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REVUE D'ECONOMIE FINANCIERE

REVUE DE
L'ASSOCIATION
D'ÉCONOMIE FINANCIÈRE,
N° 60

SECURITY AND FINANCIAL REGULATION

Montchrestien

How Should the Powers of Regulatory Authorities be Established in Terms of Law?

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Within the political order powers are the expression of a might, which can be discriminated from plain force by the fact that they have a foundation. This means that these powers are endowed with a justification that puts a stop to the never-ending regressive question about their source. The law is an established power as opposed to plain force, which entails that powers in society are organized according to the law. Therefore, powers are deemed politically founded when they can be associated with a lawful source. The source is organized by the legal system itself. For instance, an election system allows the will of the people to be expressed and ensures that the link between the source and the exercise of powers is not distorted, by imposing punishments whenever powers are exceeded. The French organization of public authorities can be entirely summed up in these principles. However, regulatory authorities do not seem to fit in. Financiers may find that the powers claimed by lawyers in regulatory matters exceed the actual amount of law involved in these matters. Symmetrically the legal doctrine is cautious towards regulatory authorities. Mr. Jacques Ribs and Rémy Schwartz recently expressed this feeling: "This spontaneous, bursting creation of independent regulatory bodies could very well, if one does not pay attention, lead to a kind of legal chaos which might threaten the organization of political powers"[1].

Within the traditional administrative structure of the French State, market regulators as they are currently organized can be either strictly professional bodies subject to private law, such as the *Conseil des Marchés financiers* (CMF, Financial markets organization) or public law agencies which, while remaining administrative bodies, are nevertheless independent, that is, not directly connected to a political source. These

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agencies are for instance the *Commission des opérations de Bourse* (COB, Stock market operations authority), the *Conseil des marchés à terme* (CMT, Derivative markets organization), as well as the *Banque de France* (Federal Reserve), the *Commission bancaire* (Bank Commission) and the *Conseil des établissements de crédit et des entreprises d'investissement* (CECEI, Investment companies and credit institutions committee), the mission of which is to develop a regulatory activity using prudential supervision. The forthcoming law on New Economic Regulations aims at standardizing these various bodies, in so far as it strengthens the bond between banking and financial regulation on the one hand, and market and actor supervision on the other, both these actions being necessary to prevent systemic risk. The legal structures being numerous and yet unsettled[2], it appears that only the expression of "regulatory authorities" supplies them with a uniform legal meaning.

This expression is based on the fact that, each in their own field, the regulatory authorities are intended to organize and supervise market efficiency, by ensuring market transparency and equality between investors, and by enforcing prudential and ethical rules upon all market intermediaries including banks. One may consider that the aim of stock exchange companies is to regulate the market which they allow access to, notwithstanding the fact that they are private companies. Regulation is actually a service provided to issuers and investors. However widely used, the concepts of regulation and regulatory agencies are not unified into a specific legal category. Paradoxically, the legal system fails to account for the existence of such bodies, while at the same time the law is becoming a growing element of the regulation system[3]. The legal analysis of regulatory authorities thus seems to be going astray, on the one hand because it is torn between traditional, administrative structures and private, commercial mechanisms, on the other hand because as of today it has failed to produce both a satisfactory link between the different kinds of authorities and a clearly identified legal source of their powers.

Regulatory bodies have gained considerable might, using the diversity (enactment of general rules, power to accept or refuse admission of market intermediaries, power to authorize and punish[4]) and the amount of their powers. For instance, all market intermediaries are first accepted by the CMF and consecutively remain under the supervision of the COB. Similarly, all public offerings must go by the general rules set by Title V of the *Règlement général du CMF* (CMF General Statute), each individual offering being closely supervised by both the CMF and the COB. These powers will probably increase as the idea that a national authority may have competence over an international field is gaining momentum[5]. But whether these powers are lawful remains uncertain.

The questions surrounding the powers of regulatory agencies are often asked on a bitter tone, which suggests that no reliable answer can be found. For instance, how can the right of the COB to punish operators in the same way as a court of law, to the extent that it should be qualified as such by the European Convention on Human Rights[6], be legally justified, considering that it does not rule in the name of the French People, as regular courts do? How can the enactment and enforcement of behavioral standards upon operators lawfully replace the powers of the Parliament and the Government, by substituting the might of expertise to the power of democracy?

The issue of the legitimacy of the powers of regulatory agencies is one that is easily raised, because it is self-evident. There have been different answers, the first one being to find a political source of power. Many other hypotheses have been sustained. One may argue for instance that there is a kind of contract between the regulator and the operators of a given sector or that the way according to which the regulator exercises its powers is what makes the use of these powers legitimate, thus expressing the procedural concept of lawful powers. The first solution is one that comes naturally to the mind because it aims at building a bond between the regulatory authorities and the democratic source of powers. The second possibility is diametrically opposed to the first one in so far as it aims at basing the system upon a contract instead of administrative structures[7]. The third possibility is even more modest because it only requires that the exercise of regulatory powers remain within a set of procedural rules. It will be shown that none of these hypotheses provides a satisfactory theoretical foundation for the full legitimacy of regulatory powers, probably because it is more appropriate to combine them all in order to obtain a description based on a rhetorical conception of the law.

ARGUMENTS BASED ON THE SOURCE OF REGULATORY POWERS

The idea is to try to find a legal source for the powers that regulatory agencies exercise over any agent operating on the market, using either general rules or individual measures. The agency will thus be either an institution linked to the democratic power, as in political and administrative law, or a contractual and self-regulating organization, as in contract law.

Reconstructing a connection with the democratic source of powers

Legitimating powers by the definition of a political source is a cornerstone of the French legal system. In a democratic system, a

political source means that the will of the people has been expressed. The legislative power is legitimate if it is founded on an election, the Government is legitimate if it is chosen by the Parliament, and the administration is legitimate if it remains connected with the Government. Therefore, the one-sided power exercised by the administration over individuals is lawful because the administration is dependant upon the political power. This is what we call regressive legitimacy because it is based on going up through the series of delegations back to the source of powers.

However, regulatory authorities are independent from the political power, their independence being an element of the legal definition of these authorities, as stated by the Law dated 2nd July 1996 defining the COB. The *Conseil constitutionnel* (Constitutional Counsel) has also accepted and even imposed the use of the term independence[8], so that it has become usual to refer to these agencies, most of which are administrative, as a specific legal category[9]. However, being independent deprives these authorities from their political legitimacy because the bond connecting them with the will of the people is severed[10]. The *Conseil constitutionnel* has nevertheless allowed these agencies to enact statutory rules, but it has imposed several limitations, concerning the scope of this power, as well as its contents[11]. The Constitution would indeed be violated if an independent agency had full statutory power, that is, the power to enact general, abstract rules. Therefore, it seems that one should restore the connection between the regulatory agency and the political power and that the agency should be inserted back into the administrative structure, which is itself dependant upon the Government. This would allow the Treasury and Finance departments to recover their full authority. This solution, although creating a basis for legitimate regulatory powers, is however unfit for two reasons. The first reason is political and sociological. It is based on the fact that operators and investors would not rely[12] on a regulation depending closely on people whose decisions may be biased by their own political strategies. The second reason is strictly legal. Being market operators themselves, Government services and especially the Treasury department would be simultaneously operators and regulatory authorities. This situation would violate a major principle of antitrust law because it could be considered as an abuse of dominant position[13]. This leads to a complete paradox. Regulatory agencies lack legitimacy, which could be provided by connecting them with the political power, but such a connection is impossible to put into practice. At this point of our analysis, the issue of a legal basis for the existence of regulatory agencies is literally dramatic[14].

A pragmatic solution can be found according to two different perspectives. The regulatory agency is not under the authority of the

Government but it does owe its existence to a law duly voted by representatives of the people. Thus, the Ordinance of 1967 and the Laws of 2nd August 1989, 2nd July 1996 and 2nd July 1998 are indeed the result of a democratic will to provide regulatory agencies with increasing powers. Therefore, the existence of an initial democratic will is real. The question is whether the regulatory powers exercised by the agencies have been effectively given by the law, in which case the system will work if the agency is constrained whenever it exceeds its powers, in order for the agency to remain within the scope of its legal competence. The drawback of such a system is that it controls the use of powers in a strictly formal way, with regard to the legal limitation of powers instead of the substance of the decision that is to be made by the agency. This means giving priority to the restrictive principle of remaining within one's competence instead of the efficient principle of making adequate decisions. It is all the more remarkable that a precedent by the Paris Court of Appeals dated 28 April 1998 concerning the *Autorité de régulation des télécommunications* (ART, Telecommunications regulator) is founded on the opposite argument according to which the ART is entitled to exercise a particular power even though it was not specifically given by the law, because this power is absolutely essential in order for the ART to accomplish its mission. Therefore, the first and foremost concern to avoid both competence and power excesses reflects a hierarchical instinct which does not serve as a proper foundation for the powers of the regulatory agencies, in so far as it hinders the agencies' efficiency by neglecting the question of the actual adequacy of their regulatory decisions.

Another way of reinstating a connection between the regulatory powers and the political power is to organize a political responsibility *a posteriori*. Political responsibility refers to the right for the legislative body to remove an empowered person from office, either by not reelecting a representative, or by dismissing the Government who is thus made accountable of its political decisions. The powers are thus based on the possible removal from office of the person who exercises them. However, regulatory bodies do not have a political responsibility. There is a form of accountability in the fact that they must publish annual reports and that the President of each agency must present this report to the Parliament. The forthcoming law on New Economic Regulations aims at generalizing this procedure. However, annual reports allow the agencies to convey the scope of their powers and insist upon the rules they intend to follow, furthermore, to send messages to public authorities, instead of allowing these authorities to control their powers. Moreover, even if the Parliament is informed of the way in which the agencies exercise their powers, representatives have no way of constraining the

agencies. All they could do would be to vote a new law, but this does not correspond to the idea of a political responsibility attributed to an individual person. Any argument based on trying to connect the regulatory agencies with the political power leads to paradoxical and unsatisfactory solutions.

Creating a contract between the regulation agency and market professionals

The contract may be used as a theoretical model for the system. The contract is a system allowing the creation of binding obligations: a person can be bound either because of a politically legitimate law or because of an agreement. The person who has entered a legally binding agreement is forced to execute his promise. Therefore, it has been said that the fact for a company to issue capital or debt on a stock market entails an actual agreement to follow the rules that are applied on this market, including punishment if a rule enacted by a regulatory body is violated[15]. In this situation, the financial system is based on a network of contractual relationships including the regulatory agencies themselves. The stock market is thus similar to a club[16]: although rules are enacted by the agency and ratified by the Government, they are elaborated in a collective way in so far as the operators themselves are allowed to express their opinion. There is also a form of contract in the fact that regulatory agencies require issuers to modify the price or the conditions of their issuance instead of rejecting it one-sidedly. It thus seems possible to base regulatory powers on their being accepted by the operators over whom they are exercised. Such an analysis involves theoretical and technical consequences. If the connection between regulators and operators is contractual instead of administrative, private law should be applied and civil law jurisdictions should be competent, whereas administrative courts are competent and administrative law applies if regulatory powers are the result of a delegation of powers by public authorities. The legal doctrine is divided on the subject: some think that because they are private bodies, the CMF and the SBF (*Société des bourses françaises*, stock market company), which is a commercial company should merely use contracts to exercise their power, whereas other authors[17] argue that the regulatory bodies are public institutions which enact one-sided rules and statutes that do not require the intention and the agreement of operators who are thus forced to execute them. Should the question be raised in a lawsuit, one would face a legal void, given that the texts do not provide the necessary denominations for the agency while the sound application of the rules depends on this denomination. Moreover, contractual regulatory powers would involve specific prerogatives. What is based

on the agreement of the parties can also be undone by the will of the parties, including the acceptance by the operator of the agency's regulation offer. In this case, agencies would be lawfully endowed with a transaction power. A contractual regulation would also mean that the only possible rules would be those in favor of the operators, or else they would not accept them. Such a hypothesis is not merely theoretical in so far as operators do chose to invest on a market place where the regulations suit them best. Globalization and more particularly the growing competition between market places are changing the nature of regulation, which is becoming a service offered to the operators, thereby supporting the contractual conception of regulation[18].

The remaining problem is that of public order, that is, rules that are intended to protect the interest of society as a whole, not only the common interest of market operators. Operators should comply with these rules whether they agree or not. A precedent concerning squeeze-out procedures reaffirmed the idea that market regulation is intended to protect a greater public interest. It was indeed ruled that an expropriation procedure would violate the European Convention on Human Rights if it was intended for the mere satisfaction of a private interest[19]. It is not impossible for a commercial company, such as a stock market company[20] to have public interest goals, in the same way as it is not impossible for a general rule to be based on an agreement between parties[21]. In this situation, one would have to acknowledge that an initial agreement was given for the creation of regulators before the system was actually set up. Such an agreement would be equivalent to a broad social contract instituting the different regulatory bodies, as in the classical scheme of the foundation of a political society. This hypothesis is not easily sustainable because non-professional investors do not in fact accept the same risks and rules as professional operators[22], and because it would mean that people who are not market operators or investors are excluded from the main political contract giving birth to society.

The first two hypotheses used to legitimate regulatory powers can be qualified as theoretical ambushes. The search for a connection between regulators and the political power entails a lack of independence, whereas the contractual foundation leads to an accumulation of powers in the hands of a professional group made up of all financial intermediaries. This theoretical weakness is the consequence of a poor premise. Firstly, there is a constant alternative between private and public law resulting in a form of competition for regulation. Secondly, examining this problem in a more pragmatic way should lead to considering the actual manner in which the powers are exercised rather than the source of these powers.

ARGUMENTS BASED ON THE EXERCISE OF REGULATORY POWERS

A pragmatic view means that what is considered relevant is the manner in which powers are exercised: an adequate and efficient decision producing a relation based on mutual trust involves legitimate enough powers. The powers can be justified either through the people who exercise them or through the use that is made of them. Legal authorities have taken into account the relevancy of these arguments by organizing the nomination of regulatory agencies' members as well as by expressing a growing concern about procedural issues.

Legitimating powers through the people who exercise them

Legal theory is close to economic theory when it insists on the fact that a person's powers are legitimate if this person is notorious and trustworthy enough. The legitimacy of powers rests in the character of the incumbent and the concern becomes increasingly that of the person's personal credit, what can be referred to as a charismatic theory of regulation. How does the law fit in this theory? The law provides increasingly precise rules governing the nominations, but different methods are available because the laws were not all enacted at the same time. Among the various regulatory bodies[23], the rules governing nominations in private entities such as stock market companies, on the one hand, are identical to the rules governing nominations of executive directors and officers in private company law. Credit and power are generated by the fiduciary relationship that binds the shareholders and directors. In public regulatory bodies such as the *Commission bancaire* and the CECEI, on the other hand, the members are usually nominated on the basis of the fact that they belong to or head another administrative body. In this case, the agency's powers are legitimate because it is a meeting place for other public entities. This institution-based trust reinforces inter-regulation but threatens the independence and efficiency of the entity.

Moreover, focusing on nomination procedures is another way of raising the same issue, that of the source of regulatory powers, but from a different perspective: that of the source of nominations instead of that of the source of the powers themselves. The law dated 21st July 1996 creating the ART and the law dated 10 February 2000 creating the *Commission de régulation de l'électricité* (CRE, Electricity regulator) have given the power to nominate members and directors of these entities to people representing legitimate political powers, such as the President of the Republic, the President of the House of Representatives, the President of the Senate, the President of the Economic and Social Counsel[24].

Because legitimacy is here again guaranteed by the source of powers, the law neglects the matter of the adequate execution of the missions attributed to the entities, the requirement being that of the legitimacy of the designating authorities instead of that of the qualification of the people in charge. A legitimate nominating authority does not however necessarily mean that the nominee is qualified. The law usually imposes a mandatory participation of members of certain entities such as the *Conseil d'Etat* (Supreme administrative court) and the *Cour de Cassation* (Supreme civil court) in regulatory bodies, which conveys a competence requirement, which is a legal competence in this particular example. The law may also require a minimum length of office in regulatory entities, in order to allow for a sufficient age and experience guaranteeing trustworthy regulators. This growing concern regarding the credit which regulators should be endowed with by the authorities that nominate them, in order to legitimate their powers, is finding its way in the legal system through a new principle referred to as the principle of coherence. This rule is inspired by the Anglo-Saxon concept of estoppel[25] which means that that once powers have been exercised in a given way with regard to a given situation, the incumbent will be required to exercise his powers in the same way regarding similar situations in the future, so as not to deceive the people over whom these powers are exercised. This system is reminiscent of that of binding precedents in Anglo-Saxon law in so far as it aims at making regulation somewhat foreseeable in order to insert decisions in a continuous trend and thus reinforce the regulator's necessary objective reliability. This is the reason why it is usually referred to the "jurisprudence" issued by regulatory agencies, because it conveys the idea that precedents may be binding in a future case and reinforces the analogy between regulatory agencies and courts of law.

The objective character of the French system, as opposed to the legal rules in the United Kingdom and the situation in the United States, expresses a concern for the credit of the regulator without insisting on the character of the person in charge. The law therefore imposes a bureaucratic instead of a charismatic regulation, in so far as it commands collegiality as well as the nomination of persons representing institutions or whose position guarantees that they are qualified. The law aims at ensuring the effective competence of regulators by guaranteeing their abstract impartiality, so that operators may rely on them. Impartiality means that the person does not allow his or her personal interests to prevail by taking a decision that could not be justified with regard to the existing laws and rules. The increasingly precise and important constraining system of incompatibilities organizes the *a priori* conditions of impartiality and is being enforced by the decisions of civil and administrative courts. Enforcing impartiality as a condition of a legitimate

exercise of powers conveys a requirement that is one of procedure instead of one relative to the people holding the powers.

Legitimating regulatory powers through the procedural exercise of powers

Market regulators are independent so as to avoid violations of the principle of equal treatment[26] and also because their independence allows them to make impartial decisions. In this respect, regulatory bodies are closely similar to judiciary bodies, in so far as they are both public authorities, while not a part of the administrative hierarchy. What is usually referred to as an increasingly judicial action of the regulatory bodies is best conveyed by the fact that the legal status of regulators leads them to be organized and to operate in the same was as courts of law.

Legal rules strengthen this phenomenon. The compelling regulatory powers include the power of settling disputes, which is typically the mission of the civil judge. It also includes the power to punish, which is a part of the mission of the criminal judge. French law usually refers to the nature of regulators according to their legal status and to the literal meaning of this legal description. For instance, the COB is legally defined as an "administrative authority", therefore the decision it makes will be defined as administrative. On the other hand, European law is based on a concrete and dynamic approach, which into account the fact that regulators deliver authorizations, settle disputes and punish operators. Thus, with regard to their actual powers and functions, regulators can be defined according to European law as courts of law, criminal or civil depending on the type of decision made. Defining regulators as courts entitles European law to apply article 6 of the European Convention on Human Rights, compelling them to be objectively impartial, that is, to organize an equitable procedure in a reasonable time period. Impartiality and rights of the defendant have become fundamental principles governing the decision-making process of regulatory agencies. The idea according to which decisions must be made by regulatory bodies according to a set of procedural rules (including consideration of the other party's arguments, obligation to give the legal and factual grounds on which the decision is based, right to appeal to a higher court) fits well into the current social and political philosophy[27] but it seems that it has been acknowledged by the regulators themselves only because it was forcefully implemented by a series of judgments, first by civil courts[28], then by the *Conseil d'Etat*. The case ruled by the Paris Court of Appeals on 7 March 2000[29], which has led to a reform of the COB procedures, is the final stage of this evolution towards objective impartiality, in so far as the Court of Appeals required that the same people should be refrained

from simultaneously prosecuting, inquiring and judging the case, in order to guarantee an unbiased procedure.

Regulation thus becomes a matter of mere procedure, for the following reasons. Technically, the courts supervise the procedure and ensure that the rights of the defendant have been spared in the same way as in a normal criminal procedure[30]. More generally, a regulator will gain credit and authority only if it itself complies with the rules that it has enacted, this being the foremost expression of the existence of a State of law. Transparency in the decision-making process allows the regulator to require that the operators proceed in the same way. This mirror effect guarantees equal treatment. There are however limits to the procedural basis of regulatory powers, in so far as the control is exercised over a decision-making process, not over the content of the decision made. The decision is considered legal if powers have not been exceeded and operators have been allowed to defend themselves. This type of control is purely formal and the resulting legitimacy is poorly founded because it is based on a systematic, discursive reasoning instead of on the substance of regulation, which is what the law is supposed to establish.

ORGANIZING A LEGAL RHETORIC IN ORDER TO JUSTIFY AND CONSTRAIN THE POWER OF REGULATORY AGENCIES

The theory of legal rhetoric allows the legitimacy of regulatory agencies to be made explicit and thus to draw consequences regarding legal techniques.

Legitimacy through the insertion of regulatory bodies in a legal rhetoric system

Rhetoric is an ancient technique used to obtain the other party's rational approval of ones opinion. Rhetoric was developed mainly during trials, with parties enhancing their arguments in order to convince the judge. Interest in rhetoric was renewed after the Second World War when Chaïm Perelman set to create a legal method that would ensure that legal and moral values, such as equality and dignity, would be preserved by the law. This meant bending a purely formal legal logic in order to prevent public authorities from using the power of the law to destroy justice[31].

The central concept in this theory is that of auditory, in so far as the parties as well as the judge must convince concentric circles of auditory (the trial audience, social groups involved in the litigation, society as a whole and finally, the universal audience), that the opinions that are

developed are relevant and that the resulting decisions are adequate. Therefore, a decision will be considered sound if on the one hand it uses valid legal instruments and on the other hand, the effect that it intends to produce is relevant, that is, approved by the people involved. The fact that the decision is adequate with regard to a given situation (that should also be regarded concentrically: the present situation, the future similar situations, the system as a whole) and that it complies with the available laws is what makes the decision legitimate. The auditory thus gives credit to the decision and allows the legal powers to be exercised in a legitimate way.

This ethical and practical conception of the law is concretized particularly well in financial law[32]. The decisions made by market regulators must indeed be both in compliance with legal rules and adequate regarding the needs of the people involved. We find concentric circles here also: the parties (the issuer and the financial intermediary), the surrounding professions (banks, counsels), the relevant market and finally the stock market as a whole. This legal rhetoric enables all the different interests at stake to be taken into account, including the public interest, through the claims, opinions, and messages that the public authorities address to the regulatory bodies. Thus, the Government and the administration are not excluded from the financial system but they are not in a dominant position either. Financial globalization and the information network built by financial analysts allow the universal auditory required for the legitimacy of the decisions to be effective. Therefore, the legitimacy of the regulatory body is based upon the substantial manner in which its powers are exercised, that is, the fact that all interests are taken into consideration, that the chosen solutions have a positively appreciated impact, that these solutions are reached only with regard to available legal rules, and that the approval of the relevant auditory is ensured.

This conception synthesizes the previous analyses. Firstly, the substantial adequacy of the decision that is concretely made conveys the desire to avoid a merely procedural conception of regulation, which is always threatened by a sophistic use of powers while nevertheless being based upon fundamental procedural guarantees (such as the right for anyone to defend his opinions and the obligation for the regulatory body to always justify their decisions). Secondly, the decisions made are decisions in the true meaning of the word, in so far as they are enacted one-sidedly by the market regulator[33], and intended either for the public as a whole or for individuals, the approval of the addressee allowing the effective participation of everyone in the regulation process[34]. Thirdly, the Government may not, either *de jure* or *de facto* dispose of the system, but it is however allowed to express an

opinion, which must be taken into account by the regulator. Moreover, the different regulatory bodies must first of all take into account their respective opinions, because they are all elements of the public authorities and can thus argue of their common impartiality. Therefore, the State remains present in the regulation process, through a substitution of a dialog-type inter-regulation to the ordinary hierarchical system[35].

Legal consequences of a rhetorical legitimacy of the regulatory bodies

The reference to legal rhetoric allows an understanding of how regulatory bodies operate, and legitimates their powers. Once these powers based upon adequacy, the regulators can exercise them fully[36]. In particular it is possible for them to use powers that are not literally given to them by the law but are virtually required by the system. A full exercise of powers requires a strong legal constraint, as well as the approval of the addressees and compliance of the regulator with rules such as transparency, justification of decisions and coherence of the decision-making process.

This leads us to technical issues. Objective impartiality, justification and more generally evidence requirements, transparency and the control of the judge over every participant are key elements of the system. Indeed, the judge is the institution that guarantees the system, in so far as all litigations converge towards him and as he sets forth the fundamental legal principles in connection with those defined by the regulators, in a dialectical mechanism. A 1993 judgment by the Paris Court of Appeals[37] indeed set the principle of equality between competitors during public offerings, before this concept was mentioned in the new *Réglement général du CMF*[38] and consequently used by the judges. Similarly, the system enables a broad interpretation of the scope of regulatory powers, as opposed to the restrictive conceptions that base their legitimacy on a limitation of powers, and therefore make an increased control by the judge over the regulators necessary. Thus, the appeals to a higher court are not merely based on legality, but also allow a reformation of the initial decision, which means that the judge may substitute his appreciation to that of the regulator[39]. Through the use of the principle of proportionality, the judge exercises a strict control over the amount of the fines imposed by the regulators[40], as well as the ways in which these fines are computed[41].

This legal control over the exercise of regulatory powers may appear as an impeding constraint upon the financial system. One must however keep in mind that such an organization disturbs the French legal system far more than the financial system. Indeed, in so far as a distinction

between public law and private law appears less needed, it is the *summa divisio* of the legal system that disappears as well as the separation between civil and administrative jurisdictions. Such an evolution leads us increasingly towards the Anglo-Saxon legal system.

NOTES

1. "L'actualité des sanctions administratives infligées par les autorités administratives indépendantes", Gaz. Pal., 28 July 2000, at 3-11.

2. For instance, it is questionable whether or not the CECEI can be legally defined as a independent administrative body.

3. See, for instance, H. Dumez and A. Jeunemaître, "Evaluer l'action publique. Régulation des marchés financiers et modèle du contrat", L'Harmattan (1988), at 32 *et seq.* M.-A. Frison-Roche, Droit, finance, autorité, PUF, to be published.

4. This leads us to the issue of the accumulation of powers. See F. Terré, La COB. "La confusion des pouvoirs". Vie judiciaire, 7 August 1989.

5. F. Peltier, "Les règles fondamentales du droit financier et l'internationalisation de la bourse", *Revue de droit bancaire et financier*, 2000, n.1, at 40 *et seq.*

6. Regarding this procedural issue, see *infra.*

7. For a demonstration of the substantial opposition between political and contractual regulation, see J. Chevallier, "L'obligation en droit public", in *L'obligation*, Archives de philosophie du droit, t.44 (2000), at 179-194.

8. Decision dated 28 July 1989, n. 89-260 DC.

9. See, for instance, J.-L. Autin, "Du juge administratif aux autorités administratives indépendantes : un autre mode de régulation", *Revue de droit public*, 1988, at 1213 *et seq.*

10. See *supra.*

11. Decisions dated 17 January 1989 (n. 88-248 DC) regarding the *Conseil supérieur de l'audiovisuel* (CSA, Boadcasting regulator) and 23 July 1996 regarding the ART (JO, 27 July 1996, at 1140).

12. On the importance of this concept regarding the legal grounds of regulatory powers, see *supra.*

13. For further developments, see M.-A. Frison-Roche, "La victoire du citoyen-client" in Services publics et marché : l'ère des régulateurs, *Revue Sociétal*, n°30, 4th Term 2000, at 49-54.

14. *Ibid.*

15. See, for instance, the decisions dated 12 January 2000 regarding market regulations on the MONEP and the MATIF, Revue mensuelle du Conseil des Marchés financiers, March 2000, at 10 *et seq.*

16. For a sociological analysis of this "club effect", see M.-A. Frison-Roche, *supra* n.3.

17. For a synthesis, see Ph. Neau-Leduc, "A propos de la réglementation des marchés financiers", Mélanges M. Cabrillac, Litec (1999), at 449 *et seq.*

18. See, for instance, "Le cadre juridique de la mondialisation des marchés financiers", *Banque et Droit*, May-June 1995, at 46 *et seq.*

19. Com., 29 April 1997, Sogénal, D. 1998, at 334 *et seq.*

20. Ph. Neau-Leduc, La réglementation de droit privé, Litec (1999).

21. On the relation between Rousseau's analysis of the social contract and market mechanisms, see P. Rosanvallon, La formation du concept de marché au XVIIIe siècle, EHESS Thesis (1978).

22. This accounts for the precedents holding the intermediary responsible, in so far as he is the person whom the non-professional investor deals with.

23. See *supra*.

24. The nomination of the members of the Conseil constitutionnel is the historical model for this type of procedure.

25. See, for instance, H. Muir-Watt, "Pour l'accueil de l'estoppel en droit privé français", Mélanges Y. Loussouarn, Dalloz (1994), at 303-309.

26. See supra.

27. See, for instance, the ideas of Habermas and their developments in the fields of political philosophy (J. M. Ferry, Justice politique et démocratie procédurale, Le Cerf (1994)) and legal philosophy (B. Frydman and G. Haarscher, Philosophie du droit, Dalloz (1998)).

28. Reference can be made to three cases : Métrologie internationale (Paris, 12 January 1994, Bull. Joly Bourse 1994, § 20, at 120, note by N. Decoopman; Com, 9 April 1996, Petites Affiches, 26 June 1996, note by Cl. Ducouloux-Favard), Conso (Com, 18 June 1996, Bull. Joly Bourse 1997, §3, at 19 et seq.) and Oury (Paris, 7 May 1997, *Revue de droit bancaire et de la bourse* 1997, at 119, observations by M. Germain and M.-A. Frison-Roche ; Ass. Plén., 5 February 1999, JCP 1999, II, 10060, note by H. Matsopoulo).

29. KPMG, *Revue de droit bancaire et financier*, March-April 2000, n.82.

30. For technical details, see, for instance, Les droits de la défense en matière pénale, in Libertés et droits fondamentaux, 6th Edition (2000), at 439-457.

31. See Ch. Perelman, Logique juridique. La nouvelle rhétorique, Second Edition, Dalloz, (1979), New Edition (2000). See also, Traité de l'argumentation. La nouvelle rhétorique (in collaboration with L. Olbrechst-Tyteca), ULB (1983), Le raisonnable et le déraisonnable en droit. Au-delà du positivisme juridique, L.G.D.J. (1994) and the publications regarding Perelman's logic, for instance, Chaïm Perelman et la pensée contemporaine, Bruylant (1994).

32. For further developments, see M.-A. Frison-Roche, *supra* n.3.

33. Therefore, it is not a spontaneous creation of rules by autonomous legal entities. Against this idea, see G. Teubner, "Global private regimes : Neo-spontaneous law and dual constitution of autonomous sectors in world society ?", in La mondialisation et le droit, Bruylant, to be published.

34. To approve is not the same as to accept, therefore the operators are not merely parties to a contract.

35. On the relation between legal rhetoric and dialogic, see "Dialogue, dialectique en philosophie et en droit", Archives de *Philosophie du Droit*, t.29, Sirey (1984).

36. See *supra*.

37. Paris, 27 April 1993, OCP, JCP, éd E, 1993, II, 457, note by A. Viandier.

38. Article 1 of Title V of the *Règlement général*. See, more generally, "La considération de la jurisprudence dans le nouveau Titre V du Règlement général du Conseil des Marchés Financiers", *Revue de jurisprudence de droit des affaires*, 1999, at 9-13.

39. G. Canivet, "Le juge et l'autorité de marché", *Revue de jurisprudence commerciale*, 1992, at 1985 *et seq*.

40. See, for general issues, "Existe-t-il un principe de proportionnalité en droit privé ?", Special Issue, *Petites Affiches*, 30 September 1998 ; for practical matters, "Peut-on établir des analogies opératoires entre droit de la concurrence et droit boursier ?", in Droit boursier et droit de la concurrence, Special Issue, *Petites Affiches*, 21 July 1999, at 8-17, especially at 16.

41. Com, 29 April 1997, Sogénal, D. 1998, at 334 *et seq*.