

“Club des Régulateurs”
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The Regulator and his Judge

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Former Chair of the OECD NER*

The Regulator and his Judge



The Regulator and his Judge:
comparing independences



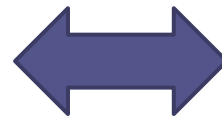
The Italian experience:
a case-study approach

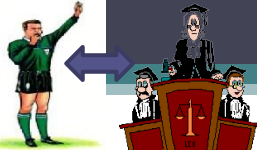


The challenges:
for the Regulator, and for the Judge

Independent Regulator & Administrative Judge

Comparing independences...





The independence of Regulator is recognized by the Administrative Judge

*The Italian Council of State recognizes the independence of the Regulatory Authorities, **insisting more and more often on a 'de facto independence'...***

Financial independence

Financial 'cuts' cannot be imposed on these Authorities if they have an autonomous financial income.

(C. St., spec. comm., advise n. 385/2012)



Independence on Human Resources

The attribution on new competences (i.e., waste regulation) imposes the necessity of new human resources.

Resources are an element of "feasibility" of the reform.

(C. St., spec. comm., advise n. 1075/2016)

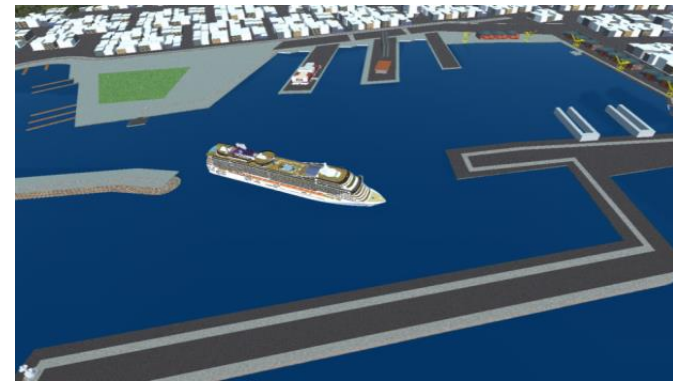
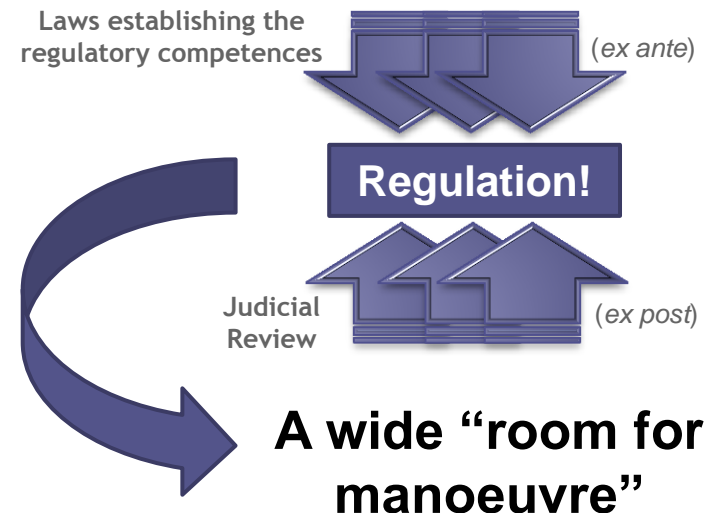


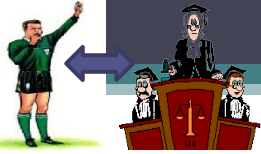
The independence of the Administrative Judge can be useful to the Regulator

The 'Independent Regulator' should be aware of the (potential) usefulness of a judicial review from an 'Independent Judge'

The only other limit: being subject to the Law

Constraints





The independence of the Administrative Judge can be useful to the Regulator

Independent judicial review could:

- ✓ highlight the independence of Regulator and protect him from undue influences
- ✓ innervate the technical and economical regulation with the Rule of Law principles
- ✓ improve the strength of controversial or critical regulatory decisions
- ✓ drive out any doubts on excessive self-confidence or arbitrary acts from the independent Regulator
- ✓ in conclusion, enhance the ‘authoritativeness’ of the Regulator



The Italian experience: a case-study approach

A case-study approach, looking at some decisions of the *Council of State* (the Administrative Supreme Court of Italy) and of the *TAR of Lombardia-Milan* (the *Regional Administrative Court*, Judge of first instance)





The Italian experience: 2 main Playing Fields

- a point of **procedure**: the issue of consultation
- a point of **substance**: the case of tariff and the “limits” of judicial review



Consultation\1

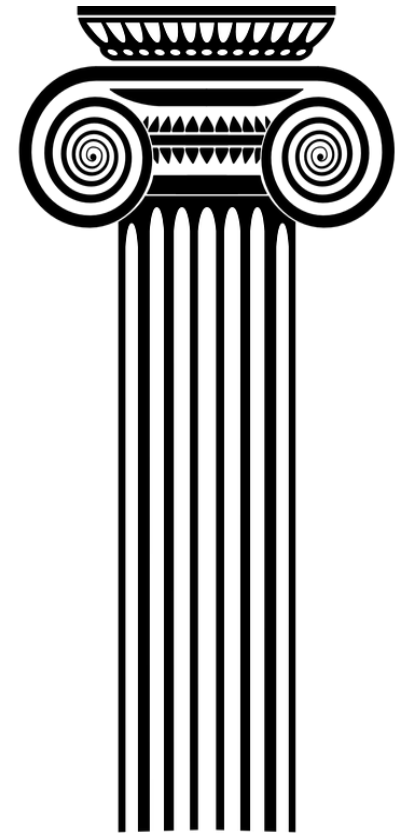
The “founding role” of consultation and its requirements

(C. St., sez.VI, n. 7972/2006)

- Regulators’ independence can rely on a “*bottom up support through consultation*”
- Open debate and stakeholders engagement allow to “*fill the Regulator’s democracy gap*”
- A **proper consultation** requires:
 - ✓ ensuring a correct and transparent process
 - ✓ an *ex post* judicial review

(TAR Lombardia, sez.III, n. 4659/2012)

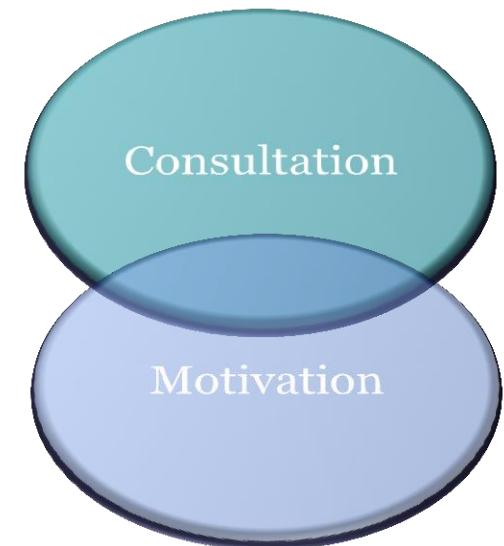
- Consultation needs an **adequate period** to allow an adequate participation of the stakeholders (proportionality principle): minimum 30, not 15 days



Consultation\2

Consultation & Motivation

- Consultation and motivation are **different and crossing concepts**
- Consultation results don't substitute the motivation of a regulatory decision, but integrate it
(Cons. Stato, sez. VI, n. 7972/06)
- No need to motivate on all points raised in consultation
(Cons. Stato, sez. VI, n. 7972/06)
- Consultation can be avoided in case of extreme urgency (but the Judge can control if it was really an urgent case ...)
(Cons. Stato, sez. VI n. 1532/2015)





Consultation\3

What happens after the judicial annulment for a ‘vice’ regarding consultation?

*The case of **lack of consultation***

The lack of consultation is a “formal” vice in the regulation, not a “substantive” one

(the Judge has allowed the re-adoption of the same regulatory measure after a proper consultation procedure)

(TAR Lombardia, sez.II, n. 509/2015 and n. 1629/2016)

*The case of **insufficient consultation***

A new - and wider - consultation can help the judge to “better understand” the regulatory measure

(a case of regulation that had been annulled and re-adopted in its initial version, after a wider consultation. During the judgement on the re-adopted regulation, the Judge “changed his mind” on the merit, and considered that regulation was legitimate, verifying an uniform stakeholders consensus)

(TAR Lombardia, sez.II, n. 494/2017)





Consultation\4

Consultation is not the (only) solution:
from the ritual to an “evidence based decision”

The ‘ritual’ of **consultation can be not sufficient** enough to ensure the full legitimacy of the regulatory procedure!

The Council of State, in its advisory role, is indicating **the next steps** (*see next slide*) ...
(*C. St., spec. comm., advise n. 1767/2016*)



Consultation\4-bis

Consultation is not the (only) solution:
from the ritual to an “evidence based decision”

(C. St., spec. comm., advise n. 1767/2016)

The regulator must use ‘**the whole Better Regulation toolkit**’ (RIA, *ex post* evaluation, codification) to establish a coherent, high quality regulatory process, in order to:

- show his capacity to **assess the factual data** (again, consultation is not ‘an empty rite’, but provides data to be assessed and integrated by the Regulator!)

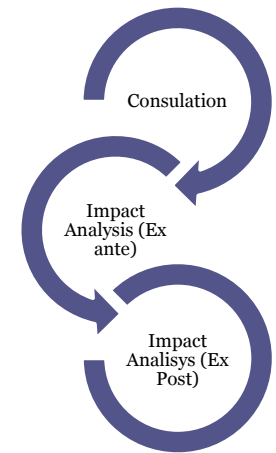
AND

- use consultation, together with the other b. r. tools, to transform a **widely discretionary** decision (such as the independent regulator one: remember the ‘wide room for manoeuvre’?)

from a **potentially arbitrary (or political)** choice

into a **fully evidence-based regulation**

It is the whole better regulation toolkit (not consultation alone) which can ‘fill the democratic gap’ and (above all) ensure the full legitimacy of the regulatory process!



Merit\1

Addressing the complexity and technicality of regulation
The case of water tariffs (*C. St., sez.VI, n. 2481, 26-05-2017*)



The Administrative Judge rejected the thesis that, when regulating water tariffs, the Italian Regulator (AEEGSI) had introduced the «Return On Investment» (ROI) criterion, which was forbidden according to the results of the 2011 Referendum

«Calculating separately financial costs and taxes, AEEGSI avoided to guarantee any ROI and ensured only to cover capital costs, strictly following referendum results (full cost recovery methodology)»



The Council of State issued this decision taking advantage of a **technical expertise**, investigating the regulatory decision making process (*see next slide*) ...



Merit\1-bis

The importance of a technical expertise *ex officio* (art. 67-68 c.p.a.)



The tool of the “Technical Expertize *ex officio*” (CTU) of the Italian Code of Administrative trial:

- the Court nominates an **expert**, formulates the **questions** and specifies the **deadline**
- **adversary proceedings** is fully guaranteed. “**Experts of each party**” can be appointed; they can:
 - ✓ witness the operations of the court expert,
 - ✓ speak to him,
 - ✓ attend the hearing and chambers and
 - ✓ provide with their observations on the results of the technical investigations

In the water tariffs case, the expertise:

- allowed an “**external**” examination in terms of “**technical rationality, logicity, reliability**” of tariffs
- recognized the existence of “**technical/scientific debatable margins** in industrial economy, business financial, and in the regulation finance economy”

Merit\2

The Judge recognizes the ‘amplitude’ of regulatory powers
The case of “safeguard clauses” in gas price (*C.St., sez.VI, n. 2463/2011*)

The Italian Regulator (AEEGSI) had adopted the “safeguard price clauses”, in order to **mitigate the increasing of gas price** - connected to the crude oil cost trends - at a maximum of 75%



The Council of State affirmed that the AEEGSI’s **regulatory power can be used “also in liberalized sectors, in order to ensure competition and to protect consumers”**

The Regulator has a **“right/obligation” to use all necessary measures** to ensure the correct competition, *ex post* or *ex ante*

Merit\3

The ‘psychological’ risks of ‘physiological’ complexity The case of gas distribution tariffs (*C. St., sez.VI, n. 162/2016*)



The case on gas distribution tariffs is particularly interesting for what could be considered as a ‘psychological’ approach

The starting point:

“Regulatory choices on tariffs are often highly complex and technical, and require a knowledge of sectoral disciplines, both economical and technical.”

This (physiological) complexity creates two opposite risks for the Judge:

- a ‘weaker’ judicial review (*risk of creating ‘no competence’ areas*);

OR

- confusing complexity with irrationality (*“risk of considering illogical, or not adequately motivated, everything is not immediately intelligible”*)

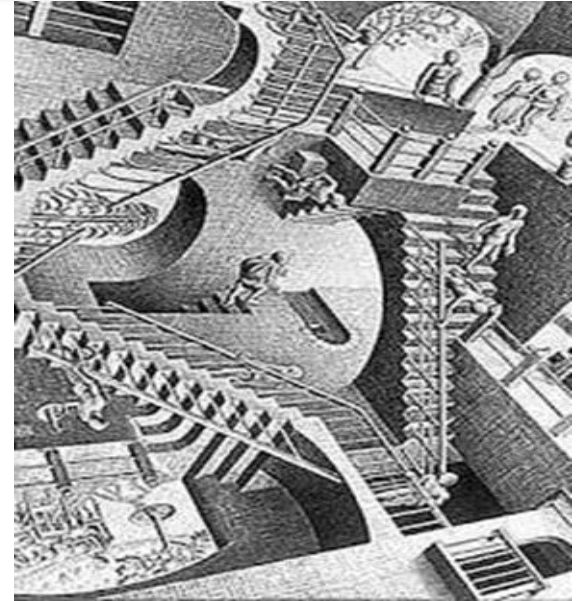
The Judge *“must re-use the same technical criteria as the Regulator”* in order to *“verify from the inside”* whether the regulatory choice is *“reliable and reasonable”* ...

Merit\3-bis

The ‘psychological’ risks of ‘physiological’ complexity
 The case of gas distribution tariffs (*C. St., sez.VI, n. 162/2016*)

C. St., sez.VI n. 162/2016 affirms that:

The Regional Administrative Court of first instance had annulled the regulatory act “*stopping at the surface*”, looking only at what “*looks reasonable*”, and “*considering inadequately motivated every non-immediately-intelligible choice*”.



The Administrative Judge has the **duty to “go beyond the appearance”** and to **verify “the effective rationality”** of the regulatory choices, including:

- connecting the rate of return on private risk investments to 10-years Italian State Bonds
- increase the *ratio* between venture capital and debt capital

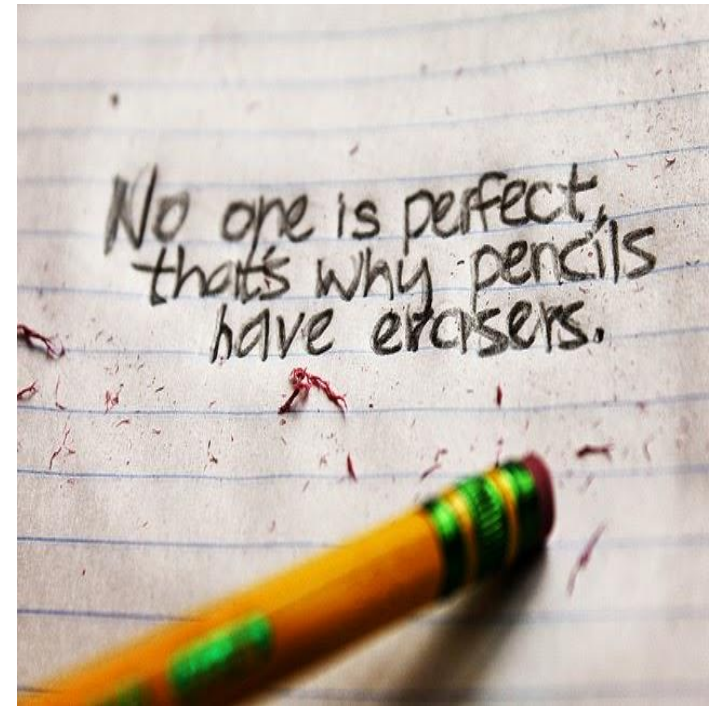
Merit\4

When does the Judge annul?

The case of gas transport tariffs (*C. St., sez.VI, n. 2888/2015*)

Despite the Judge “cannot substitute himself to the regulator”, his competence must not be “restricted to an external exam of the discretionary analysis”, but has to be extended also to:

- “the exact representation of the facts”;
- “the matching of the regulation to the actual data”
- “the reliability of technical operations”
- “the correctness of the criteria applied, according to the parameters of the relevant discipline”



Organizational measures

The 'abbreviated trial' for Independent Authorities

Peculiarities of the 'abbreviated trial' (art. 119 c.p.a.):

- All ordinary procedural time limits are halved, except the one for the first notification of the introductory application
- A 'fast track procedure' to arrange the hearing and to decide the case
- The judgement's abstract may be published before the motivation, if requested
- Overall length of the trial on a regulatory act, for both sets of proceeding (TAR and C.St.): 1 year / 1 year and a half

Other new trial measures:

- the Judge can hear the Regulator's officials for clarifications
- during compliance proceedings, parties can ask the Judge clarifications on how to enforce the decision
- technical expertise *ex officio*



Challenges for the future / 1

Challenges for the Regulator

Case studies show a possible trend:

*the more the Regulator makes full use of regulatory quality tools to operate within his 'room for manoeuvre',
the more the judicial review is focused on 'procedural legitimacy' rather than on 'substantive legitimacy',*

*the more the regulation is evidence-based,
the more the Judge respects (and strengthens!) the regulatory choice*

Within its two constraints (the Law and the Judicial review), regulation should be ...



Discretionary



Transparent, Participated,
Evidence-based, Minimizing burdens



Political



Arbitrary, not matching with the actual data, applying incorrect criteria or unreliable technical operations



Challenges for the future/1-bis

Challenges for the Regulator

Challenges for the Regulator (and for the NER!):

- ✓ deserving his independence and being accountable
- ✓ using wisely the wide 'room for manoeuvre' between the Law and the Judge
- ✓ **investing in regulatory quality!**

Not only in terms of transparency and participation, but

integrating consultation with other regulatory quality tools (RIA, ex post analysis, etc.),

*to craft **a fully evidence-based decision***

(in this regard, the Judge can help, too!)



Challenges for the future/2

Challenges for the Judge

Accelerate the ‘cultural leap’

*The Judge should
not only focus on the parties’
complaints (according to our
traditional judicial culture)*

but

*should have a stronger awareness
about the “decision impact” on
the markets, on the economy, etc.*





Challenges for the future/2-bis

Challenges for the Judge

Challenges for the Judge:

- ✓ having a better knowledge of the new 'regulatory quality tools' (towards an OECD Network of Administrative Judges?)
- ✓ trying to 'better understand' the *rationale* behind some technical choice
- ✓ making a more systematic use of the new trial measures

i.e., using technical expertise, hearing (and trying to understand) the Regulator's officials, giving clarifications on the enforcement

OECD and ACA initiatives ...



Challenges for the future/3

The common challenge!

Lesson on comparing independencies

not a conflict

between two powers “*superiorem non recognoscentes*”

but an alignment (and a better mutual understanding)

for the common public interest: the benefit of the citizens and of the economy!

