

**THE REGULATORY POWER OF INDEPENDENT
ADMINISTRATIVE AUTHORITIES**

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1. INTRODUCTION

In the vast body of issues about independent administrative authorities, the one more closely related to their regulatory power revolves around the foundation of such power, the location of these regulations in the sources of law, their drafting procedure and, more generally, around the place of such regulatory power within the powers and the role played by independent administrations. The study of the regulatory power of independent administrative authorities requires the analysis of both the effects determined by such power with reference to the sources of law and its incidence in the identification and determination of the role of independent administrative authorities and their location in the institutional system. As a matter of fact, if the prospect of the theory of the sources enables to highlight the changes undergone by the whole system of sources of law over the last years¹, the prospect based on the proper function of independent authorities (the so-called regulatory function) enables to go deeper into the aspects relating to their establishment and their development in the Italian legal system. Hence the “richness” of independent administrations authorities².

¹ For the sources of law, see R. BIN – G. PITRUZZELLA, *Le fonti del diritto*, Torino, Giappichelli, 2011; F. POLITI, *Diritto pubblico*, Torino, Giappichelli, 2011; L. CARLASSARE, *Fonti del diritto (diritto costituzionale)*, in *Enc. dir.*, *Annali*, II, 2008, 561 ss.; A. CERRI, *Prolegomeni ad un corso sulle fonti del diritto*, Torino, Giappichelli, 2005; S.M. CICCONETTI, *Le fonti del diritto italiano*, Torino, Giappichelli, 2007; P. GROSSI, *Premesse per uno studio sistematico delle fonti del diritto*, Torino, Giappichelli, 2008; N. LIPARI, *Giurisprudenza costituzionale e fonti del diritto*, Napoli, 2006; F. SORRENTINO, *Le fonti del diritto italiano*, Padova, 2009; G. TARLI BARBIERI, *Appunti sulle fonti del diritto italiano*, Torino, 2008; A. PIZZORUSSO, *Delle fonti del diritto*, in *Commentario cod. civ.*, a cura di A. Scialoja - G. Branca, Bologna-Roma, 2011.

² Cf. R. TITOMANLIO, *Potestà normativa e funzione di regolazione. La potestà regolamentare delle autorità amministrative indipendenti*, Torino, Giappichelli, 2012, and the doctrine referred to therein. Before see R. TITOMANLIO, *Autonomia e indipendenza delle Authorities: profili organizzativi*, Milano, Giuffrè, 2000; ID.,

The regulator activity of each authority expresses itself in a wide and varied typology of administrative powers (authorizatory, sanctionatory,...), also regulatory. The acknowledgment of the regulatory nature of the relevant acts also implies the acknowledgment of their differentiated regime compared to other acts of the administrative function (from the possibility of appeal to the *Cassazione*, pursuant to *art. 360, cod.proc.civ.*, for the violation of them, to the configurability of the illegitimacy of following administrative acts - general or specific - for "violation of law", pursuant to *art. 21-octies l.n. 241/90*, up to the applicability of the principle *iura novit curia*).

At the same time, both scholars and courts agree that the regulations of independent administrative authorities are to relate to the category of administrative acts, both regarding the implementation procedures of these acts (according to principles and rules of the administrative action) and regarding the judicial review.

Finally, it is important to mention that there are significant forms of procedural

Funzione di regolazione e potestà sanzionatoria, Milano Giuffrè, 2007. In doctrine, there are many observations concerning the independent administrative authorities: in this regard see M. MANETTI, *Poteri neutrali e Costituzione*, Milano, 1994; ID., *Autorità indipendenti (dir. cost.)*, in *Enc. giur. Treccani*, IV, Roma, 1997; N. LONGOBARDI, *Autorità amministrative indipendenti e sistema giuridico-istituzionale*, Torino, Giappichelli, 2009; M. D'ALBERTI, *Autorità indipendenti (dir. amm.)*, in *Enc. giur. Treccani*; IV, Roma, 1995; F. MERUSI, *Democrazia e autorità indipendenti*, Bologna, Il Mulino, 2000; A. PREDIERI, *L'erompare delle autorità amministrative indipendenti*, Firenze, Passigli, 1997; ID., *Le autorità indipendenti nei sistemi istituzionali ed economici*, I, Firenze, Passigli, 1997; L. GIANI, *Attività amministrativa e regolazione di sistema*, Torino, 2002 M. CLARICH, *Autorità indipendenti. Bilancio e prospettive di un modello*, Bologna, Il Mulino, 2005; A. La Spina – G. MAJONE, *Lo Stato regolatore*, Bologna, Il Mulino, 2000. G. GRASSO, *Le autorità amministrative indipendenti della Repubblica italiana*, Giuffrè, Milano, 2006; L. GIANI, *Attività amministrativa e regolazione di sistema*, Giappichelli, Torino, 2002; P. ROSSI, *Le Autorità di regolazione dei servizi di interesse economico generale*, Giappichelli, Torino, 2005; M. POTO, *Autorità amministrative indipendenti* (revision) in *Digesto pubbl.*, tomo I, Utet, Torino, 2008, 54 ss.; M. CUNIBERTI, *Autorità indipendenti e libertà costituzionali*, Giuffrè, Milano, 2007; D. BORSELLINO, *Autorità amministrative indipendenti e tutela giurisdizionale - Dal difensore civico alla tutela del risparmio*, Cedam, Padova, 2006; G. NAPOLITANO, *Autorità indipendenti e agenzie amministrative*, in *Il diritto*, vol. II, Il Sole 24 Ore, Milano, 2007, 255 ss.; *Authorities*, a cura di L. Paganetto, Donzelli, Roma, 2007.

participation for the exercise of regulatory functions (someone speaks about "*contraddittorio orizzontale*" – ("horizontal adversary process/ cross-examination", tn), which aim to ensure the participation of the interested parties with a collaborative - and not merely "defensive"- role³.

2. NEW CASE LAW AND ACADEMIC ASPECTS

Over the last two years, several new aspects concerning scholars and courts have been reported, regarding the regulatory power of independent authorities. In an academic context, in particular, the study of the regulatory power of independent authorities has been carried out within an analysis aimed at examining the origins, sources and functions of

³ Many authors have found in procedural guarantees a peculiar legitimacy of the authorities, based on the very "procedural democracy" (see Cassese S., *Negoziazione e trasparenza nei procedimenti davanti alle Autorità indipendenti*, in VV.AA., *Il procedimento davanti alle Autorità indipendenti*, Torino, 1999, p. 42). In this regard, it was stated that the authorities receive a "*democratic legitimacy a posteriori*" (Clarich M., *I procedimenti di regolazione*, in VV.AA., *Il procedimento davanti alle Autorità indipendenti*, cit., p. 19; R. CHIEPPA, *Tipologie procedurali e contraddittorio davanti alle Autorità indipendenti*, cit.; N. LONGOBARDI, *Autorità amministrative indipendenti e sistema giuridico-istituzionale*, Torino, 2009: "As a matter of fact, the democratic legitimacy does not depend only on the application of the institution of a political representation, but also on a participatory process in the elaboration and implementation of the rules, based on fairness and justice"; G. GRASSO, *Le Autorità amministrative indipendenti della Repubblica*, cit., 80 ss.). Also in the exercise of decision-making functions (eg. adoption of sanctionatory, interdictory or pecuniary measures) independent administrative authorities are required to follow procedures characterized by a guarantee of participation the interested parties (this activity - defined, according to the U.S. model – of *adjudication* - takes place ensuring wider right of defense both to the interested parties and to counterparties).

independent authorities, analizing their judicial nature and the resulting constitutional placement, even in studies focused on single independent administrative authorities⁴.

⁴ Cf. P. BILANCIA (edited by) *La regolazione dei mercati tra autorità indipendenti nazionali e organismi europei*, Milano, Giuffrè, 2012; G. GITTI, *Autonomia privata e Autorità Indipendenti*, in *Enciclopedia del diritto. Annali*, Volume 5, Milano, Giuffrè, 2012; F. LUCIANI, *Le autorità indipendenti come istituzioni pubbliche di garanzia*, Napoli, Edizioni scientifiche italiane, 2011; G. DE MINICO, *Indipendenza delle Autorità o indipendenza dei regolamenti? Lettura in parallelo all'esperienza comunitaria*, in *Osservatorio sulle Fonti*, n.1, 2012; Regarding the relationship between free trade and free competition and public utility services (and therefore on the role of independent administrative authorities in particular in the field of networks, trade and ports), see F. MERUSI, *Lo schema della regolazione dei servizi di interesse economico generale*, in *Dir. Amm.*, 2010, fasc. 2, p. 313 ss.; F. CINTIOLI, *Concorrenza, istituzioni e servizio pubblico*, Milano, Giuffrè, 2010; About the debate on the ‘paragiurisdizionale’ nature of the guarantor Authority of competition and market, see F. MANGANARO, *La giustizia innanzi all'Autorità garante della concorrenza e del mercato*, in *Il diritto dell'economia*, 2010, fasc. 1 p. 23 ss.; For a wide overview, see G.P. CIRILLO – R. CHIEPPA, *Le autorità amministrative indipendenti*, Padova Cedam, 2010; regarding the sanctionatory power of the authorities, see VV. AA. *Le sanzioni delle autorità amministrative indipendenti* edited by Marco Fratini, introduction by M. Clarich, Padova, Cedam, 2011; Concerning the economic and regulatory analysis of the independent authorities in Italy (especially with regard to the Bank of Italy, the Guarantor of competition and market, the Guarantor of communication, to CONSOB and to the Authority for Electricity and Gas), see M. D'ALBERTI – A. PAJNO, *Arbitri dei mercati: le Autorità indipendenti e l'economia*, Bologna, Il Mulino, 2010; M. GENGHÌ, *Profili problematici delle autorità amministrative indipendenti*. in *Nuova rass.*, 2012, n. 7/8, p. 763 ss; About the genesis of the independent administrative authorities and on the impartiality, neutrality and autonomy, A. LEONARDI – M.F. SPERANZA, *Sull'indipendenza delle autorità amministrative*, in *Diritto ed economia dei mezzi di comunicazione*, 2011, n. 1, p. 39 ss.; G. NAPOLITANO, *La rinascita della regolazione per autorità indipendenti*, in *Giornale di diritto amministrativo*, 2012, n. 3, p. 229 ss.; M. DE BENEDETTO, *Le liberalizzazioni e i poteri dell'Agcm*, ibid. Concerning specific authorities or particular fields, see A. CONTALDO – M. ZAMBUCO, *La disciplina della media-conciliazione nell'ambito delle autorità amministrative indipendenti*, in *Riv. Amm. Rep. it.*, 2012, n. 3, p. 157 ss. (which goes in more depth into: the theme of mutual recognition of the Alternative Dispute Resolution; the implementation of legislative decree no. 28/2010 and the nature of the mediation process; the peculiarities as regards independent administrative authorities and the cases CONSOB and AGCOM); Regarding the administrative jurisdictional functions on economic disputes related to regulatory authorities’ acts, see F. MATTASOGlio, *Giudice amministrativo, mercato ... e i suoi fallimenti*, in *Il diritto dell'economia*, 2011, n. 3/4, p. 489 ss.; Regarding the analysis of the impact of the regulation concerning the regulatory activity of independent authorities and the relevant “obbligo di motivazione” (“duty to state reasons”, tn) (and the connected jurisprudential leanings), see M. COCCONI, *Motivazione e qualità dei provvedimenti di regolazione generali*, in *Il*

3. CASE LAW

Among the several cases regarding the independent administrative authorities, we can mention:

- the judgment of the *Corte Costituzionale n. 162 del 27 giugno 2012*, which deemed unconstitutional the regulations - *artt. 133, comma 1, lettera l; 135, comma 1, letter c; 134, par.1, lettera c*, of the legislative decree *2 luglio 2010, n. 104* ("Attuazione dell'articolo 44 della legge 18 giugno 2009, n. 69, recante delega al governo per il riordino del processo amministrativo") and *art. 4, comma 1, n. 19*, of the same legislative decree *n. 104 del 2010*, "in the part where they assign the disputes relating the sanctions imposed by the *Commissione Nazionale per le Società e la Borsa* (National Commission for Companies and the Stock Exchange, tn) to the exclusive jurisdiction of the

diritto dell'economia, 2011, n. 3/4 , p. 459 ss.; About communication authorities, see P. IULIANO, *Autorità Indipendenti nel settore delle telecomunicazioni e dell'informazione: modelli internazionali a confronto*, in *Diritto ed economia dei mezzi di comunicazione*, 2012, n. 1, p. 61 ss.; Regarding the relationship between the regulation and safeguard of competition in the community policy of network services (with regard to both networks for electronic communications and networks for electricity and gas) and the powers of the national authorities, see G. CAGGIANO, *La regolazione delle reti delle comunicazioni e dell'energia nel diritto dell'Unione europea*, in *Studi sull'integrazione europea*, 2011, n. 1, p. 41 ss.. On the control of financial market, see E.L. Camilli, *Autorità di vigilanza (profili normativi)*, in *Enciclopedia del diritto. Annali*, Volume 5; Milano, Giuffrè, 2012; M. CLARICH, *Autorità di vigilanza (mercato finanziario)*, ibid N. RANGONE, *Mercati finanziari e qualità delle regole*, in *Banca impresa società*, 2010, fasc. 1 p. 55 ss.; G. NAPOLITANO – A. ZOPPINI, *Le autorità al tempo della crisi: per una riforma della regolazione e della vigilanza sui mercati*, Bologna, Il Mulino, 2009; Concerning the Authority for the control of public contracts, see C. CELONE, *La funzione di vigilanza e regolazione dell'Autorità sui contratti pubblici*, Milano, 2012.

administrative court, with jurisdiction extended to the matter of fact and functional competence of *TAR Lazio – sede di Roma* (Administrative Regional Court, tn)⁵;

⁵ According to the *Corte Costituzionale*, the *legislatore delegato* (in the exercise of the delegation conferred upon him by law no. 69 of 2009), "when taking innovative action on the division of jurisdiction between ordinary and administrative judges, had to take into account "the jurisprudence of the Corte Costituzionale and the superior courts", in ensuring the *concentrazione delle tutele*, according to the relevant law (*art. 44, commi 1 e 2, legge n. 69 del 2009*). By attributing to the exclusive jurisdiction of the administrative judge (with the functional competence of TAR Lazio – sede di Roma, and *cognizione estesa al merito*) the disputes relating to the sanctions imposed by CONSOB, the legislator did not take into account the jurisprudence of the *sezioni unite civili della Corte Suprema*. As a matter of fact, the *Corte Suprema* has always made clear that the judicial competence to hear and determine objections (art. 196 del d. lgs. 24 febbraio 1998, n. 58) against the also interdictory sanctions imposed by CONSOB to financial dealers, is up to the ordinary judicial authority, on the assumption that even those sanctions, like the pecuniary ones, are to be applied on the basis of the gravity of the violation, and taking any possible recidivism into consideration, and therefore on the basis of criteria that are not expression of *discrezionalità amministrativa* (administrative discretionary power, tn) (Corte Suprema, sezioni unite civili, 22 luglio, 2004, n. 13703, 11 febbraio, 2003, n. 1992, 11 luglio, 2001, n. 9383). The *Consiglio di Stato*, too, has recognized that, as regards the jurisdiction over disputes concerning the sanctions imposed by CONSOB, *precedenti giurisprudenziali* existed as regards ordinary jurisdiction, confirming the jurisdiction of the administrative judge only on the basis of the *insuperabile dato legislativo*, expressly consolidated in *art. 133 (materie di giurisdizione esclusiva) comma 1, lettera l del d. lgs. n. 104 del 2010*, which rules that "disputes concerning all measures, including the sanctionary ones and excluding those related to the *rapporti di impiego privatizzati*, adopted by [...] the *Commissione Nazionale per la Società e la Borsa*" are up to the exclusive jurisdiction of the administrative judge (*Consiglio di Stato, sezione VI, 19 luglio 2011, n. 10287*), that is on the basis of the very contested provisions. Before the legislative intervention in hand, however, the *Consiglio di Stato* itself had agreed with the statement of the *Cassazione*, according to which the jurisdiction over the sanctions imposed by CONSOB was to be assigned to the ordinary judge (*Consiglio di Stato, sezione VI, 6 novembre 2007, n. 6474; cfr. in precedenza, sezione VI, 19 marzo 2002, n. 4148*). The mentioned jurisprudence of the *Corte di Cassazione* - which points out that the imposition of sanctions by the CONSOB is not up to mere administrative discretionary power, as well as considering that such sanctions can be of both pecuniary and interdictory nature (going so far as to affect the possibility that the sanctioned subject can continue to perform the embarked on activity) - prevents from justifying, at a constitutional legitimacy level, the intervention of the legislator *delegato*, who, deeply affecting the previous arrangement, transferred the disputes relating to sanctions imposed by CONSOB to the exclusive jurisdiction of the administrative judge, moving away from the jurisprudence of the *Corte di Cassazione*, which should have oriented the intervention of the legislator *delegato*, according to the delegation."

- the judgement of the *Cassazione, sez. VI-3 civile, sent. n. 10730, 27 giugno 2012*, which, with regard to the resolution of AEEG, *n. 200/1999* - according to which the service provider must provide a free of charge bill payment option - ruled that the regulatory power of the *Autorità per l'energia elettrica e il gas* (Authority for Electricity and gas, tn) may also provide for regulations that, pursuant to *art. 1339 cod.civ.*, can integrate the content of the pending individual consumer relations, also by repealing in accordance to the law, but only if the latter are merely dispositive and such power is expressly provided by the Authority itself to protect consumers (and therefore, in this case, this resolution cannot integrate the existing contracts, pursuant to *art. 1339 cod.civ.*).

It is also worth mentioning the voidance, by the *Consiglio di Stato*, of the “*Piano di Numerazione automatica dei canali*” (“Logical Channel Numbering Plan”, tn) approved by *Autorità per le garanzie nelle comunicazioni* (Authority for Communication Guarantees, tn), which led to the opening of the new “*Piano*” proceedings. As a matter of fact, with resolution *n. 442/12/CONS of the 4th of October 2012* (“*Consultazione pubblica sullo schema di provvedimento recante il nuovo piano di numerazione automatica dei canali della televisione digitale terrestre, in chiaro e a pagamento, modalità di attribuzione dei numeri ai fornitori di servizi di media audiovisivi autorizzati alla diffusione di contenuti audiovisivi in tecnica digitale terrestre e relative condizioni di utilizzo*”) (“Public consultation on the draft resolution containing the new logical channel numbering plan of digital terrestrial television, free-to-air and pay tv, the process for allocating numbers to audiovisual media services providers authorized to broadcast audiovisual contents in digital terrestrial format and the relevant terms of use”, tn) the *Autorità per le garanzie nelle comunicazioni*, considering the voidance by the *Consiglio di Stato (sez. III, judgment n. 04658/2012, n. 04659/2012, n.04660/2012 e n. 04661/20120, of the 31th of August 2012)* of the logical channel numbering plan of digital terrestrial television, approved by resolution *n. 366/10/CONS*, triggered the process of public consultation on the draft measure.

In the above mentioned judgments, the *Consiglio di Stato* had also traced the path that the AGCOM (Authority for Communication Guarantees, tn), pending the adoption of the new TLC Plan, was called to tread, pointing out the "necessity" that "*in compliance with the principle of fair execution, the AGCOM meanwhile adopt, with the urgency of the*

case, any transitional measure considered necessary in order to permit the orderly use of television programming by the users and operators of the sector ".

And the judges of Palazzo Spada also point out, "*considering the urgency and the necessity to provide*", the possibility of the adoption of a "*de facto extension of the voided LCN Plan, except that it is a remedy to be taken only in case of urgent necessity*".

Exactly in order to avoid the occurrence of a situation of "regulating loop" and "*confusion in the broadcasters' programming resulting from the possibility to freely acquire the remote control numbers on which transmit their schedules*," the Consiglio di Stato also authorized (and "recommended") AGCOM the extension of the voided Plan, provided that the same authority proceeds expeditiously to implement the new Plan ("*It is important to reiterate that, however, AGCOM is required to adopt the new determinations regarding LCN with the readiness corresponding to the obligation to give compliance with this judgment of invalidation of resolution n. 366/2010*").

Therefore, with resolution *n. 391/12/CONS of the 4th of September 2012 ("Proroga, in via d'urgenza, del piano di numerazione automatica dei canali della televisione digitale terrestre, in chiaro e a pagamento, modalità di attribuzione dei numeri ai fornitori di servizi di media audiovisivi autorizzati alla diffusione di contenuti audiovisivi in tecnica digitale terrestre e relative condizioni di utilizzo di cui alla delibera n. 366/10/CONS in conseguenza delle sentenze del Consiglio di Stato n. 04658/2012, n. 04659/2012, n. 04660/2012, n. 04661/2012 depositate il 31 agosto 2012, nelle more della revisione del detto piano di numerazione")* ("Extension, as a matter of urgency, of the logical channel numbering plan of digital terrestrial television, free-to-air and pay tv, the process for allocating numbers to audiovisual media services providers authorized to broadcast audiovisual contents in digital terrestrial format and the relative terms of use", tn) the Authority extended, pending the resolution of the new Plan, the pre-existing numbering Plan and set the time limit for the renewal of the procedure (including the requirements relating to the carrying out of the public consultation and the new survey on users' habits and preferences) providing, for the adoption of the new Plan, a period of one hundred and

eighty days, starting from the public consultation that had to be started within the October 4, 2012.

The previous "*Piano di numerazione automatica dei canali della televisione digitale terrestre*" was approved by AGCOM, with resolution n. 366/2010 (pursuant to art. 32 d. lgs. 31 luglio 2005 as amended by art. 5 d. lgs. 15 marzo 2010 n. 44) which regulated the "LCN - Logical Channel Numbering" system, with the automatic assignment of a number for each channel to providers of audiovisual media services, dictating the process for allocating numbers and the terms of use.

Sky Italia srl, authorized to broadcast under the brand name "Cielo" (using the digital terrestrial network operator "letter A" spa), had challenged before TAR Lazio the above mentioned resolution n. 366/2010 and the relevant numbering plan.

Pending the judgement, the *Ministero dello Sviluppo* (Ministry of Development, tn), while assigning the automatic numbering of nationwide digital terrestrial television channels, gave to the brand names "Cielo" and "Cielo 2" (falling under the category of semi-generalist channels) LCN numbers 26 and 131, rejecting the requests of Sky Italia, which had asked for both brands a number included in the same subgroup of the national generalist channels and, in any case, up to position no. 10 for "Cielo" and no. 11 for "Cielo 2". TAR Lazio, with judgment n. 873/2012, accepted the appeal with regard to the insufficiency of the period of 15 days granted for the consultation of the draft Plan and the failure to include also national digital channels – non former analogue - under the category of national generalist channels, invalidating the AGCOM resolution n. 366/2010 and parts of the numbering plan. The Consiglio di Stato (*RG 921/2012*), with a precautionary injunction, suspended the effects of the judgment under appeal, with reference to "significant aspects of serious and irreparable prejudice".

The regulatory framework was (and is) represented by art. 32 d. lgs. 177/2005 (as amended by d.lgs. 15 marzo 2010 n. 44, adopted pursuant to the delegation conferred by law n. 88/2009, *legge comunitaria del 2008*, in order to comply with the obligations ruled by the *direttiva EC 2007/65* on *Servizi Media Audiovisivi* – SMAV (Audiovisual Media

Services, tn) in implementation of that the AGCOM, in order to ensure fair, transparent and non-discriminatory conditions, was required to adopt a specific "*Piano di numerazione automatica dei canali della televisione digitale terrestre*", setting, with its own rules, the process for allocating numbers to providers of audiovisual media services, on the basis of principles and criteria provided (in order of priority) by the above mentioned regulation⁶. AGCOM, after public consultations on the draft Plan, commissioned a special survey to Demoskopea spa, then used their results. The Authority, once concluded the preliminary investigation, approved with resolution n. 388/2010, the "*Piano di numerazione automatica dei canali della televisione digitale terrestre*", ruling the process for allocating LCN numbers and their terms of use. This Plan, arranged the criteria for the allocation of numbering (art. 3), assigned (art. 4) numbers 1 to 9 to the former analogue national generalist channels, in accordance with users' habits and preferences, and (art. 5) numbers 10 to 19 (and 71 to 99) of the first group of numbers (i.e. 1 to 100) to local broadcasters. According to the *Consiglio di Stato*, the positioning of the native digital channels starting from LCN number 21, did not constitute an infringement of the above mentioned art. 32, comma 2, or a discrimination in comparison to former analogue channels, but was based on the application of a normative parameter that prescribes to allocate LCN numbers "*respecting users' habits and preferences, with particular reference to the national generalist channels and local broadcasters*".

Instead, the Plan had to be considered illegal for violating the minimum time limit of 30 days for the consultation of the interested parties, set by art. 11, comma 1, d. lgs. n. 259/2003 (*Codice Comunicazioni Elettroniche*) (Electronic Communications Code, tn) and

⁶ The directive principles and criteria are: a) guarantee of the ease of use of the logical channel numbering system; b) respect of the habits and preferences of users, with particular reference to national generalist channels and local broadcasters; c) assigning of numbering to national channels on the basis of the prevalent programming criteria, with regard to the thematic programming genres, with adequate gaps in the numbering, aimed at enhancing the local broadcasters' programming and the one linked to the territory, d) identification of specific numbers for pay-media audiovisual services; e) settlement of terms of use for the numbering; f) revision of the numbering plan according to market development.

art. 3, comma 1, resolution *n.453/2003/Cons.* The shorter time limit of 15 days (set in resolution *n.122/210, 16 aprile 2010*) clashes with *art. 11, comma 1*, of the Codice Comunicazioni Elettroniche, which sets for these type of consultations a minimum period of 30 days.

In this regard, the *Consiglio di Stato* pointed out that neither this rule, being part of primary sources of law, could be repealed by the Authority "*in the exercise of its regulatory power*", nor the consultation could be considered substantially occurred (as asserted by the Authority) as based on a similar topic to the one set out in the previous AGCOM resolution⁷.

Above all, though, the *Consiglio di Stato* underlined that "*procedural guarantees have their own meaning, as they are intended to safeguard the proper modus operandi of P.A.*" and therefore "*the detected defect in the procedure for the adoption of the AGCOM resolution and the attached LCN Plan, involves the illegality of the plan itself*".

In the drawing up of the "*Schema di provvedimento*" (draft measure, tn) on which the public consultation is opened, the AGCOM started from the arguments contained in the above mentioned judgments of the *Consiglio di Stato*, which lays down, among other things, the obligation of the Authority to "*give a new judgement on the assignment of numbers to channels [...] following a new survey on users' habits and preferences, to be carried out with appropriate criteria, that ensure the intelligibility of the elements of comparison*" and the inadequacy of the use of the lists of CORECOM (Regional Communication Committees, tn) referred to in *Decreto Ministeriale 5 novembre 2004 n. 292 (Regolamento per le concessioni alle tv locali dei contributi di cui all'art. 45 co. 3 della*

⁷ According to the *Consiglio di Stato*, the previous resolution concerned a different situation, that is the suggestion of a conventional self-regulation as regards the channel numbering, put forward in 2009 by the DGTVI Association, but then dismissed following the coming into force of the new text of *art. 32 d. lgs. n. 177/2005*, amended by *d. lgs. n. 44/2010*, which introduce a LCN system of clearly authoritative nature, precluding the possibility to regulate the numbering on a conventional basis as a result of agreements between sector operators).

*legge 23 dicembre 1998 n. 448) ("Regulation for the granting of subsidies to local TV stations", tn) as a principle for the allocation of numbers to local broadcasters (judgment n. 4658/2012)⁸. The voidance of the Plan (judgment n. 4659/2012) was issued on the base of the illegality of the time limit of 15 days, set by AGCOM for the public consultation launched by resolution n.122/10/CONS (following which resolution n.366/10/CONS was approved), instead of the 30 days set by art. 11 d. lgs. n. 259/2003 (*Codice delle Comunicazioni Elettroniche*)⁹.*

⁸ As a matter of fact "while highlighting such lists of elements potentially related to the criteria laid down by the law, the same could not be used by AGCOM for the adoption of the logical channel numbering plan of digital terrestrial television" as "drawn up for purposes other than those for which the AGCOM plan was drawn up, being the combined result of two factors of the score assignment, that is the turnover and the number of employees." Moreover, the Council of State points out that the procedure for the access to such contributions took place with a voluntary participation of local broadcasters (and about 13% of them did not appear in such lists, as they had not submitted the petition to participate). Therefore, such lists, having been adopted with a different ratio and pursuing goals that differ from the requirements of art. 32 del Testo Unico on audiovisual and radio media services, could only partly be considered as a quality criterion and an indicator of users' preferences and of the stabilization on the territory, because "they also brought out support needs to local broadcasters, preordinated only to grant public fundings", being therefore an unsuitable criterion to verify users' habits and preferences and the broadcasting stations' stabilization on the territory.

⁹ The Consiglio di Stato, in the same judgment, ruled the unsuitability of the use of the criterion of CORECOM lists for the allocation of numbers to local broadcasting stations, being these lists drawn up on the basis of the turnover of broadcasters and therefore unfit to testify users' preferences, as "Even considering that one of the main revenue item is represented by the advertising, the missing step from the advertising to users' preferences remains unproven. As a matter of fact, although the advertising is a useful indicator of the users' preferences (as the advertisers turn usually to broadcasters with the highest number of users), it is ambiguous and inadequate." Instead, the habits and preferences of users are better verified with the "audience rating of each station and its stabilization on the territory, being understood that the legislator has given the "users' habit" criterion a meaning all its own, which does not depend on the audience rating. With reference to the broadcasting stations' quality criteria laid down by law, the Consiglio di Stato points out that "The strategic role of quality local broadcasting stations, that have enhanced customs and traditions of specific geographic areas, heritage of secular and religious traditional local culture, is quite clear. That culture - through media coverage and programmes on festivals, food, places of worship and historic environmental assets – is offered to the younger generation and the audience of

Moreover, with regard to the survey on users' preferences and about the allocation of positions 8 and 9 of the remote control, the *Consiglio di Stato* (judgment n. 4660/2012) pointed out that "*the results of the survey-poll (with 10,000 interviews) carried out by Demoskopea spa on the 2th of July 2010 - which led to the identification, among users' habits and preferences, of 9 favourite national generalist channels – in the constituency's opinion, are not supported by a relevant and unambiguous feedback*" as "*according to the survey, in analogue coverage areas, the former analogue national broadcasters are tuned to numbers 1 to 8, while to number 9 a local station is tuned at 51,1%. The situation, however, changes in digital coverage areas, where the former analogue national broadcasting stations are mainly tuned to all the numbers from 1 to 9 on the remote control*". Therefore "*the data are ambiguous and [...] the results of the survey are misleading, because they add up unhomogeneous elements*"¹⁰.

scholars and trade operators - such as those in the tourism sector, the food and agriculture sector or the craft sector - avoiding both the dissemination of those resources and the weakening of the local community's identity in contrast to patterns of mass behavior, broadcast by the network communications and coming from other cultures, which can be passively accepted by users and result in disjoining effects on socio-cultural contexts already at risk. At the same time, we can not forget, in other respects, the contribution to information and social welfare that the quality local broadcaster is able to offer to the audience in its geographic area, on the occasion of emergency situations as well as specific issues limited to the territory corresponding to its own catchment area." In addition, in the same judgment, the *Consiglio di Stato* made remarks about the assignment of positions 8 and 9 of the numbering plan to "MTV - Music Television" and "Deejay TV", because "*the positions eight and nine must be assigned - in accordance with the habits and preferences of users - to generalist channels, where operating, being understood - as mentioned above - that the criterion of consolidated habits does not depend on the audience rating, while Music TV and Deejay Television can not be put into the category of traditional generalist channels, which have been broadcasting generalist programmes for decades.*"

¹⁰ According to the *Consiglio di Stato*, "*an argument 'ex post', which confirms such lack of investigation, can be found in the identification of the two national broadcasting stations to which the relevant decision of the Ministero dello Sviluppo Economico of 24 November 2010 has assigned numbers 8 and 9 of the remote control: as a matter of fact, MTV and Deejay TV do not have the required characteristics to fit into the category of former analogue generalist broadcasting stations, as they broadcast a programming clearly not aimed at a general audience, but dedicated to a specific group of users, with a prevalence of programmes on youth and, in any case, of programmes*

The Authority, after extending the Plan previously in force, initiated (with resolution *n. 427/12/CONS, of the 13th of September 2012*) the procedure for the choice of a subject to whom entrust a new survey on users' habits and preferences, "*to be carried out with appropriate criteria that ensure the intelligibility of the data and the homogeneity of the elements of comparison*". Finally - with the resolution in hand, of the 4th of October 2012 - the Authority launched a public consultation on the "*Schema di provvedimento relativo all'adozione del nuovo Piano di numerazione automatica dei canali della televisione digitale terrestre*" because of "*the need to change the parts of the Plan deemed incompatible, by the Consiglio di Stato, with art. 32 of the Testo Unico (consolidated act, tn), and the opportunity to carry out the amendment in accordance with the market development*".

The "*Schema di provvedimento recante il Nuovo piano di numerazione automatica dei canali della televisione digitale terrestre, in chiaro e a pagamento, modalità di attribuzione dei numeri ai fornitori di servizi di media audiovisivi autorizzati alla diffusione di contenuti audiovisivi in tecnica digitale terrestre e relative condizioni di utilizzo*") ("*Draft measure containing the new logical channel numbering plan of digital terrestrial television, free-to -air and pay tv, the process for allocating numbers to audiovisual media services providers authorized to broadcast audiovisual contents in digital terrestrial format and the relevant terms of use*", tn) approved on the 4th of October, was published on the Authority's website on the 10th of October and in the *Gazzetta Ufficiale* on the 19th of October (observations must be made, starting from that date, within a period of 30 days).

In the "*Schema di Provvedimento*", first of all, the Authority changed some definitions¹¹ and, among these - also considering the remarks contained in the mentioned

set for a specific user, often taken from English-speaking broadcasters - so they are broadcast in English with Italian subtitles - as well as music shows for a young audience."

¹¹ From "*ambito locale televisivo*" ("tv at a local level", tn) definition (the exercise of television broadcasting in one or more basins - not exceeding ten - even non-neighbouring, as long as with a coverage of less than 50 percent of the national population. The area is named 'regional' or 'provincial' when there is only one basin reached by the

judgments of the Consiglio di Stato – the ones' of “*genere di programmazione semigeneralista*” (“semi-generalist programming genre”, tn) (as a “*programming dedicated to at least three different genres, including the daily news, fairly distributed in the tv daily schedule, including the dayparts with the highest audience rating, none of which reaches 70% of the overall scheduled programming*”) and the expected percentage for the “*genere di programmazione tematico*” (“thematic programming genre”, tn) (a “*programming genre dedicated to a specific theme related to a target audience, to which an audiovisual media services provider directs at least 70% of the programming broadcast in digital terrestrial format*”) seem to have a particular relevance¹².

television broadcast signals - and is located within the territorial borders of a single region or province - and when the broadcaster does not cover other basins; the definition “*ambito locale televisivo*”, quoted without specifications, is also referred to broadcasts in regional or provincial areas) to “*ambito nazionale televisivo*” (“tv at a national level”, tn) (the television or radio broadcasting is not limited to a local area) to “*canale generalista nazionale*” (“national generalist channel”, tn) (nationwide coverage channel, analogue and simulcast digital-analogue, free-to-air, broadcasting especially generalist and information programmes, pursuant to *art. 7 del Testo Unico*).

¹² Also identified: the thematic programming genre “*bambini e ragazzi*” (“thematic programming genre dedicated to children and teens, of different groups of age, for formation, information and entertaining purposes, respecting the minors' rights, in order to protect their dignity and their physical, mental and moral development); the thematic programming genre “*informazione*” (“thematic programming genre dedicated to information, showing news, special reports, debates and live tv, running commentaries, talk shows on social issues and lifestyle”); the thematic programming genre “*cultura*” (“thematic programming genre of educational, historical, artistic, literary and scientific content; programmes on science, art and technology current affairs and entertainment; Italian and European audiovisual works, theater, opera, documentaries, historical re-enactments and reports on social issues and lifestyle”); the thematic programming genre “*sport*” (thematic programming genre dedicated to sport, showing live or recorded national and international sport events, sport news and reports”); the thematic programming genre “*musica*” (thematic programming genre dedicated to music, showing programmes dedicated to all genres and subgenres of music, with live or recorded music events and music programmes dedicated to young artists”); the thematic programming genre “*shopping*” (“thematic programming genre targeted to home shoppers consumers, which aims at providing goods or services you pay for, included real estates, rights and obligations”.)

With reference to the criteria for the allocation of numbering, the "Schema di provvedimento", after pointing out that the numbering plan had to be organized so as to ensure "*the ease of use of the logical channel numbering*" and to "*respect users' habits and preferences*" ("with special reference to national generalist channels and local broadcasters"), introduced in the first group of numbers "*adequate gaps [...] that enhance the local broadcasters' programming and the one linked to the territory*". In particular, it was expected that the numbering assigned to the national native digital channels (except for the national generalist channels) had to be carried out according to the subdivision of programming in the following genres: semi-generalist, kids and teens, information, culture, sport, music, shopping¹³. Numbers 1 to 9 and ("for those which do not fit in this sequence of numbers") at least number 20 of the first numbering set, were assigned to national generalist channels. Within this subgroup, the allocation of numbers was carried out "*according to the principle of respect for users' habits and preferences*"¹⁴.

As for local broadcasters, they were assigned numbers 10 to 19 and 71 to 99 of the first numbering set (and for the second and third numbering set, groups of numbers – also allocated to local broadcasters - are repeated with the same sequence), while the

¹³ In the first numbering set, broadcasting adult-targeted programmes is banned, including programmes promoting telephone services such as *voice messaging, hot-line, chat-line, one-to-one* and similar. Pay-audiovisual media services have specific numberings, which start from the fourth numbering set.

¹⁴ With reference to the assignment of numbers 7, 8 and 9 to former analogue national channels, the *Cosiglio di Stato* (*sent n. 04660/2012*) laid down the obligation for AGCOM to "give a new judgement on the assigning of numbers to the channels under consideration, following a new survey on users' habits and preferences, to be carried out with appropriate criteria that ensure the intelligibility of the elements of comparison," specifying that "*the positions eight and nine must be assigned - in accordance with the habits and preferences of users - to generalist broadcasting stations, where operating, being understood - as mentioned above - that the criterion of "consolidated habits" has a meaning all its own, which does not depend on the audience rating*. Consequently, the AGCOM initiated the procedure for the choice of a subject to whom to entrust a new survey on users' habits and preferences, to be carried out with appropriate criteria that ensure the intelligibility of the data and the homogeneity of the elements of comparison.

seventh numbering set is reserved for local broadcasters¹⁵. Numbers 21 to 70 of the first numbering set were assigned to free-to-air national digital terrestrial channels, divided into the following programming genres: semi-generalist, kids and teens, information, culture, sport, music, shopping. The allocation of numbering to these channels was proceeded on the basis of a division of the programming genres in subgroups (in case of requests exceeding the availability of numbers, the assigning in the second numbering set of numbers relating to the "teleshopping" genre was provided).

The decision on the size of each subgroup was handed over to the Ministry ("according to the existing offer and taking into consideration the requests made by the national audiovisual media services providers, who already have a digital terrestrial

¹⁵ The "Schema di Provvedimento" pointed out that, in order to enhance the quality programming and the one linked to the territory, the numberings relating to sets coming under the competence of local broadcasters in every region (and in the autonomous provinces of Trento and Bolzano) were assigned, starting from number 10, according to the allocation resulting from special lists prepared by the *Ministero dello Sviluppo Economico*, giving scores with regard to the following evaluation criteria: quality of programming, users' preferences and the stabilization on the territory. The quality of programming was evaluated on the basis of the editorial plans of the past five years and the employees, up to a maximum of 50 points, with reference to the following aspects: a) percentage of information programmes out of the total of broadcast programming; b) percentage of self-produced information programmes out of the total of information programmes; c) percentage of self-produced programmes linked to the territory out of the total of shown programming, net of the information programmes; d) number of daily news, with regard to their total duration; e) percentage of culture and education programmes and those dedicated to minors; f) number of employees. Shopping programmes are not considered self-produced programmes. Instead, users' preferences and the stabilization on the territory are calculated on the basis of the audience ratings, the number of years of tv broadcast and the extent of coverage, with reference to the following aspects: a) users' preferences are calculated on the basis of the audience ratings, detected by AUDITEL (Italian association for audience measurement, tn) in the last years; b) number of years of tv broadcast of the transmitting station; c) extent of the coverage of the transmitted programme. Local broadcasters that transmit the same programme in several regions and intend to ask for the assignment of an identical numbering for all the covered areas, are given numbers from 75 to 84, on the basis of lists for multi-region broadcasting.

broadcast licence [...], yet saving no less than 30 % of each subgroup for new entrants")¹⁶. The fourth and fifth numbering sets were assigned to pay-audiovisual media services¹⁷, while the sixth group is assigned to high definition (HD) channels and the eighth to radio services (the numberings following the eighth numbering set are assigned to other types of services)¹⁸. In conclusion, article 10 of the "*Schema di Provvedimento*" regulated the procedure the Ministry must follow in order to proceed with the re-allocation of numbers to providers of audiovisual media services, in accordance with the new numbering plan¹⁹.

¹⁶ In addition, the groups and subgroups of numbers in the first numbering set, were repeated with the same sequence in the second and third numbering sets, except for a possible insertion of a subgroup appointed to the thematic programming genre “shopping”, starting from the second numbering set.

¹⁷ Within this subgroup, the numberings were assigned on the basis of the offer/package of each pay-audiovisual media services broadcaster. The allocation of a numbering set to each offer/package is made on the basis of the requests of each subject and of his actual need, according to the transmitted contents.

¹⁸ System services, such as tv guides and mosaic channels, were assigned the numbers 0, 100, 200, 300, 400, 500, 600, 700, 800, 900.

¹⁹ The Ministry publishes the national, regional and multiregional announcements for the allocation of numberings, within thirty days, starting from the entry into force of the new Plan, asking the interested parties to submit their applications for requesting the allocation of numberings within the period stipulated by the announcements. The Ministry makes the lists and assigns the numberings to the applicants within the period stipulated by the announcement. The lists are made public. Until the allocation of new numberings, those currently in use remain in force. Following the first phase, the Ministry allocates the available numberings according to the applicants' requests. If the requests exceed the available numberings, the Ministry will act through public draw. If a single subject submits an application for the allocation of several numbers, he can be assigned only one number for each requested genre. The number obtained following the public draw, can not be exchanged for at least one year after the assignment. The allocation of numbers is carried out for the duration of the authorization to provide audiovisual media services issued to the requesting subject. The allocation of numbers to subjects who already own a digital terrestrial broadcasting licence, is carried out by the Ministry with a separate supplementary measure. The Ministry announces the allocation of numbers to the applicants and to the Authority and makes them available on its website; to do so, it makes a public list with the assigned numbers and the respective assignees, as well as the numbers still available, and it updates it periodically.

With reference to the regulatory powers of the *Autorità per l'energia elettrica e il gas*, the *Consiglio di Stato*²⁰ has confirmed some important decisions already reached by the administrative jurisdiction (especially of second instance), with particular reference to the distinctive features of the regulatory power over natural gas distribution, the conditions of compatibility of the regulatory power with the *principio di legalità* (the rule of law, tn), and the limits of the judicial review over the exercise of such power.

The judges of Palazzo Spada were asked to give their opinion on four judgments of TAR Lombardia, with which several disputes, regarding various aspects of the regulation over the process for rates regulation in the field of natural gas distribution, had been settled²¹. The *Consiglio di Stato*, after highlighting the "particular amplitude" of AEEG's regulatory power (explicitly referring to the notion of "implied powers" and using as a main argument the "highly technical" connotation of the regulated sector, a sector that needs a continuous renewal of the contents of the single normative disciplines)²², has reiterated the argument, which was already made clear²³, that gives the principle of due process (and thus

²⁰ *Consiglio di Stato, sez. VI, 2 maggio 2012, sent. N. 2521.*

²¹ Such regulation was made by AEEG with resolution of 22 dicembre 2008, ARG/gas 159/08, entitled "Testo Unico delle disposizioni della regolazione della qualità e delle tariffe dei servizi di distribuzione e misura del gas per il periodo 2009-2012 (TUDG)" ("Consolidated Act of the measures for the regulation of the quality and the tariffs of gas distribution over the period 2009-2012", tn), and following amending and supplementary resolutions.

²² "Usually, as regards regulatory acts, the law [...] does not indicate the details of their contents. The partial exception to the principle of substantive justice is justified because of the need to ensure the accomplishment of the purpose that the same law predetermines: the special technicality of the sector requires, as a matter of fact, to assign to the Authority the task of constantly review and adapt the content of the technical rules to the evolution of the system. A legislative rigid predetermination would form an obstacle to the pursuit of these purposes: hence the compliance with the Constitution, in relation to the regulatory actions under consideration, of implicit powers." (*Consiglio di Stato, sez. VI, 2 maggio 2012, sentenza n. 2521*).

²³ Also TAR Lombardia, sez. III, 3 gennaio 2011, n.1, reiterated the need for AEEG to exercise its functions through participatory processes: "The general rules of the administrative activity, which exclude, from what concerns the application of the rules on participation, the activity of the public administration interested in

the provision for formation procedures of the legislation of independent authorities) the task of "making up for" the so-called "*perdita di legalità sostanziale*" ("loss of substantive justice", tn): *"The fall in value of the principle of substantive justice [...] implies [...] the strengthening of the principle of procedural justice that is embodied, among other things, in the provision for enhanced forms of participation of the sector operators in the formation procedures of the normative acts"*.

The emphasis placed by the *Consiglio di Stato* on the importance of procedural guarantees serves both to establish the control powers of the administrative judge throughout the various phases of a trial proceeding, and, above all, as a moment of emergence of the different evaluation options and the attention that AEEG has brought to

promulgating general regulatory and administrative acts, are not applied to regulatory proceedings carried out by independent authorities" since "the exercise of the regulatory powers by the Authority, placed outside of the traditional tripartition of powers and of the responsibility outlined in the art. 95 of the Constitution, is also justified by the existence of a participatory process, used as a tool of participation of the interested parties, aimed at replacing the dialectic of the representative structures." In addition: "In the areas regulated by the Authority, in absence of a complete and precise code of conduct which outlines the obligations and prohibitions laid down by the legislature, the fall in value of the substantive justice must be counterbalanced, at least in part, by a reinforcement of the procedural justice, in the form of adversarial proceedings. An essential tool to enrich the basic knowledge of regulatory activities is the prior consultation, aimed at collecting the interested parties' comments through hearings and "notice and comment" processes, which informs in advance of the draft act, and allows interested parties to submit their comments." Moreover, in the light of all this, it is necessary to point out that "the simple rejection of the suggestions advanced by the stakeholders, does not require a specific rebuttal for each of them and it is not loaded with abuse of power." As regards the foundation of the regulatory powers of Aeeg, the TAR adds: "The rule of law, as it is known, operates also on a personal level, in the distribution of powers among the various public bodies and is referred to in art. 97 of the Constitution, which leaves to the law the organization of the public offices. While there are no exceptions to this principle, with regard to the independent authorities, it must be observed that, since the legislator, in selecting the functions attributed to each authority (see l.n. 481/1995), used general and flexible forms declaimed "by target", as therefore only accepted a wicker linguistic version compatible with the Constitution any time it is not the case of decisional measures involving deprivation of the parties (similar, but with reference to an act with general, not normative, content, TAR, sect. III, 11 October 2010, n. 6913).

each of them. In this regard, the *Consiglio di Stato*, on the decision over the control power of the administrative judge over the technical evaluations of public administration, used the expression “*ragionevolezza tecnica*” (“technical reasonability”, tn) to indicate that the technical assessments made by AEEG in the exercise of the regulatory power are subject to a judicial review, to be carried out also on a reasonable point of view: “*The Authority's acts [...] are usually expression of technical evaluations and therefore amenable to judicial review - according to criteria belonging to the interested sector - only when the Authority has made choices that are in contrast with what may be called the “principio di ragionevolezza tecnica”*” (“technical reasonability principle”, tn). *The fact that the taken decision is merely questionable, for the method and procedure followed, is not enough. As a matter of fact, according to the constitutional principle of separation of powers, the administrative judge is not allowed to replace, with his own decisions, the assessments carried out by the Authority*”. Therefore, the interested parties have to prove “*the existence of signs of abuse of power, which demonstrate that the decision taken by the Authority is in contrast with the above mentioned technical reasonability principle*”.

The administrative case law, with reference to the assessments carried out by the independent administrative authorities, after rethinking its previous assessment, aimed at formalizing some sort of distinction between “*controllo forte*” (“strong control”, tn) and “*controllo debole*” (“weak control”, tn) (used by the administrative judge over the weighting process carried out by the independent authority), appears to be directed towards a control on the “*ragionevolezza*” (reasonability) of the choices made by the independent authority among the various options that were available and as emerged during the formation procedure of the regulatory act. Hence, the importance guarantees of an open participatory process (and AEEG’s experience - as we have seen - is particularly significant)²⁴.

²⁴ In case of the introduction of partial amendments or additions to previous resolutions, the AEEG deemed unnecessary to renew the entire consultation process already put into action and the administrative jurisprudence (*Consiglio di Stato, sez. VI, aprile 23, 2007, n., 1822, in Foro Amm-Cons. Stato, 2007, 1256*) has recognized that,

Finally, in accordance with the strategic objective of improving the quality of regulation (objective pursued by the triennial strategic plan 2009-2011), AEEG brought much attention on the implementation of the information contained in the resolution *GOP 46/08 ("Introduzione della metodologia 'AIR'" - "Analisi di impatto della regolazione nell'Autorità per l'energia elettrica e il gas")* ("Introduction of "Air" methodology – Analysis on the Regulation Impact in the Authority for electricity and gas", tn), which divided the consultation process into three phases, in each of which AEEG forwarded a new document to be consulted and, consequently, to get remarks on the proposal submitted by the Authority (also providing for technical meetings for full examinations). In this process, the initial proposal was therefore reformulated twice, in order to reach a final decision widely agreed on²⁵. Therefore, the AIR technique, with its procedural articulations described in the triennial strategic plan, arose as an ordinary technique followed by AEEG in the adoption of the most significant acts²⁶. The same approach was applied to the

where the changes made are marginal, "*a complete renewal of the procedural participation already in practice, with reference to the resolutions that have outlined the subject and make the limitation of the contraddittorio (adversary procedure/cross-examination, tn) logic - exactly because related to marginal amendments to an already outlined system – only to producers who are directly interested to the amendments*" is not required.

²⁵ PUCCINI, cit., pointed out how this new and original propounded procedure and this gradual adjustment of the solutions, even in oral *contraddittorio*, on the one hand can ensure the actual influx of the interested parties and an effective and conscious involvement in the contents of the regulation, even confronting opposite parties at the same time and, on the other hand, can lead to a final rule everybody agrees on.

²⁶ The same technique was followed by AEEG on the occasion of the adoption of the " *Testo Integrato delle disposizioni dell'Autorità per l'energia elettrica e il gas in ordine alla regolazione delle partite fisiche ed economiche del servizio di dispacciamento (settlement TIS) comprensivo di modalità per la determinazione delle partite economiche insorgenti dalle rettifiche ai dati di misura con modifiche alla deliberazione n. 111/06)*" (*Resolution ARG / elt 107/09 del 30 luglio 2009*). Even in this case, the AEEG first presented a document indicating the objectives to be pursued and the proposals to achieve them; following the outcome of the first round of consultation, the AEEG submitted a second document, designed to clarify in detail the preferred options and on which a further consultation phase was held. Moreover, it often happens that the AEEG, with further proceedings (eg. through specific forms of consultation) acquires other significant elements for the choices to be made. In this way, in addition to the enrichment of the single procedure, it is the whole regulatory function that "uses" several

regulatory production of AEEG over the last years, aimed at subjecting to “revision” (*“manutenzione evolutiva”* – “evolutionary maintenance”, tn - is the expression used by AEEG itself) regulatory acts previously adopted²⁷. And the same was also applied to for the *“Documento per la Consultazione”* (“Consultation Document”, tn) of 31 October 2012.

processes, converging to provide significant data for the choices to be made. Once again, the regulatory function proves to be an element that provides unity to the many powers enjoyed by a single independent administrative authority.

²⁷ See for example resolution *GOP 33/09 del 21 luglio 2009*, entitled *“Misure per la semplificazione delle attività di regolazione dell’Autorità per l’energia elettrica e il gas: ricognizione dei provvedimenti relativi agli anni 1999, 2000 e 2001, che hanno esaurito i loro effetti”* (“Measures for the simplification of the regulatory activities of the Authority for the electricity and gas: acknowledgement of the adopted measures in 1999, 2000, 2001”, tn).