II-6.23: The Financial Regulator's liability must be examined by an administrative jurisdiction when the facts involved do not strictly concern an individual decision, the only hypothesis when a civil jurisdiction is statutorily competent

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MAIN INFORMATION

The Tribunal des Conflits ruled in a May 2, 2011 decision that administrative courts have jurisdiction over examining the Autorité des marchés financiers (AMF¬—French Financial Markets Authority)'s liability when the facts involved are unrelated to an individual decision against a corporate plaintiff, but rather pertain to the conditions under which applications for the approval of documents relating to public issuance of shares are examined: the AMF is a legal person incorporated according to public law, and this is not a case in where jurisdiction had specifically been transferred to civil courts of law.

CONTEXT AND SUMMARY

Europe Finance et Industrie (EFI) is a corporation that provides investment services. It submits documents and prospectuses for approval to the AMF on behalf of its clients, so that they can publicly issue shares. The company alleges that between 2002 and 2004, the regulator is guilty of having taken too much time in order to approve the documents in question.

It therefore sued the AMF in order to obtain reparation of the damages it suffered, and invoked Article L.621-30 of the *Code monétaire et financier* (Monetary and Financial Code), which designates civil courts of law competent to hear suits brought against individual decisions taken by the Financial Markets Authority.

But, the Court of Appeals of Paris declared itself incompetent to try the suit in a January 16, 2007 ruling, on the grounds that the AMF is a "legal person incorporated under public law," and article L.621-30 states that the attribution of jurisdiction to civil courts of law does not concern the entities mentioned under subsection II of article L.621-9, which includes investment service providers.

Therefore, *EFI* brought the suit before the Council of State. The public reporter declared that civil law courts, rather than administrative law courts had jurisdiction over the AMF's liability, because of the theory of "*blocs de compétence*" (blocks of competence). A game of "hot potato" seemed to be starting, in which the civil and administrative legal orders would claim that the other was competent over the case.

In such cases, the *Tribunal des Conflits* must be convened. The Council of State deferred the case to this special jurisdiction, stating, in its December 28, 2009 ruling, that this was a "serious difficulty."

In its May 2, 2011 ruling, the *Tribunal des Conflits* primarily stated that "the liability of the State, or of other legal persons incorporated under administrative law, for of damages alleged to have been caused by their public administrative services is subject to the principles of administrative law and therefore must be tried by an administrative law court." The ruling goes on, affirming that, "it cannot be otherwise unless the law, via an explicit statutory provision, has derogated from this principle."

Thereby, the die is cast.

Indeed, using the technique of syllogism—applying the major part of the aforementioned reasoning to the facts, which are the minor part of the reasoning—the Court observes that Article L.621-30 of the *Code monétaire et financier* ascribed jurisdiction to civil law courts for suits concerning the abrogation of, or liability arising from, individual decisions made by the regulatory authority. But, the plaintiff's suit alleges damages arising from the irregular conditions under which applications were examined. Therefore, the suit brought against the *Autorité des marchés financiers* "is completely unrelated to any individual decision that the authority may have made, and concerns this authority's execution of its mission of public administrative service."

An administrative law court must therefore hear the suit in order to determine whether the *Autorité des marchés financiers*' liability may be invoked in this case.

Links with other documents in the same sector

BRIEF COMMENTARY

The first remark concerns the extreme complexity of the French system. In the same way that the American system is bogged down with questions of whether Federal or State courts have purview over various questions, this case is based on whether civil law or administrative law courts have purview over regulators' liability. More than ten years later, the company that brought suit just barely determined the court before which its case may be tried...The duality of orders of jurisdiction, which constitutes the summa divisio of the French system, is aberrant to its regulatory efficiency.

From the perspective of the economic analysis of law, one sole jurisdiction ought to have purview over such questions. Since civil law courts already have purview over suits concerning individual decisions, be it their abrogation, reformation, or liability arising from them, it would be economical—and this is the very idea of the theory of "blocks of competence"—to centripetally endow them with purview over all other suits.

The Tribunal des Conflits decided otherwise in the present case. This decision is, by its very nature, prejudicial to all economic operators. Furthermore, every procedural decision contains a hidden substantial definition. An example is in the Compagnie des Diamantaires d'Anvers ruling of June 22, 1992, in which the Tribunal des Conflits used downstream reasoning: what the regulator's activity bore upon.

Following the opinion of the Commissaire du Gouvernement (The Government's 'attorney' in French administrative proceedings), the Tribunal ruled that the regulator's role was to regulate markets, which are a liberal organization, and which therefore justified that jurisdiction be granted to the civil law judge, since civil law courts are the natural forum for suits concerning economic exchanges.

Adopting a more procedural angle, one might say that procedure is the necessary predicate for individual decisions, and that the purview granted to civil law courts to appreciate regulatory liability for individual decisions ought to appreciate the procedure that led it to make that decision.

The Tribunal des Conflits surprisingly broke the link between procedure and decision because it reasons according to a logic completely different from those that were just exposed: the

concern that justice is not rendered when such delays occur because operators desperately have to seek the correct judge, and the economic analysis of the legal situation and the link between procedure and decision. Indeed, following a classic public law approach, the Tribunal des Conflits sought out the origin of the attribution of jurisdictional competence, meaning it used upstream reasoning (the origin of the power), rather than downstream reasoning (the subject upon which the power has bearing). First and foremost, the Tribunal's ruling states that the liability of a legal person incorporated under public law "is subject to a regime of public law and therefore is subject to the purview of the administrative law courts." Since statute only derogates from this principle for individual decision, and that in the present affair this is not exactly the case, we must return to the principle of the natural jurisdiction of administrative law courts in order to examine whether the Autorité des marchés financiers' liability can be invoked in the execution of its "mission of public administrative service."It is regrettable that this absolutely classic formal syllogism has prevailed over the aforementioned concrete and modern arguments.