

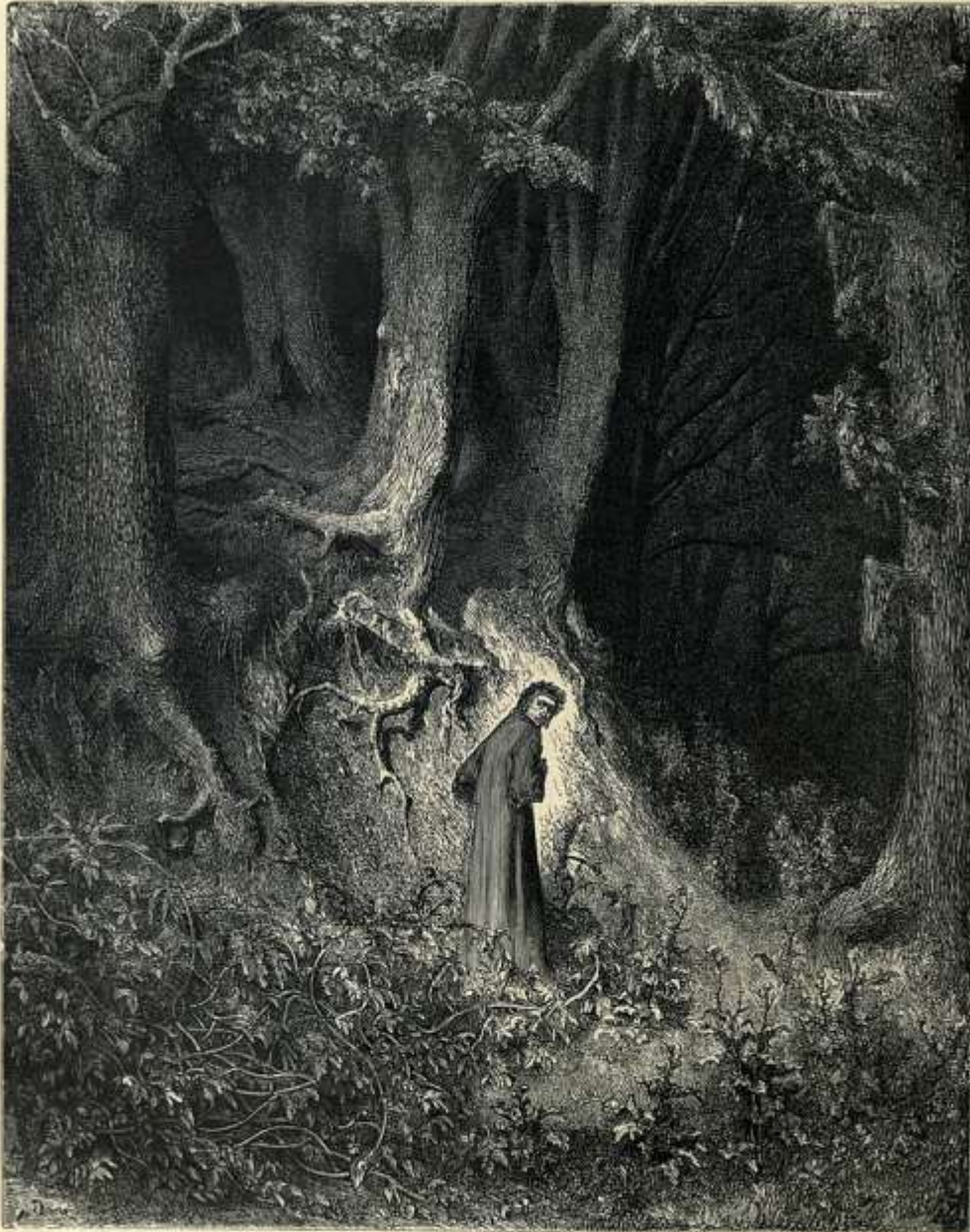
The Judge in the ecosystem of Independent Regulation

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Italian Presidency of ACA- Europe 2021-2023
Présidence italienne de l'ACA-Europe 2021-2023
Presidenza italiana dell'ACA-Europe 2021-2023



A. 1.

In the midway of this our mortal life,
I found me in a gloomy wood, astray.

Canto I., lines 1, 2.

The
“ecosystem of
regulation”

can be very complex
and obscure ...

The Judge in the ecosystem of Independent Regulation



Comparing types of independence



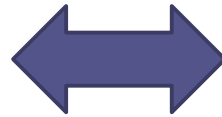
How to “find the way”
in a complex ecosystem:
an Italian case-study approach

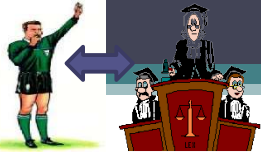


The challenges:
for the Regulator, and for the Judge

Independent Regulator & Administrative Judge

Comparing types of independence...





The Administrative Judge can be useful to the Regulator

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 by the Gov. on these Authorities if they have an autonomous financial income.

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

Contributions imposed by a Regulatory Authority to private stakeholders are not a «hidden tax» to finance every kind of administrative activity, but are a contribution aimed at carrying out (only) the regulatory activity.

(C.St., sez. VI, n. 600, 810, 1224, 1274 e 1712/2015, n. 1140/2021)

Independence in relation to Human Resources

The addition of new functions (e.g., waste regulation) requires new human resources.

Resources are necessary to make reform feasible.

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

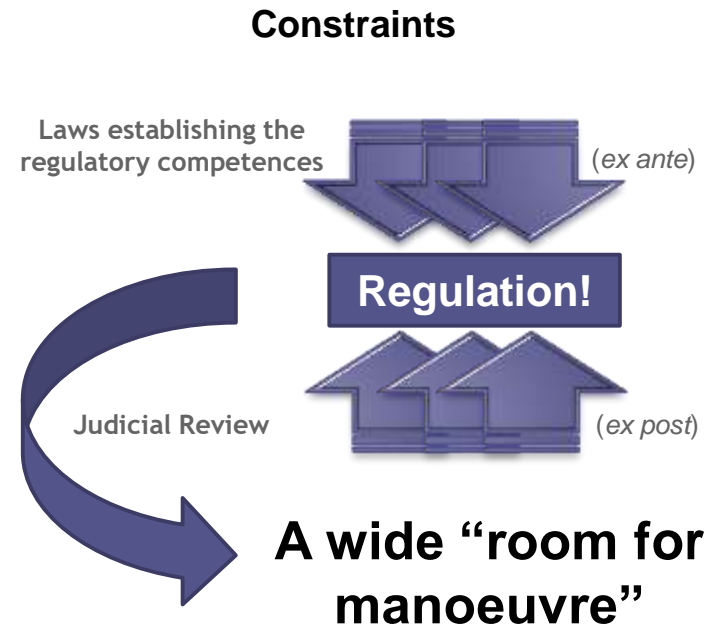




The Administrative Judge can be useful to the Regulator

2 - The Regulator has a wide “room for manoeuvre” between the Law and the judicial review.

The Administrative Judge can enhance Regulator’s “authority” by using it (*see next slide ...*)





The Administrative Judge can be useful to the Regulator

Independent judicial review could:

- ✓ highlight the independence of Regulator and protect it from undue influences
- ✓ integrate technical and economical regulation with Rule of Law principles
- ✓ improve the strength of controversial or critical regulatory decisions
- ✓ drive out any doubts that the Regulator is excessively self-confident or arbitrary
- ✓ in conclusion, enhance the 'authority' of the Regulator



Note - As a recent trend, we observe that Independent Regulation is replacing Governmental Regulation, in some cases.

In these cases, Regulators tend to ask the advice of the Chamber for Regulatory Acts of the Council of State.



Useful tools for the Judge to “find the way” to see the stars

- 1) Procedural legality
- 2) Limits of the judicial review. When annulling?
- 3) Tools in the trial. The technical expertise

(a case study approach)



1) Procedural legality

A compensation of technical (discretionary) powers

(Cons. St., VI, n. 7972/2020)

Independent regulation has a very technical and complex character, which makes it **difficult to implement the principle of legality-guarantee**.



Therefore, administrative jurisprudence has found it necessary, in compensation, to **strengthen “procedural legality”** (especially consultation and guarantees of participation in the procedure), which constitutes **“an antidote to the vastness and generality of the powers** attributed by the legislator to the independent Regulators”.

1) Procedural legality

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
- Consultation and justification are **different and crossing concepts**
- Consultation results don’t justify a regulatory decision, but the justification must be integrated with consultation
- No need to motivate on all points raised in consultation



2) Limits of the judicial review?

The ‘psychological’ risks of ‘physiological’ complexity

The case of gas distribution tariffs (*C. St., sez.VI, n. 162/2016*)



The (physiological) complexity of technical regulation 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 justified, everything that is not immediately intelligible to a judge*”)

The Regional Administrative Court of first instance had annulled the regulatory decision “*stopping at the surface*”, looking only at what “*looks reasonable*”, and “*considering inadequately motivated every choice that was not-immediately-intelligible to the court*”.

The Council of State affirms that the Administrative Judge has the **duty to “go beyond the appearance”** and to **verify “the effective rationality”** of the regulatory choices.

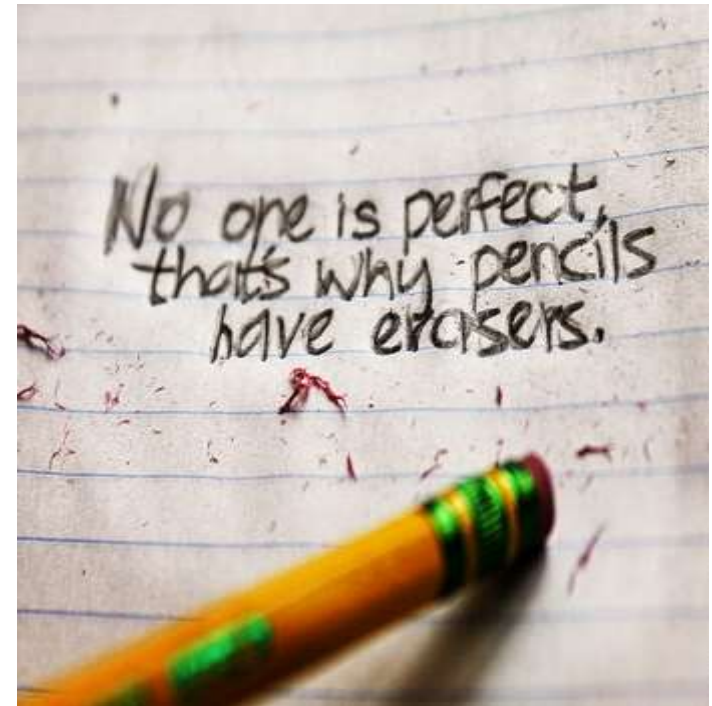
2) Limits of the judicial review?

When does the Judge annul?

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

Despite the Judge “being unable to substitute themselves for the regulator”, their competence must **not be “restricted to an external exam of the discretionary analysis”**, but must also be extended 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”



3) Tools in the trial

The ‘special 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 full reasons, 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 seek clarifications from the Regulator’s staff
- during compliance proceedings, parties can ask the Judge for clarifications on how to enforce the decision
- technical expertise *ex officio*



3) Tools in the trial

The technical expertise *ex officio*



The tool of the “Technical Expertize *ex officio*” (CTU) of the Italian Code of Administrative trial (art. 67-68 c.p.a.) :

- 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 hearings and chambers
 - ✓ provide with their observations on the results of the technical investigations





Challenges for the future

Challenges for the Regulator

Case studies show a possible trend:

- the more the Regulator makes full use of better regulation tools to operate within its '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, Using better regulation, Evidence-based, Minimizing burdens
	Political		Arbitrary, not matching with the actual data, applying incorrect criteria or unreliable technical operations

Challenges for the future

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

Challenges for the Judge

Challenges for the Judge:

- ✓ trying to **'better understand'** the *rationale* behind some technical choices
- ✓ having a better knowledge of the **new 'regulatory quality tools'**

ACA Europe initiative on better regulation ...

- ✓ making more systematic use of **new trial measures**
i.e., using technical expertise, hearing (and trying to understand) the Regulator's officials, giving clarifications on the enforcement





E QUINDI USCIMMO A RIVEDER LE STELLE.
INFERNO, c. XXXIV, v. 139.

... and the Judge
can thence
come forth
to contemplate
the stars