



III-1.9: La régulation des réseaux industriels. Quelles évolutions et perspectives en France et en Europe? Par la Fondation Nationale Entreprise et Performance

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Translated
Article



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MAIN INFORMATION

"The regulation of industrial networks, what evolutions and perspectives in France and in Europe? by Fondation Nationale Entreprise et Performance"

This report aims to improve the regulation of industrial networks in France and in Europe. Therefore, the Fondation nationale Entreprise et Performance (FNEP) concentrates its study on industrial networks, a category in which it includes telecommunications, energy, rail transportation, and postal services, in France and in Europe. The report proposes new rules or adaptations to old ones in order to increase regulators' independence, efficacy, and oversight. It then suggests rules be modified to allow for the implementation of regulation at the European level, whenever the relevant market is European in scale.

CONTEXT AND SUMMARY

In her preface, Marie-Dominique Hagelsteen defines regulation as the "appropriate form of public intervention in private activities involving concerns that go beyond the companies involved." This broad definition of regulation could be applied to a great deal of industries, such as finance, healthcare, or even to the general concern for the common interest rather than any particular industry, such as environmental protection. The report concentrates its analysis on what are commonly called "network industries," namely telecommunications, energy, rail transportation, and postal services.

The study first performs a comparative analysis of the question by taking examples from various European countries (Germany, The Netherlands, United Kingdom, and Sweden) and non-European countries (South Korea, United States), distinguishing between national initiatives and the influence of European Union legislation, which, even though there is no such thing as a pan-European regulator, has nonetheless shaped member states' national models. This temporal and spatial description provides a clear and easily understandable panorama of the relevant economic theories and legislation. Specialists will be able to recognize the fundamentals, and less specialized readers will benefit from a perfect general introduction to the subject.

The report is based on observations gleaned from many months of interviews and visits abroad

performed by the Foundation's team. These observations are the basis for the series of 9 propositions that are intended to improve the regulation of industrial networks in France and in Europe.

First of all, the report is in favor of a tax on the regulated industry to finance the regulator's budget. This measure is intended to protect regulators' independence, which is directly proportional to their budgetary independence. The rate of this tax would be proposed by the regulator and approved by Parliament. In order to enable regulatory agencies to develop sufficiently close and expert relationships with the industry, the report proposes that agencies be led by a multidisciplinary team of full-time employees. As is already the case in many countries, all regulators should systematically carry out public consultations and publish a summary of these consultations before making any decisions, and all major decisions should be preceded by an impact study. Lastly, because of the importance of regulators' activities, their calendar should be made public. The report also believes that these procedures would be sufficient to end many of the criticisms about regulators' lack of independence.

However, the report also reminds the reader that regulators must be held accountable. The authors insist that accountability should take the form of judicial review, which implies that magistrates must receive an education in economics and technology, equivalent to that of the lawyers with whom they must deal on a daily basis. Furthermore, magistrates should be kept in office for three to six years.

Regulatory agencies must also be evaluated on the basis of their performance. Indeed, the report borrows the notions of efficacy from economics and economic law and suggests rules of "performance." Thereby, regulators' means and support functions must be mutualized, and a parliamentary body must have the power to periodically evaluate the regulation of any particular industry. In order to increase this method's efficacy, the report suggests that regulatory agency's boards of directors establish a "roadmap" detailing their goals, which should also be approved by Parliament.

The Foundation's report then addresses the substantial theme of industry regulation. The authors pertinently remark, "better regulation means guaranteeing the proper functioning of strategic industries over the long term." This is a broadened understanding of regulation that goes beyond market failure and therefore also goes beyond institutional concerns, and a crucial one at that, because it not only takes into account the ever closer relationship between regulation, investment, and industrial and economic policies, but also because in the near future it will likely be implemented at the European level in many industries. To that end, the report proposes that foresight committees be created within regulatory agencies, and that these committees be granted the ability to set long-term price orientations in order to allow prices to meet market expectations.

But the report goes further in its ambitions for regulators, which it sees as technical experts for society's debates. This is why Parliament should be required to ask for their opinion before voting any law or amendment concerning a regulated industry.

The second part of the report (chapter III) is devoted to the major issue of a potential European harmonization of regulation. The authors cite one of the people they interviewed, who stated that national markets have been successfully opened to competition, but that a European market has yet to be created. The study points out that national regulatory systems are highly disparate, not only from a legal point of view, but also from an economic and technical one. Therefore, the report desires the creation of a "European regulatory law". The authors themselves use the quotation marks because they propose a minimal solution by which good practices would be propagated, a common set of powers would be granted to all regulators, and cooperation between national regulators would be increased. This solution would allow national regulators' decisions to have an impact on other member states: indeed the markets are geographically European, but must yet become European in substance.

The report observes that the industries on which it focuses are essentially national, but that European construction makes going further than simple cooperation—such as within the frameworks

of the ACER in energy regulation or the BEREC in telecommunications regulation—necessary. Indeed, the network of competition authorities is a model of efficiency, but the very idea of cooperation via networking is insufficient. According to the authors, true regulatory bodies must be created in every instance where European issues come to play on a market. Such issues exist in the field of energy (interconnection stations), rail transportation (corridors and border crossings), and telecommunications (interconnections and roaming).

This institutional evolution would strengthen the idea of a “service in the general economic interest” at the expense of competition, which was the primary goal in the past, but which it would be more appropriate to nuance when faced with European public services.

Furthermore, the document posits that the creation of European regulators is necessary because building a common market requires the construction of trans-European networks, which itself requires adequate regulation that can only take place at the European level. The report highlights that the reason why European regulators are so necessary is because European construction, rather than implementing competition on national markets, should be the goal. However, the report concedes that the creation of such bodies is only conceivable in the medium-to-long term.

It is true that the report can only formulate propositions for the long term because of the audacity of these propositions: for example, the report proposes transferring national regulatory agencies’ dispute settlement powers to the hypothetical European agencies, which should also benefit from the power to set prices. National regulatory authorities would only be consulted for their opinions.

Finally, a “European Observatory of Network Industries” should also be created to evaluate policies in this domain.

Links with other documents in the same sector

BRIEF COMMENTARY

Full citation: Fondation nationale Entreprise et Performance, *La régulation des réseaux industriels. Quelles évolutions et perspectives en France et en Europe?*, Preface Hagelsteen, Marie-Dominique, 105 p., La documentation Française, 2011.

This report is interesting for many reasons, if not only because it is the work of a diverse team whose members mostly work in these industries. Furthermore, the team conducted many interviews and travelled extensively to draw up its report. The result is a clear and well-constructed paper that does not get tied up in what might be called the “regulatory erudition” contained in the hundreds of detailed studies available on this topic.

The primary virtue of this hundred-page report is its concision and its simple and clear language, which belies an excellent technical mastery of the topic despite the fact that it adopts a multidisciplinary perspective.

The second major interest of this report is the preeminence it has accorded to propositions, rather than technical information. To cite an example, it is to be congratulated that so few pages deal with the sempiternal question of regulators’ legitimacy, since all potential points of view on the question have already been heard and discussed, and that the report prefers to spend more time describing little-known regulatory systems, such as those of the Netherlands or South Korea, or justifying its original propositions concerning European regulation *de lege ferenda*.

Furthermore, the report prefers procedural solutions to resolve the question of regulators’ legitimacy, such as obliging regulators to perform public consultations before making rules. This seems to lump general and individual rules together, and although we would have preferred a clearer distinction between these two types of decisions, this does not affect the interest of this report. The first part of the report is clearly in favor of a political and technical system that provides regulators

with power and the means to exercise it.

These developments are more like affirmations than propositions, since they relay and support propositions made by others, especially regulators. The second part of the report is more audacious because nobody has yet proposed either “European regulatory law,” or the creation of common regulators. This is the report’s third major point of interest, since it places European construction at the heart of regulatory issues, which is a rare approach as compared with the traditional points of view that limit regulation to the simple liberalization of formerly monopolistic industries.

Of course, European integration in this field is currently underway, but only in industries that are not studied by this report (banking, financial, and insurance industries). It is true that it is difficult to conceive of a “European law” governing national regulators and national regulatory systems because of the very rules of subsidiarity governing the European Union. The report prudently evokes the “lack” of a “common framework,” but affirms that « le manque » d’un tel « cadre commun » mais affirme que « la mission n’avait pas vocation à se pencher spécifiquement sur les outils juridiques permettant de créer ce cadre commun ... »¹ (p. 82). The proposed “European law” is no longer precisely defined thenceforth, and it seems to be nothing more than a set of recommendations that group together good practices.

However, looking at other industries, one observes that the financial crisis has justified rapid European integration via regulatory and supervisory institutions that were implemented in 2011 using hard law, such as the ESMA (*European Securities and Markets Authority*).

It is true that a similar cause does not exist in the industries examined by this report. The reason that the study proposes this sort of integration is therefore different, and has the merit of being just as clearly expressed as the first part of the report: if the market in question is European in scale, it needs integrated European regulation. Moreover, this is the prerequisite for obtaining long-term European investments. European regulation is therefore the way towards European construction.

One might think at first glance that this is a different approach than the one that has presided over the institutional integration of the banking, financial, and insurance industries. The report does not address these industries, which is understandable since the report already impeccably analyses an immense field, and follows the distinction between “network industries”—such as telecommunications, energy, rail transportation, and postal services—and the other aforementioned industries.

However, this distinction is becoming weaker because technology has led to the financialization of the economy, and financial, banking, and insurance products pass through telecommunications networks. Digital convergence has shattered the distinction between the container and its contents, and similarly, financial products are now exclusively based on natural resources, such as energy.

Had it been mentioned, this reality would have brought clout to the innovative propositions formulated in this report, since Europe has already integrated the regulation of its banking, financial, and insurance industries. Network industries have become financialized, and must therefore be transitively regulated in an integrated fashion, in addition to the many other reasons for doing so.

1. “our mission was not to study the legal tools that would allow for the creation of this common framework...”