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PUBLIC ENVIRONMENTAL SERVICES (WATER AND MUNICIPAL WASTE) IN ITALY. NEW REGULATORY MEASURES.

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Water management and municipal waste management services have been involved, in recent years, in a series of regulatory measures which have substantially modified their institutional structure. In a first phase, responsibility for organizing and managing these services has been committed to the sub-area authorities, as dedicated and specialized bodies (A.T.O.). Then, in a second phase, the same responsibility has been transferred to municipal, provincial and regional government authorities.

1. LAW NO. 36 OF 1994 FOR WATER MANAGEMENT AND LEGISLATIVE DECREE NO. 22 OF 1997 FOR MUNICIPAL WASTE MANAGEMENT: OPTIMUM SUB-AREAS AND SUB-AREA AUTHORITIES.

During the 1990's the need emerged within the ambit of the Italian system of regulations for supramunicipal, optimum sub-area organization of local public services regarding the environment, water and municipal waste.

A supramunicipal approach covering large areas was considered necessary for entrepreneurial development and industrialization within the sector.

For integrated water management, law no. 36 of 1994 set forth that "Water management services are reorganized on the basis of optimum sub-areas" (art. 8, paragraph 1) and that "the regions … govern the forms and manners of cooperation among the local authorities within the said optimum sub-areas" (art. 9, paragraph 3).

Legislative Decree no. 22 of 1997 included similar measures for municipal waste management. This law provided for "optimum sub-areas for municipal waste management"

(art. 23, paragraph 1) and "the forms and manners of cooperation among the local authorities within the said optimum sub-areas" (art. 23, paragraph 5).

Lawmakers on the state level contemplated the principle of inter-municipal cooperation. Regional laws governed concrete organization of sub-area authorities.

The above state law provisions provided for, and required, a later regional law for government of the concrete organization of sub-area authorities.

The regions nearly all made provisions that the municipal authorities within the sub-area might choose, as alternatives, between two forms of cooperation: a new public body or a special coordination agreement without constitution of a new body.

2. LEGISLATIVE DECREE NO. 152 OF 2006, KNOWN AS THE CODICE DELL'AMBIENTE (ENVIRONMENTAL CODE): OPTIMUM SUB-AREAS AS PUBLIC BODIES.

Optimum sub-areas and cooperation among municipalities, regarding water and municipal waste management, were provided for in Legislative Decree no. 152 of 3 April 2006, known as the Codice dell'ambiente (environmental code).

An important new development was included, namely that municipalities were obliged to constitute sub-area authorities as new public bodies.

In regard to water management, art. 148 of Legislative Decree no. 152 of 2006 ruled that the sub-area authority was to be a "structure endowed with legal status" constituted in each optimum sub-area, that local government authorities were obliged to hold shares in

them, and that the responsibilities for management of water resources of the said local authorities were to be transferred to the said structures.

In regard to municipal waste management, art. 201 set forth that the sub-area authority is a "structure endowed with legal status" constituted in each optimum sub-area, that local government authorities were obliged to hold shares in them, and that the responsibilities for integrated municipal waste management of the said local authorities were to be transferred to the said structures.

Thus, in 2006, lawmakers on a State level made it obligatory that sub-area authorities for water and municipal waste management be constituted as new public bodies.

This meant that the said new bodies were to be provided with head offices, their own staff, and the means and instruments for conducting their tasks.

In many cases, this generated new costs and items of expenditure for municipalities.

At a time of serious public finance deficits, these costs and items of expenditure began to be considered a waste of public money.

In view of these public finance concerns, lawmakers quite simply abolished the optimum sub-area authorities in 2009.

3. LAW NO. 191 OF 2009 ABOLISHES OPTIMUM SUB-AREA AUTHORITIES.

Art. 2, 186-bis of law no. 191 of 2009 abolished optimum sub-area authorities.

This law delegated to the ambit of regional laws the task of returning the functions of the said authorities to local public bodies (previously, and traditionally, the bodies responsible for them).

In concrete terms, decisions are made by means of regional laws as to whether the functions are to be assigned to municipal or provincial authorities, or to the regional authorities themselves.

This State law sets forth that the decision must be governed by the principles of subsidiarity, differentiation and adequacy.

As a general rule, we may conclude that, in accordance with the principle of subsidiarity, delegation is favour the lower-tier authority, namely municipalities. However, it clearly emerges that assignment of functions to municipal authorities rules out application of the principle of adequacy.

Hence, it appears, for consistency with the indicated criteria to be attained, that he functions of organization of water and municipal waste management be assigned to the provincial government authorities.

This is consistent with the general law of local autonomy, Legislative Decree no. 267 of 2000. The said law assigns to provincial authorities administrative functions regarding the environment in the areas governed by a plurality of municipal authorities (art. 19, paragraph 1).

By way of conclusion we note that the tasks of organization of water and municipal waste management shall be governed by new regional laws, and that, in all likelihood, these regional laws shall assign the said tasks to the provincial authorities.

The principle of differentiation provides for the possibility that regional laws assign the said tasks to the larger municipal authorities, which had already been considered optimum sub-area authorities (see the case of the Municipality of Milan), or to very small regional authorities (e.g. Basilicata).

4. THE NEW RULES GOVERNING THE MANNERS OF MANAGEMENT AND ASSIGNMENT OF LOCAL PUBLIC SERVICES OF MAJOR ECONOMIC SIGNIFICANCE. ART. 23-BIS OF LEGISLATIVE DECREE 112 OF 2008 AND DECREE OF THE PRESIDENT OF THE REPUBLIC NO. 168 OF 2010.

The local government bodies indicated by the regional law shall be responsible for service organization and management.

Art. 23-bis of Legislative Decree 112 of 2008 contains new rules governing local public services of major economic significance.

The new rules have been imposed for "application of Community regulations and in order to foster the broadest application of the principles of competitiveness, freedom of establishment and freedom to provide services on the part of all economic operators involved in management of services of general interest on a local level" (art. 23-bis, paragraph 1).

The decree applies both to water and municipal waste management.

Decree of the President of the Republic no. 168 of 2010 was issued to implement the said law.

5. SPECIAL RULES GOVERNING WATER MANAGEMENT AND THE REFERENDUMS TO ABROGATE LAWS ADMITTED BY THE CONSTITUTIONAL COURT.

The new laws and regulations are fully applied to the municipal waste management sector.

However, for water management, a special regulation has been applied, which facilitates recourse to in house companies.

Generally speaking, recourse to in house companies requires a prior opinion on the part of the national authority responsible for upholding competition and the market (Autorità Garante della Concorrenza e del Mercato).

The AGCM is of the opinion that the market is inefficient in this specific concrete instance and therefore that it is opportune not to have recourse to the marketplace, assigning management to an in house company.

The opinions of the AGCM have been, without exception, contrary.

The Decree of the President of the Republic no. 168 of 2010 facilitates the procedure whereby a favourable opinion may be obtained from the AGCM in the case of water management with respect to the other services.

Indeed, for a favourable opinion to be obtained it will be enough for it to be demonstrated that the in house company has made a profit at the end of the financial year, that it reinvests 80% of the profits in developing the service, and that it charges less that the average within the sector.

This means that, for water management, the decision to opt for in house management shall be facilitated and shall be less exceptional in nature than is the case for other local public services.

Lastly, we must note that on 12 January 2010, the Constitutional Court admitted three referendums on local public service and on water management in particular.

The calls which are the object of the referendums are that art. 23-bis on the manners of assignment of local public services of major economic significance (no. 149 Reg. Ref.), art. 150 of Legislative Decree no. 152 of 2006 on the manners of assignment of integrated water management (no. 150 Reg. Ref.), and that art. 154 of Legislative Decree no. 152 of 2006 on the criteria applying to determination of charges (regarding the part thereof in which, among the criteria "adequacy of remuneration of invested capital" has also been included), be abrogated.

The objective of the three abrogative referendums, indicated above and admitted by the Constitutional Court, is that of affirming the public service nature of water management, and that the said services are not, economic and industrial in nature.

In this regard, we may note that abrogation of the above provisions following the referendums would clash with the provisions of recent years and with needs relating to development of the sector and improvement of the national infrastructure network for water.