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PhD Thesis

The new competences of the Italian Power and Gas Regulatory Authority in the water sector: the impact of the independent regulation

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Abstract

The main purpose of the PhD thesis is to provide an analysis of the process of renewal which is currently interesting the water sector’s regulation, thus providing an overview of the changes which the public authorities each time in charge of regulating water services have undergone from the Law No. 36/1994 (hereinafter “Galli Law”) until now, with particular reference to organizational and functional aspects, in order to highlight the benefits arising from the so-called “independent regulation”.

The choice of analyzing the above described matters derives from several factors: first of all the singular characteristics of the good “water”, whose management and regulation imply several economic and juridical issues; secondly, the impact on the water services market of the assignment of the regulatory competences related to the water sector to the Italian Regulatory Authority for Power and Gas (Autorità per l’energia elettrica e il gas, hereinafter “Authority” or “AEEGSI”), which is an independent authority in charge, inter alia, of regulating power and gas sectors; thirdly, the limited number of authors who have dealt with the said
matters and, in particular, with the organizational and functional aspects of the regulating authority.

The assignment to the AEEGSI of the regulatory functions related to the water services has determined the overcoming of the regulatory deficit which has affected the water sector for many years.

Until 2011, the authority in charge of the regulation concerning the water sector was the Water Services Committee (Comitato nazionale per la Vigilanza sulle Risorse Idriche, hereinafter also “Committee”), subsequently replaced by the Commission for the Vigilance on Water Sources (Commissione per la vigilanza sulle risorse idriche, hereinafter also “Commission”) and then by the National Authority for the Regulation of Water Sector (Agenzia nazionale per la regolazione e la vigilanza in materia di acqua, hereinafter also “Agency”).

Article 21, Paragraphs 13, 19 and 20, of Law Decree No. 201/2011 (converted into Law No. 214/2011) provided for: (i) the abolition of the Water Services Committee; (ii) the abolition of the National Authority for the Regulation of Water Sector; (iii) the transfer of the regulatory functions concerning water sector to the AEEGSI.

Before the assignment of the new competences to the AEEGSI, all the authorities in charge of regulating water services depended from the Italian Government, being a sort of offices of the ministerial administrations. Therefore, the above mentioned authorities – which were not provided with the relevant technical know how and could not operate with a sufficient independence – failed in the aim of regulating the sector and we not able to improve the efficiency of the water services management.

Thus, the need of a new regulating authority has arisen from the acknowledgement by the legislator of the water sector’s inefficiency and the disjointed regulatory system.
In respect to the above, it must be noted that the faith of the private investors vanished due to the several changes undergone by the legislative framework concerning public local utilities and water services which did not – and do not – provide any certainty in relation to the remuneration of the investments made in the sector. Besides no investments can be planned in the absence of a clear regulation of the sector guaranteeing the investor to remunerate its investment.

In addition to the above, Italy, as well as the other European countries, has undergone, during the last years, a strong crisis which clamped down on the Italian investors.

Moreover, it is worth noting that the public administrations have not made only few investments in the water sector during the last years. In this respect, it must be highlighted the risk that public investors may suffer the influence of the politic powers.

In this context of legislative uncertainty and inefficiency, the public authorities which were in charge of regulating the sector have not been able to solve the several problems connected to the water sector regulation.

In particular, the Committee, which was a ministerial office, was not provided with an adequate independence by the Italian Government and with technical competences (the Water services Observatory and the Technical Secretary which, according to the Galli Law, should have support it for all the technical aspects related to its activity); moreover, the law did not clearly define the powers of the Committee.

The competences of the Commission were broader than those assigned to the Committee. However, the increase of the framework of functions assigned to the Commission was not accompanied by the necessary increase of the staff and the improvement of its technical know how.
As to the Agency, its functions were very similar to those typically assigned to the independent regulatory authorities. However, the Agency – due to its “hybrid” nature, midway between a Government authority and an independent regulatory authority – did not adopt any relevant regulatory measure and therefore, have not ever exercised its powers.

For many years, therefore, the special administrative bodies in charge of regulating water sector proved inadequate and exercised their limited powers only in a few cases.

In light of the above, it is evident that the assignment to the AEEGSI of the role of regulating authority for water services sector, provided with adequate organization and powers – such as those regarding the definition of the relevant costs and the criteria for the determination of tariffs, the fixing of quality standards, the drafting of standard concession agreements – have represented a relevant step in the direction of an efficient regulatory system.

Under an organizational viewpoint, it is worth mentioning the rules regarding the appointment of the AEEGSI’s members, which are based on the model provided under Law No. 481/1995 (i.e. the law which have instituted the Authority) and are aimed at offering adequate guarantees of independence. The members of the Authority are appointed through a decree of the President of the Italian Republic, upon previous decision of the Council of Ministers, on the basis of the proposal of the competent Ministry and upon previous 2/3 majority favorable opinion of the competent Parliamentary Committees. Therefore, the Authority cannot be qualified as a ministerial administration.

The members of the Authorities hold their offices for 7 years, not renewable. This solution (7 years not renewable instead of 5-6 years admitting one renewal) reduces the risk that politic powers – the majority and the opposition – try to satisfy their preferences by promising the renewal or threatening the non-renewal
of the office. In addition, the members of the Authority are required to hold a number of juridical and technical capabilities and qualifications.

Moreover, the independence is guaranteed by means of a rigorous incompatibility regime, which must be applied during and after the termination of the office.

A broad framework of powers accompanies the new rules concerning organizational aspects.

The main competence assigned to the Authority is the power of approving the tariff. However, the Authority has even the power of: (i) defining minimum quality standards for the provision of the water services; (ii) controlling and supervising the water sector and applying pecuniary and administrative sanctions in case of violation of its regulatory measures; (iii) drafting the standard concession agreements, disciplining the relationship between the administrations and the concessionaires operating the services; (iv) supporting the competent administrations in the local planning and regulating activities; (v) carrying out advisory and propulsive activities.

Between 2012 and 2015, the AEEGSI exercise some of the above described powers and adopted several regulatory measures concerning, inter alia, the following matters: (i) the adoption of a new method for the calculation of the tariff and the procedure for its approval; (ii) the definition of quality standards and the supervision of the operation of the services; (iii) the drafting of the standard concession agreements; (iv) the protection of the users and the alternative dispute resolutions (ADR) procedures; (v) the economic and financial equalization measures.

In light of the above, it is evident that the AEEGSI’s regulations on the water sector will have – and have already had – a relevant impact on the related market, in particular with reference to the procedure for the determination and approval of the tariffs.
Below are illustrated the main benefits arising from the so-called “independent regulation”.

A first advantage connected to the independence of the regulating authority regards the neutrality and impartiality in drafting fundamental regulatory rules such as those concerning the tariffs method. The certainty of these regulatory measures in relation to the terms and conditions for the remuneration of the investment boosts the investments and promotes the development of the competition in the sector.

Secondly, the independent regulation –in particular through the powers of vigilance and control as well as the power of applying sanctions – guarantees higher level of protection for the users, by avoiding an increase of the tariffs or the reduction of the quality standards. Moreover, the previous definition of minimum quality standards strengthens the bargaining power of the public administrations towards the concessionaires, providing the administration with the right of imposing higher quality standards.

A third relevant benefit is connected to the “indirect” increase of the technical competences of the national and local administrations, which, on the basis of the guidelines provided by the Authority, exercise their powers with a higher level of awareness.

Another relevant advantage concerns the “independent regulation culture” and, in particular, the expertise matured by the Authority in regulating power and gas sectors.

A further positive aspect regards the administrative efficiency and the public saving. The assignment of the regulatory functions on water sector to the Authority has allowed the Italian Government to avoid all the expenses which would have been connected to the institution of a new body / authority (by way of example, the expenses related to the staff and the new offices). In the case at
hand, the only expenses which have been borne are those connected to the creation of a special department of the Authority dedicated to the water sector.

In addition to the above, it is worth noting that: (i) the good “water” may be used both for the production of electricity and for the provision of water services; (ii) several economic operators deal with both the above mentioned sectors (for instance, Iren S.p.A. and Hera S.p.A.). The operators dealing with both the sectors get a benefit from communicating exclusively with a single authority regulating both the sectors and adopting a unique regulatory strategy, save for the peculiarities intrinsically connected to each relevant sector.

In conclusion, it is evident that the independent regulation represents an efficacious remedy for the inefficiency which for many years has affected the water services sector.

A first relevant step in the right direction of the development of the sector has been made. Notwithstanding many of the procedures started from the Authority for the adoption of regulatory measures are still on going, the benefits deriving from the independent regulation are already evident and clear in terms of a higher efficiency of the activities carried out by administrations and concessionaires.

It may be deemed that, after 20 years from the Galli Law, the Italian Government has found the right path to “ford the river”.