



**II-6.27: The provisions of French legislation limiting regulatory agencies' power to increase their staff in general terms and obliging them to submit an annual financial report to the Government were canceled by the Constitutional Court.**

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## MAIN INFORMATION

The French "Loi de finance rectificative pour 2011" (Rectified Budget for 2011) was censured by the "Conseil constitutionnel" (French Constitutional Council) after being adopted by Parliament, but before it was published in the Official Journal of the French Republic. The "Conseil constitutionnel" (French Constitutional Council) does not allow the "Loi de Finances" to ask a general limit of the Regulator workforce, paid by the State. Consequently, the "Loi de Finances 2012" will not give up the will of Parliament to limit the numbers but will do in a precise and quantitative way.

## CONTEXT AND SUMMARY

Click [here](#) to read the full Constitutional Council's decision.

The Constitutional Council handed down ruling n°2011-638 DC on July 28, 2011 regarding the *Loi de finance rectificative pour 2011*, in which it exercised its *a priori* oversight, deciding to censure two of its paragraphs.

One of these paragraphs was Article 71, introduced into Parliament by the Government, ordered that all bills concerning the budget contain an annex regarding regulatory agencies that are not subject to hiring limits, and which concerns the last budgetary period, the current one, and the next one.

Article 72 was also censured because it contained hiring limits for these types of agencies.

The Constitutional Council pointed out that "only a *loi organique* (institutional act) can determine the contents of budgets." This is why it declared these two provisions unconstitutional.

After having forcefully established that only a *loi organique* can determine what one might consider to be the architecture of national budgets, the Council tempered the effects of its censure by affirming, “que, pour autant, indépendamment de l’obligation découlant de la loi organique qui lui impose de fixer les plafonds d’autorisation des emplois rémunérés par l’État, il est loisible au législateur de prévoir, dans chaque loi de finances, des dispositifs permettant de contenir l’évolution des dépenses des organismes relevant de l’État” (english translation : *regardless of the obligation that hiring limits for government employees be determined by an organic law, it is desirable that the Legislature include in each budget methods to limit spending of all public agencies*).

## BRIEF COMMENTARY

Regulatory independence is not explicitly mentioned in the Constitutional Council’s ruling, but one might think that the principle underlies the decision(1). Indeed, independence is a major element in regulatory systems. But, independence is also a question of state of mind, as is impartiality, but it is also a question of good stewardship. Therefore, budgets, hiring caps, and salaries are a primary element of independence(2). However, the French government, on its quest to rationalize its spending and means by the Loi organique des lois de finance (LOLF — The institutional act regarding budgets), subjects itself to constraints designed to implement the necessary reduction in public spending. This is why it is difficult to reconcile the LOLF and the necessary independence of regulators(3). This explains why a French parliamentary report demanded that regulatory authorities be subject to the general rules applied to the State(4), even though that this demonstrates a deep incomprehension of what regulators are(5). The rectified budget was more likely influenced by the parliamentary report than by regulators themselves or by doctrine, but the aforementioned tension could only be released by the constitutional court, which did so handily, even though the true impact of this decision is therefore difficult to ascertain. Indeed, the Constitutional Council first gave precedence to the principle of independence, because it censured the measures voted by Parliament that would institute hiring caps for regulatory agencies and would allow the Government to judge said agencies according to financial criteria, even though they are supposed to remain independent from the Government. This censure is all the more legitimate due to the fact that regulators are only independent if they are in charge of their budgets and human resources, and because regulators can only be effective if they have plentiful and highly qualified staff at their disposal: the industries they regulate are able to mobilize great means to advise them on their relations with the regulator. It is well known that information asymmetry between the supervisor and the supervised party is a major source of regulatory failure, and regulators must have the human resources at their disposal to remedy this failure without having to beg for resources from a central administration, especially since the Government itself could thereby find itself in a situation of conflict of interest because of the existence of publicly owned corporations in various regulated industries. Furthermore, even though it is generally accepted that the technique of annual reporting is the best way to enable Parliament to ensure that regulators make good use of their powers and means (the technique of accountability as a means of legitimation), this is only true for reports drawn up by the agencies themselves, and not by the Government.

However, the Constitutional Council’s ruling is not radical, otherwise it would have transformed regulatory agencies into constitutional agencies. Indeed, the ruling in question

simply states that a regular act of parliament, even a budgetary act, cannot introduce hiring caps for regulators or enable the Government to draw up budgetary reports on them.

The Parliament simply has to adopt a more precise rule about limits against a too discretionary regulators' powers. In fact, the article 72 of the French "Loi de finance" on December 28, 2011, sets limits for hiring people paid by the State, namely 2277 for all the independent administrative authorities, detailing the number authority by authority (469 for exemple concerning the AMF, the French Financial Markets Authority)(6). This is disappointing and it is unclear whether a "question prioritaire de constitutionnalité" (priority issue of constitutionality) would be sufficient to protect the regulators, because their independence is not yet sufficiently crystallized at the constitutional level, from the moment they do not act like courts.

The new Law isn't surprising, it is questionable only. In this decision taken before the new financial Law, the Constitutional Council's ruling might be called balanced, but might also be called ambiguous, since it takes into consideration the fact that these agencies are part of the State and therefore must be subject to the same spending and hiring controls as other administrations, especially in a time of budgetary restrictions, but also takes into account that since regulators are intrinsically independent, only institutional acts can implement such limits(7). Concretely and casuistically, lawmakers are entitled to vote measures intended to limit public spending by regulators, as for all organs of the State. What must be retained from this decision is that even though regulatory agencies are independent by nature, they are not sanctuaries.

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(1) Cf. SUTTER, Gérard, Plafonnement en loi de finances des emplois des autorités administratives indépendantes et compétences du législateur organique (Cons. Const., 28 juill. 2011), Les Petites Affiches, 18 Nov. 2011, pp.8-21.

(2) STORCH, Olivier, Les conditions et modalités juridiques de l'indépendance du régulateur, in FRISON-ROCHE, Marie-Anne (dir.), Les régulations économiques : légitimité et efficacité, coll. « Droit et économie de la régulation », vol.1, Presses de Sciences-Po / Dalloz, 2004, pp.65-71. , coll.

(3) FRISON-ROCHE, Marie-Anne, Régulateur indépendant versus LOLF, Revue Lamy Concurrence, 2006, pp.69-73.

(4) DOSIERE, René et VANNESTE, Christian, Rapport d'information fait au nom du comité d'évaluation et de contrôle des politiques publiques sur les autorités administratives indépendantes, Ass. Nat., n°2925, 28 oct. 2010.

(5) FRISON-ROCHE, Marie-Anne, Autorités Administratives Incomprises (AAI), JCP G 2010, act. 1166.

(6) Click here to read the article 72 (in French). <http://www.thejournalofregulation.c...>

(7) In France, the loi organique is inferior to the Constitution but above ordinary laws. In case of disagreement between the National Assembly (lower house of Parliament) and the Senate (upper house of Parliament), a loi organique cannot be adopted unless there is an absolute

majority vote amongst the members of the National Assembly. Furthermore, every loi organique is subject to constitutional review by the Constitutional Council.