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The regulator and its judge(s)

Conference report

Annual conference of the Club of Regulators, organised in cooperation with the OECD Network of Economic Regulators

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The relationship between regulators and judges underpins the power and authority of the regulator, influences its workload, and is an essential mechanism of accountability. It is particularly important given that the market, politicians and the general public often find the role and status of regulators to be opaque. These sessions will explore the substantial role that litigation and judicial reviews play in regulatory activity.

1st roundtable: The impact of litigation on economic regulators

The French Rail and Road Regulatory Authority (ARAFER)

Marie-Astrid de Barmon
Head of the Legal Department, French Rail and Road Regulatory Authority (ARAFER)

The French rail and road regulatory authority (called "ARAFER") is a young regulatory body. It was created by a Law of December 2009 to accompany the introduction of competition in the railway sector, traditionally operated as a public monopoly, like other sectors (telecoms, energy)[1]. The ARAFER is an independent authority that oversees this liberalization by ensuring new entrants a non-discriminatory access to the railway network. It then saw its scope expanded to the road sector and to the motorway sector by a Law of August 2015. The legislator has entrusted the ARAFER with the regulation of intercity coaches. On this market, the authority ensures that the opening to competition does not undermine the economic balance of public utility lines performing similar transport links. At the same time, the authority was invested with a regulatory mission in the motorway sector: it is mainly responsible for checking compliance with the tendering and public procurement rules by motorway concession companies.

The ARAFER regulates each of these three areas of competence through two main categories of instruments, relevant for this seminar. It first exercises an *ex ante* control to guide the behavior of actors by using its supplementary regulatory powers and by issuing opinions, very often under the form of assents, on the network access conditions and prices (main rail network and service facilities, bus stations) and the opening of new private bus lines, for which it can prevent a public transport organizing authority to introduce a prohibition or a restriction. The second ARAFER's great action lever, enabling it to carry a control action *ex post*, is its dispute resolution mission. It then plays the role of an arbitrator, for example at the request of a candidate to the allocation of train paths or of a bus transportation company that considers itself the victim of discriminatory treatment or any other harm regarding the access to the rail and road network and infrastructures.

Obviously, all these categories of decisions fall inside the control of the judge, and this is where we get to the topic of our seminar. All the decisions of the authority (its various opinions and regulatory decisions) are subject to review by the administrative courts, with the exception of dispute resolution decisions, which are subject to review by the civil courts, that is to say, the other French jurisdiction system.

More precisely, the Council of State ("Conseil d'Etat"), the French highest administrative court, has jurisdiction to hear disputes on the opinions and decisions rendered by the authority as part of its *ex ante* regulatory mission: there is for this kind of disputes only one level of jurisdiction, which has the advantage to ensure a rapid and consistent treatment of these disputes regarding the legality of administrative acts.

Instead, it is the Court of Appeal of Paris which hears appeals from decisions by which the authority settle disputes, because they oppose private persons (e.g. the infrastructure

1 As the CRE ("Commission de Régulation de l'Energie", the French energy regulatory authority) and the ARCEP (« Autorité de Régulation des Communications Electroniques et des Postes", the French regulatory authority for electronic communications and postal activities).

manager and a railway company). Its judgments are subject to an appeal before the Court of Cassation, the French highest civil court. The applicants have in this case the benefit of a second hearing, more adapted to this type of litigation, almost arbitral and more factual.

This division of powers between two jurisdictions is not specific to the ARAFER: we find the same pattern for other sectoral regulators (energy and telecoms), with a block of competence vested to the administrative judge, and a residual jurisdiction of the civil courts for the dispute settlement.

Before returning to the issues that this jurisdictional dualism may arise, I suggest to make a quick overview of the case law relating to the decisions of the authority.

I - Case-law overview

As I told you at the beginning, ARAFER is one of the new-born in the family of French sector regulators and this youth is reflected in the still very limited case-law concerning its opinions or decisions.

1 - On the administrative court side, first, the French Council of State issued 9 decisions, all of them validating the ARAFER's opinions that were being challenged.

The first two decisions of the Council of State, given on January the 30th 2015 regarding the PACA Region and on October the 3rd 2016 regarding SNCF Mobilités are related to the railway sector. They are the only two disputes in this area that have so far been submitted to the administrative court.

The first case was related to international passenger services with cabotage, which refers to a train calling somewhere on the French territory but whose journey is part of an international connection. EU law allows the public organizing authority concerned to refer to the regulatory body in order to ban this service if it compromises the economic equilibrium of the public transport service. In the case I comment on, ARAFER rejected the request made by the PACA Region, on the ground that the service operated by the Italian railway undertaking Thello between Milan and Marseille was only of a limited effect on the economic equilibrium of the public service that the Region was operating. In the decision of January the 30th 2015, the Council of State validated the method of analysis used by ARAFER and its assessment in this case. This decision on cabotage remains so far isolated but deserves to be mentioned because it may anticipates future disputes in the context of the opening of the domestic passenger transport services, which will give rise to a similar control over the compromising of the economic equilibrium of public services.

The second case related to the railway sector is also interesting because it deals with an issue that arises in a number of regulated sectors. ARAFER had given a negative opinion on the tariffs of basic regulated services proposed in railway passenger stations for the 2016 timetable. The railway passenger operator – SNCF Mobilités – appealed to a judicial review before the Council of State which rejected his request by a decision of October the 3rd 2016. The court ruled that ARAFER did not commit neither an error of law nor an error in the assessment of the weighted average cost of capital, i.e. the cost of capital employed for financing investments (borrowing costs, capital cost of equity for the self-financed part) that charges must cover considering that SNCF Mobilités charged an excessive risk

premium compared to the low risks associated with an activity operated as a regulated public monopoly. The decision also specifies that the administrative judge exercises a normal control over the assessments made by the regulatory body on charges for railway passenger station services.

The passenger transport services by coach sector, partly liberalized on the 1st of January 2016, provided so far a relatively richer case-law since between December 2016 and October 2017 seven negative opinions of ARAFER were challenged before the Council of State by the Regions as public transport authorities in charge of prohibiting or restricting freely organized services. However, ARAFER's ratio of opinions on road transport challenged before the judge is quite low: it is around 11% since 7 of the 66 negative opinions given so far by ARAFER for the year 2017 were subject of a judicial review before the Council of State.

Going further among these cases, I comment on one, whose scope far exceeds the litigation of the regulation of transport: a decision of March 20th 2017 on the Region Aquitaine. The Council of State ruled over sensitive issues applicable to regulation law in general. ARAFER had issued guidelines, a form of soft law, defining its analytical framework of substitutability between the freely organized service and the public service. The first question that arose was whether the applicants could ask for the application of these guidelines to their case. The Council of State responds in the affirmative, in line with its recent jurisprudence reinforcing the place of soft law in the courtroom and admits the justiciability of such general orientations. The second question was whether a regulatory body made an error of law by adding a relevant criterion not initially included in its guidelines to assess a particular situation. In this case, ARAFER had not merely used the criteria set out in its guidelines to assess substitutability but had further added the location of stops provided by service proposed by the private company. By validating this approach, the Council of State allows the regulatory body to assess the various cases submitted to it with flexibility and to gradually complete its normative tools, according to experience, without excessive rigidity. In my opinion, this decision should be valid in other regulated sectors.

2 – On the judicial side, now, the Paris Court of Appeal delivered 7 rulings in the railway sector, which also uphold all the dispute settlement decisions taken by ARAFER. Two of them deserve to be mentioned here.

In a series of 4 rulings of December 17th 2015, the Paris Court of Appeal validated ARAFER decisions settling disputes between SNCF Réseau and railway undertakings (Euro Cargo Rail, Europorte, T3M and VFLI) in requiring the introduction of a reciprocal incentive mechanism to improve the allocation of train paths. The Court of Appeal acknowledged the right for the ARAFER to impose obligations necessary to the resolution of the dispute to all stakeholders in the sector and not only to the parties. According to the Court, ARAFER can adopt dispute settlement measures having a general nature – as a regulatory act – and not only an individual nature. If not, it would violate the non-discrimination principle which requires that all railway undertakings put in the same situation are treated in the same way by the infrastructure manager. Appeals of these rulings before the Court of Cassation are currently pending.

By rulings of 9 March 2017, SNCF Réseau versus STIF and SNCF Réseau vs Pays de la Loire, the Paris Court of Appeal ruled that ARAFER is empowered to give a retroactive application to the regulatory decisions it takes to settle a dispute. Therefore ARAFER may require the infrastructure manager to retroactively amend the access charges for services in railway passenger stations for the working timetables concerned by the dispute settlement even if ARAFER ruled after the date of entry into force of these tariffs.

These two rulings combined together have strengthened the role of the regulatory body as the arbitrator of the railway sector. By providing ARAFER with a regulatory power over dispute resolution, they have also created a risk of conflicting case-law between administrative and judicial judges.

II – The potential difficulties raised by the dual jurisdiction system – the dialogue between judges

The dual jurisdiction system raises the issue of the interplay between the two jurisdictions. If there have been no conflicting decisions until now, a contradiction could arise between the Council of State's decision on an opinion delivered by the authority *ex ante* and the judgment that the Court of Appeal of Paris would make on similar issues on a dispute regulatory decision in which the regulatory body implemented its regulatory power.

This situation has almost happened: on a judicial review raised by SNCF Mobilités, the Council of State ruled in October 2016 on the unfavorable opinion delivered by ARAFER on the prices of the regulated services relating to railway passenger stations, including the cost of capital rate to be retained. Simultaneously, SNCF Mobilités had appealed before the Court of Appeal of Paris against the dispute resolution decisions taken by ARAFER on the same matter. SNCF Mobilités argued that ARAFER could not rule on the network statement relating to railway passenger stations, regulatory act establishing the corresponding charges, as part of a dispute settlement, without violating the constitutional principle of separation between administrative and judicial courts, because this would amount for the Paris Court of Appeal to rule over opinions given by ARAFER which falls within the jurisdiction of the Council of State. In its dispute resolution decision, ARAFER answered that appealing before the administrative judge against its opinion over charges in railway passenger stations and appealing against a dispute settlement decision are independent proceedings, which have different purposes, and are therefore compatible. This point was eventually not addressed by the Court of Appeal as SNCF Mobilités withdrew its appeals against ARAFER's decisions.

How would such a question be solved? In principle, when the judicial judge meets a regulatory provision and when its decision depends on the legality of the latter, he stays the proceedings and asks the administrative court for a preliminary ruling. This mechanism avoids divergence of jurisprudence. However, it is not sure that it would be used for ARAFER's litigation. Indeed, for the Court of Appeal of Paris, the fact that the measure is adopted for the settlement of a dispute prevails over the regulatory nature of the measure in question. In response of SNCF Réseau which argued that conferring a regulatory power within a dispute resolution to ARAFER would be an infringement of the constitutional requirements relating to jurisdictional dualism, the Court of Appeal replied that it had to verify whether the measures pronounced by ARAFER, whether individual or general in nature, are necessary and proportionate to the settlement of the dispute (see

Paris Court of Appeal judgment of 17 December 2015, SNCF Réseau v. T3M et al., p. 17).

However, even if the judicial judge does not deem necessary to refer the matter to the administrative court, it is reasonable to expect that the informal dialogue between judges avoids differences of jurisprudence. The Court of Appeal expects in practice that the Council of State rules in the first place before deciding to settle a dispute. In the case of SNCF Mobilités that I have mentioned earlier, it was the plaintiff himself who ensured this jurisprudential convergence in withdrawing its appeal and anticipating the alignment of the Court of Appeal with the Council of State which had just dismissed his appeal in another case.

Dualism is also an issue for the regulatory body itself: it must adopt compatible positions first in its opinions over the network statement and then in the framework of dispute settlements raised by railways undertakings. In this respect, a well-managed jurisdictional duality encourages the regulatory body to ensure the coherence of its action in the interest of the railway undertakings.

Let me finally address a more personal dualism, which will make the transition from this round table to the next one. I have been able to work as a judge and then as a legal director in a regulatory body. Even if the judge does not hesitate to get to the heart of the matter, he comes across difficulties in tackling very technical subjects. Luckily, only a very small part of the activity of the regulatory bodies cases reaches him. Those cases are often unique and represent a very small part of a judge's activity: from 5 to 20 cases out of the 350 cases that the public rapporteur in the Council of State deals with each year. What is true for the transport sector (see the small number of decisions made in this area) is also true in the litigation of energy regulation, telecoms, the banking sector or the audiovisual sector. When working for the regulatory body, the lawyer finds obviously comfort in a more secure mastering of the technical fundamentals of his area of intervention around him. But in that situation, the lawyer is confronted with another challenge: anticipate legal issues and draw his colleagues' attention on those, which are one parameter amongst others in the regulatory body's decision-making process.

The Agência Nacional de Energia Elétrica (Brazil)

Tiago de Barros Correia & Cid Arruda Aragão
Director & Litigation Coordinator, Agência Nacional de Energia Elétrica (Brazil)

In the last five years, regulatory decisions in Brazil have been affected by more legislation, an increasing number of formal and legal challenges, and a growing gap between regulatory and judicial approaches. Although significant amounts of time are devoted to establishing the procedures, costs and benefits of new regulations, these are then subject to lengthy additional reviews in the courts. *Ex ante* regulatory impact assessments must take account of the risk of judicial review and the manner in which it occurs.

ANEEL, the Brazilian electrical energy regulator, has a very robust and open administrative process based on extensive, public, stakeholder engagement. Nevertheless, all decisions can be challenged in court at any point during the process. As a result, administrative discussions and judicial reviews can occur in parallel, giving rise to interference between the two and to judges second-guessing the merits of very complex, technical regulatory actions. Preliminary injunctions, which can shut down regulatory debate and can be issued without consultation or technical disclosures, present a significant hurdle to progress. The four-tiered court system is also very slow and agencies are unable to act until a decision has been reached.

Factors explaining the large number of lawsuits against ANEEL include the complexity of the regulatory framework, the existence of incentives to litigation, the economic crisis in Brazil, and a trend towards judicial activism among judges. The example of litigation around underperformance risk mitigation in the Brazilian hydroelectric sector highlights the extent to which multiple layers of judicial review can have a substantial financial impact on all parties without an adequate regulatory resolution being reached. This kind of complex, expensive judicial process is harmful to the credibility of the regulatory body, undermines the regulator's ability to act decisively, creates delays on the market, and has a negative impact on financial performance by creating a perception of regulatory insecurity. To overcome these challenges, the relationship between the judiciary and regulatory bodies in Brazil must be reviewed and reconsidered.

The Bundesnetzagentur (Germany)

Annegret Groebel
Head of the International Department, Bundesnetzagentur (Germany)

In Germany, regulatory decisions are subject to cross-cutting external, internal and judicial reviews to ensure that powers are exercised in line with the law and implemented effectively. The telecoms, postal and rail sectors are subject to review by local and federal administrative courts while the energy sector falls within the jurisdiction of the civil courts of justice. As a last resort, decisions can be challenged in the Federal Constitutional Court. Cases generally relate to access and pricing decisions, particularly the cost of capital and the rate of return on equity and capital.

All entities in the energy and rail sectors are regulated as these networks are considered to be natural monopolies. In the telecoms and postal sectors, regulation only applies to dominant operators (operators with significant market power). The regulator has a wide margin of discretion when it comes to choosing market analysis methods and calculating efficient costs. For example, in 2006, the courts upheld the regulator's decision to impose an obligation of *ex ante* termination rates on four mobile telecoms operators, even though the operators argued that their grids had been rolled out privately and not under monopoly conditions. The regulator's freedom to act is, of course, subject to European legislation and the imperative to create a competitive market.

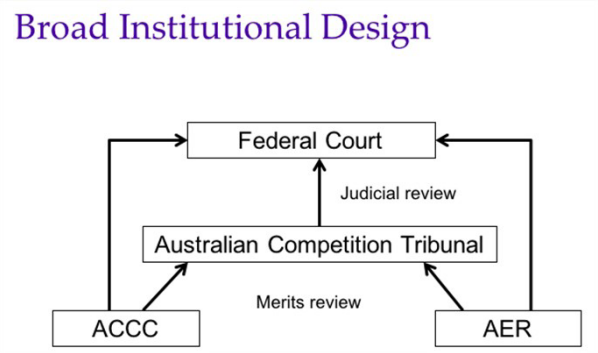
Regulated entities are obliged to provide the regulator with meaningful cost documentation which is used to inform regulatory decisions on price and cost. When insufficient information is available, the courts have ruled that the regulator is entitled to calculate the efficient cost on the basis of cost accounting, cost modelling or benchmarking, as it sees fit. The efficient cost can be lower than the actually incurred cost. Regulation of the rate of return has been challenged on the basis that it infringes the right to economic activity and to use property. However, the courts have confirmed that, in order to promote a competitive market, the regulator can set the cost of capital at an appropriate level and is entitled to exercise discretion which is only to a limited extent controlled by the court.

In conclusion, regulatory decisions around pricing and the cost of capital have been challenged in the highest courts and the regulator's right to exercise discretion and to create conditions that mimic a competitive market has been upheld.

The Australian Competition and Consumer Commission

Richard Home
Executive General Manager, Legal and Economic – Australian Competition and Consumer Commission

Until recently, the decisions of the AER, the Australian economic regulator for electricity and gas networks, were subject to both judicial review and merits review. The decisions of the Australian Competition and Consumer Commission (ACCC), which regulates telecoms, some transport and water, are subject to judicial review and, in some cases, to merits review. Most reviews relate to revenue cap determinations, access arbitrations, undertakings and determinations, and decisions about which services are subject to regulation. Merits reviews are heard by the Australian Competition Tribunal; judicial reviews are heard by the Federal Court. Both types of review can occur in parallel. The decisions of the competition tribunal can be subject to judicial review in the federal court.



A merits review assesses whether the outcome of a decision was correct. There can be various forms - on the basis of a complete, *de novo* review, an 'on the papers' review of the original arguments and materials or, a limited review with a scope restricted to where a 'reviewable error' has been established,. The tribunal is empowered to make a new decision or remit matters back to the original decision-maker. The concept of a limited review was introduced in the energy sector in 2013 to prevent cherry-picking of regulatory decisions and raise the appeal threshold, but continued dissatisfaction with the merits review process led to its abolition for energy in the last week.

Judicial reviews focus more on the decision-making process itself. Decisions can be challenged on the grounds of jurisdictional error, error of law, improper exercise of power, unreasonableness, and questions of natural justice, procedural fairness and bias. Merits review frequently cover the rate of return, operating expenditure allowances, benchmarking approaches, asset valuations and the scope of regulated services.

The merits review process is complicated, time-consuming and contentious and the results have not always provided clarity. Notionally, the regulator is considered to be a 'friend of the court' or tribunal; in practice, the role can be more like that of a party. The judicial review process tends to take the regulator's original decision more as a starting point. The merits review process has now been largely abolished due to a perception that regulated entities were exploiting it to delay decisions and the effects of decisions for their own benefit. The regulators have now entered an interesting new phase where recourse will be sought primarily via judicial review.

The Comisión Reguladora de Energía (Mexico)

Jesus Serrano Landeros & Montserrat Ramiro Ximenes
Commissioners, Comisión Reguladora de Energía (Mexico)

In late 2013, a constitutional amendment transformed the Mexican oil and gas and electricity sectors, shifting these vertically-integrated monopolies into a regime of unbundling and competition. In the telecoms sector, which was the first to be unbundled, regulatory decisions had frequently been stalled by the use of litigation. To avoid a repeat of this situation, a co-ordinated legal framework and mandate for energy sector regulation was introduced from the outset. Regulators are charged with fostering the efficient development of the energy sector and the reliable provision of energy to all parties. They are independent, have technical and operational autonomy and financial and budgetary self-sufficiency, and are empowered to set technical and economic standards.

The regulator has the power to propose updates to the legal framework and participate in the formulation of new legal systems. Regulated entities have the right to challenge decisions through an injunction mechanism, but regulatory decisions can only be suspended by the final decision of the court and not by the act of bringing litigation. This approach has been upheld by the Mexican Supreme Court. As a result, the energy regulators work within a solid legal framework while the market enjoys clarity and certainty.

The number of injunctions has increased dramatically since the transition to the new regulatory regime in 2015: over 2,000 injunctions were filed against the Energy Regulatory Commission in the first nine months of 2017 alone. Many of these injunctions are part of a general legal strategy that involves suing all parties involved in a decision or are filed by market players seeking to remain under the previous regime. In the electricity sector, less than 2.5% of injunctions relate to electrical matters. Most injunctions are dismissed; those that are successful tend to relate to procedural errors. In order to decrease litigation stemming from 'non-fundamental' errors, the Commission has introduced a mechanism that will allow permit-holders to request the correction of obvious and indisputable errors.

Discussion

Montserrat Ramiro Ximenes

'Unreasonableness' seems like a very broad term. How is it defined and measured? Secondly, what do you think will happen following the abolition of merit reviews for the energy sector?

Richard Home

The definition applied is that of 'Wednesbury unreasonableness'. It has been tested by administrative review in Australia and is subject to a somewhat high threshold with a degree of discretion granted to the regulator. It will be interesting to see whether judicial review will expand to fill the gap left by the merits review process. As it tends to be more difficult for regulated parties to exploit the judicial review process, it is likely that parties will engage more constructively with the regulator instead.

Judges do not necessarily have the skills and experience to handle highly technical subjects such as the rate of return. What are your experiences in this area?

What approach is taken to regulating market failures such as the existence of asymmetric information?

Why, in your discussion of benchmarking mechanisms, do you refer to costs rather than prices?

Regulators are expected to have specialist knowledge of their sector. Should administrative tribunals also be specialised so they can conduct in-depth reviews or is it preferable to maintain generalist tribunals?

Marie-Astrid de Barmon

Judges are frequently challenged by very technical problems. This can be addressed by organising technical sessions with all stakeholders as part of the review process. Another option is to allocate all questions relating to a sector to one court, so it acquires the necessary expertise.

Jean-Yves Ollier

The French Council of State can organise investigatory auditions to clarify technical points, in which all parties and intervenants in a litigation are asked to respond to specific technical questions.

Tiago de Barros Correia

It is important not to allow regulations to be suspended while litigation is in progress and to provide clarity around constitutional amendments and legal decisions. Brazil needs to make progress in this area.

Annegret Groebel

Our powers extend to anti-competitive behaviour but do not cover mergers, cartels or market failures caused by external factors. There is a benchmark for prices to the extent that price serves as a proxy for the cost of efficient service provision. As regards the margin of discretion, the standard must be very high. Three criteria are used to identify margins uncontrollable by the court: if the law can be interpreted; if the decision is complex (i.e. requiring weighting of arguments/judgment); and if the decision contains an element of forecasting.

Montserrat Ramiro Ximenes

Judicial expertise and experience is a fundamental issue. The energy market in Mexico only opened to competition recently, so judges do not have a strong background for making effective rulings in this area.

Richard Home

In practice, specialised tribunals can depart significantly from the regulator's original decision, and change the way that businesses engage with the regulator, without necessarily delivering better outcomes. Non-expert judges can be effective as long as legal tests, such as unreasonableness, are clear and well calibrated.

2nd roundtable: Trends in regulatory litigation

The Regulatory Policy Division - OECD

Lorenzo Casullo
Economic Adviser, Network of Economic Regulators, Regulatory Policy Division - OECD

A key role for the OECD in the field of regulation is to ensure that good practice principles are shared across countries and jurisdictions. To this end, the OECD Council agreed on a number of recommendations in 2012. Specifically, recommendation number 8 on administrative and judicial review states that there should be an effective system to review the legality and procedural fairness of regulations and regulatory decisions and emphasises that citizens and businesses should have access to review systems at a reasonable cost and receive responses in a timely manner. It should be easy for parties to challenge regulatory decisions and sanctions, the right of appeal should extend to both legality and procedural fairness, and appeals should be heard by a separate authority.

All parties benefit from effective appeal systems that ensure regulators exercise authority within the scope of their legal powers, enhance trust in and the legitimacy of regulatory activity as part of economic policy agenda, and provide confidence to businesses and citizens that review processes will take place within a predictable framework. The right to appeal and judicial review is fundamental to achieving accountability and independence. It may also, via the threat of appeal, enhance the quality of regulations and associated impact assessments. These positive aspects must be balanced against concerns about potential encroachments on regulatory independence and the significant drain on resources that can result from legal challenges.

In conclusion, appeals and judicial review provide an incentive for regulators to adhere to best practice principles. Regulators may see appeals as a threat or an obstacle in the short term but, ultimately, judicial reviews are a litmus test of good regulatory practice. Stronger accountability to businesses and citizens and effective independence are more likely to be preserved in the presence of effective appeal systems.

The UK's Competition and Markets Authority

William Kovacic
Professor, George Washington University; Former Chair of the US Federal Trade Commission; Non-Executive Director with the UK's Competition and Markets Authority

In the modern environment of fragmented authority, it can be difficult to establish the scope and scale of regulatory mandates and the roles and responsibilities of regulatory entities. Often, the regulator is given a broad mandate to serve 'the public interest' and is then expected to reconcile different visions of what the law should achieve and how it should be enacted. Regulators and courts are faced with trying to predict how rapidly-changing, technologically-dynamic sectors will evolve and their decisions are subject to intense public and political scrutiny, especially if the sector is of economic importance. Regulators and judicial authorities must take account of commercial developments, changes in conceptual frameworks, and the effects of their decisions on the regulatory process and market operations.

In assessing the work of regulators, courts must have the knowledge and perspective necessary to inform their decisions but must resist the temptation to over-reach their mandate and seek to make policy. Courts must decide how much deference to accord to expert regulatory authorities and whether they wish to prioritise speed, accuracy or sound process in the regulatory process. Effective dialogue between courts and regulators can help judges to understand how their decisions affect the regulatory ecosystem and help regulators to recognise and avoid potential legal pitfalls. Judicial review plays a critical role in supporting accountability and legitimacy and, as a result, buffering regulatory activity from political pressure: regulators can enjoy greater freedom to exercise their scaleable and flexible mandate if it is understood that the courts are exercising rigorous oversight.

In my personal opinion, the Supreme Court and the Court of Appeals for the District of Columbia are the two courts that really matter for US regulatory matters. The highly competent, experienced judges are able to conduct rigorous, in-depth analysis of regulatory policy and methodology. Judicial knowledge in the US is developed through academic hubs, which convene debates, perform research and educate judges who wish to engage in these issues. Academic institutions and professional societies, such as the American Bar Association, are an important way of encouraging ongoing debate, learning and exchange among regulators, judges and business decision-makers. The Administrative Conference of the US, a public agency, also promotes transparency and continuous improvement by conducting research into the judicial process and associated issues, notably the effect of process on regulatory substance, and issuing recommendations.

Judicial deference to the regulator is not automatic but must be earned through expert research, carefully considered decisions, sound process, the disclosure of enforcement intentions, open external engagement, and effective evaluation. Although rigorous judicial reviews can be time-consuming and frustrating, they enhance legitimacy and can help to shield regulators from political interference, especially in the case of open-ended mandates. It should be remembered that the world view of politically-appointed individual judges in the US system can have a huge impact on regulatory outcomes over time.

The regulator and its judge(s) in France

Arnaud Sée
Professor of Public Law, University of Paris Nanterre

In France, regulators have the right to refer cases to the courts and seek judicial action against operators. Regulators and courts can have overlapping functions. For example, in the case of dispute resolution, operators can choose whether to refer their case to the regulator or a judge. Civil and administrative judges can also control aspects of the regulator's activities.

Responsibility for examining the legality of regulatory decisions and conducting judicial reviews of regulatory liability is split between the administrative and civil courts. Responsibility is allocated in different ways for different sectors and the underlying rationale for this is not always clear. In 1987, the French Constitutional Court empowered the civil courts to hear financial matters with a view to ensuring that these matters were heard by expert judges. Since then, the environment has changed and French administrative judges are also now experts in this field. The lack of a unified, coherent approach has become a constitutional problem and is no longer acceptable.

It should also be noted that the Paris Court of Appeal, which hears regulatory matters, rules on administrative litigation but does so by applying civil law procedures and processes. As such, its decisions are not always consistent with administrative jurisprudence. In addition, the regulator is not a party to litigation that concerns it but is only entitled to provide observations. French regulators are often tasked with defending the general interest of consumers, but judges often overlook this and focus solely on the competitive aspect of the regulators' role.

In the last year, administrative judges have agreed to rule on regulatory soft law. This is a significant change as soft law can have major practical and economic impacts, but it will raise issues around timing as soft laws can take immediate effect while judicial reviews of soft laws will take time. Opening soft law to judicial review is innovative but the utility of doing this is not immediately clear.

Il Consiglio di Stato (Italy)

Luigi Carbone
Chair of the Consultative Section for Nominative Acts, Council of State (Italy); Former Commissioner at the Regulatory Authority for Electricity, Gas and Water; Former Chair of the OECD NER

In discussions of the relationship between the regulatory and judicial systems, it should be remembered that regulators and judges are individuals, not institutions. Judges, while exercising significant power, must recognise the specific technical expertise of regulators; the regulator, while independent, must recognise the need for a degree of judicial control.

The Italian Council of State recognises the independence of regulatory authorities and increasingly insists on *de facto* independence, particularly with regard to financial and human resources. This gives regulators significant room for manoeuvre but judges continue to play an important role by providing useful checks and balances, protecting the regulator from undue external influence, enhancing regulatory authority and autonomy, and supporting controversial or critical decisions.

Italy has a two-stage system with the Regional Administrative Court of Lombardia-Milan serving as the first instance and the Council of State, the administrative supreme court, serving as the second. In the energy sector, the regulator's position is upheld in more than 90% of cases. Regulatory cases tend to relate to points of procedure, such as the consultation process, and points of substance, such as tariff decisions.

In 2006, the Council of State enshrined the role of consultation in regulatory jurisprudence. As regulators are not elected, it is vital for democratic accountability that stakeholders are able to participate in the regulatory process. To be effective, consultation must be transparent and include an *ex post* judicial review. It is important to note that the consultative process is necessary but not sufficient: the regulator must still provide adequate motivation for its decisions. Although regulators can dispense with consultation in urgent cases, this is subject to judicial review. Consultation is important but it is not sufficient. To ensure regulatory transparency and legitimacy, regulators must complement the ritual of consultation with evidence-based decision-making as part of a coherent, high-quality methodology that takes account of the available data and the needs of parties, such as future generations, who cannot participate in the consultative process.

In a recent important decision on water tariffs, the administrative judge upheld the cost recovery methodology used by the regulator on the basis that it calculated financial costs and taxes separately rather than using return on investment, an approach that had been banned. This decision is important because the Council of State followed the opinion of a court-appointed technical expert who consulted with experts from both parties and conducted an external examination of the case based on the technical rationality, logic and reliability of the tariffs.

The Council of State also overturned a decision by the first instance court to annul a regulatory decision on gas distribution tariffs on the basis that the highly complex and technical nature of regulatory decisions on tariffs created competing risks. The Council of State ruled that judicial reviews must decide whether decisions are reliable and reasonable

using the same technical criteria as the regulator rather than restricting themselves to external examinations of the discretional analysis. This is important as there is a risk that non-specialist courts will shy away from engaging with complex subject matter or, due to limited understanding, wrongly interpret complex decisions as irrational or inadequately motivated.

Case studies highlight that the more the regulators use high quality tools, the more judicial reviews can focus on procedural legitimacy rather than substantive legitimacy. Judges are more likely to respect, and uphold, evidence-based regulatory decisions. Regulators must work to earn their independence and exercise their room for manoeuvre wisely by investing in quality, upholding transparency and encouraging consultation. Judges, for their part, must look beyond the simple facts of the cases they hear to consider the broader impact of their decisions on the market and the economy. As such, they must enhance their knowledge of regulatory quality tools and work to better understand the rationale behind technical regulatory decisions. Regulators and judges must recognise that their role is to support the common public interest and that alignment and mutual understanding is in the best interests of citizens and the economy.

Discussion

It would be interesting to compare the judicial approaches taken in different countries. Might it be interesting to collect the decisions of national regulators and courts and make them more widely available?

Jean-Yves Ollier

The most important decisions of the French Council of State have been translated into 5 languages and made available on the internet (http://english.conseil-etat.fr/Judging). Many of these decisions relate to regulation. It would indeed be interesting for a regulatory forum to gather key cases across jurisdictions.

Luigi Carbone

This is a sensible proposal. Examples of jurisprudence are likely to be available at an event that ACA-Europe, the association of the administrative courts of Europe, is organising next year. The OECD has also been asked to form a network for administrative judges. Greater transparency and exchange between judges and regulators about the effects of their decisions could result in significant improvements in this field.

By what mechanism is political pressure exerted on judges and regulators in modern democracies?

Tiago de Barros Correia

The OECD has produced a complete and comprehensive document on this subject. Regulators can protect their independence by being transparent, accountable and making fact-based decisions.

Jean-Yves Ollier

The framework to guarantee the independence of judges is well established; politics may play a role in the initial appointment in certain jurisdictions. Political pressure on regulators can take a variety of forms. Legal and governance mechanisms (such as fixed term appointments) protect their independence.

Luigi Carbone

Transparency must be backed by evidence-based decisions.

William Kovacic

Regulators must also exercise their judgement and pick their battles. As well as being technically proficient, regulators must be politically shrewd and understand how their actions will be received in the broader political environment. Even though judges tend to be self-assured and competent, media pressure – particularly focused and relentless social media pressure – can undermine independence and have an insidious effect on the way decisions are taken over the long term.

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