, according to, at the very least, positions so far taken by EU bodies. Positions that could change in the future.

[25] With regard to Sardinia, the premise to be made is that the regional law n. 23 of 29 July 1998, the main transposition regional law, doesn't dwell on marine sites at all. Instead, some resolutions of the Council of Autonomous Region of Sardinia subsequently adopted – like n. 19/45 of 14 May 2013 which establishes an integrated programme of enhancement of Sardinia's maritime and coastal heritage, n. 37/18 of 12 September 2013 which provides the guidelines for drawing up the sites of Community importance's and special protection areas' management plans, and n. 22/4 of 17 June 2014 which fixes the prioritised action framework (PAF) for Natura 2000 for the EU Multiannual Financing Period 2014-2020 – seem to show such an attention to marine environment. As regards Tuscany, there are a lot of resolutions of the Council of Region of Tuscany as well, like n. 1223 of 15 December 2015 which defines the general conservation measures in force in every marine and terrestrial site of Community importance, and n. 10 of 11 February 2015 which establishes the environmental and energetic regional plan including the regional strategy for biodiversity. A less, but not to say non-existent, attention is given to marine environment by the regional law n. 30 of 19 March 2015, the main transposition regional law.

[26] What is provided by the resolution of the Council of Region of Liguria n. 1533 of 2 December 2005. Anyway, it isn't the only legal instrument dedicated to marine environment conservation carried out by Liguria. There are some resolutions worthy of note, like: n. 30 of 18 January 2013 concerning the adoption of standards and procedural courses for the assessment of implications of plans, projects and actions; n. 1459 of 21 November 2014 concerning the adoption of conservation measures specific to Ligurian marine sites of Community importance; n. 537 of 4 July 2017 concerning the adoption of conservation measures in force in special areas of conservation belonging to Mediterranean biogeographic region. Special attention is also given by two regional laws: n. 28 of 10 July 2009, which is the main transposition regional law; n. 8 of 1 April 2014 regulating fisheries into inland waters and conservation of his own fish stocks and of aquatic ecosystem.

[27] Here is the real aim whose pursuit is required by the «Habitat» directive, as appears from the article 2: «1. The aim of this directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies. 2. Measures taken pursuant to this directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest. […]».

[28] «In the marine environment, obligations of Member States are the same as in the terrestrial environment. Therefore, the provisions of the Habitats directive related to the site designation process are the same: the site designation process is exclusively based on scientific criteria», cit. Guidelines for

5. – Finally, the last question is whether it is possible to determine which approach into practice is the best. The main point of reference to carry out such an analysis turns out to be the overall reports on the state of «Habitat» directive implementation in Italy and France [30].

First glance, it appears that France's performances in terms of Natura 2000 marine sites protection seem to be worse than those achieved by Italy, even though she's about to succeed in overturning the original «drawback» [31].

Actually, it's not at all sure that this is due to the approach chosen. Maybe it could be simply due to a greater efficiency of the Italian administrative structures dedicated to Natura 2000 network management, or to a greater overall abili-

the establishment of the Natura 2000 network in the marine environment – Application of the Habitats and Birds directives, EU Commission, 2007.

[29] They are judgment of the Court 20 March 2003 (case C-143/02), and 15 July 2010 (case C-573/08).

[30] According to article 17, paragraph 1, of the «Habitat» directive, «Every six years from the date of expiry of the period paid down in Article 23, Member States shall draw up a report on the implementation of the measures taken under this directive […]». The reports that will be examined constitute the final report drawn up by EU Commission «based on the reports referred to in paragraph 1» (these reports are available at https://circabc.europa.eu).

[31] The examined reports refer both to the 2001-2006 five years period and the 2007-2012 five years period. Therefore, data doesn't concern subsequent periods. Anyway, up to 2013 France established two-hundred-seven marine SCIs & SACs: thirty-three of them were SACs. Together, they covered twenty-seven-thousands-seven-hundred-five square kilometres. Instead, up to 2013 Italy established two-hundred-ninety-five, and none SACs, which covered a smaller surface of six-thousand-three-hundred- forty-eight square kilometres. In the 2001-2006 five years period, Italy counts five coastal habitats in a «favourable» status condition, nine in a «unknown» status condition, ten in a «unfavourable inadequate» status condition, and none in a «unfavourable bad» status condition. In the 2007-2012 period, Italy still counts five coastal habitats in a «favourable» status condition, only two in a «unknown» status condition, eleven in a «unfavourable inadequate» status condition and three in a «unfavourable bad» status condition. As regards France, in the 2001-2006 five years period she counts none coastal habitats in a «favourable» status condition, only one in a «unknown» status condition, sixteen in a «unfavourable inadequate» status condition and fifteen in a «unfavourable bad» status condition; in the 2007-2013 five years period she counts two coastal habitats in a «favourable» status condition, none in a «unknown» status condition, fourteen in a «unfavourable inadequate» status condition and still fifteen in a «unfavourable bad» status condition. With regard to major differences in extension of Natura 2000 marine networks between France (but also other Member States, like Germany and Denmark) and Italy, it can be said that one of the main causes of these differences is to be found in the Italian reluctance to declare an exclusive economic zone. See, among all, L. TUNESI *et al.*, *I siti di interesse comunitario in Italia per la creazione di una rete europea di aree marine protette*, cit., 49 s.

ty to transpose the EU directive, or to the delays caused by problems found by France in concertations with local agents [32], or to the manner chosen by each State to implement the «Habitat» directive as a whole [33], or, most likely, to a persistent lack of data. Surely, Italy has benefited from the experience gained in the first period during which the law 6 December 1991, n. 394 (framework law on the protected areas) [34], has been in force, although this law has been also one of the main reasons of the delay in the implementation of the «Habitat» directive in Italy. Just think of the previous belief, that died hard, according to which the law n. 394/1991 was enough to implement the directive.

[32] Probably, the struggle for a fair compromise with the stakeholders has been the main reason why the implementation of the «Habitat» directive in France has been delayed for a long time. About this subject, see S. MALJEAN-DUBOIS, J. DUBOIS, *Vers une gestion concertée de l'environnement. La Directive "habitats" entre l'ambition et les possibles*, cit.; J. MAKOWIAK, P. STEICHEN, *Natura 2000 et le juge. La situation en France*, 252, cit.

[33] About that, doubts get thicker, because the number of infringement proceedings initiated by EU against France concerning the «Habitat» directive transposition in national law and ended with a judgment of condemnation is pretty much the same. They are: judgment of the Court 11 September 2001 (case C-220/99; 6 April 2000 (case C-256/98); 4 March 2010 (case C-241/08); 9 June 2011 (case C-383/09). Only the third one concerns specifically aspects linked to Natura 2000 marine sites.

[34] That can be considered, as claimed by G. DI PLINIO, *Aree protette vent'anni dopo. L'inattuazione «profonda» della legge n. 394/1991*, in *Rivista quadrimestrale di diritto dell'ambiente*, 2011, n. 3, 29-58, one of the best environmental legislations worldwide.

Abstract

The «Habitat» directive 92/43/EEC of 21 May 1992 only requires to ensure a favourable conservation status of habitats and species which should justify the designation of a Natura 2000 network site, leaving Member States freedom to choose how to achieve such a goal. With regards to marine sites, Italy and France have chosen two different protection approaches. This latter has preferred to take into special account marine environment by providing different legal instruments from those in force in terrestrial ones, rather than adopt the same framework. Italy – or, rather, some of his Regions and Autonomous Provinces - seems to follow the lead of France, but in a milder way.

La direttiva «Habitat» 92/43/Cee del 21 maggio 1992 impone agli Stati membri l'obbligo esclusivo di assicurare uno stato di conservazione favorevole agli habitat e alle specie che giustificano che dovrebbero giustificare la designazione di un sito della rete Natura 2000, lasciando gli Stati membri liberi di decidere come perseguire tale obiettivo. Riguardo i siti marini, l'Italia e la Francia hanno scelto, per tutelarli, approcci differenti. Quest'ultima ha preferito dare loro una considerazione particolare disciplinandoli in maniera differente rispetto a quelli terresti, piuttosto che includerli nello stesso identico quadro normativo. L'Italia – o meglio, alcune delle sue Regioni e Province autonome – sembra voler seguire l'esempio francese, ma in maniera più moderata.