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1. The ideological and objective obstacles to regulating and managing a public water service.

When a policy maker tries to regulate the supply of drinkable water, it is faced with many ‘sensitive’ issues. First of all, since access to drinkable water is considered a fundamental human right¹ and a minimum quantity of this essential resource should be guaranteed to every person in an effectively affordable way,² the regulation of the water supply should be guided by an approach of solidarity and fairness. This is often not consistent with ‘the law of the market’ and is, instead, imbued with ideological implications: for this reason, many scholars consider water as a common good instead of a commercial product.³

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Although this paper is the result of a collaboration between the two co-authors, Fabrizio Fracchia wrote sections 1-3 while Pasquale Pantalone wrote sections 4-7.

¹ See, among other international acts on this issue, the UN General Assembly Resolution No. 64/292 adopted on 28 July 2010 that recognized access to clean water and sanitation as a human right, <http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E>.

² For a European perspective on this issue, see the paper published by WAREG (European Water Regulators) on ‘Affordability in European Water Systems’, which is available at <http://www.wareg.org/news.php?q=detailed&id=6>.

³ See section 5. For instance, Recital 1 of EU Directive 2000/60/EC states that ‘Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such’. Recital 5 points out that: ‘The supply of water is a service of general interest as defined in the Commission

Secondly, even though water is a non-excludable good, it is rival in consumption, because its presence on earth is limited.

In this regard, one may note that the ‘climate change’ phenomenon⁴ is making access to water – which is sometimes already very challenging, especially in arid regions – even more difficult: according to a prestigious study,⁵ ‘warming is very likely to intensify the water cycle, reinforcing existing patterns of water scarcity and abundance and increasing the risk of droughts and floods’.⁶

The environmental implications of the scarcity of water on earth require that its allocation has to be properly regulated, primarily taking into consideration the sensitive balance between the ‘sustainable’ protection of water ecosystems and the survival of present and future generations.⁷

Thirdly, the supply of water is a natural monopoly because an expensive infrastructure, which cannot be duplicated, is required to deliver the service.⁸ Water services, more than other public services, appear to be basically infeasible using a model of ‘competition in the market’.

Fourthly, providing high quality water to end-users implies an ‘efficient’ infrastructure in terms of security of supply, reduction of loss of water during the provision, proper functioning of purification plants, and so on; to ensure the quality of water it is also necessary to implement consumption metering mechanisms and qualitative control procedures for both the distributed water and the information available.⁹

However, the implementation of an efficient infrastructure and efficient technologies requires long-term investment and a large amount of initial capital, which is not easy for providers to find through traditional

communication on services of general interest in Europe’. An important ‘social’ consequence in terms of the regulation of the water supply is the free provision, even when there is a delay in payment, of a minimum quantity of water to disadvantaged people: see section 7.

⁴ F. Fracchia, M. Occhiena (Eds), *Climate change: la risposta del diritto*, Napoli, 2010.

⁵ See *Stern Review: The Economics of Climate Change*, in http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf

⁶ *Stern Review: The Economics of Climate Change* (n. 5), 62: ‘temperature rises of 2°C will result in 1–4 billion people experiencing growing water shortages, predominantly in Africa, the Middle East, Southern Europe, and parts of South and Central America (...). In these regions, water management is already crucial for their growth and development. Considerably more effort and expense will be required on top of existing practices to meet people’s demand for water. At the same time, 1–5 billion people, mostly in South and East Asia, may receive more water. However, much of the extra water will come during the wet season and will only be useful for alleviating shortages in the dry season if storage could be created (at a cost). The additional water could also give rise to more serious flooding during the wet season.’

⁷ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, Milano, 2012, XXXI.

⁸ M. Polo, F. Denozza, *Le reti*, in E. Bruti Liberati, M. Fortis (Eds), *Le imprese multiutility*, Bologna, 2001, 41.

⁹ The importance of the quality of water has been also recently emphasized in Encyclical Letter ‘Laudato Si’ of The Holy Father Francis on care for our common home’. This makes specific reference to the water available to the poor, which is often unsafe for human health: see Encyclical Letter, ‘Laudato Si’, of The Holy Father Francis on care for our common home, English text available at https://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_encyclica-laudato-si_en.pdf, 23.

bank funding because this is usually limited to short-term investments and reasonably small amounts of money. The amortization of the infrastructure may be also longer than the duration of the water concession, and this circumstance makes the quantification of the residual value of the infrastructure very difficult to define.

The complexity of the water sector generates incomplete contracts of service, since there is a need to make the parties' commitments flexible and adaptable to the factual and legal changes that may occur during the performance of the contract. As a consequence, frequent and challenging renegotiation of agreements leads to very high transaction costs in the sector.¹⁰

Policy makers have to deal with all the complex and unique aspects briefly described above, which have often justified massive public intervention (even though this was not sufficient on its own) and the development of a 'special' legal framework different from the general one being designed for other public services.¹¹

In addition, there are specific problems in Italy in regulating the public water service.¹²

Unlike other similar fields (such as the electricity and gas sectors), the number of actors in the water sector is limited and they are primarily local public bodies. It is more complex to design the relevant body of regulation because it is mainly addressed to these subjects who do not just react to economic pressures.¹³

For a long time, the Italian water industry has been characterized by a high degree of fragmentation (every single municipality used to have its own local water service) and by a low level of investment (although this sector is undoubtedly highly capital-intensive, as we have seen). These circumstances have significantly delayed the development of the sector.¹⁴

Most of the infrastructure around the country is obsolete¹⁵ and, as a consequence, network losses are significant: it is no accident that it is forecast that it will cost EUR 65 billion over the next thirty years for

¹⁰ A. Massarutto, *The evolving global water industry*, in M. Finger at al. (Eds), *The Routledge companion to network industries*, London, 2015.

¹¹ See section 3.

¹² Although this is not strictly connected to the water service, it is worth highlighting that, in Italy, in addition to the administrative jurisdiction, there is another special jurisdiction in respect of administrative acts concerning public water. It consists of eight regional tribunals for public water and a superior tribunal for public water located in Rome: on this issue, see the recent work of G. Mastrangelo, *I tribunali superiori delle acque pubbliche*, Milano, 2010; V. Parisio, *I tribunali delle acque: un modello giurisdizionale tutto italiano*, in *Foro amm-TAR*, 2009, 3679 ff.

¹³ M. Clarich, Seminar contribution to *Regolare l'acqua. Una riflessione interdisciplinare e comparata*, 3 April 2017, Bocconi University of Milan.

¹⁴ A. Massarutto, *Economia del ciclo dell'acqua*, Milano, 1993, *passim*.

¹⁵ According to data from AEEGSI (the Italian Regulatory Authority for Electricity Gas and Water), the Italian aqueduct network is very old: 60% of the national infrastructure was built more than 30 years ago, and 25% more than 50 years ago.

the modernization of the infrastructure, even though the whole of general taxation would not amount to this huge sum of money. In this regard – as we will see later on¹⁶ – the Regulatory Authority for Electricity Gas and Water (the ‘Regulatory Authority’) has already played a crucial role in stimulating private investment in the sector.

Within an EU legal context, the lack of a modern and adequate water infrastructure (especially in the southern part of the country) has sometimes led to infringement procedures being brought against Italy. For instance, on 19 July 2012 the European Court of Justice ruled that the Italian authorities were violating EU law (specifically, the Urban Waste Water Treatment Directive¹⁷) by not adequately collecting and treating the [urban waste water](#) discharged by 109 agglomerations.¹⁸

In December 2016, because of the continuing absence of suitable collection and treatment systems in 80 (out of the 109) agglomerations around the country, the European Commission brought another claim against Italy in the Court of Justice for its failure to comply fully and completely with the Court’s judgment of 2012.¹⁹ The Commission called on the Court to impose a lump sum payment of EUR 62,699,421.40 and proposed a daily penalty payment of EUR 346,922.40 if full compliance was not achieved by the date when the Court issued its ruling.

In the light of the above brief description of the specific Italian situation, the Italian organization and regulation of its drinkable water service has often been very complex and unstable, and there has been a reluctance to promote greater access for private entrepreneurs to the management of the service. In addition, the ideological aspects involved have contributed to the presence of a substantial public control over the drinkable water supply, which is sometimes even supported by the ‘adaptation’ of the theory of the commons.²⁰

In this paper we will instead highlight that today, in a period when there are limited public funds, it is important that the private management of the water service becomes more widespread in order to attract investment to improve the efficiency and the quality of the water infrastructure. An efficient distribution of a limited and essential resource for life – like water – could indeed safeguard the rights of future generations without compromising the water ecosystem and the environment too much.

¹⁶ See section 4.

¹⁷ Council Directive 91/271/EEC.

¹⁸ Case C-565/10, <http://eur-lex.europa.eu/homepage.html?locale=it>.

¹⁹ European Commission – Press release, *Commission takes Italy back to the Court and proposes fines*, Brussels, 8 December 2016.

²⁰ See section 5.

The necessity – clearly recognized by national²¹ and EU legislation – for a ‘sustainable’ water service could perhaps be better met with incentivized, high quality and homogeneous regulation, free of ideological elements in determining the tariff method, laid down by a ‘reliable’ regulator.

This is why, in analysing the special legal framework of the Italian drinkable water service, we will focus our ‘critical eye’ on the role that the independent Italian Regulatory Authority for Electricity Gas and Water could play in the development of best practices to be implemented by the competent local authorities and the providers, who are the final accountable entities for delivering water to end-users.

2. The organization and management of the Italian water service before the Regulatory Authority entered the field.

The high level of fragmentation and the low efficiency of the water supply in Italy until the 1990s led to an important national reform in 1994.²² This reform marked the transition from the widespread and uncontrolled exploitation of water (which was basically considered as a means of production) to its sustainable allocation and protection because of the environmental aspects.²³

Article 1 of Law no. 36 of 5 January 1994 (known as the ‘Galli Law’) is indicative of this ‘paradigm shift’: it states that all surface and ground waters are public and form a ‘resource’ (instead of a ‘good’, as was the idea in the past) to be protected and used with an approach of solidarity.

Specifically, water is to be used in order to safeguard the rights of future generations so that they can benefit from an intact environmental heritage. This means that its use must primarily take into consideration the saving and the renewal of the resource, in order not to compromise the water ecosystem, environmental sustainability, agriculture, marine biodiversity, and geomorphological and hydrological objects and processes.

The Galli Law redesigned the institutional structure for water, and reorganized the water supply system by establishing rules and principles that live on in the Italian Environment Code (specifically, in Arts. 147 to 158 of the Legislative Decree no. 152/2006).²⁴

²¹ Starting with Law no. 36 of 5 January 1994.

²² On this reform, see, among others, see J. Bercelli, *Organizzazione e funzione amministrativa nel servizio idrico integrato*, Rimini, 2001, *passim*; G. Caia, *Organizzazione territoriale e gestione del servizio idrico integrato*, in *N. russ. ldg.*, 1996, 747 ff.

²³ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 16 ff. According to the author, the ‘new’ fundamental task of water law is to ensure there is a balance between the preservation of water ecosystems, the human need for water and the respect of aquifer recharges.

²⁴ Before the Galli Law, the use of water was regulated by Royal Decree no. 1775/1933 (the so-called ‘Consolidated law on waters’).

The main purposes of the Galli Law were to rationalize and promote the industrialization of the entire sector by integrating water-related services (which had been managed separately until that moment) to exploit economies of scale, by overcoming the former fragmentation of management of water services at the municipal level, by ensuring minimum quality standards and by applying tariffs that would cover both current costs and investment for the future.²⁵

The vertical integration of the various phases of the water service was achieved through the creation of an ‘integrated water service’ (the so-called ‘S.I.I.’), which includes the public services of the catchment, intake and supply of water for civil use, as well as sewerage and the purification of waste water.²⁶

The municipal administration of the management of water services was replaced by the creation of super-municipal territorial areas called ‘Optimal Territorial Areas’ (‘ATO: Ambito territoriale ottimale’).²⁷ Each ATO, designated by the regions on the basis of territorial water bodies and of both physical and demographic parameters, was governed by a Basin Authority established by the municipalities and provinces through voluntary contracts or consortia.²⁸ These local authorities then had to manage – directly, or indirectly through third parties – the integrated water service.

The compulsory nature of the service was reaffirmed, and its economic nature was acknowledged by applying the principles of efficacy, efficiency and cost effectiveness to the management of the service. Thus, a sole tariff was established for the ‘integrated service’, calculated in such a way (using the so-called ‘normalized method’) as to ensure that the provider’s investment and operating costs, including remuneration for invested capital, were covered.²⁹

The most relevant parts of the regulation of the integrated water service (i.e. risk-sharing, investment planning, and water pricing) were basically to be found in the contract of service concluded between the Basin Authority and the provider. Water service regulation was therefore mainly based on a single agreement between these parties.

In 2006 the Environment Code replaced the Galli Law without erasing the general framework introduced in 1994. In any case, the ad hoc regulation of the water service was confirmed.³⁰

²⁵ G. Romano, A. Guerrini, L. Masserini, *Endogenous and environmental determinants of water pricing policy in Italy*, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331391.

²⁶ Art. 141, para. 2 of the Environment Code.

²⁷ Indeed, the goal of the ‘territorial’ reform was a reduction of providers from more than 8,000 small companies owned by municipalities to around 90 integrated companies, with the consequent benefit of economies of scale.

²⁸ The legal personality of the Basin Authorities was acknowledged in 2006 in the Environment Code.

²⁹ V. Parisio, *The management of the water service in Italy: from the sectoral regulations to the European Law principles*, in V. Parisio (Ed), *The water supply service in Europe: Austrian, British, Dutch, Finnish, German, Italian and Romanian experiences*, Milan, 2013, 108-109.

³⁰ V. Parisio, *The management of the water service in Italy: from the sectoral regulations to the European Law principles*, (n. 29), 110; M.A. Sandulli, *Il servizio idrico integrato*, in *federalismi.it*, 16 February 2011, 5 ff.; A. Bartolini, *Il servizio*

However, more than ten years after its approval, the original water policy framework designed by the Galli Law had not been widely implemented in practice.

The reasons for the failure of the reform can be found in several aspects, such as the weakness of the industrial culture in the sector, the uncertainty of stable financial plans, the delay in the creation of the Basin Authorities, the structural inadequacy of the local authorities, and the permanent conflict of interests suffered by the local authorities (in terms of being both regulators and regulated at the same time).³¹ As a consequence, only a few water service providers were private economic operators (5%), while the vast majority of them remained substantially under public control.

3. (continued). The failed legislative attempts to reduce the public stake in the management of the service: the ‘allergy’ to a ‘market-oriented model’.

In 2008, within the EU market, the Italian legislator tried to promote better competition in the local public services sector by introducing a general rule according to which the management of every local public service with economic relevance (including the water service³²) had to be primarily performed by a company selected on the basis of a public tender, in accordance with EU principles, or a public–private partnership company whose private partners (with specific tasks and a minimum shareholding) had been chosen through a public tender.³³

The clear political aim of this Act was to ‘deliver’ to the market the vast majority of the local public services with economic relevance. It is interesting that the existing ‘special’ legal framework on the management of the water service was ‘crushed’ by a general regulation (valid for any public service with economic relevance, except for a few particular services) with a view to achieving the ‘super value’ of free market competition.

It was considered that the decision to maintain the management of the service under public control (through the ‘in-house providing’ model) would only be made in exceptional circumstances, and such a decision was subject to very restrictive conditions compared to the EU principles.³⁴ Specifically, the local

idrico integrato tra diritto europeo e Codice dell’ambiente, in M.P. Chiti, R. Ursi (Eds), *Studi sul codice dell’ambiente*, Torino, 2009, 300.

³¹ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 112-113.

³² However, some exceptions were provided for, such as public gas and electricity services.

³³ See the (repealed) Art. 23-*bis* of the Decree-Law no. 112/2008. For a detailed analysis of the evolution of the legal framework, see M.A. Sandulli, *Il servizio idrico integrato*, (n. 30).

³⁴ According to the ECJ case law, the ‘in-house providing’ model consists of a ‘contract’ being concluded ‘between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities’

public authority had to prove, with a detailed market report that was subject to a compulsory opinion of the national antitrust authority, the existence of particular socio-economic conditions in the territorial area that made it impossible to resort to the market. This means that using the ‘in-house providing’ model was practically infeasible.³⁵

With judgement no. 325/2010,³⁶ the Constitutional Court ‘saved’ the ‘market-oriented model’ of the management of local public services with economic relevance by holding it to be compliant with the EU legal framework, since it implemented, even more completely, the general EU principle of free competition. This decision is very important because it also confirmed the exclusive legislative competence of the State to regulate local public services with economic relevance (including the water service³⁷). Indeed, the presence of a market justifies a national regulation on the basis of the ‘protection of competition’ under Article 117 of the Italian Constitution.³⁸

However, the following year a popular consultation was promoted to do away with the aforementioned ‘market-oriented model’ for local public services with economic relevance.

Although the referendum addressed the withdrawal of this model for the management of the entire local public services sector (with the exceptions mentioned above), the political and public debate that took place before the public consultation focused, almost exclusively, on the public or private nature of the management of the water service.

Specifically, the aim of the promoters of the referendum was to prevent the substantial ‘privatization’ of water through the ‘privatization’ of the management of the service, and to allow only an exclusively public governance of this fundamental ‘common good’.³⁹

The repeal of the legislation in question was largely agreed by the Italian people (with 95% of the voters consenting to it).

(ECJ, Case C-107/98, better known as the Teckal case). The ‘in-house providing’ model was amended in 2014 by EU Directives on public procurement law: see n. 47.

³⁵ V. Parisio, *The management of the water service in Italy: from the sectoral regulations to the European Law principles*, (n. 29), 114.

³⁶ Corte cost. no. 325/2010 in *Foro it.*, 2011, I, 1332 ff.

³⁷ On the economic relevance of the integrated water service, see the earlier Constitutional Court decision of 24 July 2009, no. 246, in www.cortecostituzionale.it, in particular para. 14.1 of the reasoning.

³⁸ Even the environmental implications of the water service attract legislative competence to the State.

³⁹ G. Azzariti, G. Ferrara, A. Lucarelli, U. Mattei, S. Rodotà, *Invertire la rotta: per un governo pubblico dell’acqua. Relazione introduttiva ai quesiti referendari*, Roma, 5 February 2010, in http://archivio.gonews.it/pdf/tre_quesiti_acqua.pdf, according to which the ‘privatization’ of the management of water service causes, on one hand, an increase in the tariff and, on the other hand, both labour costs and management cuts, with a subsequent negative impact on the quality of the service.

Thus, the ‘market-oriented model’ for local public services with economic relevance was withdrawn. The referendum also affected the methodology for calculating the water service tariff, to which we will return.⁴⁰

A few months after the referendum (which took place on 12 and 13 June 2011), the legislator approved a new Act (Decree-Law no. 138/2011) that proposed the same ‘philosophy’ as the repealed legislation by considering the ‘in-house providing’ model to be the exception.

Specifically, this model was only allowed under almost the same restrictive conditions as under the previous regulation and, also, only if the economic value of the public service to be awarded was equal to or lower than EUR 200,000 annually. However, the integrated water service was not included within the scope of this new restrictive regulation.

Because the new regulation had the same aim as the repealed regulation, the Constitutional Court intervened again by ruling that it contradicted the will being expressed in the public consultation.⁴¹

According to the Court, since the repealing will of the people imports a ‘negative’ legal constraint to legislative power, preventing the restoration of the same piece of legislation that was ‘erased’ through the public consultation,⁴² the legislator cannot bring that legislation back into the legal system unless in the meantime a political change or some particular factual circumstances justify its ‘revival’.⁴³

In this specific case, because of the very short time (23 days) between the result of the referendum and the approval of the new regulation, when there had been no ‘change’ that could justify the ‘revival’ of the repealed rule, the Constitutional Court declared Article 4 of Decree-Law no. 138/2011 unconstitutional for violating Article 75 of the Constitution.⁴⁴

As a result, the ‘in-house providing’ model, as interpreted by EU law, was ‘saved’ and could be treated in the same way as other forms of management, especially in the water service sector. Therefore, this service could be awarded to third parties on the basis of a public tender, or assigned directly to an ‘in-house provider’ or to a public–private partnership company whose private partners had to be chosen through a public tender.

⁴⁰ See section 6.

⁴¹ Corte cost. no. 199/2012, in www.cortecostituzionale.it.

⁴² The Constitutional Court justifies this ‘negative’ limit because it aims to prevent the result of a popular consultation being made ineffective by subsequent legislative activity. On the debate on the legal effects of a repealing referendum on subsequent legislative power, see M. Luciani, *Art. 75. Il referendum abrogativo*, in G. Branca, A. Pizzorusso (Eds), *Commentario della Costituzione*, I, 2, Bologna, 2005, 661 ff. The author criticizes the thesis of the immutability of the popular will expressed in a public consultation, and he even denies that there is a specific legal prohibition on restoring the same piece of legislation that has been repealed through a public consultation because, in his view, this prohibition has no legal basis in a representative democratic system.

⁴³ See also Corte cost. no. 468/1990, no. 33/1990 and no. 9/1997, in www.cortecostituzionale.it.

⁴⁴ Art. 75 of the Italian Constitution regulates repealing referenda.

The situation described above was expressly ‘formalized’ in 2014⁴⁵ and the ad hoc regulation of the water service was ‘restored’, while other local public services became subject to different legislation.⁴⁶

Specifically, the ‘new’ Article 149-*bis* of the Environment Code establishes that the management of the public water service may be awarded to ‘in-house providers’ (whose shares are 100% owned by local authorities included in the ATO), in accordance with EU law.⁴⁷ However, only one provider can be selected within each Optimal Territorial Area, according to the ‘uniqueness of management’ principle.⁴⁸ The latest available data shows that the management of the water service is still mainly under public control.⁴⁹

The ‘in-house providing’ model represents the most widely used award procedure: it is used by 43.4% of Italian municipalities, corresponding to 40.3% of the Italian population. Around 25% of Italian municipalities (corresponding to 11% of the Italian population) manage the integrated public water service directly,⁵⁰ 8.3% of municipalities (corresponding to 12.3% of the Italian population) have awarded the management of the service to a public–private partnership, while an award to a third party on the basis of a public tender remains rare (3.2% of municipalities, corresponding to 3.4% of the population).⁵¹

⁴⁵ See Art. 7 of Decree Law no. 133 of 11 September 2014 (converted in Law no. 164 of 11 November 2014). In the light of this provision the Environment Code was amended (see, specifically, Art. 149-*bis* of the Environment Code).

⁴⁶ Art. 34 of Decree Law no. 179/2012, converted in Law no. 221/2012.

⁴⁷ The ‘in-house providing’ model was amended again in 2014 by EU Directive 2014/23/EU in the field of public procurement law, even though integrated water services are not included in the scope of the Directive (Art. 12 of EU Directive 2014/23/EU). Specifically, Art. 17 of EU Directive 2014/23/EU states that: ‘A concession awarded by a contracting authority (...) shall fall outside the scope of this Directive where all of the following conditions are fulfilled: (a) the contracting authority or contracting entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority (...); and (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person’. This Directive was implemented into Italian law by Legislative Decree no. 50/2016.

⁴⁸ Actually, this principle is not yet fully implemented in practice, since the award of the service to a unique provider is subject to a complex transitional legal framework laid down by Art. 172 of the Environment Code. According to data provided by *Blue Book 2017 – I dati sul servizio idrico integrato in Italia*, edited by Utilitatis with the collaboration of Cassa Depositi e Prestiti, in the north of the country some ATOs have confirmed, within their territories, the existing awards, while in the south the selected providers may manage only limited portions of the territory governed by an ATO because of the presence of awards that existed before.

⁴⁹ *Blue Book 2017 – I dati sul servizio idrico integrato in Italia*, edited by Utilitatis with the collaboration of Cassa Depositi e Prestiti; see also AEEGSI report no. 811/2016/I/IDR, in *www.autorita.energia.it*.

⁵⁰ On average each of those municipalities has a population of fewer than 3,500 inhabitants, and they are located in mountainous areas of the country.

⁵¹ In Sicily, 31% of the municipalities have instead awarded the management of the water service to a third party on the basis of a public tender.

4. The current governance and regulation of the integrated water service: the key role recently played by the Regulatory Authority.

Unlike other similar fields (such as the electricity and gas sectors), domestic regulation of the integrated water service has not been directly shaped by the EU legal framework, since the latter mainly deals with the environmental aspects of the water supply, such as the qualitative and quantitative standards to be met in each Member State to ensure a sustainable use of the resource.⁵² The same trend may be seen in the recent EU Directives on public procurement⁵³ (2014), in which the issue of the outsourcing of the service is not relevant, since water concessions are not included in the scope of the Directives.⁵⁴

At a national level, although the Ministry of the Environment and Protection of Land and Sea has retained some important functions,⁵⁵ the crucial role in the regulation of the water system was, as mentioned above, transferred in 2011⁵⁶ to the Regulatory Authority (AEEGSI), which is the national independent regulatory body for the energy markets and the integrated water service.⁵⁷

The Regulatory Authority defines minimum quality levels for every water provider; it establishes standard framework contracts for the assignment and the management of the service⁵⁸; it defines the admissible cost components of the tariff and the criteria for the determination of the tariff (the so-called ‘tariff method’); it approves the tariffs proposed by the competent local authorities; it supervises the proper drafting of water plans; and it protects the rights of users by taking into account their concerns and complaints. To fulfil its mission it is ‘equipped’ with the right to take both direct administrative measures

⁵² See, specifically, Directive 91/271/EEC on urban waste water treatment and Directive 2000/60/EC, known as the Water Framework Directive.

⁵³ In particular, see Directive 2014/23/EU on the award of concession contracts.

⁵⁴ According to Recital 40 of Directive 2014/23/EU, ‘Concessions in the water sector are often subject to specific and complex arrangements which require a particular consideration (...). The special features of those arrangements justify exclusions in the field of water from the scope of this Directive. The exclusion covers works and services concessions to provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks. Concessions for the disposal or treatment of sewage and for hydraulic engineering projects, irrigation or land drainage (provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations) should also be excluded in so far as they are connected with an excluded activity’. See, in similar terms, Art. 12 of Legislative Decree no. 50/2016.

⁵⁵ Specifically, it retained the functions that have not been transferred to the AEEGSI, including the power to adopt general guidelines and quality standards for water resources.

⁵⁶ See Art. 21 of Law Decree no. 201/2011, converted in Law no. 214/2011; see also Prime Ministerial Decree no. 6364 of 20 July 2012.

⁵⁷ This Authority was established by Law no. 481 of 14 November 1995, with the purpose of protecting the interests of users and consumers, promoting competition and ensuring efficient, cost-effective and profitable nationwide services with satisfactory levels of quality in the electricity and gas sectors.

⁵⁸ See Annex A of AEEGSI’s decision of 23 December 2015, no. 656/2015/R/IDRI, at <http://www.autorita.energia.it/allegati/docs/15/656-15all.pdf>.

(such as inspections and sanctions) and also indirect ones by advising and reporting to the government and parliament on deficiencies detected while carrying out its activities.

At a regional level, the regions must establish Optimal Territorial Area Authorities that local authorities have to join; the regions coordinate planning activities and set up water protection plans; they may also amend the administrative borders of the Optimal Territorial Areas and may exercise substitution powers over the aforementioned authorities if the local authorities do not join the Optimal Territorial Area Authority within a specific time limit.⁵⁹

The local authorities have to organize the integrated water service through the Optimal Territorial Area Authority; they choose the form of management and they decide on the assignment of the service; they determine and modulate the tariff for users (which must be approved by the Regulatory Authority); and they adopt the plans made by the Optimal Territorial Area.

The selected providers manage the service and make investments in accordance with a contract of service that is laid down by the Optimal Territorial Area Authority on the basis of a standard framework contract established in 2015 by the Regulatory Authority.⁶⁰

The ‘standardized’ contractual relationship mentioned above does not only involve the provider and the Optimal Territorial Area Authority. There is another (external) party, namely the Regulatory Authority, which may intervene during the performance of the contract and has strong powers.⁶¹ The Regulatory Authority must approve any extension of the duration of the contract (in the cases provided by Article 5 of the AEEGSI decision no. 656/2015/R/IDRI), any necessary ‘rebalancing measures’ (including a review of the tariff method: Article 11), and the redemption value to be given to the former provider (Article 12). The Regulatory Authority shall also exercise sanctions if the provider violates the regulatory provisions (Article 18).

This does not, therefore, imply that the Regulatory Authority carries out generic monitoring activity, but instead gives it direct and strong administrative powers that allow it, de facto, to ‘manage’ the contract of service from beginning to end.⁶²

⁵⁹ See Art. 147, para. 1-*bis*, Legislative Decree no. 152/2006.

⁶⁰ AEEGSI’s decision of 23 December 2015, no. 656/2015/R/IDRI (n. 58). According to Art. 151, para. 2, of the Legislative Decree no. 152/2006, the contract of service must have a minimum essential content, such as the legal regime for the service; the award duration (not exceeding 30 years); the water infrastructure to be implemented during the award; the maintenance of an economic and financial balance for the management; the level of efficiency and reliability to be ensured to users; the structure of the tariff; the manner in which the tariff is applied; and so on.

⁶¹ M. Clarich, Seminar contribution to *Regolare l’acqua. Una riflessione interdisciplinare e comparata*, (n. 13).

⁶² M. Clarich, Seminar contribution to *Regolare l’acqua. Una riflessione interdisciplinare e comparata* (n. 13).

The standardization of the contractual obligations included in the contract of service – which is not an unknown prerogative of the Regulatory Authority⁶³ – may be useful to drive the relevant parties in the water service forward towards the implementation of best practice and the harmonization of the previous – often not monitored – local regulations laid down by each Optimal Territorial Area Authority.

In the light of this new regulatory framework, one may note the transition from a decentralized and fragmented system of water service regulation ‘by contract’ (with very few amendments at a national level) created by specialized subjects (the Optimal Territorial Area Authorities) towards a uniform national regulation laid down by the Regulatory Authority.⁶⁴

The risk of not adequately taking into account the territorial peculiarities of each Optimal Territorial Area has been addressed by the ‘innovative regulatory framework’ laid down by the Authority, which is ‘asymmetric’, in order to take into consideration the differences between territorial areas, and ‘progressive’, in its implementation of the general principles of transparency, consistency, convergence, efficiency and effectiveness.⁶⁵

The transfer of regulatory powers to an independent national public body with high quality specialized expertise in the relevant fields (electricity and gas) was essentially meant to provide technical support – detached from specific political or ideological implications – to the competent local authorities, to allow the resumption of private investment in the sector after the widespread uncertainty created by the result of the popular consultation of 2011.⁶⁶

The lack of private investment in the sector was, indeed, the main concern of the Regulatory Authority. The first stage of the ‘new’ independent regulation ‘process’ was the definition of the tariff method.

⁶³ For instance, in the field of the natural gas distribution, the AEEGSI draws up a standard framework contract of service that must be approved by the Ministry of Economic Development: see Ministerial Decree 5 February 2013.

⁶⁴ One may note that the same ‘centralizing tendency’ of regulations can be seen in Italy in the field of public procurement law, at both a legislative and an administrative level: see F. Fracchia, *I contratti pubblici come strumento di accentramento*, in *Riv. it. Dir. pubbl. comun.*, 6, 2015, 1529 ff.

⁶⁵ See the Presentation by the President Guido Bortoni at the 3rd National Conference on Water Services Regulation, Milan, 24th November 2014, 4, at http://www.autorita.energia.it/allegati/inglese/water_IIIconference.pdf.

⁶⁶ A. Biancardi, Seminar contribution to *Regolare l’acqua. Una riflessione interdisciplinare e comparata*, 3 April 2017, Bocconi University of Milan. As we have seen in section 3, the repealing referendum has, indeed, had an impact not only on the form of the management of the water service, but also on the calculation of the tariff and, therefore, on the attractiveness of private investment in the sector (see section 6).

Specifically, using a ‘price-cap’ methodology,⁶⁷ the Regulator’s primary aim was to stimulate efficiency in the sector by limiting the costs that the providers could charge to users.⁶⁸

After having approved the tariffs for the transitional period (the ‘MTT’) of 2012 and 2013, the Authority developed the ‘Water Tariff Method’ or ‘MTT’.⁶⁹

In accordance with the aforementioned ‘asymmetric’ approach and with the subsequent aim of achieving convergence of the differing regulations in existence into a uniform regime, the MTT was based on the possibility that local authorities could choose, for 2014 and 2015, one of four alternative regulatory schemes (corresponding to the four quadrants of a ‘matrix of schemes’), according to, on the one hand, the ratio between the necessary investment and the value of the existing infrastructure and, on the other hand, the operating costs related to specific objectives.⁷⁰

The same approach has been used for the definition of ‘MTT-2’ with regard to the second regulatory period (2016-2019).⁷¹

The goal of the following stage of the independent regulation was to establish contractual quality standards with incentive schemes in order to avoid the risk that the efficiency target – pursued through

⁶⁷ For an explanation of the ‘price-cap’ methodology, see, for instance, T. Ballance, A. Taylor, *Competition and economic regulation in water. The future of the European water industry*, London, 2005. Generally speaking, ‘price-cap’ regulation sets a cap on the price that the utility provider can charge, with the cap being fixed by reference to various economic factors, including the inflation rate.

⁶⁸ M. Bonacina, A. Cretì, C. Mariotto, F. Pontoni, *What determines efficiency? An analysis of the Italian water sector*, at www.iefe.unibocconi.it, Working Paper 72, October 2014.

⁶⁹ AEEGSI Resolution no. 643/2013/R/IDR. According to *The Annual Report on the state of services and on the regulatory activities. Summary and excerpts from the presentation by the President Guido Bortoni*, in www.autorita.energia.it, 21 June 2016: ‘(t)ariffs approved for the years 2014-2015, within the frame of a single homogenous tariff methodology established for the whole country, regarded 1,971 service managements and more than 53 million Italians, and implied an increase in charges compared to the previous year of just over 4.3% in 2014 and 4.5% in 2015, and an increased growth in investments (compared to 2012, an increase of 55% was reported) for an overall total of approximately 5.8 billion euros in the four year period 2014-2017’.

⁷⁰ Specifically, ‘(t)he scheme chosen by the local authorities (Enti d’Ambito or other subjects) to determine the tariffs is adopted according to: [a] the ratio between the needed investments (duly identified for the period 2014-2017) and the value of the existing infrastructures, where Quadrants I and II are characterised by lower investment needs compared to the past, while Quadrants III and IV are suitable for relevant investments, which are identified according to unbiased and non-deferrable needs that call for appropriate measures able to ensure their sustainability; [b] (t)he operating costs related to specific objectives, where Quadrants I and III are characterised by the invariance of the specific objectives and the range of operations of Service Providers, so that the planned costs do not require any modifications; Quadrants II and IV are characterised by the presence of a systemic change in the operations of Service Providers, in terms of served territory or supplied services, requiring the identification of additional costs’: see the Presentation by the President Guido Bortoni at the 3rd National Conference on Water Services Regulation, (n. 65), 6. For a critical analysis of the water tariff method, see G. Romano, A. Guerrini, B. Campedelli, *The new Italian water tariff method: A launching point for novel infrastructures or a backwards step?* in *Utilities Policy*, 2015, 34, 45-53.

⁷¹ AEEGSI Resolution no. 664/2015/R/IDR.

the ‘price-cap’ methodology – could have a negative impact on the quality of the service.⁷² In this regard, it should be noted that the strengthening of the fundamental right to water (and the respect of minimum quality standards) is ensured not only by an efficient organization of the service (in which the individual legal claim of each consumer would be weaker and more nuanced), but also through the enforceability of end-users’ rights contained in the contract concluded with the provider, which undoubtedly represents the practical legal means to allow users to trigger their rights effectively before a court.⁷³

An important part of this second ‘step’ was the regulation of service metering in order to make consumers more aware of the service they use and indirectly to protect water resources, which is in accordance with the European legal framework.⁷⁴

According to Article 4, paragraph 3 of Annex A of AEEGSI Resolution no. 218/2016/R/IDR, consumer consumption is to be measured by a specific meter located at the place that corresponds to the ‘delivery point’. The Resolution also points out that the responsibility for metering activity is given to providers, who are required to ensure the installation, the good functioning, the maintenance and the verification of water meters. The assignment of this responsibility may be relevant, especially in terms of providers’ investment, given that in many areas of the country water meters have not yet been installed, or the area has forfeited its metering mechanisms.

Another important stage in the independent regulation is represented by the obligation to unbundle accounts in the water sector.⁷⁵ The unbundling regulation aims to identify in greater detail the costs of the individual services that form the integrated water service, in order to obtain a better definition of a ‘cost reflective’ tariff.

When compared with other regulated public services (such as gas, electricity, or transport), the independent regulation of the integrated water service seems different: the promotion of competition in the sector might not really be the primary aim of water regulation. Water regulation is instead addressed, on the one hand, to the improvement of efficiency, cost-effectiveness and transparency and, on the other hand, in the dimension of solidarity to the protection of end-users’ rights in the water supply without losing sight of the protection of the environment.⁷⁶

⁷² AEEGSI Resolution no. 655/2015/R/IDR. See also the recent Resolution 90/2017/R/IDR on the initiation of a procedure to define the technical quality of the service.

⁷³ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 138.

⁷⁴ AEEGSI Resolution no. 218/2016/R/IDR. See A. Giannelli, S. Vaccari, *Le nuove prospettive di regolazione del S.I.I. e le possibilità offerte dal nuovo Codice dei contratti pubblici*, in *Dir. econ.*, to be published.

⁷⁵ AEEGSI Resolution no. 137/2016/R/COM.

⁷⁶ For a confirmation of this tendency, see the Presentation by the President Guido Bortoni at the 3rd National Conference on Water Services Regulation, (n. 65), 24.

This statement confirms that a general and standardized regulation established for any local public service may not be suitable for the water service, which needs ad hoc regulation because of the high social value inherent in this type of public service.⁷⁷

5. Water as a commons as regards conservation duties and required consumption rights.

As stated above, the ad hoc regulation of the water service is also justified by the specific nature of water within the traditional legal category of public goods.

As a result of the progressive awareness of the limited availability of water, a new category of goods (the ‘commons’) began to be associated with this essential and vulnerable ‘resource’, even from the viewpoint of the law,⁷⁸ which had traditionally limited the legal debate on public goods (including water) to the dichotomy between public and private property and, therefore, to the question of the owner of the good.⁷⁹

Commons are goods that are non-excludable in consumption (in the sense that no-one is prevented from consuming the same good), but rival (in the sense that if one person consumes the good then someone else is simultaneously prevented from doing so). In other words, the impossibility of excluding someone from consuming the good is ‘tragically’⁸⁰ combined with the fact that one person’s consumption of the good prevents another person from consuming it.

The absence of external regulation may therefore lead to a gradual depletion of such goods, because individual users acting independently each in their own self-interest behave in a way that is contrary to the common good of all users.

What are the institutional solutions to prevent the depletion of commons from this egoistic and uncontrolled use?

The legal debate essentially fluctuates between three positions: 1) considering commons to be private goods because only private owners can protect finite resources from being depleted; 2) considering

⁷⁷ See sections 5 and 6.

⁷⁸ In general, for a legal perspective of the theory of the commons, see M. Cafagno, *Principi e strumenti per la tutela dell’ambiente come sistema complesso, adattivo, comune*, Torino, 2007, 137; See also the work of the Rodotà Commission on public goods, which was established by the Ministry of Justice in 2007 in order to produce a general bill for the revision of the Civil Code. According to the definition given by the Rodotà Commission, the commons are goods that are functional to the exercise of fundamental rights and to a free development of the human being: more detail can be found at https://www.giustizia.it/giustizia/it/mg_1_12_1.np?previousPage=mg_1_12&contentId=SPS47624. More specifically on water as a common, see E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 211 ff.

⁷⁹ Art. 822 of the Italian Civil Code states that rivers, streams, lakes, and other public water belong to the State and are part of the public domain.

⁸⁰ G. Hardin, *The tragedy of the commons*, in *Science*, 162, 1968, 1243.

commons as exclusively public goods, for the opposite reasons; and 3) letting commons be managed by local communities applying a cooperative approach.⁸¹

The uncertainty about the legal nature (and, as a consequence, about the applicable legal regime) of commons is shown in the fact that these goods may not be clearly identified by a set of criteria for whether they are commons or not, in contrast to traditional legal classifications of goods.

A useful, and relatively recent, reading of the key legal issues raised by commons is founded on the concept of sustainable development⁸²: we all have the responsibility to ensure a ‘sustainable’ use of commons. Specifically, this is true for the environment⁸³ (and therefore also for water resources), where the need to protect future generations is very strong.⁸⁴

Water as a commons is very interesting in our perspective, since some legal scholars have used the commons theory, even taking into account the needs of future generations, to support a new concept of the public domain with reference to water: specifically, the concept of the public domain is no longer used in an ‘appropriating’ or ‘utilitarian’ perspective, but is recalled to emphasize the duty of public authorities to limit the overconsumption of an essential (but limited) resource for the survival of human life.⁸⁵

In this different perspective, the public authority is not, therefore, seen as the ‘owner’, because it is not possible for water to be appropriated or owned by anyone; instead, it is seen as a ‘guardian’ of the sustainable use of a good belonging to the community, and its actions have to be inspired by an approach of solidarity,⁸⁶ taking into consideration the sensitive balance between water protection and the fundamental right to universal access to drinkable water.⁸⁷

⁸¹ E. Ostrom, *Governing the commons: The evolution of institutions for collective action*, Cambridge, 1990. With regard to Ostrom’s perspective, E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), suggests that local communities may ‘take charge’ of single bodies of water, but they cannot replace the necessary public ownership of the entire and indivisible water system.

⁸² E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 220; E. Casetta, F. Fracchia, *Manuale di diritto amministrativo*, Milano, 2016, 236.

⁸³ On the environment as a commons see D.A. Farber, J. Freeman, A. Carlson, *Cases and materials on environmental law*, 2008, 5 ff.. See E.W. Bailey, *Incorporating ecological ethics into manifest destiny: Sustainable development, the population explosion, and the tradition of substantive due process*, in *Tul. Envtl. L.J.*, 2008, 21, 485.

⁸⁴ F. Fracchia, *Lo sviluppo sostenibile: la voce flebile dell’altro tra protezione dell’ambiente e tutela della specie umana*, Torino, 2010, *passim*.

⁸⁵ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 518 ff.

⁸⁶ According to the Italian Constitutional Court (Corte cost. no. 273/2010, 22 July 2010, in www.cortecostituzionale.it), there is a close connection between the public legal nature of water and the use of this resource in solidarity.

⁸⁷ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 221 ff., also highlights the currently differing functions of water concessions, which range from agreements conferring uncontrolled drawing rights to instruments aimed at ensuring environmental compatibility.

Even the Constitutional Court has highlighted that the public regime for water is justified by the limited availability of water, as a ‘common resource’⁸⁸, or is closely related to the protection of water and to its use in accordance with an approach of solidarity.⁸⁹ Thus, legal scholars and the courts seem to focus their attention on the function of these goods (namely, ‘the implementation of the interests of all the citizens’⁹⁰), rather than who owns them.⁹¹

6. The ideological dimension of the theory of the commons applied to water: the emblematic case of the regulation of tariffs.

We have often highlighted that regulating the water service involves taking into account the relevant ideological aspects. In this context, the theory of the commons has been used, especially in Italy, to give legal support to important decisions made by policy makers in relation to the management of the integrated water service.

With reference to public services, the calculation of tariffs has often played a crucial (and ideological) role, since it requires a balance to be found between the different interests involved in the management of a public good or commons at any given time.⁹² In the water sector particular emphasis has been given to this balance because of the high social value implicit in this resource that is essential for human life. Until the public consultation of 2011, both the investment and the costs of managing the water service could be entirely covered by the tariff.⁹³

In other words, the inclusion of this heading in the tariff calculation – initially provided by the Galli Law and then included in the Environment Code to promote private investment in the sector – assured providers of an ‘appropriate’ remuneration for their invested capital through a pretty high fixed interest rate of 7%.⁹⁴

After the public consultation, the reference to remuneration for invested capital contained in Article 154 of the Environment Code was erased. Therefore, the water service tariff should then have been determined without taking into account the ‘appropriateness of remuneration for the invested capital’,⁹⁵ as had been the case before the referendum.

⁸⁸ Corte cost., 19 July 1996, n. 259, in *Foro amm.*, 1999, 1410.

⁸⁹ Corte cost. no. 273/2010 (n. 87).

⁹⁰ Cass., sez. un., no. 3665/2011: the case concerned the legal nature of the fishing valleys near Venice.

⁹¹ Recently, see R. Miccù, F. Palazzotto, *Smoke on the Water o della ripubblicizzazione dell’acqua. Lo statuto giuridico della risorsa idrica tra beni demaniali, beni comuni e doveri di tutela dell’amministrazione*, in *Nomos*, 2, 2016, 11 ff.

⁹² A. Travi, *La disciplina tariffaria nel servizio idrico integrato*, in *Rivista della regolazione dei mercati*, 1, 2014.

⁹³ Art. 13 of Galli Law and Art. 154 of the Environment Code.

⁹⁴ Decree of Ministry of Public Works 1 August 1996.

⁹⁵ On this issue, see A. Travi, *La disciplina tariffaria nel servizio idrico integrato*, (n. 93); S. Vaccari, *Le tariffe del servizio idrico*, in *Munus*, 2, 2014, 289 ff.

By eliminating that phrase, the ultimate aim of the promoters of the referendum was, on the one hand, to exclude any direct or indirect form of profit in the water supply sector and, on the other hand, by discouraging the involvement of private investors, to create a sort of ‘implicit’ public right to the management of the service.⁹⁶

In other words, according to the promoters of the referendum, the exclusion of private bodies from the management of the water service was the only way to avoid an increase in the tariff. The high social dimension of the water service could therefore, applying the theory of the commons to water, only be protected by public entities.

It is interesting to note that the regulation resulting from the repealing referendum had an impact not only on the method of calculating the water service tariff (with the elimination of the reference to the ‘appropriateness of remuneration for the invested capital’), but also on the nature of the bodies – exclusively public entities – who had to manage the service.

The (formal and substantial) prohibition – which was recognized by the Constitutional Court⁹⁷ – on restoring a piece of legislation that has been repealed through a public consultation raised the issue of whether and to what extent the independent Regulatory Authority (which in the meantime had assumed the competent regulatory powers⁹⁸) might itself be subject to the result of the public consultation in defining the tariff method.

Specifically, this problem arose when the Regulatory Authority defined the ‘transitional tariff method’ for 2012 and 2013⁹⁹; this method included, among the other cost components of the tariff, investment costs (including the cost of equity capital).

According to some consumer organizations, the inclusion of these costs in the new tariff method would have infringed the substance of the popular consultation because it would have reintroduced a sort of ‘hidden’ remuneration for invested capital, which was prohibited in the light of the result of the referendum.

In 2014, the administrative court of the Lombardy Region rejected all the petitions against the new tariff method and confirmed its legitimacy on the basis of the economic relevance of the integrated public

⁹⁶ A. Travi, *La disciplina tariffaria nel servizio idrico integrato*, (n. 93).

⁹⁷ See section 3.

⁹⁸ See section 4.

⁹⁹ See section 4.

water service¹⁰⁰ and of the subsequent application of the ‘full cost recovery’ principle,¹⁰¹ which allowed all operating and investment costs (the latter in the form of both equity and debt capital) to be covered.¹⁰² Thus, the inclusion of investment costs in the tariff method complies with the substance of the popular consultation, whose aim was only to prohibit a fixed and standardized remuneration regardless of real capital injections.

In spite of the aforementioned judicial decisions (for which appeals are still pending), the (sometimes ideological) choice of leaving the management of the water service exclusively in the hands of public authorities might not be consistent with the legal framework of the Italian water service, and raises some legal issues that will be briefly considered.

First of all, when there is a public reservation (even if this is not explicit) of an economic activity, indemnities have to be given for the existing private management arrangements. Thus, the change in the tariff system after the public consultation of 2011 should have been accompanied by adequate economic compensation.¹⁰³

Secondly, because of the economic relevance of the water service¹⁰⁴ and following the EU principle of full recovery of costs, the elimination of any remuneration for invested capital does not make legitimate an uneconomic (public) management, because at least an equivalence between the costs incurred and the revenue received has to be ensured.¹⁰⁵

Thirdly, when there is an external and detailed regulation issued by an independent national authority, the risk of ‘predatory practices’ by private entrepreneurs is relatively limited. We may therefore argue that the existence of this important regulatory framework can mainly be justified not so much by the public management of the water service but rather by the existence of ‘regulated’ private management.¹⁰⁶

¹⁰⁰ Corte cost. no. 325/2010, (n. 36); see also Corte cost. no. 67/2013.

¹⁰¹ Established by the Water Framework Directive and included in Art. 154 of the Environment Code.

¹⁰² Tar Lombardia, Milan, 26 March 2014, nos. 779 and 780. See the comments of M. Vanni, *Le tariffe dei servizi idrici dopo il referendum: note a margine delle decisioni del Tar Lombardia*, in *Quad. Cost.*, 2014, III, 700 ff.; S. Vaccari, *Le tariffe del servizio idrico*, (n. 96).

¹⁰³ A. Travi, *La disciplina tariffaria nel servizio idrico integrato*, (n. 93).

¹⁰⁴ Corte cost. no. 325/2010 (n. 36).

¹⁰⁵ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 119.

¹⁰⁶ It is no accident that in France the decision to go back to municipally-owned companies in the water sector was not made so much because of the failure of privatization, but rather because of the failure of an ‘uncontrolled’ privatization in which economic operators used to work without any accountability and with a high degree of financial opacity. See A. Le Strat, *Le choix de la gestion publique de l'eau à Paris*, speech presented in Turin at the Conference ‘Acqua bene comune: il diritto al futuro’, 15 February 2010.

Fourthly, there is an issue (more practical than legal) of the technical feasibility of the exclusively public management of the water service, which cannot be sustainable with the current lack of public funds and the need to ensure that the water distributed meets minimum quality standards.¹⁰⁷

In conclusion, the ideological support of an exclusively public management of the water service can, on the one hand, be legally weak, even taking into account the current dominant role of the independent authority, which undoubtedly reduces the scope for a specific ideology in the regulation of the water service; on the other hand, it may risk limiting the debate on the Italian water service to the legal nature (public or private) of the provider, without giving much consideration to any of the other important problems raised by this fundamental service.¹⁰⁸

7. Conclusions: independent regulation and future generations.

Regulation and the courts play a key role in the ‘stability’ of the organization of the water service in Italy. In fact, there have been many and frequent regulatory changes and important judgements (which have often even been issued by the Constitutional Court), and these have created general legal uncertainty for public organizations and economic operators.¹⁰⁹

Another element of legal uncertainty is created by the complex interaction between different sources of law and different ‘regulators’,¹¹⁰ and this is even increased by the resistance of municipalities towards abdicating from their traditional leading role in the water industry and by their chronic delays in implementing legislative reforms.

The rationalization of the territorial organization of the water service is still in progress. There are currently 63 Optimal Territorial Areas around the country, although some local authorities have not yet submitted to the authority of their competent ATO.¹¹¹ Twelve regions have a unique ATO¹¹² in their respective regional territories, although in some cases there are sub-optimal territorial areas within the

¹⁰⁷ A. Travi, *La disciplina tariffaria nel servizio idrico integrato*, (n. 93); see also A. Tonetti, *Investimenti infrastrutturali e (in)certezza delle regole: il caso del servizio idrico*, in *Giornale di dir. ammin.*, 2013, 1102 ff.

¹⁰⁸ E. Boscolo, *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*, (n. 7), 116.

¹⁰⁹ See A. Tonetti, *Investimenti infrastrutturali e (in)certezza delle regole: il caso del servizio idrico*, in *Giorn. dir. amm.*, 2013, XI, 1115; A. Massarutto, *La cultura del fare (e del disfare): il cantiere aperto della riforma dei servizi idrici*, in *Analisi Giuridica dell'Economia*, 1, June 2010.

¹¹⁰ For the influence of international and EU law on water service management, see S. Lorenzmeier, *International and European aspects of the management of the water service in Europe*, in V. Parisio (Ed), *The water supply service in Europe: Austrian, British, Dutch, Finnish, German, Italian and Romanian experiences*, Milan, 2013, 1 ff.

¹¹¹ For instance, in Calabria 74% of the local authorities (304 out of 409) have not yet adhered to the unique regional ATO.

¹¹² Abruzzo, Basilicata, Calabria, Campania, Emilia Romagna, Friuli Venezia Giulia, Molise, Puglia, Sardegna, Toscana, Umbria, Valle d'Aosta.

unique regional ATO, and in one case there is an interregional Optimal Territorial Area (the ATO of Lemene, which is located across Veneto and Friuli Venezia Giulia). The other regions have more than one ATO in their regional territories: specifically the number of these ATOs is 55 and, in almost all cases, they correspond to the provincial administrative borders.¹¹³

In recent times, in order to make the water industry attractive to private investors, an important part of the regulation has been developed by an independent national authority, whose regulatory production is structurally ‘asymmetric’ and ‘progressive’¹¹⁴ and, thus, unstable because of the peculiar character of the water service.

This ‘independent’ regulatory process has not ‘saved’ the regulation of ongoing water management, especially with reference to the sensitive issue of the water tariff after the popular consultation of 2011: the duty to implement the ‘transitional tariff method’ has, indeed, ‘hit’ the existing water management arrangements, with a subsequent weakening of the principle of the protection of legitimate expectations.¹¹⁵ This circumstance demonstrates that in Italy the regulatory risk in this sector is very high, unless the legislator decides to adopt reasonable compensatory measures.¹¹⁶

Furthermore, regulation is often influenced by a strong ideological component that is hidden behind the management of the water service. In this regard, there is a great example in Italy of ‘social innovation’ in regulation, in the sense that some of the regulation came directly from society (or from ‘social movements’¹¹⁷) and not through the traditional channels of representative democracy. The ideological dimension and the need for huge investment in the sector still lead to permanent conflicts between policy makers and stakeholders, which once again make it difficult to find a stable and accepted legal framework.

¹¹³ All data is taken from AEEGSI report no. 811/2016/I/IDR, (n. 49).

¹¹⁴ See section 4.

¹¹⁵ The Regulatory Authority and the Council of State (no. 267/2013, in www.giustizia-amministrativa.it) justified the application of the new tariff method to the existing water management contracts because of the result of the referendum. This implies, among other things, the reimbursement of most of what had already been paid – under the previous tariff method (the so-called ‘normalized method’) – by users between the result of the popular consultation of 2011 and the approval of the new tariff method.

¹¹⁶ See section 6.

¹¹⁷ U. Mattei, S. Bailey, *Social movements as constituent power: The Italian struggle for the commons*, in *Indiana Journal of Legal Studies*, 2013, 20, 995, according to whom ‘(t)he common goods movement in Italy is a powerful example of the way in which social movements are emerging as the new *pouvoir* constituent as an oppositional force to the process of economic constitutionalism imposed by international economic institutions (...). A social movement of the “many worlds”, the many sites of societal constitutionalism of the commons, linked together in a global network, could provide us with a truly bottom-up constitutional and deliberative process capable of reversing the progressive transfer from the commons to the private on local, national, and global levels, giving renewed relevance to the concepts of “constituent power” and “popular sovereignty” today’.

The ideological dimension may also be seen in some recent draft legislation on water service that is ‘in the pipeline’ and in which the ‘allergy’ to a ‘market-oriented model’ seems still to be present.¹¹⁸

Specifically, we are talking about the Bill entitled ‘Principles for the protection, the government and the public management of waters’, which is currently under discussion within the Senate.¹¹⁹ This Bill establishes, among other things, that water is both a commons and a universal human right.¹²⁰ It specifies that local authorities must resort to forms of ‘participatory democracy’ in order to adopt the fundamental planning and programming activities of the integrated water service.¹²¹ It also foresees the free provision to everyone, even in cases when there is delay in payment,¹²² of the minimum quantity of water necessary to satisfy basic human needs.¹²³

In the light of this widespread uncertainty about the fate of water service regulation and governance, the independent regulator could represent a ‘safety anchor’, as has already been demonstrated in practice, stimulating virtuous behaviour and processes for the development of an efficient and high quality water service. Other European countries, like France and Spain, are even considering introducing an independent national authority with regulating powers in the water sector: in this regard, the Italian model certainly represents a ‘good lesson’ from which to take inspiration.

Although it may be a flawed argument,¹²⁴ it is true that, since the Regulatory Authority started to deal with the integrated water service, private investment in the sector has shown an increasing trend and has doubled (from EUR 1 billion to more than EUR 2 billion).¹²⁵

¹¹⁸ Art. 7, para. 1 of Bill no. AS 2343.

¹¹⁹ Another recent reform, which is also still ‘in progress’, concerns the other public services with economic relevance, but not the water service, which is expressly excluded in the most recent version of the Bill. For a first comment on this reform, see F. Fracchia, *Pubblico e privato nella gestione dei servizi pubblici locali: tra esternalizzazione e municipalizzazione*, in *federalismi.it*, 14, 2016.

¹²⁰ Art. 2 of Bill no. AS 2343.

¹²¹ Art. 11, para. 2 of Bill no. AS 2343.

¹²² With reference to delays in payment within the water service, see the government decree 29 August 2016 (which entered into force on 14 October 2016) that guarantees the free provision of a minimum vital quantity of 50 litres of drinking water per person per day to economically disadvantaged households even if they fail to pay bills. The Regulatory Authority has started a process aimed at regulating this issue: see AEEGSI Resolution no. 638/2016/R/IDR.

¹²³ With regard to this last provision, as the Regulatory Authority has observed (AEEGSI Legal Brief no. 344/2016/I/IDR), it is not practically possible today to measure the water consumed by each household. In addition, only a few water management companies have implemented a detailed user database in order to figure out how many people correspond to each household. Furthermore, the guarantee of the free provision of a minimum quantity of water to everyone has the paradoxical effect of increasing the amount charged for water consumed in excess of this minimum quantity.

¹²⁴ We refer, specifically, to the post hoc, ergo propter hoc argument, according to which if one event occurs after another event, the first is considered as a cause of the second.

¹²⁵ A. Biancardi, Seminar contribution to ‘Regolare l’acqua. Una riflessione interdisciplinare e comparata’ 3 April 2017, Bocconi University of Milan.

Indeed, the presence of an independent national regulator, with twenty years' experience in regulating related fields (electricity and gas), justifies – primarily in view of the greater private investment in the sector – a more widespread outsourcing of the management of the water service to third parties, because of a reduced risk of corruption and illegal behaviour by private entrepreneurs to the detriment of consumers.¹²⁶

In this context, the unquestionable dimension of solidarity in the service (in relation to the protection of the environment and future generations) and the need for social fairness and universal access to water (which implies the setting of affordable tariffs) may not represent, in our opinion, arguments for excluding greater openings for private entrepreneurs in the management of the service.

In this regard, the theory of the commons, purified from ideological and political implications, should certainly not be interpreted as a theoretical obstacle to the entry of private managers: as we have already seen,¹²⁷ this theory does not focus on the owner of the good, but on the specific function (namely, the pursuit of a 'collective' interest) of the good itself, which could even be preserved by a 'well-regulated' private entity.

However, the ideological implications of this theory – namely, the need for the water service to be managed only by public bodies¹²⁸ – could be constrained by the actions of the Regulatory Authority, in the sense that the independent regulation aims to implement the principles of transparency, efficiency and effectiveness, regardless of who is accountable for the management of the service.

In addition to representing a 'means of defence' against ideologies, the Regulatory Authority plays a key role as a reliable 'consultant' for the competent local authorities. The Regulatory Authority has, in fact, started a continuous 'dialogue' with the Optimal Territorial Area Authorities in order to prevent the dispersal of the existing useful information assets that have been created by the regulation 'by contract' over the years and to give technical support to their activities,¹²⁹ without influencing the form of the

¹²⁶ F. Fracchia, *Pubblico e privato nella gestione dei servizi pubblici locali: tra esternalizzazione e municipalizzazione*, (n. 120), 24. Therefore, a link could be identified between the decision to maintain the management of the service under public control and the absence of an external regulator. However – according to A. Massarutto, Seminar contribution to *Regolare l'acqua. Una riflessione interdisciplinare e comparata*, 3 April 2017, Bocconi University of Milan – the direct public management of the service does not automatically exclude the presence of an external (and independent) regulator, given that such a regulator has the crucial role, among other tasks, of limiting the risk of generating economic inefficiencies for political/electoral reasons.

¹²⁷ See section 5 and Cass., sez. un., no. 3665/2011.

¹²⁸ This perspective is clearly highlighted in G. Azzariti, G. Ferrara, A. Lucarelli, U. Mattei, S. Rodotà, *Invertire la rotta: per un governo pubblico dell'acqua. Relazione introduttiva ai quesiti referendari*, (n. 39).

¹²⁹ A. Biancardi, Seminar contribution to *Regolare l'acqua. Una riflessione interdisciplinare e comparata*, 3 April 2017, Bocconi University of Milan.

management of the service (which remains a discretionary decision of these local authorities in accordance with State legislation¹³⁰).

Since, in this peculiar ‘market’ (if it can be called such), the independent regulation is primarily addressed to the local governments of the water service (instead of to the economic operators)¹³¹, we might say that the Regulatory Authority should not be traditionally identified as a ‘market arbiter’¹³², but instead that its regulatory activity is more aimed at ‘coordinating’ the untouched prerogatives of the competent public local actors (namely the ATO authorities, who remain accountable for their decisions) by setting the common constraints within which they can operate (consider, for instance, the discretionary choice of the ATO authorities between the different regulatory schemes for tariffs drawn up by the Regulatory Authority).

In summary, independent regulation is to be welcomed for the general improvement of the water service, but we must not forget – even in the light of the weakness of the functioning of the mechanisms of representative democracy with reference to the activities of the independent administrative authorities – that the relevant role being assumed by the independent regulator is justified as long as the system achieves the virtuous objectives set out in the State legislation. However, until that moment, the Regulatory Authority has the highly sensitive task of being the ‘guardian’ of a ‘sustainable’ allocation of water, taking into account the complex balance between the protection of water ecosystems and the implementation of the fundamental right to universal access to drinkable water, which must both be preserved for future generations.

¹³⁰ As we saw in section 3, the State has exclusive legislative power over the forms of water service management on the basis of the promotion of competition and the protection of the environment, while the regions can only adopt a higher level of protection under the principle of competition.

¹³¹ For instance, consider the regulation of tariffs and of contractual quality, and the standard framework contracts of service to be used by the ATO authorities. A parallel could be found with the National Anti-Corruption Authority; among other functions, this authority regulates the public procurement market through specific regulatory acts primarily addressed to the contracting authorities and not to economic operators: see L. Torchia, *Il nuovo Codice dei contratti pubblici: regole, procedimento, processo*, in *Giorn. dir. amm.*, 5, 2016, 607.

¹³² For the legal background on independent authorities as market arbiters, see M. D’Alberti, A. Pajno (Eds), *Arbitri dei mercati. Le autorità indipendenti e l’economia*, Bologna, 2010, *passim*.