I-2.3: Neutralization in economically regulated industries using procedural law techniques

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In itself, regulation does not necessary require judicial review of regulators' acts, whether the regulator is a ministry or an independent authority. In short, regulators could have the "last word" in all circumstances. However, because of an equal concern for democratic legitimacy and care to respect its international commitments, the French Parliament is convinced that judicial review over regulators' actions is necessary.

But, what is the goal of this judicial review (I)? What advantages do economic agents draw from judicial review of regulatory decisions (II)? What use have judges made of their powers granted in order to carry out judicial review of regulators' decisions (III)? This leads us to wonder, in terms of regulation, is the question of neutrality really pertinent (IV)?

I. PARLIAMENT EXPECTS JUDICIAL NEUTRALITY

It is easy to understand that Parliament expects judges to be neutral in the sense that they are supposed to temper regulators' enthusiasm: regulators' passion for their undertaking leads them to justify the ends by the means, whereas judges are supposed to adopt a neutral attitude.

We can also suppose—in a complementary, rather than inverse, fashion to the aforementioned conception—that Parliament wanted to make sure that decisions fundamentally based on economics could be controlled for their legality, since legal sciences are reputed to be neutral. Finally, and reciprocally, we can be certain that Parliament did not want judicial review to be powerful, and that it especially did not want it to be systematic.

It is not exaggeratedly rash to posit that none of these legislative postulates are based on any sort of pragmatic reality.

Judicial abstention is naturally a delusion: judges' decisions are purely political acts, and even reluctantly so, judges are in the political arena. Guy Canivet, the founder of the Paris Court of Appeal's *Chambre Régulation économique*, said and wrote on numerous occasions that judges play a role in creating regulation, and indeed, it could not be otherwise. An insolent, but not fundamentally inexact, interpretation would allow us to classify each court in terms of its economic school of thought.

The law's second postulate is its supposed superiority over economics, and makes no sense at all. I will therefore not bog myself down with this question: who still today believes that the two subjects are separate? Not so long ago, certain magistrates of the Court of Appeals of Paris still took classes in economic science applied to law.

Parliament's last wish for a "judge but not too much" has more chances to succeed, but for bad reasons. As we will see later, economic agents can go to court as much as they want, but they only do so as long as this is profitable to them: they are economic agents to the end, and do not philosophize. Parliament can seek to stop them by squelching the judge.

When in 1986, Parliament chose to assign Competition Law cases—which were seen to be intellectually poor and non-specialized—to civil law judges, it was acting on its will to maintain a low level of judicial review. But, my illustrious forbears were great innovators, and judicial review of Competition Law was a great success.

Alas, currently the Court of Appeals of Paris is once again going through a very difficult time, and is due to the theory I have just advanced: the notorious decline in funding risks causing an erosion of quality, and is indubitably part of a larger strategy; it would be shameful to think that it was due to simple negligence on behalf of the executive branch or those in charge of the judicial branch.

II. CORPORATIONS DEMAND STRICT JURISDICTIONAL NEUTRALITY

Perhaps economic agents have more strictly legal expectations than Parliament itself. At least, this seems to me to be an accurate conclusion based on the means they deploy before the Court of Appeals of Paris, and which reveal both corporations' need to benefit from the same guarantees before all market authorities (competition authority, financial markets' authority, or industry regulators), and their need to debate their problems in a public forum, in order to explain or apologize for their acts. Companies expect both guarantees and an open debate.

In order to create a common procedural law, a common standard would have to be devised for, and applied equally to, all Independent Administrative Authorities. This standard exists, although it is very recent. Naturally, it is based on Article 6-1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and more recently, articles 41 and 47 of the Charter of Fundamental Rights of the European Union (part of the Lisbon Treaty), which together provide a common foundation for procedural law much more effectively than any provision of national law.

Enforcement penalties are considered by European Law to be criminal punishment, and so must be addressed in the same way by all Authorities. This is a form of "culture" that judges and regulators must impregnate themselves with, and is an answer to the demands economic agents have been explicitly and repeatedly making for years. We will see that neutrality is at the heart of this culture

Parenthetically, let us note that a common procedural law needs a single source of judicial review. However, the French repartition of appeals between the Council of State and the Court of Cassation is not, or is no longer, a source of problems. I won't return to this subject: the duality of jurisdictions in France is a curiosity that astonishes foreign legal scholars, but no longer causes significant problems for the matter that interests us here.

Within the Court of Appeals of Paris, we are extremely attentive to make sure that there is one single standard of judicial review for all the various regulatory authorities. Periodically, voices are raised in favor of creating a large "competition chamber," where judicial review of the Competition Authority would take place, and where corporate competition lawsuits would be heard. In the meantime, this plan would provide for suits concerning the Financial Markets Authority to be devolved to a small, separate, chamber, which would also be in charge of indemnifying hoodwinked investors.

These suggestions are unlikely to become reality because both branches of regulation—rule making and enforcement penalties—are really all parts of a whole because they both revolve

around procedural rules, and that all regulatory authorities succeed or fail in the same fashion: it all depends on whether or not they respect formal procedural rules in their rulemaking and enforcement activities. When they do not respect formal rules, either because they have adopted an authoritarian or lackadaisical attitude, they are unable to fulfill their goals. In passing, it is noteworthy that the fact that the chamber was recently granted jurisdiction over customs and tax suits, in addition to its other attributions, was not due to chance: these suits are also principally based in procedure and have the same goal of regulating the economy and exercising enforcement over companies.

It is probable that when regulators and the judges who exercise judicial review over them are old-fashioned and retrograde on the procedural level because of their varying methods and possible resistance to progress, companies have an even greater need for a "common procedural law" even more, and it is also probable that other procedures that are equally efficient at regulating will come to the fore, such as class actions or criminal proceedings, which—at least in Competition Law—can lead to more severe penalties than simple fines (banning a person from managing or administrating a corporation, forbidding a corporation from bidding on a public call for tenders, shutting a company down, seizing or confiscating its merchandise or stock, etc.).

The ideal of a regulatory authority in charge of investigating complaints that will be judged by an independent, criminal, tribunal made up of specialized magistrates has begun to win over our élites in other domains concerning penal law for corporations. Needless to say, economic agents do not hope that such changes will come to pass.

Lastly, it is obvious that companies enter courts of law looking for a place where they can express themselves, a possibility with which regulatory agencies have neither the time nor the professional culture to provide them.

This has never been as true as today: the economic crisis that we are experiencing is the opportunity to discover or rediscover the virtues of discussion, be it by writing or orally; never have investors and companies been so desirous or in need of expressing themselves and explaining their problems: even though regulatory agencies cannot provide them with this possibility, the judges in charge of judicial review cannot deny them what they ask, since adversarial proceedings are the general and imperative law governing the public service that is the justice system.

III. JUDGES' RECEPTION OF PARLIAMENTARY AND CORPORATE EXPECTATIONS

What have judges done with these various expectations, and have they attained neutrality? In short, what is the role of judges in economic regulation? This role is obviously articulated around the three fundamental tasks of a court of law: open proceedings (a), evaluating the evidence (b), and providing the parties with a binding and enforceable judgment. This last dimension of the justice system (namely enforcement, in all meanings of the word) will not be addressed here because it cannot be used as the basis for procedural unity.

The Proceedings

Many anticipated that the quality of the proceedings was a goal in itself, and wrote that regulation and regulatory enforcement were incompatible with the rights of the defense, and that they might even be seriously weakened. I think exactly the opposite: no agency, whether it is focused on rulemaking or enforcement, has any interest in weakening its decisions by prohibiting corporations or investors from expressing themselves as they see fit, within reasonable limits. This is one of the dimensions of the 1996 *HADAD* ruling[1].

The limits are well known, but an inquisitorial phase must be maintained at the beginning of every case.

This being said, there has been a clear tendency in the Court of Appeal's and the Court of Cassation's jurisprudence to exercise extensive judicial review over the inquisitorial phase. This is what we can read in the January 7, 2011 *Philips-Sony*[2] cassation ruling, which—simply by mentioning the Code of Civil Procedure—introduces the possibility of extremely heavy-handed judicial review over the way investigations are carried out. In its ITS (September 9, 2010) and Kelly (March 20, 2010) rulings[3], the Court of Appeals more humbly introduced judicial review over seizures of mail and the loyalty of oral interrogations carried out by investigators. This is also what led the AMF, the French Financial Markets Authority, to create an "investigation charter," and to provide a summary of its investigations along with the notification of its allegations. Regretfully, the AMF is the only authority in France to have adopted these practices. Finally, this is what may have been behind the so called "Perfume" rulings handed down by the Court of Appeals of Paris on November 10, 2009[4], and then on appeal by the Court of Cassation's Commercial Chamber[5]: this latter decision remarkably endorses the idea that an overly-long investigation might be contrary to the rights of the defense.

Indeed, the time is long past when judges exercising judicial review simply—albeit vigorously and ruthlessly—reviewed the proceedings and the debates (cf. the Court of Cassation's Plenary Assembly ruling on the *Oury* case on February 5, 1999[6], of which the Court of Appeals of Paris' Competition and Regulation Chamber's *Cemex* ruling on 27 January 2011[7] was a distant echo), and openly neglected the phases that had taken place before them, such as the notification of the allegations and the delay between the public reporter's report and the audience—and therefore allowed each agency to develop working habits of varying quality.

Can corporations and investors nonetheless be assured of a "neutral model"? This could only be the case if regulatory agencies were transformed into courts of law. But, it is not the case today[8] because the European Court of Justice and the European Court of Human Rights accept decisions made by administrative entities, even partisan or brutal ones, on the (extremely questionable[9]) condition that it be possible for a court of law worthy of the name to intervene in the end. But, is the judge to whom an arbitrary decision is appealed neutral? Of course not: that judge will simply try to find various footholds in order to rectify the decision's irregularities. This is precisely what the Court of Appeals of Paris was recently criticized for doing: some of its decisions have been perceived as attacks by various agencies, and particularly by the Competition Authority.

At least, we might hope that all agencies rigorously obey the same standards in their investigations, and thereby contribute towards true neutrality.

The Evidence

True justice, in the common meaning of the word, consists in accumulating loyal and openly debated evidence.

On the *loyalty* of evidence, I do not need to develop any further: the aforementioned *Sony-Philips* case was exemplary of this debate. There would only be much to write about this subject had I chosen to speak about search warrants, especially searches of electronic messaging systems, but I will leave this topic for a later debate with the audience. The *discussion* of evidence, on the other hand, is a good way to investigate judges' neutrality.

This discussion is not about how public reporters use their freedom of action, which the Court of Appeals systematically defends, and which promotes a certain amount of opacity, which in turn augurs poorly for the neutrality of rulings handed down initially by the agency and then by the judge reviewing the decision on appeal—but this is due to a number of technical and practical reasons that the format of this exposé prevents me from addressing.

On the other hand, according to the Court of Appeals, discussion over the *value* of evidence obtained must be intense. The ability for the accused to consult the file the agency has compiled on their case is one of the Court's longstanding obligations, and only makes sense if it gives way to debate at the appropriate point in each agency's proceedings. Another example is agencies' motivation of their rulings, which are severely reviewed by the Court of Appeals, especially because it is the adequate way to examine the value of evidence.

Truth be told, judicial review is the key to neutrality since it is at the heart of protecting the rights of the defense, but it requires human and material means that we lack, and also intellectual

means that we sometimes do not possess when it comes to evaluating the purely economic aspect of a complicated case. This consideration led me to implement a special procedure for hearing economists in a case dealing with interbank fees that the Court examined at the end of 2011, before hearing the Competition Authority's lawyers and defenders.

IV. THE CULMINATION OF JUDGES' METHODS FOR ACHIEVING NEUTRALITY

In order to evaluate the culmination of our efforts at achieving neutrality, I should like to point out that the Court of Appeals of Paris ardently wishes to achieve a form of neutrality, since this is its historical and 'structural' vocation—even if it is not, and should not be, the mythic form of neutrality desired by Parliament: yet, the Court of Appeals is in the fray of the action and will not be able to advance any further on the question without the intervention of the European Court of Justice or the European Court of Human Rights.

I should also like to mention the following: neither preconceived scenarios nor academic or prudent organizational schemes are needed to protect the rights of the defense before bringing their suit before a court of law, and allowing judges to claim a certain form of neutrality. For example, the Competition Authority has no enforcement commission, but this is not the only reason that companies do not feel understood or even listened to by this authority. The Court of Appeals of Paris has long taken, and will continue to take, a pragmatic and case-by-case approach towards questions concerning the rights of the defense.

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[1] Com, 9 avril 1996, *Haddad*, pourvoi n° 94-11,323, Bull. civ., IV, n° 115

[2] Cass,Plénière, 7 janv, 2011, *Philips-Sony*, pourvoi n° 09-14,667, Bull. civ., Ass. Plén. n° 1.

[3] Paris, chambre 5-7, *International Technology Selection*, 9 septembre 2010, affaire n° 2010-00128 ; *Kelly*, 30 mars 2010, affaire n° 2009-13348.

[4] Paris, chambre 5-7, *Ministre de l'Economie c/ Shiseido et al. et al.*, 10 novembre 2009, affaire n° 2008-18277

[5] Com., 23 nov, 2010, pourvoi n° 09-72,031.

[6] Revue de droit bancaire et bourse, 1999, 33, obs. M.-A. Frison-Roche.

[7] Cour de Paris, chambre 5-7, *Cemex*, 27 janvier 2011, affaire n° 2010-04297.

[8] Cf. the Court of Appeals of Paris' Sept. 23, 2010 ruling on the *Orange Caraïbes* affair: Cour de Paris, chambre 5-7, *Orange Caraïbes* du 23 septembre 2010, affaire n° 2010-00163.

[9] Cf. the Court of Appeals of Paris' Jun. 16, 2009 ruling on the *Graça vs. AMF* affair: Cour de Paris, chambre 5-7, Graça-AMF du 16 juin 2009, affaire n° 2009-02354.