I-1.31: The Competition Authority between "regulation" and competition policiy

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Two and a half years after having been established by the LME[1], the French Competition Authority has uncontestably acquired its "place in the sun" amongst the competition authorities of other countries, as demonstrated by multiple indicators. Its (excellent) global ranking amongst competition authorities performed by Global Competition Review is the best illustration[2] of this observation. But, we could also cite its international aura as demonstrated by the many invitations its President, Mr. Bruno Lasserre, has received to speak at the most prestigious international conferences, its leadership role in the European Competition Network and the International Competition Network[3], or the headlines economic and financial publications have devoted to this Authority's decisions.

The establishment of such an important "authority" with so many powers justifies that practitioners momentarily forget the "heat of the action" to think about its role in France's legal and institutional system, in terms of its goals and whether it has the appropriate means in order to fulfill its goals.

The subject that will be discussed—or even more modestly, will be initiated in this paper—bears upon two points:

- even though recent legal semantics cause hesitation on whether or not to classify the Competition Authority amongst the "regulators", practice forces us to admit that it is a regulator;
- if the Competition Authority is a "regulator", what is its place in relation to other institutions that make rules and also have a role in setting competition policy?

I.Even though this affirmation is not perfectly orthodox, the Competition Authority is indeed a "regulator".

1.According to proper legal orthodoxy, the Competition Authority was not designed to be a "regulator".

In order to determine whether or not an authority is a "regulator", a practitioner must consult the many books and articles that have been written on the rise of "regulation" since the end of the 1970s. Without going so far back in time as to cite the "fathers" of regulation[4], it is possible to consult Marie-Anne Frison-Roche's seminal article, which established the existence of a new branch of law, "regulatory law" [5]. Using this article, we can schematically identify the following characteristics of regulation:

a)It can be defined by its subject material (or the area to which it is applied, "*ratione materiae*"): regulation is applied to sectors of the economy that are not open or insufficiently open to competition, and/or which are subject to a compromise between free-market competition and other principles of socio-economic organization (public service obligations, plurality of the media, respect of prudential rules, security, etc.)

This approach has been confirmed both by the OECD[6] and by the International Competition Network[7]. The list of relevant sectors ceaselessly grows longer: in the beginning, the energy, telecommunications, transportation, and financial industries were targeted, but today, this list also includes healthcare and foodstuffs[8].

A preliminary opposition of principle thus appears between competition law and regulation, as defined above: the common law of "competition" applies to all unregulated goods and services, and is not intended to construct and maintain competitive equilibrium within an industry, but rather to punish artificial hindrances

to the "natural" process of competition (cartels, abuse of dominance). In this sense, there are only sector-specific regulators, and the Competition Authority is not a regulator.

b)But, regulation can also be defined using its original methodology: it establishes an organizational and punitive relationship intended to achieve an efficient equilibrium between relevant operators, the requirements of openness to competition, and the other constraints placed on the industry. In this sense, "the end justifies regulation's means": the regulating authority must have all necessary powers (rule making, investigation, sanction) allowing it to act both *ex ante*, but also *ex post*, if needed.

Here once again, a competition authority is different from a sector-specific regulator because its essential role is not to act ex ante, but rather, ex post, thereby enforcing compliance with a preexisting rule rather than seeking effective action on the ground[9].

c)Finally, regulation can be defined using the existence of specific institutions outside the State's traditional apparatus—they are neither part of the civil service, nor are they tribunals: in France, they are described as belonging to the category of "independent administrative authorities"[10].

Anne Perrot[11] pointed out in 2002 that sector-specific regulators were significantly different from competition authorities, both in their approach—'technical' for the former, 'generalist' for the latter—and in their composition (sector-specific regulators are mostly composed of experts), their method of intervention (sector-specific regulators intervene continuously, whereas competition authorities intervene on an ad hoc basis), and their procedures (the rules concerning due process and the separation of internal functions is less strict for sector-specific regulators).

2.But, this perspective does not allow us to distinguish the Competition Authority from a regulator in 2011.

This is clearly the result of this institution's evolution, which has been confirmed by practitioners' perception of it.

Let us compare the Competition Authority's recent evolution with the foregoing criteria that define "regulators":

a)From an institutional point of view, the Competition Authority clearly falls within the category of "regulators".

Regulators' principal institutional specificity is that they are not part of the State's traditional apparatus. This is a quality absolutely shared by the Competition Authority. We can also observe that the rules relating to the composition, operations, and procedures of these authorities are becoming more similar, or even harmonized.

We will simply cite the similarity in composition of France's most recent regulators (AMF, ACP, ARAF)[12]. Concerning operational and procedural rules, the principles defined by the Council of State and the Court of Cassation apply equally to all independent administrative authorities, so long as they have disciplinary powers, even though there can be some nuances in their implementation[13]. The broad alignment of the procedural rules applicable to sector-specific regulators and the Competition Authority is significant.

b)From a methodological point of view, the Competition Authority has acquired most of the attributes of sector-specific regulators that it did not initially possess

Although the two principal differences between these two authorities reside in whether they intervene ex post or ex ante, and in their possibility to make rules as a result, these differences have significantly decreased because of the Competition Authority's development of five types of instruments:

- Negotiating commitments that affect an industry's competitive structure:

  As a reminder, the competition commitments were introduced in France by executive order n°2004-1873 on November 4, 2004,[14] and allow companies that agree to modify their behavior or activity on markets to avoid punishment. This represents the apparition of a "negotiated" form of law in anticompetitive practices whose "*interventionist aspect…must not be dissimulated.*"[15]. The Competition Authority (and its predecessor, the *Conseil de la concurrence*) have gone farther and farther in this interventionism. A simple example: in 2006 the Council "regulated" online sales of products distributed within a selective distribution network—watches, jewelry, hi-fi equipment, and cosmetics, successively[16]. "*Many commentators regretted that the Council used a negotiation procedure to regulate an entire industry and make decisions on complex, and essential, questions on the relatively new subject of online distribution*."[17].

  The Council—and now the Authority—both act more as regulators than as classic competition authorities, because, without having to demonstrate the harm done to competition, they set the rules and enforce them using commitments.

- The French system of settlement (*non-contestation des griefs*), was created by the *Loi portant nouvelles régulations économiques* (NRE) in 2001[18], also allows companies to make commitments and leads to the same observation: the Council, and then the Authority, both regulate the market. In the "linens" and "cables" decisions[19], the Council pointed out that in order to justify a reduction in the fine, the commitments proposed *"must be capable of substantially and verifiably ameliorating competition on the markets affected by these practices*." More precisely, in the "linens" decision, beyond the commitments made concerning procurement and tender bids that were designed to prevent anticompetitive behavior, the Council organized a whistleblowing procedure within the relevant companies.
- The transfer of decision-making power in merger review cases from the Minister of the Economy to the Competition Authority was also performed by the *Loi de modernisation de l'économie* (LME)[20], and gave the Authority a broad range of ex ante regulatory activities. Of course, other competition authorities around the world have the same power, but this is a "regulatory" type power. We will also add that the multiplication of behavioral commitments within merger authorizations reinforces this regulatory aspect.[21]
- We must not omit the fact that the LME also granted the Competition Authority with a potentially very important regulatory power that results from its possibility of self-referral in order to emit an opinion "*on any question concerning competition.*" Commentators were not mistaken when they identified "the attribution of an economic regulatory function to the Competition Authority."[22] The Competition Authority itself stated this in its June 24, 2009 opinion (09-A-21) on fuel markets in French overseas territories: "*The Authority has proposed reinforcing ex ante regulation in order to better supervise monopolies and ultimately guarantee the provision of fuel at the lowest price.*" [23] The opinions recently published by the Competition Authority concerning the structural framework of supermarket distribution in France, and on online gambling[24], include a series of recommendations to the Government, which become almost mandatory because they were published, and which incite it to adopt the necessary reforms. The relevant distributors also must follow these recommendations, because they risk prosecution if they do not comply. [25]
- Similarly, let us not forget that the Competition Authority has recently taken initiatives to create its own soft law, beyond its statutory powers. Until very recently, the "thematic

studies" contained in the Authority's annual reports could only very indirectly be interpreted in this fashion. But today, the Competition Authority directly publishes "procedural communiqués" or even "guidelines" that very clearly play the same role as the erstwhile ministerial circulars that used to explain how to implement new laws and rules. The guidelines relative to merger reviews adopted in 2009 are an example, because they directly took the place of those issued by the *Direction générale de la concurrence, de la consommation, et de la répression des fraudes* (DGCCRF)[26]. The Authority's "procedural communiqué" (the qualifier 'procedural' seems to have been forgotten, and now the Authority simply calls it the "communiqué") relative to the method of determining fines and defining the Competition Authority's disciplinary policy[27], mimics the European Commission, which clearly has the normative power that the French authority does not officially have.

c)Lastly, it is no longer possible to characterize a "regulator" simply by its "sector-specificity" in order to claim the Competition Authority is not one of them

- First of all, because the generalist nature of the Competition Authority has not stopped it from being just as technically competent as sector-specific regulators in regulated industries, both in the traditional industries like telecommunications, and in newer ones. The dialogue was very strong between the French telecommunications regulators (the ARCEP – formerly the ART) and the French Competition Authority (as well as its predecessor the *Conseil de la concurrence*), and proved the regulatory audacity of the latter, in order to support the specialized regulator or to act in parallel to it (such as the measures imposed by the *Conseil de la concurrence* concerning broadband Internet access, and those recently recommended by the Authority[28]).

  But, this "expert" intervention on behalf of the Competition Authority has been particularly remarkable as of late in new industries, whether sector-regulated or not: not only concerning online gambling or the structure of supermarket distribution as already mentioned (*cf. supra* I-2-b), but also as concerns the role of train stations in intermodal transportation, or the market for digital books[29].

- Also, more generally, there is no need to attribute sector-specific expertise to the Competition Authority because there truly exists "horizontal regulation" where competition is concerned. The Competition Authority is simply a horizontal regulator.

  The Authority explicitly admits this reality: Mr. Lasserre himself said as early in 2001 "*I am lucky enough to be a member of the* Conseil de la concurrence*, and therefore to be able to think about what horizontal regulation of competition means*" [30]. Now that he has become the President of the Competition Authority, he has recently once again shown us his role as a regulator[31].

  Let us be understood: the Competition Authority cannot simply style itself a regulator or develop this role by itself, using jurisprudence. Rather, doctrine has very generally admitted this reality beginning in the early 2000s[32], and especially recently a number of articles have systematically referred to "competition regulation" or "competition-based regulation" to describe the Competition Authority's mission[33].

  Even from a conceptual point of view, we believe that the differences currently have more to do with nuance than with an actual difference. Today, there exist many shared characteristics between a "generalist" regulator and a "sector-specific" regulator, in France and abroad. Competition authorities share the specificity of being entities separate from the traditional branches of government and civil service. Furthermore, the distinction in terms of *ex ante*, as opposed to *ex post,* intervention is no longer certain since competition authorities generally perform merger reviews, which is an *ex ante* activity, and anyway in France, this

distinction has progressively grown weaker with the multiplication of alternative forms of action, such as sanctions, self-referral, and "guidelines". It is no longer possible to say that the *"Competition Authority does not oversee the markets as such*,"[34] because the LME explicitly stated that the Competition Authority's mission is to "*ensure free competition*" [35].

Recognizing that there is a "regulator" of competition does not stop us from being able to distinguish competition law from regulatory law—today, these are simply secant ensembles. The main problem does not seem to be semantic in nature, but rather resides in the way the competition regulator positions itself in relation to the other institutions also in charge of competition policy.

II.The Competition Authority's role and legitimacy in setting competition policy have increased, but there remain serious ambiguities that must be cleared up

The debate over whether or not the Competition Authority is a regulator must lead us to address the fundamental question from which this debate stems: are the important missions and powers invested in the Authority appropriately justified and supervised in accordance with a democratic institutional framework? In France, this debate has involved all independent administrative authorities, and excellent reports have been produced by the Council of State[36] and the Parliament[37]. However, both of these institutions' reports remain very broad and only contain a few lines about the Competition Authority. Doctrine has also addressed this question, more specifically when the LME was implemented[38]— a discussion that I would like to expound upon.

1.Parliament has legitimated the Authority as a major actor in defining competition policy

Let us state that by "competition policy," we mean the policy implemented by public powers using powerful means to enforce competition rules in order to promote free competition in the economy—which goes beyond the simple definition of competition law and implies "political" choices. This regulation has "major political implications."[39]

a)The LME, along with the executive order of November 30, 2008, and a number of implementation decrees[40], established the bases of the essential role the Competition Authority can play in competition policy.

This role was intentionally devolved to the Authority, and the Senate was particularly interested in the reform and had decided to transpose into statute most of the new decisions regarding the missions and organization of the Competition Authority that the Government had initially planned to include in an executive order[41].

As pointed out by many commentators, this important reform caused France to go from a "bicephalous" regime—with a "political" entity represented by the Minister of the Economy, with his "strong-arm," the DCGGRF, and a more "expert" body, the *Conseil de la concurrence*—to a single authority (or almost); "*the Minister is no longer a competition authority*"[42]. The approach adopted here led us to end the debate on "monism" or "dualism" of competition authorities, because in France, like everywhere else, the Government continues to set competition policy, too, in a more or less conscientious and intense way.

In any case, the three types of powers regarding competition policy transferred to the Competition Authority or reinforced by the LME are: merger review, self-referral, and the transfer of full powers to perform competition investigations.

- The transfer of the Minister's decision-making power to the Authority regarding mergers was the most visible aspect of the LME's reform of the institutional aspects of Competition

Law in France. Of course, as the President of the Authority took care to point out, this transfer was part of a clear distribution of tasks: the Authority is supposed to make a decision using its technical expertise, based only upon competition law concerns; the Minister retains residual decision making power of a political sort, which can be used if there are issues of national interest at hand, other than competition law concerns[43].

However, this pertinent observation does not cause another reality to disappear: reviewing mergers is a *ratione personae* decision, and so in the French legal order, should be made by the executive branch because it is an "ex ante" intervention and could be an important decision for France's economic structures, which cannot be left to technical expertise alone. The vocabulary used does not change this profound reality (the test of "economic efficiency" that the Authority performs has replaced the "economic appraisal" that the Minister used to carry out).

- With the new power of consultative self-referral, Parliament has conferred power of intervention on the Authority, which is showing itself to be politically significant. Of course, as Mr. Lasserre stated, the Authority's opinions "*are intended to provide a competition-based diagnostic and to encourage thought,*" but they are also part of an ill-concealed strategy: "*to allow the French Authority to build a competition policy based on the areas most important to the economy*"[44] (underlined by me).
- Even though it is less often remarked, providing the Competition Authority with full investigatory powers gives it the ability to create true "investigatory powers": the investigations performed by the Authority are now used as one part of the ensemble of powers it has to "orient itself towards the initiatives that are thought to be strategic for the proper functioning of the economy (individual investigations, general market surveillance, studies, opinions, European activities)…which are the fruit of a voluntary policy to define the priority and relative importance of various cases."[45]

Even though Parliament had devolved this power to the *Conseil de la concurrence* before the LME, the Authority uses its commitment procedures and settlement procedures in order to perform sector-specific regulation: this is also part of competition policy (*cf. supra* I-2-b)

Finally, without hesitation, we can also include disciplinary policy in competition policy. The "guidelines" adopted by the Authority (even when they are called "communiqués") is an explicit demonstration of this—and proves true a simple remark made by the former Chief Justice of the Economic Regulation section of the Paris Appeals Court: the Authority "*conducts the policy desired by Parliament, which is precisely composed of…sanctions*"[46].

b)Parliament intended to ensure the Authority's legitimacy using a number of safeguards

The principle that regulators should be independent from the executive branch is generally accepted today: for reasons of efficiency, this modern take on government intervention has become part of legal and political standards, especially where the economy is concerned.[47]

But, under the influence of evolving jurisprudence[48] and Parliamentary criticism[49], lawmakers have conditioned the "competition regulator's" increased powers with a certain number of safeguards, which must be described, albeit briefly:

- The separation between investigation and disciplinary powers has been reinforced within the Competition Authority by the creation of two distinct hierarchies: the *Rapporteur Général* is in charge of investigations, and the *"Collège"* (members of the Authority) is in charge of disciplinary sanctions. This has caused a change in the distribution of tasks as compared to the way the *Conseil de la concurrence* used to function.

- Due process has been improved in litigation before the Competition Authority, with the explicit provision that lawyers are allowed to be present during investigations involving searches, the creation of a "hearing officer," and increased protection of business secrets, etc.
- Judicial review has been increased in companies' favor, in order to ensure the double degree of jurisdiction demanded by the ECHR[50] for appeals against warrants authorizing searches and seizure.
- Creation of a parliamentary review with Parliament being consulted as to the appointment of the Authority's President, the obligation for the Authority to perform an annual accountability report to the Parliament, and the possibility of Parliament to hear the Authority's President[51].

2.There remain significant ambiguities that must be cleared up

The foregoing observations are similar to those of a number of commentators in that they point out a certain number of unresolved problems in the Competition Authority's place in the larger institutional picture.

Of course, the general and inevitable problem—or even oxymoron[52]—that the Authority shares with other independent administrative authorities because of its hybrid character results from the major contradiction between its "administrative" character (it is neither private, nor judiciary…but a "public power" that is part of the State) and its independence (which prevents it from being subordinate to the State). Nonetheless, a democratic regime obliges all regulators to "*remain liable for the use they make of their powers,*" [53] and to try and maintain coherency between the use each one makes of its powers, and the use the other public powers in charge of competition policy make of theirs.

The main questions raised regarding these objectives are: the distribution of tasks between the Competition Authority and the Government, and judicial and parliamentary review of the Authority, which should both be improved.

a)The distribution of tasks between the Authority and the Government

Four points concerning the distribution of tasks currently seem essential: rulemaking, the setting of strategic priorities, coordination between the Authority and the civil service, and international representation.

- The devolution of rulemaking power, which has become current practice for "regulators," is still seen as a "dismembering of the State" in the French tradition, and concerns the executive branch more than the legislative, because the power involves "rules" rather than "laws"[54].

  The Competition Authority thereby creates its "soft law," principally made up of its "guidelines" or "procedural *communiqués*." Since no jurisprudence has been issued on this kind of documents, except on the European level[55], what value should they be accorded in order to ensure them legal security and a place in the French legal arsenal, while making sure that they retain the requisite flexibility? There is no easy answer, but a possible solution would be to turn towards the ratification procedure created for certain rules created by regulators[56], or perhaps to look at the Council of State's jurisprudence according broad protection to ministerial circulars[57].

- "*Defining thoughtful strategic priorities*"[58] is something that all practitioners urgently wish for when faced with the eternal fluctuation of competition's place in government policy, and the manifest divergence between the Government and the Authority on questions such as disciplinary policy against anticompetitive practices, for example in the

steel-trading case[59]: this case successively involved a government initiative, the creation of an *ad hoc* commission[60], and then the elaboration of a "*communiqué*" by the Authority, whose president was forced to explain that this was not a conflict over "*who was in control*" [61].

The fundamental question of "who does what" in terms of strategy is not easy to answer here. Let us take three concrete examples before broadening the debate.

Concerning merger reviews, there has not been an obvious problem up to now because there have been no "sensitive" mergers since the reform. But, there is great uncertainty as to the role of the "government's commissioner," as to how the Minister will be able to justify going into "phase 2" and how the Authority will react. How will the Minister justify making a decision contrary to the Authority's at the end of phase 2 without disobeying European law? We expect to see guidelines published by the Minister of the Economy concerning such cases.

Concerning self-referral, perhaps we should reduce the Authority's powers, because otherwise they might go directly against the Government's priorities. The solution might be to adopt the "Attali Commission's" proposition[62], which limited self-referral to draft rules and legislation. If it is not desired to publicly reduce the Authority's powers, it is at least necessary to instate an "institutional dialogue" between the Authority and the Government on the opportunity of performing such and such self-referral, and that the Government retain the power to decide whether or not to act on the Authority's opinions.

Concerning disciplinary policy, the contestation of the policies adopted lately by the French Authority (and moreover the European one) [63] should lead us to think about the best possible approach. The finalization of the "guidelines" on fines in the form of a communiqué is the right occasion to ask ourselves two questions: if the Government agrees, does it have to "ratify" this document? And if it does not agree, what will it do, since it cannot even ask the Authority to reconsider its decision? It is rather amusing to note that the Paris Court of Appeals will be in charge of applying administrative case law concerning this statute's legal value.

More importantly, there are a certain number of purely "political" choices that must be made: what degree of competition is desired in each industry (this especially concerns industries without a specific regulator: taxis, self-employed professionals, supermarkets, etc.)? What is the place of public service (unregulated transportation, health, etc.)? What are the local or social interests that must be taken into consideration? Which investments should be made first? [64] This leads us back to wondering whether the Government or the "competition regulator" is best equipped to make the most appropriate long-term social choices (at least in industries where there is no specific regulator, and sometimes even in industries where there are, such as energy, for example).

At this point, we can make two "reasonable" recommendations: an annual, explicit determination by the Government of its priorities in competition policy, alongside the Authority's (which have already been published), and a constructive and institutionalized dialogue on this subject between the two institutions.

- Practical coordination between the Authority and the DGCCRF has happily never ended, but there have been visible tensions and misunderstandings between the two since the LME has come into effect. This does not mean that the Authority's preeminent role, as desired by Parliament, should be reconsidered, but rather that the coordination between the two bodies should be made more harmonious and therefore more efficient in areas where the

DGCCRF still has jurisdiction. Let us take two practical areas of application as an example:

- The first concerns the DGCCRF's residual role in competition investigations. This role cannot be ignored, since the most recent legal texts regarding its organization gives it, including at the local level, the task of "*controlling the functioning of competition*"[65] Because the national investigation squad was transferred to the Authority, there is a risk that less attention will be given to the "clues" of anticompetitive practices picked up on by the DGCCRF's local investigators[66]. Of course, some of these clues can be used to deal with "local" anticompetitive practices, which are still part of the DGCCRF's responsibility[67]. But, as for the rest, only permanent coordination between the two bodies' investigation capacities will allow the DGCCRF's local teams to remain involved in this area.
- The second area has to do with the DGCCRF's central administration: the role of the "government's commissioner" must be optimized. This person could be the best means for coordination between the two bodies. The presence of a government commissioner within all independent administrative authorities was recommended by Parliament[68], and such a post has existed within the French competition authority since its inception. Optimizing this post means that it must be placed high up in the hierarchy in order to effectively and regularly convey the Government's strategic point of view in important cases. We note that the current president of the Authority himself expressed the wish that the "*government ensure that it frankly notify him of its objectives*" [69].

- As concerns international representation, we understand the simple solution introduced by the LME, which consists in leaving France's seat in European and international competition bodies to the "single" Competition Authority, but we should remember that in 2001 the Council of State recommended that "*if it involves a meeting where decisions are to be made, only authorities that are responsible to the Government should speak."* [70] This principle should be followed and as long as the Minister has jurisdiction over the matter, he should continue to be represented at the Consultative Committee on Mergers in Brussels.

b)Judicial and Parliamentary review of the Authority

The Authority's relationship with judges and the Parliament are currently the necessary checks-and-balances to counterbalance its independence from the Government. There remain, however, weak spots in the way these checks-and-balances are carried out, which are not necessarily what we think they are.

- Judicial review is exercised over the Competition Authority by two different sorts of judges when its decisions are appealed—the Paris Court of Appears for anticompetitive practices, and the Council of State for merger review. We do not agree with the Parliament that all appeals should be unified under a single judge[71], since French culture tolerates this duality in many areas and the distinction between merger review and anticompetitive practices does not create significant procedural problems.

  Yet, we should be concerned with the difficulty resulting from the "vertical" way in which such appeals are organized, especially between the Competition Authority and the Paris Court of Appeals, which leads to difficult showdowns. We agree with the suggestions that have already been published to fix the imbalance between a Court ill-equipped to deal with such a dynamic and expert Authority, and which has led to many of the Parisian court's decisions being quashed by the Court of Cassation ("the disavowal of disavowals"); it is necessary to increase the Chamber of Economic Regulation's means and expertise, especially by "*hiring economic drafters and assistants*." [72] Even by doing so, we need not fear a "government of judges" concerning competition law. We also suggest improved coordination between the counsel for the prosecution and the ministry's representative before the Appeals Court—this would give more strength to those

who defend the general interest, since the divergent positions revealed during the steel industry case, for example, were incomprehensible and harmful to the general interest.

Parliamentary review of the Competition Authority was introduced by the LME, but suffers from the same sorts of weaknesses as the Paris Court of Appeals: insufficient expertise. We have mentioned the "democratic deficit" involving oversight of the competition regulator[73]. Unless we implement political liability where the Authority is concerned, accountability and ex-post evaluation of its actions must be improved. The last parliamentary report on the subject[74] was severely criticized[75], and its weaknesses seem to come from the absence of relevant expertise in both houses of Parliament, for even when such expertise exists, the members who possess it are often not available. We might hope that specialized parliamentary assistants might be hired, and especially that deputies and senators will pay more attention to the subject. Let us not forget that the parliamentary review will be improved if it increases it scope to encompass the repartition of competition policy and strategy between the Government and the Authority. It might even be possible to increase Parliamentary review of the Authority "American style" if the Government abdicates too many of its powers in setting competition policy to an independent authority.

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In 2008, France made an important choice for society by adopting the LME and by creating an independent horizontal regulatory authority for the entire economy: the competition regulator. This type of "regulation" is a modern answer—at the crossroads of law, economics, and politics—to emphasizing the useful role of competition in a complex "social market economy." But, since the Competition Authority is a primary actor in competition policy, it must become a harmonious and conscientious member of France's broader economic and social policy: this means that competition must be able to be "regulated"[76] either by explicitly supporting and prolonging the Authority's opinions, especially concerning structural reforms, as well as in ways that go against the Authority's wishes. It is primarily the Government's responsibility, and subsidiarity, Parliament's, to supervise the proper execution of these responsibilities. We would be pleased if the foregoing thoughts helped improve the framework for the coordination and trade-offs that are needed.

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[1] *Loi de Modernisation de l'Economie- Journal Officiel de la République Française* n° 181, 5 August 2008, p. 12471.

[2] "*Rating enforcement 2010*" - *www.globalcompetitionreview.com*.

[3] Mr. Bruno Lasserre was notably one of the two co-presidents of the International Competition Network's working group, *Antitrust Enforcement in Regulated Sectors*.

[4] Ronald Coase and Richard Posner in the United States, cf. proceedings of *La régulation en France*, a colloquium organized by *l'Institut Français des Sciences Administratives* on 4-5 Nov. 1999, *Petites Affiches n° 223, 8 Nov. 2000* ; also Marie-Anne Frison-Roche, *L'Etat, le marché et les principes du droit interne et communautaire de la concurrence*, Petites

Affiches, 17 May 1995, n° 59, p. 4.

[5] *Le droit de la régulation, Dalloz 2001*, p. 610.

[6] *Relationship between Regulators and Competition Authorities – OCDE DAFFE/CLP Report (99) 8*, 24 June 1999.

[7] *Antitrust Enforcement in Regulated Sectors Working Group – Subgroup: interrelations between antitrust and regulating authorities – Report to the third ICN Annual Conference, Seoul, April 2004. www.internationalcompetitionnetwork.org.*

[8] Marie-Anne Frison-Roche, *La régulation, objet d'une branche du droit.* Petites Affiches n° 110, 3 June 2002.

[9] The differentiation between "ex-ante and ex-post intervention" has been the subject of a number of academic articles. See especially *Marie-Anne Frison-Roche, Dialectique entre concurrence et régulation, Actualité du droit de la Régulation, Revue Lamy Concurrence 2008*, and by the same author: *Ex-ante/Ex-post, les 100 mots de la régulation, coll. "Que sais-je?", 2011*; also, Anne Perrot, *les frontières entre régulation sectorielle et politique de la concurrence*, *Revue Française d'Economie, vol. 16 n° 4-2002*.

[10] *Conseil d'Etat, Rapport public 2001. Les autorités administratives indépendantes; Assemblée Nationale, Rapport d'information du Comité d'évaluation et du contrôle des politiques publiques* par René Dosière et Christian Vanneste, *29 Oct. 2010*.

[11] *Les frontières entre régulation sectorielle et politique de la concurrence,* op. cit.

[12] AMF : Autorité des Marchés Financiers (French Financial Markets Authority), *loi n° 2003-706 of 1 Aug. 2003*.

ACP : Autorité du Contrôle Prudentiel (Prudential Supervisory Authority), *ordonnance of 21 Jan. 2010*.

ARAF : Autorité de régulation des activités ferroviaires (French Railway Regulator), *loi n° 2009-1503 of 8 Dec. 2009.*

[13] Especially the jurisprudence concerning the separation between investigation and disciplinary powers, derived from the following decision: *Cass. Com. 5 Oct 1999 – Bull. Civ. 1999, IV. n° 159*.

[14] Today *Code de commerce, Article* . L. 464-2 I.

[15] Patricia Kipriani, *Les engagements : vers un droit « négocié » en matière de pratiques anticoncurrentielles – Contrat Concurrence Consommation n° 12-2010, étude 13.*

[16] *Cons. Conc., décision n° 06-D-24, 4 juillet 2006, relative à la distribution des montres commercialisées par Festina France ; décision n° 06-D-28, 5 oct. 2006, relative à des pratiques mises en œuvre dans le secteur de la distribution collective de matériel Hi-Fi et Home Cinema ; décision n° 07-D-07, 8 mars 2007, relative à des pratiques mises en œuvre dans le secteur de la distribution de produits cosmétiques et d'hygiène corporelle.*

[17] Jérôme Philippe, *l'avènement des procédures de coopération devant le Conseil de la concurrence : clémence, engagements, transaction, Contrats Concurrence Consommation n° 12-2006,* 28.

[18] *Loi sur les nouvelles régulations économiques du 15 May 2001 ; Commercial Cod, article L.464-2-III*.

[19] *Cons. conc., décision n° 07-D-21, 26 June 2007, relative à des pratiques mises en œuvre dans le secteur de la location - entretien de linge ; décision n° 07-D-26, 26 July 2007, relative à des pratiques mises en œuvre dans le cadre des marchés de fourniture de câbles à haute tension*.

[20] *Loi de modernisation de l'économie du 4 Aug. 2008*, op. cit. *art. 86* ; for comments, see Stanislas Martin, *La LME transfère le contrôle des concentrations à une nouvelle autorité de la concurrence. Concurrences 4-2008, Chronique Concentrations, p. 99* ; Antoine Choffel and Emmanuel Reille, *l'Autorité de la concurrence : unifier pour mieux réguler. Décideurs SFD n° 97, Sept. 2008*.

[21] Cf. the dozens of commitments taken by applicants to obtain authorizations; for example: decision of the Competition Authority *n° 10-DCC-198 of 30 Dec. 2010 relative à la création d'une entreprise commune par Veolia Environnement et la Caisse des Dépôts et Consignations*, which included a series of commitments, including the creation of a "competition stimulus fund" concerning urban transportation networks.

[22] Michel Bazex, *L'attribution d'une fonction de régulation économique à l'Autorité de la concurrence. Contrats Concurrence Consommation n° 3-2011, comm. 76.* One of the Authority's members, Patrick Spillaert, says the same thing when he evokes « *construction normative originale* » [original normative construction] in*: Les avis de l'Autorité de la concurrence, Concurrences 3-2010, p. 58*.

[23] *Communiqué de presse de l'Autorité de la concurrence, 24 June 2009*.

[24] *Avis n° 10-A-26 of 7 Dec. 2010 sur les contrats d'affiliation des magasins indépendants et les modalités d'acquisition de foncier commercial dans le secteur de la distribution alimentaire et n° 10-A-25 of 7 Dec. 2010 sur les contrats de « management catégoriel » ; avis n° 11-A-02 of 20 Jan 2011 relatif au secteur des jeux d'argent et de hasard en ligne.*

[25] Whence Leclerc's appeal before the Council of State against *avis n° 10-A-26 of 7 Dec. 2010, relatif aux contrats d'affiliation de magasins indépendants et les modalités d'acquisition de foncier commercial dans le secteur de la distribution alimentaire*, cf. letter by Michel-Edouard Leclerc published by la Tribune on 15 Dec 2010.

[26] *Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations*, adopted on 16 Dec 2009 and enforced from 12 Jan 2010 (Authority's website).

[27] *Communiqué of 16 May 2011 relatif à la méthode de détermination des sanctions pécuniaires*.

[28] *Cons. Conc., avis n°08-A-09, 5 Jun. 2008, relatif à une demande d'avis de l'ARCEP dans le cadre de la procédure d'analyse des marchés de gros du haut débit et du très haut débit* ; voir le commentaire de Michel Bazex, *les modalités du recours à la régulation ex-ante (suite), Contrats Concurrence Consommation n°7, July 2008, comm. 180 ; avis n° 11-A-05 du 8 March 2011 relatif à une demande d'avis de l'ARCEP portant sur le 3ème cycle d'analyse des marchés de gros du haut débit et très haut débit*.

[29] *Avis n° 09-S0A-01, 18 May 2009, relatif à une saisine d'office pour avis dans le secteur du transport public terrestre de voyageurs ; avis n° 09-A-56, 18 Dec 2009, relatif à une demande d'avis du ministère de la culture et de la communication portant sur le livre*

numérique.

[30] Bruno Lasserre, *Qu'est-ce qu'un régulateur ? Avis du colloque international de l'Université Paris-Dauphine des 17-18 May 2001 sur les stratégies d'entreprise dans les nouvelles régulations* - campus.media9.dauphine.fr/virtuel/video/conferences/regulations.htm

[31] Bruno Lasserre, *La régulation concurrentielle, un an après sa réforme : un point de vue d'autorité (I), Concurrences n° 3-2010, et (II), Concurrences n° 4-2010.*

[32] *Conseil d'Etat, Les autorités administratives indépendantes, op.cit. (voir notamment p. 346) ;* J. de Guillenchmidt, *le sectoriel et le général dans le droit de la régulation, Petites Affiches n° 110, 3 Jun 2002*.

[33] Inter alia: Laurence Idot et Christophe Lemaire, *Le nouveau visage de la régulation de la concurrence, S.J. Ed. Générale* n°12, Mar 2009, *I 125* ; Thierry Dahan et Christophe Lemaire, *Portrait de l'Autorité en jeune fille : l'Autorité de la concurrence issue de la LME*, *Revue Juridique de l'Economie Publique n° 683, Feb 2011* ; Denys de Béchillon et Thierry Tuot, *Autorités de régulation : l'âge adulte, Les Echos, 10 Mar 2011* ; *DGCCRF, Actualités, Dossiers thématiques, commentaires du rapport du groupe de travail de l'ICN sur la répartition des compétences entre autorités de concurrence et régulateurs sectoriels, 2004*.

[34] Marie-Anne Frison-Roche, *Les 100 mots de la régulation*, op. cit. - *p.26*.

[35] *C. com. art. L.461-1-I*.

[36] *Conseil d'Etat, rapport public 2001 sur les autorités administratives indépendantes*, op. cit.

[37] *Rapport sur les autorités administratives indépendantes de l'office parlementaire pour l'évaluation de la législation* by Patrice Gélard, *Les Rapports du Sénat, June 2006*.

[38] Cf. articles cited in footnote 33.

[39] Marie-Anne Frison-Roche, *Les 100 mots de la régulation*, préc. p. 116.

[40] The *décrets d'application* concerning the Competition Authority are as follows:

- décrets n° 2009-139 à 2009-142, 10 Feb 2009 *relatifs respectivement au toilettage de la partie réglementaire du Code de commerce, au régime des pratiques anticoncurrentielles locales confié à la DGCCRF, à la représentation de l'Autorité par son président et au nouveau régime de protection des affaires ;*

- décrets n° 2009-185 et 2009-186, 17 Feb 2009 *relatifs respectivement à la publication des décisions de l'Autorité en matière de pratiques anticoncurrentielles et au contrôle des concentrations ;*

- décret n° 2009-322, 20 Mar 2009, *relatif à la prise en charge des enquêtes par le rapporteur général ;*

- décret n° 2009-735, 26 Mar 2009 *relatif au conseiller-auditeur*.

[41] *Rapport de la Commission spéciale présidée par M. Gérard Larcher*, drawn up by

Laurent Béteille, Elisabeth Lamure et Philippe Marini, *Sénat, session ordinaire de 2007-2008, n° 413*

[42] Thierry Dahan & Christophe Lemaire, *Portrait de l'Autorité en jeune fille…* op. cit.

[43] Bruno Lasserre, *La régulation concurrentielle un an après sa réforme : un point de vue d'autorité (I),* op. cit.

[44] Bruno Lasserre, *La régulation concurrentielle un an après sa réforme : un point de vue d'autorité (II)*, op. cit.

[45] Ibid.

[46] Thierry Fossier, Le *« sentencing » en droit de la concurrence, Revue Lamy Droit des Affaires n°50, juin 2010*.

[47] Notamment depuis le rapport 2001 du Conseil d'Etat sur les autorités administratives indépendantes, préc.

[48] *Arrêt Cass. Com. 5 octobre 1999* : *Bull. civ. 1999, IV, n°159*, transposant la jurisprudence de la Cour Européenne des Droits de l'Homme – cf. Laurence Idot et Christophe Lemaire, *Le nouveau visage de la régulation de la concurrence en France – l'Autorité de la concurrence entre deux Europe, préc.*

[49] Patrice Gélard, *Rapport sur les autorités administratives indépendantes, Office Parlementaire pour l'évaluation de la législation, les rapports du Sénat 2006, n°2166-404*.

[50] Ravon *et al. v. France, ECJ case n° 18497/03, 21 Feb 2008.*

[51] *Commercial Code. art. L. 461-5.*

[52] According to the expression of reporter Patrice Gélard, *Rapport sur les autorités administratives indépendantes*, op. cit.

[53] According to the expression used by Marie-Anne Frison-Roche, *Les 100 mots de la régulation*, op. cit. p. 118.

[54] Patrice Gélard, *Rapport sur les autorités administratives indépendantes*, op. cit.

[55] *ECJ Decisions, 28 Jun 2005, Dansk Rozindustri, Joined Cases, C-189, 202, 205, 208, 213/02, Rec. II-1681 ; ECJ, 22 May 2008*, *Evonik Degussa*, *Case C-266/06.*

[56] The AMF or the ARCEP, for example.

[57] Conseil d'Etat, 11 Dec 1970, *Crédit Foncier de France*.

[58] Thierry Dahan & Christophe Lemaire, *Portait de l'Autorité en jeune fille…*, op. cit.

[59] *CA Paris, pôle 5, ch. 5-7, n° 2009/00334, 19 Jan 2010, Négoce de l'acier.*

[60] Report by MM. Folz, Raysseguier et Schaub, members of the *mission sur l'appréciation de la sanction en matière de pratiques anticoncurrentielles*, submitted to Mrs. Lagarde on 20 Sep 2010.

[61] Bruno Lasserre, *la régulation concurrentielle, un an après sa réforme : un point de vue d'autorité (II)*, op. cit., point 61.

[62] *Rapport de la Commission pour la libération de la croissance française*, submitted to the President of the Republic on 23 Jan 2008, décision 189.

[63] Cf. especially Jean-Paul Tran Thiet, *Dissuasion et Proportion*, in *Concurrence : l'infraction et l'amende*, *Bulletin de l'ILEC n°418, March 2011*.

[64] Question asked by a number of authors. Cf. especially Thierry Dahan et Christophe Lemaire, *Portait de l'autorité en jeune fille*..., op. cit. ; Denys de Béchillon & Thierry Tuot, *Autorités de régulation : l'âge adulte*, op. cit.

[65] Decree n° 2009-1377 of November 10, 2009 regarding the organization and the missions of the regional directorates for companies, competition, consumer protection, labor and employment ; decree n° 2009-1484 of December 3, 2009 regarding the same for local directorates.

[66] Thierry Dahan & Christophe Lemaire, *Portrait de l'Autorité en jeune fille*..., op. cit.

[67] Commercial Code, article L.464-9.

[68] Recommendation 14 from the *Rapport d'information sur les Autorités Administratives indépendantes* by René Dosière et Christian Vanneste, op. cit.

[69] Bruno Lasserre, *La régulation concurrentielle un an après sa réforme (I)*, op. cit., point 45.

[70] *Rapport du Conseil d'Etat sur les autorités administratives indépendantes*, op. cit., p. 347.

[71] Recommendation 4 from the *Rapport d'information sur les autorités administratives indépendantes*, op. cit.

[72] Thierry Dahan & Christophe Lemaire, *Portrait de l'autorité en jeune fille*..., op. cit., point 63..

[73] Marie-Anne Frison-Roche, *les 100 mots de la régulation*, op. cit.

[74] *Rapport d'information sur les autorités administratives indépendantes*, by René Dosière & Christian Vanneste, op. cit.

[75] Marie-Anne Frison-Roche, *Autorités administratives incomprises*, La Semaine Juridique, Ed. générale, n° 48, 29 Nov 2010.

[76] Cf. Jean-Pierre Jouyet, *Vers la concurrence régulée,* Concurrences n° 4-2008, p. 1.